or purparts of lands, tenements, and hereditaments, have, as aforesaid been, or hereafter shall be, sold or delivered upon executions, shall hold and enjoy their said respective parts, purparts or allotments, in severalty, or as tenants in common, and not as joint tenants. 1705. they held by the parties in severalty.

III. *And be it further enacted*, That no deed, grant, conveyance or assurance, heretofore made, of any lands, tenements or hereditaments whatsoever, shall be judged or taken to be defective, avoided or prejudiced, for or by reason of any want of form, or formal or orderly parts of a deed, as *the Premises*, *Habendum*, *Tenendum*, *Reddendum*, *the Clause of Warrantee*, *the Conclusion*, *In Witness whereof*, and the *Date*, or for *Mis-naming*, *Mis-recital*, or *Non-recital*, of any of the said lands or hereditaments, or for *Mis-recital* or *Non-recital*, or *not mentioning*, or *not true mentioning*, of the grantor's estate of, in or to, the premises, or for want of *Livery and Seizin*, or *Attournment*, or *Proofs* of the consideration money actually paid, or for *not producing in Court*, upon trial, any of the said deeds or grants, recited in the said conveyances, or for *not being recorded* in the Rolls-office: but that all and every the said deeds, grants and conveyances, releases and assurances, shall be, and are hereby declared and enacted to be, good and available in law, and shall be expounded as the law of this province was when they were made, and shall conclude all strangers, as well as privies to the same: saving to every person and persons, other than to the said grantors, their heirs and successors, all such rights, titles, estates, claims and interests, as they or any of them had, or ought to have, of, in or to, the said lands, tenements and hereditaments, or any part thereof, at the time when such deeds or conveyances were sealed and delivered, so as they do pursue their said rights, titles, claims or interests, by way of action or lawful entry, before the first day of October, which shall be in the year of our Lord one thousand seven hundred and ten. All deeds defective in the form, &c. declared good. Strangers may pursue their claims within a limited time.

Passed in 1705.—Recorded A, vol. I. page 155.

CHAPTER CXXXIII.

An ACT *concerning the probates of written and nuncupative wills, and for confirming devises of lands.*

BE it enacted, That all wills in writing, wherein or whereby any lands, tenements or hereditaments, within this province, have been, are, or shall be devised (being proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof in this province, or being proved in the Chancery in England, and the bill, answer and depositions transmitted hither, under the seal of that court, or being proved in the Hustings or Mayor's Court in London, or in some Manor-Court, or before such as have or shall Written wills, proved in this province, or elsewhere, and certified copies thereof, shall be good, and the estate given by the same shall pass.

1705. have power in England, or elsewhere, to take probates of wills, and grant letters of administration, and a copy of such will, with the probate thereof annexed or indorsed, being transmitted hither, under the public or common seal of the courts or offices where the same have been or shall be taken or granted, and recorded or entered in the Register-General's office in this province, shall be good and available in law, for the granting, conveying and assuring of the lands or hereditaments thereby given or devised, as well as of the goods and chattels thereby bequeathed; and that the copies of all wills and probates, under the public seals of the courts or offices where the same have been or shall be taken or granted respectively, other than copies or probates of such wills as shall appear to be annulled, disproved or revoked, shall be judged and deemed, and are hereby declared and enacted, to be matter of record, and shall be good evidence to prove the gift or devise thereby made; and that all such probates, as well as all letters of administration granted out of this province, being produced here, under the seals of the courts or offices granting the same, shall be as sufficient to enable the executors or administrators, by themselves or attornies, to bring their actions in any court within this province, as if the same probates or letters testamentary or administrations were granted here, and produced under the seal of the Register-General's office of this province.

Letters of administration granted out of this province declared good.

II. *Provided always*, That if any of the wills, whereof copies or probates shall be so as aforesaid produced and given in evidence, shall, within seven years after the testator's death, appear to be disproved or annulled before any judge or officer, having conusance thereof, or shall appear to be revoked or altered by the testator, either by a later will, or codicil in writing, duly proved as aforesaid, then, and in every such case, it shall and may be lawful for the party aggrieved, or his or their heirs, executors or assigns, to have their action for what shall be taken or detained from them by occasion of such wills, or have their writ or writs of error for reversing the judicial proceedings thereupon, as the case shall require, any thing herein contained to the contrary notwithstanding.

III. *And be it further enacted*, That from henceforth no nuncupative will, be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by two or more witnesses, who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; nor unless such nuncupative will be made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own house, and died before he returned to the place of his or her dwelling.

A nuncupative will, where good and where not.

