

Trustee Bill.

TABLE showing repealed Acts and sections of Acts and how the same have been dealt with.

Act.	Sections.	Subject.	How dealt with.	Section of Trustee Bill.
1897, No. 17	82-90	Renewable leaseholds	Repealed and re- placed by.	24
1898, No. 4 (Trustee)	1-3	Short title : Repeal : Interpretation	Repealed and re- placed by.	1-5
	4 (1)	Investments	Repealed	6
	4 (2)	Substitution of investments	Repealed and re- enacted.	7
	5	Investments	Repealed and re- placed.	6 (1) (g)
	6, 7	Appointment of new trustees	Repealed and re- placed.	10
	8	Powers of sale, &c., to raise money charged by a testator.	Repealed, unneces- sary ; see Wills, Probate and Ad- ministration Act, 1898.	
	9-17	Powers of sale, lease, exchange, &c.	Repealed and re- placed.	14-19
	18	Power to apply income of infants for maintenance.	Repealed and re- placed.	31
	19	Payments under power of attorney	Repealed	29
	20	Petitions for advice	Repealed and re- enacted.	32
	21	Tenants for life may execute power notwithstanding encumbrances.	Repealed ; see Settled Estates and Settled Land Act.	
	22	Powers may be negatived by express declaration.	Repealed and re- enacted ; see various sections.	
	23	No persons other than those entitled under settlement to be affected.	Repealed and re- enacted ; see various sections.	
	24	Operation of part of Act.....	Repealed	
	25-28	Appointment of new trustees by Court.	Repealed and re- placed by.	39
	29	Vesting orders as to land	Repealed and re- placed by.	40
30	Contingent right of unborn trustee	Repealed	41	
31	Vesting of lands of infants or insane mortgagee.	Repealed	42	
32	Power to convey in place of mort- gagee.	Repealed	43	
33, 34	When a decree is made for sale of real estate for payment of debts.	Repealed	44	

TABLE showing repealed Acts and sections of Acts and how the same have been dealt with—*continued*.

Act.	Section.	Subject.	How dealt with.	Section of Trustee Bill.
1898, No. 4 (Trustee)— <i>continued</i> .	35	Vesting order consequential or judgment for specific performances, &c.	Repealed	45
	36	Effect of vesting order	Repealed	46
	36 (3)	.....	Repealed; see Conveyancing Act.	
	37	Power to appoint person to convey	Repealed and replaced by.	47
	38	Vesting orders of stock or choses in action.	Repealed	40
	39	Vesting order of stock of insane mortgagee.	Repealed	42
	40-42, 43 (2)	Transfer of stock	Repealed	40
	43 (1)	Indemnity to companies	Repealed	66
	44	Effect of an order vesting legal right in chose in action.	Repealed	40
	45	Trustees of charities	Repealed and replaced by.	51
	46	Who may apply	Repealed and replaced by.	48
	47-53	Power to go before Master in first instance; costs, &c.	Repealed, obsolete	
	54	Costs may be paid out of the estate.	Repealed and replaced by.	50
	55	Proceedings in lunacy may be directed.	Repealed and re-enacted.	56
	56	Suit may be directed	Repealed and re-enacted.	57
	57	Judgment in absence of trustee....	Repealed and replaced by.	54
	58	Orders made upon certain allegations to be conclusive evidence.	Repealed	52
	59-61	Trustees may pay trust funds into Court.	Repealed	58
	62	Certain moneys of infants, &c., to be paid into Court.	Repealed and re-enacted.	59
	63	Receipt of Master to be a discharge to trustees.	Repealed	59
	64	Trustees' receipts.....	Repealed	25
	65-66	No escheat of property held upon trust or mortgage.	Repealed and re-enacted.	62
	67	Divesting of trust estates from Chief Justice.	Repealed and re-enacted.	See 64
	68	Power to compel trustees to account	Repealed	65
	69	Implied indemnity of trustees.....	Repealed and replaced by.	30
	70	Power to make rules	Repealed	68
	1900, No. 24 (Partition).	6	Application of section 35 of Trustee Act, 1898.	Repealed and included in.	45
1902, No. 98 (Trustee Amendment).	1	Short title and operation.....	Repealed .....	.....
	2-4	Investments by trustees.....	Repealed and re-enacted.	8
	5	Retirement of trustees	Repealed and re-enacted.	11
	6	Interpretation of section 6 of Trustee Act, 1898.	Repealed and covered by.	10

TABLE showing repealed Acts and sections of Acts and how the same have been dealt with—*continued*.

Act.	Section.	Subject.	How dealt with.	Section of Trustee Bill.
1902, No. 98 (Trustee Amendment) — <i>continued</i> .	7	Advertisement of proposed appointment of Trustee Company.	Repealed and re-enacted.	67
	8	Court may sanction retirement of trustee without appointment of successor.	Repealed and included in.	39
	9	Relief from breaches of trust.....	Repealed and re-enacted.	53
	10	Improvements of trust property ...	Unrepealed; to be incorporated in Settled Land Bill.	
1915, No. 31 (Trustee Delegation of Powers).	{ 1	Short title	Repealed	17
	{ 2	Definition	Repealed and covered by.	5, 61
	3	Absent trustees may delegate certain person.	.....	} 33
	4	Consent of other trustees .....	.....
	5	Original trustee to remain liable ...	.....	34
	6	Validation .....	.....	35
	7	Liability of delegate .....	.....	34
8	Protection of persons dealing with delegate.	.....	38	
	9	Protection of banks, &c. ....	.....	37
1916, No. 40	1-2	Sales by Trustees Confirmation Act, 1916.	Repealed, re-enacted, and extended.	.....

ENGLISH ACTS IN BILL.

Act.	Section.	Subject.	New South Wales Act.	Bill.
25 & 26 Vic., c. 108 (Confirmation of Sales).	1	Confirmation of sales by trustees	1916, No. 40. s. 2.	17
44 & 45 Vic., c. 41 (Conveyancing Act, 1881).	42	Management of infants' lands..	.....	21
45 & 46 Vic., c. 38 (Settled Land), 1882.	43	Maintenance of infants	1898, No. 4, s. 18	31
	17	Powers of trustees as to sale...	.....	16
51 & 52 Vic., c. 59 (Trustee, 1888).	8	Statute of limitations .....	.....	20
	1-4	Investment	1898, No. 4, s. 4.	6
56 & 57 Vic., c. 53 (Trustee, 1898).	8	Loans when not breach of trust	1902, No. 98, ss. 2, 4.	8
	9	" " " "	" " s. 3.	9
	10	Appointment of new trustees...	1898, No. 4, s. 6.	10
	11	Retirement of trustees	1902, No. 98, s. 5.	11
	12	Vesting of trust property	" " s. 5.	12, 13
	13	Purchase of sale... ..	.....	14
	14	Sale on depreciatory conditions	.....	15
15	Sale under Conveyancing and Law of Property Act, 1907, s. 46.	.....	18	
	17	Authority to solicitor, &c., to receive money.	.....	22

ENGLISH ACTS IN BILL.

