
Volume 55
Issue 1 *Dickinson Law Review - Volume 55,*
1950-1951

10-1-1950

Proposed Legislation for 1951 - Revised Orphans' Court Act and Register of Wills Act

A.J. White Hutton

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

A.J. W. Hutton, *Proposed Legislation for 1951 - Revised Orphans' Court Act and Register of Wills Act*, 55 DICK. L. REV. 48 (1950).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol55/iss1/3>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

PROPOSED LEGISLATION FOR 1951—REVISED ORPHANS'
COURT ACT AND REGISTER OF WILLS ACT

By

A. J. WHITE HUTTON*

On May 10, 1950, the Subcommittee On Decedents' Estates Laws of the Joint State Government Commission issued an interim report embodying a proposed "Orphans' Court Act of 1951" to be distributed to the bench, the bar, and the public for consideration, study and suggestion.

Heretofore, there have been submitted drafts of an intestate act, a wills act, an estates act and a principal and income act, all of which were enacted in 1947.¹ Later, drafts were submitted of a fiduciaries act and a fiduciaries investment act, both of which were enacted in 1949.²

On July 10, 1950 the Subcommittee issued a record interim report in the form of a proposed "Register of Wills Act of 1951."

Concerning these two reports of its Subcommittee, the Commission states that it is the intention "to give careful consideration to suggestions and recommendations" as may be made by the reading public before the proposals are finally submitted to the General Assembly.³

As a result of the foregoing labors, six important acts relative to decedents' estates and trusts have passed into law supplanting in large part the "seven sisters acts of 1917."⁴

The proposed two acts when, as, and if adopted will in turn supplant the Orphans' Court Act and the Register of Wills Act, both of 1917, and reflecting the present law.

It is the purpose, therefore, to discuss these two proposals, giving also some history pertaining to these basic functions in the administration of the estates of the dead in our Commonwealth, to the end that the steady development and growth be adequately appreciated.⁵

* A.B., Gettysburg; A.M. Gettysburg; LL.B. Harvard; LL.D. Gettysburg; Professor of Law Dickinson School of Law; former Member Pennsylvania House of Representatives; Author of HUTTON ON WILLS IN PENNSYLVANIA; Member of Pennsylvania and Franklin County Bar Association; Member of Advisory Committee, Law of Decedents' Estates and Trusts, Joint State Government Commission of Commonwealth of Pennsylvania.

¹ Report of Joint State Government Commission relating to Decedents' Estates Laws for 1947.

² Report of Commission, *ibid.*, 1949.

³ For copies of these reports address the Commission, Capitol Building, Harrisburg.

⁴ See:—*Substantial Changes in the Intestate Law*—52 DICK. L. REV. 39 (1947); *The Fiduciaries Act of 1949*—54 DICK. L. REV. 26 (1949).

⁵ *Death as a Jurisdictional Fact Before the Register of Wills and the Orphans' Court*, 53 DICK. L. REV. 108 (1949).

Genesis of Orphans' Court.

The proprietary, William Penn, had long been a resident of the City of London and was familiar with its special customs. Hence, in contemplating upon laws appropriate for the new colony of Pennsylvania, naturally he drew from these customs. Scott, writing in 1871, states:⁶

"The Orphans' Court, as has been already stated, finds its origin in the Court of Orphans, of the City of London. This court was peculiar to that city's limits, and had its origin, in turn, in the customs of that locality."

As has been pointed out by several of our justices, the Orphans' Court in its early period occupied a low place in our judicial system, and even down through the first quarter of the 19th Century its decrees were frequently subjected to collateral attack.⁷

Statutory Jurisdiction.

It is trite law that the Orphans' Court, although always founded on Constitutional provisions, nevertheless is limited in jurisdiction by the terms of the statutes. In short, it has no common law jurisdiction, and if its jurisdiction is challenged, the answer must be in a statutory enactment and the decisional construction thereof. Concerning the statute history, Scott observes:⁸

"Several provincial enactments had reference to this Court, but as they were all afterwards supplied by the Act of 27th. March, 1713, they need not be here repeated. This act of 1713, from time to time modified, remained in force until the Act of 1832, under which, as will be seen hereafter, our Orphans' Court now exists."

