

Laws of His Majesty's Province of Upper Canada, passed in the year 1857. Toronto: Stewart Derbyshire & George Desbarats, 1857.

20 Victoria – Chapter 65

An Act to amend the Act to abolish the rights of Primogeniture, and to afford relief to parties succeeding to the real estate of persons dying intestate, in certain cases in Upper Canada. Assented to 10th June, 1857.

Whereas it frequently happens in cases of persons dying intestate, leaving, real estate in Upper Canada, that by reason of the absence thereof or of the minority of some of the parties entitled to participate in the succession to such real estate, no title can be made to the same without great delay, expense and inconvenience; and It is desirable to provide some remedy: therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

- I. The Judge of; the Surrogate Court in each of the Counties or Unions of Counties in Upper Canada, having jurisdiction within such County or Union of Counties, shall be the “Real Representative” for all real property within such County or Union of Counties, in respect of or to which, any person being seized of or entitled to an estate, in fee simple therein, shall die intestate.
- II. From and after the expiration of six months from the death of any person: dying intestate, seized of or entitled to such real estate as aforesaid, it shall and may be lawful for any one or more persons entitled to a share or interest in such estate and the immediate possession thereof, being of full age, to apply to either of the Superior Courts of Law or Equity or to the County Court of the County or Union of Counties where such estate is situated, for a division or partition thereof, or for a sale thereof if such sale shall by such Court be considered more advantageous to the parties interested,
- III. The application to any Court for a partition or sale, shall particularly describe the premises sought to be divided or sold, and set forth the interest of the petitioner and the rights and titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any tenant for years, for life, by the courtesy or in dower, or in case any one or more of such parties, or the share or quantity of interest of any of the parties, be unknown to such petitioner, the same shall be set forth in such petition: and the truth of such petition and the matters contained therein shall be verified by the oath or affirmation of the petitioner, to be taken before any Commissioner for taking affidavits, or before any of the Judges of the said Courts.
- IV. Every person having any such interest as aforesaid, may be made a party to such petition, and if any of the parties so interested are minors and it shall be satisfactorily proved to the Court that, at least fourteen days’ notice has been served on such minors as reside in this Province, of an intention to apply to such Court for an order for partition or sale, such Court shall thereupon appoint a suitable and disinterested person to be guardian for one or more of such minors, whether the said minors reside

within or without this Province, for the special purpose of taking charge of the interests of such minors in the proceedings upon such petition.

V. Every guardian so appointed, shall, before entering upon his duties, execute a bond, in such penalty and with such surety as the Court shall direct, to the "Real Representative" of the County or Union of Counties where such estate is situate, by his name of office, conditioned for the faithful discharge of the trust committed to him, and to render a just and true account of his guardianship, when thereto required by the Court, and no proceedings shall be taken upon the petition until such bond is filed in the office of the Court; and after the execution and filing of such bond, such guardian shall represent his minor in the proceedings, upon the said petition, and his acts in relation thereto shall be binding on such minor, and shall be as valid as if done by such minor after having arrived at full age.

VI. It shall not be necessary in the first, instance to make any creditor having a lien on such estate or any part thereof, by judgment, decree, mortgage or otherwise, a party to the proceedings, nor shall the partition or sale of the estate alter, affect or impair the lien of such creditor, but the petitioner may make such creditor a party, and in such case the petition shall set forth the nature of any such lien or incumbrance, and if such lien or incumbrance is on the undivided interest or estate of any of the parties to the petition, it shall be a lien only on the share of such party, and such share shall be first charged with its just proportion of the costs of the proceedings in partition, in preference to any such lien.

VII. A copy of such Petition, with notice that the same will be presented to the Court on some certain day in term, shall be served thirty days inclusive, previous to such term, on all the parties interested in such estate who shall not have joined in such petition and are resident in this Province, and on the guardians of such as are minors, who shall have been appointed such guardians as aforesaid; and every such notice shall be addressed to all the parties interested who are known, and generally to all others unknown, having or claiming any Interest in such, estate.

VIII. If any parties having such interest are unknown,(or if known, reside out of this Province or cannot be found therein, the petition and notice maybe served on such unknown or absent party, by publishing the same three months previous to the presentation of such Petition, once in each week successively, in the *Canada Gazette*, and in a paper printed and published in the County or Union of Counties where the estate is situate, and if there be none, then in the *Canada Gazette* alone, which shall be equivalent to a personal service on such unknown or absent parties, or such petition and notice may be served personally on any known absent party, forty days previous to its presentation, without publishing the same.

