

V. And be it enacted, That the said Commissioners shall expend the several and respective sums of money on the Roads on or before the first day of October; Provided always, that nothing herein contained shall extend or be construed to extend to prevent any Commissioner from expending money after the first day of October, when it shall be necessary to expend the same for building Bridges, removing rocks, stumps, trees or other obstructions.

VI. And be it enacted, That none of the before mentioned sums of money, or any part thereof, shall be laid out or expended in the making or improving any alteration that may be made in any of the said Roads, unless such alterations shall have been first duly laid out and recorded.

CAP. LXI.

An Act in amendment of the Law relating to Wills, Legacies, Executors and Administrators, and for the settlement and distribution of the Estates of Intestates.

Passed 31st March 1840.

I. BE it enacted by the Lieutenant Governor, Legislative Council and Assembly, That the Surrogates already appointed or hereafter to be appointed by the Lieutenant Governor or Commander in Chief, in the several and respective Counties in this Province, shall have power to take the Probate of Wills, and to grant Administration on the Estates of deceased persons in the manner heretofore accustomed, subject nevertheless to the rules and directions hereinafter prescribed, and shall continue in office and be in all respects authorized to act as such Surrogates, until some other person shall be appointed in his stead, without taking out any new Commission on the change of the person administering the Government of this Province.

II. And be it enacted, That the Court of Chancery in this Province shall have appellate jurisdiction of all matters cognizable by the said Surrogates for the respective Counties, and shall also have the powers and jurisdiction hereinafter prescribed.

III. And be it enacted, That the Lieutenant Governor or Commander in Chief for the time being, shall and may appoint a Register of Probates in the several and respective Counties of this Province, who shall have the care, custody and keeping of all books and papers belonging to the Surrogate Court or the Probate Office in the County for which he shall be appointed.

IV. And be it enacted, That every Surrogate or Register shall respectively be sworn to the faithful performance of the duties of his office, before he enters thereupon.

V. And be it enacted, That the said Court of Chancery shall and may from time to time, make, establish, alter and amend rules and forms of practice and proceedings, as well for that Court in matters made cognizable before it by this Act, as for the said Surrogate Courts, in such manner as the Court of Chancery shall see fit, provided that such rules and forms be in no wise repugnant to this Act.

VI. And be it enacted, That no Surrogate shall admit to Probate any Will, or grant Letters Testamentary, or of Administration in any case or upon any Estate where he shall be interested as next of kin to the deceased, or as Executor or Legatee under such Will.

VII. And be it enacted, That where any Surrogate who would otherwise be authorized to act, shall be so interested, the Lieutenant Governor or Commander in Chief for the time being, shall and may on the application of any party entitled to such Probate or Administration, specially appoint some other person within the said County Surrogate *pro hac vice*, who shall be vested, as regards such Estate, with all the powers and authority incidental thereto.

VIII. And be it enacted, That from and after the passing of this Act, when any sole or surviving Executor of any last Will and Testament may die testate, leaving an Executor of his last Will and Testament, such last mentioned Executor shall not *ipso facto* be the Executor of the last Will and Testament of the first Testator, but in such case, Administration *cum testamento annexo* may be granted in the same manner as if such first Executor had died Intestate, any law or usage to the contrary notwithstanding.

IX. And be it enacted, That any person aggrieved by any order, sentence, decree or denial of any Surrogate, may appeal therefrom to the said Court of Chancery: Provided that the appeal be filed in the Registry of such Surrogate Court within thirty days after the making of such order, sentence, decree or denial; and that the party appealing do, at the same time with the appeal, file in the Registry of such Surrogate Court, a Bond to the said Surrogate with two sufficient sureties, in the penal sum of thirty pounds, conditioned for the payment of such costs as shall be awarded against him by the said Court of Chancery, upon such appeal; and such appeal when so perfected, by the filing of such Bond therewith, shall suspend all proceedings upon the decision appealed from, until the appeal be determined.

X. And be it enacted, That upon such appeal being perfected, and upon the Fees allowed by Law for the services in this Section required being paid, such Surrogate shall immediately transmit to such Court of Chancery a copy of such appeal, and of all papers, documents and testimony produced before him in relation to the subject of such appeal, duly certified under the Seal of the Surrogate Court, with a statement of the decision made by him, and the reasons of such decision.

