

PROPOSED REGISTER OF WILLS ACT OF 1951

REPORT
OF THE
SUBCOMMITTEE ON DECEDENTS' ESTATES LAWS



OF THE
JOINT STATE GOVERNMENT COMMISSION
OF THE GENERAL ASSEMBLY
OF THE COMMONWEALTH OF PENNSYLVANIA

CAPITOL BUILDING
HARRISBURG, PA.

JOINT STATE GOVERNMENT COMMISSION

The Joint State Government Commission was created by Act No. 459, Session of 1937, as amended by Act No. 380, Session of 1939, and Act No. 4, Session of 1943, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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INTRODUCTION

Pursuant to House of Representatives Concurrent Resolution No. 74 of the 1949 Session of the General Assembly, the Joint State Government Commission was directed to study and revise the Orphans' Court Act, Orphans' Court Partition Act, Register of Wills Act and Revised Price Act with their supplements and related statutes.

Heretofore the Joint State Government Commission, as directed by Senate Resolution Serial No. 46 of the 1945 Session of the General Assembly, 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. These, with comments, are contained in the Commission's report, "*Decedents' Estates Laws of 1947*". And, as directed by Senate Resolution Serial No. 34 of the 1947 Session of the General Assembly, the Joint State Government Commission submitted drafts of a fiduciaries act and a fiduciaries investment act both of which were enacted in 1949. These, with comments, are contained in the Commission's report, "*Decedents' Estates Laws of 1949*." Under date of May 10, 1950, there was submitted an interim report containing a draft of a proposed "Orphans' Court Act of 1951".

Herewith is submitted a second interim report in the form of a proposed "Register of Wills Act of 1951", distributed to the bench, the bar, and the public for their consideration. In addition to changes of arrangement and clarification of language, there are some changes in existing law, the reasons for which either are obvious or are explained in the comments to the sections involved. Many of the changes recommended were required to conform with provisions of the Proposed Orphans' Court Act of 1951 and the Fiduciaries Act of 1949.

It is the intention of the Joint State Government Commission, through its Subcommittee on Decedents' Estates Laws, and the Advisory Committee composed of orphans' court judges and practitioners familiar with decedents' estates laws, to give careful consideration to suggestions and recommendations concerning this draft of the "Proposed Register of Wills Act of 1951" before it is finally submitted to the General Assembly.

Suggestions and recommendations should be addressed to the research consultant, M. Paul Smith, Norristown-Penn Trust Building, Norristown, Pennsylvania.

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PROPOSED REGISTER OF WILLS ACT OF 1951

AN ACT

Relating to the jurisdiction, powers, and duties of registers of wills, and regulating proceedings before them, and the costs thereof, the effects of their acts, and appeals therefrom.

Comment. This is substantially the same as the title to the 1917 act. It omits reference to "qualifications" of registers because Section 1 of the 1917 act relating to the register's oath and bond, has not been re-enacted herein for the reasons stated in the comment to Section 601.

TABLE OF CONTENTS

ARTICLE I.

PRELIMINARY PROVISIONS.

	Page
Section 101. Short Title	9
Section 102. Definitions	9
Section 103. Effective Date	9
Section 104. Severability	9

ARTICLE II.

JURISDICTION AND POWERS.

Section 201. Register's Jurisdiction	10
Section 202. Deputy Register	10
Section 203. Witnesses—Testimony	10
(1) Subpœnas	10
(2) Administering Oaths	10
(3) Depositions	11
Section 204. Witness Fees	11
Section 205. Enforcement of Subpœnas, Orders and Costs.....	11
Section 206. Caveat	11
(a) Bond	11
(b) Failure to Give Bond.....	11
(c) Costs	12
Section 207. Certification of Records to Court.....	12
Section 208. Appeals	12
(a) When Allowed	12
(b) Bond	13
(c) Effect of Appeal	13
(d) Excepted Appeals	13
Section 209. Bill of Costs	13

ARTICLE III.

PROBATE.

Section 301. Place of Probate	13
Section 302. Manner of Probate.....	14
(1) Will Signed by Testator	14
(2) Will Signed by Mark or by Another.....	14
(3) Nuncupative Will	14
Section 303. Limit of Time for Probate.....	15
(a) Original Probate	15
(b) Conclusiveness of Original Probate	15
(c) Effect Upon Grantee or Mortgage.....	15
Section 304. Nuncupative Wills	15
Section 305. Wills in Foreign Language.....	16
Section 306. Wills Probated Outside the Commonwealth.....	16
Section 307. Enforcing Production of Will.....	16

ARTICLE IV.

