

SOUTH AUSTRALIA

TRUSTEE ACT 1936

This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at 1 July 1999.

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

SUMMARY OF PROVISIONS

1. Short title and commencement
2. Division
3. Repeal
4. Interpretation

PART 1 INVESTMENTS

5. Application of Part
6. Power of trustee to invest
7. Duties of trustee in respect of power of investment
8. Law and equity preserved
9. Matters to which trustee must have regard in exercising power of investment
10. Powers of trustee in relation to securities
11. Power of trustee as to calls on shares
12. Power to purchase dwelling house as residence for beneficiary
13. Power of trustee to retain investments
- 13A. Loans and investments by trustees not breaches of trust in certain circumstances
- 13B. Limitation of liability of trustee for loss on improper investments
- 13C. Court may take into account investment strategy in action for breach of trust
- 13D. Power of court to set off gains and losses arising from investment
- 13E. Transitional provision

PART 2 POWERS AND DUTIES OF TRUSTEES

Appointment of New Trustees

14. Power of appointing new trustees
- 14A. Appointment of separate trustees
- 14B. Appointment of additional trustees
15. Retirement of trustees
16. Vesting of trust property in new or continuing trustees

Power of trustee to delegate

17. Trustee's power of delegation
- 17A. Power of delegation of members of fighting forces
18. Revocation of power of attorney not effectual as against person in ignorance
19. Trustee's ADI account
- 19A. Power of fiduciaries as to cheques

Purchase and sale

20. Power of trustees for sale to sell by auction and convey
- 20.(2a) Power of trustee to set apart roads and reserves
21. Power to sell subject to depreciating conditions
22. Married woman as bare trustee may convey
23. Power to take mortgage for part purchase money
- 23A. Deferred payment on sale of land
- 23B. Sale after right of redemption barred
- 23C. Power to purchase equity of redemption in lieu of foreclosure

Various powers and liabilities

- 24. Power to authorise receipt of money by banker or solicitor
- 25. Powers of trustee as to insurance
- 25A. Repairs to trust property
- 25B. Power of Court to authorise alterations and repairs
- 25C. Power of trustee as to granting leases
- 26. Power of trustees of renewable leaseholds to renew and raise money for the purpose
- 26A. Power to surrender leases with onerous covenants
- 27. Power of trustee to give receipts
- 28. Power for executors and trustees to compound, etc.
- 28A. Power to release equity of redemption in satisfaction of mortgage debt
- 28B. General power of trustee to raise money
- 28C. Application of income by trustee-mortgagee in possession
- 29. Distribution of estate after notice by representative or trustee
- 30. Liability of trustee in respect of rents, covenants, etc.
- 31. Shares with contingent liability
- 32. Powers of two or more trustees
- 33. Powers of trustees as to maintenance and accumulation
- 33A. Power to apply capital towards advancement and benefit
- 34A. Notice where trustee acts in two or more trusts
- 35. Liability of trustees
- 35A. Investment of pecuniary bequest
- 35B. Variation of employees' benefit fund

PART 3
POWERS OF THE COURT

Appointment of new trustees and vesting orders

- 36. Power of the court to appoint new trustees
- 37. Vesting order as to land
- 38. Contingent rights of unborn trustees
- 39. Effects of vesting order
- 40. Power to appoint person to convey
- 41. Vesting orders as to stock and choses in action
- 42. Persons entitled to apply for vesting orders
- 43. Powers of new trustee appointed by Court
- 44. Power to charge costs on trust estate
- 45. Trustees of charities
- 46. Orders made upon certain allegations to be conclusive evidence

Payment into court by trustees and mortgagees

- 47. Payment into Court by trustees and mortgagees

Sales of trust property

- 48. Trustee to have power to sell or convey in certain cases
- 49. Power for court to authorise purchase of trust property by trustee
- 50. Power to sanction sale of land or minerals separately
- 51. Power of trustees to dispose of land held in trust for a church
- 52. Power to apply proceeds of sale, mortgage, or lease
- 53. Power of association holding land in trust for religious purposes to dispose of same
- 54. Restriction of application of Act
- 55. Trustee may sell land with consent of Court

Relief from liability for breach of trust

- 56. Jurisdiction of Supreme Court in cases of breach of trust
- 57. Power to make beneficiary indemnify for breach of trust

Miscellaneous

- 58. Power to give judgment in absence of a trustee
- 59B. Advantageous dealings
- 59C. Power of Court to authorise variations of trust

**PART 4
CHARITABLE TRUSTS PROCEDURE**

- 60. In cases of breach of trust, etc., petition may be presented to Supreme Court
- 61. Petition to be accompanied by affidavit
- 62. Petition to be heard in open court
- 63. Evidence may be brought by affidavit or otherwise
- 64. Service of petition and copy of affidavit
- 65. Attorney-General may address court at hearing
- 66. With Judge's consent any person may address court
- 67. Powers of court in dealing with petition
- 68. Court may order costs
- 69. Powers of Supreme Court may be exercised by a single Judge
- 69A. Inclusion of non-charitable and invalid purposes not to invalidate a trust
- 69B. Alteration of purposes of charitable trust
- 69C. Recreational charities

**PART 5
SPECIAL PROVISIONS AS TO APPOINTMENT OF NEW TRUSTEES**

- 70. This Part to be permissive
- 71. Application of this Part
- 72. Interpretation
- 73. Form of appointment of new trustee
- 74. Extension of power of appointing new trustees
- 75. Appointment of new trustees may be registered
- 76. Registration to vest estates in new trustees
- 77. Registered proprietors
- 78. Registration with power of disposition to lesser number of joint owners
- 79. Form of memorandum of appointment of new trustee
- 80. Verification of memorandum
- 81. Verification of memorandum in special case
- 82. Preservation of powers of Registrar-General
- 83. Preservation of liability of trustee
- 84. False affidavit or declaration

**PART 5A
RECORDS TO BE KEPT BY TRUSTEES AND INVESTIGATIONS**

- 84A. Interpretation
- 84B. Records to be kept by trustee
- 84C. Appointment of inspector
- 84D. Powers of an inspector
- 84E. Reports to be made to Attorney-General
- 84F. Confidentiality

Trustee Act 1936

PART 6
MISCELLANEOUS AND SUPPLEMENTAL

- 85. Commission concerning person of unsound mind
- 86. Provisions of Act in addition to unrepealed Act
- 87. Application to trustee under Settled Estates Act of provisions as to appointment of trustees
- 89. Registration of vesting order or transfer
- 90. Parties entitled may apply to the Court by summons or petition
- 91. Advice and directions of court and commission
- 92. Power to make order in a cause
- 93. Indemnity
- 94. Regulations

SCHEDULE 1
Appointment of New Trustees

SCHEDULE 2
Memorandum of the Appointment of New Trustees

SCHEDULE 3

APPENDIX
LEGISLATIVE HISTORY

TRUSTEE ACT 1936

being

Trustee Act 1936 No. 2270 of 1936
[Assented to 13 August 1936]¹

as amended by

Statute Law Revision Act 1937 No. 2346 of 1937 [Assented to 6 October 1937]
Trustee Act Amendment Act 1940 No. 10 of 1940 [Assented to 26 September 1940]
Trustee Act Amendment Act 1941 No. 49 of 1941 [Assented to 27 November 1941]²
Trustee Act Amendment Act 1942 No. 14 of 1942 [Assented to 29 October 1942]
Trustee Act Amendment Act 1946 No. 24 of 1946 [Assented to 28 November 1946]
Trustee Act Amendment Act 1950 No. 5 of 1950 [Assented to 28 September 1950]
Trustee Act Amendment Act 1953 No. 52 of 1953 [Assented to 17 December 1953]
Trustee Act Amendment Act 1967 No. 71 of 1967 [Assented to 16 November 1967]
Trustee Act Amendment Act 1968 No. 20 of 1968 [Assented to 28 November 1968]³
Statute Law Revision Act 1974 No. 42 of 1974 [Assented to 11 April 1974]
Trustee Act Amendment Act 1980 No. 55 of 1980 [Assented to 3 July 1980]⁴
Trustee Act Amendment Act 1982 No. 44 of 1982 [Assented to 22 April 1982]⁵
Trustee Act Amendment Act 1983 No. 111 of 1983 [Assented to 22 December 1983]
Trustee Act Amendment Act 1984 No. 2 of 1984 [Assented to 12 April 1984]⁶
Criminal Law Consolidation Act Amendment Act 1984 No. 49 of 1984 [Assented to 24 May 1984]
ANZ Executors & Trustee Company (South Australia) Limited Act 1985 No. 56 of 1985 [Assented to 30 May 1985]⁷
Trustee Act Amendment Act 1986 No. 71 of 1986 [Assented to 27 November 1986]⁸
Trustee Act Amendment Act 1989 No. 18 of 1989 [Assented to 20 April 1989]⁹
Statutes Amendment (Attorney-General's Portfolio No. 2) Act 1993 No. 92 of 1993 [Assented to 4 November 1993]
State Bank (Corporatisation) Act 1994 No. 17 of 1994 [Assented to 12 May 1994]¹⁰
Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994 No. 59 of 1994 [Assented to 27 October 1994]¹¹
Trustee (Investment Powers) Amendment Act 1995 No. 32 of 1995 [Assented to 27 April 1995]¹²
Trustee (Variation of Charitable Trusts) Amendment Act 1996 No. 50 of 1996 [Assented to 25 July 1996]¹³
Financial Sector Reform (South Australia) Act 1999 No. 33 of 1999 [Assented to 17 June 1999]¹⁴

