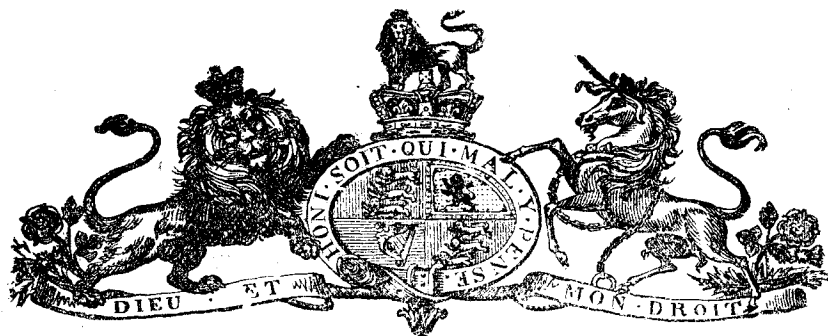


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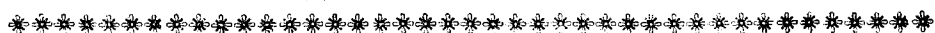


1893.

ANNO QUINQUAGESIMO-SEPTIMO

VICTORIÆ REGINÆ,

No. 14.



AN ACT to amend the Law relating to Probate. A.D. 1893.
[14 November, 1893.]

BE it 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 for all purposes be cited as “The Probate Act, Short title. 1893.”

2 The Acts set forth in the Schedule hereto shall, to the extent therein specified, be and the same are hereby repealed; but such repeal shall not affect any act, matter, or thing duly done thereunder before the commencement of this Act. Repeal.

3 The provisions 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*, One thousand eight hundred and thirty-one, as far as the provisions of this Act are inconsistent with the provisions of such Charter, but not further or otherwise. Provisions of this Act substituted for Charter of Justice.

Interpretation.

4 In the construction of this Act, unless the context be inconsistent with the meaning hereby assigned—
“Will” shall comprehend “testament” and all other testamentary instruments of which probate may now be granted. Interpretation of terms. 20 & 21 Vict. c. 77, s. 2.

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“Administration” shall comprehend all letters of administration of the real and personal estates and 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 as to the right thereto, including the passing of probates and administrations through the Supreme Court of *Tasmania* 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 of caveats against the grant of probate or administration.

“Court” shall mean the Supreme Court of *Tasmania*.

Property of Intestates.

How property to vest between death of person deceased and grant.
21 & 22 Vict.
c. 95, s. 19.

5 From and after the decease of any person dying intestate, and until letters of administration shall be granted, or an order for the Curator of Intestate Estates to manage and collect shall be made in respect of his real and personal estate and effects, the real and personal estate and effects of such deceased person shall be vested in the Chief Justice of the Supreme Court of *Tasmania* for the time being, or, in case there may not be a Chief Justice at any time, then in the Senior Puisne Judge of the said Court for the time being, in the same manner and to the same extent as aforesaid they vested in the Ordinary in England.

Powers of the Court.

Power to examine witnesses.
20 & 21 Vict.
c. 77, s. 24.

6 The Court may require the attendance of any party in person, or 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 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, 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 or as nearly as may be as that in which a writ of *subpœna ad testificandum* or of *subpœna duces tecum* is now issued by the said Court; 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.

Powers of the Court to enforce orders.
Ib., s. 25.

7 The Court shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting, or refusing to produce deeds, evidence, 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 the trial or determination of questions of fact, and for enforcing all orders, decrees, and judgments made or given by

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the Court under this Act, and otherwise in relation to the matters to be inquired into and done under this Act, or by or under the orders of the Court under this Act, as are or shall be by law vested in the said Court in Equity for such purposes in relation to any suit or matter depending in such Court in Equity.

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8 The Court 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 Registry 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 may direct such person to attend for the purpose of being examined in open Court 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.

Order to produce any instrument purporting to be testamentary. 20 & 21 Vict. c. 77, s. 26.

9 It shall be lawful for the Court to make all such Orders as may be necessary for the due administration of the real and personal estate and effects of any deceased person, and also for the payment out of such real and personal estate and effects to the persons administering the same of any costs, charges, and expenses which may have been lawfully incurred by them, and also such commission or percentage, not exceeding Five Pounds per centum, for their pains and trouble therein as shall be just and reasonable; and if any executor or administrator shall neglect to pass his accounts, or dispose of the real and personal estate and effects of any deceased person, at the time and in the manner directed, it shall be lawful for the Court, on the application of any person aggrieved by such neglect, to order and direct that such executor or administrator shall pay interest at a rate not exceeding Eight Pounds per centum per annum for such sums of money as from time to time shall have been in his hands, and the costs occasioned by the application.