Act.	Section.	Subject.	New South Wales Act.	Bill.	
56 & 57 Vic., c. 53 (Trustee, 1898)— <i>continued.</i>	18	Power to insure .....	.....	23
	19	Renewable leaseholds .....	.....	24
	20	Power to give receipts.....	1898, No. 4, s. 64.	25	
	21	Power for executors, &c., to compound, &c.	.....	26
	22	Powers of two or more trustees	.....	27
	23	Exoneration in respect of powers of attorney.	1898, No. 4, s. 19.	29	
	24	Implied indemnity .....	..... 69.	30
	25	Appointment of new trustees by Court.	{ 1898, No. 4, s. 25. } { 1902, No. 98, s. 8. }	39	
	26, 35	Vesting orders	1898, No. 4, ss. 29, 33.	40	
	27	Contingent rights of unborn persons.	„ s. 30.	41	
	28	Vesting in case of infant, &c., mortgagee.	„ ss. 31, 39.	42	
	29	Vesting in case of deceased mortgagee.	„ s. 32.	43	
	30	Vesting consequential on decree for sale.	„ ss. 33-34.	44	
	31	Vesting consequential on decree for specific performance	{ 1898, No. 4, s. 35. } { 1900, No. 24, s. 6. }	45	
	32	Effect of vesting order	1898, No. 4, s. 36.	46	
	33	Power to appoint person to convey.	„ s. 37.	47	
	36	Persons entitled to apply for orders.	„ ss. 46.	48	
	37	Powers of new trustees .....	.....	49
	38	Power to charge costs on trust estate.	1898, No. 4, s. 54 ...	50	
	39	Trustees of charities	„ s. 43.	51	
	40	Orders conclusive.....	„ s. 58.	52	
	42	Payment into court	„ s. 59.	58	
	43	Power to make decree in absence of trustee	„ s. 57.	54	
	44	Power to sanction sale of land and minerals separately.	.....	16
	45	Indemnity by beneficiary .....	.....	55
	48	Forfeiture for felony, &c.	1898, No. 6, ss. 65-66.	62	
	49	Indemnity to companies.....	„ s. 67.	63	
	50	Definitions.....	„ s. 3.	5	
	57 Vic., c. 10 (Trustee, 1893).	3	Power to sell land and minerals separately.	16
		4	Liability for continuing to hold investment.	9
	59 & 60 Vic., c. 8 (Payment into court by Life Assurance Co.).	Payment into court by life assurance companies.	60
	59 & 60 Vic., c 35 (Judicial Trustees).	3	Relief of trustees.....	53
	60 & 61 Vic., c 65 (Land Transfer).	4	Appropriation of land in satisfaction of legacy.	62
1 & 2 Geo. V, c 37 (Conveyancing, 1911).	8	Survivorship of trusts and powers.	.....	28
	9	Powers of trustees as to foreclosed property.	.....	19
	14	Amendment of 1881 Act .....	.....	21
5 Geo. V, c. 13	1	Delegation of powers by trustees.	1915, No. 31, ss. 3-4.	33, 34	
	2	Protection of persons dealing with delegate.	„ s. 9.	37	

[CONFIDENTIAL.]

(Rough Draft for Consideration Only.)

No. 1922.

A BILL

To amend and consolidate the law relating to trustees and trust property.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

1. (1) This Act may be cited as the "Trustee Act, 1922." Short title and commencement.

(2) This Act shall commence and come into operation on the _____ day of _____, one thousand nine hundred and twenty-two.

2. This Act is divided into Parts as follows :—

Division into parts.

PART I.—INTERPRETATION.

PART II.—TRUSTEES.

DIVISION 1.—*Appointment, retirement, and disclaimer.*

DIVISION 2.—*Powers and duties.*

DIVISION 3.—*Delegation.*

DIVISION 4.—*Statute of limitations.*

PART III.—POWERS OF THE COURT.

DIVISION 1.—*Appointment of new trustees and vesting orders.*

DIVISION 2.—*Relief and indemnity.*

DIVISION 3.—*Miscellaneous powers.*

PART IV.—PAYMENT INTO COURT.

PART V.—MISCELLANEOUS PROVISIONS.

3. (1) The Acts mentioned in the Schedule to this Act, to the extent to which the same are there expressed to be repealed, are hereby repealed. ^{Repeal of Acts.}

(2) All rules of court made under the authority of any Act hereby repealed and being in force at the commencement of this Act shall be deemed to have been made under the authority of this Act.

4. Except as hereinafter provided, this Act so far as it is inconsistent with the Public Trustee Act, 1913, shall not apply to the public trustee. ^{Application to public trustee.}

PART I.

INTERPRETATION.

5. In the interpretation of this Act, unless the context or subject-matter otherwise indicates or requires—

“Administrator” means administrator within the meaning of the Wills, Probate and Administration Act, 1898, and includes the public trustee acting as collector of an estate under an order to collect. See 56 & 57 Vic., c. 53, s. 50. 1898, No. 4, s. 3.

“Convey” and “conveyance,” applied to any person, include the execution or doing by that person of every necessary or suitable assurance or thing for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of property.

“Court” means the Supreme Court in its equitable jurisdiction.

“Decree” includes order.

“Executor” means the executor to whom probate has been granted and includes an executor by right of representation.

“Insane person” means a person who has been declared to be an insane person by the Supreme Court in its lunacy jurisdiction, or who has been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo.

“Instrument” includes deed will and Act of Parliament.

“Judge” means the Chief Judge in Equity, or any other judge of the Supreme Court exercising jurisdiction power or authority in equity.

“Land” includes tenements and hereditaments, corporeal and incorporeal, and every estate and interest therein, whether vested or contingent, freehold or leasehold, and whether at law or in equity.

“Legal

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- “Legal representative” means executor or administrator.
- “Mortgage” and “mortgagee” include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee.
- “Order” includes decree.
- “Pay into court” and “payment into court” in relation to stocks and securities, include the deposit or transfer of the same in or into court.
- “Person of unsound mind” means any person not an infant who is incapable, from infirmity of mind, to manage his own affairs, but is not an insane person as above defined.
- “Possessed” applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in any land.
- “Prescribed” means prescribed by or under this Act.
- “Property” includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest.
- “Right” includes estate and interest.
- “Security” includes stocks, funds, and shares.
- “Stock” includes 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 corporation company or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein.
- “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”

- “Trust” does not include the duties incident to an estate conveyed by way of mortgage; but, with this exception, includes 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 legal representative of a deceased person.
- “Trustee” has a meaning corresponding with that of trust.
- “Trustee company” means a company authorised by Act of Parliament of this State to act as trustee in New South Wales.
- “Trustee for sale” means a trustee in whom a trust for sale or a power of sale of property is vested.
- “Will” includes codicil.

PART II.

TRUSTEES.

DIVISION 1.—Appointment, retirement, and disclaimer.

Appointment.

(1) A new trustee may by registered deed be appointed under this Part in place of a trustee, either original or substituted, and whether appointed by the Court or otherwise.

Appoint-
ment.
See 56 & 57
Vic., c. 53,
s. 10.

(2) A new trustee may be so appointed in any of the following cases, namely—

See 1898,
No. 4, s. 6.
Vict. Act
1915,
No. 2,741,
s. 14.
1902, No. 98,
s. 6.

- (a) where a trustee is dead;
- (b) where a trustee remains out of New South Wales for more than two years;
- (c) where a trustee desires to be discharged from all or any of the trusts or powers reposed in or conferred on him;
- (d) where a trustee refuses or is unfit to act therein, or is incapable of acting therein.