IV. *And be it further enacted*, That after six months past, after speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony,

or the substance thereof, were committed to writing within six days after the making of the said will. 1705.

V. *And be it further enacted*, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of the Register-General's office, in the respective counties of this province, till fourteen days, at the least, after the death of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process have first issued out to call in the widow or next of kindred to the deceased, to the end they may contest the same, if they please. Nuncupative wills not to pass the seal, &c. within 14 days.

VI. *And be it further enacted*, That no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words or will, by word of mouth only, except the same be, in the life-time of the testator, committed to writing, and, after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by two or more witnesses. No written will to be altered, &c. by words only, except, &c.

VII. *Provided always*, That notwithstanding this act, any mariner or person being at sea, or soldier being in actual military service, may dispose of his moveables, wages, and personal estate, as he or they might have done, before the making of this act. Mariners', &c. wills not within this act.

VIII. *And be it further enacted*, That there shall be an officer called Register-General, to be commissionated by the Governor, from time to time, for the probate of wills, and granting letters of administration in this province; which Register-General shall keep his office at Philadelphia, and shall, from time to time, constitute a sufficient deputy, to officiate for him in each of the other counties of this province; who, being by him deputed, shall be, and are by this act impowered to take probates of wills, and grant letters of administration in the respective counties, as fully and amply as the Register-General himself ever could or can do, according to the powers granted by the royal charter of the late King Charles the second. Which deputies shall have and use a common seal, to be provided at the charge of the respective counties where they serve, with the like inscriptions as is or shall be upon the seal of the Register-General's office at Philadelphia. *Provided*, That no person, who shall prove any will, or take letters of administration, in any one of the counties of this province, shall be obliged to prove the same will, or take letters of administration in any other of the said counties, wherever such testator's or intestate's estates may lie or be. But before any Register-General, or his deputies, shall enter upon their respective offices, they shall be duly qualified, either before the Governor, or in the Orphans' Court of the county where they respectively officiate. And every Register-General, and every of his deputies, shall find one or more sufficient sureties with himself, to become bound to the Governor for the time being, in a bond of two hundred pounds, for the true and faithful execution of his office, and for the delivering up the records and other writings belonging to the said office, by him, his heirs, executors or administrators, to his successor in the said office, whole and undefaced; which said bond shall be recorded in the Orphans' Court, and be kept by one of the Justices of the same Court, as the majority of A Register-General's office in Philadelphia, &c. Probate of wills and letters of administration not to be in more than one county. The Register-General and his deputies to be qualified and give security.

1705. the Justices for the time being shall order; to be made use of for making satisfaction to the parties that shall be damnified or aggrieved, as is or shall be directed by the laws of this province in such cases. And if the Register-General, or his deputies, or any of them, shall officiate in the said office before he has given such security, or if the Register-General for the time being, shall refuse or neglect to constitute a Deputy-Register in each county, according to the direction of this act, then, and in every such case, he or they so offending shall forfeit the sum of two hundred pounds, to be recovered in any Court of Record in this province; and the one half thereof shall go to the Governor, for support of government, and the other half to him or them that shall sue for the same.

Passed in 1705.—Recorded A. vol. I. page 158. (x)

(x) An act was passed June 7th, 1712, establishing the Register-General's office, and regulating his powers and duties; but that act was altered and supplied by the act of March 14th, 1777, (post. chap. 737,) and the office of Register-General of wills formally abolished, in consequence of the change of government, and the direction of the 34th section of the constitution of 1776, which provided for the institution of a Register's and Recorder's office in each county of the State, and vested the appointment in the General Assembly; and by an act passed August 31st, 1778, (post. chap. 793,) sect. 9, 10, provision was made for rendering valid probates of wills and letters of administration, issued between the 4th of July, 1776, and the 14th March, 1777, by the late officers. The present Constitution vests the appointment of Registers and Recorders in the Governor, and directs their offices to be kept in each county. ART. 5, SECT. 11. And, by ART. 6, SECT. 3, in the county town of each county, unless by special dispensation of the Governor, for a limited time, in any county newly established.

By ART. 5, SECT. 7, the Register of Wills, together with the Judges of the Court of Common Pleas of each county, or any two of them, shall compose the Register's Court of each county: Which provision is carried into the act to establish the judicial courts of this Commonwealth, &c. passed April 13th, 1791, sect. 5, (post. chap. 1564,) in the following terms: "The President and Judges, or any two of them, and the Register of Wills, shall compose the Register's Court in each county, and shall have all and singular the powers, jurisdictions and authorities, thereunto belonging.

