

CONVEYANCING, TRUSTEE AND PROBATE (AMENDMENT) ACT.

Act No. 30, 1938.

An Act to make certain provisions with respect to trusts for charitable purposes; to amend in certain respects the law relating to trustees and trust property; to amend in certain respects the law relating to executors and administrators; to validate certain matters; for these and other purposes to amend the Conveyancing Act, 1919-1932, the Trustee Act, 1925, the Wills, Probate and Administration Act, 1898-1932, the Public Trustee Act, 1913-1936, the Real Property Act, 1900, and certain other Acts in certain respects; and for purposes connected therewith. [Assented to, 14th December, 1938.]

George VI.
No. 30, 1938.

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

PART I.

PRELIMINARY.

1. (1) This Act may be cited as the "Conveyancing, Trustee and Probate (Amendment) Act, 1938." Short title.

(2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

(3) The Conveyancing Act, 1919-1932, as amended by this Act, may be cited as the Conveyancing Act, 1919-1938.

(4)

Conveyancing, Trustee and Probate (Amendment) Act.

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(4) The Trustee Act, 1925, as amended by subsequent Acts and by this Act, may be cited as the Trustee Act, 1925-1938.

(5) The Wills, Probate and Administration Act, 1898-1932, as amended by this Act, may be cited as the Wills, Probate and Administration Act, 1898-1938.

(6) The Public Trustee Act, 1913-1936, as amended by this Act, may be cited as the Public Trustee Act, 1913-1938.

(7) The Testator's Family Maintenance and Guardianship of Infants Act, 1916-1934, as amended by this Act, may be cited as the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938.

Division
into Parts.

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

PART I.—PRELIMINARY—ss. 1, 2.

PART II.—AMENDMENT OF CONVEYANCING ACT, 1919-1932—ss. 3, 4.

PART III.—AMENDMENT OF TRUSTEE ACT, 1925—s. 5.

PART IV.—AMENDMENT OF WILLS, PROBATE AND ADMINISTRATION ACT, 1898-1932—s. 6.

PART V.—AMENDMENT OF PUBLIC TRUSTEE ACT, 1913-1936—s. 7.

PART VI.—AMENDMENT OF REAL PROPERTY ACT, 1900—s. 8.

PART VII.—AMENDMENT OF TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT, 1916-1934—s. 9.

PART

PART II.

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AMENDMENT OF CONVEYANCING ACT, 1919-1932.

3. The Conveyancing Act, 1919-1932, is amended—

Amendment of Act No. 6, 1919. New Div. 6, Part II.

(a) by inserting in Part II, next after section 37c, the following new Division:—

DIVISION 6.—Trusts for charitable purposes.

37d. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

Inclusion of non-charitable purpose not to invalidate trust. cf. Property Law Act, 1928 (Vict.), s. 131.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

(3) This section shall not apply to any trust declared before or to the will of any testator dying before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938.

(b) by inserting in section two at the end of the matter relating to Part II the following words:—

Sec. 2. (Division into Parts.)

DIVISION 6.—Trusts for charitable purposes —s. 37d.

4. The Conveyancing Act, 1919-1932. is further amended—

Further amendment of Act No. 6, 1919. Sec. 90A. (Notice of trusts affecting mortgage debts.)

(a) by inserting next after subsection one of section 90A the following new subsection:—

(1A) For the purposes of this section the expression "mortgagee" includes a mortgagee who, pursuant to any power conferred by a trust instrument or by law has purchased or otherwise acquired the equity of redemption in the mortgaged property.

(b)

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Sec. 106.
(Leasing
powers of
mortgagor
and of mort-
gagee in
possession.)

- (b) by inserting at the end of subsection sixteen of section one hundred and six the following proviso:—

Provided that, in any case where a trust corporation has been appointed receiver pursuant to subsection (6A) of section one hundred and fifteen of this Act, the delegation by that trust corporation in its capacity of mortgagee shall be sufficiently evidenced by a statement in the lease of the decision of that trust corporation to exercise the power conferred by this subsection.

Sec. 107.
(Powers
(with a
view to the
grant of an
authorised
lease) for
mortgagor
or mort-
gagee in
possession
to accept
surrenders
of lease.)

- (c) by inserting at the end of subsection eleven of section one hundred and seven the following proviso:—

Provided that, in any case where a trust corporation has been appointed receiver pursuant to subsection (6A) of section one hundred and fifteen of this Act, the delegation by that trust corporation in its capacity of mortgagee shall be sufficiently evidenced by a statement in the deed or instrument of surrender of the decision of that trust corporation to exercise the power conferred by this subsection.

Sec. 115.
(Appointment
powers,
remuneration,
and duties of
receiver.)

