

TRUSTEE ACT, 1936.

No. 2270 of 1936.

An Act to consolidate the Acts relating to trustees, and
for other purposes.

[Assented to 13th August, 1936.]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

1. This Act may be cited as the "Trustee Act, 1936," and shall come into operation on a day to be fixed by the Governor, by proclamation. Short title and commencement.

2. This Act is divided into parts, as follows:— Division.

PART I.—Investments.

PART II.—Powers and duties of trustees.

PART III.—Powers of the court.

PART IV.—Charitable trusts procedure.

PART V.—Special provisions as to appointment of new trustees.

PART VI.—Miscellaneous and supplemental.

3. The following Acts are repealed:— Repeal.

No. 6 of 1860: The Property Act, 1860, sections 22 and 23.

No. 4 of 1873: An Act to authorise the Investment of Trust Money in Government Securities.

No. 586 of 1893: The Trustee Act, 1893, except sections 30, 31, 32, 33, 34, 38, 39 (2), 43, 45, 46, 69, 72, 73, 74, 75.

No. 944 of 1907: The Trustee Act, 1907.

s. 1. This Act was proclaimed to commence on 1st November, 1937: *Gazette* 25th March, 1937, p. 646.

- No. 1196 of 1915: Trustee Act Further Amendment Act, 1915.
- No. 1538 of 1922: Charitable Trusts Procedure Act, 1922.
- No. 1563 of 1923: Trustee Act, 1923.
- No. 1743 of 1926: Trustee (Disposal of Church Land) Act, 1926.
- No. 2012 of 1931: Trustee Act, 1931.

Interpreta-
tion.
586, 1893,
s. 82.
Cf. U.K.
15 Geo. 5
c. 19, s. 68.

4. (1) In this Act (except in Part V.), unless the context otherwise requires—

“contingent right,” as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

“convey” and conveyance” applied to any person include the execution by that person of every necessary or suitable transfer or assurance for conveying, assigning, appointing, surrendering, or otherwise transferring, or disposing of land to which he is entitled or of which he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities or acts required by law under The Real Property Act, 1886, or otherwise for the validity or completion of the conveyance, including any acts to be performed by married women and tenants in tail for perfect conveyance and assurance under the Acts for the time being in force in that behalf:

“instrument” includes Act of Parliament:

“land” includes incorporeal as well as corporeal hereditaments, and any estate or interest therein, and also an undivided share of land:

“lunatic” means any person who has been found to be a lunatic upon inquiry by the Supreme Court, or upon a commission of inquiry issuing out of the Supreme Court in the nature of a writ of *de lunatico inquirendo*:

“mortgage” and “mortgagee” include every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee:

“pay” and “payment,” as applied in relation to stocks and securities, and in connection with the expression “into court,” include the deposit or transfer of the same in or into court:

“person of unsound mind” means any person, not an infant who, not having been found to be a lunatic, is incapable from infirmity of mind of managing his own affairs:

“possessed” includes being in receipt of income of or having any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land:

“property” includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not:

“representative” means an executor or administrator, and includes the Public Trustee in cases where the Supreme Court has authorised him to administer the estate of a deceased person:

“securities” includes stocks, funds, and shares:

“stock” includes fully paid up shares, and, so far as relates to vesting orders made by the court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein:

“Supreme Court” includes a judge of the Supreme Court:

“transfer,” in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

“trust” does not include the duties incident to an estate conveyed by way of mortgage, or to the estate or interest of a mortgagee under The Real Property Act, 1886, but with these exceptions the expressions

“trust” and “trustee” include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of representative of a deceased person, and the expression “trustee” includes a representative of a deceased person.

(2) Notwithstanding The Real Property Act, 1886, this Act applies to land which is subject to that Act, but only to the extent necessary for carrying out the purposes of this Act.

PART I.

PART I.

INVESTMENTS.

Authorised
investments.
586, 1893,
s. 4.
1196, 1915,
s. 3.
U.K. 15
Geo. 5 c. 19,
s. 1.

5. (1) A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not—

- (a) in South Australian Government securities;
- (b) on real securities in the State;
- (c) in any securities guaranteed by the Government or Parliament of the State;
- (d) in the bonds, debentures, or other securities of any municipal corporation in the State;
- (e) on deposit in the Savings Bank of South Australia;
- (f) on deposit in any incorporated bank carrying on business in the State and proclaimed by the

s. 5. (1) (f) Up to 8th November, 1937, the following banks have been proclaimed by the Governor as banks in which deposits may be made by trustees:—The Bank of Adelaide: *Gazette* 21st June, 1894, p. 1381. The Bank of New South Wales, The Bank of Australasia, The Union Bank of Australia Limited: *Gazette* 8th February, 1900, p. 228. The National Bank of Australasia Limited: *Gazette* 21st February, 1901, p. 367. English, Scottish, and Australian Bank Limited: *Gazette* 6th October, 1904, p. 635. The Commercial Bank of Australia Limited: *Gazette* 7th June, 1906, p. 996. The London Bank of Australia Limited (absorbed by The English, Scottish, and Australian Bank Limited, January, 1921): *Gazette* 1st June, 1911, p. 1071. The Commonwealth Bank of Australia: *Gazette* 21st May, 1914, p. 1105. The Bank of Victoria Limited (absorbed by the Commercial Banking Company of Sydney Limited, March, 1927): *Gazette* 17th August, 1922, p. 333. The Australian Bank of Commerce (absorbed by The

Governor as a bank in which deposits may be made by trustees;

- (g) in any of the Parliamentary stocks or public funds, or Government securities of the United Kingdom of Great Britain and Northern Ireland (subject to subsection (3) of this section);
- (h) in the Government securities of any British colony or possession (subject to subsection (4) of this section);
- (i) in any securities of, or guaranteed by, the Government or the Parliament of the Commonwealth of Australia:

and may also from time to time vary such investment.

(2) The Governor may from time to time, by proclamation, declare that satisfactory arrangements have been made in the said United Kingdom, or in any British colony or possession, for permitting trustees in the said United Kingdom, or in any such colony or possession to invest in the public securities of the State; and may from time to time, by proclamation, revoke any such proclamation.

(3) No investment under the authority of this section shall be made in any of the stocks, funds, or securities mentioned in paragraph (g) of subsection (1) of this section, except while a proclamation such as in subsection (2) of this section is first mentioned and relating to the United Kingdom remains in force.

(4) No investment under the authority of this section shall be made in any of the securities mentioned in paragraph (h) of subsection (1) of this section, except while a proclamation such as in subsection (2) of this section is first mentioned, and relating to the British colony or possession concerned, remains in force.

6. No trustee who has deposited trust moneys either on fixed deposit or on current account in any bank shall be liable for any loss which may have ensued in consequence of the failure of any such bank: Provided that in the opinion of the court he acted with ordinary prudence, and not in contravention of any express trust.

