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No. 4.

3rd Session, 5th Parliament, 20 Victoria, 1857.

BILL.

An Act to amend the law of substitutions.

Received and read, first time, Tuesday, 3rd
March, 1857.

Second reading, Wednesday, 4th March, 1857.

MR. LOBANGER.

TORONTO :

PRINTED BY JOHN LOVELL, YONGE STREET.

An Act to amend the Laws relating to Substitutions in Lower Canada.

WHEREAS it is expedient to amend the Laws relating to Substitutions in Lower Canada: Therefore Her Majesty, &c., enacts as follows: Preamble.

- 5 I. Hereafter any *fidei commissary* substitution which shall be created either by contract of marriage, deed *inter vivos* or by dispositions *causá mortis*, in whatever terms it may be expressed, shall only extend one degree beyond the donee, instituted heir, or other party appointed to take in the first instance the property of the donor or testator; any disposition creating several degrees of persons substituted one to the other in contravention of this Act, shall be restricted to one degree only and void as to the rest; so that the mutation which shall be operated in favor of the party first substituted shall confer upon such party the absolute property of the estate subject to the substitution, free from any obligation to preserve it and to return it to any persons appointed to take after such party. Substitutions created by contract of marriage, &c., to extend only one degree beyond the donee.
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- 15

II. Dispositions containing several degrees of substitution created by deeds *inter vivos* or *causá mortis*, executed before this Act shall come into force, but which shall not at that time have taken any effect, shall be restricted to one degree, as provided by the foregoing section. Restriction to one degree in certain cases.

- 20 III. The restriction above mentioned to one degree, of any *fidei commissary* substitution, shall also apply, in the manner following, to substitutions created before this Act shall come into force, and which shall have begun to take effect; if, when this Act shall come into force, the donee, instituted heir and other tenants in substitution, shall have taken the property substituted, or, if their rights are open, the mutation which shall take place in favor of the parties next taking under the substitution, shall make void any subsequent substitution, and shall confer upon them the absolute ownership of the property substituted; if the substitution has taken effect, and the parties taking first under it are in possession, or if their rights are open, every further substitution shall be void, and they shall be in law freed from any subsequent substitution; provided, however, that in the two cases referred to in this section, the substitutes in the second degree be neither born nor conceived, otherwise the substitution shall have full force and effect. How the above restriction shall apply to substitutions created before this Act.
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- 30

- 35 IV. Reciprocal *fidei commissa*, by virtue of which one or more Institutes (*Institués*) are substituted one to the other, subject to the condition of making over the property substituted to third parties, shall only be held to extend one degree for all the purposes of this Act, and shall receive their complete execution. How reciprocal *fidei commissa* are to be construed.

Possession of property substituted how to be obtained.

V. The occurrence of the event upon which, by disposition *causd mortis* the opening of the rights of the tenant in substitution is to depend, shall not have the effect of investing him *pleno jure* with the legal *seizin* or possession of the property substituted, but he must first obtain a judgment to that effect in the manner hereinafter prescribed.

Tutor to substitution to be appointed.

VI. Within one month from the occurrence of the event which shall have rendered available the rights of the tenant in substitution, he shall cause a tutor to the substitution to be appointed, and such tutorship shall be subject to the following conditions:

Petition to be presented by tenant in substitution praying for meeting of relations and friends.

A petition shall be presented by the tenant in substitution to one of the Circuit Judges, or to one of the Judges of the Superior Court for the District in which the property is situated, and if the property is situate in two or more Districts, to one of the Judges whose jurisdiction shall include the most considerable part of such property, praying him to call a meeting of the seven nearest relations of the first substitutes, if they are born at the time, or of their fathers and mothers if they are yet unborn, or, in default of relations residing in Lower Canada, of a similar number of the friends of the first substitutes; the said relations or friends shall be summoned by an order of the Judge to that effect, and proof of such summons must be made by the return of a Bailiff of the Superior Court.

Proof of summons of relations.—Proceedings in case of deficiency of relations.

VII. Upon the day appointed for holding the meeting of the relations or friends, before proceeding to the appointment of a tutor the Judge shall require proof of the fact that the nearest relations and friends have been summoned, and such proof shall be made in the manner he shall deem most expedient; and if seven relations have been summoned and a less number shall be present, it shall not be lawful to supply the deficiency by strangers, but the holding of the meeting shall be postponed to a subsequent day, so that if the requisite number of relations have been summoned, the appointment of a tutor can only take place after the Judge shall have received their advice, excepting in the case of reasonable hindrances; and the advice of the relations summoned, in less number than seven shall be required in the same manner.