(3)

Trustee.

(3) The appointment may be made—

- (a) by the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
- (b) if there is no such person, or no such person able and willing to act, then by the surviving or continuing trustees or trustee for the time being, or by the legal representatives of the last surviving or continuing trustee.

(4) The appointment may be made for the whole or any part of the trust property.

(5) Two or more new trustees may be appointed concurrently.

(6) The number of trustees may be increased. 56 & 57 Vic., c. 53, s. 10.

(7) A separate set of trustees may be appointed for any distinct part of the trust property, that is to say, for any part held on trusts distinct from those relating to any other part or parts, notwithstanding that no new trustees or trustee are or is to be appointed for other parts.

(8) Any existing trustee may be appointed or remain one of the separate set of trustees.

(9) If only one trustee was originally appointed, then one separate trustee may be appointed for the distinct part.

(10) 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.

(11) 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, or the public trustee, or a trustee company, to perform the trust.

(12) Any conveyance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(13)

Trustee.

(13) Every new trustee appointed under this Part, as well before as after all the trust property becomes by law or by conveyance or otherwise vested in him, shall 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.

(14) 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.

(15) The provisions of this section relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section, provided that where an appointment is made by the continuing trustees, or trustee, if any, the fact that the refusing or retiring trustee was willing to join shall not affect the validity of the appointment.

(16) The powers conferred by this section shall be in addition to the powers conferred by the instrument, if any, creating the trust. Exclusion of Re Sichel ([1916] 1 Ch. 358).

(17) 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.

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

Retirement.

(1) A trustee may by registered deed retire from the trust under this Part without any new trustee being appointed in his place. Retirement. See 56 & 57 Vic., c. 53, s. 11.

- (2) A trustee may not so retire, unless—
 - (a) his co-trustees and such other person, if any, as is empowered to appoint trustees, consent by the same or other registered deed to the retirement; and
 - (b) there will be left after the retirement at least two continuing trustees, or the public trustee, or a trustee company, to perform the trust.

(3)

Trustee.

(3) Two or more trustees may retire concurrently.

(4) The retirement shall discharge the trustee from the trust :

Provided that—

- (a) if in order to vest any part of the trust property in the continuing trustees alone, it is necessary that any conveyance should be executed and registered, the retiring trustee shall not be discharged in respect of that part, until the conveyance is executed and registered ;
- (b) at any time after the registration of the deed or deeds of consent and retirement the continuing trustees shall have the same powers authorities and discretions, and may in all respects act as if the retiring trustee were wholly discharged from the trust.

(5) Any conveyance or thing required for vesting the trust property in the continuing trustees alone shall be executed or done.

(6) 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.

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

Vesting on appointment and retirement.

(1) Where a new trustee is appointed, the execution and registration of the deed of appointment shall without any conveyance, except as otherwise provided in this section, vest in the persons who become tenants and for the purposes of the trust, the trust property for which the new trustee is appointed.

Vesting.
cf. 56 & 57
Vic., c. 53,
s. 12.
1902, No. 98,
s. 5.

(2) Where a trustee retires the execution and registration of the deed or deeds of consent and retirement shall without any conveyance, except as otherwise provided in this section, vest in the continuing trustees

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trustees alone as joint tenants and for the purposes of the trust, all the trust property which is jointly vested in the continuing trustees and the retiring trustee.

(3) In the case of land subject to the provisions of the Real Property Act, 1900, the property shall not vest until either—

- (a) the appropriate transfer is executed and registered, so that the property is duly transferred; or
- (b) the appropriate entries are made by the Registrar-General without any such transfer.

(4) In the case of—

- (a) property not subject to the provisions of the Real Property Act, 1900, which has been conveyed by way of mortgage for securing money subject to the trust;
- (b) property subject to the provisions of the Mining Act, 1906, or the Crown Lands Consolidation Act, 1913, or any other Act relating to Crown lands;
- (c) property a conveyance of which is required to be registered by any Act, whether of this State or otherwise, other than the Acts mentioned in paragraphs (a) and (b) of this subsection,

the property shall not vest until the appropriate transfer is executed and registered so that the property is duly transferred.

(5) In the case of any property that is only transferable in books kept by a corporation company or other body, or in manner directed by or under any Act, whether of this State or otherwise, the property shall not vest until it is duly transferred.

(6) If any property does not vest under this section until transfer or registration, the execution and registration of the deed of appointment, or of the deed or deeds of consent and retirement, as the case may be, shall nevertheless vest right to transfer or call for a transfer of the property, and to receive the income or dividends thereof, and to sue for or recover the property.

(6A) This section extends to an appointment by deed, or a retirement by deed, under the provisions of the instrument, if any, creating the trust. (7)

Trustee.

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

Disclaimer.

(1) If a person who is appointed by will both executor and trustee thereof renounces probate, or after being duly cited fails to apply for probate, the renunciation or failure shall be deemed to be a disclaimer of the trust contained in the will.

(2) This section applies only to a renunciation or failure after the commencement of this Act.

Registration.

(1) Any instrument by which a new trustee is appointed, or by which a trustee retires or disclaims, may be registered in the office of the Registrar-General as prescribed. Registration. See 56 & 57 Vic., c. 53, s. 12.

(2) This section extends—

- (a) to an appointment or retirement, whether under this Part or under the provisions of the instrument creating the trust or otherwise, and whether the trust does or does not relate to land subject to the provisions of the Real Property Act, 1900 ;
- (b) to a consent to a retirement.

(3) In the case of land subject to the provisions of the Real Property Act, 1900, where an appointment or retirement is registered. the Registrar-General is hereby authorised and directed to make the appropriate entries so that the property may be duly vested without any transfer :

Provided that the Registrar-General shall not be bound to make the entries until—

- (a) a written request is made to him by the persons in whom the property is to be vested ;
- (b) such evidence is given as he may reasonably require ; and
- (c) such notice, if any, is given to any other person as he may direct.

(4)

(4) Subsection three of this section shall apply to an appointment or retirement in exclusion of section fourteen of the Real Property (Amendment) Act, 1921.

(5) Nothing in this section shall prevent an appointment retirement or disclaimer from being registered under any law now in force.

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

DIVISION 2.—Powers and duties.

Investment.

(1) A trustee, unless expressly forbidden by the instrument, if any, creating the trust, may—

Authorised investments.
See 56 & 57 Vic., c. 53, ss. 1, 2.
1898, No. 4, s. 4.

- (a) invest any trust funds in his hands, whether at the time in a state of investment or not, in any of the securities authorised by this Act;
- (b) from time to time vary any such investment;
- (c) invest in any of the authorised securities, notwithstanding that the same may be redeemable and that the price exceeds the redemption value, and retain the security until redemption;
- (d) in the case of real securities, or of deposit in a bank, invest for a fixed period or otherwise.

(2) The securities authorised by this Act are—

- (a) any public funds or Government stock or Government securities of the Commonwealth of Australia, or any State thereof, or New Zealand or Fiji;
- (b) real securities in New South Wales;
- (c) any debentures mortgage deeds or bonds or other securities issued by the municipal council of Sydney or any municipal or shire council in New South Wales;
- (d) deposit in the Commonwealth Bank of Australia or the Government Savings Bank of New South Wales;
- (e) any of the stocks funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court.

