

No. XII.

PROPERTY LAW
TRUSTEES
AND MORTGAGEES.

An Act to amend the Law of Property and further to relieve Trustees. [19th December, 1862.]

Preamble.

WHEREAS it is expedient further to amend the Law of Property and to relieve Trustees and to give to Trustees Mortgagees and others certain powers now commonly inserted in settlements mortgages and wills Be it therefore enacted by the Queen'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:—

LEASES.

Restriction on effect
of license to alien.

1. Where any license to do any act which without such license would create a forfeiture or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted shall at any time after the passing of this Act be given to any lessee or his assigns every such license shall unless otherwise expressed extend only to the permission actually given or to any specific breach of any proviso or covenant made or to be made or to the actual assignment under lease or other matter thereby specifically authorized to be done but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license) and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue and shall be available as against any subsequent breach of covenant or condition assignment under lease or other matter not specifically authorized or made dispunishable by such license in the same manner as if no such license had been given and the condition or right of re-entry shall be and remain in all respects as if such license had not been given except in respect of the particular matter authorized to be done.

Restricted operation
of partial licenses.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without license and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest or to do any other act prohibited to be done without license or shall be given to any lessee or owner or any one of several lessees or owners to assign or under-let part only of the property or to do any other such act

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as aforesaid in respect of part only of such property such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by co-lessees or owners of the other shares or interests in the property or by the lessee or owner of the rest of the property as the case may be over or in respect of such shares or interests or remaining property but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

3. Where the reversion upon a lease is severed and the rent or other reservation is legally apportioned the assignee of each part of the reversion shall in respect of the apportioned rent or other reservation allotted or belonging to him be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Apportionment of conditions of entry in certain cases.

4. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor or his heirs executors administrators or assigns shall be proved to have taken place after the passing of this Act in any one particular instance such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate nor to be a general waiver of the benefit of any such covenant or condition unless an intention to that effect shall appear.

Restriction of effect of waiver.

5. The Court of Equity shall have power upon such terms as to the Court may seem fit to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened and the breach has in the opinion of the Court been committed through accident or mistake or otherwise without fraud or gross negligence and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure.

POLICIES OF INSURANCE.

Relief against forfeiture for breach of covenant to insure in certain cases.

6. The Court where relief shall be so granted shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise.

Record of relief granted.

7. The Court shall not have power under this Act so to relieve the same person more than once in respect of the same covenant or condition nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of Court in favor of the person seeking the relief.

Court not to relieve more than once in respect of same covenant &c.

8. The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall on loss or damage by fire happening have the same advantage from any then subsisting insurance relating to the building or other property covenanted to be insured effected by the lessee or mortgagor in respect of his interest under the lease or in the property or by any person claiming under him but not effected in conformity with the covenant as he would have from an insurance effected in conformity with the covenant.

Lessor to have benefit of an informal insurance.

9. Where on the *bonâ fide* purchase after the passing of this Act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire the purchaser is furnished with the written receipt of the person entitled to receive the rent or his agent for the last payment of rent accrued due before the completion of the purchase and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant the purchaser or any person claiming under him shall not be subject to any liability by way of forfeiture or damages or otherwise in respect of any breach of the covenant committed at any time before the completion of the purchase of which

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases.

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which the purchaser had not notice before the completion of the purchase but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

Preceding provisions to apply to leases for a term of years absolute &c.

10. The preceding provisions shall be applicable to leases for a term of years absolute or determinable on a life or lives or otherwise and also to a lease for the life of the lessee or the life or lives of any other person or persons.

RENT CHARGES.

Release of part of land charged not to be an extinguishment.

11. The release from a rent charge of part of the hereditaments charged therewith shall not extinguish the whole rent charge but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release.

POWERS.

Mode of execution of powers.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall so far as respects the execution and attestation thereof be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity Provided always that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution or that any act shall be performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed and to any such execution of a power this provision shall not extend.

