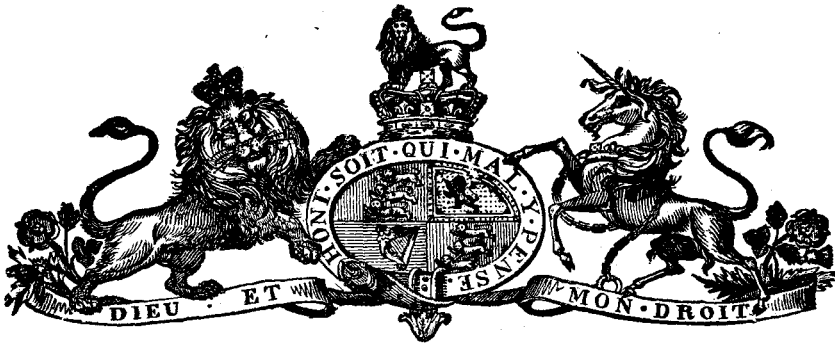


T A S M A N I A.



1874.

ANNO TRICESIMO-OCTAVO

VICTORIÆ REGINÆ,

No. 1.



AN ACT to amend the Law as to Real Property A.D. 1874.  
in Cases of Intestacy, and to consolidate and  
amend the Provisions for the Payment of  
Debts out of the Real Estate of deceased  
Persons. [18 September, 1874.]

**W**HEREAS it is expedient to provide for the Succession to Real PREAMBLE.  
Estate in cases of Intestacy, and to consolidate and amend the Law  
in certain cases for the payment of debts due by persons deceased out of  
the Real Estate of such persons :

Be it therefore enacted by His Excellency the Governor of *Tasmania*,  
by and with the advice and consent of the Legislative Council and  
House of Assembly, in Parliament assembled, as follows :

- 1** This Act may be cited as "The Deceased Persons' Estates Act, Short title. 1874."
- 2** This Act shall not come into operation until the First day of Commencement of Act.  
*October*, 1874, which date is hereinafter referred to as the com-  
mencement of this Act.
- 3** In the construction of this Act, unless the context otherwise Interpretation.  
determines,—  
"Court" shall mean the Supreme Court of *Tasmania* :  
"Judge" shall mean a Judge of the said Court :

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“Curator” shall mean the Curator of Intestate Estates :

“Administration” and “Administrator” shall respectively mean and comprehend Letters of Administration of the estates of deceased persons, and Administrator whether with or without the Will annexed, and whether granted for general, special, or limited purposes :

“Prescribed” shall mean prescribed by General Orders or Rules of Court to be made by the Judges as in this Act provided.

Intestate land not heritable, but to pass as personalty.

4 From and after the commencement of this Act all land which by the operation of the Law relating to real property now in force would upon the death of the owner intestate in respect of such land descend to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives, in like manner as is now the case with chattel real property, free from all claim to dower on the part of the widow of the intestate, and from any tenancy by the curtesy, where such would have arisen under the existing Law.

Land to be included in inventory, &c.

5 Lands held in trust or by way of mortgage passing to the personal representative of an intestate under this Act shall be subject to the same trusts and equities as the same would have been subject to if they had descended to the heir ; and all other lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application for payment of debts or otherwise, but such lands shall not be deemed “Personal Estate” within the meaning of Section Two of *The Probate Duties Act.*

A Judge may make special order relating thereto.

6 It shall be lawful from time to time for a Judge, upon the application of the administrator or of any person beneficially interested, and after such previous notice (if any) to other parties and inquiry as he thinks fit, to order and direct the course of proceeding which shall be taken in regard to the time and mode of sale of any land vested in the said administrator under this Act—the letting and management thereof until sale—the application for maintenance or advancement or otherwise of shares of infants—the expediency and mode of effecting a partition if applied for—and generally in regard to the administration of the property for the greatest advantage of all persons interested.

Judge may order partition.

7 In any case wherein upon such inquiry the Judge is satisfied that a partition of the land would be advantageous to the parties interested therein, it shall be lawful for such Judge to appoint one or more Arbitrators to effect such partition, and to exercise in regard thereto, under his direction and control, powers similar to those of commissioners acting under a decree in equity for partition.