IX. Upon the presentation of such petition, and satisfactory proof of the service or publication thereof with the notice as aforesaid, and of the facts justifying the mode of publication, the Court shall, by rule, allow such Petition, and thereupon the parties interested in the estate shall appear and shew title to the proportions which they claim of the premises set forth in the petition, within the time for pleading according to the practice of the said Court.

- X. Notice of the rule of allowance, and all other notices in any subsequent proceedings, unless otherwise specially directed, may be served by affixing the same in the office of the Clerk of the Court, which shall be equivalent to personal service on the party to be affected thereby.
- XI. Any party appearing may plead, either separately or jointly with one or more of his co-defendants, that the petitioners or any of them, at the time of presenting the petition, were not entitled to or in possession of the premises or any part thereof, or that, the defendants or any of them did not hold the premises together with the petitioners at the time of the commencement of the proceedings, as alleged in the petition; and such pleas shall form a complete issue, and any matters to support the claim or defence of either party may be given in evidence thereunder.
- XII. Any defendant may also deny the interest of any party made co-defendant, and the issue thereon may be tried at the same time as the other issues on the petition.
- XIII. All issues so joined shall be tried on a record made up of the said petition and the defence made in pleading thereto, and the like proceedings had thereupon in every respect as in personal actions, as to new trials, amendments and any other particulars.
- XIV. If judgment shall be entered against any of the defendants by default for want of a plea, the Court shall still require the petitioners to exhibit proof of their title, and from such proofs, or from the confession by plea of the parties, if they appeared, or from the verdict of a jury, by which any issue of fact shall have been tried, the Court shall declare the rights, title and interest of the parties to such proceedings, plaintiffs as well as defendants, and shall determine the rights of the parties in such estate, and give judgment that such partition be made between such of them as have any rights therein, according to such rights, but not so as to affect any parties whose rights have not been ascertained.
- XV. Whenever any judgment of partition shall be rendered, the Court shall, by rule, order the Real Representative to make the partition so adjudged, according to the respective rights and interests of the parties, as the same were ascertained and determined by such Court; and in such rule the Court shall designate the part or shares which remain undivided for the owners whose interests shall be unknown and not ascertained; and the Real Representative shall forthwith proceed to make such partition according to the judgment of the Court, unless it shall appear to him that partition cannot, be made without prejudice to the owners of the estate, in which case he shall make a return of such fact to the Court, in writing under his band.
- XVI. In making partition, the Real Representative shall divide the said, real estate, and allot the several portions and shares thereof to the respective parties, as adjudged by the Court, designating the several shares by posts, stones or other permanent monuments, and he may employ a Surveyor to assist him therein; and he shall report to the said Court in writing, the manner in which he has divided the said estate, and the share allotted to each party, with the quantity, and courses and distances of the boundaries of each share, and a description of the posts, stones or other monuments, together with an account of his fees, which, together with any charges for surveyors, shall be ascertained and allowed by

the Court, and the amount shall be paid by the petitioners, and shall be allowed to them as part of the costs to be taxed.

XVII. The said report shall be proved by affidavit before any Commissioner for taking affidavits, and shall be filed in the said Court, and a copy thereof, after the report is confirmed by the Court, certified under the hand of the Clerk and seal of the said Court, shall be registered in the County Register, on the production thereof to the Registrar of the County or Union of Counties where such estate is situated.

XVIII. Upon the return of such report, the Court shall confirm the same, or in its discretion, remit the same back to the Real Representative for amendment in any particular or particulars in which there is manifest error; and upon any final confirmation, judgment shall thereupon be given that such report is confirmed, and such judgment shall be binding and conclusive on all known parties named in the said petition, and all unknown parties where such publication as aforesaid has been made, and all persons claiming from or through them; but such judgment shall not affect any person having claims as tenants in dower, by courtesy or for life, to the whole of the premises which shall be the subject of such partition, nor any person not named in the petition either originally or by amendment, nor any unknown person when there has been no such publication as aforesaid.

XIX. If upon the report of the Real Representative, the Court shall see fit to order sale of the estate, it shall be lawful for the Court so to do, and by a rule to be made on filing such report, the Court may order the Real Representative to sell the estate at public auction to the highest bidder; and in such order the Court shall direct the terms of credit which may be allowed for any portions of the purchase money of which it shall think proper to direct the investment, and for such portions of the purchase money as are required, by the provisions hereinafter contained, to be invested for the benefit of any unknown owners, infants, parties out of the Province, or any tenants for life, in dower or by courtesy; such portions of the purchase money for which credit is so allowed, to be secured at interest by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the Court shall prescribe.