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *Entries appearing in bold type indicate the amendments incorporated since the last reprint.*
- *For the legislative history of the Act see Appendix.*

- ¹ Came into operation 1 November 1937: *Gaz.* 25 March 1937, p. 646.
- ² Came into operation 8 December 1941: *Gaz.* 4 December 1941, p. 1193.
- ³ Came into operation 6 March 1969: *Gaz.* 6 March 1969, p. 631.
- ⁴ Came into operation 21 August 1980: *Gaz.* 21 August 1980, p. 584.
- ⁵ Came into operation 6 May 1982: *Gaz.* 6 May 1982, p. 1438.
- ⁶ Came into operation 13 June 1985: *Gaz.* 13 June 1985, p. 2132.
- ⁷ Came into operation 6 June 1985: *Gaz.* 6 June 1985, p. 1910.
- ⁸ Came into operation 1 January 1987: *Gaz.* 18 December 1986, p. 1876.
- ⁹ Came into operation 20 April 1989, being the day on which the Trustee Companies Act 1988 came into operation: *Gaz.* 20 April 1989, p. 1080: s. 2.
- ¹⁰ Came into operation 1 July 1994: *Gaz.* 23 June 1994, p. 1784.
- ¹¹ Came into operation 1 January 1995: *Gaz.* 8 December 1994, p. 1942.
- ¹² Came into operation 1 July 1995: *Gaz.* 15 June 1995, p. 2841.
- ¹³ Came into operation 8 August 1996: *Gaz.* 8 August 1996, p. 420.
- ¹⁴ **Schedule (item 59) came into operation 1 July 1999: being the date specified under section 3(16) of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999* of the Commonwealth as the transfer date for the purposes of that Act.**

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

The Parliament of South Australia enacts as follows:

Short title and commencement

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.

Division

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

PART 1—Investments.

PART 2—Powers and duties of trustees.

PART 3—Powers of the court.

PART 4—Charitable trusts procedure.

PART 5—Special provisions as to appointment of new trustees.

PART 6—Miscellaneous and supplemental.

Repeal

3. The following Acts are repealed:—

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*.

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*.

Interpretation

4. (1) In this Act (except in Part 5), 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;

"**equity of redemption**" includes—

- (a) the right to redeem property which has been conveyed or assigned by way of mortgage:

- (b) the estate of the owner of any property which is subject to any legal or equitable mortgage, charge or encumbrance (including a mortgage or encumbrance under *The Real Property Act 1886-1939*) created otherwise than by conveyance or assignment of the property;

"**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 or 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 debentures, bonds, stock, funds, shares, promissory notes and documents of any kind evidencing indebtedness;

"**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;

"**trustee company**" means any incorporated company upon which power to act as a trustee has been conferred by an Act of the Parliament of the State.

(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 1
INVESTMENTS**

Application of Part

5. This Part applies to trusts created before or after the commencement of the *Trustee (Investment Powers) Amendment Act 1995*.

Power of trustee to invest

6. A trustee may, unless expressly forbidden by the instrument creating the trust—

- (a) invest trust funds in any form of investment; and
- (b) at any time, vary an investment or realise an investment of trust funds and reinvest money resulting from the realisation in any form of investment.

Duties of trustee in respect of power of investment

7. (1) Subject to the instrument creating the trust, a trustee must, in exercising a power of investment—

- (a) if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons—exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
- (b) if the trustee is not engaged in such a profession, business or employment—exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

(2) A trustee must, in exercising a power of investment, comply with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with any direction with respect to trust investments.

(3) Subject to the instrument creating the trust, a trustee must, at least once in each year, review the performance (individually and as a whole) of trust investments.

Law and equity preserved

8. (1) Any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment including, without limiting the generality of those duties, rules and principles that impose—

- (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust;
- (b) a duty to invest trust funds in investments that are not speculative or hazardous;
- (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries;
- (d) a duty to take advice,

continue to apply except so far as they are inconsistent with this or any other Act, or the instrument creating the trust.

Trustee Act 1936

(2) Any rules and principles of law or equity that relate to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continue to apply.

(3) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice is payable out of trust funds.

Matters to which trustee must have regard in exercising power of investment

9. (1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to—

- (a) the purposes of the trust and the needs and circumstances of the beneficiaries; and
- (b) the desirability of diversifying trust investments; and
- (c) the nature of and risk associated with existing trust investments and other trust property; and
- (d) the need to maintain the real value of the capital or income of the trust; and
- (e) the risk of capital or income loss or depreciation; and
- (f) the potential for capital appreciation; and
- (g) the likely income return and the timing of income return; and
- (h) the length of the term of the proposed investment; and
- (i) the probable duration of the trust; and
- (j) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment; and
- (k) the aggregate value of the trust estate; and
- (l) the effect of the proposed investment in relation to the tax liability of the trust; and
- (m) the likelihood of inflation affecting the value of the proposed investment or other trust property; and
- (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and
- (o) the results of a review of existing trust investments.

(2) A trustee may—

- (a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and
- (b) pay out of trust funds the reasonable costs of obtaining the advice.

Powers of trustee in relation to securities

10. (1) If securities of a body corporate are subject to a trust, the trustee may concur in any scheme or arrangement—

- (a) for or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the body corporate; or
- (b) for the sale of all or any part of the property and undertaking of the body corporate to another body corporate; or
- (c) for the acquisition of securities of the body corporate, or of control of the body corporate, by another body corporate; or
- (d) for the amalgamation of the body corporate with another body corporate; or
- (e) for the release, modification or variation of rights, privileges or liabilities attached to the securities, or any of them,

in the same manner as if the trustee were beneficially entitled to the securities.

(2) The trustee may accept instead of, or in exchange for, the securities subject to the trust securities of any denomination or description of another body corporate party to the scheme or arrangement.

(3) If a conditional or preferential right to subscribe for securities in a body corporate is offered to a trustee in respect of a holding in that body corporate or another body corporate, the trustee may, as to all or any of the securities—

- (a) exercise the right and apply capital money subject to the trust in payment of the consideration; or
- (b) assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or
- (c) renounce the right.

(4) A trustee accepting or subscribing for securities under this section is, for the purposes of any provision of this Part, exercising a power of investment.

(5) A trustee may retain securities accepted or subscribed for under this section for any period for which the trustee could properly have retained the original securities.

(6) The consideration for an assignment made under subsection (3)(b) must be held as capital of the trust.

(7) This section applies in relation to securities acquired before or after the commencement of the *Trustee (Investment Powers) Amendment Act 1995* but subject to the instrument creating the trust.

Power of trustee as to calls on shares

11. Subject to the instrument creating the trust—

- (a) a trustee may apply capital money subject to a trust in payment of calls on shares subject to the same trust; and

Trustee Act 1936

- (b) if the trustee is a trustee company—it may exercise the powers conferred by this section despite the shares on which the calls are made being shares in the trustee company.

Power to purchase dwelling house as residence for beneficiary

12. (1) Subject to the instrument creating the trust, a trustee may—

- (a) purchase a dwelling house for a beneficiary to use as a residence; or
- (b) enter into any other agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence.

(2) Despite the terms of the instrument creating the trust, a trustee may, if to do so would not unfairly prejudice the interests of other beneficiaries, retain as part of the trust property a dwelling house for a beneficiary to use as a residence.

(3) A dwelling house purchased, retained or otherwise secured for use by the beneficiary as a residence may be made available to the beneficiary for that purpose on such terms and conditions consistent with the trust and the extent of the beneficiary's interest as the trustee thinks fit.

(4) The trustee may retain a dwelling house or any interest or rights in respect of a dwelling house acquired under this section after the use of the dwelling house by the beneficiary has ceased.

(5) In this section—

"**dwelling house**" includes—

- (a) any building or part of a building designed, or converted or capable of being converted, for use as a residence; and
- (b) any amenities or facilities for use in association with the use of a dwelling house.

Power of trustee to retain investments

13. A trustee is not liable for breach of trust by reason only of continuing to hold an investment that has ceased to be—

- (a) an investment authorised by the instrument creating the trust; or
- (b) an investment properly made by the trustee exercising a power of investment; or
- (c) an investment made under this Part as previously in force from time to time; or
- (d) an investment authorised by any other Act or the general law.

