

Acts of the General Assembly of Her Majesty's Province of New-Brunswick passed in the year 1838. Fredericton, NB: John Simpson, Printer to the Queen's Most Excellent Majesty, 1838.

1 Victoria – Chapter 9

An Act for the amendment of the Law with respect to Wills. Passed 9th March 1838.

Whereas in and by a certain Act of the Imperial Parliament passed in the first year of the reign of Her present Majesty Queen Victoria, intituled "An Act for the amendment of the Law with respect to Wills," three several Acts of the Imperial Parliament, the one passed in the thirty second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins, whereby a man may devise two parts of his land," another Act passed in the thirty fourth and thirty fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the explanation of Wills," and the other an Act passed in the twenty fifth year of the reign of the said King George the Second, intituled "An Act for avoiding and putting an end to certain doubts and questions relating to the attestation of Wills and Codicils concerning real estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America," were repealed: And whereas the said statutes so repealed in England have extended to or hitherto been considered in force and acted upon in this Province, and it is deemed expedient that the operation of the same should also cease in this Province, and also that so much of the two several Acts of Assembly of this Province passed in the twenty sixth year of the reign of King George the Third, the one intituled "An Act relating to Wills, Legacies, Executors and Administrators, and for the further settlement and distribution of the estates of intestates," the other intituled "An Act for the prevention of frauds and perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative Wills, or to the repeal, altering or changing of any Will in writing concerning any good or chattels, or personal estate, or any clause, devise or bequest therein, should also be repealed, and that an Act of Assembly should be passed for the amendment of the Law in respect to Wills, containing similar provisions, so far as applicable to this Province, as the said Act of the Imperial Parliament in that respect;

I. Be it therefore enacted by the Lieutenant Governor, Legislative Council and Assembly, That the said two recited Acts of the Parliament of England passed in the reign of King Henry the Eighth, and also the said recited Act of the Parliament of Great Britain passed in the twenty fifth year of the reign of King George the Second, be and the same are hereby declared to be repealed, and of no force or effect in this Province, any law, usage or custom to the contrary notwithstanding.

II. And be it enacted, That the first, second, thirds fourth and fifth sections, and also so much of the sixth section, as relates to the repealing, altering or changing any Will in writing concerning personal estates, of the said Act of Assembly passed in the twenty sixth year of the reign of King George the Third, intituled "An Act relating to Wills, Legacies, Executors and Administrators, and for the settlement and distribution of the estates of intestates," and also the tenth section of the

said Act of Assembly passed in the same year of the same reign, intituled "An Act for prevention of frauds and perjuries," be and the same are hereby repealed.

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath or dispose of, by his Will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity at the time of his death, and which if not so devised, bequeathed or disposed of, would devolve upon his Heir, Child, or next of kin, or upon his Executor or Administrator; and that the power hereby given shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

IV. And be it further enacted, That if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the Heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple: and in case there shall be no special occupant of any estate *pur autre vie* whether a corporeal or incorporeal hereditament, it shall go to the Executor or Administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the Executor or Administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

V. And be it further enacted, That no Will made by any person under the age of twenty one years shall be valid.

VI. Provided also and be it further enacted, That no Will made by any married woman shall be valid except such a Will as might have been made by a married woman before the passing of this Act.

VII. And be it further enacted, That no Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary.

VIII. And be it further enacted, That no appointment made by Will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required; and every Will executed in manner hereinbefore required shall so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by Will, notwithstanding it shall have been expressly required that a Will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

IX. Provided always, and be it further enacted, That any Soldier being in actual military service, or any Mariner or Seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

X. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act of the Imperial Parliament passed in the eleventh year of the reign of His Majesty King George the Fourth, and in the first year of the reign of His late Majesty King William the Fourth, intituled "An Act to amend and consolidate the laws relating to the pay of the Royal Navy," respecting the Wills of petty officers and seamen in the Royal Navy and non-commissioned officers of Marines and Marines so far as relates to their wages, pay, prize money, bounty money and allowances or other monies payable in respect of services in Her Majesty's Navy.

XI. And be it further enacted, That every Will executed in manner hereinbefore required shall be valid without any other publication thereof.

XII. And be it further enacted, That if any person who shall attest the execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such Will shall not on that account be invalid.

XIII. And be it further enacted, That if any person shall attest the execution of any Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such Will.

XIV. And be it further enacted, That in case by any Will any real or personal estate shall be charged with any debt or debts, and any creditor or the wife or husband of any creditor whose debt is so charged, shall attest the execution of such Will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such Will or to prove the validity or invalidity thereof.

XV. And be it further enacted, That no person shall on account of his being an Executor of a Will be incompetent to be admitted a witness to prove the execution of such Will or a witness to prove the validity or invalidity thereof.

XVI. And be it further enacted, That every Will made by a man or woman shall be revoked by his or her marriage except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her Heir, Child, next of Kin, Executor or Administrator.

XVII. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XVIII. And be it further enacted, That no Will or Codicil, or any part thereof shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some, person in his presence and by his direction with the intention of revoking the same.

XIX. And be it further enacted, That no obliteration, interlineation or other alteration made in any Will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator, and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will.

XX. And be it further enacted, That no Will or Codicil or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a Codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn.

XXI. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a Will, of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death.

XXII. And be it further enacted, That every Will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will.

XXIII. And be it further enacted, That unless a contrary intention shall appear by the Will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such

Will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any contained in such Will.)

XXIV. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his Will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates of the testator to which such description shall extend as well as freehold estates, unless a contrary intention shall appear by the Will.

XXV. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his Will or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the Will: and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the Will.

XXVI. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention shall appear by the Will.

XXVII. And be it further enacted, That in any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the Will, by reason of such person having a prior estate tail, or of a preceding gift, being without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise; provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXVIII. And be it further enacted, That where any real estate shall be devised to any Trustee or Executor such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a definite

term of years, absolute or determinable, or an estate of freehold shall thereby be given to him expressly or by implication.

XXIX. And be it further enacted, That where any real estate shall be devised to a Trustee without any express limitation of the estate to be taken by such Trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such Trustee the fee simple or other the whole legal estate which the testator had power to dispose of by Will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

XXX. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

XXXI. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

XXXII. And be it further enacted, That the words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "Will" shall extend to a testament, and to a codicil, and to an appointment by Will or by writing in the nature of a Will in exercise of a power, and also to a disposition by Will, and testamentor devise of the custody and tuition of any child, by virtue of an Act of the Parliament of England, passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries and tenures in capite, and by Knight's service and purveyance, and for settling a Revenue upon His Majesty in lieu thereof," and to any other testamentary disposition; and the words "real estate" shall extend to messuages, lands, rents and hereditaments, whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate," shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever, which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

XXXIII. And be it further enacted, That this Act shall not extend to any Will made before the first day of January one thousand eight hundred and thirty nine, and that every Will re-executed or revived by any Codicil shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January one thousand eight hundred and thirty nine.