Court may make order for administration of effects of deceased person. See 38 Vict. No. 1, s. 26.

Procedure.

10 Subject to the Regulations to be established by such Rules and Orders as hereinafter mentioned, 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 always that, subject to any such Regulations as aforesaid, 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 as aforesaid, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Mode of taking evidence in contentious matters. *Ib.*, s. 31.

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Practice of the Court.
See 38 Vict. No. 1,
s. 29.

11 The practice and procedure of the Court under this Act shall, except where otherwise provided by this Act, or by the Rules or Orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the practice of the Court of Probate under the Act of the Imperial Parliament intituled "The Court of Probate Act, 1857," and the Rules made thereunder.

Chamber Practice.

Judge may sit in Chambers.
21 & 22 Vict.
c. 95, s. 3.

38 Vict. No. 1,
s. 22.

12—(1.) It shall be lawful for a Judge of the Court to hear in chambers such part of the business of the said Court under this Act as can in the opinion of such Judge with advantage to the suitors be heard in chambers, and such other business as any Rule made under this Act shall direct to be heard before a Judge of the Court sitting in chambers. Provided always that no question shall be heard in chambers which either party shall require to be heard in open Court.

(2.) Such Judge, when so sitting in chambers, may grant Probate of a Will or Letters of Administration of the estate of an intestate as fully and effectually as the Court now has power to do, anything to the contrary contained in any Law or Charter to the contrary notwithstanding.

Powers of Judge sitting in Chambers.
21 & 22 Vict.
c. 95, s. 5.

13 Such Judge as aforesaid when so sitting in chambers shall in respect of the business to be brought before him have and exercise the same power and jurisdiction as the Court; but all Orders made by such Judge as aforesaid may be reversed, discharged, or altered by the Court within such time and under such Regulations and conditions as may be prescribed in that behalf by any Rule made under this Act.

Registrar.

Registrar may issue subpoenas to produce papers, &c.
Ib., s. 23.

14 It shall be lawful for the Registrar of the Court, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena in the usual form requiring any person to produce and bring into the Registry of the Court as in the said subpoena may be directed any paper or writing being or purporting to be testamentary which may be shown to be in the possession, within the power, or under the control of such person; and such person upon being duly served with the said subpoena shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court and had been ordered by a Judge to produce and bring in such paper or writing.

The Registrar to do all acts heretofore done by surrogates.
Ib., s. 24.

15 Subject to any Rules and Orders for the time being in force under this Act the said Registrar shall be invested with and shall and may exercise with reference to proceedings in the Court under this Act the same power and authority which Surrogates of the Judge of the Prerogative Court of *Canterbury* could or might before the passing of the Act of the Imperial Parliament intituled "The Court of Probate Act, 1857," have exercised in chambers with reference to proceedings in the said Prerogative Court, and non-contentious business may be transacted and probate of will or letters of administration may, upon

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application for that purpose, be issued in the usual form by such Registrar as heretofore, or in conformity with such Rules and Orders and the duties therein imposed on him.

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Official Copies.

16 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 of the Court on the payment of such fees as shall be fixed for the same by the Rules and Orders under this Act.

Official copy of whole or part of will may be obtained.
20 & 21 Vict. c. 77, s. 69.

Taxation.

17 The bill of any proctor, attorney, or solicitor for any fees, charges, or disbursements in respect of any business transacted under this Act, whether contentious or otherwise, or any matters connected therewith, shall, as well between proctor or attorney or solicitor and client as between party and party, be subject to taxation by the Taxing Officer of the Court; and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the Rules and Orders to be made under this Act; and the certificate of the Taxing Officer shall be subject to appeal to a Judge of the Court.

Taxation of costs.
Ib., s. 29.

Oaths.

18 The Commissioners of the Court shall have power to administer oaths under this Act.

Oaths.

Renunciation or neglect of Executor.

19 Where any person has renounced or after the commencement of this Act renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate and 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.

Rights of an executor renouncing probate to cease.
Ib., s. 79.

20 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 real and personal estate and 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.

