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No. 81.

4th Session, 3d Parliament, 14th Victoria, 1851.

BILL.

An Act to regulate the proceedings and jurisdiction of the Court of Probate and Surrogate Court in Upper Canada.

Received and read a first time, Thursday, 5th June, 1851.

Second reading, Monday, 9th June, 1851.

Mr. BURRITT.

B I L L.

An Act to regulate the proceedings and jurisdiction of the Court of Probate and Surrogate Court in Upper Canada.

WHEREAS it is necessary to alter and amend the Laws now in force regulating the jurisdiction and proceedings of the Court of Probate and Surrogate Courts in Upper Canada:—Be it therefore enacted, &c. Preamble.

5 That Her Majesty's Courts of Queen's Bench or Common Pleas shall be Courts of Appeal, and shall have appellate jurisdiction of all matters determined by the Judge of the Court of Probate or by any Surrogate, and all appeals from any order or decree of any Judge of the Court of Probate or of any Surrogate shall be to one or the other of said Courts. Courts of Q. B. and C. P. to be Courts of Appeal from decisions of Court of Probate or any Surrogate Court.

15 II. And be it enacted, That after the decease of any person intestate, administration of his effects, goods and chaucels shall be granted to his widow or next of kin, upwards of *twenty-one* years of age, or to both, as the Judge of Probate or Surrogate may think fit within *sixty* days: And an inventory shall be taken of all the real estate, goods and chattels, rights or credits of the deceased within *five* months after granting such administration, by the said administrator or administrators and two suitable persons within the County where such intestate resided, to be appointed by the said Judge or Surrogate and by him sworn to discharge this trust faithfully; and if any portion of the estate lies without the County, such Surrogate or Judge shall appoint three persons to be sworn as aforesaid, to take an inventory thereof; and after the expiration of *sixty* days from the death of any person intestate, in case the widow or next of kin shall refuse or neglect to take out letters of administration, being cited before the Judge of Probate or Surrogate for that purpose, administration may be committed to some one or more of the principal creditors in the discretion of the said Judge or Surrogate; and, in case of their refusal, to such other person or persons as the said Judge or Surrogate may think fit. And every administrator shall before entering on the execution of his trust give bond according to the provisions of the Act of that part of this Province, formerly Upper Canada, passed in the 33rd year of the Reign of King George the Third, and intitled, "*An Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof.*" To whom, within what time and on what conditions administration of intestate property shall be granted.

Act of U. C. 33 Geo. 3 c. 8.

If the intestate died out of U. C. leaving property there.

III. And be it enacted, That when any person who has died or who shall die intestate without the limits of Upper Canada, shall leave any estate of any description within the same to be administered, any person interested in such estate shall be entitled to letters of administration in the same manner as if such intestate had died within the same: and the Judge of Probate (if such estate shall be in two or more Counties,) or Surrogate of the County wherein the same shall be found, (if only in one) shall have power to grant such letters of administration. 5 10

Administrator to account to the Judge or Surrogate and in what manner.

IV. And be it enacted, That every administrator shall be held to account with the Judge or Surrogate for the personal estate of the intestate as the same shall be appraised, unless the Judge or Surrogate shall consider it for the benefit of the parties interested otherwise to dispose of the same; in which case the said Judge shall order the same or any part thereof to be sold at public auction or at private sale, in such manner as he may conceive best for the interest of all parties: and the administrator shall account for the proceeds of such estate as the same shall have produced at such sale. 15 20

Executors not proving will within a certain time to be held to have renounced their office.

V. And be it enacted, That whenever any executor or executors of the last will of any person deceased, knowing of their being so named or appointed, shall neglect to cause such will to be filed, within *sixty* days next after the death of the testator, in the Surrogate or Probate office, and prove and record the same within such time as such Judge or Surrogate may limit or appoint, such executor or executors shall be taken and deemed to have renounced such executorship; and the said Judge or Surrogate shall commit administration of the estate of such testator, with the will annexed, unto the widow or next of kin to the deceased, or one or more of the creditors or other persons, as he shall think fit. 25 30

Administration to be granted, &c.

Distant witnesses to a will may be examined under *dedimus potestatem*.