No trustee to be liable in consequence of loss occasioned by depositing trust moneys in a bank. 586, 1893, s. 5.

s. 5. (1) (f) Bank of New South Wales, November, 1931): *Gazette* 7th September, 1922, p. 545. The Primary Producers' Bank of Australia Limited: *Gazette* 1st March, 1928, p. 453. The Commercial Banking Company of Sydney Limited: *Gazette* 19th May, 1932, p. 899.

s. 5. (2) The following proclamations under s. 5 (2) were in force on the 8th November, 1937:—*Gazette* 15th May, 1902, p. 1025; relating to the United Kingdom. *Gazette* 17th August, 1922, p. 333; relating to New Zealand. *Gazette* 11th October, 1923, p. 834; relating to Victoria.

PART I.

Trustees may invest notwithstanding securities redeemable. 586, 1893, s. 6.
Cf. U.K. 15 Geo. 5 c. 19, s. 2.

7. (1) Subject to subsection (2) of this section, a trustee may invest in any of the securities mentioned in section 5 notwithstanding that the securities are redeemable, and that the price exceeds the redemption value.

(2) A trustee may not under this Act purchase at a price exceeding their redemption value any securities mentioned or referred to in paragraphs (c), (d), (g), or (h) of section 5, which are liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any securities mentioned or referred to in the same paragraphs which are liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or that other fixed rate.

(3) A trustee may retain until redemption any redeemable security which has been purchased in accordance with this Act.

Discretion of trustee. 586, 1893, s. 7.
U.K. 15 Geo. 5 c. 19, s. 3.

8. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust.

Application of preceding sections. 586, 1893, s. 8.
Cf. U.K. 15 Geo. 5 c. 19, s. 69.

9. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument (if any) creating the trust.

Loans and investments by trustees not chargeable as breaches of trust under certain circumstances. 586, 1893, s. 9.
U.K. 15 Geo. 5 c. 19, s. 8.

10. (1) A trustee lending money on the security of property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—

(a) that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be competent to give a report upon the value thereof, instructed and employed independently of any owner of the property, whether such person carried on business in the locality where the property is situate or not; and

s. 10. LONGHURST AND OTHERS v. WAITE (1920) S.A.L.R. 407. Held on the facts that the trustees were not shown to have believed that the valuers were competent and that the valuers had not been properly instructed, and therefore the trustees were not protected.

(b) that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report; and

(c) that the loan was made in reliance on the report.

(2) A trustee lending money on the security of leasehold property shall not be chargeable with breach of trust only upon the ground that in making the loan he dispensed either wholly or partly with the production or investigation of the lessee's title.

(3) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act.

11. (1) Where a trustee improperly lends trust money on a mortgage security, which would at the time of the investment have been a proper investment in all respects for a smaller sum than that actually lent thereon, the security shall be deemed a proper investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

Limitation of liability for loss on improper investments.
586, 1893, s. 10.
U.K. 15 Geo. 5 c. 19, s. 9.

(2) This section applies to investments made as well before as after the commencement of this Act.

12. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust, or by the general law.

Liability of trustee in case of change of character of investment.
2012, 1931, s. 3.
U.K. 15 Geo. 5 c. 19, s. 4.

13. (1) Whenever any payment received by a trustee in respect of a sale of trust property being debentures or inscribed stock bearing interest at a fixed rate is or includes payment for the right to receive any interest accrued from those debentures or that stock at the time of the sale, though that interest may not then be due, the amount of that accrued interest shall for the purposes of the trust be deemed to have been received by the trustee as interest in respect of the period during which that interest so accrued.

Accrued interest on debentures or stock sold or purchased for a trust.
Vic. 3261, 1922, s. 2.
1563, 1923, ss. 3, 4.

(2) Whenever any payment made by a trustee out of trust money in respect of a purchase of any debentures or inscribed stock shall be or include payment for the right to receive any interest accrued from those debentures or that stock at the time of the purchase though that interest may not then

PART I.

be due, the amount of that accrued interest when received on account of the trust shall for the purposes of the trust be deemed to have been received as purchase money repaid.

(3) This section applies only if and so far as a contrary intention is not expressed in the instrument, if any, by which the trust is declared.

PART II.

PART II.

POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

Power of
appointing
new trustees.
586, 1893,
s. 11.
U.K. 15
Geo. 5 c. 18,
s. 36.

14. (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead or remains out of the State for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the State, desiring to be discharged, refusing or being unfit or being incapable, as aforesaid.

(2) On the appointment of a new trustee—

(a) the number of trustees may be increased; and

s. 14. In *re* HAMILTON (deceased) (1914) S.A.L.R. 279. Where the testator had appointed as trustees his wife and a son, the latter only during the minority of another son who was 18 years of age at the time of the application, and the son appointed as trustee renounced probate, held, that an additional trustee should be appointed and the appointment should not be limited till such time as the other son attained the age of 21 years.

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, or solely in the new trustee, as the case may require, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance or otherwise vested in him, shall have the same powers, authorities, and discretions, and be entitled to the same remuneration (if any), and may in all respects act as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

(4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This section applies to trusts created either before or after the commencement of this Act.

(7) Nothing in this section shall give power to appoint an executor or administrator.

PART II.

Retirement of trustees.
586, 1893,
s. 12.
Of U.K.
15 Geo. 5
c. 19, s. 39.

15. (1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and any other person who is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4) This section applies to trusts created either before or after the commencement of this Act.

Vesting of trust property in new or continuing trustees.
586, 1893,
s. 13.
U.K. 15
Geo. 5 c. 19,
s. 40.

16. (1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land, subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the person or persons who, by virtue of the deed, become and are the trustee or trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in that person or those persons, as joint tenants if more than one, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed under the last preceding section, by which a retiring trustee is discharged under this Act, contains such a declaration as is in this section mentioned by the retiring and continuing trustees and by the other person (if any) empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to land under The Real Property Act, 1886, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share

stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in the General Registry Office the person or persons making the declaration shall be deemed the conveying party or parties, and the deed shall be deemed a conveyance made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the twenty-third day of December, eighteen hundred and ninety-three.

Power of trustee to delegate.

17. (1) A trustee who, for the time being, is or is about to be absent from the State may, if not expressly prohibited by the instrument creating the trust, with the consent of his co-trustee (if any), by power of attorney, under seal, delegate, for a term not exceeding twelve calendar months from the date of the power of attorney, to any person or persons residing in the State, all or any of the powers, authorities, and discretions vested in the trustee.

Trustee's power of delegation.
Q. 34, 1906, s. 4.
944, 1907, s. 3.
Cf. U.K. 15 Geo. 5 c. 19, ss. 23, 25.

(2) Every deed, act, matter, and thing executed, done, and performed by any such attorney or attorneys shall be as valid and effectual as if executed, done, and performed by the trustee.

(3) A trustee appointing any attorney or attorneys as aforesaid shall be liable for the acts and defaults of every such attorney as if they were his own acts and defaults.

(4) Nothing in this section shall be deemed to limit or affect any power of appointing a new trustee in the place of a trustee absent from the State, or the power of the Supreme Court to make any order by reason of such absence.