Proceedings at meeting of relations.

VIII. If less than seven relations shall have been summoned, and the said number shall have been completed by the calling in of strangers, or if the meeting have been composed exclusively of strangers, the Judge shall require proof to be made that the parties taking under substitution have less than seven relations or that they have no relations whatever in Lower Canada, and such proof having been received and deemed sufficient, he shall proceed to receive the advice of the meeting, in the manner usual at meetings for the appointment of tutors to the person or property, and he shall be invested with all the powers conferred upon Judges in like cases, and he shall, saving the exceptions hereinafter mentioned, give preference in his selection as far as possible, to those designated by the law, to serve as ordinary tutors.

Who may be appointed tutor.

IX. No Tenant in substitution shall be tutor, but relations in the ascending or collateral lines of the parties who are to take under the substitution, if they have no interest contrary to those of the parties who are to take under the substitution, shall have the preference if they offer proper conditions, subject to this restriction however; that if the father or other paternal relation in the ascending line be a tenant in substitution,

the preference in respect to selection shall be given to the maternal relations, and if the mother be a tenant in substitution, then to the paternal relations.

5 X. If the parties to take under the substitution have no known relations, the Judge shall appoint as tutor the person whom he shall consider most suitable; Provided that the discretionary powers of the Judges, and the rules in force in relation to ordinary tutorships, shall, as far as possible apply to tutorships under this Act. In case the parties have no known relations.

10 XI. The tutor shall be responsible for the management and acts of the tenant in substitution, which might be prejudicial to the parties who are to take under the substitution, if he shall have improperly participated therein by his acts, negligence or omissions; and from the day of his acceptance under oath of the tutorship, a legal hypothec shall exist upon his property. Responsibilities of Tutor.

15 XII. Within ten days from the acceptance of the tutorship, the tenant in substitution shall cause it to be registered in the Registry Office for the County within the limits of which the property of the tutor is situate. Appointment to be registered.

20 XIII. Within sixty days from the registration of the tutorship the tenant in substitution shall cause an inventory to be made of the property substituted, and he shall cause the tutor to the substitution to see the said inventory made. Inventory of property substituted, to be made.

25 XIV. After the closing of the inventory, but within a period of three months and forty days, to be computed from the opening of the rights of the tenant in substitution, he shall notify the tutor that on the first day of the holding of the Superior Court, sitting for the District in which the property is situated, he will present a petition praying for an order of the Court to declare him seized of the substituted property; on the said day the petition shall be presented, and summary judgment shall be given thereupon, according to the forms and subject to the delays to be fixed by Duty of tenant in substitution upon closing of inventory.

30 the Judges; but no judgment shall be given, whether the said petition be contested or not, unless it be satisfactorily proved that the formalities above prescribed have been observed.

35 XV. If the tenant in substitution shall, within the period of three months and forty days, observe the formalities prescribed, it shall be declared by the judgment that he is entitled to the profits of the property from the date of the occurrence of the event on which the opening of his rights depended, to the rendering of the judgment, if not, and if he shall have allowed any useless delay to occur without any reasonable cause, he shall only be entitled to the enjoyment of the said profits from the date of Judgment upon such petition.

40 the judgment, and he shall be accountable for the profits to the parties who are to take under the substitution.

45 XVI. The rights of the tenant in substitution shall only be open in law, from the date of the said judgment, which shall be enregistered at his diligence and that of the tutor, in the Registry offices for the Counties within the limits of which the property substituted lies, and the free property of the tenant in substitution are situate, in order to the preservation of the rights of hypothec and the privileges of the parties who are to take under the substitution. Rights of tenant in substitution to be open from date of judgment.

Office of tutor
may not be
refused.

XVII. No one shall refuse the office of tutor, and there shall be no excuse for non-acceptance but those recognised by law in the case of ordinary tutorships.

Disposal of
moveable prop-
erty.

XVIII. Moveable property shall be sold and the proceeds invested in the purchase of immoveables, and all debts receivable shall be similarly employed. 5

Application of
price of re-
demption of
*rentes consti-
tuées*.

XIX. If the substitution affects *rentes constituées* and the said *rentes* be redeemed, the price of redemption shall be employed in the purchase of immoveables, and all debts receivable shall be devoted to the same purpose, but such investment and reinvestment shall only be effected with the sanction of the tutor and of the parties to take under the substitution, if they are in the exercise of their rights in their own names. 10

Forfeiture of
privileges by
tenants in cer-
tain cases.