LETTERS—ACCOUNTS.

Section 401. Bonds of Personal Representatives.....	17
Section 402. Revocation of Letters of Administration.....	17
Section 403. Revocation of Letters Testamentary.....	17
Section 404. Transmission of Accounts to the Court.....	17

ARTICLE V.

RECORDS AND CERTIFIED COPIES.

Section 501. Wills	18
Section 502. Inventories and Appraisements	18
Section 503. Certified Copies	18
Section 504. Recording Proceedings in Another County	18

ARTICLE VI.

REPEALER.

Section 601(a). Specific Repeals	18
Section 601(b). General Repeal	20
Section 601(c). Saving Clause	20

ARTICLE I.

PRELIMINARY PROVISIONS.

SECTION 101. *Short Title.*—This act shall be known and may be cited as the Register of Wills Act of 1951.

Comment. This is similar to Section 25 of the 1917 act.

SECTION 102. *Definitions.*—The following words when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) "Register" means the register of wills having jurisdiction.

Comment. This is the same as the definition of "register" in the Fiduciaries Act of 1949, and in the Orphans' Court Act of 1951, except that the words "to grant letters testamentary or of administration" are omitted.

(2) "Court" means the orphans' court having jurisdiction.

(3) "Clerk" means the clerk of the orphans' court having jurisdiction.

Comment. The definitions of "court" and "clerk" are the same as in the Fiduciaries Act of 1949, and in the Orphans' Court Act of 1951.

(4) "Personal representative" means an executor or administrator of any description.

Comment. This is the same as the definition of "personal representative" in the Fiduciaries Act of 1949.

(5) "Letters" means letters testamentary or letters of administration of any description.

Comment. The Statutory Construction Act of 1937, P. L. 1019, 46 PS 601, includes no definition of letters. Its frequent use throughout the act requires its inclusion here.

(6) "Will" means a written will, codicil or other testamentary writing and a nuncupative will.

Comment. The Statutory Construction Act provides merely that "'Will' includes codicil". The definition here provided is considered more helpful.

SECTION 103. *Effective Date.*—This act shall take effect on the first day of January, one thousand nine hundred and fifty-two.

SECTION 104. *Severability.*—If any provision of this act, or the application thereof to any person or circumstances is held invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected

thereby, and to this end the provisions of this act are declared to be severable.

Comment. This is similar to Section 106 of the Fiduciaries Act of 1949, Section 18 of the Estates Act of 1947, and Section 104 of the Orphans' Court Act of 1951.

ARTICLE II.

JURISDICTION AND POWERS.

SECTION 201. Register's Jurisdiction.—Within the county for which he has been elected or appointed, the register shall have jurisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law.

Comment. This is based on Section 3 of the 1917 act and makes only stylistic changes.

SECTION 202. Deputy Register.—Every register shall appoint a deputy or two deputies who shall have power to perform the duties of the office in his behalf and for whose conduct he and his surety shall be accountable. 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.

Comment. This is based on Section 2 of the 1917 act, as amended in 1945, amplified to indicate more clearly the place of authority in the case of vacancy in the office of register. Before the 1945 amendment, the reference to "deputy" was in the singular. Sections 224 and 233 of the General County Law of 1929, 16 PS 224, 233, applying to all but first class counties, and providing for a single deputy, are repealed and partially repealed in Section 601(a) hereof to avoid any inconsistency with this section.

SECTION 203. Witnesses—Testimony.—The register shall have power to

(1) *Subpoenas.* Issue a subpoena to any person in any county of the Commonwealth to appear or produce papers or records before him.

Comment. This is suggested by Section 741 of the Orphans' Court Act of 1951, and Section 9 of the 1917 act. It was not considered advisable to list in detail the circumstances when a subpoena may be issued or the procedure to be followed upon failure to obey the subpoena, as is done in Section 9 of the 1917 act. See Section 205, *infra*, for the procedure to enforce a subpoena.

(2) *Administering Oaths.* Administer oaths and affirmations to parties and witnesses appearing before him.

Comment. This should be compared with Section 604 of the Orphans' Court Act of 1951, and Sections 304 and 311 of the Fiduciaries Act of 1949. There is no comparable provision in the 1917 act.

