



ANNO TRICESIMO PRIMO

VICTORIÆ REGINÆ.

A.D. 1867.

No. 11.

An Act to consolidate and amend the Laws relating to the Jurisdiction and Procedure of the Supreme Court in Matters and Causes Testamentary.

[Assented to, 19th December, 1867.]

WHEREAS it is expedient to consolidate and amend the laws relating to the jurisdiction and procedure of the Supreme Court in matters and causes testamentary—Be it therefore Enacted, by the Governor-in-Chief of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:

PRELIMINARY.

Preamble.

1. This Act may be cited for all purposes as the "Testamentary Causes Act, 1867."

Short title.

2. This Act shall come into operation on the first day of February, 1868.

Commencement of Act.

3. An Ordinance No. 12 of 1848, "For the better preservation and management of the Estates of Deceased Persons in certain cases," and sections 9, 10, 11, 12, 13, and 14 of an Act No. 31 of 1855-6, intituled "An Act to consolidate the several Ordinances relating to the establishment of the Supreme Court of the Province of South Australia," are hereby repealed; except so far as may be necessary for supporting the validity of any proceedings heretofore had under the said Ordinance or sections of the said Act, or any or either of them; and all probates heretofore granted, and all letters of administration heretofore committed to any person, and all orders heretofore

Repeal.

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heretofore made by the Supreme Court under the powers therein contained, shall be as valid and effectual, and all bonds and other securities given or executed under the provisions of the said Ordinance or sections of the said Act, or any or either of them shall be as valid and shall have the same force and effect, for all purposes, as if this Act had not been passed; and all proceedings pending in the said Court in its ecclesiastical jurisdiction at the time of the passing of this Act shall be proceeded with and completed as nearly as circumstances will allow under the provisions of this Act.

Interpretation of terms.

4. In the construction of this Act, unless the context be inconsistent with the meaning hereby assigned:

“Court,” “the Court,” and “the said Court” shall mean the Supreme Court of the Province of South Australia in the exercise of the testamentary causes jurisdiction by this Act conferred:

“Court of Probate Act, 1858,” shall mean an Act of the Imperial Parliament, made and passed in the twenty-first and twenty-second years of Her Majesty’s Reign intituled “An Act to amend the Act of the twentieth and twenty-first Victoria, chapter seventy-seven.”

“Will” shall comprehend “testament” and all other testamentary instruments of which probate may now be granted:

“Administration” shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes:

“Matters and causes testamentary” shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration:

“Common form of business” shall mean the business of obtaining probate and administration where there is no contention to the right thereto, including the passing of probates and administrations through the Court in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

Division of Act.

5. This Act shall be divided into five parts viz.—

PART I.—Jurisdiction of the Supreme Court in testamentary causes, and appointment of officers:

PART II.—Procedure:

PART III.—Curator of Intestate Estates:

PART IV.—Administration bonds, and regulation of accounts of administrators:

PART V.—General matters:

PART

Adm'ns may be granted tho' no personal estate No 3240'84 Sec. 6

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PART I.—Jurisdiction of the Supreme Court in testamentary causes, and appointment of officers:

PART I.

X 6. The like voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons, as immediately after the coming into operation of the "Court of Probate Act, 1858," belonging to or were vested in Her Majesty, to be exercised in Her Majesty's name in the Court of Probate by such Act established, together with full authority to hear and determine all questions relating to matters and causes testamentary shall, within the Province of South Australia and its dependencies, be vested in and exercised by the Supreme Court of the said Province; and the said Court shall also have and exercise the like powers, and its grants and orders shall have the like effect within the said Province in relation to the personal estate in the said Province of deceased persons as, at the time aforesaid, the Court of Probate and its grants and orders respectively had in England, or within its jurisdiction, in relation to those matters and causes testamentary and those effects of deceased persons which were within the jurisdiction of the said Court; and all duties which by statute or otherwise, at the time aforesaid, were imposed on or were to be performed by the said Court of Probate in respect of probates, administrations, or matters, or causes testamentary within its jurisdiction shall be performed by the said Supreme Court within the Province of South Australia and its dependencies; and the said Supreme Court shall also have and exercise all and every the jurisdiction, powers, and authorities by this Act conferred.

Jurisdiction of Supreme Court in causes testamentary.

7. Nothing herein contained shall be construed to authorize the said Court in its testamentary causes jurisdiction to entertain any suits for legacies or for the distribution of residues.

Court not to entertain suits for legacies or distribution of residues.

8. From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, or until the Curator of Intestate Estates shall have obtained an order to administer the same, the personal estate and effects of such deceased person within the said Province shall be vested in the Chief Justice of the said Court for the time being, in like manner and to the like effect as, immediately after the coming into operation of the said "Court of Probate Act, 1858," the personal estate and effects of persons dying intestate in England vested in the Judge of the said Court of Probate.

Between death of person deceased and the grant, property to vest in Chief Justice.

9. The Governor with the advice of the Executive Council, may from time to time appoint some fit and proper person to be the Registrar of Probates of the said Court and, with the like advice, may from time to time remove such Registrar and appoint some other person in his stead, and such Registrar shall have and perform all the powers, authorities, and duties by this Act conferred or imposed upon him.

Registrar may be appointed.

10. The

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Registrar ; his power
and duties.

10. The Registrar of Probates of the Supreme Court shall be invested with, and shall and may exercise with reference to proceedings in the said Court, the like power and authority which, immediately after the coming into operation of the said "Court of Probate Act, 1858," could or might be exercised by the Registrars of the principal Registry of the said Court of Probate.