Loans and investments by trustees not breaches of trust in certain circumstances

13A. (1) If a trustee lends money on the security of property, the trustee is not in breach of trust by reason only of the amount of the loan in comparison to the value of the property at the time when the loan was made—

- (a) if it appears to the court—
 - (i) that, in making the loan, the trustee was acting on a report as to the value of the property made by a person whom the trustee reasonably believed to be competent to give such a report and whom the trustee instructed and employed independently of any owner of the property; and
 - (ii) that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report; and
 - (iii) that the loan was made in reliance on the report; or
- (b) if the trustee is insured by a prescribed body carrying on the business of insurance against all loss that may arise by reason of the default of the borrower.

(2) If a trustee lends money on the security of leasehold property, the trustee is not in breach of trust by reason only that the trustee dispensed, either in whole or in part, with the production or investigation of the lessee's title when making the loan.

(3) This section applies to transfers of existing securities as well as to new securities and to investments made before or after the commencement of the *Trustee (Investment Powers) Amendment Act 1995*.

Limitation of liability of trustee for loss on improper investments

13B. (1) If a trustee improperly lends trust money on a security that would have been a proper investment if the sum lent had been smaller than the actual sum lent, the security is to be taken to be a proper investment in respect of the smaller sum, and the trustee is only liable to make good the difference between the sum advanced and the smaller sum, with interest.

(2) This section applies to investments made before or after the commencement of the *Trustee (Investment Powers) Amendment Act 1995*.

Court may take into account investment strategy in action for breach of trust

13C. If a trustee has been charged with a breach of trust in respect of a duty under this Part relating to the trustee's power of investment, the court may, when considering the question of the trustee's liability, take into account—

- (a) the nature and purpose of the trust; and
- (b) whether the trustee had regard to the matters set out in section 9 so far as is appropriate to the circumstances of the trust; and
- (c) whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and
- (d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice.

Power of court to set off gains and losses arising from investment

13D. (1) The court may, when considering an action for breach of trust arising out of or in respect of an investment by a trustee where a loss has been or is expected to be sustained by the trust, set off all or part of the loss resulting from that investment against all or part of the gain resulting from any other investment whether in breach of trust or not.

(2) The power of set off conferred by subsection (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.

Transitional provision

13E. Any provision in an Act or any other instrument (whether or not creating a trust) that empowers or requires a person to invest money in the investments authorised by the *Trustee Act 1936*, is to be read as if it empowered or required that person to invest that money according to the provisions of this Part as to the investment of trust funds.

PART 2
POWERS AND DUTIES OF TRUSTEES

Appointment of New Trustees

Power of appointing new trustees

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 a person or 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.

(1a) The person, or any of the persons, by whom or with whose consent the appointment of a new or additional trustee is required to be made, may appoint himself or, as the case may be, consent to the appointment of himself as a new or additional trustee.

(2) On the appointment of a new trustee—

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

(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: Provided that the Public Trustee or a trustee company may, irrespective of the original number of trustees, be appointed as a sole new trustee and the original trustee or trustees shall thereupon be discharged from the trust. Notwithstanding any other Act it shall not be necessary to obtain the consent of the Supreme Court to an appointment of the Public Trustee under this section; 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.

Trustee Act 1936

(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.

Appointment of separate trustees

14A. (1) Where trustees or a sole trustee or the representatives of the last surviving or continuing trustee deem it expedient that a separate set of trustees or a separate sole trustee should be appointed for any part of the trust property held on trusts distinct from those relating to any other part of the trust property, 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 trustees for the time being or the representatives of the last surviving or continuing trustee, may by writing appoint—

- (a) a separate set of trustees 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
- (b) if only one trustee was originally appointed, a separate sole trustee for the first mentioned part of the trust property.

(2) When the appointment of a separate trustee is required to be made by, or with the consent of a person other than a trustee of the trust property, that person may appoint himself or, as the case may be, consent to the appointment of himself as a separate trustee or as one of a set of separate trustees.

In this subsection the words "**beneficiary**" and "**beneficiaries**" mean the person or persons having a beneficial interest in the property held on distinct trusts as aforesaid.

(3) Where two or more trustees were originally appointed the number of separate trustees shall be not less than two: Provided that the Public Trustee or a trustee company may in any case and irrespective of the original number of trustees be appointed as a sole separate trustee. Notwithstanding any other Act it shall not be necessary to obtain the consent of the Supreme Court to an appointment of the Public Trustee under this section.

(4) On the appointment of a separate set of trustees or a separate trustee any assurance or thing requisite for vesting the trust property or any part thereof jointly in the separate trustees or solely in the separate trustee, as the case may require, shall be executed or done.

(5) Every trustee appointed under this section, as well before as after the part of the trust property for which he is appointed becomes by law or by assurance or otherwise vested in him shall have in relation to that part of the trust property the same powers, authorities and discretion and may in all respects act as if he had been originally appointed trustee by the instrument, if any, creating the trust. Where the original trustee or trustees were entitled to remuneration, the remuneration of the separate trustee or trustees shall be calculated on the value of the part of the trust property for which he is or they are appointed.

(6) 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.

(7) 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.

(8) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

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

Appointment of additional trustees

14B. (1) 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 trustees for the time being or the representatives of the last surviving or continuing trustee, may by writing appoint one or more additional trustees.

(2) Every additional 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 may in all respects act as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

(3) On the appointment of an additional trustee any assurance or thing requisite for the vesting of the trust property or any part thereof jointly in the trustees shall be executed or done.

(4) This section shall apply unless the instrument (if any) creating the trust expressly provides that it shall not apply, or expressly forbids the appointment of additional trustees.

(5) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1942*.

Retirement of trustees

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

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.

Trustee Act 1936

(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, 1893.

*Power of trustee to delegate***Trustee's power of delegation**

17. (1) Notwithstanding any rule of law or equity to the contrary, a trustee may, if not expressly prohibited by the instrument creating the trust, by power of attorney created by deed, delegate to any person or persons residing in the State all or any of the powers, authorities and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) The persons who may be donees of a power of attorney under this section include a trustee company but not (unless a trustee company) the only other co-trustee of the donor of the power.

(3) A power of attorney under this section—

(a) must come into operation on or within six months after the giving of the power; and

(b) shall, unless sooner terminated, terminate on the expiration of twelve months from the date on which it came into operation.

(4) Before or within seven days after giving a power of attorney under this section, the donor shall give written notice of the power to—

(a) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and

(b) each of the other trustees, if any.

(5) A notice under subsection (4) must specify—

(a) the date on which the power of attorney comes into operation and its duration; and

(b) the donee of the power; and

(c) the reason why the power is given; and

(d) where some only are delegated, the powers, authorities and discretions delegated by the power of attorney.

(6) Failure to comply with subsection (4) or (5) shall not invalidate any act done or instrument executed by the donee.

(7) Every act done or instrument executed by the donee of a power of attorney under this section in pursuance of the power shall be as valid and effectual as if done or executed by the donor.

(8) The donee of a power of attorney under this section shall, in the exercise of the powers, authorities and discretions delegated to him by the power, be regarded as a trustee.

(9) The donor and donee of a power of attorney under this section shall be jointly and severally liable for any act or default of the donee.

(10) This section does not limit or affect any power to appoint a new trustee in place of a trustee who has given a power of attorney under this section or any power of the Supreme Court to make any order in relation to the trustee.

Power of delegation of members of fighting forces

17A. (1) Where a trustee is a member of any naval, military or air force of any part of the British Dominions the power of delegation conferred on him by section 17 of this Act shall not be limited to a term of twelve calendar months, but may be so exercised that the delegation is operative for the whole of the period of his service with any such naval, military or air force.

(2) This section shall be deemed to have come into operation on the third day of September, 1939, and shall apply to any power of attorney granted on or after that day and during the continuance of any war in which the Commonwealth is engaged. Any such war shall be deemed to continue from the commencement thereof until the day of the issue of a proclamation by the Commonwealth that the war has ceased.

Revocation of power of attorney not effectual as against person in ignorance

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.

Trustee's ADI account

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 ADI to honour cheques, bills, promissory notes, and drafts drawn upon or made payable out of the account of the trust by any one or more of the trustees or attorneys, and to honour the endorsement 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 ADI acting or paying money in good faith under or in pursuance of such authority in ignorance of such revocation.

(4) This section and sections 17 and 18 of this Act apply only to trusts created after the twenty-first December, 1907.

Power of fiduciaries as to cheques

19A. (1) Where two or more persons in a fiduciary position (other than trustees under a will, settlement or other instrument) have deposited with an ADI moneys which have been received by them as such fiduciaries, it shall be lawful for the ADI, when so authorised by those persons—

- (a) to pay cheques drawn on the ADI by any one or more of them or by any agent authorised by them:
- (b) to recognise as a valid endorsement upon any bill of exchange or promissory note payable to the order of such persons, an endorsement by any one or more of them or by any agent authorised by them.

(2) Where any person in a fiduciary position (other than a trustee under a will, settlement or other instrument) has deposited with an ADI moneys which have been received by him as such fiduciary, it shall be lawful for the ADI when so authorised by that person—

- (a) to pay cheques drawn on the ADI by any agent authorised by the said person:
- (b) to recognise as a valid endorsement on any bill of exchange or promissory note payable to the order of the said person an endorsement by any agent authorised by him.