XX. The Real Representative may take separate mortgages and other securities, for such convenient shares, or portions of the purchase money as are directed by the Court to be invested as aforesaid, in his own name of office, as Surrogate Judge and Real Representative for such County or Union of Counties, and his successors in office, and for such shares as any known owner of full age shall desire to be invested, in the name of such owner; and upon such sales being confirmed, the Real Representative shall deliver such mortgages to the Clerk of the Court, or to the known owners whose shares were so invested.

XXI. Before making any order for sale, where the creditors having specific liens shall not have been made parties, the Court, on motion of either party, shall direct the Petitioner to amend his Petition by making every creditor having a specific lien on the whole estate, or on the undivided interest or estate of any of the parties, by mortgage, judgment or otherwise, a party to the proceedings, and shall direct the Clerk of the Court to ascertain and report whether the shares or interests in the premises of the parties in such suit, or any of them, are subject to any general lien or incumbrance by judgment or decree, and such clerk shall forthwith cause a notice to be published once a week for four weeks in the

Canada Gazette, and also in a newspaper, if there be one, in the County or Union of Counties in which such estate is situate, requiring all persons having any general lien or incumbrance on the estate or on any undivided interest or share therein, by mortgage, judgment, decree, or otherwise, to produce to the said clerk on or before a certain day to be named in such notice, proofs of all such liens and incumbrances, together with satisfactory evidence of the amount due thereon, and the clerk shall report with all convenient speed, the names of the creditors, the nature of the incumbrances, the dates thereof, and the several amounts appearing to be due thereon, and thereupon the Court shall order the Real Representative to bring into Court, and pay to the Clerk the whole purchase money, if the lien be on the whole estate, or the portion thereof arising from the sale of the part charged with the lien, after deducting the portion of the costs, charges and expenses to which it shall be liable.

XXII. Any party entitled to a share of the estate, may apply to the Court to order such part of the purchase money as he shall claim, to be paid to him, on affidavit shewing the amount truly due on each incumbrance, if any, the owner of such incumbrance, and his residence as far as known to such party, and also on proof of the due service of a notice on each incumbrancer, of the intention to make such application, at least ten days previous thereto, such service to be personal, or on a grown up person at the residence of such incumbrancer, if residing in this Province, and if residing out of this Province, by personal service thirty days previously, or by publishing the notice once a week for four weeks in the *Canada Gazette*.

XXIII. Upon such application, and proof of notice being given, the Court shall proceed to hear the allegations and proofs of the parties, and after the amount of incumbrances shall be ascertained, shall order a distribution of the moneys so brought into and remaining in Court, among the several parties having such incumbrances, according to the priority thereof respectively, and the Clerk of the Court shall procure satisfaction thereof to be acknowledged, in the form required by law, and shall cause the incumbrances to be duly satisfied or discharged of record, defraying the expenses out of the moneys payable on the share or shares which were so incumbered; Provided always, that such proceedings to ascertain and value the amount of incumbrances, shall not affect or delay the paying over or investing of money to or for any party upon whose estate in the premises there shall not appear to be any existing incumbrance.

XXIV. Whenever the estate of any tenant in dower to the whole or part of such estate, or of any tenant by courtesy or for life to any part of the estate, has been admitted by the parties, or ascertained by the Court to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the Court shall first determine whether such estate ought to be exempted from the sale, or whether the same should be sold; and in making such determination, regard shall be had to the interests of all the parties, and if a sale be ordered including such estate, all the estate and interest of every such tenant shall pass thereby, and the purchaser, his heirs and assigns, shall hold such premises free and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be to any undivided share, or to the whole or any part of the premises sold; and the Court shall direct the payment of such sum in gross out of the purchase money, to the person entitled to such dower or estate by courtesy or for life, as shall be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate.

XXV. When any married woman shall be a party to such proceedings, the petition shall be by her and her husband, and the service or notice of such petition shall be upon her and her husband, and judgment or decree shall be binding in such case upon her and her husband, and all claiming through her or them; and if her claim be an inchoate right of dower, in any case of sale, the Court shall determine the value of such right according to the principles, applicable to deferred annuities and survivorships, and shall order the amount of such value to be paid to her and her husband on their joint release under seal, and such order and the payment and release thereon shall be a valid and effectual bar to any right or claim of dower.