Act of 1917.

The Orphans' Court Act of March 29, 1832, P. L. 1831-2, 135, with its supplements and amendments continued for eighty-five years, when it was replaced by the Act of June 7, 1917, P. L. 363, 20 P.S. 2241. This Act, together with its supplements and amendments, constitutes the present law which is proposed to be supplanted by the "Orphans' Court Act of 1951." The Commission of 1917 explained:

"In revising the statutes relative to the orphans' court, the Commissioners have not found it necessary or considered it advisable to recommend any changes of serious importance in its jurisdiction or procedure."⁹

The Orphans' Court Act of June 7, 1917, P. L. 363, 20 P.S. 2241, and following amendments included twenty-three sections covering forty-four pages.

⁶ *Intestate Law*, p. 7; "Jurisdiction of the Orphans' Court," 47 DICK. L. REV. 1 (1942); Wimmer's App., 1 Wh. 95, 102 (1835), per Sergeant, J.

⁷ *McPherson v. Cunliffe*, 11 S. & R. 422 (1834); *Mussleman's App.*, 65 Pa. 480 (1870).

⁸ *Supra*, n. (6).

⁹ Report of the Commission, Feb. 1, 1917, p. 14.

Proposed Act of 1951.

The proposed Act, like the present law of 1917, is concerned with matters of organization, jurisdiction, officers and procedure and is to coordinate with the Fiduciaries Act of 1949¹⁰ and the proposed Register of Wills Act, the latter to be considered in the concluding portions of this discussion.

Mechanical Features.

The proposed Act is an improvement over the present law in matters of literary style, clarity of language and brevity. The arrangement in topics, designated article, eight in number, subdivided into sections, follows the modern trend in statute drafting and conduces facility of approach, ease in reading, and certainty of comprehension. Compared with the present Act in its original form of twenty-three sections, the proposed Act has sixty-four sections, but as to space the present Act covers forty-four pages, whereas the proposed Act is embodied in twenty-six pages.

The topics, aside from the preliminary provisions, treat the following subjects: (1) Organization of Orphans' Court, (2) Jurisdiction, (3) Judges, (4) Clerk-Sheriff, (5) Masters, Auditors, Guardians Ad Litem and Trustees Ad Litem, (6) Procedure, (7) Repealer.

Preliminary Provisions.

Article I, embodying the preliminary provisions, opens with Section 101, stating the short title by which the Act may be designated, viz., "Orphans' Court Act of 1951." Section 102 consists of seven subsections, the first six defining the meanings of certain words "unless the context clearly indicates otherwise." Subsection (7) specifies by definition the various forms of inter-vivos trusts covered by the main title of the Act and likewise carefully designates the particular forms of trusts not included. Section 103 specifies the effective date of the Act as January 1, 1952, and Section 104 provides the terms of severability in case of court declaration of invalidity of any portions of the Act.

Organization of Orphans' Court.

Article II consists of Sections 201-206 and follows the present law in the establishment and setting up of the several orphans' courts throughout the Commonwealth. Briefly, of the sixty-seven counties of the state, there are seventeen, as specified, which, by reason of population, have separate orphans' courts, as provided by Section 22 of Article V of the Pennsylvania Constitution. In the remaining fifty counties, the orphans' court is composed of the judges of the court of common pleas of the particular county.

Section 205 is worthy of mention in making clear the present law that there are no terms of the orphan's court and that the same "shall be in session as often

¹⁰ Joint State Government Commission Report, 1949.

as its judges shall think necessary or proper."¹¹ Section 206 refers to the rules and forms of procedure, and this brings to mind the importance of the rules of the Supreme Court in conjunction with such local rules as may be established.¹²

Jurisdiction.