(3) *Depositions.* Issue commissions or rules to take the depositions of witnesses in another county or outside of the Commonwealth. The practice relating thereto shall conform to the practice in the local orphans' court.

Comment. This is based on Section 10 of the 1917 act. The second sentence is new and conforms with Section 742 of the Orphans' Court Act of 1951.

SECTION 204. *Witness Fees.*—Witnesses appearing before the register in obedience to the register's subpoena shall be entitled to the same fees and mileage as are allowed by law to witnesses in the orphans' court.

Comment. This is based on the last sentence of Section 9 of the 1917 act.

SECTION 205. *Enforcement of Subpoenas, Orders, and Costs.*—Should any person refuse to comply with any subpoena or order of the register or to pay all costs, the register shall forthwith certify the record of the proceedings to the court. The court, upon petition of any party in interest, shall compel payment of the costs and shall enforce obedience to the subpoena or order in the same manner as in cases of subpoenas and orders issued or made by the court.

Comment. This is suggested by the portions of Sections 8 and 9 of the 1917 act which deal with the enforcement of the production of a will or the appearance of witnesses. It was considered advisable to refer enforcement to the Orphans' Court in all cases. This section makes unnecessary a special reference to enforcement of payment of the register's costs as provided in Section 23 of the 1917 act.

SECTION 206. *Caveat.*—

(a) *Bond.* When a caveat has been filed, the register shall not delay the probate of a will or the grant of letters for more than ten days after the filing of the petition for probate or for grant of letters, or after the filing of the caveat, whichever shall be later, unless within such ten-day period a party in interest shall file with the register his bond in the name of the Commonwealth with sufficient surety in such amount, not less than five hundred dollars or more than five thousand dollars, as the register considers necessary, conditioned for the payment of any costs which may be decreed against the caveator.

(b) *Failure to Give Bond.* If no bond is filed within the ten-day period, the caveat shall be considered abandoned.

(c) *Costs.* The register, or the court upon appeal, shall determine the amount of costs occasioned by a caveat and direct by whom they shall be paid. If all or part of the costs shall be finally decreed to be paid by the caveator, any party interested in the costs may bring suit on the caveator's bond as provided by law.

Comment. This is based on Section 20 of the 1917 act but differs from Section 20 in that it is confined to a caveat alone and does not deal with appeals. Also it more clearly designates the time for the beginning of the ten-day period. Under existing practice it has been difficult to determine whether the ten-day period begins when a letter is filed with the register or only after a more formal caveat is filed. The allowance of a ten-day period after the filing of the petition for probate or for grant of letters will give persons who are uncertain concerning the action to be taken until they examine the will an opportunity to examine it and then to file a bond if they decide to contest the will.

SECTION 207. *Certification of Records to Court.*—Whenever a caveat shall be filed or a dispute shall arise before the register concerning the probate of a will, the grant of letters or the performance of any other function by the register, he may certify, or the court upon petition of any party in interest may direct the register at any stage of the proceeding to certify, the entire record to the court, which shall proceed to a determination of the issue in dispute. No letters of administration pendente lite shall be granted by the register after proceedings have been removed to the court except by leave of court.

Comment. This includes the substance of Sections 18 and 19 of the 1917 act, combined into a single abbreviated section as a matter of style.

SECTION 208. *Appeals.*—

(a) *When Allowed.* Any party in interest who is aggrieved by a decree of the register or a fiduciary whose estate or trust is so aggrieved may appeal therefrom to the court within two years of the decree, provided, 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. The court, upon petition of a party in interest, may limit the time for appeal to six months.

Comment. This is based on Section 21(a) of the 1917 act. As in the case of Section 771 of the Orphans' Court Act of 1951, the persons entitled to appeal are clarified. The prohibition against the executor, as such, appealing from refusal of probate is believed to be declaratory of case law: *Faust Est.*, 364 Pa. 529; *Knecht's Est.*, 341 Pa. 292; *Winters' Est.*, 57 D. & C. 433.

(b) *Bond.* Anyone appealing from a decree of the register shall, within ten days after filing his appeal, file with the register his bond in the name of the Commonwealth with sufficient surety in such amount, not less than five hundred dollars or more than five thousand dollars, as the register considers necessary, conditioned for the payment of any costs that may be decreed against him. If no bond is filed within the ten-day period, the appeal shall be considered abandoned.