18. No revocation or avoidance (whether by operation of law or otherwise) of any such power of attorney shall be effectual as against any person dealing in good faith with the attorney in ignorance of the revocation.

Revocation of power of attorney not effectual as against person in ignorance.
Q. 34, 1906, s. 5.
944, 1907, s. 4.

19. (1) Trustees, unless prohibited by the instrument creating the trust, and, if expressly authorised by the power of attorney so to do, their attorneys, appointed under section 17 of this Act, may, by writing signed by them, authorise any bank to honour cheques, bills, promissory notes, and drafts

Trustees bank account.
Q. 34, 1906, s. 6.
944, 1907, s. 5.

drawn upon or made payable out of the banking account of the trust by any one or more of the trustees or attorneys, and to honour the indorsement of any one or more of the trustees or attorneys upon any cheque, bill, promissory note, or draft payable to the order of the trustees, and also to pay to any one or more of the trustees or attorneys, whether before or after maturity, all or any portion of any moneys deposited on fixed deposit.

(2) Every trustee who, in person or by attorney, gives or joins in giving any such authority shall be liable for the acts and defaults of every trustee or attorney acting thereunder as if they were his own acts and defaults.

(3) No revocation or avoidance (whether by operation of law or otherwise) of any such authority shall be effectual as against any banker acting or paying money in good faith under or in pursuance of such authority in ignorance of such revocation.

(4) This section and the last preceding two sections apply only to trusts created after the twenty-first December, nineteen hundred and seven.

Purchase and sale.

Power of trustees for sale to sell by auction and convey.
586, 1893,
s. 14.
U.K. 15
Geo. 5 c. 19,
s. 12.

20. (1) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, at one time or at several times, subject to any such condition respecting title or evidence of title or other matter as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

(2) For the purpose of completing any such sale as aforesaid, the trustees shall have full power to convey or otherwise dispose of the property in question, either by way of revocation and appointment of uses, or otherwise, as may be necessary.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) This section applies only to trusts and powers created by an instrument coming into operation after the twenty-first day of October, one thousand eight hundred and sixty-two.

21. (1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

Power to sell subject to depreciating conditions.
586, 1893, s. 15.
U.K. 15
Geo. 5 c. 19, s. 13.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached against the purchaser upon the ground that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4) This section applies only to sales made after the twenty-third day of December, eighteen hundred and ninety-three.

22. When any freehold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a *feme sole*.

Married woman as bare trustee may convey.
586, 1893, s. 16.
Cf. U.K. 15 Geo. 5 c. 20, s. 170.

23. (1) A trustee on the sale of trust property may leave unpaid purchase-money thereof invested upon the security of the property sold to the extent to which, if the trustee were not the vendor thereof, such property would be a proper security for the investment of the trust funds.

Power to take mortgage for part purchase money.
944, 1907, s. 2.

(2) This section applies to trusts whether created before or after the commencement of this Act.

Various powers and liabilities.

24. (1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money, consideration, or property, the deed being executed or the endorsed receipt signed by the trustee.

Power to authorise receipt of money by banker or solicitor.
586, 1893, s. 17.
Cf. U.K. 15 Geo. 5 c. 19, s. 23 (3).

(2) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment. The producing of any such deed by the solicitor shall be sufficient authority to the person liable to pay or give the consideration, or transfer or deliver the

property, for his paying, giving, transferring, or delivering the same to the solicitor, without the solicitor producing any separate or other direction or authority from the trustee.

(3) A trustee may appoint an incorporated bank or a solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the bank or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(4) If a trustee permits any such money, valuable consideration, or property to remain in the hands or under the control of the bank or solicitor for a period longer than is reasonably necessary to enable the bank or solicitor (as the case may be) to pay or transfer the same to the trustee, nothing in this section shall exempt him from any liability which he would have incurred if this Act had not been passed.

(5) This section applies only where the money or valuable consideration or property is received after the twenty-third day of December, eighteen hundred and ninety-three.

(6) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

25. (1) A trustee may insure against loss or damage by fire any building or other insurable property, to any amount (including the amount of any insurance already on foot) not exceeding three-fourths of the full value of that building or property, and pay the premiums for such insurance out of the income of the building or property, or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to that income.

(2) The Supreme Court may, on the application *ex parte* or otherwise, of a trustee, or of a beneficiary interested in trust property, authorise the expenditure by the trustee, out of the capital or income of the trust property or of the estate of a deceased person, of such sum as the court thinks fit in repairing, reinstating, or improving the trust property or estate, and may by the same or any subsequent order authorise the trustee to raise moneys required for the purpose of such expenditure by mortgage of the trust property

Insurance of
and improve-
ments to
buildings.
586, 1893,
s. 18.
U.K. 15
Geo. 5 c. 19,
s. 19.

or estate concerned, or of any other property or estate subject to the same trusts.

(3) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(4) This section applies to trusts created either before or after the commencement of this Act; but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

26. (1) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest present or future or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will, the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply, unless the consent in writing of that person is obtained to the renewal on the part of the trustee.

Power of trustees of renewable leaseholds to renew and raise money for the purpose.
586, 1893,
s. 19.

(2) If money is required to pay for the renewal, the trustee effecting the renewal may pay that money out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject; and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3) This section applies to trusts created either before or after the commencement of this Act; but nothing in this section shall authorise any trustee to do anything which he

is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

Power of trustee to give receipts. 586, 1893, s. 20. U.K. 15 Geo. 5 c. 19, s. 14.

27. (1) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section applies to trusts created either before or after the commencement of this Act.

Power for executors and trustees to compound, etc. 586, 1893, s. 21. U.K. 15 Geo. 5 c. 19, s. 15.

28. (1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2) An executor or administrator, or two or more trustees acting together, or a sole acting trustee, where, by the instrument (if any) creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit—

- (a) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; and
- (b) allow any time for payment of any debt; and
- (c) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust; and
- (d) for any of those purposes enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things, as to him or them seem expedient,

without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) This section applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of this Act.

Distribution of estate after notice by representative or trustee.
586, 1893, s. 22.
Cf. U.K. 15 Geo. 5 c. 19, s. 27.

29. (1) Where a representative or trustee has given notices such as would have been given by the court in an administration action for creditors, beneficiaries, and others to send in to the representative or trustee their claims against the estate of the deceased person or against the trust property, the representative or trustee may, at the expiration of the time named in the notices, distribute the estate of the deceased person or the trust property or any part thereof amongst the persons entitled thereto, having regard only to the claims of which he then has notice, and shall not be liable for the estate or property or any part thereof so distributed to any person of whose claim he had no notice at the time of the distribution.

(2) Where a representative or trustee has received a claim or notice of claim against the estate of a deceased person or against a trust property, and he disputes the claim, that representative or trustee may give to the person making the claim, or giving the notice, a notice in writing that the claim is disputed, and requiring the claimant either to withdraw the claim or to institute proceedings to enforce it within six months of the service of the last-mentioned notice; and if the claim is not so withdrawn or prosecuted, the representative or trustee may apply by summons in chambers to any judge of the Supreme Court, on affidavit setting out the facts for an order that, as against such representative or trustee, the claim shall be absolutely barred, and any such judge may make such order as he deems just, and the order shall bind all persons whom it purports to affect.