Governor may appoint
Curator of Intestate
states.

11. The Governor, with the advice of the Executive Council, may from time to time, as often as it shall be necessary, appoint some fit and proper person to be Curator of Intestate Estates; and may from time to time, with the like advice, remove such Curator and appoint some other person in his stead, and until any appointment shall be made under this provision the present Curator of Intestate Estates, appointed under the said Ordinance, No. 12 of 1848, shall continue to be such Curator, and shall and may have, perform, and exercise all the powers, duties, and authorities by this Act conferred upon the Curator.

Curator to be under
control of Supreme
Court. His duties.

12. The Curator of Intestate Estates shall have and perform all the powers, authorities, and duties of this Act conferred or imposed upon him, and subject thereto shall be under the general superintendence and control of the said Court.

Curator to give
security.

13. The Curator of Intestate Estates shall, before entering upon the duties of his office, procure and give security to the satisfaction of the Attorney-General for the collection, and due payment of, and accounting for all moneys which shall come to his hands by virtue of his office.

PART II.**PART II.—Procedure :**

Practice of the Court.

14. The practice of the Court in its testamentary causes jurisdiction shall, except where otherwise provided by this Act, or by the rules and regulations to be made from time to time under the powers in that behalf hereinafter contained, be so far as the circumstances of the case will admit, according to the practice of the said Court of Probate immediately after the coming into operation of the said "Court of Probate Act, 1858."

Power to examine
witnesses.

15. The Court may require the attendance of any person whom it may think fit to examine or cause to be examined in any suit or other proceeding in respect of matters or causes testamentary, and may examine or cause to be examined, upon oath or affirmation, as the case may require, parties and witnesses by word of mouth, and may either before or after, or with or without such examination, cause them, or any of them, to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the Court may, by writ, require such attendance, and order to be produced before itself, or otherwise, any deeds, evidences, or writings, in the same form, as nearly as may be, as that in which a writ of *subpœna ad testificandum*,

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testificandum, or of *subpœna duces tecum* is now issued by the Court in its common law jurisdiction; and every person disobeying any such writ shall be considered as in contempt of the Court, and also be liable to forfeit a sum not exceeding One Hundred Pounds.

16. The Court or a Judge may, on motion, or petition, or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the office of the Court, or otherwise as the Court or Judge may direct, any paper or writing being or purporting to be testamentary which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court or a Judge may direct such person to attend for the purpose of being examined in open Court, or before a Judge in Chambers, or upon interrogatories respecting the same; and such person shall be bound to answer such questions or interrogatories, and if so ordered to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending, or in not answering such questions or interrogatories, or not bringing in such paper or writing as he would have been subject to in case he had been a party to a suit in the Court and had made such default, and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court or Judge.

Order to produce any instrument purporting to be testamentary.

17. The Court may direct the truth of any question of fact arising in any suit or proceeding under this Act to be determined by the verdict of a special or common Jury, and such question shall be directed to be so tried by a Jury in any case where an heir-at-law, cited or otherwise made party to the suit or proceeding, makes application to the Court for that purpose, and in any other case if the Court shall refuse to cause such question to be tried by a Jury, such refusal of the Court shall be subject to appeal as herein provided.

Questions of fact may be directed to be tried before the Court or before a Jury.

18. When any question shall be so directed to be tried, such question shall be reduced into the form of an issue, and shall be tried before one of the Judges of the said Court and a Jury of twelve men at such time and place as the Court may direct, and at the trial the Jury shall be sworn to try such issue, and a true verdict to give thereon according to the evidence, and such issue with the finding of the Jury endorsed thereon shall be returned by the proper officer into the office of the Court.

Question to be stated, and Jury sworn to try it.

19. The rules of evidence and procedure observed in the said Court in its common law jurisdiction shall be applicable to and observed on the trial of all questions of fact in the said Court in its testamentary causes jurisdiction.

Rules of evidence in common law jurisdiction to be observed.

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Mode of taking evidence in contentious matters.

20. Subject to any rules and regulations to be made under the powers hereinafter contained, the witnesses, and where necessary the parties in all contentious matters where their attendance can be had, shall be examined orally in open Court: Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom the affidavit was filed.

Caveats.

21. Caveats against the grant of probates or administrations may be lodged in the office of the Court, and subject to the rules and regulations to be made under the powers hereinafter contained, the practice and procedure under such caveats in the Court shall as nearly as may be correspond with the practice and procedure under caveats in use in the said Court of Probate after the coming into operation of the said "Court of Probate Act, 1858."

Where a will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

22. Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof, or where in any contentious cause or matter under this Act the validity of a will is disputed, except where the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, shall, unless the Court shall otherwise direct, be cited to see proceedings or otherwise summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to the rules and regulations to be made under the powers hereinafter contained, in like manner as the next of kin, or others having or pretending interest in the personal estate affected by a will are cited or summoned.

Where the will is proved in solemn form, or its validity otherwise decided on the decree of the Court, to be binding on the persons interested in the real estate.

23. Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration, with such will annexed, or a copy thereof respectively, stamped with the seal of the Court, shall in all Courts, and in all suits and proceedings affecting real estate in the said Province of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration) be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate, and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons

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persons against whose interests in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders.

24. Nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the Court, and the Court is satisfied that the deceased was at the time of his decease seised of, or entitled to, or had power to appoint by will some real estate beneficially, or in any case where the will propounded, or of which the validity is in question would not in the opinion of the Court, though established, as to personalty affect real estate, but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise think fit, the Court may proceed without citing the heir or other persons interested in real estate: Provided that the probate, decree, or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

Heir in certain cases not to be cited, and when not cited not to be affected by probate.