The report and final award of the said Arbitrators, setting forth the particulars of the land allotted to each party interested, shall, when signed by them and confirmed by the order of a Judge, and when also registered in the office of the Registrar of Deeds, be effectual without the necessity of any further conveyance to vest in each allottee the land so allotted. Where such land is held under *The Real Property Act* the report and final award shall be produced to the Recorder of Titles, who shall thereupon, without requiring the signature of any Memorandum of Transfer, issue Certificates of Title to each allottee of the land awarded to him upon payment of the usual fee for a new Certificate of Titles.

If such allotment is made subject to the charge of any money payable

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to any other party interested for equalizing the partition, such charge shall take effect according to the terms and conditions in regard to time and mode of payment and otherwise which shall be expressed in such award, without the necessity of any further instrument being made or executed.

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**8** The provisions of this Act shall apply to any executor to whom in case of partial intestacy land shall pass under this Act, to the Curator, and to any other person fulfilling a like duty.

Act to apply to executors, and Curator.

**9** No executor or administrator shall be required against his own consent to continue the duty of a trustee by managing the property during an enforced suspension of sale, but shall be entitled, upon such suspension being ordered, to relinquish his trust to such Officer of the Court or other person as the Court or a Judge thereof appoints.

Administrator's trust not to be prolonged without consent.

**10** Whenever any land or any interest therein held under the provisions of *The Real Property Act* is transmitted in consequence of the intestacy of the registered proprietor thereof, Letters of Administration, or the order of the Court authorising the Curator to administer the real and personal estate of the deceased proprietor of such estate or interest, or the real estate only of the proprietor of such estate or interest, as the case may be, accompanied by an application in writing from the administrator or Curator, claiming to be registered as proprietor in respect of such estate or interest, shall be produced to the Recorder of Titles, who shall thereupon enter in the Register Book and on the instrument evidencing title to the estate or interest transmitted, the date of the Letters of Administration or Order of the Court as aforesaid, the date and hour of the production of the same to him, the date of the death of such proprietor, when the same can be ascertained, with such other particulars as he may deem necessary; and upon such entry being made the administrator, or Curator, as the case may be, shall be deemed to be the registered proprietor of such land or interest therein; and the Recorder of Titles shall note the fact of such registration by memorandum under his hand on the Letters of Administration, or other Order so produced to him as aforesaid.

Transmission of mortgage or lease on death of proprietor.

Will or Probate, or Letters of Administration or Order of Court, to be produced.

**11** Whenever any Letters of Administration are issued under which the administrator claims to deal with any land (other than land held under the provisions of *The Real Property Act*), such Letters of Administration shall be registered in the office of the Registrar of Deeds within Six calendar months from the date thereof.

Letters of Administration affecting land to be registered.

The memorial of such Letters of Administration shall contain the name and description of the intestate, the name and description of the administrator, the date of the Letters of Administration, and a short description of the real property intended to be affected as nearly as the same can be ascertained, and shall be signed by the administrator, and shall be indexed as though the administrator were the sole devisee of all the real property of the intestate under a will made by the deceased. And a like memorial shall be registered by the Curator in respect of any land with which he may claim to deal under the provisions of this Act, and which is not held under *The Real Property Act*.

**12** The real estate of every deceased person shall in all cases be assets in the hands of his executor or administrator for the payment of his debts in the ordinary course of administration, and also for the payment of

Real estate to be assets for the payment of debts.

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Real estate may be sold by executor or administrator.

Executor not to sell without leave of Judge.

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.

The title of any administrator to have relation back to the death of the owner.

Administrator under this Act to be deemed a Trustee within Trustee Acts.

Conveyance of land without words of limitation to pass fee.

funeral and testamentary expenses; and it shall be lawful for such executor or administrator to sell such real estate, or a sufficient part thereof, or to mortgage the same with or without a power of sale, and to convey, assign, or transfer the same to a purchaser in as full, ample, and effectual a manner as the testator of such executor or the intestate of such administrator could have done in his lifetime.

The power hereinbefore conferred upon an executor to sell or mortgage real estate of his testator shall not be exercised by any executor contrary to the provisions of the Will of the testator, except for the purpose of paying debts due by the testator, and then only with the sanction of a Judge, which sanction it shall be lawful for but not incumbent upon a Judge to give, upon application to be made in Chambers upon a petition or summons in such manner and form as may be prescribed, and upon such notice and terms as such Judge may direct.

**13** In any action at Law or suit in Equity where, according to the existing practice, 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, Ten days at least before the trial or other proceeding in which the said proof is 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 been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, unless the party receiving such notice shall, within Four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition; and every Probate or Letters of Administration shall in all cases be *prima facie* evidence of the death, and the date of the death, of the testator or intestate.