(3) Nothing in this section shall prejudice the right of any person to follow the estate or property or any part thereof into the hands of any person who has received it.

(4) A representative or trustee desirous of giving notices under this section may, on application, *ex parte* or otherwise, obtain the direction of the Supreme Court, or of the Master thereof, as to what notices are proper to be given, and as to the mode of service.

30. Where an executor or administrator liable as such to the rents covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate, whose estate is being administered, has satisfied all those liabilities under that lease or agreement for a lease which have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or

As to liability of executor or administrator in respect of rents, covenants, or agreements.
6, 1860, s. 22.
Cf. U.K. 15 Geo. 5 c. 19, s. 26.

agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out that sum has not arrived, and has assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto without appropriating any part or any further part (as the case may be) of the estate of the deceased to meet any future liability under the lease or agreement for a lease.

(2) The executor or administrator so distributing the residuary estate shall not, after having assigned the lease or agreement for a lease, and having where necessary, set apart a sufficient fund as mentioned in subsection (1), be personally liable in respect of any subsequent claim under the lease, or agreement for a lease.

(3) Nothing in this section shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom they have been distributed.

As to liability of executor, etc., in respect of rents, etc., in conveyances on rent charge.

6, 1860, s. 23.

31. Where an executor or administrator liable as such to the rent covenants or agreements contained in any conveyance on rent-charge (whether any such rent be by limitation of use, grant or reservation) or agreement for such a conveyance granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, has satisfied all those liabilities under that conveyance, or agreement for a conveyance, which have accrued due and been claimed up to the time of the conveyance or assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed or agreed to be conveyed, although the period for laying out that sum has not arrived, and has conveyed that property or assigned the agreement for a conveyance of that property to a purchaser, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, without appropriating any part or any further part (as the case may be) of the estate of the deceased to meet any future liability under the conveyance or agreement for a conveyance.

(2) The executor or administrator so distributing the residuary estate shall not after having made or executed that

conveyance or assignment, and having, where necessary, set apart a sufficient fund as mentioned in subsection (1) be personally liable in respect of any subsequent claim under the conveyance or agreement for a conveyance.

(3) Nothing in this section shall prejudice the right of the grantor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or among whom they have been distributed.

32. (1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument (if any) creating the power or trust, the power or trust may be exercised or performed by the survivor or survivors of them for the time being.

Powers of
two or more
trustees.
586, 1893,
s. 23.
U.K. 15
Geo. 5 c. 19.
s. 18.

(2) This section applies only to trusts constituted after or created by instruments coming into operation after the twenty-third day of December, eighteen hundred and ninety-three.

33. (1) Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian (if any) or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is or is not any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance.

Powers of
maintenance
in case of
infants.
586, 1893,
s. 24.
U.K.
15 Geo. 5
c. 19, s. 31.

(2) The trustees shall accumulate all the residue of that income in the way of compound interest by investing that residue, and the resulting income thereof, from time to time on securities in which they are by the instrument of trust (if any), or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which they arose, but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4) This section applies whether the instrument of trust comes into operation before or after the commencement of this Act.

Exoner-
ation
of trustees in
respect of
certain powers
of attorney.
586, 1893,
s. 25.
U.K. 15
Geo. 5 c. 19,
s. 29.

34. A trustee acting or paying money in good faith, under or in pursuance of any power of attorney, shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying: Provided that—

- (a) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made; and
- (b) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

Implied
indemnity
of trustees.
586, 1893,
s. 26.
U.K. 15
Geo. 5 c. 19,
s. 30.

35. (1) A trustee shall, without prejudice to the provisions of the instrument (if any) creating the trust, be chargeable only for money, stocks, funds, and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities are deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless it happens through his own wilful default.

(2) A trustee may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

PART III.

PART III.

POWERS OF THE COURT.

Appointment of new trustees and vesting orders.

36. (1) The Supreme Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there be no trustee. In particular, and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of treason or felony, or has been adjudicated bankrupt or made an assignment or composition or arrangement with his creditors under any Act in force in that behalf, and may remove such last-mentioned trustee.

Power of the court to appoint new trustees.
586, 1893, s. 27.
U.K. 15 Geo. 5 c. 19, s. 41.

(2) An order under this section, and any consequential vesting order or conveyance shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section shall give power to appoint an executor or administrator.

37. In any of the following cases, namely:—

- i. Where the Supreme Court appoints or has appointed a new trustee:
- ii. Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person—
 - (a) is a lunatic or person of unsound mind; or
 - (b) is an infant; or
 - (c) is out of the jurisdiction of the Supreme Court; or
 - (d) cannot be found:

Vesting order as to land.
586, 1893, s. 28.
U.K. 15 Geo. 5 c. 19, s. 44.

s. 36. In the goods of JOHN SMITH (deceased) (1876) 10 S.A.L.R. 178. Held (under the Trustee Act, 1855), that the Supreme Court had no power on petition to order the appointment of trustees of real estate under a will where no trusts were contemplated.

- iii. Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land or entitled to a contingent right therein:
- iv. Where it is uncertain whether the last trustee known to have been entitled to or possessed of any land, or entitled to a contingent right therein, is living or dead:
- v. Where there is no personal representative of a deceased trustee who was entitled to or possessed of land or entitled to a contingent right therein, or where it is uncertain who is the personal representative or devisee of a trustee who was entitled to or possessed of land or entitled to a contingent right therein: and
- vi. Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement:

the Supreme Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct: Provided that—

- (a) where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and
- (b) where the order relates to a trustee entitled jointly with another person, and that trustee is out of the jurisdiction of the Supreme Court or cannot be found, the land or right shall be vested in that other person, either alone or with some other person.

38. Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land on any trust, the Supreme Court may make an order releasing the land from the contingent right,

Contingent rights of unborn trustees. 586, 1893, s. 29. U.K. 15 Geo. 5 c. 19, s. 45.

or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

39. A vesting order under any of the foregoing provisions shall—

Effects of vesting order.
586, 1893,
s. 35.
Cf. U.K.
15 Geo. 5
c. 19, s. 49.

(a) in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the court directs; and

(b) in every other case have the same effect as if the trustee, or other person, or description or class of persons to whose rights or supposed rights the said provisions respectively relate, had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

40. In all cases where a vesting order can be made under any of the foregoing provisions the Supreme Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Power to appoint person to convey.
586, 1893,
s. 36.
U.K. 15
Geo. 5 c. 19,
s. 50

41. (1) In any of the following cases, namely:—

Vesting orders as to stock and choses in action.
586, 1893,
s. 37.
U.K. 15
Geo. 5 c. 19,
s. 51.