25. In any action at law, or suit in equity, where according to the existing law it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, sixteen days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise, or other testamentary disposition, the probate of the said will, or the letters of administration, with the will annexed, or a copy thereof stamped with the seal of the Court; and in every such case such probate, or letters of administration, or copy thereof respectively stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have proved in solemn form, or have been otherwise declared valid in a contentious cause or matter as herein provided, unless the party receiving such notice shall, within eight days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition.

Probate or office copy to be evidence of the will in suits concerning real estate; save where the validity of the will is put in issue.

26. In every case in which in any such action or suit the original will shall be produced and proved, it shall be lawful for the Court or Judge, before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid.

As to costs of proving will on trial.

27. There shall be one place of deposit under the control of the Court at such place in Adelaide as the Governor may by notice in the *Government Gazette* direct, in which all the original wills brought into the Court, or of which probate or administration, with the will annexed,

Place of deposit of original wills.

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annexed, is granted under this Act and such other documents as the Court may direct shall be deposited and preserved, and the same may be inspected under the control of the Court, and subject to the rules and regulations to be made under the powers hereinafter contained; and until the Governor shall give any direction in this behalf such wills and other documents shall be deposited in the strong room attached to the office of the Court.

Official copy of whole or part of will may be obtained.

28. An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the Registrar on the payment of such fees as shall be fixed for the same by the said rules and regulations.

PART III.**PART III.—Curator of Intestate Estates:**

Curator of Intestate Estates may be appointed administrator *pendente lite*.

29. Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any grant of administration, the Court may by order appoint the Curator of Intestate Estates to be the administrator of the personal estate of such deceased person; and the said Curator shall thereupon have all the rights and powers of a general administrator other than the right of distributing the residue of such personal estate, and he shall be under the immediate control of the Court, and act under its direction.

Curator may be appointed receiver of real estate *pendente lite*.

30. The Court may also appoint the said Curator to be receiver of the real estate of any deceased person pending any suit in the Court, touching the validity of any will of such deceased person, by which his real estate may be affected, and the said Curator shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate as the Court may direct.

Remuneration of Curator for acting *pendente lite*.

31. The Court may direct that the Curator, acting as such administrator or receiver pending suits involving matters and causes testamentary, shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court may think fit, not exceeding Five Pounds per centum on moneys collected where the amount so collected does not exceed One Thousand Pounds, and not exceeding Two Pounds Ten Shillings per centum on moneys collected where the amount so collected exceeds One Thousand Pounds.

In certain cases of intestacy, &c., Curator to apply for order to manage estate.

32. If any person has died or shall die intestate, leaving personal estate within the jurisdiction of the Court, and without leaving any widow or lawful next of kin resident within such jurisdiction, or having made a will without leaving any executor thereof resident within such jurisdiction who may be willing and capable of acting in the execution of such will, and without leaving any widow or lawful next of kin resident within such jurisdiction, then, and in every such case, the said Curator shall from time to time, as soon as conveniently may be after receiving information thereof, apply to the Court, or a Judge thereof, for an order authorizing him to collect, manage, and administer such estate; and the said Court or
Judge

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Judge shall, if satisfied that the case is within the provisions hereof, make such order; which order, when made, shall give to the said Curator the same power over the personal estate of the deceased person, except as hereby excepted, as he would have had if letters of administration of such personal estate had been granted to him; subject nevertheless to any order or orders which may from time to time be made by the said Court, or any of the Judges thereof, on petition, as hereinafter mentioned, touching the said estate, or the collection, management, or administration thereof.

33. The said Curator shall apply for an order to collect, manage, and administer the estate of any deceased person, and the said Court or Judge shall have authority to make such order, whenever such person shall have died beyond the jurisdiction of the said Court, but leaving personal property within the jurisdiction thereof, and there shall be no widow or lawful next of kin of such deceased person resident within such jurisdiction.

Estates of persons dying without the jurisdiction of the Court.

34. When any person shall have died, having made a will, and named executors or an executor thereof, bequeathing personal property within the jurisdiction of the said Court, and probate thereof, or letters of administration, with the will annexed, shall not have been obtained within six calendar months after the death of the testator, the Curator, upon receiving information of the said facts, shall cite the executors named in the said will to come in and prove the same, or show cause within fourteen days after such citation, why an order should not be made for the said Curator to collect, manage, and administer the said estate; and if, at the expiration of the said fourteen days, the said will shall not be proved, or cause shown to the satisfaction of the Court, or a Judge, why the order should not be made, such order may, upon the petition of the Curator, be made accordingly.

Course to be pursued where probate is not taken out within six calendar months.

35. When any person shall have died intestate, leaving personal property within the jurisdiction of the Court, and letters of administration shall not have been obtained within three calendar months after the death of such deceased person, the Curator, upon receiving information thereof, shall cite in manner aforesaid the widow (if any) and next of kin, who may be entitled to administer, to apply for and obtain letters of administration, or show cause, within one calendar month after such citation, why an order should not be made for the said Curator to collect, manage, and administer the said estate; and if at the expiration of one calendar month, letters of administration shall not have been obtained, or cause shown to the Court, or a Judge thereof, why such order should not be made, such order may, upon the petition of the said Curator, be made accordingly.

The like, where no administration taken out in three months.

36. Where any person dying intestate, and not leaving any heir or lawful representative within the jurisdiction of the Court, shall, at the time of his death, be seised or possessed of any real estate within

As to management of real estate.