XI. And be it enacted, That the said Court of Chancery, on due proof of an appeal from the decision of a Surrogate having been perfected, and of the neglect or unreasonable delay of such Surrogate to transmit such appeal, with the copies as above directed, and the said fees having been paid or tendered, may proceed to enforce such return by attachment as for a contempt of such Court: and the said Court of Chancery may at any time within six months after the time herebefore limited for filing and perfecting such an appeal in the Surrogate Court, upon special cause shewn, and on such terms as it may appear just to prescribe, allow an appeal, in which case the same proceedings shall be had as if the appeal had been originally entered in the Surrogate Court.

XII. And be it enacted, That it shall be in the discretion of the said Court of Chancery, as well in cases of appeal, as in any other proceeding relating to the Estates of deceased persons, before such Court, to award costs to be paid personally by the parties against whom such costs shall be awarded, or out of the Estate which may be the subject of the proceeding, as the said Court may direct, and payment of such costs may be enforced against appellants by a suit upon the Bond herebefore directed to be given for that purpose, and against other parties by process of Attachment: Provided that no Attachment shall issue until proof be made by affidavit of a personal demand of such

costs, and of a refusal or neglect to pay the same, and that no suit on such Bond shall in any case be commenced without the order of the said Court of Chancery.

XIII. And be it enacted, That if upon the hearing of any matter relating to the Estate of a deceased person by the Court of Chancery, whether upon appeal, or upon application to sell real estate for the payment of debts as hereinafter directed, or otherwise, any question of fact shall arise, which, in the opinion of the said Court, cannot be satisfactorily determined without a trial by Jury, such Court shall have authority to order a feigned issue to be made up in the Supreme Court, and to prescribe the manner of making up such issue, so as to present the question in dispute, and to direct the County in which the same shall be tried; and the Supreme Court shall have power to grant new trials of such issues, as in personal actions pending in that Court, and the final determination of such issue shall be conclusive as to the facts therein controverted in the proceedings before the Court of Chancery; and it shall be in the discretion of the said Court of Chancery to order and direct by whom and in what manner the costs and expenses attending any such issue shall be paid.

XIV. And be it enacted, That if in any such matter pending before the said Court of Chancery, any question of law shall arise, upon which such Court should wish to have the opinion of the Supreme Court, such Court shall have authority to order a case to be stated for the opinion of the Supreme Court, and to prescribe the manner of stating such case; and the Judges of the Supreme Court, after the case has been argued and considered by them, shall certify their opinion thereupon to the said Court of Chancery; and the said Court of Chancery shall have the like discretion as to the costs and expenses attending such cases, as before provided with regard to feigned issues.

XV. And be it enacted, That the said Surrogate Courts shall have power to issue Subpoenas to compel the attendance of any witnesses, or the production of any paper material to any enquiry pending in any such Courts, (which Subpoena shall be according to the Schedule to this Act annexed, or in words to the like effect), and shall also have power to punish disobedience to any such Subpoena, and to punish witnesses for refusing to testify after appearing, in the same manner and to the same extent as Courts of Record in similar cases.

XVI. And be it enacted, That Citations issued out of the Surrogate Courts for the respective Counties, shall be served in the following manner (except in cases otherwise specially provided for by law) that is to say: by posting up the same in three such public places in the County as the Surrogate may direct, at least three weeks before the return of the Citation, and by publishing the same once in each week for three successive weeks in a newspaper published in the County, if there be any such newspaper, or if in case the Surrogate shall think special personal service to be requisite, and shall so direct, and the person to be cited can be found within the County, or has a known place of abode therein, the Citation shall be served by delivering a copy thereof to each person to be cited, or by leaving such copy at his place of abode with an adult person residing in the house, who shall at the same time be informed of its contents and meaning, and the service of Citations shall in all cases be made to appear by affidavit duly made and filed before the Surrogate.