(3)

(3) In particular and without prejudice to the generality of any other provision of this section, where a trustee is authorised by any instrument to invest in real or Government securities anywhere outside New South Wales, the authority shall be deemed to extend to investment in real or Government securities in New South Wales.

(4) The powers conferred by this section shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

(5) The powers conferred by this section shall be in addition to the powers conferred by the instrument, if any, creating the trust.

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

(1) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special condition, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(2) This section extends to transfers of existing securities as well as to new securities.

(3) This section applies to investments made before or after the commencement of this Act.

(1) A trustee lending money on the security of any 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, provided that it appears to the Court that the loan was made in accordance with this section.

(2) In making the loan the trustee must have acted upon either—

(a) a certificate of valuation under the Valuation of Land Act, 1916; or

(b)

(b) a report as to the value of the property made by a person whom he reasonably believed to be a competent valuer instructed and employed independently of any owner of the property, whether the valuer carried on business in the locality where the property is situate or elsewhere.

(3) The amount of the loan must not exceed two equal third parts of the value of the property as stated in the certificate or report.

(4) In the case of a report the loan must have been made under the advice of the valuer expressed in the report.

(5) This section extends to transfers of existing securities as well as to new securities.

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

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

Loss on authorised security.
56 & 57 Vic., c. 53, s. 9 (1).
1902, No. 98, s. 3.

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

Ibid. s. 5, 8(4);
9(2).
Ibid. s. 4.

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.

Continued holding.
57 Vic., c. 10, s. 4.

Sale and other dealings.

- (1) A trustee for sale may—
- (a) sell all or any part of the trust property;
 - (b) sever and sell fixtures apart from the balance of the property;
 - (c) grant and sell any easement right or privilege of any kind over or in relation to the property;
 - (d)

Powers incident to sale.

See 56 & 57 Vic., c. 53, s. 13.

1898, No. 9, ss. 9, 10.

Trustee.

- (d) do anything that a mortgagee may do under subsection one of section one hundred and ten of the Conveyancing Act, 1919, to the like extent as if the powers conferred by that subsection on a mortgagee in relation to the mortgaged property or any part thereof were in terms conferred by this subsection on the trustee in relation to the trust property or any part thereof ;
 - (e) concur with any other person in doing anything under any of the preceding paragraphs of this subsection ;
 - (f) raise any money required for any of the purposes mentioned in this subsection by mortgage of the trust property to be sold or of any other part held by the trustee on the same trusts.
- (2) The sale may be—
- (a) either subject to prior charges or not ;
 - (b) either together or in lots, in subdivision or otherwise ;
 - (c) by public auction or by private contract ;
 - (d) subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit ;
 - (e) on payment of the purchase money by instalments or otherwise.
- (3) The trustee may vary any contract for sale, buy in at any auction, rescind any contract for sale and re-sell, without being answerable for any loss.
- (4) If the trustee concurs with any other person in selling—
- (a) the purchase money shall be apportioned in or before the contract of sale ; and
 - (b) a separate receipt shall be given by the trustee for the apportioned share.
- (5) If the purchase money is to be paid by instalments—
- (a) the instalments shall be payable at intervals of not more than six months beginning from the date of the contract of sale, and shall bear interest at a rate of not less than five pounds per centum ;
 - (b)

- (b) the whole of the purchase money and interest shall be repayable within a period not exceeding five years from the date of the contract of sale ;
- (c) the land sold shall not be conveyed until at least one equal third part of the purchase money together with interest thereon shall have been paid ; and
- (d) in the event of a conveyance being made before the whole of the purchase money and interest has been paid, a mortgage of the land to secure the unpaid balance and interest shall be taken by the trustee.

(6) 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.

(7) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of subsection two of section fifty-three of the Conveyancing Act, 1919.

Sale or purchase under Conveyancing Act, 1919. 56 & 57 Vic., c. 63, s. 15.

. (1) Where a trustee sells subject to any condition which may have been unnecessarily depreciatory—

Depreciatory conditions. 56 & 57 Vic., c. 53, s. 14.

- (a) the purchaser shall not be at liberty to make any objection to the title on that ground ;
- (b) the sale shall not be impeached by any beneficiary upon that ground, unless it also appears that the consideration for the sale was thereby rendered inadequate ;
- (c) the sale shall not, after the execution of the conveyance, be impeached as against the purchaser upon that ground, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(2) This section applies only to sales made after the commencement of this Act.

. (1) Where a trustee or other person is authorised to dispose of land by way of sale exchange or partition, he may so dispose—

- (a) of the land with or without an exception or reservation of all or any of the mines and minerals therein; or
- (b) of any mines and minerals.

(2) The disposition may be with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the land or any part thereof, or any other land.

(3) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

. (1) Where any property is vested in a trustee by way of security, and the property becomes discharged from the right of redemption, the trustee shall hold the property on trust for sale, with power to postpone the sale for such a period as he may think proper.

(2) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable.

(3) This section shall not affect any rule of law relating to the apportionment of capital and income between tenant for life and remainderman.

(4) This section shall not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or in accordance with his directions.

(5) This section applies whether the discharge is by virtue of the statutes of limitation or of an order for foreclosure or otherwise.

(6) This section extends to securities by way of mortgage of land under the Real Property Act, 1900, and in relation thereto an order for foreclosure includes an order for foreclosure under that Act.

(7)

(7) This section applies to property the right of redemption whereof is discharged before as well as after the commencement of this Act.

(1) Where any property is vested in a trustee by way of security and the trustee has power to invest on mortgage and to vary investments, the trustee may release part of the property from the mortgage, provided that the unreleased part would at the time be a proper investment in all respects for the amount of the mortgage debt.

Release of part of the security.

(2) A statement in the release that the unreleased part of the mortgaged property is a proper investment in all respects for the amount of the mortgage debt shall in favour of a purchaser of the released part be conclusive evidence of the fact so stated.

(1) Where an equity of redemption is vested in a trustee and the mortgaged property is not of greater value than the amount of the mortgage debt, the trustee may release the equity of redemption to the mortgagee in discharge of the mortgage debt.

Release of equity of redemption in discharge of mortgage debt.

(2) A statement in the release that the mortgaged property is not of greater value than the amount of the mortgage debt shall in favour of a purchaser of the property be conclusive evidence of the fact so stated.

(1) Where leasehold property is vested in a trustee and the property is subject to onerous covenants of such a nature that it would not be in the interests of the beneficiaries to retain the property, the trustee may surrender the lease to the lessee.

Surrender of onerous lease.

(2) The surrender shall not be impeached by any beneficiary, provided that the trustee has acted bona fide and on the advice of a person whom he reasonably believed to be a competent valuer instructed and employed independently of the lessor, whether the valuer carried on business in the locality where the property is situate or elsewhere.

[NOTE.—Quære adopt some such provision as this subsection in the two previous sections.]

[NOTE.—Quære give trustees the same power of leasing as executors under s. 153 of the Conveyancing Act, 1919.]

Insurance.

Insurance.

(1) A trustee may insure against loss or damage by fire any insurable property.

Insurance.
See 56 & 57
Vic., c. 53,
s. 18.

(2) The insurance may be for any amount, provided that together with the amount of any insurance already on foot, the total shall not exceed the insurable value.

Vict. Act
No. 2,741,
s. 22.