Comment. This is based on Section 20(a) of the 1917 act and should be compared with Section 206(a) hereof dealing with caveats.

(c) *Effect of Appeal.* No appeal from a decree of the register shall suspend the powers or prejudice the acts of a personal representative to whom letters have been granted.

Comment. This is based on Section 21(b) of the 1917 act. It seemed advisable to refer to "a decree" rather than decrees involving the validity of a will or the right to letters as in the 1917 act. Compare Sections 520 and 547 of the Fiduciaries Act of 1949 and Section 772 of the Proposed Orphans' Court Act of 1951.

(d) *Excepted Appeals.* This section shall not apply to appeals for inheritance tax purposes, nor to appeals specially regulated by law.

Comment. This subsection is added out of an abundance of caution to avoid any possible conflict with appeals on inheritance tax matters for which special provision is made in the tax laws. See Act of 1919, P. L. 521, Section 13, as amended, 72 PS 2327.

SECTION 209. *Bill of Costs.*—The court may establish a bill of costs to be charged for the services of the register not otherwise provided by law.

Comment. This is suggested by Section 22 of the 1917 act and is similar to Section 503 of the Orphans' Court Act of 1951. It seemed inadvisable to make any distinction between counties with or without separate orphans' courts as was done in the 1917 act. The Act of 1947, P. L. 933, as amended, 20 PS 2045, lists the fees of registers in counties of the fifth, sixth, seventh and eighth classes.

ARTICLE III.

PROBATE.

SECTION 301. *Place of Probate.*—The will of a decedent domiciled in the Commonwealth at the time of his death shall be probated only before the register of the county where the decedent had his last family or principal residence. If the decedent

had no domicile in the Commonwealth, his will may be probated before the register of any county where any of his property is located.

Comment. This is based on Section 4 of the 1917 act. It conforms to Section 301 of the Fiduciaries Act of 1949, and Section 305(1) of the Orphans' Court Act of 1951. The second sentence differs from the 1917 act which restricted the right to letters in such circumstances to the county "where the principal part of the goods and estate of such decedent within this Commonwealth shall be".

SECTION 302. Manner of Probate.—All wills shall be proved by the oaths or affirmations of two competent witnesses, and

(1) *Will Signed by Testator.* In the case of a will to which the 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;

Comment. There is no statutory precedent for this clause, but it conforms with Section 4 of the Wills Act of 1947. It should now be clear that when a subscribing witness is not readily available, the testator's signature may be proved by others without resort to proof of the witnesses' signatures. Compare *Miller v. Carothers*, 6 S. & R. 215.

(2) *Will Signed by Mark or by Another.* In the 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;

Comment. This is suggested by Section 2(2) and 2(3) of the Wills Act of 1947. The validity of such a will depends on the circumstances under which it was executed including its subscription by two witnesses. Proof of the signatures of subscribing witnesses would not of itself prove a compliance with the requirements of the Wills Act of 1947, unless the attestation clause recited a compliance therewith. Cf. Hunter, O. C. Commonplace Book, pp. 437, 440. Non-subscribing witnesses present at the execution of the will, of course, would be competent to prove compliance with the statutory requirements.

(3) *Nuncupative Will.* In the case of a nuncupative will, the witnesses shall have been present when the will was declared,

and shall have reduced it to writing or directed it to be reduced to writing.

Comment. This is suggested by Section 3(a) of the Wills Act of 1947.

SECTION 303. *Limit of Time for Probate.*—

(a) *Original Probate.* A will, other than a nuncupative will, may be offered for probate at any time.

Comment. This conforms with the first portion of Section 16(b) of the 1917 act. The reference to nuncupative wills is included to avoid inconsistency with Section 3(a) of the Wills Act of 1947, and Section 304, *infra*.

(b) *Conclusiveness of Original Probate.* The probate of a will shall be conclusive as to all property, real or personal, devised or bequeathed by it unless an appeal shall be taken from the probate as provided in Section 208.

Comment. This is based on Section 16(a) of the 1917 act. Regardless of its all-inclusive language, this subsection would not of course be applied strictly where fraud (*cf. Culbertson's Est.*, 301 Pa. 438) or uncertainty of the probate record (*cf. Rockett Will*, 348 Pa. 445) is involved. No special provision is made for refusal of probate as in Section 16(a) of the 1917 act. That is covered by Section 208 hereof.