Article III treats of jurisdiction covered by Sections 301-309. Section 301, in nineteen subdivisions, specifies the subjects of orphans' court exclusive jurisdiction. Thus, at one place is gathered all these features, most being well known, which the reader will quickly recognize. It is noted that inter-vivos trusts and incompetents' estates¹³ are in the exclusive category, and absentees' and presumed decedents' estates are likewise so entrenched in accordance with Article XII of the Fiduciaries Act of 1949.¹⁴ In contrast to these provisions, Section 302 provides for concurrent jurisdiction of the orphans' court in matters of title to real estate,¹⁵ and Section 303 secures definitely whatever applicable rules may arise in problems of conflict of laws. Section 304 invests the orphans' court with all legal and equitable powers necessary and proper to the exercise of jurisdiction, and Section 305 clarifies the questions of venue in decedents', minors', and trust estates. Sections 307, 308 and 309 provide rules for determining the situs of testamentary and inter-vivos trusts in varying situations arising.

Judges.

Article IV sets forth in Sections 401-404 the powers of judges of the orphans' court. There is a distinction, time honored, between a judge and the court as to powers and functions.¹⁶

Clerk-Sheriff.

Article V, in Sections 501-512, prescribes the duties of clerk and sheriff, together with the functions of each and how carried out. The provision in Section 505 that the clerk shall advertise both the accounts "filed with him and with the register" should be noted, as in some counties the present practice is for the clerk and register respectively to see to the advertising of the accounts as filed in each office.

Masters, Auditors, Etc.

Article VI contains Sections 601-604, which empower the court to appoint masters, auditors, examiners, guardians ad litem and trustees ad litem and which prescribe the functions of these several types of "arms of the court," specifying the powers of each.

¹¹ *Kretzer v. Murry*, 297 Pa. 451, 149 A. 102 (1929); *Cf.* § 11 of 1917 Act.

¹² Effective first Monday of July, 1943, 345 Pa. IV.

¹³ June 1, 1950, protest by resolution of the Board of Judges of the Courts of Common Pleas of Phila. County was filed with the Commission.

¹⁴ See note 5.

¹⁵ *Johnson's Estate*, 185 Pa. 179; HUTTON ON WILLS, 397-399.

¹⁶ *This Honorable Court*, Braham, 54 DICK. L. REV. 1 (1949).

Procedure.

Article VII contains twenty-eight sections, subdivided as follows:

A. Institution of Proceedings and Original Process.

Under this subdivision are Sections 701-706, treating of petitions, accounts, writs of habeas corpus, citation, issue and service of citation and proof of service. As the Orphans' Court is of statutory origin and has no common law powers, being thus in contrast with the common pleas court, so the procedure of the former has always differed from that of the latter. The orphans' court has followed the methods of the equity court, which in turn drew from ecclesiastical sources, which in turn originated in the law of Rome. So in orphans' court practice there are no common law writs, except as is noticed in Section 703 allowing a writ of habeas corpus in proceedings for adoption of minors or for the appointment of a guardian of a minor's person, the suggestion here being from the Act of 1949, P. L. 793, and the writs of attachment of person and sequestration of property or execution upon property as mentioned hereinafter. A proceeding in the orphans' court is usually instituted by petition addressed to the court outlining the facts in paragraphs and closing with a prayer for certain relief. The court will, in appropriate cases, order the issuance of a citation to obtain jurisdiction of the person or the appearance of any person already subject to its jurisdiction. The citation is a form of process and is the equivalent of an original writ.¹⁷

B. Notice.

Section 711 provides additional methods for service of citations provided by Sections 705-706, the same being by notice "as the court shall direct by general rule or special order."

C. Action Upon Default of Respondent.

Section 721 confers power upon the court to enforce compliance by respondent with the requirements of a citation or notice by "such order as to right and justice may belong."