(3) The premiums may be paid by the trustee out of the income of the property insured 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 the income.

(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.

[NOTE.—Reconsider this section in the light of the English cases. Quære whether there should be a duty of insurance.]

Maintenance of infants.

(1) Where any property is held by a trustee in trust for an infant, either for life, or for any greater interest, and whether—

Application
of income.
See 44 & 45
Vic., c. 41,
s. 43.

(a) absolutely, or

(b) contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age,

1898, No. 4,
s. 18.

the trustee may 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 the property or any part thereof, whether there is any other fund applicable to the same purpose or any person bound by law to provide for the infant's maintenance or education or not.

(2) The trustee shall accumulate all the residue of the income in the way of compound interest by investing the same, and the resulting income thereof from time to time in investments authorised by the instrument, if any, or by this Act.

(3)

Trustee.

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(3) The trustee shall hold the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise.

(4) The trustee may at any time if he thinks fit apply the accumulations or any part thereof as if the same were income arising in the then current year.

(5) 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.

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

General.

. 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 same may be exercised or performed by the survivor or survivors of them for the time being.

Powers of two or more trustees.
See 56 & 57 Vic., c. 53, s. 22.

(1) Until the appointment of new trustees the legal representatives for the time being of a sole trustee, or where there were two or more trustees, then of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee.

Survivorship of trusts and powers.
1 & 2 Geo. V, c. 37, s. 8.

(2) This section shall take effect subject to any direction to the contrary expressed in the instrument, if any, creating the power or trust.

(3) This section applies only to powers or trusts constituted after or created by instruments coming into operation after the commencement of this Act.

[NOTE.—Quære as to the policy of this section, the Law Institute suggests its omission. See the Conveyancing Act, 1919, and Wolstenholme.]

(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

Receipts.
56 & 57 Vic., c. 53, s. 20.
See 1898, No. 4, s. 64.

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.

(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient. Compound-
ing.
Ibid. s. 21.

(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 claimed;
- (b) allow any time for payment for any debt;
- (c) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the estate or trust;
- (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.

(5) Section ninety-six of the Wills Probate and Administration Act, 1898, is hereby repealed.

- . (1) A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust—
- (a) be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity ; and
- (b) 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 may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful neglect or default.
- (2) A trustee may reimburse himself, or pay or discharge out of the trust property all expenses incurred in or about the execution of his trusts or powers.

Implied indemnity of trustees. 56 & 57 Vic., c. 53, s. 24. 1898, No. 4, s. 69.

- . (1) 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.

Exoneration of trustees in respect of certain powers of attorney. 56 & 57 Vic., c. 53, s. 23. 1898, No. 4, s. 19.

- (2) 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 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.

- . (1) A trustee may apply to the Judge for his opinion advice or direction on any question respecting the management or administration of the trust property.

Application for advice. See 1898, No. 4, s. 20.

- (2) If the trustee acts in accordance with the opinion advice or direction, he shall be deemed, so far as regard his own responsibility, to have discharged his duty as trustee in the subject matter of the application, provided that he has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.

(3)

(3) The application may be made as prescribed by rule of court without any person being served unless the Judge otherwise directs: Application, how made.

Provided that unless otherwise prescribed, the application may be made by petition or summons upon a written statement signed by the trustee, his counsel, or solicitor.

(4) The costs of the application shall be in the discretion of the Judge to whom the application is made.

(1) A trustee may apply for a decision on any question respecting the interpretation of the trust instrument— Application for interpretation.

(a) to the Judge, where the amount involved does not exceed five hundred pounds; and

(b) to the Master in Equity, where the amount involved does not exceed two hundred pounds.

(2) The decision shall be binding upon all beneficiaries and persons claiming through or under them, as well as upon the trustee; and any statement therein that the amount involved does not exceed five hundred pounds, or two hundred pounds, as the case may be, shall be conclusive evidence of the fact so stated.

(3) The application may be made as prescribed by rule of court, without any person being served, unless the Judge or Master otherwise directs.

(4) Evidence in support of the application may be by affidavit or otherwise.

(5) The costs shall be in the discretion of the Judge or Master, to whom the application is made.

DIVISION 3.—*Delegation.*

(1) A trustee may by registered deed delegate the execution of the trust under this Part. Absence or departure from New South Wales.

(2) A trustee may not so delegate, unless— See 1915, No. 31, ss. 3-4; N.Z. Trustees Act, 1908, s. 103-4; 5 Geo. V, c. 13, s. 1 (1).

(a) he is absent from New South Wales or is about to depart therefrom;

(b) his co-trustees or co-trustee, and such other person, if any, as is empowered to appoint trustees, consent by the same or other registered deed to the delegation; and

(c)

(c) the delegation is to a person residing in New South Wales and capable of being appointed a trustee of the trust.

(3) The delegation may be made—

- (a) in respect of the whole or any part of the trust;
- (b) for any period not exceeding two years from the date of the deed;
- (c) on one occasion only, unless after the delegation the trustee has returned to New South Wales and is again absent or about to depart therefrom.

(4) The delegation shall not be made, whether to a co-trustee or to any other person, unless there will be remaining in New South Wales at least one other trustee, or the public trustee, or a trustee company, to perform the trust.

(5) Two or more trustees may delegate concurrently.

(6) 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.

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

(1) A trustee who delegates his trust shall remain answerable for all acts and omissions of the delegate within the scope of the delegation as if they were the acts and omissions of the trustee.

Liability of original trustee.
See 1915, No. 31, s. 5.

(2) Every delegate shall be subject to the jurisdiction of any court so far as respects the execution of the trust in the same manner as if he were the trustee delegating.

Liability of delegate.
Ibid., s. 7.
See 5 Geo. V, c. 13, s. 1 (3).

(1) A person whose consent is required by any instrument to the exercise of a trust or power may by registered deed delegate the right to consent under this Part.

Delegation of right to consent to exercise of trust or power.

(2)

(2) A person may not so delegate, unless—

- (a) he is absent from New South Wales or is about to depart therefrom; and
- (b) the delegation is to the public trustee, or a trustee company.

(3) Two or more persons may delegate concurrently.

(4) The person who delegates and the delegate shall be severally liable for any improper exercise of the right to consent.

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

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

(1) No person dealing in good faith with the delegate under any deed of delegation authorised by this Part shall, by reason only that by the delegation or any evidence or document in connection therewith it appears that the delegate is acting in the execution of any trust, be affected for any purpose with notice of the trust.

Protection of persons dealing with delegate.
See 1915 No. 31, s. 9.
5 Geo. V, c. 13, s. 2
(3) (4).

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

Every delegation under this Part shall be deemed to be a power of attorney within the meaning of Part XVI of the Conveyancing Act, 1919, and that Part with the exception of sections one hundred and sixty-one and one hundred and sixty-two shall apply thereto.

Delegation as a power of attorney.
See *Ibid.* s. 8.

(1) Any instrument by which a trust or the right to consent to the exercise of a trust or person is delegated may be registered in the office of the Registrar-General as prescribed.

Registration.

(2) This section extends—

- (a) to a delegation, whether under this Part or under the provisions of the instrument creating the trust or power or otherwise, and whether the

the

the trust or power does or does not relate to land subject to the provisions of the Real Property Act, 1900 ;

(b) to a consent to a delegation.