By the 18th section of the same act, upon the hearing of any cause litigated before the said Register's Court, the depositions of the several witnesses examined therein, shall be taken in writing, and made part of the proceedings in the cause, upon which the decree of the said Register's Court may be reversed for any error arising either in law or in fact, or affirmed according to the merits and justice of the case. But if the Register's Court, upon a dispute upon facts arising before them, shall send an issue into the Court of Common Pleas of the county, to try the said facts, which they shall do at the request of either party, and a verdict establishing the said facts be returned, the said facts shall not be re-examined on appeal. And no appeal from the decree of the said Register's Courts, concerning the validity of a will, or the right to administer, shall stay the proceedings, or prejudice the acts of any executor or administrator pending the same, provided the executor shall give sufficient security for the faithful execution of the will and testament to the Register; but in case of refusal, the Register is directed to grant letters of administration during the dispute, which shall suspend the power of such executor during that time.

And by the supplement to the act to establish the judicial courts, passed Sept'r 30th, 1791, sect. 2, (post. chap. 1590,) from all acts and decisions of the several Registers for the probate of wills, &c. appeals shall lie to the respective Register's courts, if made within the term of two years; with the usual saving as to minors, femes covert, persons *non compotes mentis*, or absentees, and in such case within five years after the disability is removed, but not afterward, nor otherwise. By the 24th section of the act to regulate intestate's estates, &c. passed April 19th, 1794, (post. chap. 1740,) an appeal from any final decree or sentence of the Register's court, lies to the Supreme Court,

in all cases and instances, where the sum mentioned in the said decree, sentence or judgment, or the sum or other matter in controversy shall exceed the sum of fifty pounds.

By the act establishing the Circuit Courts in each county, passed March 20th, 1799, the said Circuit Courts had authority to allow and take cognizance of appeals from the Register's Court. But that act having been repealed by the act of March 11th, 1809, the appeal to the Supreme Court is restored by an express provision in the 6th section, and no other court now exists, which can sustain it.

By the 23d section of the above recited act of 1794, it is provided, that where a man makes his will, and afterwards marries, or has a child born, he shall be deemed to have died intestate as to the widow, or after born child, which follows the original provision in the act of March 23, 1764, (repealed;) and in the 1st section of the same act, (1794,) the Register is to take bond on granting letters of administration, and the condition of such bond is prescribed. And by the 11th section of the act of April 4th, 1794, all bonds taken by the Register shall be in the name of the Commonwealth.

The fees to be received by the Register of Wills are fixed by the act of April 20th, 1795, (post. chap. 1851.)

The amount of security to be given by Registers of Wills, is ascertained in the act of March 14th, 1777, (post. chap. 737,) and in counties since erected, by the several acts dividing and establishing them.

By the 5th section of an act passed April 6th, 1791, (post. chap. 636,) when any last will and testament is brought to be recorded in any of the Register's offices of this State, which shall contain any bequest or legacy, to a public corporate body, the Register is enjoined and required, that within six months, he shall make known, by letter addressed to the corporate body, in whose favour such bequest or legacy is made, the nature and amount of the same, together with the names of the executors of such last will and testament.

By the act of March 14th, 1777, the Register of Wills in each county is directed to appoint a deputy to officiate in his absence, and for whose conduct he shall be accountable: and the deputy, in the absence of his principal, can exercise all the powers and duties of the Register.

By the 9th section of the supplement to the intestate act, passed April 4th, 1797, (post. chap. 1938,) it is made the duty of the Register to give notice, in at least three of the most public places in his county, of the filing of administration accounts in his office, and of the time and place of presenting the same to the Orphans' Court for allowance, and also to set up a copy of such notice in his office. 1705

By the 10th section of the same act, a devise or bequest to a wife, shall be taken to be in lieu and bar of dower, unless otherwise expressed in the will. But the widow may elect to take either her dower, or the estate devised or bequeathed.

By the 17th section of the act of 1794, in all cases where the Register hath used heretofore to grant administration with the will annexed, he shall continue so to do.—So,

Letters of administration may be revoked in certain cases, by the Orphans' Court, and the Register is directed to grant new letters. Act of 1713, sect. 2, (post. chap. 197,) And in what cases executors shall be obliged to give security—see sect. 3, and also the act of April 4th, 1797; on refusal to give security, the Court shall vacate letters testamentary, and the Register shall issue letters of administration *de bonis non*—sect. 1. and by sect. 3. Executors and administrators, upon settling their accounts, may be dismissed from the duties of his or their appointment, and surrender the residue of the estate to such person or persons as the Court may appoint; and the Register shall take bond with sureties, &c. and administer the usual oaths or affirmations to such persons so appointed, and grant letters of administration *de bonis non*.

