

Laws of His Majesty's Province of Upper-Canada; Passed in the Second Session of the Provincial Parliament of Upper Canada, Met at Newark, on the Thirty-First day of May, in the Thirty-Third Year of the Reign of our Sovereign Lord George the Third (1793). Niagara: Gideon Tiffany, Printer to the King's Most Excellent Majesty, 1795.

33 George III – Chapter 8

An Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof.

Whereas it is expedient to establish a court for the purpose of granting probate of wills and committing letters of administration of the goods of persons dying intestate, having personal estate within this province, Be it enacted by the king's most excellent majesty, by and with the advice and consent of the legislative council, and assembly of the province of Upper-Canada, constituted and assembled, by virtue of, and under the authority of an Act passed in the parliament of Great-Britain, entitled an Act to repeal certain parts of an Act, passed in the fourteenth year of his majesty's reign, entitled, "An Act for making more effectual provision for the government of the province of Quebec, in North-America, and to make further provision for the government of the said province," and by the authority of the same, That there be constituted and established, and there is hereby constituted and established, a court with full power and authority to issue process and hold cognizance of all matters relative to the granting of probates, and committing letters of administration, and to grant probates of wills, and commit letters of administration of the goods of persons dying intestate, having personal estate, rights and credits within this province, to be called and known by the name of the Court of Probate of the province of Upper-Canada, and that the governor, lieutenant-governor, or person administering the government thereof, shall preside in the said court, to hear, give order or decree, or pronounce judgment in all questions, causes or suits that may be brought before him, relative to the matters aforesaid, and that for such purpose he may from time to time, when he shall be so disposed, call such person or persons as he shall think proper to be assessor or assessors with him, and that it shall and may be lawful for the governor, lieutenant-governor, or person administering the government in this province, to nominate and appoint from time to time, an official principal of the court together with a register and such officers as may be necessary for the exercise of the jurisdiction to the said court belonging.

II. And whereas it will be convenient for the inhabitants of this province to be enabled to obtain probate of wills, and letters of administration within their several districts, Be it enacted by the authority aforesaid, That it shall and may be lawful for the governor, lieutenant governor or person administering the government in this province, to institute, and he is hereby authorized to institute by commission under the great seal of this province, in each district thereof, a court for the purpose of granting probate of wills, and letters of administration of the goods of persons dying intestate, having personal estate within the limits of each district respectively, which courts shall be severally called and known by the names of the surrogate court of the Eastern district, the surrogate court of the Midland district, the surrogate court of the Home district, and the surrogate court of the Western district, and also to appoint from time to time, a surrogate to preside as

judge in each of the said courts, to hear, give order, or decree, or pronounce judgment in all questions, causes or suits, that may be brought before him, relative to the said matters, and also from time to time, to nominate and appoint a fit and proper person to be register, and also such officers as may be necessary for the exercise of the jurisdiction to the said courts belonging, and that each and every of the said courts shall have full power and authority to issue process and hold cognizance of all matters relative to the granting of the probate of wills and letters of administration, and to grant probate of wills, and to commit letters of administration of all and singular the goods and effects, rights and credits of persons dying intestate, within the limits of their respective districts, except in the cases herein after mentioned. Provided always, That in all cases where a testator or intestate shall die possessed of goods, chattels or credits to the amount of five pounds in any district, other than that in which he usually resided at the time of his decease, or when any testator or intestate shall die possessed of goods to the value of five pounds, in two or more several districts within this province, the probate of such will and letters of administration of the goods and effects of such person shall be granted by the court of probate only, and not by any surrogate court.

III. And in order to give due authenticity to the acts and proceedings of the said several courts, Be it enacted by the authority aforesaid, That each of the said courts be provided with a suitable seal; that on the seal of the court of probate be inscribed the name of the province, and on the several seals of the surrogate courts the name of the district, over which its jurisdiction extends, and that a particular description of such seals be respectively sent to the office of the secretary of the province to be kept among the records of the province. Provided always, That no person shall be entitled or qualified to enter upon or execute the office of surrogate in any of the courts so to be established, until after he shall have taken the following oath:

“I A. B. do solemnly promise and swear, that I will honestly and impartially execute the office of according to the best of my knowledge and ability,

“So HELP ME GOD.”