(3) Nothing in this section contained shall affect any liability of any person in a fiduciary position to any person towards whom he is in a fiduciary position.

(4) This section shall not be construed so as to limit in any way the operation of section 19.

Purchase and sale

Power of trustees for sale to sell by auction and convey

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.

Power of trustee to set apart roads and reserves

(2a) Where the property sold or offered for sale is land the trustees may set apart or dedicate any land being portion of the trust property as roads, streets, passages, thoroughfares, squares, gardens, and reserves and for such purposes may without receiving any consideration vest the land comprising such roads, streets, passages, thoroughfares, squares, gardens and reserves in the Crown or any municipal corporation, municipal council, district council or in any public authority or other person, to be held by the Crown or the corporation, council, public authority or person for the purpose for which it was set apart.

(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, 1862.

Power to sell subject to depreciating conditions

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.

(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, 1893.

Married woman as bare trustee may convey

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*.

Power to take mortgage for part purchase money

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.

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

Deferred payment on sale of land

23A. (1) A trustee for sale may sell land on terms of deferred payment or otherwise.

(2) The terms of deferred payment may provide either for the purchase money being paid by instalments, or for the unpaid purchase money being secured by mortgage.

(3) If the purchase money is to be paid by instalments, the terms upon which the land is sold shall, in addition to such other provisions as the trustee deems proper, include provisions for giving effect to the following:—

- (a) That part of the purchase money shall be paid on the execution of the contract of sale;
- (b) That the balance of the purchase money shall be payable in instalments, the first not later than three years from the date of the contract of sale and the others at intervals of not more than a year being from the date on which the first instalment is payable, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid;

Trustee Act 1936

- (c) That the whole of the purchase money and interest shall be payable within a period not exceeding ten years from the date of the contract of sale;
- (d) That if any instalment or interest or part thereof is in arrear and unpaid for six months or for such less period as may be specified, the whole of the purchase money and interest thereon calculated up to the day of payment shall become due and payable;
- (e) That the purchaser will maintain and protect the land and all buildings (if any) thereon and keep all such buildings insured against loss or damage by fire to the full insurable value thereof.

(4) If the unpaid purchase money is to be secured by mortgage, the terms upon which the land is sold shall, in addition to such other provisions as the trustee deems proper, include provisions for giving effect to the following:—

- (a) That part of the purchase money shall be paid on the execution of the contract of sale;
- (b) That the unpaid purchase money shall be secured by a registered mortgage of the land sold, with or without the security of any other property, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid;
- (c) That the mortgage shall contain covenants by the mortgagor to pay the principal money secured and the interest thereon, to maintain and protect the property, and to keep all buildings, if any, thereon insured against loss or damage by fire to the full insurable value thereof.

(5) Whether the purchase money is to be paid by instalments or the unpaid purchase money is to be secured by mortgage the trustee shall not be deemed to be lending money within the meaning of section 10 of this Act so as to be bound to act in accordance with the provisions of that section, and shall not be liable for any loss which may be incurred by reason only of the fact that the part of the purchase money to be paid by instalments or secured by mortgage is insufficiently secured.

(6) The part of the purchase money to be paid on the execution of the contract of sale shall not be less than the sum which a person acting with prudence would, if the land were his own, have accepted in the circumstances in order to sell the land to the best advantage.

(7) The trustee shall not be bound to require payment of any greater part of the purchase money before letting the purchaser into possession, or before conveying the land and taking a mortgage back, than a person acting with prudence would, if the land were his own, have considered sufficient: Provided that the trustee shall not convey the land and take a mortgage back until at least one-tenth of the purchase money has been paid.

(8) Notwithstanding that the purchase money is to be paid by instalments, the trustee may at any time after one-tenth of the purchase money has been paid convey the land and take a mortgage back in any case where a person acting with prudence would, if the land were his own, have been willing in the circumstances to do so; and in any such case the mortgage shall be in accordance with paragraphs (b) and (c) of subsection (4) of this section, and the provisions of subsection (5) of this section shall apply to it.

(9) Any mortgage under this section may be for any period not exceeding ten years from the date of the contract of sale.

(10) The trustee may, on such terms, if any, as he deems proper by writing waive or vary any right arising from failure to comply with any term of the contract of sale or of any mortgage under this section within the proper time, and may exercise in relation to any such mortgage or agreement any of the powers conferred by sections 13A, 13B, and 13C of this Act.

(11) Where the sum payable under or secured by any such agreement or mortgage (being an agreement or mortgage of or in respect of real property whether freehold or leasehold) does not exceed two-thirds of the whole purchase price, or has been reduced by payment to an amount not exceeding two-thirds of the whole purchase price, that agreement or mortgage, as the case may be, may be held and dealt with by the trustee as though it were an investment authorised by law.

(12) Where the sale is made under the order of the Supreme Court, the provisions of this section shall apply, unless the Supreme Court, or, on any reference to the Master, the Master shall otherwise direct.

(13) 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.

(14) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

Sale after right of redemption barred

23B. (1) Where any property which has been mortgaged to a trustee becomes vested in the trustee discharged from the equity of redemption, the trustee shall hold the property as an authorised investment 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, or any power of the trustee to appropriate the property *in specie* to any beneficiary.

(5) This section applies whether the property is discharged from the equity of redemption by virtue of the statutes of limitation or an order for foreclosure or the purchase of the equity of redemption or otherwise.

Power to purchase equity of redemption in lieu of foreclosure

23C. A trustee unless expressly forbidden by the instrument, if any, creating the trust, in lieu of proceeding to foreclosure may with moneys held upon the same trusts as the mortgage debt purchase the equity of redemption of land in the State the subject of a mortgage held by the trustee under which default has been made: Provided that—

Trustee Act 1936

- (a) before purchasing any such equity of redemption the trustee shall obtain a report as to the value thereof from a person whom the trustee reasonably believes to be competent to give a report upon that value, and who is employed independently of the owner of the equity of redemption; and
- (b) the price paid for the equity of redemption shall not be more than the value thereof as so reported to the trustee.

*Various powers and liabilities***Power to authorise receipt of money by banker or solicitor**

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.

(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 ADI 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 ADI 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 ADI or solicitor for a period longer than is reasonably necessary to enable the ADI 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, 1893.

(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.

Powers of trustee as to insurance

25. (1) A trustee may insure any building or other insurable property against loss or damage whether by fire or otherwise and against any risk or liability against which it would be prudent for a person to insure if he were acting for himself.

(2) The amount for which any property is insured (including any amount of insurance already on foot) shall not exceed the full value of the property: Provided that the full value shall not be limited for the purposes of this section to the sale value of the property but shall include the replacement cost as at times material as well as indemnity against loss of rent and other collateral risks.

(3) A trustee may pay the premiums for such insurance out of any income from the property insured or out of the income of any other property subject to the same trusts, without obtaining the consent of any person, notwithstanding that there may be a person entitled wholly or partly to such income.

(4) If there is no such income or to the extent to which such income is deficient (for which purpose all other outgoings payable from such income whether discretionary or not may be brought into account by the trustee) the trustee may borrow the necessary money for paying the premiums and may give security over the property insured or over any other property subject to the same trusts. The principal of the money so borrowed and the interest thereon shall be repaid out of any income from the property insured or out of the income of any other property subject to the same trusts, if there is any such income available for the purpose; and if there is no such income, or if such income is insufficient, the said principal and interest, or, as the case may be, that part of the said principal and interest which is in excess of the income available for payment thereof, shall be repaid out of the capital of any property subject to the same trusts.

(5) Where a policy of insurance against the loss or damage of any property subject to a trust, whether by fire or otherwise, has been kept up under any trust in that behalf, or under any power statutory or otherwise, or in performance of any obligation statutory or otherwise, the money receivable by a trustee under the policy shall except to the extent to which it is receivable in respect of loss of rent or other collateral risk as aforesaid, be capital money for the purposes of the trust.

(6) If the money is receivable in respect of property held upon trust for sale, it shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust.

(7) In any other case the money shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was receivable.

(8) Notwithstanding subsection (6) of this section, and whether the property in respect of which the money is receivable is held upon trust for sale or not, the money or any part thereof may also be applied by the trustee, or, if in Court, under the direction of the Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged.

(9) Any such application by the trustee shall be subject to the consent of any person whose consent is required by the instrument, if any, creating the trust to the investment of money subject to the trust.

(10) Nothing in this section shall prejudice or affect the right of any person to require the money or part thereof to be applied in rebuilding, reinstating or repairing the property lost or damaged.

(11) Nothing in this section shall prejudice or affect the rights of any mortgagee lessor or lessee, whether under any statute or otherwise.

(12) 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.

Trustee Act 1936

(13) This section applies to trusts created and to policies issued either before or after the commencement of the *Trustee Act Amendment Act 1941* but only to money received after that commencement.