(c) *Effect Upon Grantee or Mortgagee.* A will offered for original or subsequent probate more than two years after the decedent's death shall be void against a bona fide grantee or mortgagee of real estate of the decedent if the conveyance or mortgage is recorded before the will is offered for probate. This subsection shall not apply to a will of a person dying before the effective date of this act offered for original probate within three years after the decedent's death.

Comment. This is based on Section 16(b) of the 1917 act, but reduces the period from three years to two years. The last sentence avoids constitutional objections.

SECTION 304. *Nuncupative Wills.*—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.

Comment. This is based on Section 6 of the 1917 act. The 1917 act prohibited probate of a nuncupative will within fourteen days of decedent's death. It is not considered advisable to delay the time for probate if provision is made for adequate notice to those who would be entitled to letters of administration. The requirements for nuncupative wills are found in Section 3 of the Wills Act of 1947.

SECTION 305. *Wills in Foreign Language.*—A writing not in English shall not be filed for probate or for any other purpose in the office of the register unless there is attached to it and filed with it a translation into English sworn to be correct. The register shall attach the translation to the original and shall file them in his office, and in all cases where a recording is now or hereafter may be required, both the original and the translation shall be recorded. A writing filed in violation of this section shall not constitute notice to any person.

Comment. This is based on Section 12 of the 1917 act. It should be compared with Section 504 of the Orphans' Court Act of 1951.

SECTION 306. *Wills Probated Outside the Commonwealth.*—A duly authenticated copy of a will proved outside of the Commonwealth according to the law of the place of probate may be offered for probate before any register having jurisdiction, and letters testamentary or of administration with a will annexed may be granted thereon as though the original will had been offered before such register. If, in addition to such copy, there shall be produced a duly authenticated copy of the record of the probate proceeding of the original instrument issued thereon the will shall be entitled to probate in this Commonwealth and appropriate letters shall be issued thereon without the production or examination of the witnesses to prove such will unless the record shows or it is satisfactorily proved that an essential requirement of Pennsylvania law for a valid will has not been met. In such event the probate proceedings may be supplemented by the submission of additional evidence to the register.

Comment. This is based on Section 7 of the 1917 act. It is intended that probate proceedings in Pennsylvania may be supplemented by the production of additional evidence before the register without the necessity of changing the probate records of the jurisdiction where the will was originally proved. Authentication of wills probated outside of the Commonwealth is governed by Act of Congress, 28 USCA 1738 (formerly 687) and 1741.

SECTION 307. *Enforcing Production of Will.*—The register, at the request of any party in interest, shall issue a citation to any person alleged to have possession or control of a will of a decedent requiring him to show cause why it should not be deposited with him. In the absence of good cause shown the register shall order the will to be deposited with him.

Comment. This is based on Section 8 of the 1917 act. Provisions for enforcement are found in Section 205 supra. No special procedure is pro-

vided for service of the citation or for the hearing before the register. Presumably it will follow the practice in similar cases before the orphans' court.

ARTICLE IV.

LETTERS—ACCOUNTS.

SECTION 401. *Bonds of Personal Representatives.*—If any register shall grant letters without having taken bond as required by law, he and his surety shall be liable to pay all damages which shall accrue to any person by reason thereof. Nothing herein stated shall be deemed to relieve the personal representative from liability which would otherwise be imposed upon him by law.

Comment. This is suggested by Section 8(d) of the Fiduciaries Act of 1917. The statement that letters issued without bond are void is omitted because it is believed that they should not be void insofar as other persons acting upon the faith thereof are concerned.

SECTION 402. *Revocation of Letters of Administration.*—The register may revoke letters of administration granted by him whenever it appears that the person to whom letters were granted is not entitled thereto.

SECTION 403. *Revocation of Letters Testamentary.*—The register shall amend or revoke letters testamentary granted by him not in conformity with the provisions of the will.

Comment. Sections 402 and 403 are based on Section 5 of the 1917 act, the language of which made revocation of letters and grant of new letters discretionary in the case of letters testamentary as well as letters of administration. They are set forth as separate sections herein because it is believed that there should be no discretion in the case of a will.

SECTION 404. *Transmission of Accounts to the Court.*—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.

Comment. This is based on Section 46(d) of the Fiduciaries Act of 1917 which in addition made provision for the advertisement of accounts. This is now covered by Section 505 of the Orphans' Court Act of 1951.