The Orphans' Court is also authorized to take and require security from administrators, empowered to sell any part of an intestate's estate under the order of that Court, by the 3d section of the act of 26th March, 1808, (post. chap. 2965.)

Lands devised to be sold, without directing who shall sell, or where executors are directed to sell, may be sold by the surviving executors, or by the acting executor, where the others refuse, or renounce, or by the administrators with the will annexed—or where letters testamentary are vacated, by the administrator *de bonis non*—or where any one of the executors shall be discharged or dismissed, by the remaining executor or executors. March 12th, 1800, (post. chap. 2120.) The testator may, however, direct otherwise. See 2 Dallas, 223. 1 Binney, 546.

A naked authority given by will to executors to sell lands, they shall hold

1705. the same interest, and may bring the like actions respecting it, as if the same had been devised *to them to be sold;* but testator may direct otherwise. March 31st, 1792, (post. chap. 1607,) and by the same act, by leave of the Court, &c. may convey lands contracted for with their decedents.

Executors declared to be trustees for next of kin, of the residue of the personal estate, undisposed of by the will. April 7th, 1807, (post. chap. 2812,) see 1 Binney, 584. Certain duties enjoined on Registers by the act of April 1st, 1797, (post. chap. 1935,) respecting the settlement of the estates of deceased officers and soldiers, &c.

An exemplification of a will, made in *England*, and certified *generally* to have been proved, approved, and registered, in the year 1704, in the prerogative Court of *Canterbury*, under the seal of that Court, allowed, on debate, to be read in evidence to the jury, in 1759. *Lessee* of *Lewis* & *al.* v. *Stammers*, 1 Dallas, 2. And in *Morris's Lessee* v. *Vanderen*, ibid. 66. The plaintiff produced the probate of a will, under the seal of the prerogative court of *Canterbury* in *England*, which *was not recorded in the office here.* THE COURT allowed the probate to be read, as by the act of assembly passed in 1705, it is made evidence here.

But, since the revolution (1789,) it has been decided in the Supreme Court, that letters of administration, granted by the archbishop of *York*, were not a sufficient authority to maintain an action within this *Commonwealth*. *Græme* & *al.* v. *Harris*, 1 Dallas, 456. See 1 Binney, 63, S. C. 4 Dallas, 292.

This act requires all wills to be in *writing*, and to be proved by two or more credible witnesses, upon their *solemn affirmation*, or by other *legal* proof in this province.

The genuine exposition of the foregoing clause of the act is fixed by the case of *Lewis* v. *Maris*, 1 Dallas, 278, in which it was decided, that the Legislature evidently meant to require two witnesses in proof of every testamentary writing, whether for the disposition of real or personal estate; and the words, *other legal proof*, are put in opposition to *solemn affirmation*, in order to admit the attestation of an *oath*. But it is not necessary, that a will devising real estate, in this Commonwealth, should be sealed; nor that all the subscribing witnesses should prove the execution; nor that the proof of the will should be made by those who subscribed as witnesses; nor that the will should be subscribed by the witnesses. *Hight* v. *Wilson*. 1 Dallas, 94.

But though a will must regularly be proved by two witnesses; yet circumstances may supply the want of one witness, where they go directly to the immediate act of disposition As where a scrivener received instructions from the decedent, at his bed side, in the presence of two persons, one of whom was the physician; and as he made the short memorandums of them in writing, he read and explained them to him, and asked him if he was satisfied therewith, as his will; to which he replied in the affirmative; and was then in his perfect senses; but in considerable, though not continual, pain. It was proved that he was at no loss with respect to his directions, and seemed to have thought of his will before; which was remarked at the time. The scrivener retired to another room, to draw a formal will, but before this latter could be read to the decedent more than half through, his senses had left him, and he died in an hour afterwards. One of the persons present was dead at the time of the trial of the issues; but his deposition taken, though very imperfectly, before the Register, on the *caveat*, confirmed the substantial parts of the testimony of the scrivener; but he was not so minute; he had heard some of the directions given by decedent, but not all, as he spoke in a low tone of voice—they were written down in his presence, and were read to decedent—but he did not identify the minutes, though they were filed in the Register's office. The physician swore that he was in the room all the time, as he *thought*, when decedent gave the directions, which were committed to writing, and read to him afterwards, and he said they were all right, and he *believed* the memorandums produced were those taken at the time from the instructions.

The Court said the only doubt was, whether there were two witnesses to prove the *written* instrument. The scrivener was one complete witness, and the most material circumstances related by him in detail, were proved by the deposition; and all the papers must necessarily have been before the Register when the deposition was taken on the *caveat*; and if necessary, the physician would supply the place of one witness. The jury established the notes, as the will of the deceased.