VI. And be it enacted, That when a will shall be offered for probate to any Judge of the Probate Court or Surrogate, and the witnesses, being out of the Province or more than *thirty* miles distant, or by reason of age or indisposition of body, are unable to appear and give evidence, the deposition of such witnesses in writing, taken before any two or more persons duly authorized by *dedimus potestatem* by such Judge, shall have the same force and effect as if taken before such Judge. 35 40

Executors acting to give security, and to what effect.

VII. And be it enacted, That every executor named in any will hereafter to be proved, upon taking upon himself that trust, shall give bond to the Judge of Probate or Surrogate, with sufficient sureties to his satisfaction, resident within Upper Canada, to return upon oath a true and perfect inventory of the testator's estate (as well real as personal,) into the office of such Probate or Surrogate. 45 50

within *three* months, and that he will pay the debts and legacies of the testator; and in case such executor or executors shall neglect or refuse for the space of *thirty* days to give such bond as aforesaid, the Judge of Probate or Surrogate may commit administration of the estate of such testator, with the will annexed, in like manner as if the executor had renounced; and where there are two or more persons named Executors in any will hereafter to be proved, none shall act as such but those who give bond as aforesaid.

In default to be held to have renounced the office.

If more than one.

VIII. And be it enacted, That when any executor or administrator residing in Upper Canada, or who shall remove therefrom, shall neglect or refuse after due notice from the Judge of Probate or Surrogate, to render his account and make a settlement of such estate with the creditors, legatees or heirs, or their legal representatives, or where any executor or administrator shall become insane, or otherwise incapable of or evidently unsuitable or unfit to discharge the trust reposed in him, the Judge of Probate or Surrogate is hereby authorized and empowered to remove such executor or administrator from office, and grant letters of administration, with the will annexed, to such person as to the said Judge shall seem meet.

Executors or administrator may be removed and others appointed in certain cases.

IX. And be it enacted, That the Judge of Probate or Surrogate is hereby authorized and empowered to call before him and examine upon oath any person suspected by any executor or administrator, heir, curator or legatee, or other person having lawful right or claim to the estate of any person deceased, of having concealed, embezzled or conveyed away any of the money, goods or chattels left by the testator or intestate, for the discovery of the same; and if any person suspected as aforesaid shall refuse to be examined, or to answer interrogatories upon oath respecting the estate which he or she may be suspected of concealing, embezzling, or conveying away, it shall and may be lawful for such Judge, and he is hereby empowered to commit such person so refusing to be examined and answer interrogatories on oath as aforesaid, unto the Common Gaol of the County, there to remain until he or she shall consent to be examined and answer interrogatories, or be released by order of the Court of Queen's Bench or Common Pleas.

Persons suspected of embezzling property of deceased may be examined.

Persons refusing to appear or to answer may be committed.

X. And be it enacted, That when the estate of any person deceased shall be insolvent or insufficient to pay all just debts which the deceased owed, the personal estate shall be distributed to and among all the creditors, in proportion to the sums respectively due and owing, saving that debts due for the last sickness, necessary funeral expenses, and fees for proving or registering the last will, or procuring administration, shall be first paid, and the executor or administrator appointed to any such insolvent es-

Application of personalty where the estate is insolvent, &c.

tate before payment to any be made (except as aforesaid) shall represent the condition and circumstances thereof to the Judge of Probate or Surrogate, and the said Judge shall cause an advertisement thereof to be printed in such public newspaper or papers as such Judge shall direct, 5 for a period of not less than months, nor more than months, calling on the creditors of the said estate to present upon oath their respective claims, at the end of which limited time the expense of the last sickness, the funeral expenses and all other expenses attending the proving of the will or granting administration being deducted, the said Judge shall order the residue of such personal estate to be paid and distributed to and among the creditors who have made out and presented their claims as aforesaid; Provided always that it shall be 15 the duty of any executor or administrator to enter or file a *caveat* against the claim of any creditor or creditors which he may deem unjust or not lawfully due; and if it shall appear to the satisfaction of such Judge that the said claim or claims so objected to are unjust or unlawful, it may be lawful for such Judge to direct an issue to try the same, and to direct by whom and in what manner the costs of such suit shall be paid. 20

Distribution
pro rata.

Proviso:
claims of
creditors may
be contested.