XX. Any tenant in substitution who shall not have observed the formalities required by sections 5, 6, 7, 12, 13 and 14, shall be deprived of the benefit of the dispositions made in his favor, such forfeiture shall be prosecuted by the tutor or the parties who are to take under the substitution, by action in the usual form; but such action shall only be comminatory. 15

Coming of age
of tenants not
to cause func-
tions of tutor
to cease.

XXI. The coming of age of the parties to take under the substitution shall not cause the functions of the tutor to cease, but each such party under substitution upon reaching the age of majority shall exercise his rights conjointly with the tutor, and upon the death of the tutor, or in case of the extinction of the tutorship by reason of any other event, he shall be replaced at the diligence of the tenant in substitution in the manner and form prescribed in respect of the first tutorship. 20

Tenant ne-
glecting to
comply with
requirements
of this Act to
forfeit his
rights.

XXII. If the tenant in substitution shall neglect to cause a tutor to be appointed and to comply with the requirements of sections 5, 6, 7, 12, 13, and 14, and thus subject himself to the forfeiture of his rights contemplated by section 20, such forfeiture may be prosecuted by a tutor to be appointed by the Circuit Judges at the suit of the relations and friends of the parties who are to take under the substitution, or by the said parties themselves if they are of age, or by their ordinary tutor if they are minors. 25

Donee and
particular
legatee not
obliged to ob-
serve formal-
ities in certain
cases.

XXIII. The donee by disposition *inter vivos* and the particular legatee, shall not be bound to observe any of the formalities prescribed by articles 5, 6, 7, 12, 13, and 14, the legatee being entitled to be put into possession by the heir or universal legatee, but no *delivrance* of legacy shall operate a legal *seizin*, if the Will creating the substitution has not been enregistered by the heir or the universal legatee, or by the particular legatee himself. 35

When rights
of parties who
are to take, &c,
shall be avail-
able.

XXIV. The rights of parties who are to take under substitution shall be open from the period at which, for any cause whatsoever, the enjoyment by the tenant in substitution shall cease, or at which he shall be deprived thereof; the premature voluntary abandonment of possession by the tenant in substitution in favor of the parties who are to take under the substitution shall not, however, prejudice the claims of his creditors who are prior to the substitution. 40

Substitutions
created before
the passing of
this Act.

XXV. In the case of substitutions created before the passing of this Act, the rights in respect of which shall have become open by the occurrence of the event mentioned in the disposition, if the tenant in sub- 45

stitution is seized of the property substituted, he shall not be bound to obtain the judgment of the Court referred to in the foregoing sections, and his possession shall be deemed legal; but in the contrary case and if no tutor to the substitution shall have been appointed or no inventory made, he shall observe all the formalities required by sections 5, 6, 7, 12, 13 and 14, with respect to the tutorship, inventory of the property substituted, and his being put into possession by authority of justice.

XXVI. In the case of substitutions of more than one degree created before the passing of this Act, the first degree of which shall have taken effect at the time this Act shall come into force, but which are extended to a remoter degree by virtue of section three of this Act, the party having first taken under the substitution shall be assimilated in every respect to tenants in substitution, and shall observe the formalities in respect of the tutorship, the inventory, and the putting into possession, as in the cases provided for by the foregoing section.

In case of substitutions of more than one degree.

XXVII. Property substituted, whether it be in possession of the tenants in substitution or of the parties taking in the first degree under substitution, in cases in which the substitution ought, in accordance with this Act, to receive its effect beyond one degree, may be partially alienated and hypothecated to provide for the repair and improvement of the remainder, and to provide means of subsistence for the tenant in substitution or parties taking under the first degree of substitution, in the cases hereinafter mentioned.

Property substituted may be partially alienated for repairs.

XXVIII. If by reason of the nature, position or extent of the property substituted, or of any particular circumstances connected therewith, it does not produce a revenue proportioned to its value, and such revenue might be increased by the erection of buildings thereon or by improving and repairing such property, it shall be lawful for the tenant in substitution, or parties taking under substitution, as the case may be, to obtain authority to alienate it, upon petition presented to the Superior Court for the District in which the most considerable portion of the property is situate; and the same proceedings shall be had in case the revenues produced by the property are insufficient to furnish the means of subsistence for such parties.

Proceedings in order to such alienation.

XXIX. The said petition shall be in every respect assimilated to an ordinary suit or action, and shall be proceeded with according to the forms, and with the delays usual in ordinary matters, notice of the petition shall be given to the tutor to the substitution, and to the parties to take under the substitution if they are of age, and if not, then to the tutor appointed to their persons and property, if any they have, such notice being given during the usual period.