Eyster and *Kagey* v. *Young*. Circuit Court, *York*, April 1803. MSS. Reports. The same point was held in *Boudinot* v. *Bradford*, MSS. Reports—see the same case, but not full on this head. 2 Dallas, 266.

It was said by the Court in the above case of *Eyster* v. *Young*, (two Judges then holding the Circuit Court,) that written declarations of a man's mind, how his estate shall go after his death, made *animo testandi*, may amount to a will, when duly proved. That the law requires no particular form of publication; it may be inferred from circumstances, and will have the same force to render the instrument valid, as if expressed by parol declaration. It is not necessary to establish a will, that two witnesses must swear, that they were present, and saw it executed. If the subscribing witnesses are dead, their hands writing may be proved. So, a will written by the testator himself—his hand writing may be proved by two witnesses.

So where the special instructions for drawing a will are proved by two witnesses, and a will was drawn conformable thereto, in testator's life time, though he does not sign it, it is a good will in writing under the act of Assembly of 1705.

As, where one *Thomas Walmesly*, (the deceased,) had desired one *D. Livesley* to draw his will, and gave him particular verbal directions concerning it, in the fall of 1787, and on the 11th February, 1788, repeated the several devises to him, and requested him to have it ready the third day following. At the time appointed, *L.* went to his house, where he mentioned the particulars of his will to him a third time; and in consequence thereof, *L.* procured one *E. C.* the same day, to reduce it to writing, exactly conformable to the testator's directions, and brought it to him ready drawn, and asked him if he should read the will to him; he answered, it was no matter, he was then too poorly to sign it, but hoped he would be better in the morning, and would then put his name to it. On the second interview he complained to *L.* that the drawing of the will had been so long neglected—He died about two hours after the written will was brought to him, in a fainting fit, without executing it.

On the same 11th of Feb'y, 1788, testator complained to one *H. Ridge*, that he was uneasy in his mind, that his will was not perfected; mentioned his earnest desire that *L.* should draw his will, that he had given him special directions for that purpose, and repeated the particulars of them to *Ridge*.

The intentions of testator, as to the general disposition of his property, and the reasons and grounds of his bequests, were also proved by other witnesses, in corroboration, to shew that the settled purpose of his mind, for some years previous to his death, had been, that his will should be drawn agreeably to the instructions given to the said *D L.* Those express instructions, given on the 11th of Feb'y, were proved by two witnesses, in manner above stated; and testator's recognition, on the day of his death, that he had given the said *L.* directions to draw his will, was proved by three witnesses. The jury found a verdict, establishing the will accordingly. 1705.

Another important point occurred in this case. An issue had been sent by the Register, to the Court of Common Pleas, at the request of one of the parties, (after a *caveat* had been filed against proving the writing as the will of *G. W.*) to try the validity of the instrument as a will; and after a full trial, the verdict of the jury established the validity of the will, and thereupon it was declared to be proved, and letters testamentary were issued thereon.

These proceedings were, of course, received in evidence, under the directions of the act of Assembly, and it was contended, that by force of the act in the text, and the act of Feb'y 28th, 1780, (now repealed, but the section relied on is supplied in the same terms by the 18th section of the act of April 13th, 1791, before cited,) which declares, that where such issue shall be directed, and a verdict be returned, establishing the facts, *the said facts shall not be re-examined on appeal*, this was complete and conclusive evidence. The Court, however, said, that they could not compel the party claiming under the will, to give further testimony, but permitted the opposite party to examine the witnesses who had given evidence in support of the will, on the feigned issue, and any other testimony to impugn the will, and that the jury, upon the whole, must form their judgments, under the direction of the Court. That there was nothing in the act of 1705, or of 1780, or of 13th April, 1791, which shews an intention in the Legislature, that such a probate should be conclusive evidence of *a will of lands*. The Court cannot wish the law to be so, and if even the fullest hearing has been had of all the contending parties, which is not generally the case, still new evidence, and additional circumstances may turn up, which would weigh greatly in the scale of justice. In the strongest point of view, the decision on the feigned issue could only affect the parties to the *caveat*; as to other contending parties, it would be *res inter alios acta*. Suppose on an ejectment brought to try the validity of a will, it could be made appear, that the person whose will was attempt-

1705. ed to be established, was still in full life; that the subscribing witnesses, who had proved it, had been convicted of perjury therein; or that the crimes of perjury and forgery could be fully proved by evidence at the bar; could it be reasonably urged, that the former proceedings were still incontrovertible, and conclusive evidence to the jury?

Walmesley's Lessee v. *Read. Bucks*, October, 1791. MSS. *Nisi Prius* Reports.