I. Where the Supreme Court appoints or has appointed a new trustee: and

II. Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(a) is a lunatic, a person of unsound mind, or an infant; or

(b) is out of the jurisdiction of the Supreme Court; or

(c) cannot be found; or

- (d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto, for twenty-eight days next after a request in writing has been made to him by the person so entitled; or
- (e) neglects or refuses to transfer stock, or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the Supreme Court for that purpose has been served on him; or

III. Where it is uncertain whether a trustee entitled, alone or jointly with another person, to stock or to a chose in action is alive or dead:

the Supreme Court may make an order vesting the right to transfer or call for a transfer of stock or to receive the dividends or income thereof, or to sue for or recover a chose in action in any such person as the court may appoint: Provided that—

- (a) where the order is consequential on the appointment by the court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees: and
- (b) where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person, either alone or jointly with any other person whom the court may appoint.

(2) In all cases where a vesting order can be made under this section the court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act may transfer the stock to himself or any person, according to the order; and all companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section, it shall not be lawful for any company to transfer any stock to which the order relates, or to pay any dividends thereon, except in accordance with the order.

(5) The Supreme Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

42. An order under this Act for the appointment of a new trustee, or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

Persons entitled to apply for vesting orders.
586, 1893, s. 39.
U.K. 15 Geo. 5 c. 19, s. 58.

43. Every trustee appointed by a Court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

Powers of new trustee appointed by Court
586, 1893, s. 40.
U.K. 15 Geo. 5 c. 19, s. 43.

44. The Supreme Court may order the costs of and incident to any application for an order appointing a new trustee, or for a vesting order, or for an order releasing or disposing of a contingent right, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the application is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

Power to charge costs on trust estate.
586, 1893, s. 41.
U.K. 15 Geo. 5 c. 19, s. 60.

45. The powers conferred by this Act as to vesting orders may be exercised for vesting any land, stock, or chose in action in any trustee of a charity or society over which the Supreme Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the Supreme Court under its general or statutory jurisdiction.

Trustees of charities.
586, 1893, s. 42.
U.K. 15 Geo. 5 c. 19, s. 52.

46. (1) Where a vesting order as to any land has been made under this Act, or under any Act relating to lunacy, founded on an allegation of any of the following matters, namely:—

Orders made upon certain allegations to be conclusive evidence.
586, 1893, s. 43.
U.K. 15 Geo. 5 c. 19, s. 55.

(a) the infancy or personal incapacity of a trustee or representative; or

- (b) that a trustee is out of the jurisdiction of the Supreme Court, or cannot be found; or
- (c) that it is uncertain which of several trustees was the survivor; or
- (d) whether the last trustee is living or dead; or
- (e) that any trustee has died intestate without personal representatives, or has died and it is not known who is his personal representative,

the fact that the order has been so made shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order.

(2) This section shall not prevent the Supreme Court from directing a conveyance, or a redistribution of any contingent right, or the payment of costs occasioned by any such order if improperly obtained.

Payment into court by trustees and mortgagees.

Payment into Court by trustees and mortgagees. 586. 1893, s. 44. U.K. 15 Geo. 5 c. 19, s. 63.

47. (1) Trustees or mortgagees, or the majority of trustees or mortgagees, having in their hands or under their control money or securities belonging to a trust, or in respect whereof a trust has arisen by implication or construction of law, may, on filing an affidavit shortly describing the instrument under or in consequence of which the trust arises, according to the best of their knowledge and belief, or if there be no such instrument, then shortly setting out the facts of the case, pay the money or securities into the Supreme Court.

(2) On such payment the money or securities shall, subject to rules of court, be dealt with according to the orders of the Supreme Court, which may also order the administration of the trusts in respect of the money or securities.

(3) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(4) Where any moneys or securities are vested in any persons as trustees or mortgagees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the Supreme Court may order the payment into court to be made by the majority

s. 47. In *re* the effects of POOLE (deceased) (1884) 18 S.A.L.R. 62. Order made for payment of fund out of court to petitioner (one of the beneficiaries under a will) on her own security, where there was no reasonable probability of adverse claimants.

without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court, and every transfer, payment, and delivery made in pursuance of any such order shall be valid and take effect as if it had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

Sales of trust property.

48. (1) Where a trustee has, by the instrument creating the trust, power, subject to the direction, request, or authority of any person, to sell, convey, assure, mortgage, or otherwise deal with property, and that person is dead, of unsound mind, a lunatic, under disability, or absent from the State, the Supreme Court may authorise the trustee to sell, convey, assure, mortgage, or otherwise deal with the property as if such direction, request, or authority had been given, but the power conferred by this section shall not be exercised so as to injuriously affect any beneficial interest of such person.

Trustee to have power to sell or convey in certain cases. 586, 1893, s. 48.

(2) This section applies to trusts created either before or after the commencement of this Act.

(3) This section shall authorise the Supreme Court to confirm any sale, conveyance, assurance, mortgage, or other dealing heretofore made or executed by such trustee in any case in which the court, under this Act, would have authorised the same had it not been made or executed.

49. The Supreme Court, on the application, *ex parte* or otherwise, of—

- (a) a trustee, or
- (b) the Public Trustee, or
- (c) any beneficiary interested in the trust property with respect to which the application is made, or
- (d) a next friend on behalf of any such beneficiary who is not *sui juris*,

Power for Court to authorise purchase of trust property by trustee. 944, 1907, s. 7. 1196, 1915, s. 4.

and on being satisfied, by such evidence as the said court deems sufficient, that it will be advantageous to the beneficiaries, may authorise a sale of that property, or any part thereof, by the trustee to himself, or to himself and any other person, for his or their own use and benefit, notwithstanding

that the property so to be sold has not been offered for sale by public auction or otherwise: Provided that the power conferred by this section shall not be exercised contrary to any express prohibition contained in the instrument whereby the trust was created.

Power to sanction sale of land or minerals separately. 586, 1893, s. 49. Cf. U.K. 15 Geo. 5 c. 20, s. 92.

50. (1) Where a trustee is for the time being authorised to dispose of land by way of sale, exchange, or partition, the Supreme Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or may sanction his so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

(2) Any such trustee, with the said sanction previously obtained may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the court, so dispose of any such land or minerals.

(3) Nothing in this section shall derogate from any power which a trustee may have under any other Act or law.

Power of trustees to dispose of land held in trust for a church. 1743, 1926, s. 3. Cf. The Presbyterian Church of South Australia Act (1899), s. 2.

51. (1) Where land is held by trustees in trust for any church or the congregation of any church or any purpose thereof then, notwithstanding that the deed or other instrument creating the trust does not contain any power to sell, mortgage, or lease the land, or forbids any such transaction, it shall nevertheless be lawful for the trustees from time to time to sell, mortgage, or lease the land upon such terms and conditions as the trustees think fit, subject, however, to the observance of the following conditions:—

- I. The consent of the congregation of the church in question shall be obtained to every such transaction:
- II. The consent shall be obtained by a vote of the members of the congregation at a meeting of the congregation called and held pursuant to notice in that behalf duly given from the pulpit of the church on at least two consecutive Sundays immediately preceding the holding of the meeting and also duly given in each of two successive issues of two newspapers circulating in the locality in which the church is situated and published at least one week before the holding of the meeting:

III. The consent of the congregation shall not be deemed to have been given unless two-thirds of the members present and voting at a meeting held as aforesaid consent to the transaction.