D. Summary Decree—Injunction.

Section 731 provides for summary process, that is without a prior hearing, the court allowing issuance of a writ of attachment of the person or of sequestration, or both, where one is about to leave the Commonwealth or conceals his whereabouts to the prejudice of complainant or to an estate or trust within the jurisdiction of the court. Section 732 provides for the issuance of injunctions for the protection of property within the courts' jurisdiction "in the same manner as the court of common pleas of the same county."

¹⁷ *Petition of Schoble*, 43 D. & C. 459 (1942); *Gangloff's Estate*, 42 D. & C. 666 (1941); *Probate of Wills in Penna.*, 54 DICK. L. REV. 242 (1950).

E. Witnesses, Evidence, Hearings, Trials.

Section 741 authorizes the court to issue subpoenas with or without a clause of *duces tecum*, and the power so to issue, it will be noticed, is also accorded masters, auditors, and examiners as appointed, under the specific provisions of Section 603. Sections 742 and 743 provide respectively for depositions and discovery, and perpetuation of testimony and court records.¹⁸

Section 744 will reenact the present law that upon appeals or removal of proceedings from the register to the orphans' court, testimony *de novo* shall be heard, unless the parties stipulate that the case be heard on the testimony taken before the register. In the latter event the court may require witnesses already examined and other witnesses to appear before it.

Section 745 provides generally for jury trials when available and when waived, and Section 746 provides particularly for the practice, new since the Act of 1937, of jury trials in the orphans' court, instead of requiring the issues to be sent over to the common pleas, as was the prevailing practice prior to 1937.¹⁹

Section 747 provides particularly for trial by jury in a will contest when a substantial dispute of fact shall arise concerning the validity of a writing alleged to be testamentary, thus preserving the trial of this fact by a jury to any party in interest.²⁰

Section 748 continues the right of trial by jury in proceedings to establish incompetency as is now the law by Section 4 of the Act of 1907, P. L. 292, 50 P.S. 944. The demand should be made before hearing, as pointed out in Section 745(a) of the proposed act and heretofore discussed.

F. Enforcement of Orders and Decrees.

Section 751 states the various methods for enforcement of court orders and decrees as dealing with: (1) attachment of the person, (2) sequestration of real or personal property, (3) execution on personal property, (4) attachment execution, and (5) execution on real estate. And Sections 752, 753, 754, 755 and 756 elaborate upon these respective methods of enforcement.

G. Costs.

Section 761 provides for the allowance and allocation of costs "as now or hereafter provided by law, and in the absence thereof, as fixed by the court by general rule or special order."

¹⁸ *Baker v. Weiss*, 43 D. & C. 707 (1941), illustrates the matter of taking and perpetuation of testimony.

¹⁹ *The Probate of Wills in Pa.*, 54 DICK. L. REV. 237 (1950).

²⁰ See article, note 19; also *Judicial Function in Will Cases*, 50 DICK. L. REV. 104 (1946); *Lare Will*, 51 DICK. L. REV. 62 (1946); *Fleming's Est.*, 265 Pa. 399, 109 A. 265 (1919); HUTTON ON WILLS, p. 385, et seq.; Pa. Const. Art. I, § 6.

H. Appeals.

Section 771 provides for right of appeal, following the present law as to final order and by the party in interest, but making it clear that "a fiduciary whose estate or trust is so aggrieved"²¹ may also have an appeal. A change in the present case law²² is made by the second sentence in this section allowing an appeal from a decree of distribution which is not final, "provided the orphans' court shall certify that the decree is sufficiently definite to determine the substantial issues between the parties."

Section 772 states the effect of an appeal as at present, and Section 773 provides for the disposition of cases on appeal.

Repealer.

Article VIII is the close of the proposed Act, providing in Section 801 for (a) specific repeals, (b) general repeal, and (c) a saving clause for the fee bill under the Act of June 25, 1947, P. L. 963, 20 P. S. 2223.

Genesis of Register.