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within the said Province, which may be liable to be injured, or the profits thereof lost, unless some care and superintendence be had thereof, the Curator may, upon receiving information thereof, apply to the said Court or Judge for an order authorizing him to take charge of such estate; and the Court or a Judge, if satisfied that the case is within this provision, may make such order, and such order, when made, shall give to the said Curator power to enter upon any such estate, and to receive the rents of any part thereof which may have been demised, and to demise any part thereof which may not be already demised for any term not exceeding seven years, and to distrain for arrears of rent accruing since the decease of the intestate, and to sue for and recover all arrears of rent which may have become due in respect of any part of such estate in the lifetime of the intestate, and may then be in arrear and unpaid, or which may have become due since his death, either under a demise made by the intestate, or by such Curator since his death; and to sue for and recover compensation for the use and occupation of any part of such estate since the death of the intestate, and with the sanction of the Court or a Judge thereof, to bring an action or actions of ejectment for the recovery of any part of such real estate, all which last-mentioned actions may be brought by such Curator in his own name, with the addition of his title as Curator of Intestate Estates; and such Curator shall have authority to expend any part of the proceeds of such real estate in the execution of such repairs and improvements as may be necessary or advantageous for such estate: Provided that no sum exceeding Twenty Pounds shall be expended on such repairs or improvements at any one time, without the previous order of the Court or a Judge, obtained upon a statement of the circumstances of the case, and verified in such manner as the Court or Judge shall direct; and the Curator shall have all such further powers and authorities for the execution of his charge of real estate as are herein given to him with respect to personal estate, so far as the same are applicable, and also all such powers and authorities as can be ordinarily exercised by receivers of real estate appointed by the authority of the Court in its equitable jurisdiction, and shall render his accounts and pay all balances in his hands in the manner herein directed with regard to personal estate.

Proviso.

Power of sale of real estate.

37. In cases when the estimated value of any such real estate shall not exceed Five Hundred Pounds, or when the personal property of any intestate estate and the rents and profits of the real estate shall be insufficient to pay the debts of the intestate, and the charges attending the administration of the same, or when the yearly income or revenue derived from the real estate is insufficient to pay the charges upon such estate, or when there shall be an absolute necessity to repair or reconstruct buildings, the decay of which would materially diminish the value of the property, and there shall be no assets in the hands of the Curator available for the purpose of the required repairs or reconstruction, or it would be more advantageous that such real estate should be sold than that any portion of the available personal assets in the hands of the Curator

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Curator should be applied to making the repairs or reconstruction, the Curator may apply to the Court or a Judge for an order authorizing the sale of such real estate; and the said Court or Judge may, on satisfactory proof that the case is within the provisions hereof, order such real estate to be sold by public auction, after such advertisement, and in such manner and form, and subject to such terms and conditions, as the said Court or Judge shall direct, and may direct a conveyance or transfer to the purchaser, to be made and executed by the said Curator; and such conveyance or transfer shall be as valid and sufficient to vest the real estate thereby conveyed in the purchaser or purchasers thereof as if the same were executed by the party having the legal or beneficial estate or interest therein; and the proceeds of the sale, after paying all the costs and charges of and attending the same, including the commission of the Curator, and after paying all debts of the intestate, and all sums of money charged or chargeable upon such real estate, such costs and charges, commission, debts, and charges being first ascertained by the Master of the said Court, shall be disposed of and accounted for in like manner as the proceeds of personal estate under the provisions hereof: Provided always that in the deed of conveyance or memorandum of transfer to be executed by the Curator no covenant shall be required to be entered into by him with the purchaser, nor shall any covenant be implied against him, except a covenant with the purchaser that he, the said Curator, hath not done any act whereby the hereditaments comprised in such deed of conveyance or memorandum of transfer can be impeached, encumbered, charged, or affected in title, charge, or estate, or otherwise.

Proviso.

38. Whenever it shall be made to appear to the Court or a Judge that there is reasonable ground to suppose that any person has died out of the jurisdiction of the Court, leaving property within such jurisdiction, the Court or a Judge may order and empower the Curator to collect and manage the estate of such person, both real and personal, without requiring strict legal proof of the death of such person, and every such order shall be valid until revoked, and shall empower the Curator to collect, manage, and administer the personal estate, and enter upon and receive the rents and profits and otherwise manage the real estate of such supposed deceased person, and to pay and discharge the debts and liabilities of such person in like manner as if he were really dead, and the Curator had obtained an order to collect, manage, and administer the personal estate, and to take charge of the real estate of such person under the preceding provisions: Provided that the Curator shall not proceed to any distribution of the assets without an order of the Court specially authorizing him to make such distribution.

Where there is reasonable ground to believe that any person has died out of jurisdiction of the Court, the Curator may obtain order to manage, &c., without strict legal proof of death.

39. When any executor, widow, or next of kin entitled to grant of probate or letters of administration shall be out of the jurisdiction, but shall have some person within the jurisdiction, appointed under power of attorney, to act for such executor, widow, or next

Probate or letters of administration may be granted to duly authorized attorney.

of

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of kin, probate of the will or letters of administration may be granted to such agent, but on behalf of the person entitled thereto, anything herein contained to the contrary notwithstanding.

Order to Curator to collect estate not to prevent subsequent proving of will.

40. No order to collect, manage, and administer any real or personal estate shall in any way interfere with or prevent the proving of any will or obtaining the grant of any letters of administration to the personal estate of any person dying intestate, or limit or affect the powers or duties of any executor or administrator of the same estate.

Upon probate or letters of administration being granted, duties of Curator to cease.