An executor not acting or not appearing to a citation to be treated as if he had renounced.
21 & 22 Vict. c. 95, s. 16.

Probate in solemn form.

21 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 other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act and to the general Rules and Orders under this Act, be cited to see proceedings or otherwise

Where a will affecting real estate is proved in solemn form, &c. the persons interested in the real estate to be cited.
20 and 21 Vict. c. 77, s. 61.

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summoned in a like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to such Rules and Orders and to the discretion of the Court.

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. 20 & 21 Vict. c. 77, s. 62.

22 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 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 person against whose interest 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.

Person interested in real estate in certain cases not to be cited, and where not cited not to be affected by probate. *Ib.*, s. 63.

23 Nothing herein contained shall make it necessary to cite any person or 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 seized 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 questioned 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 person or persons interested in the real estate, provided that the probate, decree, or order of the Court shall not in any case affect the person or persons in respect of his or their interest in real estate, unless such person or persons has or have been cited or made party to the proceedings or derives title under or through a person so cited or made party.

Executor or Administrator out of the jurisdiction.

Executor out of jurisdiction. 38 Geo. III., c. 87, s. 1. 21 & 22 Vict. c. 95, s. 18.

24 After the expiration of Twelve calendar months from the death of any testator or intestate, if the executors or executor to whom probate of the will, or administrators or administrator of the intestate to whom letters of administration shall have been granted by the Court, are or is then residing out of the jurisdiction of the said Court, it shall be lawful for the Court, upon the application of any creditor, next of kin, or legatee, grounded on an affidavit in the prescribed form, to grant special administration in such form as may be prescribed to a creditor, next of kin, or legatee, which administration shall be written or printed upon paper or parchment, stamped only with one Five

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Shilling stamp, and shall pay no further or other duty ; and this provision shall extend to all grants made before as well as subsequently to the passing of this Act.

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25 It shall be lawful for the Court in Equity in which a suit shall be pending relating to the estate of a deceased person, to appoint (if it shall be needful) any persons or person to collect in and sue for any outstanding debts or effects due to such estate, and to give discharges for the same, such persons or person giving security in the usual manner duly to account for the same.

Court may appoint persons to collect outstanding debts.
38 Geo. III.,
c. 87, s. 4.

26 If the executors or executor, administrators or administrator, capable of acting as such, shall return to and reside within the jurisdiction of the Court pending such suit, such executors or executor, administrators or administrator, shall be made party to such suit ; and the costs incurred by granting such administration and by proceeding in such suit against such special administrators, shall be paid by such person or persons, or out of such fund as the said Court shall direct.

Executors returning to reside within the jurisdiction of the Court to be made a party to such suit.

27 Where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the said Court shall think fit, until such infant shall have attained the full age of Twenty-one years, at which period, and not before, probate of the will shall be granted to him.

Where an infant is sole executor administration to be granted to the guardian, &c.
38 Geo. III.
c. 87, s. 6.

28 The person to whom such administration shall be granted shall have the same powers vested in him as an administrator by virtue of an administration granted to him *durante minore ætate* of the next of kin.

Who shall have the same power as where administration is granted *durante minore ætate* of the next of kin.
Ib., s. 7.

Interim and exceptional Administrator.

29 Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court may appoint an administrator of the real and personal estate of such deceased person, and the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of such real and personal estate ; and every such administrator shall be subject to the immediate control of the Court and act under its direction.

Administration *pendente lite*.
20 & 21 Vict.
c. 77, s. 70.

30 The Court may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the real and personal estate of the deceased such reasonable remuneration as the Court think fit.

Remuneration to administrators *pendente lite*.
Ib., s. 72.

31 When a person has died or shall die wholly intestate as to his real or 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 Colony of *Tasmania*, and it shall appear to the Court to be necessary or convenient in any such case by reason of the bankruptcy of the estate of the deceased or other special circumstances to appoint some person to be the administrator of the real and personal estate of the deceased, or of any part of such real and personal

Power as to appointment of administrator.
Ib., s. 73.

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estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such real and personal estate, it shall not be obligatory upon the Court to grant administration of the real and personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court in its discretion to appoint such person as the Court shall think 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.

Interim Receiver.

Receiver of real estate
pendente lite.
20 & 21 Vict.
c. 77, s. 71.

32 It shall be lawful for the Court to appoint any administrator appointed as aforesaid or any other person 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 such receiver 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.