Sale under power not to be avoided by reason of mistaken payment to tenant for life.

13. Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon or any other articles attached thereto and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles it shall be lawful for the Supreme Court in its Equitable Jurisdiction upon any bill or claim or application in a summary way as the case may require or permit to declare that upon payment by the purchaser or the claimant under him of the full value of the timber and articles at the time of sale with such interest thereon as the Court shall direct and the settlement of the said principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto the said sale ought to be established And upon such payment and settlement being made accordingly the Court may declare that the said sale is valid and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed And the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him.

Devisee in trust may raise money by sale notwithstanding want of express power in the will.

14. Where any testator shall have charged his real estate or any specific portion thereof with the payment of his debts or with the payment of any legacy or other specific sum of money and shall have devised the estate so charged to any trustee for the whole of his estate or interest therein and shall not have made any express provision for the raising of such debt legacy or sum of money out of such estate it shall be lawful for the said devisee in trust notwithstanding any trusts actually declared by the testator to raise such debts legacy or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof or by a mortgage of the same or partly in one mode and partly in the other and any deed
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of mortgage so executed may reserve such rate of interest and fix such period of repayment as the person executing the same shall think proper.

15. The powers conferred by the next preceding section shall extend to all and every person in whom the estate devised shall for the time being be vested by survivorship descent or devise or to any person who may be appointed under any power in the will or by the Supreme Court in its Equitable Jurisdiction to succeed to the trusteeship vested in such devisee in trust aforesaid.

Powers given by last section extended to survivors devisees &c.

16. If any testator who shall have created such a charge as is described in the next but one preceding section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee the executor for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee in trust for the said hereditaments and such power shall from time to time devolve to and become vested in the person (if any) in whom the executorship shall for the time being be vested but any sale or mortgage under this Act shall operate only on the estate and interest whether legal or equitable of the testator and shall not prevent the necessity for getting in any outstanding subsisting legal estate.

Executor in certain cases vested with like power as devisee in trust as respects raising money.

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by the three next preceding sections or either of them shall have been duly and correctly exercised by any person acting in virtue thereof.

Purchasers &c. not bound to inquire as to powers.

18. The provisions contained in sections fourteenth fifteenth and sixteenth shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the passing of this Act but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed and the said several sections shall not extend to a devise to any person in fee or in tail or for the testator's whole estate and interest charged with debts or legacies nor shall they affect the power of any such devisee to sell or mortgage as he may by law now do.

Sections 14 15 and 16 not to affect certain sales &c. nor to extend to devisees in fee or in tail.

19. Where by any instrument any hereditaments have been or shall be limited to uses all uses thereunder whether expressed or implied by law and whether immediate or future or contingent or executory or to be declared under any power therein contained shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses nor shall any such seisin to uses or scintilla juris be deemed to be suspended or to remain or to subsist in him or elsewhere.

Provision for cases of future and contingent uses.

20. Where there shall be a total failure of heirs of the purchaser or where any land shall be descendible as if an ancestor had been the purchaser thereof and there shall be a total failure of the heirs of such ancestor then and in every such case the land shall descend and the descent shall thenceforth be traced from the person last entitled to the lands as if he had been the purchaser thereof.

INHERITANCE.
Descent how to be traced.

21. The next preceding section shall be read as part of the Act Third and Fourth William the Fourth Chapter one hundred and six adopted in this Colony by the Act Seventh William the Fourth number eight.

Preceding section incorporated with 3 and 4 Wm. 4 c. 106.

22. Any person shall have power to assign personal property now by law assignable including chattels real directly to himself and any other person by the like means as he might assign the same to another.

ASSIGNMENT OF PERSONALTY.
Assignment to self and others.

23. Any seller or mortgagor of land or of any chattels real or personal or choses in action conveyed or assigned to a purchaser or mortgagee

PURCHASERS.
Punishment of vendor &c. for fraud.