Repairs to trust property

25A. (1) Unless prohibited by the terms of the trust the trustee at his discretion may—

- (a) execute or cause to be executed all repairs to any buildings erections or fixtures being part of the trust property which repairs in the opinion of the trustee are necessary or proper for the preservation of the buildings erections or fixtures or to render them tenable;
- (b) pay and satisfy all rates taxes charges assessments or impositions (including arrears) assessed or imposed on or in respect of the trust property or any part thereof whether payable by the landlord or tenant or owner or occupier in respect thereof;
- (c) pay the moneys required for the purposes mentioned in paragraphs (a) and (b) out of any moneys whether capital or income which are subject to the same trusts as the property repaired or in respect whereof the said rates taxes charges assessments or impositions are paid;
- (d) debit the moneys so paid to capital or income or adjust the same between capital and income in such manner as to the trustee shall seem equitable.

(2) Upon the application of an interested party of which application notice shall be given to the trustee and to such other parties as the Supreme Court may think to have a sufficient interest in the subject matter of the application, the Supreme Court in its discretion may review any such debit or adjustment and may direct how the payments made as aforesaid shall be borne between the parties interested in the trust property. On any such application there shall be no presumption that the trustee has exercised his discretion under paragraph (d) of subsection (1) of this section properly.

(3) On the application of the trustee, of which notice shall be given to the person intended to be affected, the Supreme Court may in its discretion order that the whole or any portion of the moneys paid by the trustee under this section shall be paid by any beneficiary under the trust who the court in its discretion thinks should be made personally liable therefor.

(4) Nothing in this section shall relieve a trustee from any liability in respect of any breach of trust: Provided that a trustee shall not be liable for any breach of trust because of an honest although erroneous exercise of discretion under paragraph (d) of subsection (1) of this section.

Power of Court to authorise alterations and repairs

25B. (1) The Supreme Court may on the application *ex parte* or otherwise of a trustee or of a beneficiary interested in the trust property authorise or direct the expenditure by the trustee of such sum or sums as the court thinks fit out of the capital or income of the trust property or both or out of any part or parts thereof in and for building or rebuilding or repairing, reinstating, altering, adding to or in any way improving the trust property or any part thereof.

(2) If there is no ready money available for the said purposes or to the extent that the ready money is insufficient, the Supreme Court may authorise or direct the trustee to sell any part of the trust property or to raise money upon loan by mortgage of the whole or any part or parts of the trust property for the purpose of securing such loans or otherwise and in either case upon or subject to such terms and conditions as the Court may by order authorise or direct.

(3) The Supreme Court may give directions for the debiting of the expenditure (including the costs of the application to the court) incurred for the purposes of this section to capital or income or for the adjustment of the same between capital and income in such manner as the Court in its discretion thinks just.

(4) 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.

(5) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*; but nothing in this section shall authorise the 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 as to granting leases

25C. (1) A trustee may make a lease of land in possession in any of the following cases, that is to say—

- (a) where he holds the land with power to manage it, or upon trust for sale with an express power to postpone the sale, the lease may be for any term not exceeding ten years;
- (b) where he holds the land without power to manage it, or upon trust for sale, without any express power to postpone the sale, the lease may be for any term not exceeding five years.

(2) A trustee shall not be deemed to hold land with power to manage it within the meaning of this section by reason only of the fact that it is proper to postpone the sale in order to sell to the best advantage and in the meantime to manage the land.

(3) Any lease which a trustee is authorised to make under this section or under the instrument, if any, creating the trust or power may—

- (a) provide for a rent increasing at such times as are specified in the lease;
- (b) give an option of renewal, provided that the duration of the lease and any such renewal shall not in the aggregate exceed the term for which the trustee is authorised to make the lease.

(4) If the land is the subject of a settlement within the meaning of *The Settled Estates Act 1880* and there is any other person authorised by the settlement or by that Act to demise the land or any part thereof, this section shall not apply unless that person in writing authorises the trustee to make the lease.

(5) This section shall not apply to a bare trustee, where the beneficiary, or all the beneficiaries (if more than one) is or are entitled in possession and free of any incapacity.

(6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, 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 to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

Trustee Act 1936

Power of trustees of renewable leaseholds to renew and raise money for the purpose

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.

(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 to surrender leases with onerous covenants

26A. (1) Where a lease is vested in a trustee or in a trustee with others and the lease or the property comprised in the lease is subject to onerous covenants or obligations of such a nature that it would not be in the interests of the beneficiaries to retain the property, the trustee may surrender or concur in surrendering the lease.

(2) A trustee may, in respect of any lease, exercise any power conferred on trustees by this section, notwithstanding that the reversion of the lease is vested in him or in him with others as trustee or trustees under a different trust.

(3) Where the trustee has acted in good faith 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, the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the covenants or obligations were not of the nature mentioned in subsection (1) of this section.

(4) Any person who acquires *bona fide* for value any estate or interest in the property previously subject to such lease shall not be concerned to inquire whether the surrender was authorised by this section.

(5) This section applies whether the leasehold vested in the trustee before or after the commencement of the *Trustee Act Amendment Act 1941*.

Power of trustee to give receipts

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.

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 arrangements, 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.

Power to release equity of redemption in satisfaction of mortgage debt

28A. (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 or part thereof.

(2) The trustee shall not be chargeable with breach of trust nor shall the release be impeached by any beneficiary upon the ground only that the mortgaged property was of greater value than the amount of the mortgage debt or of the part thereof discharged, provided that the trustee has acted in good faith and on the advice of a person whom he reasonably believed to be a competent valuer instructed and employed independently of the mortgagee, whether the valuer carried on business in the locality where the property is situate or elsewhere.

(3) This section applies whether the equity of redemption vested in the trustee before or after the commencement of the *Trustee Act Amendment Act 1941*.

Trustee Act 1936

General power of trustee to raise money

28B. (1) Where a trustee is authorised by the instrument, if any, creating the trust or by law to pay or apply capital money for any purpose or in any manner, he shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as the capital money.

(2) Where a trustee holds land in respect of which moneys are due and payable for rates or taxes or in respect of which the trustee is under a statutory obligation to expend moneys and the trustee has no moneys subject to the same trusts as such land wherewith to pay such rates or taxes or discharge such statutory obligation the trustee shall have and shall be deemed always to have had power to raise the money required to make such payment or discharge such obligation by sale or mortgage of the whole or part of such land or by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as such land.

(3) This section shall apply notwithstanding anything to the contrary contained in the instrument, if any, creating the trust but shall not apply to a trustee of property held for charitable purposes.

(4) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

Application of income by trustee-mortgagee in possession

28C. (1) Where a trustee is entitled whether severally or as a co-mortgagee to a debt secured by a mortgage of land in trust as to the whole or part of such debt for persons by way of succession, and such trustee is at the commencement of the *Trustee Act Amendment Act 1941* or at any time after such commencement becomes mortgagee in possession of the mortgaged land, the trustee shall apply the net income of the mortgaged land received by him after such commencement or after he becomes mortgagee in possession, as the case may be, as follows, namely—

- (a) in discharge of all rents, taxes, rates and outgoings affecting the mortgaged land;
- (b) in payment of the premiums on any insurances properly payable under the mortgage instrument or under the *Trustee Act Amendment Act 1941* and the cost of executing necessary repairs;
- (c) in keeping down all periodical payments whether of principal or interest charged upon the mortgaged land and having priority to the mortgage in right whereof he is in possession.

Subject to the rights of the mortgagor such trustee shall hold the residue of the income so received by him upon the trusts to which such mortgage debt is subject.

(2) The rents, taxes, rates, outgoings, premiums, costs, annual sums, payments and interest so to be discharged, kept down and paid shall be those accruing due—

- (a) after the commencement of the *Trustee Act Amendment Act 1941* where the trustee is in possession of the mortgaged land at such commencement;

- (b) after the date of possession by the trustee, where the entry into possession is after the commencement of the *Trustee Act Amendment Act 1941*:

Provided that if at the commencement of the *Trustee Act Amendment Act 1941* or on the date of possession by the trustee, as the case may be, any rents, taxes, rates, outgoing, annual sums, payments, interest or premiums mentioned in paragraphs (a), (b) or (c) of subsection (1) of this section were or are due and unpaid, and such of those rents, taxes, rates, outgoing, annual sums, payments and premiums as are periodical payments, were payable wholly or in part in respect of any period subsequent to such commencement or to such date of possession, as the case may be, then such last mentioned rents, taxes, rates, outgoing, annual sums, payments and premiums shall, for the purpose of this section, be considered as accruing from day to day and shall be apportionable in respect of time accordingly.

(3) On the recovery of the moneys secured by the mortgage whether in whole or in part, and whether by repayment or on realisation of the security or otherwise, such part of the income applied by the trustee in the payments specified in paragraph (a), (b), and (c) of subsection (1) of this section as would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt shall as between the persons respectively entitled to the income and capital of the mortgage debt be deemed to be arrears of interest and the amount received by the trustee shall be apportioned accordingly.

(4) Notwithstanding anything in this section contained, the trustee may, if in the administration of the trust he deems it necessary so to do, apply income of the mortgaged property received by him after the commencement of the *Trustee Act Amendment Act 1941* in payment of any rents, taxes, rates, outgoing, premiums, costs, annual sums, payments and interest affecting the mortgaged land other than those specified in subsection (2) of this section but the person entitled to the interest on the mortgage debt shall be entitled to recoupment out of the capital of the mortgage debt of all payments made by the trustee under the authority conferred by this subsection.