At another place²³ the present writer has said:

"The primary point of contact in the administration of the estates of the dead in Pennsylvania is with the office of the Register of Wills. This ancient office has jurisdiction (a) in the probate of wills, (b) in the issuance of letters testamentary and of administration, (c) in the receipt and advertising of accounts of fiduciaries, and (d) in the collection of death transfer taxes."

Scott, on the Intestate Law, says:²⁴

"Mr. Hood states that the oldest book in the office of the Register of Wills at Philadelphia commences with the record of the will of Thomas Fream, which appears to have been proved on the tenth of the eighth month, 1682. At that time, he observes, the title of Register General belonged to the officer who granted letters testamentary and of administration at Philadelphia. This title, and the power of appointing deputy registers in the other counties, belonged, down to the Revolution, to the Register at Philadelphia, his functions being modified and regulated by the acts of 1705 and 1712, which were supplied by the act of March 14, 1777. The office of Register General was abolished by the thirty-fourth section of the constitution of 1776, which provided for establishing a register's office in each county of the State, vesting the appointment in the General Assembly. The constitution of 1790 vested the appointment of Registers in the Governor. The present constitution provides that Registers of Wills shall be elected by the qualified electors of each county, for a term of three years, and be commissioned by the Governor."

²¹ See *The Probate of Wills in Pa.*, 54 DICK. L. REV. at p. 413-414 (1950).

²² Cf. *Hood's Est.*, 323, Pa. 253, 186 A.2d 740 (1936); *Brusstar's Est.*, 123 Pa. Super. 45, 186 A.2d 147 (1936).

²³ *Death as a Jurisdictional Fact & c.*, 53 DICK. L. REV. 108 (1949).

²⁴ Page 6—HUTTON ON WILLS, pages 336-339.

The term of office of registers was changed from three years to four years by amendment of Article 4, Section 2, of the Constitution, adopted by the people November 2, 1909, and effective first Monday of January, 1910.

The Act of March 15, 1832, P. L. 135, recommended by the Commission of 1830, codified the law pertaining to the register's office, and consisted of forty-five sections, treating of registers and registers' courts.

Article 5, Section 22, of the Constitution of 1874 stipulated that in every county orphans' courts should possess all the powers and jurisdiction of a registers' court, and therefore separate registers' courts have been abolished, all reference to the same in the statutes then existing having application thereafter to the orphans' courts of the respective counties.

The Act of 1917.

The law was again codified by the Commission appointed in 1915, and the present law is found in the Act of June 7, 1917, P. L. 415, consisting of 26 sections, together with the amendments and supplements.²⁵

Proposed Act of 1951.

The proposed Act consists of six articles, in turn divided into 31 sections, covering fourteen pages. The topics considered, aside from the preliminary provisions, are (1) jurisdiction and powers, (2) probate, (3) letters—accounts, (4) records and certified copies, (5) repealer.

Preliminary Provisions.

Article I, in Sections 101-104, treats of preliminary provisions and embodies the short title—"Register of Wills Act of 1951," definitions, effective date—January 1, 1952, and the matter of severability of provisions.

Jurisdiction and Powers.

Article II, on the subjects of jurisdiction and powers, consists of nine sections. Section 201, following the present law, specifies that "the register shall have jurisdiction of the probate of will, the grant of letters to a personal representative, and any other matter as provided by law."

Section 202 on the matter of deputies states that the register "shall appoint a deputy or two deputies" and stipulates that "in case of a vacancy in the office of register, the first deputy shall exercise all the powers of the register until a successor is appointed or elected."

Sections 203-205 treat matters of subpoenas, oaths, depositions, witness fees, and the enforcement of subpoenas, orders and costs. Section 206 provides for the filing of caveats and is based primarily on Section 20 of the Act of 1917. The latter did not define a "caveat" and in this omission the proposed section fol-

²⁵ Report of 1917, page 362 et seq.

laws, although Section 17 of the Act of 1917 did give a broad hint as to what was meant by the expression "caveat." Referring on this point to old standard, Scott on the Intestate Law of Pennsylvania, it is interesting to note the learned author gives this explanation:²⁶

"Caveat, let him beware, is a notice given by a party having an interest, to some officer not to do an act till the party giving the notice has a chance to be heard; as, to the register of wills not to permit a will to be proved, or not to grant letters of administration; or to the land officers not to give a patent; or to a clerk in chancery not to enroll a decree until the objections can be heard. It always precedes the act and is never heard of as a means of undoing what has already been done."