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dulent concealment
of deeds &c. or
falsifying pedigree.

mortgagee or the solicitor or agent of any such seller or mortgagor who shall after the passing of this Act conceal any settlement deed will or other instrument material to the title or any incumbrance from the purchaser or mortgagee or falsify any pedigree upon which the title does or may depend in order to induce him to accept the title offered or produced to him with intent in any of such cases to defraud shall be guilty of a misdemeanor and being found guilty shall be liable at the discretion of the Court to suffer such punishment by fine or imprisonment for any time not exceeding two years with or without hard labor or by both as the Court shall award and shall also be liable to an action for damages at the suit of the purchaser or mortgagee or those claiming under the purchaser or mortgagee for any loss sustained by them or either or any of them in consequence of the settlement deed will or other instrument or incumbrance so concealed or of any claim made by any person under such pedigree but whose right was concealed by the falsification of such pedigree And in estimating such damages where the estate shall be recovered from such purchaser or mortgagee or from those claiming under the purchaser or mortgagee regard shall be had to any expenditure by them or either or any of them in improvements on the land but no prosecution for any offence included in this section against any seller or mortgagor or any solicitor or agent shall be commenced without the sanction of Her Majesty's Attorney General or in case that office be vacant of Her Majesty's Solicitor General and no such sanction shall be given without previous notice of the application for leave to prosecute to the person intended to be prosecuted in such form as the Attorney General or the Solicitor General (as the case may be) shall direct.

Extended limits for
recovering mort-
gaged land.

24. Notwithstanding anything contained in the Imperial Act for the limitation of actions and suits relating to real property which Act was adopted by the Colonial Act eighth William Fourth number three it shall be lawful for any person entitled to or claiming under any mortgage of land being land within the definition contained in the first section of the said Imperial Act to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued.

Mortgages to be
pledges at law as in
equity and not to
affect mortgagor's
rights of action.

25. All mortgages of real or personal estate shall hereafter be deemed at law as now in equity pledges only of the property thereby mortgaged and nothing in any such mortgage shall prevent the title of any mortgagor or person claiming and being in possession from being deemed a good title at law subject to such pledge as against all persons other than the mortgagee and those claiming under him Provided that nothing in this enactment contained shall interfere with or prejudice the legal rights and remedies of mortgagees and those claiming under them for the preservation and enforcement of their securities nor shall affect any action or proceeding commenced before the twentieth day of November one thousand eight hundred and sixty-two.

TRUSTEES EXECUTORS
RECEIVERS TRUST
ESTATES AND INVEST-
MENTS.

Trustee &c. making
payment under
power of attorney
not to be liable by
reason of death of
party giving such
power.

26. No trustee executor or administrator making any payment or doing any act *bonâ fide* under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done by reason that the person who gave the power of attorney was dead at the time of such payment or act or had done some act to avoid the power provided that the fact of the death or of the doing of such act as last aforesaid at the time of such payment or act *bonâ fide* done as aforesaid by such trustee executor or administrator was not known to him Provided always that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment

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ment shall have been made but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee executor or administrator if the money had not been paid away under such power of attorney.

27. Where an executor or administrator liable as such to the rents covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised although the period for laying out the same may not have arrived and shall have assigned the lease or agreement for a lease to a purchaser thereof he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease and the executor or administrator so distributing the residuary estate shall not after having assigned the said lease or agreement for a lease and having where necessary set apart such sufficient fund as aforesaid be personally liable in respect of any subsequent claim under the said lease or agreement for a lease but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the persons to or amongst whom the said assets may have been distributed.

As to liability of executor or administrator in respect of rents covenants or agreements.