(3) This section applies to instruments executed either before or after the commencement of this Act.

DIVISION 4.—*Statute of limitations.*

(1) In any action suit or other proceeding against a trustee or any person claiming through him, the provisions of this section shall have effect : Statute of limitations. 51 & 52 Vic., c. 59, s. 8.

Provided that this section shall not affect any action suit or other proceeding where the claim—

(a) is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy ; or

(b) is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.

(2) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action suit or other proceeding, if the trustee or person claiming through him had not been a trustee or person claiming through him.

(3) If the action suit or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to the action, suit, or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

(4)

(4) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or decree obtained by another beneficiary than he could have obtained if he had brought the action suit or other proceeding and this section had been pleaded.

(5) This section shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

(6) This section shall apply only to actions suits or other proceedings instituted after the commencement of this Act.

PART III.

POWERS OF THE COURT.

DIVISION 1.—*Appointment of new trustees and vesting orders.*

Appointment.

(1) The Court may make an order for the appointment of a new trustee or new trustees under this Part either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

Power to
appoint new
trustees.

56 & 57 Vic.,
c. 53, s. 25.

1898, No. 4,
s. 25.

1902, No. 98,
s. 8.

(2) The appointment may be made whenever it is expedient to appoint a new trustee or new trustees, and it is inexpedient difficult or impracticable so to do without the assistance of the Court.

(3) In particular and without prejudice to the generality of any other provision of this section, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

(4) This section shall be deemed to authorise the Court to make an order for the reappointment of the continuing trustees alone as new trustees.

(5)

(5) 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.

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

Vesting orders.

- (1) The Court may make an order under this Part, in this Act called a vesting order. Vesting orders generally. See 56 & 57 Vic., c. 53, ss. 26, 35.
- (2) A vesting order may be made in any of the following cases, namely—
- (a) where the Court appoints or has appointed a new trustee; 1898, No. 4, ss. 29, 38.
 - (b) where a trustee retires or has retired; 1902, No. 98, s. 8.
 - (c) where a trustee is an infant;
 - (d) where a trustee is an insane person or person of unsound mind;
 - (e) where a trustee is out of the jurisdiction of the Court;
 - (f) where a trustee cannot be found;
 - (g) where a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property according to the direction of the person absolutely entitled to the same for twenty-eight days next after a request in writing has been made to him by the person so entitled;
 - (h) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any property; and
 - (i) where, as to the last trustee known to have been entitled to or possessed of any property, it is uncertain whether he is living or dead; and
 - (j) where there is no legal representative to a trustee who was entitled to or possessed of any property or where it is uncertain who is the legal representative of a trustee who was entitled to or possessed of any property;
 - (k)

- (k) where any person neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property in accordance with the terms of an order of the Court;
- (l) where the Court might have made a vesting order if this Act had not been passed.

[NOTE.—Paragraph (l) is intended to cover the case of the heir or devisee of a trustee in any old matter that may possibly still come before the Court.]

(3) The provisions of paragraphs (c), (d), (e), (f), and (g) of subsection two of this section extend to a trustee entitled to or possessed of any property either solely or jointly with any other person.

(4) Where the order is consequential on the appointment of a new trustee, the property shall be vested in the persons who, on the appointment, are the trustees.

(5) Where the vesting order is consequential on the retirement of one or more of a number of trustees, the property may be vested in the continuing trustees alone. ^{1902, No. 98, s. 8.}

(6) The vesting order may vest the property in any such person in any such manner and for any such estate or interest as the Court may direct, or may release or dispose of any contingent right to such person as the Court may direct.

(7) The fact that the order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in subsection two of this section, shall be conclusive evidence of the matter in any Court upon any question as to the validity of the order.

(8) This section shall not prevent the Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained. ^{See 56 & 57 Vic., c. 53, s. 40. 1898, No. 4, s. 58.}

Where any property 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 ^{Contingent rights of unborn persons. 56 & 57 Vic., c. 53, s. 27. 1898, No. 4, s. 30.}

become entitled to or possessed of the property on any trust, the Court may make a vesting order under this Part—

- (a) releasing the property from the contingent right ; or
- (b) vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the property.

. Where any person entitled to or possessed of property by way of mortgage is—

- (a) an infant ;
- (b) an insane person or person of unsound mind,

Infant or insane mortgagee.
See *ibid.* s. 28.
Ibid. ss. 31, 39.

the Court may make a vesting order under this Part vesting or releasing or disposing of the property, with the right to transfer or call for a transfer of property, or to receive the dividends or income thereof, or to sue for or recover property or any interest in respect thereof, in like manner as in the case of a trustee being an infant, or insane person, or person of unsound mind.

. (1) Where a mortgagee of land has died the Court may make a vesting order under this Part vesting the land in such person or persons in such manner and for such estate as the Court may direct :

Deceased mortgagee.
Ibid. s. 29.
Ibid. s. 32.

Provided that where the land is subject to the provisions of the Real Property Act, 1900, the order may discharge the mortgage.

(2) The order may only be made if the mortgagee did not enter into possession, and—

- (a) the money due in respect of the mortgage has been paid to a person entitled to receive the same ; or
- (b) that last-mentioned person consents to any order for the reconveyance of the land.

(3) The order may be made in any of the following cases, namely—

- (a) where the legal representative of the mortgagee is out of the jurisdiction of the Court or cannot be found ;

(b)

- (b) where the legal representative of the mortgagee, on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and
- (c) where it is uncertain as to the legal representative of the mortgagee whether he is living or dead; and
- (d) where there is no legal representative of a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his legal representative;
- (e) where the Court might have made a vesting order if this Act had not been passed.

(4) The fact that the order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in subsection three of this section shall be conclusive evidence of the matter in any Court upon any question as to the validity of the order.

See 56 & 57 Vic., c. 53, s. 40. 1898, No. 4, s. 58.

(5) This section shall not prevent the Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

(1) Where a decree is made by the Court directing the sale or mortgage of any land, the Court may, if it thinks expedient, make an order under this Part vesting the land or any part thereof for such estate as the Court thinks fit in the purchaser or mortgagee or in any other person.

Decree for sale or mortgage of land. See 56 & 57 Vic., c. 53, s. 30. 57 Vic., c. 10, s. 1. 1898, No. 4, ss. 33, 34.

(2) For the purposes of this section every person who is entitled to or possessed of the land, or entitled to a contingent right therein, and is a party to the suit or other proceeding in which the decree is made or is otherwise bound by the decree, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act.

- . (1) Where a decree is made by the Court for—
- (a) the specific performance of a contract concerning any land;
- (b) the partition, or sale in lieu of partition under the Partition Act, 1900, of any land;
- (c) the exchange of any land;
- (d) the conveyance of any land, either in cases arising out of the doctrine of election or otherwise,

Decree for specific performance, and other matters.
 See 56 & 57 Vic., c. 53, s. 31.
 1900, No. 24, s. 6.
 1898, No. 4, s. 35.

the Court may make a vesting order under this Part.

(2) For the purposes of this section the Court may declare—

- (a) that any of the parties to the suit or other proceeding are trustees of the land or any part thereof within the meaning of this Act; or
- (b) that the interests of unborn persons who might claim under any party to the suit or other proceeding, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which the decree is made, are the interests of persons who on coming into existence would be trustees within the meaning of this Act.