XXVI. The Real Representative shall give notice of any sale to be made by him, for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution, and the terms of such sale shall be made known at the time of the sale, and after the completion thereof he shall report the same in writing to the Court, with a description of the different parcels of land sold to each purchaser, and the price paid by him; and on the filing such report, if such sales be approved and confirmed by the Court, an order shall be made directing the Real Representative to execute deeds pursuant to such sales, and such deeds so executed shall be recorded in the County where the lands lie, on a memorial thereof, in the same manner as other deeds, and shall be a bar both in law and equity, against all parties interested in the premises, who shall have been named in such proceedings as parties, and against all unknown parties where notice was published as aforesaid, and against all persons claiming under or through them, and also against all incumbrancers, where the notice hereinbefore mentioned has been given to them.

XXVII. The proceeds of such sale, after deducting all costs, shall be divided among the parties whose lights and interests shall have been sold, in proportion to their respective rights in the premises, and the shares of, such as are of full age shall be paid to them by order of Court, and in the, case of infants, unknown or absent parties, shall be invested for them, in the name of the Real Representative and his successors in office, until lawfully claimed by them or their legal representatives; and the Court may in its discretion require all or any of the parties, before they shall receive any share of the moneys arising from such sale, to give security to the satisfaction of such Court, to refund the said shares, with interest thereon, incase it shall thereafter appear that such party was not entitled thereto.

XXVIII. All securities shall be taken in the name of the Real Representative and his successors in office, except when directed to be taken in the name of any known party, and shall be delivered to and kept by the Clerk of the Court, who shall receive the interest and principal thereon, and apply or invest the same as the Court shall direct, and shall in each term render to the Court an account in writing under oath, of all moneys received by him and of the application thereof, and upon any refusal to render such account, or any misapplication of the funds, he shall be liable to be proceeded against and punished for embezzling the moneys of the Real Representative as in ordinary cases of embezzlement of a clerk or servant.

XXIX. All investments of moneys arising from sales shall be made in Provincial or Consolidated Municipal Loan Fund Debentures.

XXX. The Court shall apportion the costs of the proceedings on the petition according to the respective shares and interests of the parties known or unknown and shall direct the same to be paid to the petitioners, and such order shall operate as a judgment for such costs, and on a copy thereof being filed in the County Registry Office where the lands lie, shall be a charge for such proportion, against the shares representing such proportion, and execution may issue; thereon as in ordinary cases of costs, and such share or interest may be sold thereon and a valid title on such sale given to the purchaser thereof, as in the cases of sales by sheriffs in execution; and if judgment be rendered against the petitioners for any cause, the Court shall adjudge costs against: them, to be recovered as in cases of personal actions.

XXXI. The proceedings upon petition, if commenced in a County Court, maybe removed into either of the Superior Courts of Law or Equity by *certiorari* at any time before judgment, to be allowed by any judge of such Court, on security being given by the party applying for the *certiorari*, for the costs of the proceedings on petition, to the satisfaction of such judge; and upon any final judgment, decree or order, an appeal may be had by any of the parties interested, in the same manner and with the same consequences as in other cases of appeal, from the decision of any Court rendering such judgment, decree or order.

XXXII. Where the interests in such estate are equitable fees simple, the Court of Chancery alone shall have the same powers, upon petition or bill filed in that Court, to act thereupon, as are hereby given to the Courts of Law and Equity in other cases, and the same notices shall be given, served, published and verified, guardians of minors appointed, and the same rules apply as to parties, and the like proceedings be had, as hereinbefore directed.

XXXIII. in the month of January of every year after the passing of this Act, the Clerk of the Court having the custody of any bonds, mortgages or investments arising from sales of such estates, for the benefit of any unknown, absent, infant or lunatic parties, where no claim has been made on their behalf for any interest or principal of such investments during the preceding year, shall cause to be published in the *Canada Gazette*, and in one newspaper in the County or Union of Counties in which such lands are situate, weekly, for the period of four weeks, a statement of the securities or investments remaining unclaimed, showing the name of the intestate party, the amount unclaimed, and the property from which the claim has arisen, and such statement shall be verified, by the clerk, and a copy thereof filed among; the records of the Court.

XXXIV. All proceedings in petition shall be intituled "In the matter of the estate of A. B. who died intestate," and shall require no other title, except the name of the Court in which such proceedings are had; and the judges of the Superior Courts of Common Law and the Court of Chancery shall make such tariff of fees and rules and orders, for the proceedings on petitions at Law and in Equity, respectively, as they shall deem expedient and advisable.