- (d) (i) by omitting from subsection (6A) of section one hundred and fifteen the words "Where a trust corporation being a mortgagee is entitled to appoint a receiver under the power in that behalf conferred by this Act or by the mortgage deed, or is in possession of the mortgaged property, such trust corporation may appoint itself receiver, and in that event" and by inserting in lieu thereof the words "Where a mortgagee or two or more co-mortgagees is or are entitled to appoint a receiver under the power in that behalf conferred by this Act or by the mortgage deed, or is or are in possession of the mortgaged property, and such mortgagee or one of such co-mortgagees is a trust

trust corporation, such mortgagee or co-mortgagees may appoint such trust corporation receiver and in that event such trust corporation”;

- (ii) by omitting from the proviso to the same subsection the words “so appoints itself” and by inserting in lieu thereof the words “is so appointed”;
- (iii) by inserting in paragraph (d) of subsection eight of the same section after the word “interest” the words “due and unpaid and”;
- (iv) by inserting next after the same paragraph the following word and new paragraph:—
 - and
 - (c) in or towards discharge of the principal money due under the mortgage if so directed in writing by the mortgagee;
- (v) by inserting in the same subsection after the word “residue” the words “if any”;
- (vi) by inserting at the end of the same subsection the following proviso:—

Provided that, in any case where a trust corporation has been appointed receiver pursuant to subsection (6A) of this section, the decision of such trust corporation to effect the insurances mentioned in subsection seven of this section or to apply moneys received by it as receiver in payment of the costs of executing necessary or proper repairs or in or towards discharge of the principal money due under the mortgage shall, for all purposes and on all occasions be deemed to be the equivalent of a direction in writing of that trust corporation in its capacity of mortgagee, so to apply the mortgage moneys:

Provided further that a direction by a mortgagee to apply moneys received by a receiver in or towards satisfaction of the principal moneys or a decision of a trust corporation

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corporation so to apply moneys received by it as receiver shall not be carried into effect unless the mortgagee or trust corporation at the date of such application is entitled to exercise any power of sale contained or implied in the mortgage.

Sec. 151D.
(Power to
appoint
trustees of
infants'
property.)

(c) by omitting paragraph (d) of subsection one of section 151D and by inserting in lieu thereof the following paragraph:—

(d) On such appointment—

(i) the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue or share;

(ii) the rights to which the infant is entitled in virtue of such devise, legacy, residue or share shall be restricted to the property which, by the operation of this section and section nine of the Trustee Act, 1925-1938, is vested in the trustees for the infant and shall not extend to any other property;

(iii) the devise, legacy, residue or share may be retained in its existing condition or state of investment or may be converted into money and such money may be invested in any authorised investment.

Sec. 153 (5).

(f) (i) by omitting from subsection five of section one hundred and fifty-three the word "only";

(ii) by inserting in the same subsection after the words "in the case of" the symbols and letter "(a)";

(iii) by inserting at the end of the same subsection the following word and new paragraph:—

and

(b) grants of administration or orders to collect made before the commencement of
this

this Act in respect of the estates of persons dying on or after the fifteenth day of December, one thousand eight hundred and ninety (being the day of the passing of the Probate Act of 1890).

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- (g) by omitting from subsection two of section 157A the words "vested in a trustee or personal representative is resumed" and by inserting in lieu thereof the words "is acquired by resumption from a trustee or personal representative."

Sec. 157A.
(Sale and conveyance of resumed land.)

PART III.

AMENDMENT OF TRUSTEE ACT, 1925.

5. The Trustee Act, 1925, as amended by subsequent Acts, is amended—

Amendment of Act No. 14, 1925.

- (a) (i) by inserting next after subsection three of section nine the following new subsection:—

Sec. 9.
(Vesting on appointment and retirement of trustees.)

(3A) In the case of any property subject to the provisions of the Closer Settlement Acts or the Mining Act, 1906-1935, or the Crown Lands Consolidation Act, 1913, or any other Act relating to Crown lands, the property shall not vest until either—

- (a) the appropriate transfer is executed and registered so that the property is duly transferred; or
(b) an entry of the vesting is made in the appropriate register kept under the provisions of the Act to which such property is subject.

Any such entry shall have the same effect as if the property were duly transferred.

- (ii) by omitting paragraph (b) of subsection four of the same section;

(iii)

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Sec. 10.
(Renuncia-
tion of
probate.)

- (iii) by omitting from paragraph (c) of the same subsection the words "paragraphs (a) and (b) of this subsection" and by inserting in lieu thereof the words "subsections three and (3A) of this section."
- (b) (i) by omitting from subsection two of section ten the word "solely";
- (ii) by inserting next after the same subsection the following new subsections:—

(2A) Where, pursuant to subsection one of section 75A of the Wills, Probate and Administration Act, 1898-1938, the Public Trustee or a trustee company has been appointed executor of a will in the place or stead of a person by such will appointed both executor and trustee thereof, and probate of such will has been granted to the Public Trustee or the trustee company, as the case may be, then, by virtue of such grant and without further appointment, the Public Trustee or the trustee company, as the case may be, shall be deemed to be appointed trustee of the will in the place or stead of such person.