(3) The vesting order may be made with respect to the rights of those persons born and unborn as if they had been trustees.

- . (1) A vesting order under this Part shall—
- (a) in the case of a vesting order consequential on the appointment of a new trustee, or the retirement of a trustee, have the same effect as if the persons who before the appointment or retirement were the trustees, if any, had duly executed all proper conveyances of the property, 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 property; and

Effect of vesting order.
 See *ibid.* s. 32.
 1898, No. 4, s. 36.

(b)

- (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 provisions of this Part 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.

(2) In the case of land, the land shall vest on registration of the order in the office of the Registrar-General as prescribed :

Provided that where the land is subject to the provisions of the Real Property Act, 1900, the land shall vest on registration of the order in accordance with that Act.

(3) In the case of property subject to the provisions of the Real Property Act, 1900, or the Mining Act, 1906, or the Crown Lands Consolidation Act, 1913, or any other Act relating to Crown lands, the Registrar-General or other proper officer is hereby authorised and directed, upon the vesting order being registered as prescribed, to make all such entries as may be necessary to give effect thereto.

(4) In the case of—

- (a) any property that does not come within subsections two or three of this section, but a transfer of which is required to be registered by any Act, whether of this State or otherwise;
- (b) any security that is only transferable in books kept by a corporation company or other body, or in manner directed by or under any Act, whether of this State or otherwise,

the vesting order shall vest in the person named in the order the right to transfer or call for a transfer of the property or security.

(5) In the case of any security or chose in action the vesting order shall vest in the person named in the order the right to receive the dividends or income thereof, and to sue for or recover the chose in action.

(6) The person in whom the right to transfer or call for the transfer of any property or security is so vested may transfer the property or security to himself or any other person, and all corporations companies associations and persons shall obey the order. (7)

(7) After notice in writing of the vesting order it shall not be lawful for any company association or person to transfer any property or security to which the order relates, or to pay any dividends thereon except in accordance with the order.

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

Power to appoint person to convey. See 56 & 57 Vic., c. 53, s. 33. 1898, No. 4, s. 37.

(1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust, may be made on the application of—

Persons entitled to apply for orders.

- (a) any person beneficially interested in the property, whether under disability or not; or
- (b) any person duly appointed trustee thereof.

See 56 & 57 Vic., c. 53, s. 36. 1898, No. 4, s. 46.

(2) An order under this Act concerning any property subject to a mortgage may be made on the application of—

- (a) any person beneficially interested in the equity of redemption, whether under disability or not; or
- (b) any person interested in the money secured by the mortgage.

. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes 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. See *Ibid.*, s. 37.

(1) The Court may order the costs and expenses of and incident to any application or any order under this Act—

Power to charge costs on trust estate.

- (a) to be paid or raised out of the property in respect whereof the same is made or out of the income thereof; or
- (b) to be borne and paid in such manner and by such persons as to the Court may seem just.

See 56 & 57 Vic., c. 53, s. 38. 1898, No. 4, s. 54.

- (2) This section shall extend to—
 - (a) any direction opinion or advice;
 - (b) any decision on a question respecting the interpretation of a trust instrument;
 - (c) any payment into or out of Court.

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

Trustees of charities. Ibid. s. 39. 1898, No. 4, s. 45.

DIVISION 2.—*Variation of trust.*

- (1) The court may, under this Part, authorise a sale of trust property by a trustee for sale, notwithstanding that the terms or consideration for the sale—
 - (a) may not be within the terms of the trust, or may be expressly forbidden by the trust; or
 - (b) may not be within the statutory powers of the trustee.

Advantageous sale. cf. in re New ([1901] 2 Ch. 534).

(2) The sale may not be so authorised, unless it appears to the Court that the trustee is unable to effect a sale in accordance with the trust or with his statutory powers on such terms or for such consideration that the fair value would be obtained for the property.

(3) The sale may be authorised on such terms and for such consideration as the Court thinks fit.

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

DIVISION 3.—*Relief and indemnity.*

(1) The Court may under this Part relieve a trustee either wholly or partly from personal liability for a breach of trust.

Excusable breaches of trust.

(2) The relief may be given if it appears to the Court that a trustee—

59 & 60 Vic., c. 35, s. 3. 1902, No. 98, s. 9.

- (a) is or may be personally liable for any breach of trust; but

(b)

- (b) has acted honestly and reasonably ; and
- (c) ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which he committed the breach.

(3) In the case of executors and administrators the powers of the Court may be exercised by the Supreme Court in its probate as well as in its equity jurisdiction.

(4) This section applies whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act.

(1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, 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 person claiming through him.

Indemnity for breach of trust. 56 & 57 Vic., c. 53, s. 45.

(2) This section applies notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation.

(3) This section applies to breaches of trust committed as well before as after the commencement of this Act, but shall not prejudice any question in any suit or other proceeding instituted before and pending at the commencement of this Act.

DIVISION 4.—*Miscellaneous powers.*

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

Decree in absence of a trustee. 56 & 57 Vic., c. 53, s. 43. 1898, No. 4, s. 57.

. Where an application is made under this Part concerning a person of unsound mind, the Court may direct an application to be made to the Supreme Court, in its lunacy jurisdiction, for the purpose of having such person declared an insane person, and may postpone making any order until that application has been heard.

Proceedings in lunacy.
1898, No. 4,
s. 55.

. Where any application is made under this Part, the Court may postpone making any order upon the application until the right of the applicant has been declared in a suit duly instituted for that purpose.

Suit.
Ibid. s. 56.

PART IV.

PAYMENT INTO COURT.

. (1) Money or securities for money may be paid into the Court under this Part.

Money and securities.

(2) The receipt or certificate of the Master in Equity or other proper officer shall be a sufficient discharge to any trustee person or company for the money or securities so paid into Court.

(3) The money or securities so paid into Court shall, subject to rules of Court, be dealt with according to the orders of the Court.

(4) The Court may make such order as it thinks fit as to the investment payment or distribution of—

- (a) the money or securities so paid into Court; or
- (b) the dividends or income thereof.

. Payment into Court may be made by trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust.

Trustees.
See 56 & 57
Vic., c. 53,
s. 42.
1898, No. 4,
s. 59.

(1) Where any money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the Court may order the payment into Court to be made by the majority without the concurrence of the other or others.

Non-concurrence of trustees.
Ibid. s. 59.

(2)

(2) If any such moneys or securities are deposited with any banker broker or other depository, the Court may order transfer payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into Court.

(3) Every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same 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.

(1) Payment into Court may, subject to rules of Court, be made by any life assurance company, where any money is payable by it under a life policy in respect of which, in the opinion of the board of directors, no sufficient discharge can otherwise be obtained.

(2) Where in the opinion of the Court the payment in was made without reasonable grounds, the Court may order all costs occasioned thereby to be paid by the company.

(3) In this section—

- (a) "life assurance company" means any corporation, company, or society carrying on the business of life assurance, not being a society registered under the Acts relating to friendly societies; Life assurance companies— payment into Court by. See 59 & 60 Vic., c. 8.
- (b) "life policy" includes any policy not foreign to the business of life assurance.

NOTE.—It seems that Part V should be omitted. It deals with matter which would find a more appropriate place in the Wills, Probate and Administration Act, 1898. In any case it would be necessary to consider just what Part V covers.