**14** The title of any administrator or curator to the land to be administered, and to the rents and profits thereof, shall, upon his appointment, relate back to, and be deemed to have arisen upon, the death of the owner of such land, as if there had been no interval of time between such death and appointment.

**15** Every administrator or curator in whom any land may become vested under this Act shall be deemed a Trustee within the meaning of any Law now or hereafter to be in force relating to Trusts and Trustees, so far as the same concerns the application of income for or towards the maintenance or education of an infant, and the accumulation and investment of the residue, and the application of the accumulations.

**16** In any deed, will, or instrument (which would be capable according to any Law now in force of transferring the fee-simple of real estate) executed after the commencement of this Act, no words of limitation shall be necessary in order to pass the fee-simple of any land thereby affected to be dealt with; but every such deed, will, or instrument shall be construed to pass the whole estate of the grantor or testator, unless a contrary intention appears on the face of such deed, will, or instrument.

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**17** Any person who, after the commencement of this Act, retains or conceals any will or codicil, or aids or abets in such retention or concealment, with intent to defraud any person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any period not exceeding Two years; and shall also be liable to an action for damages at the suit of the persons defrauded or those claiming under them for any loss sustained by them, or either or any of them, in consequence of such retention or concealment; but no prosecution for any such offence shall be commenced without the sanction of the Attorney-General, and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted, as the Attorney-General directs.

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Concealment of will a misdemeanor.

**18** The Curator shall have the like authority to apply to the Supreme Court or a Judge thereof for an order to manage and administer real estate, or real and personal estate, as he now has with relation to personal estate; and the Supreme Court or a Judge shall, under the like circumstances, make the like order authorising the Curator to manage and administer the real estate of any deceased person, or the real and personal estate of any deceased person, as the said Court or a Judge is now empowered to make for the collection, management, and administration of personal estate; and thereupon all land which by the operation of the law relating to real property now in force would, upon the death of the owner intestate, in respect of such land descend to his heir-at-law, shall instead pass to and become vested in such Curator in like manner as is now the case with chattel real property, but subject to any order which may from time to time be made by the Supreme Court or one of the Judges.

Curator of Intestate Estates may apply for order to manage real estate.

**19** Nothing in this Act shall be deemed to render Her Majesty or the Curator, liable to any action, suit, or proceeding, or to any claim or demand whatsoever, for omitting to apply for an order to administer goods or freehold land, or for omitting to collect, recover, or convert into money the goods or any real estate of any deceased person, or for omitting to demand and receive, or to enforce payment of, the rents and profits of any real estate of any deceased person.

Limitation of liability.

**20** Every clause in the several Acts mentioned in the Schedule (1) hereto, shall be construed to extend to and include real as well as personal estate as fully in all respects as if the words "real estate" had been expressly mentioned therein.

Provisions of 17 Vict. No. 4, and 25 Vict. No. 6, to apply to real estate.

**21** The Curator shall be entitled to the like commission and fees for the management and administration of real estate under this Act as he is now by law entitled to for the collection, management, and administration of personal estate.

Curator's commission for management of real estate.

**22** A Judge of the Supreme Court may grant Probate of a Will or Letters of Administration of the estate of an intestate as fully and effectually as the full Court now has power to do, anything contained in any Law or Charter to the contrary notwithstanding.

One Judge may grant Probate or Letters of Administration.

**23** Every person to whom a grant of administration is made shall, previously to the issue of such administration, execute a bond to the Chief Justice of the said Court to enure for the benefit of the Chief

Administration bond to be executed.

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Justice for the time being, with two sureties conditioned for duly collecting, getting in, and administering the real and personal estate of the deceased, which bond shall be in such form as the Judges of the said Court shall prescribe, and in the meantime shall be in the form heretofore in use: Provided that it shall not be necessary for the Curator, or for any person obtaining administration to the use or for the benefit of Her Majesty, to execute any such bond.

Amount of penalty in administration bond.

**24** Such bond shall be in a penalty equal to the amount under which the property of the deceased shall be sworn if such amount shall not exceed Five thousand Pounds, and shall be in a penalty of Five thousand Pounds where such amount shall exceed that sum; but a Judge may in any case dispense with one or both of the sureties, or direct that such penalty shall be reduced in amount, and may also, if he thinks fit, direct that more bonds than One shall be given so as to limit the liability of any surety to such amount as he thinks reasonable, and may in place of such bond accept the security of any incorporated company or guarantee society approved of by the Governor in Council in such form and under such regulations as may be prescribed.

