

*Laws of Her Majesty's Province of Newfoundland, passed in the year 1859.*

22 Victoria – Chapter 6

**An Act to amend the Practice and Mode of Procedure in Granting Probates and Letters of Administration, and for other purposes. (Passed 20th April, 1859.)**

Whereas it is expedient to amend the Law in relation to the granting and revocation of Probates of Wills and of Letters of Administration.

Be it Enacted, by the Governor, Legislative Council and Assembly, in Legislative Session convened:

I. That Letters of Administration or Probates of Wills may be granted in common form upon rule of the Supreme Court or of the Northern or Southern Circuit Courts, or a Judge's fiat, to be made upon Petition and Affidavit, notice of the application therefor being put up in the Clerk's Office three days before making the same, where the application is made to the Supreme Court or a Judge in St. John's, and two days' notice on the door of the Court House, when made to either of the Northern or Southern Circuit Courts.

II. No administration shall be issued, or guardian or receiver of property appointed, until sufficient security, to the satisfaction of the Court or Judge, shall be given by such administrator, guardian, or receiver, for the faithful discharge of his duty.

III. Where a caveat to such application shall be entered in the Clerk's Office before the expiration of the said three days, or before rule or fiat shall be made, or when in the opinion of the Court or a Judge objection shall appear against a grant of Letters of Administration or Probate, before granting the same all parties concerned therein shall be cited to show cause before such Court or Judge why Administration or Probate should not be granted to the applicant; and such parties shall, on a day to be named in the citation, file an answer setting forth succinctly the grounds of their objection, and shall at the same time serve a copy of such answer on the Petitioner, his Attorney or Agent; after which, on a day to be fixed by the Court or Judge, the witnesses for both parties shall be brought before the said Court or Judge, or Examiner to be appointed for that purpose, and examined and cross-examined viva voce, or by commission on interrogatories and cross-interrogatories when so ordered; and the said Court or Judge, after hearing all such evidence, and the parties or their Counsel, shall make such order touching the premises as to justice shall appertain.

IV. When any of the parties do not appear and answer (due proof of service of such citation on them having been made to the Court or Judge), the proceedings may be heard and determined ex parte, or such further time given for such appearance and answer, and on such terms, as the Court or Judge may direct.

V. It shall be competent for any party interested in a Will to compel proof thereof in solemn form, by serving on the Executor or party having execution of such Will, or praying therefor, a citation; whereupon such Executor or party shall, within ten days after such service, file in the Clerk's Office a

petition verified by affidavit praying that such Will may be proved in solemn form, and such further proceedings shall thereupon be had for such proof, and, if required, for contestation of such Will, as are herein-before directed in case of the validity of such Will being contested on the first application for Probate.

VI. It shall be lawful for any Executor or party desiring or having execution of a Will to have the same proved in solemn form at any time before any such Court or Judge, by filing a petition therefor in the Clerk's Office, verified as aforesaid, and by giving, at the same time, four days' previous notice of such application to the parties interested therein, and to the next of kin of the Testator in this Colony, when such further proceedings shall be taken for such proof, and if required for contestation of such Will, as are herein-before mentioned in cases where the validity of Wills may be contested in manner aforesaid.

VII. Any of the said Courts or a Judge, upon sufficient cause shown, may set aside any order or decree obtained on a default, upon such terms, as to the payment of costs or otherwise, as may be equitable.

VIII. In all matters brought before any Judge, under the provisions of this Act, the said Judge shall have the like powers, jurisdiction and authority for enforcing the attendance of persons and witnesses, and for punishing persons and witnesses failing, neglecting, or refusing to produce deeds, evidences or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the said Judge under this Act, and otherwise in relation to the matters to be enquired into and done under the order of the said Judge under this Act, as are vested in the Supreme Court of Newfoundland for such purposes in relation to any matter depending in such Court.

IX. Neither the Northern or Southern Circuit Court shall grant Letters of Administration or Probate of a Will, unless the application therefor shall be supported by an affidavit stating, among other things, that the testator or intestate at the time of his decease had a fixed place of abode within the jurisdiction of the said Court. And where a caveat shall be entered against the granting of Letters of Administration or Probate of a Will by such Court, or when, in the opinion of said Court, objection against the granting thereof shall appear, all subsequent proceedings thereon shall be heard and determined before the Supreme Court, to which Court the petition, affidavit, caveat, and all other documents relating to such application, shall be transferred by the Clerk of said Circuit Court.

X. All Letters of Administration and Probates of Wills granted by either the Northern or Southern Circuit Courts shall be issued in the name of the Supreme Court of Newfoundland, and the seal to be used by the said Court for such purposes and attached to the said Letters of Administration or Probate shall be the private seal of the Judge presiding in the Court directing the issue thereof; and where by virtue of this Act any proceedings may be had or done by or before a Judge, the term Judge shall be construed to mean a Judge sitting in St. John's, and not elsewhere.