Distribution of estate after notice by representative or trustee

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.

Trustee Act 1936

(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.

Liability of trustee in respect of rents, covenants, etc.

30. (1) Where a trustee liable as such under any instrument or agreement entered into before the creation of the trust or before the trust became operative for or in respect of—

- (a) any rent, covenant or agreement reserved by or contained in any lease; or
- (b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or
- (c) any indemnity given in respect of any such rent covenant or agreement

satisfies all liabilities under the lease or grant which have accrued and been claimed as against him up to the date of the conveyance hereinafter mentioned, and where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed or ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out that sum may not have arrived, then and in any such case the trustee may convey the property demised or granted, to a purchaser, legatee, devisee or other person entitled to call for conveyance thereof, and thereafter—

- (i) he may distribute the estate or the residue of the estate other than the fund (if any) set apart as aforesaid as the case may be to or amongst the persons entitled thereto without appropriating any part, or any further part, of the estate to meet any future liability under the said lease or grant;
- (ii) notwithstanding such distribution he shall not be personally liable in respect of any claim that may be subsequently made under the said lease or grant except a claim for application of the fund set apart.

(2) This section shall not—

- (a) affect the right to follow assets into the hands of any person or persons to or amongst whom the assets may have been transferred or distributed for the purpose of recovering payment of any amount for which the trustee is liable as mentioned in sub-paragraphs (a), (b) and (c) of subsection (1) of this section;
- (b) apply where the trustee is himself an original party to such lease grant or indemnity or a party otherwise than as trustee.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument if any creating the trust.

(4) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

(5) In this section—

"lease" includes an underlease and an agreement for a lease or underlease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease or underlease;

"grant" includes a grant whether the rent is created by limitation, grant, reservation, or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant;

"lessee" and "grantee" include persons respectively deriving titles under them.

Shares with contingent liability

31. (1) Where trust property includes shares not fully paid up in any company in respect of which there is a contingent liability to contribute, then so soon as the trustee has procured registration of those shares in the name of some other person he may transfer and distribute the trust property without retaining any portion thereof for payment of calls made on those shares after the date of the registration whether made by the company or its directors or by its liquidator in a winding up or by a receiver or manager on behalf of the holders of any debenture or otherwise, and the trustee shall not in such case be personally liable to pay any call after the registration except to the extent of trust property which, at the time when the call is made remains, or should in the due course of administration have remained, in his hands and is, or should have been, available for paying such calls.

(2) This section shall not affect the right to follow assets into the hands of any person or persons to or amongst whom the assets may have been transferred or distributed for the purposes of recovering payment of any such call.

(3) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

Powers of two or more trustees

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.

(2) This section applies only to trusts constituted after or created by instruments coming into operation after the twenty-third day of December, 1893.

Powers of trustees as to maintenance and accumulation

33. (1) Where property is held in trust for any person—

- (a) who is for the time being an infant; or
- (b) subject to his attaining a specified age; or
- (c) contingently upon the happening of any event,

the trustee may in his discretion—

- (i) in the case of an infant, pay to the parent or guardian of the infant or to the person having the custody or control of the infant or otherwise apply for or towards the maintenance, education, benefit or advancement of the infant; or
- (ii) in the case of any beneficiary not an infant, pay to that beneficiary or on his behalf or for his maintenance or benefit or to some person (selected or approved by the trustee) the whole or any part of the income of the property held in trust as aforesaid.

Trustee Act 1936

(2) The power conferred by this section may be exercised at any time or from time to time in the discretion of the trustee and whether there is any other property or fund applicable for the same purpose or any person bound by law to provide and capable of providing for such infant or beneficiary or not.

(3) The power conferred by this section shall not be capable of being exercised so as to prejudice any interest in or charge over the property which is prior to that of the infant or other beneficiary: Provided that where the interest of the infant or other beneficiary is not vested, and would not apart from the power given by this section permit any participation in the intermediate income, but such intermediate income is not specially disposed of and would pass to some other person only under a residuary or general gift of property in the instrument (if any) creating the trust or in the absence of such gift as upon intestacy or as upon a resulting trust, then the intermediate income shall be available for the exercise of the power given by this section and the interest of such person as lastly mentioned in the intermediate income shall not be deemed prior to that of the infant or other beneficiary for the purposes of this section.

(4) To the extent that the intermediate income is not paid or applied pursuant to the power conferred by this section or otherwise the trustee may accumulate that income within the limits allowed by law by investing it and the income resulting therefrom from time to time in securities authorised by law or by the trust instrument (if any).

(5) Such accumulations of income may in any year be paid or applied pursuant to the powers conferred by this section as if they were income arising in that year.

(6) Notwithstanding that an infant or other beneficiary may participate in intermediate income by reason of the exercise of the power conferred by this section the trustee shall hold the accumulations or the residue thereof as an accretion to the corpus of the property from which the accumulations arose as one fund therewith for all purposes other than those hereinbefore particularised.

(7) This section shall be deemed to apply to a vested annuity as if the annuity were income of property held by a trustee upon trust to pay that income to the annuitant for the same period as that for which the annuity is payable save that in any case accumulations as hereinbefore provided shall be held in trust for the annuitant absolutely.

(8) 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.

(9) This section only applies where the trust was created after the commencement of the *Trustee Act Amendment Act 1941*.

(10) Notwithstanding the repeal of section 33 of this Act as in force before the passing of the *Trustee Act Amendment Act 1941* that repealed section shall, in relation to trusts created before the passing of that Act be deemed to continue in force, and to have continued in force as if it had not been repealed.

Power to apply capital towards advancement and benefit

33A. (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee may from time to time pay or apply any capital money subject to the trust, not exceeding altogether in amount one half of the value of the property or share for the advancement, maintenance, education, or benefit of such person in such manner as the trustee shall in his absolute discretion think fit.

(2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on his attaining any specified age or on the happening of any event, or whether his interest is subject to a gift over on his death under any specified age or on the happening of any other event, and notwithstanding that the interest of the person so entitled is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs or whether the person is entitled in possession or in remainder or reversion.

(3) If the person is or becomes absolutely and indefeasibly entitled to a share in the trust property, the money so paid or applied for his advancement, maintenance, education or benefit shall be brought into account as part of such share.

(4) No such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied, unless such person is in existence and under no disability and consents in writing to the payment or application.

(5) This section applies only where the trust property consists of money or securities or property held upon trust for sale calling in and conversion, and the money or securities or the proceeds of the sale calling in and conversion are not by statute or in equity considered as land.

(6) This section applies only and 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 only applies where the trust was created after the commencement of the *Trustee Act Amendment Act 1941*.

* * * * *

Notice where trustee acts in two or more trusts

34A. (1) A trustee acting for the purpose of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

(2) This section applies whether the trusts were created before or after the commencement of the *Trustee Act Amendment Act 1941*.

Liability of trustees

35. (1) A trustee is accountable only for trust property actually received by him unless he wilfully or negligently failed, in breach of his obligations under the trust, to take possession of the trust property.

Trustee Act 1936

(1a) A trustee is not liable for any loss of trust property unless—

- (a) the loss occurred as a result of his own wrongful or negligent act or omission; or
- (b) the loss occurred as a result of circumstances that the trustee could reasonably be expected to have foreseen and to have avoided.

(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.

Investment of pecuniary bequest

35A. (1) A trustee may set aside and invest the amount of any pecuniary bequest in any investments authorised by law or by the will or codicil of the testator and thereafter the investments so made or the proceeds thereof and the interest or other income arising therefrom shall be taken in full satisfaction and discharge of such bequest and all persons interested or entitled or who may become interested or entitled to the estate of the testator or any part thereof shall be bound by such setting aside and investment and any gain or loss consequent thereupon shall accrue to or be borne by the persons interested or entitled or who shall become interested or entitled to such legacy and the interest or income arising therefrom according to their respective rights or interests.

(2) A trustee may set aside and invest in any investments authorised by law or by the trust instrument a fund to answer an annuity or annuities by means of the income of the fund or otherwise, provided that at the time of appropriation the fund would be sufficient if it were invested in Government securities of the Commonwealth of Australia at par to provide an income exceeding the annuity or annuities by at least twenty-five per centum thereof and thereafter the annuitant or annuitants shall be limited to the income or if the annuity or annuities were originally payable out of or charged upon corpus the income and corpus of the fund so set apart and the trustee shall not be personally liable for the deficiency of any such annuity over and above the income or the corpus and income of such fund as the case may be.

(3) A trustee shall have power from time to time to transpose any investments made under this section for other like investments.

(4) This section applies only if or to the extent a contrary intention is not expressed in the instrument (if any) creating the trust.