(2B) In any of the following cases, that is to say—

- (a) where the Supreme Court or a Judge thereof, sitting in its probate or equity jurisdiction, appoints a trustee company administrator in the place or stead of a person who, by the will, was appointed both executor and trustee thereof; or
- (b) where, pursuant to section eighteen of the Public Trustee Act, 1913-1938, the court, upon the application of any executor who was, by the will, appointed both executor and trustee thereof, by order, transfers to the Public Trustee, for administration, the estate of the deceased person; or
- (c)

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(c) where, pursuant to subsection two of section 75A of the Wills, Probate and Administration Act, 1898-1938, an executor who was, by the will, appointed both executor and trustee thereof, by deed appoints the Public Trustee or a trustee company to be executor or one of the executors of the will,

then the trustee company or the Public Trustee, as the case may be, shall, by virtue of such appointment, order or deed, and without further appointment, be deemed to be appointed trustee or one of the trustees of the will, as the case may be.

(c) (i) by omitting from paragraph (f) of subsection two of section fourteen the words "in the Government Savings Bank of New South Wales" and by inserting in lieu thereof the words "in the Commonwealth Savings Bank of Australia or in the Rural Bank of New South Wales or in any bank or corporation prescribed by rules of court";

Sec. 14.
(Authorised investments.)

(ii) by inserting at the end of subsection eight of the same section the following words "or on mortgage of land of any other tenure under the said Acts or the Closer Settlement Acts which is or may be converted into freehold whether subject to a rent to the Crown or not or which is a lease in perpetuity."

(d) by omitting subsection one of section twenty and by inserting in lieu thereof the following subsection:—

Sec. 20.
(Release of part of the security.)

(1) Where any property is held by a trustee by way of security and the trustee has power under this Act or otherwise to invest on mortgage and to vary investments, the trustee—

(a) may release part of the property from the mortgage, whether any part of the mortgage

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mortgage debt is repaid or not, provided that the unreleased part of the property would, at the time, be a proper investment in all respects for the amount remaining unpaid;

(b) may, on a sale by the mortgagor of part of the mortgaged property and on the receipt by the trustee of the whole of the purchase money thereof after deduction of the expenses of the sale, release such part from the mortgage.

Sec. 22.
(New shares
in a
company.)

(e) by inserting next after subsection two of section twenty-two the following new subsection:—

(2A) In any case in which the preferential right in subsection one of this section referred to is offered to him the trustee may in any case in which the shares the subject-matter of the right are subject to a special or reserve liability, whether under the provisions of section one hundred and fifty-two of the Companies Act, 1936, or otherwise, in the event of the winding-up of the company exercise the right and hold the said shares as if they were part of his original holding in the company.

Sec. 26.
(Powers
incident
to sale.)

(f) by inserting next after subsection four of section twenty-six the following new subsection:—

(4A) A contravention of subsection four of this section shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to any land.

Sec. 28.
(Deferred pay-
ment on sale
of land.)

(g) (i) by omitting from paragraph (b) of subsection three of section twenty-eight the word "equal";

(ii) by omitting from the same paragraph the words "two years" and by inserting in lieu thereof the words "three years";

(iii) by inserting at the end of the same paragraph the words—

No instalment which is made payable during the first three years from the date of the contract of sale shall be of an amount
less

less than five per centum of the purchase money, and all instalments which are made payable after the third year from the date of the contract of sale shall be equal in amount.

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- (h) by inserting next after section thirty-two the following new section:—

New s. 32A.

32A. A trustee unless expressly forbidden by the instrument, if any, creating the trust, may, in lieu of proceeding to foreclosure, purchase the equity of redemption of land in New South Wales the subject of a mortgage held by the trustee under which default has been made where the moneys expended in such purchase are subject to the same trusts as the mortgage debt: Provided that in no case shall the moneys paid by way of consideration for such purchase exceed five per centum of the amount due under the mortgage.

Power to purchase equity of redemption in lieu of foreclosure.

- (i) by inserting next after the word "foreclosure" in subsection five of section thirty-three the words "or purchase of the equity of redemption."

S. c. 33.
(Sale after right of redemption barred.)

- (j) by inserting next after subsection one of section thirty-eight the following new subsection:—

Sec. 38.
(Raising money.)

(1A) 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.

(k)

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New ss.
39A, 39B.Application
of income by
trustee-
mortgagee in
possession.

(k) by inserting next after section thirty-nine the following new sections:—

39A. (1) In any case in which 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 Conveyancing, Trustee and Probate (Amendment) Act, 1938, 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 Conveyancing Act, 1919, and the costs of executing necessary repairs;
- (c) in keeping down all annual sums or other payments and the interest on all principal sums 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 Conveyancing, Trustee and Probate (Amendment) Act, 1938, where the trustee is in possession of the mortgaged land at such commencement;

(b)

(b) after the date of possession by the trustee, where the entry into possession is after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938:

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Provided that if at the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, or on the date of possession by the trustee, as the case may be, any rents, taxes, rates, outgoings, annual sums, payments, interest or premiums mentioned in paragraphs (a), (b), or (c) of subsection one of this section were or are due and unpaid, and such of those rents, taxes, rates, outgoings, 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, outgoings, 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 paragraphs (a), (b), and (c) of subsection one 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 corpus 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

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so to do, apply income of the mortgaged property received by him after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, in payment of any rents, taxes, rates, outgoings, premiums, costs, annual sums, payments and interest affecting the mortgaged land other than those specified in subsection two 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.