But better evidence will not be demanded to prove a will, than is in the party's power to give. Therefore, where a subscribing witness to a will, is out of the jurisdiction of the Court, his handwriting may be proved as if he were dead; for the Court has no power to oblige the Register of Wills to deliver out an original paper, lodged with him for probate, to be carried into another State, nor has it any control over a witness out of its jurisdiction.

Engles & al. v. *Brunington. Nisi Prius, Philadelphia*, Feb'y, 1807. MSS. Reports.

A will proved by two witnesses before a Justice of the Peace, and registered, was admitted in evidence. It was said by the Court, that it would certainly be more regular to prove the will before the Register of the county; because it is a branch of his duty, which he must be supposed to understand better than a Justice of the Peace: but the act does not expressly confine the depositions to be taken before the Register within the State; and it is well known, that many wills, in several counties, have been proved before Justices of the Peace. *Sharp's Lessee* v. *Petit. Chester Circuit Court, April*, 1807. MSS. Reports.

A will of personal property must be executed according to the law of the testator's domicil, at the time of his death. If it is void by that law, it will not pass personal property in a foreign country, although it is executed with all the formality required by the laws of that country.

This was solemnly adjudged in the case of *Desebats* v. *Berquier*, 1 Binney, 336, which was an issue directed by the Register, to try the validity of a certain paper writing, purporting to be the will of *Jean Theil*, who was an inhabitant of *Jeremie*, in the island of *St. Domingo*, and a subject of *France* at the time of making the said instrument, and continued to reside there till his death—and by the laws of the said island, it was admitted, that the said instrument is not, nor was, at the time it was made, nor since, a last will and testament. And unless this instrument was established as a will, he died intestate. The property intended to pass by the said instrument, was all *personal property*, and at the time of making the instrument, was, and hitherto has remained, and still remains in the hands of *persons resident in*, and *citizens of Pennsylvania.—Desebats*, the plaintiff, was, at the time of making the said instrument, an inhabitant of *St. Domingo*; but at the time of the death of the said *Jean Theil*, was an inhabitant of the Island of *Jamaica*. It was admitted that the instrument was in due form according to the laws of *Pennsylvania*.

The Court unanimously decided against the will, and in favour of the successor *ab intestato*. It is a clear proposition of the law of every country in the world, where the law has the semblance of science, that personal property has no locality; with respect to the disposition of it, with respect to the transmission of it, either by *succession*, or by *the act of the party*, it follows the law of the person.

To the same principles, see the case of *Guier* v. *O'Daniel* and *Young*, in the Orphans' Court of *Philadelphia*. 1 Binney, 349, (note.)

On a feigned issue to try the validity of a will, the Court before whom it is tried, but not the Register, has power to grant a new trial. 1 Binney, 448.

The plaintiff in a feigned issue, cannot enter a nonsuit, because it would defeat the act of assembly, which directs the issue to be tried, and the verdict to be returned to the Register's court. 1 Binney, 448.

A writ of error lies from the Supreme Court, on a judgment rendered in the common pleas, upon a verdict on a feigned issue. 1 Binney, 444.

An executor who is plaintiff in a feigned issue to try the validity of a will, is not a competent witness, being liable for costs. 1 Binney, 444.

The Supreme Court has an inherent power to direct an issue to try the validity of a will. MSS. Reports.

So, in all cases of dispute upon the *fact* of execution, or the *Sanity* of the testator, the Register's Court may send an issue into the court of common pleas, to have the facts tried by a jury, even without the request of either party: but when the dispute is about the *legality* of the execution, the *Court* is the proper tribunal. Cumberland, January, 1793. S. MSS.

A married woman in pursuance of an agreement made with her husband, before marriage, may dispose of her personal estate, by will, but not of her lands, at law. But where the husband, before marriage, covenants with his in-

tended wife, that she may dispose of her lands by will; and she devises them during coverture; this shall operate as a good appointment, and her heir at law shall be bound, without the legal estate having been vested in trustees. *Barnes's lessee* v. *Irwin*, 2 Dallas, 199.

A letter by an uncle, inviting an unmarried nephew to come here from Germany, and promising, if he proved obedient, and followed his directions, he should be the heir of his whole estate, cannot operate as a will. MSS. Reports, Supreme Court.

On the subject of revocations, it has been settled, that the revocation of a will of lands, since the act of assembly of 1705, cannot be by parol, but is subject to all the solemnities as a will of personal estate.

Where a second will is made, containing an express clause of revocation, the preceding will, though not formally cancelled, is revoked.

Where a second will is destroyed, *without more*, the preceding will, not having been cancelled, is generally speaking, *ipso facto*, revived.