Form of petition, and proceedings therein.

XXX. The petition shall set forth the reasons for which the alienation by sale or the hypothec is sought; the nature of the improvements to be made, the estimated cost of such improvements, the total value of the property substituted, and more particularly of the hereditaments sought to be alienated, and the amount required for the alimentary allowance, and proceedings thereupon shall be had after hearing the parties or by default, as the case may be.

Allegations of petition.

Alienation
how effected.

XXXI. No admission or confession made extrajudicially, or while proceedings are pending, by the tutors or parties to take under the substitution, shall have any effect; the portion of the property which may be alienated, shall not exceed in any case the value of one-third of the property substituted, and the alienation shall be of distinct parts, if the property is divisible with advantage, and if not, such alienation may be of undivided parts, as practised in cases of partition and licitation. 5

Experts to be
appointed.

XXXII. The judgment shall not grant the conclusions of the petition unless the truth of the facts alleged shall have been ascertained by a favorable report of *experts* appointed by the parties to the matter, or by the Court in which such proceedings are had, such *expertise*, however, shall not have the effect of excluding the ordinary proof. 10

Substance of
Judgment.

XXXIII. The judgment shall be *motivé* and shall set forth—1st. The extent of the real estate to be alienated. 2d. The price for which it may be so alienated. 3rd. The description of the improvements, and the sum to be paid therefor. 4th. The amount of the alimentary allowance, the day and place of the sale; and the said sale shall be public, and shall take place at least one month after the date of the judgment. 5th. If the alienation shall be by loan upon hypothec, the judgment shall state the amount thereof, the rate of interest, which shall not exceed six per centum, and the terms of repayment of the capital sum, and of the payment of the interest. 20

Formalities in
certain cases.

XXXIV. The costs shall be the same as those of an ordinary action, and the adjudication thereupon shall be in the discretion of the Court, but no judgment granting the conclusions of the petition shall be rendered, unless the formalities required by this Act shall have been observed, nor unless the will or other disposition creating the substitution, shall have been registered in the manner provided by the Act passed in the last session of the Legislature, intituled: "*An Act to abolish the publication in Courts of Justice in Lower Canada, of Acts containing substitutions, and to provide for their registration in the Registry Offices.*" 25 30

Judgments to
be published.

XXXV. The judgment shall be inserted for a period of fifteen days, in each issue of two newspapers, published in the District, in both languages, if there be such newspapers published; it shall also be posted up at the door of the Church in the locality in which the property is situate, and publicly read on two consecutive Sundays, and if there be no Church, then in the most public place, and notices shall be posted in a place contiguous to the property to be alienated. 35

Proceedings at
sale.

XXXVI. The sale shall be made publicly and for cash, and to the highest bidder, provided it reaches the price mentioned in the judgment; and no auction duty shall be payable on account thereof, and it shall be conducted in a similar manner, and by the like persons as sales of property belonging to minors. 40

Application of
purchase
money.

XXXVII. The purchase money or the amount of the loan effected for improvements, by virtue of the judgment rendered, shall be paid to the tenant in substitution, or the party taking under substitution or to the tutor to the substitution, or to the parties to take under the substitution if they are of age, and to their ordinary tutor if they are minors, and they shall grant a joint quittance therefor, and such monies shall be employed according to the terms of the judgment, under their joint responsibility. 45 50

XXXVIII. When a sale of a part of the property substituted shall have taken place, or when a loan shall have been effected to provide an alimentary allowance for the tenant in substitution or the parties taking under substitution, in case of indigence, the principal of the purchase money shall only be payable when the substitution shall be extinguished, and the interest shall be paid annually to the tenant in substitution or to the parties taking under substitution.

In case of alienation to procure alimentary allowance.

XXXIX. In case of sale, the purchaser may retain the price in his hands, paying however the annual interest, and in case of loan the capital may remain in the hands of the lender who shall also pay the annual interest to the tenant in substitution or party taking under substitution in the form of a *rente constituée*, until a more advantageous investment shall be found in real property or other securities, in which case the capital shall be paid over to the tutors and the other interested parties referred to in the thirty-seventh section, who shall make the said investment, the income from which shall be applied to provide an alimentary allowance for the tenant in substitution or the parties taking under substitution.

Investment of purchase money.

XL. Cases not specially provided for by this Act shall be in no way affected thereby, and all provisions of law not repealed or modified shall remain in force.

Cases not specially provided for.

XLI. This Act shall apply to Lower Canada only.

Act to apply to L. C.