And that no person shall be entitled to act as a register in any of the said courts until after he shall have taken the following oath:

“I A. B. do promise and swear, that I will diligently and faithfully execute the office of and that I will not knowingly permit or suffer any alteration, obliteration or destruction to be made or done by myself or others, on any wills or testamentary papers committed to my charge.

“So HELP ME GOD.”

IV. And be it enacted by the authority aforesaid, That every will or testamentary paper, which shall be duly proved, approved and insinuated in the court of probate, or in any surrogate court within this province, shall be kept and preserved among the records of the said court, and that a transcript thereof duly authenticated under the seal of the said court, shall be taken and received as the regular probate of such will or testamentary paper, so far as the same may regard the

disposal of any personal estate or effects, in all and every of his majesty's courts within this province, or wherever it may be necessary to produce the same.

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

VI. And be it further enacted by the authority aforesaid, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof were committed to writing within six days after making the said will.

VII. And be it further enacted by the authority aforesaid, That no letters testamentary, or probate of any nuncupative will shall pass the seal of any court until fourteen days at the least After the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred of the deceased, to the end that they may contest the same, if they shall be so advised.

VIII. And be it enacted by the authority aforesaid, That no letters of administration shall be granted by the court of probate, or by any surrogate court, of the goods, chattels or credits of any person represented as having died intestate, until due proof be made before the said judge or surrogate, to his satisfaction, that such person is dead, and died intestate.

IX. And be it further enacted by the authority aforesaid, That when application is made for letters of administration of the goods, chattels and credits of any person dying intestate, by any person or persons not entitled to the same as next of kin to the intestate, the judge of the court of probate, or the surrogate to whom such application shall be made, shall before the granting of the administration, issue a citation to the next of kin to the intestate, summoning him or her to appear, and shew cause, if any they have, why the administration should not be granted to the person or persons so applying, which citation shall be served upon the next of kin to the intestate, residing within this province, and if the next of kin, nor any person of the kindred of the intestate shall happen to reside within this province, then a copy of such citation shall be affixed up in some public place in the town where the intestate did reside at the time of his death, at least ten weeks before the return thereof, and in case such intestate did not reside within this province at the time of his death, then a copy of the citation shall be published in the Upper-Canada gazette, once in every month during the space of eight months before the return thereof. Provided always, That in case the person next of kin usually residing within this province, and regularly entitled to

administer, should happen to be absent from the province, it shall and may be lawful for the judge of probate, or surrogate, within the limits of his district, to grant a temporary administration, to the next of kin who shall be in the province, of the intestate, during a limited time, or to be revoked upon the return and application of such nearest of kin as aforesaid, and for that purpose to take sufficient bonds from the party to whom such temporary administration shall have been granted, for the surrender of such letters of administration, and to account for the same, in manner herein after to be mentioned.

X. And be it further enacted by the authority aforesaid, That the judge of probate, and every surrogate in his several district, shall and may upon their respective granting and committing letters of administration of the goods of persons dying intestate, take sufficient bonds of the respective person or persons to whom any administration is to be committed, with two or more able sureties, respect being had to the value of the estate, in the name of the governor, lieutenant-governor, or person administering the government of the said province, or with the condition in form and manner following, mutatis mutandis. "The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C, D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come into the hands, possession or knowledge of him, the said A. B. or into the hands and possession of any other person or persons for him, and the same so made, do exhibit or cause to be exhibited into the registry of _____ court, on or before the day _____ of _____ next ensuing, and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come into the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law, and further do make or cause to be made, a true and just account of his said administration, at or before the day _____ of _____ and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrators account, the same being first examined and allowed by the judge of the court, for the time being, shall deliver and pay unto such person or persons respectively, as the said judge by his decree or sentence, conformably to the provisions in a certain act of parliament, entitled, "An Act for the better settling intestate estates," and passed in the 22d and 23d year of the reign of Charles the 2d, and also in a certain act passed in the first year of king James the second, contained, shall limit and appoint, and if it shall hereafter appear, that any last will or testament was made by the deceased, and the executor or executors therein named do exhibit the same unto the said court, making request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue which bonds are hereby declared and enacted to be good and binding to all intents and purposes, and pleadable in any courts of justice.