Validation of certain payments by trustee-mortgagee in possession.

39B. In any case in which, prior to the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, a trustee was entitled either 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 the trustee, having entered into possession of the mortgaged property, has, before such commencement, applied or shall, after such commencement apply bona fide the net income of the mortgaged property received by him before such commencement in payment of any rents, rates, taxes, insurance premiums, outgoings or annual sums on the mortgaged property or of the interest on prior incumbrances on the mortgaged property, or in executing necessary repairs thereto, then—

- (a) the trustee shall not be liable for breach of trust by reason of his having so applied the income of the mortgaged property and shall not be liable personally to make any recoupment in respect of any income so applied by him before or after such commencement; and
- (b) the person entitled to the income of the mortgage debt—
 - (i) shall not be entitled to any recoupment out of the capital of the mortgage debt of any moneys

moneys payable to him as interest and so applied by the trustee prior to the twenty-sixth day of May, one thousand nine hundred and thirty-three, except such part of such moneys as were applied by the trustee in payment of any rents, rates, taxes, insurance premiums, outgoings or annual sums accrued due prior to his possession, but such moneys, except such last-mentioned part (if any), 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 of moneys secured by the mortgage recovered by the trustee whether by repayment or on realisation of the security or otherwise shall be apportioned accordingly;

(ii) shall be entitled to recoupment out of the capital of the mortgage debt of any moneys payable to him as interest and so applied by the trustee after the twenty-fifth day of May, one thousand nine hundred and thirty-three.

(1) (i) by inserting in subsection one of section forty-four after the words "such person" the words "or where such person is an infant, for the maintenance, education, advancement or benefit of such person";

Sec. 44.
(Advancement.)

(ii) by inserting at the end of the same subsection the following new subsection:—

(1A) The power conferred by this section to pay or apply any capital money subject to the trust for the maintenance or education of a person who is an infant shall not be exercised in any case where the trust property

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property or the share thereof to which the infant is entitled exceeds two thousand pounds.

- (l) by omitting subsection eight of section forty-four and by inserting in lieu thereof the following:—

(8) From and after the commencement of the Conveyancing Trustee and Probate (Amendment) Act, 1938, this section shall apply to trusts created before as well as after the commencement of the lastmentioned Act.

Sec. 46.
(Appropriation.)

- (m) (i) by inserting in subsection two of section forty-six immediately after the word “extend” the words “and apply”;

- (ii) by inserting at the end of paragraph (b) of subsection two of section forty-six the following new paragraph:—

(c) setting apart a sum of money in or towards the satisfaction of a legacy share or interest;

- (iii) by inserting at the end of subsection four of the same section the following words: “which may be dealt with or disposed of freed from any such rights”;

- (iv) by inserting next after subsection eight of the same section the following new subsection:—

(8A) Notwithstanding anything contained in paragraph (b) of subsection one or in subsection five or subsection seven of this section the consent of the annuitant shall not be necessary in any case in which the trustee, after having set apart a fund to answer the annuity, which fund at the time of appropriation would be sufficient, if it were invested in Government securities of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least twenty per centum thereof, has actually invested the fund in such securities.

(v)

(v) by inserting in subsection twelve of the same section before the word "disposition" the words "appropriation or"; No. 30, 1933.

(n) by inserting next after paragraph (a) of subsection one of section forty-nine the following new paragraph:— Sec. 49.
(Compound-
ing.)

(aa) sever and apportion any blended trust funds or property.

(o) (i) by inserting in subsection one of section fifty-four after the words "two trustees" the words "or where there are two trustees one of whom is the Public Trustee or a trustee company"; Sec. 54.
(Banks.)

(ii) by omitting from the same subsection the words "but not on any one occasion for a period exceeding three months";

(iii) by inserting in paragraph (a) of the same subsection after the word "authority" the words "or by the Public Trustee or a trustee company if one of the trustees and so named in that behalf in the authority";

(iv) by inserting in paragraph (b) of the same subsection after the word "exchange" the words "or promissory note";

(v) by inserting at the end of the same paragraph the words "or by the Public Trustee or a trustee company if one of the trustees and so named in that behalf in the authority, or where the indorsement is for collection and credit of any account of the trustees with a bank, the indorsement thereon by any one or more of the trustees named in that behalf in the authority";

(vi) by inserting at the end of the same subsection the following proviso:—

Provided that the duration of any such authority shall be limited to a period not exceeding three months on any one occasion, except where—

- (i) the trustee or one of the trustees named in the authority is the Public Trustee or a trustee company; or
- (ii)

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- (ii) the authority is to indorse for collection and credit of any account of the trustees with a bank.

New s. 54A.

- (p) by inserting next after section fifty-four the following new section:—

Banker may recognise certain signatures and endorsements.

54A. (1) Where two or more persons in a fiduciary position (other than trustees under a will, settlement or like instrument) have deposited with a banker moneys which have been received by them as such fiduciaries, it shall be lawful for the banker, when so authorised by such persons—

- (a) to pay cheques drawn on the banker by any one or more of them or 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 any agent authorised by them.