28. In like manner where an executor or administrator liable as such to the rent covenants or agreements contained in any conveyance on chief rents or rent charges whether any such rent be by limitation of use grant or reservation or agreement for such conveyance granted or assigned to or made and entered into with the testator or intestate whose estate is being administered shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed or agreed to be conveyed although the period for laying out the same may not have arrived and shall have conveyed such property or assigned the said agreement for such conveyance as aforesaid to a purchaser thereof he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance and the executor or administrator so distributing the residuary estate shall not after having made or executed such conveyance or assignment and having where necessary set apart such sufficient fund as aforesaid be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance but nothing herein contained shall prejudice the right of the grantor or those claiming under him to follow the assets of the deceased into the hands of the persons to or among whom the said assets may have been distributed.

As to liability of executor &c. in respect of rents &c. in conveyances on rents charge.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Supreme Court in its Equitable Jurisdiction in an administration suit for creditors and others to send in to the executor or administrators their claims

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

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claims against the estate of the testator or intestate such executor or administrator shall at the expiration of the time named in the said notices or the last of the said notices for sending in such claims be at liberty to distribute the assets of the testator or intestate or any part thereof amongst the parties entitled thereto having regard to the claims of which such executor or administrator has then notice and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof as the case may be but nothing in this Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of any person who may have received the same respectively.

Trustee executor &c. may apply by petition for opinion advice &c. in management &c. of trust property.

30. Any trustee executor or administrator shall be at liberty without the institution of a suit to apply by petition or by summons upon a written statement to the Primary Judge in Equity for the opinion advice or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate such application to be served upon or the hearing thereof to be attended by all persons interested in such application or such of them as the said Judge shall think expedient and the trustee executor or administrator acting upon the opinion advice or direction given by the said Judge shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee executor or administrator in the subject matter of the said application Provided nevertheless that this Act shall not extend to indemnify any trustee executor or administrator in respect of any act done in accordance with such opinion advice or direction of such Judge if such trustee executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion advice or direction Provided also that every such petition or statement shall be signed by the party his Counsel or Attorney and that the Judge may require the petitioner or applicant to attend him in Chambers or in Court when he deems it necessary and such party may appear by Counsel or Attorney and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

Every trust instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

31. Every deed will act or other instrument creating a trust either expressly or by implication shall without prejudice to the clauses actually contained therein be deemed to contain a clause in the words or to the effect following that is to say:—"That the trustees or trustee for the time being of the said deed will or other instrument shall be respectively chargeable only for such moneys stocks funds and securities as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity and shall be answerable and accountable only for their own acts receipts neglects or defaults and not for those of each other nor for any banker broker or other person with whom any trust moneys or securities may be deposited nor for the insufficiency or deficiency of any stocks funds or securities nor for any other loss unless the same shall happen through their own wilful default respectively and also that it shall be lawful for the trustees or trustee for the time being of the said deed will or other instrument to reimburse themselves or himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed will or other instrument."

As to investments by trustees.

32. When a trustee executor or administrator shall not by some instrument creating his trust be or at any time heretofore have been expressly forbidden to invest any trust fund or real securities in any part of the Colony of New South Wales or in the Government Stock of the said Colony it shall be lawful for such trustee executor or administrator to invest such trust fund on such securities or stock and he shall not be liable

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liable on that account as for a breach of trust provided that such investment shall in other respects be reasonable and proper.

33. Any person who under or by virtue of any direction trust or power already or hereafter given created or reserved in any last will or other testamentary disposition marriage or other settlement of real or personal property or other deed agreement or writing is or shall be expressly authorized or directed to lend money at interest on real or Government securities in New South Wales or on real or Government securities in England may in like manner as so authorized and directed in all other respects lend the same or any part thereof at interest on real or Government securities in England or in New South Wales *mutatis mutandis* and such person shall not on account of so lending money be deemed in a Court of Equity guilty of any breach of trust or held accountable further or otherwise than if the money had been laid out by him on real or Government securities where so expressly authorized or directed Provided that every such loan in which any minor or unborn child or person of unsound mind is or may be interested shall be made under the order of the Supreme Court in its Equitable Jurisdiction made in a summary way upon petition or motion with proper notice Provided also that no such loan shall be made without the consent of any person whose consent may be required to the investment so expressly authorized or directed testified in the manner required by such direction trust or power Provided further that this enactment shall not apply to any case in which such direction trust or power as aforesaid doth or shall contain any express restriction against the investment of such money as hereby authorized And provided lastly that nothing herein contained shall be construed to relieve any person intrusted or clothed with such direction trust or power as aforesaid from any responsibility as to title security or otherwise either at law or in equity save as aforesaid.