As in the present law, the new section requires the filing of an approved bond as the eventual efficacy of a caveat as filed and avoids the confusion of the bond with the matter of appeals from the action of the register. The latter phase is treated in Section 208 of the proposed Act. Again, in the proposed section the time for the beginning of the ten day period for the filing of the bond is more clearly designated.

The procedure by caveat, as already stated, is applicable only to forestall action by the register. If, however, the register has acted before the caveat has been filed, then the parties aggrieved have the remedy by appeal to the orphans' court from the register's action within two years from the decree of probate.²⁷ Section 17 of the present Act points out the importance of a caveat couched in specific terms alleging as "the ground thereof any matter of fact touching the validity of such writing" by providing for the framing of an issue to be tried in the common pleas court of the respective county upon the precept "at the request of any person interested."²⁸ Under the proposed Act this section is dropped and with it falls the power of the register to issue such a precept.²⁹

Section 207 is a combination of Sections 18 and 19 of the present Act treating of the certification of the records of the register over to the orphans' court. This simplifies the procedure and is a most commendable change.³⁰

Section 208 provides for appeals from the decree of the register to the orphans' court within two years of the decree and follows the present law. The problem as to who is a party in interest and thus qualified as appellant, is left to the case law but it is declared "that the executor designated in an instrument shall not by virtue of such designation be deemed a party in interest who may appeal from a decree refusing probate of it."³¹

²⁶ Page 20.

²⁷ *Probate of Wills in Pa.*, 54 DICK. L. REV. 240 (1950).

²⁸ *Ibidem*, note 26.

²⁹ Cf. *Griffith's Est.*, 276 Pa. 277, 120 A. 143 (1923).

³⁰ For explanation of present procedure see article *ibidem*, notes 26 and 27.

³¹ For discussion, see *Probate of Wills in Pa.* 54 DICK. L. REV. 413 (1950).

Probate.

Article III, in Sections 301-307 considers the topic of probate. Section 301 defines the place of probate and conforms to Section 301 of the Fiduciaries Act of 1949.⁸² The emphasis as to probate of the will of a domestic decedent is placed "on his last family or principal residence" and in the case of a decedent not domiciled in the Commonwealth, "his will may be probated before the register of any county where any of his property is located." Section 302 has no counterpart in the statutory law pertaining to the register's office. Under present practice the manner of probate has grown very largely from case law and from specific requirements of the wills acts. This section after declaring that "all wills shall be probated by the oaths or affirmations of two competent witnesses," then treats particularly of (1) wills signed by testator, (2) wills signed by mark or by another, and (3) nuncupative wills.⁸³

Section 302(1) is as follows:

"(1) Will Signed by Testator. In case of a will to which testator had signed his name, proof by subscribing witnesses if there are such shall be preferred to the extent that they are readily available, and proof of the signature of the testator shall be preferred to proof of the signature of a subscribing witness."

The generally accepted case law in Pennsylvania is that where a will has subscribing witnesses, although not necessary in the first instance, their presence by the act of the testator requires that they must be called as a prerequisite to probate of the testamentary disposition.

The importance of subscribing witnesses, even though not required, is apparent in the early cases.⁸⁴ Paxson, J. once declared:⁸⁵

"The signature of a subscribing witness to an ordinary instrument of writing implies nothing more than the instrument was signed by the person whose act or deed it purports to be. It is not so in the case of a subscribing witness to a will. His attestation is an assertion not only that the will was signed by the testator, but of the further fact that the testator was of sound mind when he executed it."