41. Upon probate or letters of administration being granted in the matter of any deceased person for the collection, management, or administration of whose real or personal estate the Curator may have obtained an order under the provisions hereof, the powers, duties, and authorities of such Curator shall cease in respect thereto, and he shall forthwith proceed to pass his accounts, and shall hand over to the executor or administrator of such estate respectively, or shall duly account for all moneys, goods, chattels, and effects which may have come to his hands in the said matter, and shall hand over to the persons entitled thereto under such will, all deeds and muniments of title of any real estate in his custody or possession in relation thereto.

Suits by or against Curator.

42. In all proceedings under this Act, and in all proceedings at law or in equity, the said Curator shall sue and be sued by his name, with the addition of the words "Curator of Intestate Estates," and it shall not be necessary for him, or the person or persons suing him, to state or prove his general authority to collect, manage, and administer the estates of the deceased persons leaving property within the provisions of this Act, but merely the order made on the petition of the said Curator for such purposes, in the specific estate to which the proceedings may relate; and whenever the office of "Curator of Intestate Estates" shall become vacant by the death or removal of the officer for the time being, and another person shall be appointed to that office during the pendency of any petition, action, suit, or other proceeding, such petition, action, suit, or proceeding shall not abate or become defective, but the petition, action, suit, or other proceeding shall be continued by or against the officer newly appointed, and his name be used in all future proceeding, in lieu of the name of the officer so deceased or removed.

Suits not to abate by death or removal of Curator.

Curator to make inventory and keep accounts, &c., and permit persons to inspect them.

43. The Curator shall make or cause to be made an inventory or list of all the personal estate of the persons whose estates he shall have been ordered to collect, manage, or administer, and shall retain the same in his office, and shall keep an account of all his receipts, payments, and dealings in every such estate, and shall retain all letters received, and copies of all letters written by him, and all deeds, papers, and writings of and relating to such estates, and shall permit all persons to inspect and take copies of the same, and of all proceedings

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proceedings relating thereto, at all reasonable hours, and shall convert into money all such personal estate as shall not consist of money, unless order be made to the contrary by the said Court or a Judge thereof.

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Personal estate to be converted into money.

44. The Curator shall, at such times as he shall think fit, cause advertisements to be inserted in the *Government Gazette*, and such of the public papers as he shall deem expedient calling upon creditors of the persons whose estates he shall have been ordered to collect, manage, and administer, to come in and prove their debts before him; and the said Curator shall allow any claim which may be made before him, if the same shall amount to the sum of Twenty Pounds or upwards, upon the like proof as would be required by the Master of the said Court in its equitable jurisdiction for proof of a claim made before him, upon a reference to take an account of debts in a suit instituted by a creditor on behalf of himself and others, against an executor or administrator; and shall allow any claim not amounting to the sum of Twenty Pounds upon the affidavit of the claimant alone, or, where he shall think fit to call for further evidence, upon such further evidence as he shall require; and the said Curator shall, as soon after the expiration of the time allowed for proof of debts as he conveniently can, pay the debts proved, if the whole thereof can be paid, out of the proceeds of the estate in his hands, and if not, shall declare and pay a dividend thereon; and if he shall collect any further assets after making such payment, he shall, in case any part of the debts proved remain unpaid, pay the same, and any debts subsequently proved before him (or a dividend thereon, as the case may be), but such debts as shall be subsequently proved, shall first be paid a dividend in proportion to their amount, equal to the dividend paid to the creditors having previously proved their debts; and after payment of all debts, fees, and expenses incident to the collection, management, and administration of such personal estate, shall pay over the residue to the personal representative of the intestate or testator (as the case may be), so soon as such representative shall have been duly constituted.

Payment of debts.

Kind of proof to be made of debts being due.

45. Nothing herein contained shall affect the power of the Supreme Court, or any Judge thereof, from time to time, to direct that any money belonging to any estate in the hands of the Curator shall be invested in the Savings Bank of South Australia, in such manner as the said Court or Judge shall think fit.

As to paying money into Savings Bank.

46. After the expiration of twelve calendar months from the time fixed by the advertisement for creditors to come in and prove their debts, if no debts shall be proved, or no creditor having proved his debt shall remain unpaid, any Judge of the Court may, if he shall think fit so to do, order the Curator to pay any sum, not exceeding Fifty Pounds, to any person claiming to be a party in distribution, or to be a legatee under a will, without letters of administration having been obtained, or the will being proved, and without legal proof

Payment to next kin or legatees in small cases.

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proof of the right or title of the party so claiming; and the said Curator shall pay the money so ordered to be paid, or, if necessary, shall remit the same in such manner as he shall think most safe and convenient.

Accounts to be passed quarterly before a Judge.

47. The Curator shall, once in every quarter of a year, on a day to be fixed by the Court or a Judge thereof, or oftener if required by the said Court, pass his accounts in each estate before one of the Judges or the Master of the said Court; but the passing of such accounts shall not prevent his being thereafter liable to any claim which may be at any time made on him in respect of any sum received and not accounted for, or any sum which might have been received by him but for his wilful neglect or default; and the Curator shall, in every year, in the month of January, transmit to the Attorney-General, a statement of the balance in his hands to the credit of each estate, with a full description of the deceased, the date of the order in each case, and such further information as may be necessary to show in what position the estate then is, whether or not there are any outstanding claims, or whether the estate is then in the course of being finally wound up; and he shall also publish, twice in every year, in the months of January and July, a like statement in the *Government Gazette* in respect of the six months preceding.

Curator to transmit yearly statement to Attorney-General.

Curator may require a release on winding up estate.