Where a second will is cancelled, under circumstances that manifest an intention, either to revive, or not to revive, the preceding will, those circumstances must be proved, and all the facts evincing the intention of the party therein, shall be received in evidence; *revocavit, vel non*, being a question of intention, and the evidence does not go directly to destroy an existing will, but merely, to shew, in effect, that the deceased did not intend again to make, or re-establish a will, which he had once actually destroyed.

The mere act of making a second testament, is a revocation of a preceding testament, in relation to personal estate, the law throwing the personal estate on the executor as trustee.

Boudinot v. *Bradford*, 2 *Dallas*, 266. *Lawson* v. *Morrison*, *ibid.* 286.

A will made many years before, *believed* by the testator to be destroyed, but detained by one of the devisees, to prevent its being cancelled or altered, is thereby avoided. MSS. Reports, Supreme Court.

And besides *actual* revocations, there are other acts of the testator, which have always been considered as revocations, because *contrary* to, or *inconsistent* with the will, and evidencing an alteration of intention; as executing a deed in fee; or a lease for years to the same devisee, to commence after the testator's death; a subsequent marriage and birth of a child; cancelling, obliterating, or destroying the will, or such like. These are termed *implied, constructive,* or *legal* revocations, and still subsist as they were before the act of assembly, or the statute of frauds. But all presumptive revocations may be encountered by evidence, and rebutted by other circumstances. 1705.

Lawson v. *Morrison*, 2 *Dallas*, 289.

On the construction of wills and devises, the decided cases, in the courts of Pennsylvania, are numerous, and are here referred to generally.

The intention of the testator is the great governing rule, since a man may devise his lands as he pleases, if his disposition of them be consistent with law. But the construction must be *ex visceribus suis*, and no word is to be rejected, which is not repugnant to the general intent. And though courts of justice will transpose the clauses of a will, and even construe "or" to be "and"—and "and" to be "or"—yet it shall be only in such cases where it is absolutely necessary so to do, to support the evident meaning of the testator; but they cannot arbitrarily expunge, or alter words, without such apparent necessity.

Where a testator uses proper technical expressions, courts are bound to say he understood the meaning of each, and they cannot substitute one for the other, unless by unavoidable and necessary construction, to make sense of the will. But they are warranted to give that effect to the will, which will best answer the devisor's *general* intention, though by so doing, some *particular* intention may be defeated.

The written words of a will shall not be *supplied, contradicted*, or *explained*, by parol evidence.

MSS. Reports, at *Nisi Prius and Supreme Court*; and see 4 Dallas, *Appendix*, 12.

Bequest to a person, who was always called *Samuel*, by the testator, and whom he had nurtured, and educated from his infancy, by the name of *Samuel*, though in fact his name was *William*. Evidence was admitted to shew, that though the legacy was bequeathed to *Samuel*, it was in fact, intended for *William*. *Powell* v. *Mifflin's* administrator, 2 *Dallas*, 70.

Testator, having no *personal* estate, bequeathed several pecuniary legacies and the residue of his estate to his son. The land was sold by the sheriff to satisfy a judgment obtained against the son. Held, that nothing is given to the residuary devisee, but what remains after payment of legacies, which are a charge upon testator's real estate; and the proceeds of the sale were directed to be first applied to the payment of the legacies, and the residue to the judg-

1705. ment creditor. *Nichols* v. *Postlethwaite*, 2 *Dallas*, 131.

A bequest of "wearing apparel, household furniture, plate, linen, books, and *every moveable whatsoever*." Moveables must be confined to things of the same nature with those before specified, and will not include debts due to testator; by a different construction in this case, the rest of the will would have been destroyed; the testator having given several pecuniary legacies, and the *residue* of her estate to *S. R.* and having no real estate. *Jackson* v. *Vanderspreigle's Executor*. 2 *Dallas*, 142.

R. B. devises, after payment of debts, a house to his wife for life, remainder to *James* and *Susanna*, his children. The widow and children, afterwards mortgage the property for the proper debt of *James*, the son, on which it was sold. The court ordered the *surplus* to be paid to the widow, on giving security, that her executors, or administrators, should account for it, after her death, to those in remainder.—And in case the security was not given, that the money should be paid to those in remainder, they giving security to pay the annual interest thereof, to the widow, during her natural life. *Bloomfield* v. *Budden*, 2 Dallas, 183.

In what case a devise of lands must be taken *cum onere*; and where the personal estate is liable to discharge a mortgage on the real; see *Ruston* v. *Ruston*, 2 *Dallas*, 243.