XVII. And be it enacted, That every Sheriff, Constable or other Ministerial Officer to whom any Citation, Subpoena, Attachment or other Process duly issued by any such Surrogate Court, may be directed or delivered for the purpose of being executed, shall execute the same in the same manner as if issued by a Court of Record, and for any neglect or misfeasance therein, shall be subject to the same penalties, actions and proceedings as if the same had occurred in relation to process issued by Courts of Record.

XVIII. And be it enacted, That the testimony taken by any Surrogate, in relation to the proof of any Will, in any controversy before him, relating to any matter of which he has cognizance, shall be reduced to writing, and shall be entered in a book to be kept for that purpose.

XIX. And be it enacted, That no Surrogate shall be Counsel, Attorney or Proctor for any party, in any matter pending or to be brought before him.

XX. And be it enacted, That any Surrogate shall have power to award and tax costs against any party, against whom a decision may be made in any matter contested before such Surrogate, to be paid personally or out of the Estate of the deceased, as he in his discretion may order, which taxation and order shall have the like effect as a Judgment in a Court of Record, upon which Execution may be awarded by such Surrogate, agreeably to the form in the Schedule hereto annexed, or in words to the like effect: Provided always, that any such taxation and order may be reviewed by the Court of Chancery, upon notice given to the party in whose favour such taxation and order may be made, without any appeal being entered and perfected.

XXI. And be it enacted, That the Surrogate of each County shall have sole and exclusive power to take the Probate of Wills, and to grant Administration on the Estates of deceased persons, who at, or immediately previous to their death, shall be inhabitants of such County, in whatever place the death of such persons may have happened.

XXII. And be it enacted, That in cases when the deceased person was not, at or immediately previous to his death, an inhabitant of any County of this Province, the Surrogate of any County in which such deceased person may have left assets, shall have power to take the Probate of Wills, and grant Administration of the Estate; and the Surrogate who shall so take the Probate of the Will, or first grant Administration of the Estate, shall be deemed thereby to have acquired jurisdiction, in exclusion of the jurisdiction of any other Surrogate over such Estate, and shall be vested with all the powers incidental thereto.

XXIII. And be it enacted, That every person wishing to obtain Letters Testamentary or of Administration, shall apply to the Surrogate by Petition in writing, setting forth according to the best of the knowledge and belief of the applicant, the time and place of the death of the deceased person, and such other particulars as may be necessary to support the application, together with the amount of the Estate both real and personal of the deceased person; which Petition shall be verified before the Surrogate by the oath of the applicant, and the Surrogate may if he see fit, examine any other person upon oath, as to the facts necessary to be enquired into on granting Letters Testamentary or of Administration, and if there shall be any person having prior right by Law to Administration, either with the Will annexed, or in case of Intestacy, the applicant shall produce, prove and file in the Surrogate Court a written renunciation of the persons having

such prior right to Administration, and if such applicant shall fail so to do, then and in such case, before any Letters of Administration be granted, a Citation shall be issued to all persons having such prior right, to shew cause, at a day to be therein specified, why Administration should not be granted to such applicant.

XXIV. And be it enacted, That from and after the passing of this Act, the Bond taken from Administrators on the granting of Administration, shall be given to the Surrogate Judge of Probates who grants such Administration, any usage to the contrary notwithstanding, and two or more competent sureties to be approved of by the Surrogate, shall join in such Bond with the Administrator; and such Bond shall be according to the form and with the condition prescribed in the Schedule to this Act annexed, or in words to the like effect, and shall be filed in the Registry of the Surrogate Court, which grants the Administration, before the Letters of Administration are issued.

XXV. And be it enacted, That if objection should be made by any Creditor of a Testator, or any Legatee, relative, or other person interested in his Estate, against granting Letters Testamentary to one or more of the persons named in the Will as Executors, the Surrogate shall enquire into such objection, and if it appear that the circumstances of any person named as such Executor, are such, that in the opinion of the Surrogate, they would not afford adequate security to the Creditors, Legatees or relatives of the Testator, for the due Administration of his Estate, he may refuse Letters Testamentary to any such person, until he shall give the like Bond as is required of Administrators in cases of Intestacy.