48. The Curator shall have the same power to require a release and discharge upon winding up any estate in his charge, and handing over the property which may be in his hands to the person or persons entitled thereto, as an executor, administrator, or any other trustee, now has in the like circumstances.

Payment to be made to the Treasurer of all sums which have been to the credit of any Intestate Estate for six years unclaimed.

49. In the first week of January, which will be in the year of our Lord one thousand eight hundred and sixty-eight, and in the first week of the same month in every succeeding year, the Accountant or principal officer of the Savings Bank shall pay to the Treasurer for the public uses of the said Province, and in support of the Government thereof, all sums of money which shall, on the first day of that month, have been in the said Bank, to the credit of any intestate estate unclaimed for the term of six years next preceding, and the said sums shall be applied thereto in such manner as shall be directed by any Act or Acts of Parliament, subject to the provisions hereinafter contained; and the Curator shall, on the said first day of January in every year, or within two days next following, furnish to the Accountant or principal officer of the Savings Bank, and also to the Treasurer, an account of all sums of money which shall be so payable, which account shall be a sufficient authority for the said Savings Bank to pay the sums mentioned therein to the said Treasurer.

Provision for parties subsequently claiming who may petition the Supreme Court, &c.

50. If at any time after any such sums of money shall have been so paid to the Treasurer, any person shall present a petition to the Court, or one of the Judges thereof, praying for the payment to him of such sum, or any part thereof (a copy of such petition being previously served on the Curator), and the said Court or Judge shall be

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of opinion, upon any affidavit or other sufficient evidence adduced, that the person petitioning is entitled to the same sum, or any part thereof, the said Court or Judge shall make an order for payment thereof, after deducting any costs and expenses which may have been incurred by the Curator, or otherwise, in respect of such application, or shall make such other order touching the premises as shall be just; and on any such order being served on the Chief Secretary, the same shall be immediately communicated to the Governor, and thereupon it shall be lawful for the said Governor, and he is hereby required to issue a warrant under his hand to the Treasurer of the said Province, to pay the money mentioned in such order to the party entitled to receive the same in pursuance thereof; but no interest shall be paid or be payable on any such sum of money by virtue of any such order, or otherwise, from the time the same shall have been paid to the Treasurer as aforesaid.

Upon order being made for payment Governor to issue warrant, &c.

51. The Treasurer shall issue and pay the money mentioned in such warrant as aforesaid, to the person or persons to whom the same shall be payable by virtue of such order as aforesaid; and the receipts of the respective persons to whom the same shall be so paid, shall be full and valid discharges for any such sum or sums as shall be therein mentioned to have been received.

Treasurer to pay under Governor's warrant.

52. The receipts in writing of the said Curator for any moneys payable to him under this Act shall be sufficient discharges for the same to the persons paying the same, who shall not afterwards be liable for any misapplication thereof.

Receipt of Curator sufficient discharge.

53. All sums of money, bills, and drafts which shall be received by the said Curator, shall from time to time, within two days after the same shall have been received, or within two days after the same shall have been accepted, completed, and perfected, if the same shall not be accepted, completed, and perfected at the time it shall be received, be paid by him into any Bank established in the said Province which may be approved of by the Court or a Judge, for which the receipt of the Manager, Accountant, or Teller of the said Bank shall be a sufficient discharge; and all such moneys, bills, and drafts so to be paid as aforesaid shall from time to time be placed to the account in the books of the said Bank, intituled the "Account of the Curator of Intestate Estates," and shall be applied and disposed of by the said Curator according to the provisions of this Act: Provided that any such moneys, bills, or drafts which may be received at a greater distance than twenty miles from Adelaide shall be paid as aforesaid as soon as practicable after receipt thereof.

Moneys received by Curator to be paid to a Bank within two days after receipt thereof.

Proviso.

54. The said Curator shall make all payments required to be made, exceeding Twenty Shillings, out of the moneys to be deposited in some Bank as aforesaid to the "Account of the Curator of Intestate Estates," by drafts on such Bank, and shall specify in every such draft the particular charge, purpose, or cause for which such draft shall be given; and every such draft shall also have marked in

Curator to make payments by drafts, and to keep counterpart of such drafts.

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Proviso—Drafts exceeding £50.

in the margin thereof a figure corresponding to the page of a book to be kept by the said Curator, wherein entry shall be made of the particular charge, purpose, or cause for which such draft shall be given: Provided always, that no draft for any sum exceeding Fifty Pounds, or drafts in any one week together amounting to a sum exceeding the sum of Two Hundred Pounds shall be drawn by the said Curator, or paid by the Bank, unless the same shall be countersigned by a Judge or the Master.

Drafts drawn pursuant to this Act to be a sufficient authority to the bank to pay them.

55. All drafts drawn pursuant to the directions of this Act shall be sufficient authority to any Bank, in which there shall be sufficient funds to the "Account of the Curator of Intestate Estates," to pay the amount thereof to the persons mentioned in such drafts, or to the bearer of them, and the said Curator, observing the rules and regulations hereby prescribed, shall not be answerable for any money which the said Curator shall have so paid into such Bank.

Curator to account as required by the Governor.

56. The said Curator shall, at such times, and in such form and manner, as shall be from time to time appointed by the Auditor-General, furnish just and true accounts of all moneys received, retained, and paid by him, under and by virtue of this Act, together with such information as the said Auditor-General may require to enable him to audit and verify such accounts.

Curator to be paid by commission.

57. The Curator shall take, retain, and receive as a remuneration for his services in respect of each estate Five Pounds per centum on moneys collected if not exceeding One Thousand Pounds; and if exceeding One Thousand Pounds, Two Pounds Ten Shillings per centum: Provided that the Court may hereafter reduce the amount so to be paid to the Curator if it shall think it expedient so to do.