(2) At every meeting held under this section the person who by the constitution or rules of the church ordinarily presides at any business meeting of or in connection with the church shall preside. In the absence of that person, or if it is not provided in the constitution or rules who is to preside at any such meeting, the members present shall elect one of their number to preside at the meeting. The person so elected shall be either the minister or priest in charge of the church or a person who holds some office of or in connection with the church.

(3) The decision of the person presiding at any meeting held under this section as to the right of any person to vote at the meeting shall be final.

(4) A certificate in writing under the hand of the person presiding at any meeting held under this section shall be conclusive evidence that the meeting was duly called and the consent of the congregation to the transaction in question was duly obtained.

(5) No person shall, for the purposes of this section, be deemed to be a member of a congregation of a church or to be entitled to vote at any meeting held under this section unless he is such a person as is by or under the constitution or rules of the church entitled to vote at any business meeting of or in connection with the church.

52. (1) If any land is sold or mortgaged as provided in the last preceding section the trustees shall stand possessed of the net proceeds thereof upon trust to apply those proceeds for such purpose of the church or the congregation thereof and in such manner as is determined by the vote of the members of the congregation ascertained in manner provided by the last preceding section at any meeting called and held in manner provided by that section.

Power to apply proceeds of sale, mortgage, or lease.
1743, 1926, s. 4.

(2) If any land is leased as provided in the last preceding section the net proceeds thereof shall be applied by the trustees for such purpose of the church or the congregation thereof and in such manner as is determined by the trustees.

53. (1) Where land is held by an association for any religious purpose or for any purpose for the advancement of religion, whether upon trust or otherwise, then, notwithstanding that the deed or other instrument creating the trust or the rules or articles of the association do not contain any

Power of association holding land in trust for religious purposes to dispose of same.
1743, 1926, s. 5.

power to sell, mortgage, lease, transfer, or convey the land, or forbid any such transaction, it shall nevertheless be lawful for the association to sell, mortgage, lease, transfer, or convey the land upon such terms and conditions as the association thinks fit, subject, however, to the observance of the following conditions:—

- i. The consent of the members of the association shall be obtained to every such transaction :
- ii. The consent shall be obtained by a vote of the members of the association at a meeting called and held pursuant to not less than seven days' notice by post in that behalf duly given to every member of the association :
- iii. The consent of the association shall not be deemed to have been given unless a majority of the members of the association voting at a meeting held as aforesaid consent to the transaction :
- iv. The consent in writing of the Attorney-General shall be obtained to every such transaction.

(2) If any land is sold, mortgaged, leased, transferred, or conveyed as provided in subsection (1) hereof the association shall stand possessed of the net proceeds thereof (if any) upon trust to apply them for such religious purpose or such purpose for the advancement of religion as is determined by a vote of the members of the association ascertained in manner provided by subsection (1) hereof at any meeting called and held in manner provided by that subsection.

(3) For the purposes of this section "association" means any association which is incorporated or deemed to be incorporated pursuant to the Associations Incorporation Act, 1929.

54. Nothing in the last three preceding sections shall in anywise be construed so as to limit any power to sell, mortgage, or lease, given to any trustees under any deed or other instrument of trust.

55. With the consent of the court, and notwithstanding anything contained in Act No. 10 of 1847, or any reservation or proviso contained in the land grants of land granted for ecclesiastical purposes to be held in conformity with that Act, the trustees in whom the legal estate of that land is vested shall have power to sell the land.

Restriction of application of Act.

1743, 1926, s. 6.

Trustee may sell land with consent of Court.
944, 1907, s. 6.

Relief from liability for breach of trust.

56. If it appears to the Supreme Court—

(a) that a trustee is, or may be, personally liable for any breach of trust (whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act), but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the said court in the matter in which he has committed such breach,

then the said court may relieve the trustee, either wholly or partly, from personal liability for the breach of trust.

57. (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Supreme Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate, by way of indemnity to the trustee or any person claiming through him.

(2) This section shall apply to breaches of trust committed as well before as after the commencement of this Act.

Miscellaneous.

58. Where in any action the Supreme Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the court, and that he cannot be found, the court may hear and determine the action, and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

59. Every executor and trustee shall, if so required by and at the cost of any beneficiary requiring the same, file annually in the Supreme Court an account of his administration of the testator's estate; and the Public Trustee shall, on the request of a majority or of half of the beneficiaries and at their cost, audit the accounts so filed.

Jurisdiction of Supreme Court in cases of breach of trust.

1196, 1915, s. 5.
U.K. 59 and 60 Vict. c. 35, s. 3.
U.K. 15 Geo. 5 c. 19, s. 61.

Power to make beneficiary indemnify for breach of trust.

586, 1893, s. 50.
U.K. 15 Geo. 5 c. 19, s. 62.

Power to give judgment in absence of a trustee.

586, 1893, s. 47.
U.K. 15 Geo. 5 c. 19, s. 59.

Accounts to be filed by trustee when required.

944, 1907, s. 8.

s. 56. In *re* WILKINSON; ELDER'S TRUSTEE AND EXECUTOR COMPANY LIMITED v. WILKINSON AND OTHERS (1924) S.A.S.R. 47. An originating summons for directions is not a proper proceeding in which the court may make a declaration under s. 56, where all parties do not consent.

PART IV.

PART IV.

CHARITABLE TRUSTS PROCEDURE.

In cases of breach of trust, etc., petition may be presented to Supreme Court.
1538, 1922, s. 2.
U.K. 52
Geo. 3, c. 101.

60. In every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of the Supreme Court shall be deemed necessary for the administration or management or to the advantage or benefit of any trust created for charitable purposes, it shall be lawful for—

- (a) any two or more natural persons who are objects of such trust; or
- (b) the trustees appointed by or in pursuance of the instrument or of the Act of Parliament creating the trust; or
- (c) the Attorney-General:

to present a petition to the Supreme Court, stating such breach or supposed breach, or the grounds upon which such direction or order is necessary, as the case may be, and praying such relief as the nature of the case may require.

Petition to be accompanied by affidavit.
1538, 1922, s. 3.

61. Every petition shall be accompanied by an affidavit made by one of the persons presenting the petition or any other person who can swear positively to the facts, verifying the petition and the grounds on which the proposed relief is sought.

Petition to be heard in open Court.
1538, 1922, s. 4.

62. Every petition shall be heard in open court.

Evidence may be brought by affidavit or otherwise.
1538, 1922, s. 5.

63. (1) Any petitioner or other person appearing at the hearing of the petition may bring before the court evidence by affidavit, or, if the court so directs, oral evidence, and the court may call upon any petitioner or other person appearing at the hearing of the petition to prove before it, by affidavit or otherwise, as the court directs, such matters as the court thinks fit.

(2) The attendance of any witness or the production of any document for the purposes of this section may be enforced by *subpœna* issued at the instance of the person requiring such attendance or production.