Order may be made to assign the bond.

**25** The Court may on application made on motion in a summary way, and on being satisfied that the condition of any such bond has been broken, order the Registrar of the Court 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 upon the said bond in his or their own name or names as if the same had been originally given to him, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.

Executors, &c. may be allowed commission.

**26** It shall be lawful for the Court or a Judge to allow out of the assets of any deceased person to his executor, administrator, or trustee for the time being, in passing his accounts, such commission or percentage, not exceeding Five Pounds per centum, for his pains and trouble as shall be just and reasonable. No such allowance shall be made to any executor, administrator, or trustee who neglects or omits without a special order of the Court or a Judge to pass his accounts pursuant to any general or special rule or order of the Court.

Provisions of this Act substituted for Charter of Justice.

**27** The provisions contained in the 22nd, 23rd, 24th, 25th, and 26th Sections of this Act shall be substituted for and read and taken in lieu of the provisions as to Probates and Administrations contained in the Charter of Justice granted by His late Majesty King *William* the Fourth on the 4th day of March, 1831, as far as the provisions of this Act are inconsistent with the provisions of such Charter, but not further or otherwise.

Devisee of real estate not to claim payment of Mortgage out of personal assets.

**28** When any person dies seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the devisee to whom such land or hereditaments shall be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under

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the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; but nothing herein contained shall affect or diminish any right of the mortgagee of such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise; and nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document made before the 31st day of *December*, 1858.

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Not to affect rights claimed under any will, &c. made before 31st December, 1858.

**29** In the construction of the Will of any person who may have died after the Thirty-first day of *December*, 1869, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the last preceding Section, unless such contrary or other intention shall be further declared by words, expressly or by necessary implication, referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless such intention expressly implied.

**30** In the construction of the last two preceding Sections, the word "Mortgage" shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator.

Interpretation of word "Mortgage."

**31** In the administration of the estate of every person who died on or after the First day of *January*, One thousand eight hundred and seventy-one, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt, but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding; but this provision shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt.

All specialty and simple contract debts of deceased persons to stand in equal degree.

**32** It shall be lawful for the Judges of the Court from time to time to make, and from time to time to revoke and alter, general rules and orders touching and concerning applications to the Court or a Judge under this Act, and the conduct and despatch of all business, matters, and things to be done in relation thereto, and for the fees and charges to be paid and allowed in reference to all such business; and to make rules for the ordinary guidance of administrators in relation to real estate administered as personal assets, either by inserting the same in letters of administration, or promulgating the same in like manner with other general rules affecting the practice of the Court.

Supreme Court may frame general rules.

No such rules shall prejudice or control the effect of any special order to be made by a Judge upon such inquiry as aforesaid in any particular case.

Every such special order shall be subject to control or revision by the full Court on appeal thereto by the administrator or any other party interested.

A copy of all such rules shall be published in the *Gazette* and laid before both Houses of Parliament within One month from the making

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thereof if Parliament is then in Session, and if Parliament be not then sitting within One month after the commencement of the next ensuing Session, and any rules so made shall be judicially noticed.

Repeal.

**33** From and after the commencement of this Act the Acts set forth in the Schedule (2) shall be and the same are hereby repealed, except as to acts done, liabilities incurred, privileges acquired, and proceedings taken under any of the said Acts.

## SCHEDULE.

Sect. 20.

(1.)

<i>Date &amp; Number of Act.</i>	<i>Title of Act.</i>
17 Vict. No. 4 .....	An Act for the better Preservation and Management of the Estates of deceased Persons in certain cases.
25 Vict. No. 6 .....	An Act to amend the Act, intituled <i>An Act for the better Preservation and Management of the Estates of deceased Persons in certain cases.</i>

Sect. 33.

(2.)

## ACTS TO BE REPEALED.

<i>Date &amp; Number of Act.</i>	<i>Title of Act.</i>
22 Vict. No. 19.....	An Act to amend the Law relating to the Estates of deceased Persons.
33 Vict. No. 12.....	An Act to explain the Operation of <i>An Act to amend the Law relating to the Estates of Deceased Persons.</i>
34 Vict. No. 19.....	An Act to abolish the Distinction as to Priority of Payment which now exists between the Specialty and Simple Contract Debts of deceased Persons.