ARTICLE V.

RECORDS AND CERTIFIED COPIES.

SECTION 501. *Wills*.—All probated wills shall be indexed and recorded by the register, and shall remain in his office, except for the period required to be in the custody of a higher court. The recording may be accomplished by photographic or other mechanical process.

Comment. This is based on Section 11 of the 1917 act.

SECTION 502. *Inventories and Appraisements*.—The register shall index and record all inventories and appraisements filed with him. The recording may be accomplished by photographic or other mechanical process.

Comment. This is based on Section 13 of the 1917 act.

SECTION 503. *Certified Copies*.—Every register upon the request of any person paying the fee therefor shall make and certify under the seal of his office true copies of his records or of papers filed with him or of proceedings before him. Such certified copies shall be as good evidence as the original in any judicial proceeding in the Commonwealth.

Comment. This is based on Section 14 of the 1917 act. The last sentence is suggested by Sections 11 and 13 of the 1917 act.

SECTION 504. *Recording Proceedings in Another County*.—Copies of wills and probate proceedings duly certified by the register may be filed in the office of the register in any county where real estate of the 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.

Comment. This is based on Section 15 of the 1917 act.

ARTICLE VI.

REPEALER.

SECTION 601(a). *Specific Repeals*.—The following acts and parts of acts and all amendments of each are hereby repealed as respectively indicated:

(1) Section 37 of the act, approved the fifteenth day of March, one thousand eight hundred thirty-two (Pamphlet Laws 135), entitled "An Act relating to Registers and Registers' Courts", absolutely.

Comment. This section except for this repeal would still apply to Beaver County. It was not supplanted by Section 7 of the Act of 1868, P. L. 3, repealed in clause (2) hereof. A proviso in Section 11 of the Act of 1868, P. L. 3, stipulated that it should not apply *inter alia* to Beaver County.

(2) Section 7 of the act, approved the second day of April, one thousand eight hundred sixty-eight (Pamphlet Laws 3), entitled "An Act to ascertain and appoint the fees to be received by the several officers of this Commonwealth", absolutely.

Comment. This section has applied only to Northampton County, the only county of the fourth class, other than Beaver County, not having a separate orphans' court. The Act of 1947, P. L. 933, as amended, expressly saved from repeal by subsection (c) hereof sets forth the fee bill of registers in counties of the fifth, sixth, seventh and eighth classes. Section 22 of the Register of Wills Act of 1917 provided that in the counties having separate orphans' courts "the said courts shall establish a bill of costs". Under Section 209 of this Act, the orphans' court "may establish a bill of costs to be charged for the services of the register not otherwise provided by law".

(3) Section 1 of the act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 415), entitled "An Act relating to the qualification, jurisdiction, powers, and duties of registers of wills, and regulating proceedings before said registers, and the costs thereof, the effects of their acts, and appeals therefrom", except insofar as it applies to counties of the first class; and Sections 2 to 23 both inclusive of the same act, absolutely.

Comment. While the subject matter of Section 1 of the 1917 act on the oath and bond of the register is included within the scope of the General County Law of 1929, it must nevertheless be preserved because the General County Law of 1929 does not apply to Philadelphia County. When legislation dealing with Philadelphia County is revised, Section 1 of the Register of Wills Act of 1917 can be repealed absolutely. Section 24 of the 1917 act is preserved from repeal because it provides for fees to be collected for the Commonwealth upon the grant of letters and is not incorporated in the new act.

(4) Section 224 of the act, approved the second day of May, one thousand nine hundred twenty-nine (Pamphlet Laws 1278), entitled "An Act relating to counties of the second, third,

fourth, fifth, sixth, seventh and eighth classes; and revising, amending and consolidating the laws relating thereto", insofar as it applies to registers of wills; and Section 233 of the same act, absolutely.

Comment. These sections apply to all but first-class counties and overlap to some extent the provisions of Section 202 of this Act. The partial repeal of Section 224 and the absolute repeal of Section 233 will eliminate any possible conflict of interpretation.

(b) *General Repeal.* All other acts and parts of acts inconsistent herewith are hereby repealed.

(c) *Saving Clause.* This act shall not repeal or modify the act, approved the twenty-fifth day of June, one thousand nine hundred forty-seven (Pamphlet Laws 933), entitled "An Act prescribing the fees to be received by registers of wills in counties of the fifth, sixth, seventh and eighth class".