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

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

(3) Nothing in this section contained shall affect any liability of such persons or person to the persons towards whom they are or he is in a fiduciary position.

(q)

- (q) by inserting next after section sixty-one the following new section:—

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New s. 61A.

61A. The legal representative or trustee of the will of a deceased person who was registered as the holder of shares not fully paid up in any incorporated company may distribute the assets of the estate of such deceased person as soon as such legal representative or trustee has procured the registration of some other person as the holder of the shares without reserving any portion of the estate for the payment of any calls made after the date of such registration whether made by the company or its directors or by its liquidators in a winding up, but nothing herein contained shall affect any right which the company or its liquidator may have to follow the assets of such deceased person into the hands of any persons amongst whom the same have been distributed or who have received the same.

Personal liability of legal representative or trustee.

Act. No. 3972, 1928 (Vict.), s. 28.

- (r) by omitting from subsection five of section sixty-four the words "whether as trustee or as delegate either one other trustee or the public trustee or a trustee company" and by inserting in lieu thereof the words "the public trustee or a trustee company or two persons whether as trustee or as delegate";

Sec. 64.

(Execution of trust.)

- (s) by inserting next after section eighty-two the following new section:—

New s. 82A.

82A. (1) Where any leasehold or freehold land is vested in a trustee for any infant or in trust for any person in succession and in the opinion of the trustee it is expedient in the interest of all persons beneficially interested in the land to expend capital moneys subject to the trust for any one or more of the purposes specified in paragraphs (a) to (f) both inclusive of subsection one of section eighty-two of this Act the trustee may, without the authority of the Court, expend on all or any of such purposes capital moneys subject to the trust not exceeding in all five hundred pounds or one-third of the value of the land whichever is the less.

Improvements and repairs without authority of the court.

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(2) Where in the opinion of the trustee it is expedient to exercise the power conferred by subsection one of this section he may without the authority of the Court exercise any of the powers specified in subsection four of section eighty-two of this Act, and he shall throw upon the respective interests of the persons beneficially interested a proper proportion of the moneys so expended.

(3) Subsection eight of section eighty-two of this Act shall apply mutatis mutandis to any sale or mortgage made by a trustee in exercise of the powers conferred by this section.

(4) This section applies to trusts created either before or after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938.

PART IV.

AMENDMENT OF WILLS, PROBATE AND ADMINISTRATION ACT, 1898-1932.

Amendment
of Act No.
13, 1898.

Sec. 31.
(Official
copy of
whole or
part of
will may be
obtained.)

6. The Wills, Probate and Administration Act, 1898-1932, is amended—

(a) (i) by inserting in section thirty-one after the word “will” the words “or such other document as the Probate Judge shall approve”;

(ii) by inserting in the same section after the words “grant of any” the words “probate or”;

(b)

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- (b) by inserting in subsection two of section 40A after the words "deceased person" the words "and of the Real Property Act, 1900, relative to a deceased proprietor";
- (c) (i) by omitting from subsection one of section 40D the words "under section 40c of this Act";
- (ii) by omitting from subsection three of the same section the words "the person himself or if he has died since the date of the grant the executor or administrator to whom a grant of probate or administration is made consequent on the revocation or any other person" and by inserting in lieu thereof the words "any person";
- (iii) by inserting next after the same subsection the following new subsection:—
- (3A) No action shall lie against the Registrar-General for loss, damage or deprivation suffered in consequence of the registration of a transfer or other dealing with land under the provisions of the Real Property Act, 1900, lawfully made by the executor or administrator before the revocation;
- (iv) by inserting in subsection four of the same section immediately before the words "the person" the following words "In any case where a grant of probate or administration is revoked under section 40c of this Act";
- (d) (i) by omitting from subsection one of section forty-two all words after the word "by" and by inserting in lieu thereof the words "motion to the Court in such manner as may be prescribed by rules of Court";
- (ii) by omitting from subsection two of the same section the words "in the Gazette and in one Sydney newspaper" and by inserting in lieu thereof the words "in such newspaper or newspapers as may be prescribed by rules of Court";

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Sec. 40A.
(Evidence or presumption of death.)

Sec. 40D.
(Effect of revoking grant.)

Sec. 42.
(Application for probate or administration may be made by motion.)

(e)

No. 30, 1938.

Sec. 50.

(e) by omitting from section fifty the words "five hundred" wherever therein appearing and by substituting therefor the words "one thousand";

New s. 75A.

(f) by inserting next after section seventy-five the following new section:—

Delegation.

75A. (1) Any person who has been appointed executor of the will of a deceased person and has not renounced or taken probate thereof may by deed appoint the Public Trustee or a trustee company to be executor of the will in his place or stead and upon the registration and filing by subsections eight and nine of this section directed such will shall be construed and take effect in all respects as if the name of the appointee had been originally inserted in such will as the executor or one of the executors thereof in lieu of the person in whose stead it has been appointed.