XI. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the said judge of probate and surrogate respectively, and they are hereby enabled to call by citation under the seal of their several courts, such administrators to account, for and touching the goods

of any person dying intestate within their several jurisdictions, and upon hearing, and due consideration thereof, to order and make just and equal distribution of what remaineth clear, After all debts, funeral and just expences of every sort, first allowed and deducted, according to the provisions in the said statutes herein before mentioned, contained. Provided always, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made, until after one year be fully expired, After the intestate's death; and that such and every one, to whom any distribution and share shall be allotted, shall give bonds with sufficient sureties, in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise made to appear, that then and in every such case, he or she shall respectively refund and pay back to the administrator, his or her ratable part of such debt or debts, and of the costs of suit, and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt and debts, so discovered after the distribution made as aforesaid.

XII. And in order to enforce, when it shall be necessary, due respect and obedience to the process, orders, sentence or decree of the said courts, in all matters within their cognizance, Be it enacted by the authority aforesaid, That it shall and may be lawful for the said judge of the court of probate, and his surrogates within their respective districts, and they are hereby authorized upon application made and supported by certificate from the register or proper officer, of any neglect of, or disobedience to the regular process, order or sentence of the court, or upon any complaint to be verified upon oath by any apparitor, officer, or other person, of any wilful contempt or resistance to the regular process, order or sentence of the said courts or any of them, or to the service thereof, to proceed against the parties, so withstanding, disobeying or offending, by attachment, to be directed to the sheriff of the district, who is hereby authorized and required to execute the same; and in case the sheriff return that the party is not found in his district, that the said courts and each of them may issue a proclamation directed to the sheriff of the district which he is hereby authorized and required to make, that the said party do on his allegiance personally appear in the said court, on a day in the said proclamation to be named; and in case the sheriff return that the party is not found, and he do not appear at the time and place as commanded, that the said courts, and each of them may proceed to a sequestration of the personal effects, goods and chattels of the said party in contempt, to be directed to certain persons to detain and keep the same, until the said contempts be cleared or the court make order to the contrary.

XIII. And be it further enacted by the authority aforesaid, That in all cases where any administration shall be granted with a will annexed either by the judge of the court of probate in this province, or by any surrogate of any district of this province, such letters shall contain an express provision or condition that the will of the deceased in such testament expressed, shall be observed and performed, and for such purpose that bonds with two or more able and sufficient sureties, shall be taken of the respective person or persons to whom such administration shall be committed in such penalties as to the judge, or surrogate shall appear reasonable, respect being hid to the value of the estate of the said testator, which condition may be as follows:— The condition of this obligation is such, that if the above bounden _____, administrator (or administratrix as the case may be) of all and singular the goods, chattels and credits of the said

_____, deceased, with the will of the said _____, annexed, and not administered by (as the case may be) do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said _____, deceased, which shall have come to the hands, possession or knowledge of the said _____, or into the hands and possession of any other person for the said _____, and the same so made do exhibit or cause to be exhibited (where such bond shall be taken by the judge of the court of probate) into the registry of the court of probate of this province, or into the office of the surrogate of the district of _____, at or before the expiration of six calendar months from the date of the above obligation, and the same goods, chattels and credits, and all other goods, chattels and credits of the said deceased, at the time of his or her death, which at any time after shall come into the hands and possession of the said _____, or into the hands and possession of any other person or persons for the said _____, do well and truly administer according to the directions and true intentions of the testator or testatrix (as the case may be) expressed in the will to the letters of administration granted to the said _____, annexed, as the law directs, and further when thereunto lawfully required, do make or cause to be made a true and just account of administration, then this obligation to be void and of none effect, or else to remain in full force and virtue.—Which bonds, shall be of the same force and effect and may be prosecuted upon the like occasions and for the purposes, and in the same manner as the bonds taken upon the granting of administrations of persons dying intestate, herein before set forth.