When the
personal
estate is
insufficient to
pay all claims,
the Judge may
order a sale of
the real estate,
first apprais-
ing the same.

XI. And whereas it is necessary to provide some satisfactory means of enabling executors or administrators 25 to sell and dispose of the real estate of insolvent testators or intestates, be it therefore enacted, That whenever an executor or administrator shall by any writing under his hand notify the Judge that the personal estate is insufficient to satisfy and discharge the claims and demands 30 against the said estate, it shall be the duty of such Judge (a schedule under oath being first delivered to him of all lands, tenements and hereditaments of such testator or intestate, by such executor or administrator) to cause the same to be appraised by two or more disinterested 35 freeholders, who shall return under their hands and seals such appraisement, and who shall make oath before any Commissioner of the Court of Queen's Bench or Common Pleas of the truth and correctness of the same, upon the return of which appraisement the said Judge shall 40 issue his license under his hand and seal of office, authorising and empowering such executor or administrator to sell and dispose of so much of the real estate of such testator as shall be sufficient to satisfy and discharge such claims as have been proved as aforesaid; which license 45 shall be registered in the office of the Registrar of each and every County in which the testator or intestate had any lands or tenements; and it shall and may be lawful for such executor or administrator to convey so much of the real estate, at its appraised value, to any creditor or 50 creditors as may be willing to accept the same at such value, and to execute all necessary deeds, conveyances and assurances as may be necessary to convey the same in

Conveyance to
any creditor at
appraised
value.

fee, for life or years (conveying no greater interest than such testator or intestate possessed:) Provided always, that in case the said creditors or any of them refuse to accept and take such real estate at such appraised value, it shall and may be lawful for the said executor or administrator to sell and dispose of the same to any such person or persons as may be willing to pay such value: And in case the said Executor or Administrator shall be unable to dispose of the same for such value, it shall and may be lawful for the said Judge (after public notice for at least days in such public newspaper or papers as the said Judge may direct) to cause the same to be sold either by the whole or in parcels, and for ready money or by instalments, as he may think best for the interest as well of the estate as of the creditors, at public auction, and to direct in what manner the conveyances shall be executed by such executor or administrator: Provided always, that nothing in this Act shall be construed to deprive the widow of her dower, but she shall have such remedy to recover the same as shall by law be provided.

Proviso:

Sale by public auction if appraised value cannot be obtained.

Proviso: as to dower.

XII. And be it enacted, That it shall and may be lawful for any executor or administrator who may be sued by any creditor, to plead the general issue, and give the special matter contained in the tenth and eleventh sections of this Act in evidence, which shall be a bar to the recovery of such creditor at law.

Executor or administrator may plead, and give this Act in evidence,

XIII. And be it enacted, That in the settlement of any estate, whether insolvent or otherwise, the widow shall be entitled to her apparel and so much of the household furniture (where none is given by the will of the testator) and personal estate, as the Judge of Probate or Surrogate shall deem meet and necessary under the circumstances of the estate, according to her quality and degree and the circumstances of the family under her care; and where such allowances have been made from intestate estates, supposed to be insolvent, which ultimately appear to be solvent, the said Judges are hereby authorised, by a subsequent decree, to make such further allowance to the widow from the personal estate of her husband as he shall deem reasonable; and in all cases of insolvency of estates, whether testate or intestate, if there be no widow, the said Judges; respectively, shall have the like authority to make an allowance of personal estate to the children of such deceased persons, who are minors.

Judge may make an allowance to the widow.

XIV. And be it enacted, That whenever any legatee shall be entitled to demand any legacy, the executor or administrator with the will annexed may, before payment of such legacy, require bonds to be given to himself (if the Judge shall deem it reasonable), with such surety or sureties as the said Judge shall approve, by the parties

Executor or administrator may (with consent of Judge) require security from persons

receiving
legacies, &c.

or any of them who shall demand such legacy or legacies, with condition that the party or parties to whom the same shall be paid, shall refund a proportionable part of such legacy, or otherwise indemnify such executor or executors against any demand which may be made against the said estate. 5

Interpretation
of clause.

XV. And be it enacted, That in construing this Act, the word "County" shall include any two or more Counties united for judicial purposes; and in any form or proceeding the words "United Counties" shall and may be introduced according to law rendering the same necessary. 10