PART IV.PART IV.—Administration Bonds and Regulation of accounts of Administrators:

Persons to whom grant of administration shall be committed shall give bond.

58. Every person to whom any grant of administration shall be committed shall give bond to the Curator of Intestate Estates to ensure for the benefit of the Curator for the time being, with one or more surety or sureties conditioned for duly collecting, getting in, and administering the personal estate of the deceased, and also for the making and exhibiting by the administrator to the Court of a just and true account of the goods, chattels, credits, and effects of the deceased within six calendar months after the granting of such letters of administration, and for making and exhibiting a just and true account of his administration of such goods, chattels, credits, and effects whenever ordered by the Court or a Judge so to do.

Penalty in bond.

59. Such bonds shall be in a penalty of the amount under which the estate and effects of the deceased shall be sworn, unless the Court or a Judge shall in any case think fit to direct the same to be reduced, in which case such Court or a Judge may order

Admission may be granted tho' there's no personal estate No 324 of 184 sec. 6.



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the same to be reduced to such amount as to such Court or Judge may seem fit; and such Court or Judge may also order that more bonds than one be given so as to limit the liability of any surety to such amount as to such Court or Judge may seem reasonable.

60. The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of such bond has been broken, order the Curator to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his own name, both at law and in equity, as if the same had originally been given to him instead of to the said Curator, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the conditions of the said bond.

Power to Court to assign bond.

61. Every person to whom letters of administration shall be granted, shall make and exhibit such accounts as aforesaid to the Court, or to a Judge, or the Registrar of Probates thereof, within the said period of six calendar months as aforesaid, and also at such times as may be appointed by the Court or a Judge upon the application of any person interested, and shall verify such accounts by his declaration, in writing, made in the presence of the Court, or a Judge, or the Registrar of Probates thereof, or any Commissioner appointed for taking affidavits in the Supreme Court, that the account exhibited by him is, to the best of his knowledge and belief, a true and just account of the goods, chattels, credits, and effects of the deceased, or of his the administrator's administration thereof, as the case may be.

Administrators to exhibit accounts, and verify same by declaration.

62. In case any such administrator shall neglect to make and exhibit to the Court such accounts, verified as aforesaid, for the space of one calendar month after the expiration of the said period of six calendar months as aforesaid, it shall be the duty of the Curator to cause such administrator to be summoned before a Judge to show cause why he should not be ordered to exhibit such account to the Court forthwith; and if at any time any such administrator, being ordered to render an account of his administration as before mentioned, shall neglect to make and exhibit the same verified as aforesaid for the space of one calendar month after the date appointed for that purpose, the person on whose application such order was made may cause such administrator to be summoned before a Judge in like manner; and in case such administrator, being duly served with such summons, shall not attend before the Judge at the time and place mentioned therein, or shall not show any reasonable cause to the contrary, it shall be lawful for the Judge from time to time to order the administrator to exhibit such account, verified as aforesaid, either forthwith or within such further time as the Judge shall think fit to allow; and if such administrator shall not within the prescribed time or within such further time as shall be allowed him by a Judge, make and exhibit such account in manner

If accounts not exhibited Curator to summon administrator before Judge who may inflict penalty.

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manner aforesaid, the Court or a Judge may order such administrator so in default to pay to the Curator or person so applying any sum not exceeding One Hundred Pounds for every such default.

Proceedings under last section not to prejudice proceedings on bond.

63. Proceedings being taken under the last preceding clause shall not prevent the Court from ordering the assignment of the bond to any person with a view of enforcing the penalty thereof as hereinbefore mentioned.

PART V.**PART V.—General matters:**

Grants heretofore made valid.

64. All grants of probates and administrations made before the commencement of this Act by the Supreme Court of the Province of South Australia in its Ecclesiastical Jurisdiction, or by any Judge of the said Court, which may be void or voidable by reason only that such Court or Judge had not jurisdiction to make such grants, shall be as valid as if such Court or Judge had at the time of making the same full power, jurisdiction, and authority to do so.

After grant of administration no person to have power to sue as executor.

65. After any grant of administration no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked.

Rights of executor renouncing, not acting, or not appearing when cited, to cease, as if he had not been named in will.

66. Where any person, after the passing of this Act, renounces probate of the will of which he is appointed executor or one of the executors, and whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

Power to appoint administrator in certain cases other than person entitled.

67. Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the said Province, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased or of any part of such personal estate other than the person who, if this present provision had not been made, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who but for this present provision would by law have been entitled to a grant thereof, but the Court may in its discretion

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discretion appoint such person as to the Court may seem fit to be such administrator, upon his giving such security (if any) as the Court shall direct; and every such administration may be limited as the Court shall think fit.

68. If at the expiration of twelve calendar months from the death of any person the executor to whom probate of the will, or the administrator to whom letters of administration of the estate and effects of such deceased person shall have been granted, is then residing out of the jurisdiction of the Court, the said Court may, upon the application of any creditor, legatee, or next of kin, grant to such creditor, legatee, or next of kin so applying, special letters of administration, limited to the collection, management, and distribution of the assets of such deceased person; nevertheless to cease upon the return of the lawful executor or administrator within the jurisdiction of the said Court, and an order being made for the rescission thereof as hereinafter mentioned.

If executor or administrator out of jurisdiction, special administrator may be appointed.

69. The person applying for any such special grant as aforesaid shall, in addition to the oath usually taken by administrators, make oath that the executor or administrator of such deceased person is resident out of the jurisdiction of the Court, and that the applicant is thereby delayed in recovering or obtaining payment of moneys or the possession of goods and chattels to which he is by law entitled.