The Court of probate may require security from a receiver of real estate.
21 & 22 Vict.
c. 95, s. 21.

33 It shall be lawful for the Court to require security by bond in such form as by any Rules and Orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the Court under the next preceding Section of this Act, and the Court may, on application made on motion or in a summary way, 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 on the said security or put the same in force in his or in their name or names both at law and in equity as if the same had been originally given to him instead of to the Chief Justice or senior Puisne Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested in the full amount due in virtue thereof.

Administration.

After grant of administration no person to act as executor.
20 & 21 Vict.
c. 77, s. 75.

34 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 real or personal estate comprised in or affected by such grant of administration until such administration shall have been recalled or revoked.

Securities.

Persons to whom grant of administration shall be committed shall give bond.
Ib., s. 81.
38 Vict. No. 1,
s. 23.

35 Every person to whom any grant of administration is made shall, previously to the issue of such administration, execute a bond to the Chief Justice of the Court to enure for the benefit of the Chief 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 Court or a Judge shall from time to time by any general or special Order direct.

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.

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36 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 when 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.

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Penalty on bond.
20 & 21 Vict.,
c. 77, s. 82.
38 Vict. No. 1,
s. 24.

37 The Court may, on application made on motion or petition in a summary way, and on being satisfied that the conditions 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 on the said bond in his own name both at law and in equity as if the same had been originally given to him instead of to the Chief Justice, 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.

Power of Court
to assign bond.
Ib., s. 83.
Ib., s. 25.

38 Where any person resident in *Tasmania* has been or hereafter may be appointed to act in the affairs of a Testator by an Executor not resident in *Tasmania*, administration of the real and personal estate and effects of such Testator, with an exemplification or other authenticated copy of the Will or Probate annexed, shall be granted by the Court to the person so appointed, upon such person giving his own bond to administer, without any sureties.

Administration
may be granted
to the agent of an
executor on his
own bond without
sureties.
21 Vict. No. 4,
s. 17.

Indemnities.

39 Where any probate or administration is revoked under this Act all payments *bonâ fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same, and the executor and administrator who shall have acted under any such revoked 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 granted might have lawfully made.

Payments under
revoked probates
or administration
to be valid.
20 and 21 Vict.
c. 77, s. 77.

40 All persons making or permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration 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.

Indemnity to
persons, &c.
making payment
upon probates.
Ib., s. 78.

41 To the intent and end that the procedure and practice of the Court may be of the most simple and expeditious character, it shall be lawful for the Judges from time to time to make, repeal, amend, add to, or alter Rules and Orders, to take effect when this Act shall come into operation, for the following purposes:—

Judges may make
Rules and Orders.

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For regulating the procedure and practice of the Court.
 For regulating the duties of the Registrar and the Officers of the Court.

For determining what shall be deemed contentious, and what shall be deemed non-contentious business.

For regulating the amount of fees, costs, and disbursements to be paid in respect of proceedings under this Act.

Provided, that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the Court or the Judges thereof to make Rules or Orders, or otherwise to regulate and dispose of the business therein.

New forms of writ and other proceedings. 23 & 24 Vict. c. 126, s. 38.

42 Such new or altered writs, citations, and forms of proceedings may be issued, entered, and taken as may by the Court be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such form as the Court shall from time to time think fit to order; and such writs, citations, and proceedings shall be acted upon and enforced in such and the same manner as writs, citations, and proceedings of the said Court are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding, the form of which shall be in any manner altered in pursuance of this Act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except as far as the effect thereof may be varied by this Act.

Existing suits and proceedings continued.

43 All suits and proceedings which at the date on which this Act comes into operation shall be pending before the Court shall be continued and dealt with and decided under and subject to the provisions of this Act and any Rules and Orders made hereunder in the same manner as if such suits or proceedings had been originally commenced under this Act: and all caveats, oaths, and bonds duly entered, sworn, or executed in the manner required by the Court prior to the date on which this Act comes into operation shall continue to have the same force and effect in law as they would have had if entered, sworn, or executed in pursuance of the provisions of this Act.

SCHEDULE.

<i>Date and No. of Act.</i>	<i>Title of Act.</i>	<i>Extent of Repeal.</i>
21 Vict. No. 4	An Act for the Relief of Executors and Administrators.	Sect. 17.
38 Vict. No. 1	The Deceased Persons' Estates Act, 1874."	Sects. 22, 23, 24, 25, 26, and 27.