Investment in England may be substituted for investments in this Colony under certain limitations and *vice versa*.

34. The Judges of the Supreme Court or any two of them the Primary Judge in Equity being one may make such general orders from time to time as to the investment of cash under the control of the Court in such stocks funds or securities as they shall see fit and may make separate orders for the conversion of any securities now standing or which may hereafter stand in the name of any officer of the said Court in trust in any cause or matter into any such other stocks funds or securities upon which by any such general order as aforesaid cash under the control of the Court may be invested all orders for such conversion being made upon petition to be presented by any of the parties interested in a summary way Provided that such parties shall be served with notice thereof as the Court shall direct.

Judges may make general orders as to investment of cash under the control of the Court.

35. When any such general order as aforesaid shall have been made it shall be lawful for trustees executors or administrators having power to invest their trust funds upon Government securities or upon public or parliamentary stocks funds or securities or any of them to invest such trust funds or any part thereof in any of the stocks funds or securities in or upon which by such general order cash under the control of the Court may from time to time be invested.

Trustees &c. to invest trust funds in the stocks &c. in which cash under the control of the Court may be invested.

36. Whereas by the Imperial Act third and fourth William the Fourth chapter twenty-seven section forty adopted in this Colony by eighth William the Fourth number three it was enacted that after the thirty-first day of December one thousand eight hundred and thirty-three no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent at law or in equity or any legacy but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same unless such acknowledgment in writing or payment of principal or interest as therein mentioned should have been given

Extension of sect. 40 of 3 & 4 Wm. 4 c. 27 s. 40 to cases of claims to estates of intestates.

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or made and then within twenty years next after such payment or acknowledgment or the last of such payments or acknowledgments And whereas it is expedient that the said enactment should be extended to the case of claims to the estates of persons dying intestate Be it therefore enacted that after the thirty-first day of December one thousand eight hundred and sixty-two no suit or other proceeding shall be brought to recover the personal estate or any share of the personal estate of any person dying intestate possessed by the legal personal representative of such intestate but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of such estate or share or some interest in respect thereof shall have been accounted for or paid or some acknowledgment of the right thereto shall have been given in writing signed by the person accountable for the same or his agent to the person entitled thereto or his agent and in such case no such action or suit shall be brought but within twenty years after such accounting payment or acknowledgment or the last of such accountings payments or acknowledgments if more than one was made or given.

Order to take account of debts &c. of deceased person under section 19 of 16 Vict. No. 3 may be made immediately after probate granted.

37. The order to take an account of the debts and liabilities affecting the personal estate of a deceased person pursuant to the nineteenth section of the Colonial Act sixteenth Victoria number three may be made immediately or at any time after probate or letters of administration shall have been granted and such order may be made by the Primary Judge in Equity upon motion or petition of course or in Chambers upon a summons in the form used for originating proceedings at Chambers and after any such order shall have been made the said Judge may on the application of the executors or administrators by motion or summons restrain or suspend until the account directed by such order shall have been taken any proceedings at law against such executors or administrators by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability due from the estate of the deceased upon such notice and terms and conditions (if any) as to the said Judge shall seem just and the Judge in directing an account of debts and liabilities pursuant to any such order shall on the application of the executors or administrators be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance of any such order shall be certified by the Master without any adjudication thereon and any notices for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the twenty-eighth section of this Act.

**POWERS OF TRUSTEES
FOR SALE.**

Persons empowered to sell may sell in lots and either by auction or private contract.