Devise of mortgaged lands to one for life, with power to dispose thereof by will, at her death; this is a *specific* devise, and the testator having other lands, and the whole of them being taken in execution to pay the debt, on a judgment on the bond accompanying the mortgage, they shall contribute according to the value of the several tracts. MSS. Reports. See 2 *Dallas*, 189, *Morris's Executors* v. *Mc Connaghy*.

On a devise of lands in trust, the rents and profits to go to a married woman during life; unless it can be collected from the words of the will, that it was intended to her separate use, her husband is entitled to them. MSS. Reports, Supreme Court.

Devise as follows: "I give to *H.* now in *Ireland*, or his heirs, 200 acres of patented land, part of a patent for 300 acres, and the other undivided 100 acres I leave to B. according to the judgment of my executors in dividing the same," passes an estate in fee simple to both devisees, the land being wholly *woodland*, and *unimproved*.

So, a devise of an *Improvement*, in 1745, without words of inheritance, will vest the devisee with all the testator's interest in the lands. MSS. Reports, Supreme Court—See 3 Dallas, 477.

It remains to be considered who are entitled to administration.

The English Statutes on this subject, reported to extend to *Pennsylvania*, and which govern the practice, are 31 *Edward*, 1 stat. 1. chap. 11. (year 1357.)—"*Item*, it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next, and most lawful friends of the dead person intestate to administer his goods; which deputies shall have an action to demand and recover, as executors, the debts due to the said person intestate, in the king's courts, for to administer. And shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past, as the time to come."

21 Henry 8, chap. 5, (year 1529,) So much of this statute as is in force in this state, is in these words. "And in case any person die intestate, or that the executors named in any testament refuse to prove the said testament, then the ordinary, or other person or persons, having authority to take probate of testaments, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels and debts which, he or they shall be so authorized to minister; and in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator, or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or *no* making request, where divers do require the administration. Or where but one or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them at his pleasure."

By the act for establishing Orphans' Courts, passed in 1713, (post. chap. 197,) where any letters of administration shall be granted, and no bond with sureties given, as the law in that case requires, such letters of administration are declared to be void, and the person

granting the same, and his sureties, shall be, *ipso facto*, liable to pay all such damages, as shall accrue to any person or persons by occasion of granting such administration And the party to whom the same shall be so granted, may be sued as executor in his own wrong, and shall be so taken and deemed, in any suit to be brought against him for or by reason of his said administration, and the stat. 43 Eliz. (chap. 8,) which also extends to *Pennsylvania*, after reciting, "That it is often put in ure, to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed to them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves, or others, by their means, do take deeds of gifts, and authorities by letter of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and the creditors for want of knowledge of the place of habitation of the administrator cannot arrest him, nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods, the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts, it enacts, "That every person and persons that hereafter shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud, as is aforesaid, or without such valuable consideration, as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in, or towards satisfaction of some just and principal debt, of the value of the same goods, or debts to him owing by the intestate at the time of his decease,) shall be charged and chargeable as executor of *his own wrong*; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself, allowance of all just, due and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him, which lawful executors and administrators may and ought to have and pay by the laws and statutes of this realm."

1705.

Letters of administration granted under seal, in a sister state, are a sufficient authority to maintain an action in this State. This has been uniformly understood, both before and since the Revolution; and such has been the practice without regard to the particular intestate laws of the State where they have been granted. But the act has never been considered to extend further than to the provinces in this country at the time it was passed, and *Græme* v. *Harris*, ante. pa. 38, turned upon that ground. There may be great inconveniences from the law, but it lies with the Legislature to remedy them. 1 Binney, 63. S. C. 4 Dallas, 292.

Husbands may demand, and have administration of the rights, credits, and other personal estate of *femes covert*, who die intestate, and recover and enjoy the same. Act of March 21st, 1772, (post. chap. 669,) sect. 5.

CHAPTER CXXXVIII.

An ACT *for selling beer and ale by wine-measure.*

WHEREAS by a law of this province, for regulating the dimensions of casks, &c. it is enacted, among other things, That a barrel shall contain thirty-one gallons wine-measure. And whereas by another law of this province, for regulating of weights and measures, it is, amongst other things, enacted, That none shall sell beer or ale by retail, but by beer-measure, according to the standard of England; by reason whereof the retailers of beer and ale are obliged to sell the same by far greater measure than they buy it: For remedy whereof, *Be it enacted*, That from and after the publication of this act, all persons which now are, or which at any time or times hereafter shall be licensed to keep any tavern, inn, ale-house or victualling-house, within this province, shall sell beer and ale by

Taverns to sell beer or ale by wine-measure in their houses and beer.