XI. The respective Clerks and Registrars of the said Northern and Southern Circuit Courts shall, at the close of each term of such Courts respectively, return to the office of the Chief Clerk and Registrar of the Supreme Court a list of Probates and Letters of Administration granted by such Circuit Courts

respectively during such term, together with the original Wills of which Probate or Administration cum testamento annexo may have been granted, and the several administration bonds which may have been taken by such Clerks during said terms—the said Clerks and Registrars having taken and filed correct copies of said original Wills—which returns shall be entered in the book of Acts of the Supreme Court of this Island by the said Chief Clerk and Registrar, and when so entered, shall be as effectual in evidence, and for all other purposes, as if the Probate or Administration had been granted by the said Supreme Court; and in case of the loss of any original Will in course of transmission to the Chief Clerk and Registrar at St. John's or otherwise, the copy of such Will, to be taken and filed in manner aforesaid, shall be of equal avail for entering in the book of Acts, and for all other purposes, as the original.

XII. That when an Executor or Administrator to whom Probate or Administration has been or may be granted, shall depart from and remain absent from this Colony for the period of one year without having appointed an Attorney to act for and represent him in either case, it shall be lawful for the Supreme Court, or a Judge thereof, on petition verified by oath shewing to the satisfaction of the said Court, or a Judge, that the interests of parties concerned in the estate are or will be prejudiced by the absence of such Executor or Administrator, to appoint an Administrator with the Will annexed, or Administrator de bonis non, as the case may be, who shall respectively, during the absence of such Executor or Administrator, on giving security to the satisfaction of the said Court or Judge, have, possess and exercise, all and singular the same power and authority as the Executor or Administrator so absent as aforesaid, if personally present.

XIII. Where a person has died or shall die Intestate, or leaving a Will without appointing an Executor thereof willing and competent to take Probate, or where the Executor shall at the time of the death of such person be resident out of this Colony, and it shall appear to the Court or Judge to be necessary or convenient in any such case, by reason of the Insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the Administrator of the personal estate of the deceased, or of any part of such estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such estate, it shall not be obligatory upon the Court or Judge to grant administration of the estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof; but it shall be lawful for the Court or Judge, in its discretion, to appoint such person as the Court or Judge shall think fit to be such administrator, upon his giving such security (if any) as the Court or Judge shall direct, and every such administration may be limited as the Court or Judge shall think fit.

XIV. The Supreme Court may, on motion or petition, or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any Probate or Administration, order any person to produce and bring into the office of the Chief Clerk and Registrar of the respective Judicial Districts of this Colony, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shewn to be in possession or under the control of such person; and if it be not shewn that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same, and such

person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court and had made such default; and the costs of any such motion, petition, or other proceeding, shall be in the discretion of the Court.

XV. Application may be made to the Supreme Court, or to either the Central, Northern or Southern Circuit Courts, for any of the following purposes, that is to say; for an account of an intestate estate, or for the distribution of such estate, or for the payment or delivery of a legacy, or for the appointment of a receiver or of a guardian to the person or property of an infant or of a natural fool, or of such as are or shall be deprived of their reason or understanding, or for any matter or thing concerning the execution of the trusts or provisions of any Will, or for the removal of any executor, administrator, receiver, guardian or trustee, or for the revocation of Letters of Administration or Probate, or for the appointment of a Trustee to the property of a married woman, or of new Trustees in the place of Trustees appointed by any Will, Conveyance or otherwise, in the event of the death or absence of such former Trustees, or their refusal to act, or being desirous of being relieved of such trust, or acting improperly, or becoming disqualified for any cause; such application shall be made to such Court by petition, filed in the Clerk's office, verified by affidavit and supported by such other affidavits as may be thought necessary, setting forth succinctly the facts and circumstances of the case; and thereupon the said Court may grant a rule on the opposite party, returnable on a day to be specified therein, to answer such petition; and on hearing said parties or their Counsel, and the affidavits by them respectively produced, shall grant or refuse the prayer of such petition, or make such other order or orders in the premises as justice shall require. Provided always, that it shall be lawful for such Court to direct the evidence to be taken viva voce in open Court, or viva voce upon interrogatories and cross interrogatories, before a Commissioner or Examiner.

XVI. Service of Citations shall be made personally upon the party to whom the same shall be directed, unless in cases where, for sufficient cause, the Court or a Judge shall otherwise order.

XVII. It shall be lawful for the Judges of the Supreme Court, by rules to be by them from time to time made and published for three months in the Royal Gazette, to regulate the practice on the Probate side of the said Court, in matters not herein provided for.