Special administrator to make certain affidavits.

70. On the return within the jurisdiction of the Court of the executor or administrator to whom probate or letters of administration shall originally have been granted, such executor or administrator may apply to the Court, by petition, to rescind such special grant of administration, and the Court, on the hearing of such petition, upon being satisfied that such executor or administrator *bonâ fide* intends to remain within the jurisdiction of the Court until the estate of the deceased has been duly administered, may make an order to rescind such special grant of administration, upon such terms and conditions as to security, costs, or otherwise as to the Court may seem reasonable.

On return of original executor or administrator special administration to be rescinded.

71. A copy of any such petition, and of all affidavits intended to be used in support thereof, shall be served upon the special administrator four days at least before the day appointed for the hearing of such petition.

Copy of petition and affidavits to be served on special administrator.

72. Upon any order being made by the Court for the rescission of any grant of special administration as aforesaid, the special administrator shall be bound duly to account to the original executor or administrator, and to pay over all moneys received by him as such special administrator and then remaining in his hands undisposed of.

On order being made for rescission, special administrator to account and pay over moneys.

73. If such executor or administrator shall neglect to apply for an order for the rescission of such special administration he shall,

Original executor or administrator liable, although special administration not rescinded.

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shall, notwithstanding such special administration remains unrescinded, be liable to answer and make good all claims and demands against the estate of the deceased to the extent of the assets which have come to his hands, or which might have come to his hands but for his wilful neglect or default.

Revocation of temporary grants not to prejudice actions or suits.

74. Where, before the revocation of any temporary administration, or the rescission of any special administration as aforesaid, any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation or rescission of such administration, and also in case of a revocation of the grant of probate or administration which shall have been made consequent thereon, and thereupon the proceedings shall be continued in the name of the new or original executor or administrator in like manner as if the proceedings had been originally commenced by or against such new or original executor or administrator, but subject to such conditions and variations, if any, as such Court may direct.

Payments under revoked probates or administrations valid.

75. Where any probate or administration is revoked or rescinded under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration, before the revocation or rescission thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked or rescinded probate or administration may retain and reimburse himself in respect of any payments made by him, which the person to whom probate or administration shall be afterwards or was originally granted might have lawfully made.

Persons, &c., making payments upon probates granted for estate of deceased person to be indemnified.

76. All persons and corporations making or permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration or order granted in respect of the estate of any deceased person, under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration or order.

Commission may be allowed to executors or administrators.

77. The Court, or a Judge, may allow to any executor or administrator of the effects of any deceased person (except as herein mentioned) such commission or percentage out of the assets as shall be just and reasonable for their pains and trouble therein: Provided that no allowance whatever shall be made for the pains and trouble of any administrator who shall neglect to pass his accounts as hereinbefore provided, or within such reasonable time as may be allowed by the Court or a Judge; or to dispose of any money, goods, chattels, or securities with which he shall be chargeable according to the due course of administration; and, moreover, every such administrator so neglecting to pass his accounts, or to dispose of any such money, goods, chattels, or securities with which he shall be chargeable, shall be charged with interest at the rate then
current

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current within the said Province for such sum and sums of money as from time to time shall have been in his hands, whether he shall or shall not make interest thereof.

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78. The Court, shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it, and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sworn or make affirmation or declaration or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the rules and regulations to be made as hereinafter mentioned, as are or may be vested in the said Court in its equitable jurisdiction for such purposes, in relation to any suit or matter therein depending.

Power to enforce orders.

79. The said Court, or any two of the Judges thereof, whereof the Chief Justice shall be one, shall have full power to fix and regulate from time to time the fees payable upon all proceedings before it.

Power to fix fees.

80. The said Court, or any two of the Judges thereof, whereof the Chief Justice shall be one, shall have power from time to time to make rules and regulations for regulating the procedure and practice of the Court in its testamentary causes jurisdiction, for defining the duties of the Registrar of Probates and other officers thereof, and for determining what shall be deemed contentious and what non-contentious business, and generally for carrying the provisions of this Act into effect, as to the said Court or Judges shall appear expedient; and the said Court or Judges shall also have power to revoke, amend, add to, or alter any such rules and regulations so to be made as aforesaid or any subsequent rules and regulations as to such Court or Judges may seem fit.

Court may make rules and regulations.

81. All such rules and regulations, and all orders fixing or regulating fees, which may be made by the said Court or Judges under the preceding provisions, shall be published in the *Government Gazette*, and shall take effect from a time to be therein specified; and all such rules and regulations shall be laid before both Houses of Parliament, within fourteen days after the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within fourteen days after the commencement of the then next Session of Parliament; and, if either House of Parliament shall, by resolution, passed within thirty-six days next after any such rules and regulations as aforesaid shall be laid before it, resolve that the whole or any part thereof ought not to continue in force, in that case the whole of such rules and regulations, or such parts thereof as may be specified in the resolution (as the case may be), shall, from and after the passing of such resolution, cease to be binding.

Rules, &c., to be published in *Government Gazette* and laid before Parliament.

82. Any person considering himself aggrieved by any final decree Appeal.

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or order of the Court, or by the refusal of the said Court to allow a question of fact to be decided by a Jury, may, within three calendar months after the pronouncing thereof, appeal therefrom to the Court of Appeals, which Court may affirm, alter, or reverse such decision, in whole or in part, or dismiss the appeal, as may be just.

In the name and on behalf of the Queen I hereby assent to
this Act.

D. DALY, Governor.