(2) Any executor who has obtained probate or any administrator who has obtained letters of administration notwithstanding that he has acted in the administration of the deceased's estate and notwithstanding the existence of any other executor or administrator may by deed appoint the Public Trustee or a trustee company to be executor or administrator in his place or stead or as co-executor or co-administrator with him or with the continuing executors or administrators (including the appointor) as the case may be and upon the registration and filing by subsections eight and nine of this section directed the estate of the deceased left unadministered and all rights, powers and obligations in respect thereof shall without any conveyance or other assurance except as otherwise provided in this section vest in the appointee as executor or administrator as the case may be, either solely or jointly with the appointor as the case may be, or, when the appointor is one of several executors or administrators then in the appointee and the continuing executors or administrators or in
the

the appointor, the appointee and the continuing executors or administrators as the case may be, as joint tenants: No. 30, 1938.

Provided that where any portion of such estate is—

- (a) subject to the provisions of the Real Property Act, 1900, such portion shall not vest until either—
 - (i) the appropriate transfer is executed and registered so that such portion is duly transferred; or
 - (ii) an entry of the vesting is made by the Registrar-General. Any such entry shall have the same effect as if the portion were duly transferred; or
- (b) subject to the provisions of the Closer Settlement Acts or the Mining Act, 1906-1935, or the Crown Lands Consolidation Act, 1913, or any other Act relating to Crown lands such portion shall not vest until either—
 - (i) the appropriate transfer is executed and registered so that such portion is duly transferred; or
 - (ii) an entry of the vesting is made in the appropriate register kept under the provisions of the Act to which such portion is subject. Any such entry shall have the same effect as if the portion were duly transferred.

Until such transfer is so executed and registered or such entry of the vesting is made, such executor or administrator shall in any case in which he has appointed the appointee in his place or stead not be discharged from the trusts in respect of such portion of the estate.

An executor or administrator who has appointed the appointee in his place or stead shall not (except as mentioned in the foregoing proviso) be in any way liable in respect of any

any act or default in reference to such estate subsequent to the registration and filing of such deed other than the act or default of himself or of persons other than himself for whose conduct he is in law responsible.

(3) No such appointment shall be made under subsection one or subsection two of this section if the testator has by his will directed or intimated that the office of executor should not be delegated or that the proposed appointee should not act in the trusts of the will.

(4) Prior to making any appointment under subsection one or subsection two of this section the person proposing to make such appointment shall give twenty-eight days' notice in writing thereof to—

- (a) the co-executor or co-administrator (if any) of such person; and
- (b) such of the persons entitled beneficially under the will or in consequence of the intestacy of the deceased person of whose will or estate the person proposing to make the appointment is executor or administrator, as are ordinarily resident in the Commonwealth of Australia and of the full age of twenty-one years:

Provided that the Court may, on the application of the person proposing to make the appointment, direct that service of any notice required by this paragraph be dispensed with.

(5) Any person who is or who ought to be served or who if he were ordinarily resident in the Commonwealth ought to be served with the notice required by subsection four of this section (whether or not the Court has directed that service of notice on such person be dispensed with) may at any time prior to the expiration of the said period of twenty-eight days lodge with the Registrar a notice in the form prescribed that he objects to such appointment being made and serve a copy of such notice

on

on the person proposing to make the appointment mentioned in subsection one or subsection two of this section.

(6) In the event of any such notice of objection being filed and a copy thereof served as aforesaid—

(a) the person proposing to make an appointment under subsection one of this section shall not make such appointment unless the Court, on application made by him, directs that the appointment be made; notice of such application shall be served on such persons as the Court may direct or as may be prescribed;

(b) the person proposing to make an appointment under subsection two of this section shall not make such appointment under that subsection.

(7) In the case of the appointment of a trustee company the capital both paid and unpaid and all other assets of the company and the manager, assistant manager and directors and their respective estates shall be liable for the due administration of the estates of which the company shall be so appointed executor or administrator.

(8) Any such deed as is referred to in subsection two of this section shall be registered in the office of the Registrar-General in the manner and on payment of the fees prescribed by regulation under the Conveyancing Act, 1919-1938.

(9) A duly verified copy of any such deed as is referred to in subsection one or in subsection two of this section shall be filed in the office of the Registrar of Probates.

(10) For the purposes of this section the words "trustee company" shall have the same meaning as in the Trustee Act, 1925.

(g) by inserting in subsection one of section eighty-five immediately before the word "pass" the words "file or file and";

Sec. 85.
(Executor or
administrator
to pass
accounts.)

(h)

No. 30, 1938.

Sec. 86.

(Executors,
&c., may be
allowed
commission.)

(h) by inserting in section eighty-six after subsection two the following new subsection:—

(3) Where any executor, administrator or trustee renounces his right to such commission in respect of any particular year, he shall be entitled to indemnity out of the said assets for the amount of his solicitor's charges and disbursements, as moderated in accordance with the relevant professional scale, for non-professional work performed in that year, to an amount not exceeding that which the executor, administrator or trustee would have been in the opinion of the Registrar allowed by way of such commission for that year had he not so renounced but had applied therefor.