38. In all cases where by any will deed act or other instrument it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale either generally or in any particular event over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will deed act or other instrument it shall be lawful for such trustees or other persons whether such hereditaments be vested in them or not to exercise such power of sale by selling such hereditaments either together or in lots and either by auction or private contract and either at one time or at several times and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in this Colony or other specified Colony or Country and upon any such exchange to give or receive any money for equality of exchange.

Sale may be made under special conditions and trustees may buy in &c.

39. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations either as to title or evidence of title or otherwise in any conditions of sale or contract for sale or exchange as they shall think fit and also to buy in the hereditaments or any part thereof at any sale by auction and to rescind or vary
any

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any contract for sale or exchange and to re-sell the hereditaments which shall be so bought in or as to which the contract shall be so rescinded without being responsible for any loss which may be occasioned thereby and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase money in the purchase of any other hereditaments or otherwise.

40. For the purpose of completing any such sale or exchange as aforesaid the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question either by way of revocation and appointment of the use or otherwise as may be necessary.

Trustees exercising power of sale &c. empowered to convey.

41. The money received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will deed act or other instrument containing the power of sale or exchange or if no such indication be therein contained as to all or any part of such money then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in this Colony or other specified Colony or Country or of lands of a leasehold tenure which in the opinion of the persons making the purchase are convenient to be held therewith or with any other hereditaments for the time being subject to the subsisting uses or trusts of the same will deed act or other instrument in which the power of sale or exchange was contained and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses upon and for the trusts intents and purposes and with under and subject to the powers provisoes and declarations to which the hereditaments sold or given in exchange were or would have been subject or as near thereto as the deaths of parties and other intervening accidents will admit of but not so as to increase or multiply charges and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold tenure shall be settled and assured upon and for such trusts intents and purposes and with under and subject to such powers provisoes and declarations as shall as nearly as may be correspond with and be similar to the aforesaid uses trusts intents and purposes powers provisoes and declarations but not so as to increase or multiply charges and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise Provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

Moneys arising from sales &c. to be laid out in other lands.

42. Provided nevertheless that it shall be lawful for the persons exercising any such power as aforesaid if they shall think fit in lieu of applying any money to be received upon any sale or for equality of exchange as aforesaid or any part thereof in purchasing lands therewith to apply the same in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.

Or in payment of incumbrances.

43. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid and to the rents and profits thereof in case such purchase and settlement as aforesaid were then actually made.

Until purchase of lands &c. money to be invested at interest.

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Trustees of renewable leaseholds may renew.

44. It shall be lawful for any trustees of any leaseholds which are renewable from time to time either under any covenant or contract or by custom or usual practice if they shall in their discretion think fit and it shall be the duty of such trustees if thereunto required by any person having any beneficial interest present or future or contingent in such leaseholds to use their 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 it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting and to do all such other acts as shall be requisite in that behalf but this section is not to apply to any case 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 the lease or to contribute to the expense of renewing the same.

Money for equality of exchange and for renewal of leases may be raised by mortgage &c.

45. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid or for renewal of any lease as aforesaid it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange or comprised in the renewed lease whether arising by any of the ways and means hereinbefore mentioned or otherwise and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be) or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject and for the purpose of affecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted or that no more is raised than is wanted for the purposes aforesaid.

No sale &c. to be made without consent of tenant for life &c.

46. No such sale or exchange as aforesaid and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid shall be made without the consent of the person appointed to consent by the will deed act or other instrument or if no such person be appointed then of some person not being under disability entitled in possession to the receipt of the rents and profits of such hereditaments but this clause shall not be taken to require the consent of any person where it appears from the will deed act or other instrument to have been intended that such sale exchange or purchase should be made by the person making the same without the consent of any other person.

POWERS OF MORTGAGES.

Powers incident to mortgages.

47. Where any principal money is secured or charged by deed on any hereditaments of any tenure or on any interest therein the person to whom such money shall for the time being be payable his executors administrators and assigns shall at any time after the expiration of one year from the time when such principal money shall have become payable according to the terms of the deed or after any interest on such principal money shall have been in arrear for six months or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge namely:—

- 1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract subject to any reasonable conditions he may

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may think fit to make and to rescind or vary contracts for sale or buy in and re-sell the property from time to time in like manner.