XVIII. The costs of contested suits shall be the same as those on the Equity side of the said Court.

XIX. Any person feeling himself aggrieved by the decision or judgment of a Judge, or of the Central, Northern or Southern Circuit Courts exercising jurisdiction under the provisions of this Act, may, within thirty days from the pronouncing of such decision or judgment, appeal therefrom to the Supreme Court upon giving sufficient security, subject to the approval of such Judge or Court, to obey such order or decree thereon as may be made by the said Supreme Court, and costs.

XX. That the forty-eighth rule of the Supreme Court be repealed, and that the fees (and none other) in the following Table, for the services therein mentioned, be received by the Clerks of the Supreme,

Northern and Southern Circuit Courts, that is to say: In all cases, where the value of the Estate of any person deceased, in which application shall be made for Administration, shall not exceed Fifty pounds, the sum of Ten shillings and six-pence, in lieu of all other fees; and between Fifty and up to One Hundred pounds, Fifteen shillings, in lieu of all other fees; and in cases of Probate or Administration with the Will annexed, where the value of the Estate shall be as aforesaid, the fee in addition, in the scale following, for fair copying and registering Will; and if the value of the Estate shall exceed One Hundred pounds, the following fees:—

|   |   |   |    |   |
|---|---|---|----|---|
| For taking Proof of Will in Office                                      | £ | 0 | 6  | 8 |
| Registering the Will, every folio of 100 words                          |   | 0 | 1  | 0 |
| Taking Prof by Dedimus Potestatem, where necessary                      |   | 0 | 6  | 8 |
| Issuing Probate or Letters of Administration                            |   | 0 | 10 | 6 |
| Taking Bond from Administrator and Sureties, Affidavits, &c.            |   | 0 | 6  | 8 |
| Copy of Will to be annexed to Probate or Administration,<br>every folio |   | 0 | 1  | 0 |
| Entry and Record of Probate or Administration                           |   | 0 | 5  | 0 |
| Every Search  |   | 0 | 1  | 0 |
| Every Affidavit   |   | 0 | 1  | 0 |
| Every Citation  |   | 0 | 1  | 0 |
| Letters of Guardianship   |   | 0 | 10 | 6 |
| Exemplification of Probate or Letters of Administration                 |   | 0 | 10 | 6 |

XXI. The forms in the Schedule to this Act annexed, and all matters directed and mentioned therein, shall be deemed and taken to be a part of this Act.

#### SCHEDULE.

##### *Form of Caveat.*

In the \_\_\_\_\_ Court,  
Probate Side.

Let nothing be done in the Estate of A. B., late of \_\_\_\_\_ deceased, who died on the \_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ unknown.

Signature of the party or his  
Attorney opposing Letters of  
Administration or Probate.

To

*Citation where Caveat entered or where ordered by Court or Judge.*

In the Supreme Court,  
Probate Side.

In the Estate of A. B. of &c. \_\_\_\_\_ deceased \_\_\_\_\_ at the instance of C. D. of &c., claiming (as the next of kin, or as Executor, as the case may be) of the said A. B. It is ordered that E. F., of &c. do show cause, if any he have, or why (Administration or Probate to the Will of, or Probate in solemn form, as the case may be) the said A. B. should not be granted to the said C. D., by filing in the Registrar's office and service on the said C. D. an answer containing the grounds on which he resists such grant within six days after service of this Citation; otherwise the claim of the said C. D. will be taken to be admitted by him.

By the Court,  
August \_\_\_\_\_ 18\_\_\_\_

M. N.  
Proctor for C. D.

G. H.  
Clerk and Registrar

*Form of Citation to compel proof of a Will in solemn form*

Supreme Court,  
Probate Side.

In the Estate of A. B. of &c., \_\_\_\_\_ at the instance of C. D. of &c. \_\_\_\_\_ claiming &c. \_\_\_\_\_ It is ordered that E. F. Executor of the alleged last Will of the said A. B. (or Administrator, with the Will annexed, as the case may be,) do, within ten days after the service thereof, proceed according to law to prove the said Will in solemn form, otherwise the Probate thereof (or Administration and Probate) heretofore granted will be revoked.

By the Court.

August \_\_\_\_\_ 18\_\_\_\_

M. N.  
Proctor for C. D.

G. H.  
C. C. and Registrar.

*Notice of Executor or other party to have Will proved in solemn form.*

Supreme Court  
Probate Side.

In the Estate of  
deceased.

From: British North America Legislative Database; University of New Brunswick  
bnald.lib.unb.ca

I, \_\_\_\_\_ Executor (as the case may be,) hereby give you notice, that after expiration of four days from the date hereof, I (as the case may be) will apply to the Supreme Court to prove the Will of the said \_\_\_\_\_ deceased in solemn form.

Signature of Executor or other party  
Or Proctor of other party.

To \_\_\_\_\_ (parties interested.)