(5) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

Variation of employees' benefit fund

35B. (1) The trustees of any employees' benefit fund may vary the instrument creating the fund as they think fit, subject to the observance of the following conditions:—

- I. The consent of the beneficiaries shall be obtained to the variation:
- II. The consent shall be obtained by a vote of beneficiaries at a meeting called and held pursuant to not less than four weeks' notice in that behalf stating the details of the proposed variation to be submitted to the meeting and served personally or by post on every beneficiary. If the notice is served by post it shall be sufficient to address it to the usual or last known place of abode or business of the beneficiary:

III. The consent of the beneficiaries shall not be deemed to have been given unless three-fourths of the beneficiaries present and voting at a meeting held as aforesaid consent to the variation.

(2) A person nominated in that behalf by the trustees of the employees' benefit fund shall preside as chairman at a meeting held under this section unless and until some other person is proposed and seconded by beneficiaries and elected as chairman by a majority of the beneficiaries present and voting at the meeting, in which case that person shall preside as chairman.

(3) A person voting at a meeting under this section shall do so by marking his vote on a ballot-paper provided by the trustees; and the meeting shall be so conducted as to ensure that the voting shall be secret.

(4) A certificate in writing under the hand of any person who was chairman of a meeting held under this section at the time the beneficiaries voted on the variation shall be *prima facie* evidence that the meeting was duly called and the consent of the beneficiaries to the variation was duly obtained.

(5) Where the instrument creating an employees' benefit fund is varied pursuant to this section, the property of the fund shall be held on the trusts contained in the instrument as varied.

(6) The benefits to which any person is entitled in possession under an employees' benefit fund shall not be prejudiced or diminished in any way by any variation under this section of the instrument creating the fund without the consent in writing of that person.

(7) This section shall apply unless the instrument creating the employees' benefit fund expressly provides that it shall not apply.

(8) Subject to subsection (7) of this section, where the instrument creating an employees' benefit fund provides for the variation of the instrument, the instrument may be varied in accordance with its terms or in accordance with this section.

(9) This section shall apply to any employees' benefit fund whether created before or after the passing of the *Trustee Act Amendment Act 1953*.

(10) In this section—

"**benefit**" means all or any of the following benefits, namely, pensions, retiring allowances, sickness or hospital benefits, payments during unemployment, death or funeral benefits or other like benefits, allowances or payments;

"**beneficiary**" means a person who is entitled or prospectively entitled to a benefit under an employees' benefit fund by virtue of his employment and who is actually in that employment at the time that the meeting is held pursuant to paragraph II of subsection (1) of this section;

"**employees' benefit fund**" means any fund established, provided, or contributed to, by any employer for the purpose of providing any benefit to his employees during or after the determination of their employment or to both those employees and any other persons;

"**vary**" includes "**add to**" and "**variation**" includes addition.

PART 3
POWERS OF THE COURT

Appointment of new trustees and vesting orders

Power of the court to appoint new trustees

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 an indictable offence, 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.

(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.

Vesting order as to land

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

- I. Where the Supreme Court appoints or has appointed a trustee or where a trustee has been appointed out of court under any statutory or express power:
- 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:
- 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.

Contingent rights of unborn trustees

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, 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.

Effects of vesting order

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

- (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.

Power to appoint person to convey

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.

Vesting orders as to stock and choses in action

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

- I. Where the Supreme Court appoints or has appointed a trustee or where a trustee has been appointed out of court under any statutory or express power:

Trustee Act 1936

- 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.

Persons entitled to apply for vesting orders

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.

Powers of new trustee appointed by Court

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.

Power to charge costs on trust estate

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.

Trustees of charities

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.

Orders made upon certain allegations to be conclusive evidence

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:—

- (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.

Trustee Act 1936

Payment into Court by trustees and mortgagees

Payment into Court by trustees and mortgagees

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 without the concurrence of the other or others; and where any such moneys or securities are deposited with any ADI, 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

Trustee to have power to sell or convey in certain cases

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.

(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.

Power for court to authorise purchase of trust property by trustee

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*,

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

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

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.

Trustee Act 1936

(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.

Power to apply proceeds of sale, mortgage, or lease

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.

(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.

Power of association holding land in trust for religious purposes to dispose of same

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 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*.

Restriction of application of Act

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.

Trustee may sell land with consent of Court

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.

Relief from liability for breach of trust

Jurisdiction of Supreme Court in cases of 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.

Power to make beneficiary indemnify for 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 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

Power to give judgment in absence of a trustee

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.

* * * * *

Trustee Act 1936

Advantageous dealings

59B. (1) Where in the management or administration of any property vested in a trustee, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Supreme Court expedient, but cannot be effected by reason of the absence of or defect in any power for that purpose vested in the trustee by the instrument, if any, creating the trust, or by law, the Supreme Court—

- (a) may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Supreme Court may think fit; and
- (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) Subsection (1) of this section shall be deemed to empower the Supreme Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustee by the trust instrument, if any, creating the trust or by law is expedient, to authorise the trustee to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Supreme Court or the consent of the beneficiaries would be a breach of trust, and in particular the Supreme Court may authorise the trustee—

- (a) to sell trust property notwithstanding that the terms of or the consideration for the sale may not be within any statutory powers of the trustee, or within the terms of the instrument, if any, creating the trust, or may be forbidden by that instrument;
- (b) to postpone the sale of trust property;
- (c) to carry on any business forming part of the trust property during any period for which a sale is postponed;
- (d) to employ capital money subject to the trust in any business which the trustee is authorised by the instrument, if any, creating the trust or by law to carry on;
- (e) to borrow money on such terms and conditions as the court orders.

(3) The Supreme Court may from time to time rescind or vary any order made under this section, or may make any new or further order.

(4) The powers of the Supreme Court under this section shall be in addition to the powers of the Supreme Court under its general administrative jurisdiction and under this or any other Act.

(5) This section applies to trusts created either before or after the commencement of the *Trustee Act Amendment Act 1941*.

Power of Court to authorise variations of trust

59C. (1) The Supreme Court may, on the application of a trustee, or of any person who has a vested, future, or contingent interest in property held on trust—

- (a) vary or revoke all or any of the trusts; or
- (b) where trusts are revoked—
 - (i) distribute the trust property in such manner as the Court considers just; or
 - (ii) resettle the trust property upon such trusts as the Court thinks fit; or
- (c) enlarge or otherwise vary the powers of the trustees to manage or administer the trust property.

(2) In any proceedings under this section the interests of all actual and potential beneficiaries of the trust must be represented, and the Court may appoint counsel to represent the interests of any class of beneficiaries who are at the date of the proceedings unborn or unascertained.

(3) Before the Court exercises its powers under this section, the Court must be satisfied—

- (a) that the application to the court is not substantially motivated by a desire to avoid, or reduce the incidence of tax; and
- (b) that the proposed exercise of powers would be in the interests of beneficiaries of the trust and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class; and
- (c) that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers; and
- (d) that the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust.

(4) An order made by the Supreme Court in the exercise of powers conferred by this section is binding upon all present and future trustees and beneficiaries of the trust.

(5) This section does not apply to—

- (a) a trust affecting property settled by an Act; or
- (b) a charitable trust.

(6) This section does not derogate from any other power of the Supreme Court to vary or revoke a trust, or to enlarge or otherwise vary the powers of trustees.

PART 4
CHARITABLE TRUSTS PROCEDURE

In cases of breach of trust, etc., petition may be presented to Supreme Court

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

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

62. Every petition shall be heard in open court.

Evidence may be brought by affidavit or otherwise

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 *subpoena* issued at the instance of the person requiring such attendance or production.

Service of petition and copy of affidavit

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.

Attorney-General may address court at hearing

65. The Attorney-General may appear and address the court, either personally or by counsel, at the hearing of the petition.

With Judge's consent any person may address court

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.

Powers of court in dealing with petition

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.

Court may order costs

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.

Powers of Supreme Court may be exercised by a single Judge

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.

Inclusion of non-charitable and invalid purposes not to invalidate a trust

69A. (1) Where the purposes for which property is required or permitted to be applied in pursuance of a trust (whether constituted before or after the enactment of this section) are partly charitable, and partly non-charitable and invalid, the trust shall not be held to be invalid, but shall be construed as if no provision had been made requiring or permitting the application of property for purposes that are non-charitable and invalid.

(2) This section does not apply to any trust declared by the will of any testator dying before, or to any other trust declared before, the enactment of this section, if before the enactment of this section—

- (a) the trust has been declared to be invalid by any order or judgment made or given in legal proceedings; or
- (b) property subject to the trust or income therefrom has been paid or conveyed to, or applied for the benefit of, or set apart for, the persons entitled to that property or income by reason of the invalidity of the trust.

Alteration of purposes of charitable trust

69B. (1) The purposes for which property is required or permitted to be applied in pursuance of a charitable trust may be altered by a scheme (**a trust variation scheme**) approved under this section in any of the following circumstances:—

- (a) where the original purposes, in whole or in part—
 - (i) have been as far as possible fulfilled; or
 - (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or
- (b) where the original purposes provide a use for part only of the trust property; or
- (c) where the trust property could be more effectively used if combined with other property applicable for similar purposes and administered jointly with that property; or

Trustee Act 1936

- (d) where it is not reasonably practicable having regard to—
 - (i) the value of the trust property; or
 - (ii) changes in circumstances that have taken place since the constitution of the trust; or
 - (iii) any other relevant factor,to apply the trust property in accordance with the original purposes; or
- (e) where the original purposes, in whole or in part—
 - (i) have been adequately provided for by other means; or
 - (ii) have ceased to be charitable purposes; or
 - (iii) have ceased to provide a suitable and effective method of using the trust property.