Service of petition and copy of affidavit.
1538, 1922, s. 6.

64. The petition, together with a copy of the accompanying affidavit, shall be served upon the Attorney-General where the petition is presented by some person other than the Attorney-General, and upon such other persons as the court may direct.

PART IV.

- 65.** The Attorney-General may appear and address the court, either personally or by counsel, at the hearing of the petition.
- 66.** With the leave of the court, any person interested who has not been served with the petition may appear and address the court on the hearing of the petition, but shall not be allowed costs out of the trust funds unless the court so directs.
- 67.** The court may make such order upon the petition as to it seems just, or may refuse to make any order, or may direct that the right to the relief sought be determined in an action to be brought for that purpose.
- 68.** The court may make such order as to costs as to the court may seem just, and may order any petitioner to pay the taxed costs of any person appearing at the hearing in pursuance of section 66.
- 69.** The authority and jurisdiction by this Act vested in the Supreme Court may, subject to any rules or orders of that court in relation thereto, be exercised by a single judge of such court.

Attorney-General may address Court at hearing.
1538, 1922, s. 7.

With Judge's consent any person may address Court.
1538, 1922, s. 8.

Powers of Court in dealing with petition.
1538, 1922, s. 9.

Court may order costs.
1538, 1922, s. 10.

Powers of Supreme Court may be exercised by a single Judge.
1538, 1922, s. 11.

PART V.

PART V.

SPECIAL PROVISIONS AS TO APPOINTMENT OF NEW TRUSTEES.

- 70.** This Part is permissive only, and trustees may be appointed and trust estates may be transferred, conveyed, and assigned as if this Part had not been passed.
- 71.** This Part shall not apply to trust estates held upon any trust created by an instrument expressly forbidding the application of this Part; but, except as provided by this section, this Part shall apply to all trust estates.
- 72.** In this Part—
“trust estates” includes real and personal estate of every description held upon trust:

This part to be permissive.
586, 1893, s. 51.

Application of this part.
586, 1893, s. 52.

Interpretation.
586, 1893, s. 53.

“appointment of new trustees” includes every appointment of new trustees, and whether such new trustees are to act solely or jointly with any old trustees.

Form of appointment of new trustee.
586, 1893, s. 54.

73. Any appointment of new trustees, if signed by the persons entitled to exercise the power of appointment and by the new trustees, and attested in manner prescribed by The Real Property Act, 1886, for the attestation of instruments, and made in the form or to the effect contained in the first schedule hereto, or as near thereto as circumstances will permit, shall be sufficient and valid and effectual to all intents and purposes, so far as regards the form and mode of execution and attestation thereof.

Extension of power of appointing new trustees.
586, 1893, s. 55.

74. (1) Any power of appointing new trustees vested in any persons within the State, jointly with any persons absent therefrom, and who have been continuously absent therefrom for at least one year then immediately preceding, may be exercised by the persons within the State solely as if the power were exclusively vested in them.

(2) The power conferred by this section on the said persons within the State shall extend to authorise the appointment of new trustees in the places of any trustees absent from the State, and having been continuously absent therefrom for at least one year immediately preceding the appointment of new trustees, and such trustees on any appointment of new trustees in their places shall cease to be trustees.

Appointment of new trustees may be registered.
586, 1893, s. 56.

75. On any appointment of new trustees, a memorandum of that appointment may be registered in the General Registry Office or in the Lands Titles Registration Office, at Adelaide.

Registration to vest estates in new trustees.
586, 1893, s. 57.

76. On the registration of any memorandum of the appointment of new trustees, those trustees shall be deemed to be duly appointed, and the trust estates held upon the trusts to which such new trustees are appointed shall, without any conveyance, transfer, or assignment, vest in the new trustees, either solely or jointly with the old trustees, as the case may require, for all the estate and interest of the old trustees therein, subject to the trusts affecting such trust estates then subsisting, and capable of taking effect: Provided that—

(a) in order to affect any land not held under the provisions of The Real Property Act, 1886, the memorandum shall be registered in the General Registry Office:

(b) in order to affect any land held under the provisions of The Real Property Act, 1886, the memorandum shall be registered in the Lands Titles Registration Office, and the Registrar-General shall enter in the register book a memorial of such memorandum.

77. Upon the entry in the register book of the memorial provided for by subdivision (b) of the preceding section, the persons in whom the trust estates vest pursuant to the said section shall be the registered proprietors thereof for all the purposes of The Real Property Act, 1886.

Registered proprietors.
586, 1893,
s. 58.

78. (1) Whenever any land is brought or dealt with under the provisions of The Real Property Act, 1886, the application or instrument affecting the same may require the registration consequent thereon, if in favour of two or more persons, to be made with the addition of the words "with power of disposition to any registered proprietors" specifying in that application or instrument a smaller number of registered proprietors.

Registration with power of disposition to lesser number of joint owners.
586, 1893,
s. 59.

(2) Thereupon the Registrar-General shall include in the registration the words desired, and thereafter, whilst the registration continues, the number of registered proprietors so specified whilst registered with others as joint owners may deal with and dispose of the registered estate or interest as if they were registered as sole proprietors thereof.

79. Every memorandum of the appointment of new trustees presented for registration pursuant to this part of this Act shall be in the form contained in the second schedule hereto, and shall contain the particulars therein referred to.

Form of memorandum of appointment of new trustee.
586, 1893,
s. 60.

80. (1) No memorandum of the appointment of new trustees shall be received for registration unless the contents thereof are verified by affidavit or declaration accompanying such memorandum in the form contained in the third schedule hereto, and made by the persons entitled to exercise and exercising the power by which the new trustees are appointed, or, if such persons number more than three, by any three of such persons.

Verification of memorandum.
586, 1893,
s. 61.

(2) Such an affidavit or declaration shall for all purposes be *prima facie* evidence of the truth of the statement contained therein.

81. When a power of appointing new trustees in exercisable and exercised by any meeting or body of persons by resolution or voting, the affidavit or declaration required to be

Verification of memorandum in special case.
586, 1893,
s. 62.

PART V.

made by the preceding section may be made by any three persons present at the exercise of such power, of whom the chairman or person presiding shall be one.

Preservation
of powers of
Registrar-
General.
586, 1893,
s. 63.

82. Nothing in this Part, or implied by this Part, or to be done in pursuance of this Part, shall be construed to affect the title of any registered proprietor with notice of any trust, or otherwise to limit the right of any registered proprietor to deal with the estate or interest of which he is registered proprietor for all the purposes of The Real Property Act, 1886, as absolute owner, or to defeat, limit, or prejudice any power or discretion vested in the Registrar-General under The Real Property Act, 1886, but all such powers and discretions may be exercised by the Registrar-General with reference to proceedings under this Act; and for the purpose of such proceedings this Part shall be incorporated with The Real Property Act, 1886, and all persons shall be subject to the provisions thereof.

Preservation
of liability of
trustee.
586, 1893,
s. 64.