2nd. A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest.

3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

48. Receipts for purchase money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers who shall not be bound to see to the application of such purchase money. Receipts for purchase money sufficient discharges.

49. No such sale as aforesaid shall be made until after six months notice in writing given to the person or one of the persons entitled to the property subject to the charge by serving such notice personally upon such person or persons or by leaving the same at his or their usual or last known place of abode or business but when a sale has been effected in professed exercise of the powers hereby conferred the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power or that no such notice as aforesaid had been given but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling. Notice to be given before sale but purchaser relieved from inquiry as to circumstances of sale.

50. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows first in payment of all the expenses incident to the sale or incurred in any attempted sale secondly in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made and thirdly in discharge of all the principal moneys then due in respect of such charge and the residue of such money shall be paid to the person entitled to the property subject to the charge his heirs executors administrators or assigns as the case may be. Application of purchase money.

51. The person exercising any power of sale hereby conferred shall have power to convey or assign by deed to and vest in the purchaser the property sold for all the estate and interest therein which the person who created the charge had power to dispose of. Conveyance to the purchaser.

52. At any time after the power of sale hereby conferred shall have become exercisable the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge all the deeds and documents in his possession or power relating to the same property or to the title thereto which he would have been entitled to demand and recover if the same property had been conveyed appointed surrendered or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled or any purchaser from such person shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made. Owner of charge may call for title deeds and conveyance of legal estate.

53. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time if any person has been named in the deed of charge for that purpose appoint any such person to be receiver or if no person be so named then may by writing delivered to the person or any one of the persons entitled to the property subject to the charge or affixed on some conspicuous part of the property require Appointment of receiver.

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such last-mentioned person to appoint a fit and proper person as receiver and if no such appointment be made within ten days after such requisition then may in writing appoint as receiver any person he may think fit.

Receiver deemed to be the agent of the mortgagor.

54. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge who shall be solely responsible for the acts or defaults of such receiver unless otherwise provided for in the charge.

Powers of receiver.

55. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents issues and profits of the property of which he is appointed receiver by action suit distress or otherwise in the name either of the person entitled to the property subject to the charge or of the person entitled to the money secured by the charge to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Receiver may be removed.

56. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver and a new receiver may be appointed from time to time.

Commission to Receiver.

57. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him in lieu of all costs charges and expenses whatsoever such a commission not exceeding eight per centum on the gross amount of all money received as shall be specified in his appointment and if no amount shall be so specified then four per centum on such gross amount.

Receiver to insure if required.

58. Every receiver appointed as aforesaid shall if so directed in writing by the person entitled to the money secured by the charge insure and keep insured from loss or damage by fire out of the money received by him the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.

Application of moneys received by him.

59. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes rates and assessments whatsoever and in payment of his commission as aforesaid and of the premiums on the insurances if any and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver or on any part thereof and subject as aforesaid shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge his executors administrators or assigns.

This part to relate to charges by way of mortgage only.

60. The powers and provisions aforesaid relating to mortgages relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan or to secure an existing or future debt.

FURTHER PROVISIONS AS TO TRUST FUNDS APPOINTMENT AND POWERS OF TRUSTEES.

On what securities trust funds may be invested.

61. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty at their discretion to invest the same in any public funds or Government securities or real securities in any part of the Colony and such trustees shall also be at liberty at their discretion to call in any trust funds invested in any other securities than as aforesaid and to invest the same on any such securities as aforesaid and also from time to time at their discretion to vary any such investments as aforesaid for others of the same nature Provided that no such original investment as aforesaid (except in Government Debentures of the Colony) and no such change of investment as aforesaid shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life or for a term of years determinable with his life or for any greater estate without the consent in writing of such person.