(2) References in this section to the original purposes of a charitable trust shall be construed, where the purposes for which the trust property is required or permitted to be applied have been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being required or permitted to be applied.

- (3) A trust variation scheme may be approved, on the application of the trustee, by—
 - (a) the Supreme Court; or
 - (b) if the value of the trust property does not exceed \$250 000 or another limit prescribed by regulation—the Attorney-General.

[The authority to which the application is made (ie. the Supreme Court or the Attorney-General) is referred to in this section as "**the relevant authority**".]

(4) However, the Attorney-General has a discretion to refer an application to the Supreme Court if the application raises questions that should, in the Attorney-General's opinion, be decided by the Court.

(5) Notice of an application for approval of a trust variation scheme must be given as the relevant authority directs.

(6) If the relevant authority is satisfied, on application under this section, that the variation of the terms of a trust proposed in a trust variation scheme—

- (a) accords, as far as reasonably practicable, with the spirit of the trust; and
- (b) is justified in the circumstances of the particular case,

the relevant authority may approve the trust variation scheme and the approved scheme prevails over inconsistent provisions of a relevant instrument or declaration of trust.

(7) The reasonable costs of an application under this section are payable at the direction of the relevant authority from the trust property.

(8) In the case of an application decided by the Attorney-General, the costs—

(a) are to be fixed by the Attorney-General; and

(b) may include costs payable to the Crown to defray the cost of investigating and deciding the application; and

(c) may be recovered as a debt.

(9) The Attorney-General must keep available for public inspection a register of approvals given by the Attorney-General under this section.

Recreational charities

69C. (1) Any trust (whether constituted before or after the enactment of this section) to provide, or assist in the provision of, recreational facilities for the public benefit is a charitable trust.

(2) This section does not apply to recreational facilities unless—

(a) the facilities are provided with the object of improving the conditions of life of the persons for whom they are primarily intended; and

(b) either—

(i) those persons have need of those facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or

(ii) the facilities are to be available to the general public, or a substantial section of the general public.

PART 5
SPECIAL PROVISIONS AS TO APPOINTMENT OF NEW TRUSTEES

This Part to be permissive

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.

Application of this Part

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.

Interpretation

72. In this Part—

"trust estates" includes real and personal estate of every description held upon trust;

"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

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 schedule 1 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

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

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

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.

Registered proprietors

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*.

Registration with power of disposition to lesser number of joint owners

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.

(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.

Form of memorandum of appointment of new trustee

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 schedule 2 hereto, and shall contain the particulars therein referred to.

Verification of memorandum

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 schedule 3 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.

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

Verification of memorandum in special case

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

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.

Trustee Act 1936

Preservation of liability of trustee

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

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 5A
RECORDS TO BE KEPT BY TRUSTEES AND INVESTIGATIONS

Interpretation

84A. In this Part—

"**inspector**" means a person appointed as an inspector under this Part;

"**trust**" means a trust created by a will or other instrument of trust; and "**trustee**" means the trustee administering such a trust.

Records to be kept by trustee

84B. (1) A trustee shall keep such records relating to his administration of the trust property as may be prescribed.

Penalty: Five hundred dollars.

(2) A trustee shall, at the request of—

- (a) the Public Trustee; or
- (b) another trustee of the trust; or
- (c) a beneficiary under the trust,

produce the records kept by the trustee in pursuance of this section for inspection and permit the Public Trustee, the other trustee or the beneficiary (as the case may be) to examine and make copies of those records.

Penalty: Five hundred dollars.

Appointment of inspector

84C. (1) The Supreme Court may, of its own motion, or on the application of any person who has, in the opinion of the Court, a proper interest in the matter, appoint an inspector to investigate the administration of any trust.

(2) An inspector must be a person who holds prescribed qualifications.

(3) The Supreme Court may make orders for the payment of the whole or part of the costs of an investigation under this Part—

- (a) by the applicant for the investigation; or
- (b) by a trustee or beneficiary of the trust; or
- (c) out of the trust estate.

Powers of an inspector

84D. (1) For the purpose of investigating the administration of a trust, an inspector may—

- (a) require any person to produce documents relevant to the administration of the trust; and

Trustee Act 1936

- (b) take copies of, or extract from, any such documents; and
- (c) require any person to answer any question relevant to the administration of the trust; and
- (d) exercise any other power conferred on him by the Court.

(2) A person who—

- (a) refuses or fails to produce documents in his custody or power when required to do so by an inspector; or
- (b) refuses or fails to answer to the best of his knowledge, information and belief any question put to him by an inspector under this section; or
- (c) hinders an inspector in the exercise of his powers,

shall be guilty of an offence and liable to a penalty not exceeding two thousand dollars or imprisonment for six months or both.

(3) A person may decline to answer a question put to him by an inspector under this section if the answer to the question would tend to incriminate him of an offence.

Reports to be made to Attorney-General

84E. (1) Upon completing an investigation under this Part, an inspector shall make a report in writing to the Supreme Court and to the Attorney-General upon the results of the investigation.

(2) An inspector shall make such interim reports to the Supreme Court and to the Attorney-General in relation to an investigation under this Part as the Court may direct.

Confidentiality

84F. An inspector shall not divulge any information that comes to his notice in the course of an investigation under this Part and relates to the administration of the trust subject to the investigation except—

- (a) to the Supreme Court and to the Attorney-General; or
- (b) as directed by the Court.

Penalty: Two thousand dollars.

PART 6
MISCELLANEOUS AND SUPPLEMENTAL

Commission concerning person of unsound mind

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

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

Application to trustee under Settled Estates Act of provisions as to appointment of trustees

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.

(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.

* * * * *

Registration of vesting order or transfer

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.

(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.

Parties entitled may apply to the Court by summons or petition

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.

(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.

Trustee Act 1936

Advice and directions of court and commission

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

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

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.

Regulations

94. The Governor may make such regulations as are contemplated by this Act, or as are necessary or expedient for the purposes of this Act.

SCHEDULES

SCHEDULE 1

Appointment of New Trustees

Pursuant to Part 5 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.]

SCHEDULE 2

Memorandum of the Appointment of New Trustees

Pursuant to Part 5 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 5 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.]

Trustee Act 1936

SCHEDULE 3

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.*]

APPENDIX

LEGISLATIVE HISTORY

· Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 11 of The Public General Acts of South Australia 1837-1975 at page 152.

· Legislative history since 3 February 1976 (**entries in bold type indicate amendments incorporated since the last reprint**) is as follows:

Section 4(1): definition of "deposit" repealed by 32, 1995, s. 3
definition of "investment adviser" inserted by 55, 1980, s. 3(a);
repealed by 32, 1995, s. 3
definition of "securities" substituted by 55, 1980, s. 3(b);
amended by 111, 1983, s. 2

Part 1 comprising ss. 5 - 13F and heading amended by 55, 1980,
s. 4; 44, 1982, ss. 3-6; 111, 1983, s. 3; 56, 1985, s. 3
(Sched.); 71, 1986, s. 3; 18, 1989, s. 3; 92, 1993, s. 4; 17,
1994, Sched. 4 cl. 10; repealed and ss. 5 - 13E and heading
inserted in its place by 32, 1995, s. 4

Section 17: substituted by 2, 1984, s. 3
Section 19(1): amended by 33, 1999, Sched. (item 59(a))
Section 19(3): amended by 33, 1999, Sched. (item 59(b))
Section 19A: amended by 33, 1999, Sched. (item 59(c))
Section 24(3): amended by 33, 1999, Sched. (item 59(d))
Section 24(4): amended by 33, 1999, Sched. (item 59(e))
Section 34: repealed by 2, 1984, s. 4
Section 35(1): substituted by 55, 1980, s. 5
Section 35(1a): inserted by 55, 1980, s. 5
Section 36(1): amended by 59, 1994, Sched. 2
Section 47(4): amended by 33, 1999, Sched. (item 59(f))
Section 57(1): amended by 55, 1980, s. 6
Sections 59 and 59A: repealed by 55, 1980, s. 7
Section 59C: inserted by 55, 1980, s. 8
Sections 69A and 69B: inserted by 55, 1980, s. 9
Section 69B(1): amended by 50, 1996, s. 3(a)
Section 69B(3) - (6): substituted by 50, 1996, s. 3(b)
Section 69B(7) - (9): inserted by 50, 1996, s. 3(b)
Section 69C: inserted by 55, 1980, s. 9

Part 5A comprising ss. 84A - 84F and heading inserted by 55,
1980, s. 10

Section 88: repealed by 49, 1984, s. 6
Section 94: inserted by 55, 1980, s. 11