83. Nothing in this Part, or implied by this Part, or to be done in pursuance thereof, shall release any trustee from any liability for any breach of trust.

False
affidavit or
declaration.
586, 1893,
s. 65.

84. It shall be sufficient if an affidavit or declaration under section 80 purports to be made under the Trustee Act, 1936, and any person wilfully making a false statement in any such affidavit or declaration shall be guilty of perjury.

PART VI.

PART VI.

MISCELLANEOUS AND SUPPLEMENTAL.

Commission
concerning
person of
unsound
mind.
586, 1893,
s. 66.

85. Upon any petition being presented under this Act to the Supreme Court concerning a person of unsound mind, the court may direct a commission in the nature of a writ *de lunatico inquirendo* to issue as to such person, and may postpone making an order on such petition until after the return to the commission.

Provisions of
Act in
addition to
unrepealed
Act.
586, 1893,
s. 67.

86. The provisions of this Act are in addition to those of any other enactment.

87. (1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of The Settled Estates Act, 1880, whether appointed by the court or by the settlement, or under provisions contained in the settlement.

Application to trustee under Settled Estates Act of provisions as to appointment of trustees.
586, 1893, s. 68.
Cf. U.K. 15 Geo. 5 c. 19, s. 64.

(2) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this Act.

(3) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act.

88. Property vested in any person on trust, or by way of mortgage, shall not, if that person becomes a convict within the meaning of Part X. of the Criminal Law Consolidation Act, 1935, vest in any curator appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his personal representative, as if he had not become a convict: Provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

Trust estates not affected by trustee becoming a convict.
586, 1893, s. 71.
U.K. 15 Geo. 5 c. 19, s. 65.

89. (1) The Registrar-General shall, on receiving any vesting order or transfer made in pursuance of an order of the Supreme Court under this Act of land under the provisions of The Real Property Act, 1886, register the order or transfer by making an entry thereof in the register book.

Registration of vesting order or transfer.
186, 1893, s. 76.

(2) Thereupon the person in whose favour the vesting order is made, or the transferee, shall be the registered proprietor of the land, and the Registrar-General may register any such vesting order or transfer without requiring the production of the duplicate certificate or other instrument of title.

90. (1) Any person entitled to apply for an order of the Supreme Court under this Act may apply by summons or upon petition, and may give evidence, by affidavit or otherwise, in support of that summons or petition, and may serve such person or persons with notice of the application as he may deem entitled to service thereof.

Parties entitled may apply to the Court by summons or petition.
586, 1893, s. 77.

(2) Upon hearing the application the Court may either dispose of the matter in the first instance, or may direct a

reference to the Master to inquire into any facts which require investigation, or may direct the application to stand over until the right of the applicant has been declared in an action instituted for that purpose, or to enable the applicant to adduce evidence, or for further consideration, or to enable notice or any further notice of the application to be served upon any person, and may deal with the applicant, and may make such order with respect to costs as shall seem just.

Advice and directions of court and commission. 586, 1893, s. 78.
Amended by S.L.R. Act, 1937.

91. Sections 69 and 70 of The Administration and Probate Act, 1919, apply to trustees as defined by this Act, and section 90 of this Act shall extend to applications under either of the same sections, but without limiting the powers of the Supreme Court, apart from the said section 90, with regard to such applications.

Power to make order in a cause. 586, 1893, s. 79.

92. When in any action or matter, either by the evidence adduced therein, or by the admission of the parties, or by a report of the Master, the facts necessary for an order under this Act appear to the Supreme Court to be sufficiently proved, the court may either upon the hearing of the action or any petition or motion in the action or matter, make such order under this Act.

Indemnity. 586, 1893, s. 80.
U.K. 15
Geo. 5 c. 19, s. 66.

93. This Act, and every order purporting to be made under this Act, shall be a complete indemnity to all companies and persons for any acts done pursuant thereto; and it shall not be necessary for any company or person to inquire concerning the propriety of the order, or whether the court by which it was made had jurisdiction to make the same.

SCHEDULES.

FIRST SCHEDULE.

APPOINTMENT OF NEW TRUSTEES.

Pursuant to Part v. of the "Trustee Act, 1936," we [*here set out names, addresses, and occupations*], being persons entitled to exercise and exercising the power of appointing new trustees of the trust hereinafter referred to, do hereby appoint [*here set out names, addresses, and occupations of new trustees*], to be new trustees [*here if necessary insert "jointly with"*] [*here insert names, addresses, and occupations of the old continuing trustees*] of the trust constituted under [*here set out shortly particulars of the instrument creating the trust, including date, and name of person by whom trust was created*], and we the said [*here insert names of new trustees*] do hereby accept the said trusteeship.

Dated this day of , 19 .

[*To be signed by the persons exercising the power of appointment, and by the new trustees, and to be attested.*]

SECOND SCHEDULE.

MEMORANDUM OF THE APPOINTMENT OF NEW TRUSTEES.

Pursuant to Part v. of the "Trustee Act, 1936," it is hereby certified as follows:—

1. The trust is constituted under [*here set out shortly particulars of the instrument creating the trust, including date and names of persons by whom trust created*].

2. The trust estates consist of [*here set out shortly the trust estates, giving particulars sufficient to identify, so far as practicable, and, as regards real estate, giving the last registration reference, and the estate or interest of the trustees*].

3. The names, addresses, and occupations of the trustees on the constitution of the trust (*or, whichever shall last happen, on the last appointment of trustees, dated the* day of , 19) were [*here set out names, addresses, and occupations*].

4. The power of appointing new trustees is vested in [*here set out person in whom it is vested*] by virtue of the provision in that behalf contained in [*here set out where contained. Add, if provision not contained in Act of Parliament*] and of which provision the following is a copy [*here set out copy*].

5. The power of appointing new trustees of the said trust has been lawfully exercised by the persons entitled to exercise the same by the appointment of the new trustees mentioned in the next paragraph.

6. The person in whom the trust estates will become vested on compliance with the provisions of Part v. of the "Trustee Act, 1936," are as follows:—

First.—Old continuing trustees [*here set out names, addresses, and occupations of old trustees, if any*].

Secondly.—New trustees [*here set out names, addresses, and occupations of new trustees*].

Dated this day of , 19 .

[*To be signed by the persons entitled to make the affidavit or declaration verifying, and to be attested.*]

THIRD SCHEDULE.

We [*here set out names, addresses, and occupations of deponents*], the persons signing the memorandum of the appointment of new trustees above written (*or annexed thereto, as the case may be*), severally make oath and swear (*or, as the case may be, solemnly and sincerely declare*) as follows, that is to say:—

1. The statements contained in the said memorandum are true in every particular.

2. We are [*here show authority to make the affidavit or declaration, as, for instance, "the persons entitled to exercise and exercising the power by which the new trustees are appointed."*]

[*To be signed and severally sworn or declared by all deponents before a notary public or a Justice of the Peace.*]

Rules of Court.

The following rules of court as to proceedings under this Act were in force on 8th November, 1937:—

RULES OF COURT, 1937—

Gazette—4th November, 1937, p. 1225.