If a subscribing witness is dead, non compos mentis or beyond the jurisdiction, then the accepted practice is to call witnesses to prove the signature of the unavailable subscribing witness. Proof of testator's signature by other means is not in order until it is shown to be impossible to proceed as above.⁸⁶ This "dogma" is modified by the terms of Section 302(1) specifying that proof by

⁸² Fiduciaries Act of 1949, 54 DICK. L. REV. 26 (1949).

⁸³ For study under Wills Act of 1917 see *Execution of Wills*, 47 DICK. L. REV. 72 (1942); HUTTON ON WILLS, 71-72. For excellent discussion under Wills Act of 1947 see Bregy, WILLS ACT § 2301 et seq. See also *Probate of Wills in Pa.*, 54 DICK. L. REV. 238-39 (1950).

⁸⁴ Hays v. Harden, 6 Pa. 409 (1847); idem, 9 Pa. 151 (1848).

⁸⁵ Egbert v. Egbert, 78 Pa. 326 (1875); called the court's witnesses," Whitaker's Estate, 10 W. N. C. 139 (1881); Plott's Estate, 335 Pa. 81, 5 A.2d 901 (1939).

⁸⁶ Miller v. Carothers, 6 S. & R. 215 (1820). See Bregy, WILLS, p. 2305.

subscribing witnesses if there are such "shall be preferred to the extent that they are readily available" but providing further that "proof of the signature of the testator shall be preferred to proof of the signature of a subscribing witness."

Section 302(2) is as follows:

"(2) Signature by Mark or by Another. In case of a will signed by mark or, by another in behalf of the testator, the proof must be by subscribing witnesses except to the extent that the register is satisfied that such proof cannot be adduced by the exercise of reasonable diligence. In that event, other proof of the execution of the will, including proof of the subscribers' signatures, may be accepted, and proof of the signature of a witness who has subscribed to an attestation clause shall be prima facie proof that the facts recited in the attestation clause are true."⁸⁷

The Wills Act of 1947 is unique as to our previous wills statutes in requiring subscribing witnesses in two instances, viz., signing by mark and signing by another. There is no counterpart to this innovation, except as once required in a gift to charity.⁸⁸

Howbeit, the Acts of 1705, 1833, 1917 and 1947 pertaining to wills in Pennsylvania have all prescribed that "the legal declaration" as offered be proved by the oaths or affirmations of two or more competent witnesses and as the Act of 1917 phrased it, "otherwise to be of no effect." Therefore, in addition to the intricacies of proving the wills of incapacitated persons, Sections 2 and 4 of the present Wills Act are read together and the final emphasis is upon the principle that the law specifies *the will* as the subject of proof and not the signature alone.⁸⁹ It will be noted that Section 302 as proposed opens with the following:

"All wills shall be proved by the oaths or affirmations of two competent witnesses."

This statement is in affirmation of Section 4 of the Wills Act of 1947.

Section 302(3) relates to the manner of proof of a nuncupative will and carries out the terms of Section 3(a) of the Wills Act of 1947.

Section 303(a) states that a will, other than a nuncupative will, may be offered for probate at any time and Section 303(b) provides for the conclusiveness of the probate unless an appeal is taken from the register's decree within the prescribed time.⁴⁰

⁸⁷ Cf. §§ 2 and 3 of the Wills Act of 1947 and §§ 2 and 3 of the Wills Act of 1917. For history see "Execution of Wills," 47 DICK. L. REV. 72 (1942) and generally citations in note 33, ante.

⁸⁸ For discussions as to §§ 2 and 4 of the present Act, see BREGY, WILLS ACT, p. 2301, et seq.

⁸⁹ BREGY, *ibid.*, p. 2310 et seq.

⁴⁰ Concerning a decree of probate as impregnable when no appeal is taken and the exceptions the following illustrate: Wall v. Wall, 123 Pa. 545, 16 A. 598, 10 Am. St. Rep. 549 (1889); Sebik's Est., 300 Pa. 45, 150 A. 101 (1930); Culbertson's Est., 301 Pa. 438, 152 A. 540 (1930); Rockett Will, 348 Pa. 445, 35 A.2d 303 (1944); Freer's Est., 353 Pa. 351, 45 A.2d 47 (1946).