XXVI. And be it enacted, That the Surrogate on granting Letters of Administration, and also when he may consider it proper and necessary on granting Letters Testamentary, and as often afterwards as he may think necessary, shall by a Warrant of Appraisement, appoint two or more disinterested persons, to estimate and appraise all the real and personal Estate of the Testator or Intestate; and such Appraisers shall be entitled to receive a reasonable compensation of their services, to be allowed by the Surrogate, not exceeding ten shillings per day for each appraisers for the time they may be actually employed.

XXVII. And be it enacted, That when appraisers are so appointed, the inventory shall be made by the Executor or Administrator, with the aid of such appraisers, and when the property shall be in different and distant places, two or more inventories may be made, and shall with the Warrant of Appraisement, be returned and filed with the Register of Probates, within three months from the time of granting the same unless a further time be given by the Surrogate.

XXVIII. And be it enacted, That before proceeding to the execution of their duty, the Appraisers shall take an oath, to be administered either by the Surrogate, or any person authorized to take Affidavits to be read in the Supreme Court, that they will truly and impartially appraise the Real and Personal Estate, which may be exhibited to them, according to the best of their knowledge and ability: the taking of which oath shall be certified on the Warrant of Appraisement by the person who administered the same.

XXIX. And be it enacted, That the Inventory shall contain a true and perfect description and estimate, of all the Real Estate, Goods, Chattels and Credits of the deceased person, as well in possession as in action, and shall also specify the names of all the debtors of the deceased known to the Executors or Administrators, together with the nature of the debt, and the security therefor, whether by Judgment, Bond, Mortgage, Promissory Note, Book Debt or otherwise; and the date of each security, the sum originally payable, and the payments, if any, which have been made thereon; and shall distinguish those debts which in the opinion of the Appraisers are doubtful or desperate; and shall also contain an account of all monies, whether in specie or Bank Bills, belonging to the deceased, which shall have come to the hands or knowledge of the Executor or Administrator; and if no such monies shall have come to his hands or knowledge, the facts shall be so stated in the Inventory, and the Inventory shall be verified by the oath of the Executor or Administrator before the Surrogate.

XXX. And be it enacted, That the bare naming of any person Executor in a Will or the granting of Administration to any debtor of any Intestate, shall not operate as a discharge of any just claim which the Testator or Intestate had against such person; but such claim shall be included among the credits and effects of such deceased person in the Inventory, and such Executor or Administrator shall be liable for the same, as for so much money in his hands at the time such debt or demand shall be due and payable and shall apply and distribute the same as part of the personal Estate of the deceased.

XXXI. And be it enacted, That in case of an Executor or Administrator failing to return the Inventory within the time limited for that purpose, he may be required so to do by a Citation from the Surrogate: such Citation to be issued on the application of some person having an interest in the Estate of the deceased as Creditor, Legatee or next of Kin, or of some person in behalf of a Minor having such interest, or of any surety upon an Administration Bond.

XXXII. And be it enacted, That whenever property of any kind not mentioned in any Inventory that shall have been made, shall come to the possession or knowledge of an Executor or Administrator he shall cause the same to be appraised in manner aforesaid, and an Inventory thereof to be returned within three months after the discovery thereof; and the making of such Inventory and return, may be required in the same manner as in the case of the first Inventory.

XXXIII. And be it enacted, That every Executor or Administrator shall proceed with diligence to pay the debts of the deceased according to their legal priority in the order of classes; and all debts of the same class shall be paid in equal proportion, and no preference shall be given in the payment of any debt over debts of the same class, nor shall a debt due and payable be entitled to a preference over debts not due; nor shall the commencement of a suit for the recovery of any debt, or the obtaining of a Judgment therein, entitle such debt to any preference over others of the same class; nor shall any debt of an Executor or Administrator, be entitled to any preference over others of the same class: Provided always, that all allowances made by the Surrogate to any Executor or Administrator for expenses and services shall have priority in payment to any debts of what class soever.

XXXIV. And be it enacted, That in any suit against an Executor or Administrator, the Defendant, if he plead that he has fully administered, may shew under a notice for that purpose to be given with such plea, (which notice may be proved to have