Sec. 87.

(If accounts
not exhibited
Registrar to
summon ad-
ministrator
before Judge,
who may inflict
penalty.)

(i) (i) by inserting in subsection one of section eighty-seven immediately before the word "pass" the words "file or file and";

(ii) by omitting from subsection two of section eighty-seven the words "exhibit such account to" and substituting the words "file or file and pass such accounts in";

Sec. 90.

(j) (i) by omitting subsection one of section ninety;
(ii) by omitting from subsection two of the same section the word "such";

Sec. 98.

(District
agents
to receive
applications in
estates
under £300.)

(k) by omitting from section ninety-eight the words "District Court" and substituting therefor the words "Court of Petty Sessions";

Sec. 101.

(Application
to Registrar
or district
agent.)

(l) by omitting from section one hundred and one all words after the words "may be made" and by inserting in lieu thereof the words "to the Registrar or to a district agent for the Registrar."

Sec. 107.

(Probates and
letters of
administra-
tion granted
in other
colonies or
the United
Kingdom to be
of like force as
if granted in
New South
Wales, on
being resealed.)

(m) by inserting after subsection three of section one hundred and seven the following new subsection:—

(4) For the purposes of this Division of this Part of this Act the word "executor" shall be deemed to include executor by representation.

(n)

(n) (i) by inserting at the end of subsection one of section one hundred and fifty-two the following new paragraph:—

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Sec. 152.

(Registrar to keep records.)

(d) all deeds copies whereof are filed pursuant to subsection nine of section 75A of this Act.

(ii) by inserting at the end of subsection two of the same section the following new paragraph:—

(g) the dates and the names of parties to the deeds whereof copies are filed pursuant to subsection nine of section 75A of this Act.

PART V.

AMENDMENT OF PUBLIC TRUSTEE ACT, 1913-1936.

7. The Public Trustee Act, 1913-1936, is amended—

Amendment of Act No. 19, 1913.

(a) by inserting at the end of subsection one of section eighteen the words “or unless a majority in value of the next of kin have expressed a wish for the appointment of the public trustee”;

Sec. 18.

(Grant of probate or administration to the Public Trustee.)

(b) (i) by inserting in paragraph (d) of subsection one of section thirty-five after the word “property” the following words:—

Sec. 35

(1) (d).

“and the cost of any such repairs shall be charged either to capital or to income or apportioned between capital and income as the public trustee may consider equitable.”

(ii) by omitting from paragraph (n) of subsection two of the same section the words “five hundred pounds” and by inserting in lieu thereof the words “one thousand pounds”;

(iii) by omitting from paragraph (p) of the same subsection the words “five hundred pounds” and by inserting in lieu thereof the words “one thousand pounds.”

(c)

Conveyancing, Trustee and Probate (Amendment) Act.

No. 30, 1938.

Subst.
sec. 40.
Accounts.

(c) by omitting section forty and by inserting in lieu thereof the following section:—

40. (1) Before the thirty-first day of August in each year the public trustee shall prepare and render to the Minister accounts for the then next preceding financial year setting forth—

- (a) the amount of the trust moneys received and paid by the public trustee during the financial year to which the accounts relate; and
- (b) the revenue received and expenditure incurred in the administration of the public trust office during the financial year to which the accounts relate.

(2) The Minister shall cause such accounts to be laid before Parliament within seven sitting days if Parliament is in session and if not then within seven sitting days after the commencement of the next session.

PART VI.**AMENDMENT OF REAL PROPERTY ACT, 1900.**Amendment
of Act No.
25, 1900.

8. (1) The Real Property Act, 1900, as amended by subsequent Acts, is amended—

Sec. 12.
(Powers of
the Registrar-
General.)

(a) by inserting at the end of section twelve the following new paragraph:—

- (f) He may, if he thinks fit, enter a notification in the register book or a caveat for the protection of any person interested in the land.

cf. Convey-
ancing Act,
1919-1932,
s. 88 (3).

Where any such notification is so entered—

- (i) the entry of the same shall not give the interest any greater operation or effect than it would otherwise have;
- (ii) the interest notified shall be deemed to be an interest within the meaning of section forty-two of this Act.

(b)

- (b) by inserting at the end of subsection three of section thirty-eight the following proviso:—

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Sec. 38 (3).

(Dispensing with production of certificate of title.)

Provided that, where the Registrar-General is satisfied as to the bona fides of the transaction and that there is no reasonable possibility of obtaining the statutory declaration referred to in this subsection, he may waive the requirement that such statutory declaration be made; and, in any such case, the Registrar-General shall give notice of his intention to register the dealing which notice shall indicate that such requirement has been waived and shall be published three times at intervals of not less than one month between the several publications, in the Gazette and also in at least one daily newspaper published in Sydney and also, where the land the subject of the dealing is situated outside the County of Cumberland, in at least one newspaper published and circulating in the locality in which the land is situated.

Where notices are published under this proviso the Registrar-General may charge such special fees to cover the cost thereof as may be prescribed by regulations made under the Conveyancing Act, 1919-1932.