Section 303(c) is a qualification upon the absolutism of the statement in Section 303(a) that a will may be offered for probate at any time, viz., shortly after the maker's death or fifty years thereafter. The limitation is realistic and protects a bona fide grantee or mortgagee of real estate of the decedent where the latter's will is offered more than two years after the maker's death if the conveyance or mortgage is recorded before the will is offered for probate either original or subsequent. This follows the present law but the period is reduced from three to two years.

It may be noted that the statute law does not protect the purchaser or mortgagee from a devisee under a will within the two year period as against the claims of those under a subsequent will discovered and presented within the period and appeal filed in proper time against the probate of the first will.

Section 304 provides that a nuncupative will shall not be admitted to probate, nor shall letters thereon be issued, unless notice has first been given to those who would be entitled to the estate in case of intestacy.

This is a modification of Section 6 of the 1917 Act.⁴¹

Section 305 provides for wills in foreign language and follows Section 12 of the 1917 Act.⁴²

Section 306 takes care of wills probated outside the commonwealth and is in substantial accord with Section 7 of the present law. Section 307 follows Section 8 of the 1917 Act in the matter of enforcing the production of a will. This section is complementary to Section 205 of this proposed act as already mentioned.

Letters — Accounts.

Article IV considers certain features of letters and also the matter of accounts. Section 401 carries the terms of liability of a register and his surety where letters are granted without requiring bonds and refrains from specifying that such letters are void, thus reflecting the case law, in part at least, construing the present and former acts containing the characterization of void as applying to such letters.⁴³ Sections 402-403 provide severally for power in the register to revoke letters of administration granted to persons not entitled and in case of letters testamentary to amend or revoke the same when not in conformity with the provisions of the will.

Section 404 directs that all accounts filed with the register shall be transmitted to the court for audit and confirmation on dates fixed by the court by general rule or special order.⁴⁴

⁴¹ Cf. § 3 of Wills Act of 1947 and notes thereunder, Report—Decedents' Estates Laws, 1947, p. 37 et seq.

⁴² This may be compared with § 504 of the Orphans' Court Act of 1951.

⁴³ Cf. § 8(d) Act of June 7, 1917, P. L. 447, and § 321, Fiduciaries Act of 1949. *Bradley v. Comm.*, 31 Pa. 522 (1858); *Comm. v. Gregory*, 261 Pa. 106, 104 A. 562 (1918); *Huff's Est.*, 299 Pa. 200, 149 A. 179 (1930).

⁴⁴ Cf. § 505 of the Orphans' Court Act of 1951.

Records and Certified Copies.

Article V contains Sections 501-504 covering respectively the topics pertaining to recording wills, inventories and appraisements, the issuance of certified copies by the register of records and papers in his office, and making such copies as good evidence as the originals in any judicial proceedings in the Commonwealth and also providing for the recording of copies of wills and probate proceedings duly certified by registers interchangeably in the respective counties where real estate of a testator is located.

"The register with whom such papers are filed shall forthwith record the same and the record thereof shall be as valid and effectual in law as the original will after probate, or its duly certified copy, or its record would be for all purposes of vesting title, of evidence and of notice."

Repealer.

Article VI provides in Section 601 for special and general repeals and a particular saving clause.

Conclusion.

The foregoing is a brief summary of two proposed and important revisions of certain procedural and fundamental principles applying to the law of the orphans' court and the register's office in Pennsylvania. Quoting from another article it may again be said:

"As to the vast practical and monetary importance of this branch of the law, one need only learn as may easily be done, the dollar volume of business measured by estate values passing annually through the register's office and the orphans' courts of the several counties of the Commonwealth."⁴⁵

⁴⁵ The Fiduciaries Act of 1949, 54 DICK. L. REV. at p. 39 (1949).