PART V.

EXECUTORS AND ADMINISTRATORS.

NOTE.—The Law Institute suggests the omission of this section.

(1) Executors and administrators shall for all purposes, but subject as hereinafter provided, be deemed trustees.

(2) Some or one only of several joint executors or administrators shall not be entitled to give receipts, or release or pay debts, or sell, mortgage, or otherwise deal with the assets of a deceased person, without such concurrence of the other or others as is by this Act or otherwise required in the case of trustees, or without the leave of the Court.

(3) Subject as hereinafter provided an executor or an administrator may retire from his office, and shall be liable to be removed therefrom on the same grounds as trustees are by this Act or otherwise removable: Provided that—

- (a) an administrator shall only be entitled to retire with the leave of the Court;
- (b) an executor shall not be entitled to retire, except by leave of the Court, within a period of twelve months from the grant of probate to him;
- (c) subject as in the last preceding paragraph, provided the provisions of Division 2 of Part II of this Act shall apply to executors: Provided that an executor so retiring shall not be discharged under this section unless there will be at least two trustees, or the public trustee, or a trustee company to perform the trust;
- (d) upon the retirement of an administrator, and an executor under paragraph (b) hereof, and upon the removal of an executor or administrator the appointment of a person or persons in the place of such executor or administrator shall

shall be made by the Court, and the Court may appoint such person or persons as it thinks fit, and upon the retirement or removal of one or more of a number of executors or administrators may appoint the continuing executors or administrators alone.

(4) (a) "The Court" in this section means the Supreme Court in its probate jurisdiction, and the provisions of the Wills, Probate and Administration Act, 1898, as to grants of administration of assets remaining unadministered apply to appointments made in pursuance of this section.

(b) In respect of the removal of an executor and the appointment of a person or persons in his place the power, authority and jurisdiction of the Supreme Court in its probate jurisdiction may be exercised by the Supreme Court in its equitable jurisdiction.

(5) This section shall have effect subject—

(a) in the case of executors and administrators with the will annexed to the terms of the will and the grant of probate or administration; and

(b) in the case of other administrators to the terms of the grant of administration.

(6) This section applies to the public trustee as executor or administrator.

(7) This section applies to executors and administrators under grants made before as well as after the commencement of this Act.

(1) The legal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person, or to a share in his residuary estate, or, if the person entitled is an infant, or person of unsound mind, with the consent of his trustee, guardian, or committee, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with any rules made under this Act, the whole or any part of the property of the deceased person in such manner as they think fit.

Appropriation of land in satisfaction of legacy or share in estate.
See 60 & 61 Vic., c. 65, s. 4.

(2)

(2) Before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within such time as may be prescribed by rule apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court.

(3) Where any property is so appropriated a conveyance or an acknowledgment in respect thereof by the legal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(4) In the case of land under the provisions of the Real Property Act, 1900, the production of the prescribed evidence of an appropriation under this section shall authorise the Registrar-General to register the person to whom the property is appropriated as the registered proprietor of the land.

PART VI.

MISCELLANEOUS PROVISIONS.

(1) Property vested in any person upon any trust or by way of mortgage shall not escheat or be forfeited to His Majesty by reason of the attainder or conviction for any offence of the trustee or mortgagee.

No escheat of property held upon trust or mortgage.
1898, No. 4, ss. 65, 66.
See 56 & 57 Vic., c. 53, s. 48.

(2) Property so vested shall remain in the trustee or mortgagee or survive to his co-trustee, or vest in his representative as if the attainder or conviction had not taken place.

(3)

(3) This section shall not prevent the escheat or forfeiture of any property vested in any trustee or mortgagee so far as relates to any beneficial interest therein of the trustee or mortgagee, but the property, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not been passed.

. Where any new trustee is appointed under or in pursuance of the powers conferred—

- (a) by any instrument creating a trust; or
- (b) by this or any other Act,

all the property which for the time being is vested in the Chief Justice or the senior Puisne Judge for the time being by virtue of the Wills Probate and Administration Act, 1898, and is subject to the trust in respect of which the new trustee is appointed, shall, by virtue of the order or instrument appointing the new trustee, and without other assurance in the law, become and be legally and effectually vested in the new trustee either solely or jointly with any surviving or continuing trustee as the case may require.

Divesting of trust estates from the Chief Justice upon the appointment of new trustees. 1898, No. 4, s. 67. See 56 & 57 Vic., c. 53, s. 49.

. Where any guardian, committee, receiver, or other trustee appointed by the Supreme Court in any jurisdiction has been or is (either by order in the particular cause or matter or by any general rule) directed to account from time to time to the said Court, or to file any report or account in the office of the Master in Equity, the said Court, on the application of any party interested, or of such Master on behalf of the parties or any of them, or without any such application may enforce compliance with every such rule or order by a rule or summons to show cause, and by rule or order absolute thereon, as in an action or proceeding at law, and may punish non-compliance with any such rule or order absolute by attachment for contempt as in any case of contempt at law, with costs in each case, payable by and to whom the said Court thinks fit to direct.

Power to compel trustees to account. *Ibid.* s. 68.

(1) Notwithstanding anything contained in any other Act it shall not be necessary to advertise in any newspaper notice of any application for the appointment or the consent of the Chief Judge in Equity to the

Advertisements of proposed appointment of trustee companies. 1902, No. 98, s. 7.

appointment of a trustee company as trustees where all persons beneficially interested are before the Court or have had notice of the intended application to the Court or Judge.

(2) In any such case in which the Court or Judge directs any reference to the Master in Equity to appoint a new trustee a trustee company may be appointed by the Master in the same way as any other trustee may be appointed without the necessity for any reference back to the Court.

[NOTE.—Quære omit this section, but consider whether it is desirable to retain subsection (2).]

(1) A trustee company may be appointed and may lawfully act as the sole trustee of any will or other instrument notwithstanding that the same may provide for or direct the appointment of two or more trustees.

Trustee companies may be appointed sole trustees. N. Z. Act, 1908, No. 202, s. 100.

(2) This section does not apply to any instrument which provides that any such company shall not be appointed a trustee thereof.

(3) This section extends to instruments made before or after the commencement of this Act.

[NOTE.—Quære omit this section.]

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

Indemnity. See 56 & 57 Vic., c. 53, s. 49. 1898, No. 4, s. 48.

The judges of the Supreme Court, or any three of them, may make such general rules and orders as from time to time seem necessary for better carrying the provisions and objects of this Act into effect, and for regulating the practice and procedure under this Act.

Power to make rules. 1898, No. 4, s. 70.

Trustee.

SCHEDULE.

Reference to Act.	Subject or short title.	Extent of repeal.
1898, No. 4 ...	Trustee Act, 1898 ...	The whole Act.
1898, No. 13 ...	Wills, Probate and Administration Act, 1898.	Section 96.
1898, No. 17 ...	Conveyancing and Law of Property Act, 1898.	Sections 82 to 90 inclusive.
1900, No. 24 ..	Partition Act, 1900 ...	Section 6.
1902, No. 98 ...	Trustee Act Amendment Act, 1902.	Sections 2 to 9 inclusive.
1915, No. 31 ...	Trustees Delegation of Powers Act, 1915.	The whole Act.
1916, No. 40 ...	Sales by Trustees Confirmation Act, 1916.	The whole Act.