- (c) (i) by inserting in section sixty-four after the words "possession of the said land or" wherever occurring the words "the receipt of";
- (ii) by omitting from the same section the words "and to the extent of any" and by inserting in lieu thereof the words "or receipt but only to the extent of any benefit";

Sec. 64.

(Mortgagee of leasehold entering into possession liable to lessor.)

- (d) by inserting next after subsection three of section seventy-two the following new subsection:—

Sec. 72.

(Caveat may be lodged.)

(3A) Where the Registrar-General is satisfied that notice cannot be served on the caveator the Registrar-General may, if he deem fit, by writing under his hand, direct—

- (a) that notice be served in such manner (by advertisement or otherwise) and upon such persons (if any) as he may prescribe; or
- (b)

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(b) that service of notice be dispensed with.

Sec. 73.
(When caveat to lapse.)

(e) by inserting at the end of section seventy-three the following words:—

“or where a direction pursuant to subsection (3A) of section seventy-two of this Act has been given by the Registrar-General upon the expiration of fourteen days after the last notice to the like effect has been served in accordance with such direction or after the date of the direction by the Registrar-General where such direction is that service of notice be dispensed with, as the case may be.”

Sec. 94.
(Registration of executors, etc., by transmission.)

(f) by inserting next after subsection one of section ninety-four the following new subsection:—

(1A) The Registrar-General may, if he thinks fit, accept an application by a person to be registered as proprietor of an estate of freehold in the land of a deceased proprietor where such person claims title otherwise than consequent upon the death, will or intestacy of a deceased proprietor, and may deal with such application under this section.

Any such application shall be accompanied by the consent of the executor or administrator of the deceased proprietor, unless the Registrar-General thinks fit to dispense with such consent.

Sec. 105.
(Sales by Sheriff or under order of Court.)

(g) by inserting next after subsection one of section one hundred and five the following new subsection:—

(1A) A reference in subsection one of this section to a writ shall include and shall be deemed always to have included a writ against the personal representative of a deceased registered proprietor under which any land or any estate or interest in land under the provisions of this Act of the deceased registered proprietor or of the personal representative of the deceased registered proprietor is seized or sold.

Validation.

(2) Any caveat or notification entered and any application accepted and dealt with by the Registrar-General before the commencement of this Act which could

could lawfully have been entered or accepted and dealt with if the amendments made by subsection one of this section had then been in operation is hereby validated.

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PART VII.

AMENDMENT OF TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT, 1916-1934.

9. The Testator's Family Maintenance and Guardianship of Infants Act, 1916-1934, is amended—

Amendment of Act No. 41, 1916.

(a) by inserting next after subsection one of section three the following new subsection:—

Sec. 3. (Orders for maintenance.)

(1A) If any person dies wholly intestate after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, and, in consequence of the provisions of sections fifty and fifty-one of the Wills, Probate and Administration Act, 1898-1938, his widow is left without adequate provision for her proper maintenance, the court may, at its discretion and taking into consideration all the circumstances of the case, upon application made by or on behalf of such widow, order that such provision for such maintenance as the court thinks fit shall be made out of the estate of such person.

Notice of such application shall be served by the applicant on such persons as the court may direct.

(b) by inserting at the end of section four the following new subsection:—

Sec. 4. (Operation of order.)

(2) Any order made under subsection (1A) of section three of this Act shall, subject to this Act, operate and take effect as a modification of the provisions of sections fifty and fifty-one of the Wills, Probate and Administration Act, 1898-1938.

(c)

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Sec. 5.

(Time for making application.)

(c) by inserting at the end of section five the following new subsections:—

(2) No application under subsection (1A) of section three of this Act shall be heard by the court unless the application is made within twelve months from the date of the grant or resealing in New South Wales of letters of administration of the estate of the deceased person.

(3) An application shall be deemed to be made on the day upon which the notice of motion or other process originating the application is filed.

Sec. 6.

(Contents of order.)

(d) (i) by inserting in subsection three of section six after the words “with the will annexed” the words “or, as the case may be, letters of administration”;

(ii) by inserting in subsection four of the same section after the words “testator’s estate” the words “or of the administrator of the estate of the intestate”;

Sec. 7.

(Periodic payments and lump sums.)

(e) (i) by inserting in section seven after the words “legatee or devisee” the words “or beneficiary”;

(ii) by inserting in the same section after the words “under the will” the words “or in consequence of the intestacy”;

Sec. 10.

(Duty on estate, how computed.)

(f) (i) by inserting in subsection one of section ten after the word “testator” the words “or in consequence of the death of the deceased person”;

(ii) by inserting in subsection two of the same section after the word “executor” the words “or administrator”;

Sec. 11.

(Distribution of assets.)

(g) (i) by inserting in subsection one of section eleven after the word “executor” wherever occurring the words “or administrator”;

(ii) by inserting in the same subsection after the word “testator” wherever occurring the words “or intestate, as the case may be”;

(iii)

- (iii) by inserting in subsection two of the same ^{No. 30, 1933.} section after the word "executor" the words "or administrator."
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