Trustees may apply income of property of infants &c. for their maintenance.

62. In all cases where any property is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of twenty-one years or on the occurrence of any event previously to his attaining that age it shall be lawful for such trustees at their sole discretion to pay to the guardian (if any) of such infant or otherwise to apply for

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for or towards the maintenance or education of such infant the whole or any part of the income to which such infant may be entitled in respect of such property whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not and such trustees shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in proper securities for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen. Provided that it shall be lawful for such trustees at any time if it shall appear to them expedient to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

63. Whenever any trustee either original or substituted and whether appointed by the Court or otherwise shall die or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed before the same shall have been fully discharged and performed it shall be lawful for the person or persons nominated for that purpose by the deed will act or other instrument creating the trust (if any) or if there be no such person able and willing so to act then for the surviving or continuing trustees or trustee for the time being or the acting executors or administrators of the last surviving and continuing trustee or for the last retiring trustee by instrument in writing to appoint any new trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged or refusing or becoming unfit or incapable to act as aforesaid and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee or in the heirs executors or administrators of any trustee shall by virtue of such instrument and without other assurance in the law become and be conveyed assigned and transferred so that the same shall thereupon become and be legally and effectually vested in such new trustee or trustees either solely or jointly with the surviving or continuing trustees or trustee as the case may require and every new trustee or trustees to be appointed as aforesaid and also every trustee appointed by the Court either before or after the passing of this Act shall have the same powers authorities and discretions and shall in all respects act as if he had been originally nominated a trustee by the deed will act or other instrument creating the trust.

Provisions for appointment of new trustees on death &c.

64. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

Appointment of new trustees in cases herein named.

65. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient and to accept any composition or any security real or personal for any debts due to the deceased and to allow any time for payment of any such debts as they shall think fit and also to compromise compound or submit to arbitration all debts accounts claims and things whatsoever relating to the estate of the deceased and for any of the purposes aforesaid to enter into give and execute such agreements instruments of composition releases and other things as they shall think expedient without being responsible for any loss to be occasioned thereby.

Executors may compound &c.

66. For the purposes of this Act a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property although his estate may be charged or incumbered either by himself or by any former owner or otherwise howsoever to any extent but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid unless they shall concur therein.

Tenants for life &c. may execute powers notwithstanding incumbrances.

Life Assurance Encouragement.

Powers &c. hereby given may be negatived by express declaration.

67. None of the powers or incidents hereby conferred or annexed to particular offices estates or circumstances shall take effect or be exercisable if it is declared in the deed will act or other instrument creating such offices estates or circumstances that they shall not take effect and where there is no such declaration then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed will act or other instrument such powers or incidents shall be exercisable or shall take effect only subject to such variations or limitations.

No persons other than those entitled under the settlement &c. to be affected.

68. Nothing in this Act contained shall be deemed to empower any trustee or other person to deal with or affect the estates or rights of any person whomsoever except to the extent to which such trustee or other person might have dealt with or affected the estates or rights of such person if the deed will act or other instrument under which such trustee or other person is empowered to act had contained express powers for him so to deal with or affect such estates or rights.

Operation of Act.

69. This Act shall except where otherwise provided extend to all deeds wills acts or other instruments or trusts executed passed or created as well before as after the passing of this Act.

Interpretation of terms.

70. In the construction of this Act the term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed assigned pledged or charged as security for the repayment of money or money's worth lent and to be reconveyed reassigned or released on satisfaction of the debt and the term "mortgagor" shall be taken to include every person by whom any such conveyance assignment pledge or charge as aforesaid shall be made and the term "mortgagee" shall be taken to include every person to whom or in whose favor any such conveyance assignment pledge or charge as aforesaid is made or transferred and the term "judgment" shall be taken to include registered decrees orders of Courts of Equity and Insolvency and other orders having the operation of judgments.

Short title.

71. This Act shall be styled and may be cited as the "Trust Property Act of 1862."