XIV. And be it further enacted by the authority aforesaid, That it shall and may be lawful for all persons who may be aggrieved by any order, sentence, judgment or decree, of any surrogate court within this province, to appeal from the same or any part thereof, to the judge of the court of probate, who shall have full power and authority, and hereby is authorized and required to examine, hear and finally determine all such appeals and all matters concerning the same, and to reverse, affirm or alter such order, sentence, judgment or decree, and to make such other order or decree therein, as justice and equity shall require, and thereupon to remit the same with his order, judgment or decree in the premises, and all things concerning the same, into the court so appealed from. Provided always, That all such appeals from the said surrogate court, shall be made within fifteen days next after making or giving the order, sentence, judgment or decree so appealed from, and upon security being given to the satisfaction of the said surrogate, for prosecuting such appeal, such order, sentence, judgment or decree, shall be suspended. Provided always, that no appeal shall be had or lie from any such order, judgment, sentence or decree, of any surrogate court, unless the value of the goods, chattels, rights or credits to be affected by such order, judgment, sentence or decree, shall be more than fifty pounds.

XV. And in order that certain stated times be fixed for the hearing and determining all motions, petitions, pleadings, suits and causes respecting the matters aforesaid, that may be brought before the said court of probate, or the said surrogate courts: Be it enacted by the authority aforesaid, That four terms or times of session be appointed in each and every year for the purposes aforesaid, the first term to be holden from the first Monday in January to the Saturday of the same week inclusive; the second to be holden from the last Monday in March, to the Saturday of the same week inclusive; the third to be holden from the first Monday in June to the Saturday

of the same week inclusive; and the fourth term to be holden from the last Monday in September to the Saturday of the same week.

XVI. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the members and officers of the said courts to demand and take the following fees:

Official Principal and Surrogate

| | | | | REGISTER. | | |
|--|----|----|----|-----------|----|----|
| | £. | s. | d. | £. | s. | d. |
| For seal to the probate of a will, to letters of administration with the will annexed, and to letters of administration, where the property devolving is under 300 <i>l.</i> | 0 | 16 | 0 | 0 | 6 | 8 |
| From 300 to 1000 <i>l.</i> - - - - - | 1 | 0 | 0 | 0 | 6 | 8 |
| When above 2000 <i>l.</i> - - - - - | 2 | 0 | 0 | 0 | 6 | 8 |
| For seal of the court to any writing or instrument - - - - | 0 | 13 | 0 | 0 | 3 | 4 |
| For receiving caveat - - - - - | 0 | 6 | 8 | 0 | 0 | 0 |
| For filing the same - - - - - | 0 | 0 | 0 | 0 | 3 | 4 |
| For receiving inventory - - - - - | 0 | 6 | 8 | 0 | 0 | 9 |
| For filing the same - - - - - | 0 | 0 | 0 | 0 | 3 | 4 |
| For citation - - - - - | 0 | 3 | 4 | 0 | 1 | 0 |
| For collating will - - - - - | 0 | 0 | 0 | 0 | 6 | 8 |
| For drawing bond and attesting execution - - - - - | 0 | 0 | 0 | 0 | 6 | 8 |
| For searching register each year - - - - - | 0 | 0 | 0 | 0 | 1 | 0 |
| For office copy each page 18 lines, 6 words in each - - - - | 0 | 0 | 0 | 0 | 1 | 0 |

Apparitor or Messenger

| | | | |
|-------------------------------------|----|---|---|
| For service of citation - - - - - | £0 | 2 | 0 |
| For travelling, each mile - - - - - | 0 | 0 | 4 |