



CAP. IX.

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 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estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations in America," were repealed: And whereas the said statutes so repealed in England have extended to or hitherto been considered in force and acted upon in this Province, and it is deemed expedient that the operation of the same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 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 bequest 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writing concerning any goods or chattels, or personal estate, or any clause, devise or bequest therein, should also be repealed, and that an Act of Assembly should be passed for the amendment of the Law in respect to Wills containing similar provisions, so far as applicable to this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, third, 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 any 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 hereinafter required; and every Will executed in manner hereinafter required shall so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by Will, notwithstanding that 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 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 hereinafter 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 Wills.

XIV. And be it further enacted, That in case by any Will 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 herein before required, or by some writing declaring an intention to revoke the same and executed in the manner in which a Will is hereinafter 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 hereinafter 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 herein before 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, or of 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, 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.

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.

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 has 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 testament or 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.

CAP. X.

An Act in addition to the Act for defining the crime of Forgery.

Passed 9th March 1838.

WHEREAS in and by an Act of Assembly passed in the fifth year of the reign of King William the Fourth, intituled "An Act to define the crime of Forgery," it is declared and enacted, "That if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any writing, with intent to defraud any person whatsoever, every such offender shall be deemed to have committed the crime of forgery, and shall be guilty of felony." And whereas it is necessary for the purposes of justice to enlarge the meaning of the word "writing" in the said Act contained in manner following:

Be it enacted by the Lieutenant Governor, Legislative Council and Assembly, That every instrument partly printed and partly written, or wholly printed, with a written signature thereto, and every signature of an individual, or a firm, or a corporate body, or of any officer of such body, to any instrument, and every writing purporting to be such signature shall be deemed and taken to be a writing within the meaning of the provisions of the said recited Act.

CAP. XI.

An Act in addition to and explanatory of an Act, intituled "An Act to regulate proceedings before Justices of the Peace in Civil Suits."

Passed 9th March 1838.

WHEREAS in and by the third section of an Act made and passed in the fourth year of the reign of His late Majesty King William the Fourth, intituled "An Act to regulate proceedings before Justices of the Peace in Civil Suits," it is among other things enacted that "a Justice shall upon application issue a capias when it is made to appear on affidavit to be taken in writing of the plaintiff or his agent that the cause of action does not exceed five pounds, that the defendant is justly and truly indebted to the plaintiff in a sum to be specified in the affidavit which shall not be, less than twenty shillings, after giving full credit to the best of deponents knowledge or belief for all payments and offsets;" And whereas it is expedient that Justices of the Peace should be authorized and empowered to issue capias when the sum sworn to shall amount to ten shillings;

I. Be it therefore enacted by the Lieutenant Governor, Legislative Council and Assembly, That from and after the passing of this Act, it shall and may be lawful for a Justice of the Peace, when proceeding under the authority and according to the provisions of the hereinafter recited Act, upon application and affidavit, as therein directed, to issue a capias when the sum sworn to shall amount to ten shillings, any thing in the said Act contained to the contrary thereof in any wise notwithstanding.

II. And whereas doubts have arisen whether defendants arrested by virtue of executions issued under the provisions of the said Act, and not in close custody, but only confined within the limits of the Gaol under the authority of an Act of the General Assembly of this Province, intituled "An Act relating to insolvent confined debtors," are entitled to their discharge after a certain number of days imprisonment, in like manner as is provided by the third section of the said first recited Act, for persons actually committed in close custody: Be it therefore further enacted and declared, That nothing in the said first mentioned Act contained with respect to the discharge of a debtor after a certain number of days imprisonment, shall extend or be construed to extend to persons having the benefit of the Gaol Limits.

III. And be it further enacted, That whenever a cause shall have been heard and determined before any Justice of the Peace, and judgment given and entered under the authority of the said first mentioned Act, in case of the absence, sickness, or death of such Justice, it shall and may be lawful for any other Justice of the Peace resident in the County or Parish in which said Judgment may have been given and entered as aforesaid, at any time within three calendar months after the giving of such judgment, on view of the original entry of such judgment, and on affidavit made before him that the amount of the said judgment or some part thereof remains unsatisfied, to issue execution upon the same in like manner and subject to the same provisions, restrictions, and limitations as if the cause had been heard and determined and judgment given by such last mentioned Justice of the Peace.

IV. And be it further enacted, That in any case where a Judge of the Supreme Court may on review award costs to either party in pursuance of the said first recited Act, it shall and may be lawful for such party to sue out of the Supreme Court a Writ of attachment according to the form in the Schedule hereunto annexed or to that effect; which Writ the Clerk of the said Court shall issue upon the fiat or order of a Judge; Provided always, that no fiat or order for such Writ shall be made by any Judge of the Supreme Court until it be made to appear to his satisfaction by affidavit that such costs have been duly demanded by the party to whom the same have been awarded or by some person duly authorized by him to demand and receive the same or by the Attorney of such party in the proceedings of review, and that such costs have not been paid; and the party who may issue such attachment shall be entitled to demand, receive and levy the sum of ten shillings from the party against whom the attachment may issue as the costs of such attachment and of the proceedings hereinafter directed for obtaining the same.

V. And be it further enacted, That the Sheriff or other officer by whom any such Writ of attachment shall be executed shall be entitled to, and he is hereby authorized and empowered to demand and receive from the party against whom such attachment shall issue, the like poundage and fees as in cases of execution; and that any party arrested on any such attachment shall on payment to the said Sheriff or other officer of the costs specified in such attachment, together with the costs of the attachment and the Sheriff's poundage and fees as aforesaid, be discharged from custody and arrest under such attachment; and the Sheriff or other officer shall make due return of such Writ, and pay over the money received under the same to the party at whose suit or instance the said Writ may have issued or his Attorney.

VI. And be it further enacted, That any person in custody upon a Writ of attachment issued pursuant to this Act, or the said Act of which this is an amendment, shall be entitled to the benefit of any Act or Acts of Assembly for the relief of confined debtors in the same manner as if such person were arrested on mesne process or execution in any civil suit.

VII. And whereas by the provisions of the said first recited Act process and execution may be served by a Constable of the Parish only within which the party to be served may reside or be found: and whereas it would be more convenient if any Constable of the County were authorized to serve any such process or execution: Be it therefore enacted, That all process and execution which may be issued under the provisions of the said first recited Act may be directed in general terms to and served by any Constable of the County within which the party to be served may reside.

VIII. And be it further enacted, That the provisions of this Act, so far as the same are applicable, shall extend to the city court of the city of Saint John, and to persons in custody under process issuing therefrom.

SCHEDULE.

WRIT OF ATTACHMENT.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, &c. To our Sheriff of greeting,

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