QUEENSLAND

A REPORT OF THE LAW REFORM COMMISSION

ON THE LAW RELATING TO TRUSTS, TRUSTEES, SETTLED LAND AND CHARITIES

Q.L.R.C. 8

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To the Honourable P.R. Delamothe, O.B.E., M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

The first item on the approved programme of the Law Reform Commission is the examination of the law relating to the powers and duties of trustees with a view to preparing an improved and modern Trustee Act. Our Report, which comprises a draft Bill and accompanying Commentary, contains the recommendations of the Commission on this subject together with certain further proposals for reform of the law relating to charities. The latter is among the topics included in Item 7 of Part A of the approved programme of the Commission but, for reasons which appear in the Report, we consider that the subject of charities may more appropriately be combined with legislation on trusts and trustees. The remaining topics in Item 7 of the programme are considered in an earlier Report of the Commission (Q.L.R.C. 7) on the law relating to perpetuities and accumulations.

One of the major contemporary criticisms of the law of trusts has been its tendency in the last 150 years to move towards rigidity and inflexibility. In the course of this development the part played by legislative intervention has been confined largely to the function of supplementing the administrative powers of trustees by remedying the defects of imperfectly drawn trust instruments. The existing Queensland statute, The Trustees and Executors Act of 1897, is an example of legislation in this traditional form. Now almost three-quarters of a century old, and lacking many of the features of more modern trustee legislation in the United Kingdom and the Australian States, the provisions of the Queensland enactment are directed principally to improving, by adding to rather than by modifying, the framework which the trust instrument itself provides. In this that statute is to be contrasted with The Settled Land Act of 1886, of which the particular purpose was and is to enable land, which is subject to one or more of the forms of limited ownership capable of subsisting at law or in equity in real property, to be disposed of free of restrictions imposed in the past. Hence, whilst in certain respects the Act of 1886 performs in relation to land a function similar to that of the general trustee legislation in relation to trusts of personalty, it does so not merely by supplementing but in many instances by supplanting the original terms on which that land might be held and used.

A central feature of the Act of 1886 is that settled land should be capable of conversion into other forms of property but that the terms on which the land was held should attach to that property whatever the form into which it may have been converted. It is one of the

foremost recommendations of the Commission that the policy of the settled land legislation should be extended to personalty, with a view to assimilating the law relating to trusts of personalty and trusts of land and eliminating unnecessary distinctions between the two. This is capable of being achieved only by conferring on all trustees and limited owners defined statutory powers which may be exercised notwithstanding the absence of powers or even the presence of restrictions in the trust instrument itself. We realise that some of the rigidity which has in the past crept into the law of trusts has been prompted in some cases by a desire to protect the interests of beneficiaries from what were believed to be the dangers implicit in allowing trustees to exercise wide powers. But we are satisfied that there is no substantial reason for supposing that a policy of limitation of trustee powers affords an effective safeguard against dishonesty, or that standards of trusteeship decline if wider powers are conferred. The truth is that the most prominent and direct consequence of limiting the powers of trustees is to place at risk those who deal with trustees who may unconsciously exceed their powers and to impose on such persons the not inconsiderable expense of investigating and ensuring that the limits of power are not exceeded.

This is not to say that the recommended statutory extension of trustee powers represents a novel or even a radical proposal. Indeed, the invariable practice in well-drawn trust instruments is to invest the trustees with powers at least as extensive as those which it is proposed should be conferred by statute. We have, however, made detailed reference to this aspect of the Report for two reasons. One is that, in the absence of such powers, there is the clearest evidence that in changing social and economic conditions rigidity and inflexibility work to the detriment not only of the individuals whom the trust is supposed to benefit but of the community as a whole. The other is that in one submission received by the Commission it has been suggested that extensive powers should be conferred upon and exercisable only by professional trustees. We find ourselves unable to agree with this suggestion. Its adoption would inevitably produce monopoly and result in an interference with individual freedom of choice which would not, we believe, be generally acceptable. It would, moreover, be almost impossible to implement such a proposal without at the same time extending it to executors, since, at least in Queensland, the office of executor is commonly combined with that of trustee, and there are, we think, few who would deny to a testator the right to appoint an executor of his own choosing.

In recommending the repeal and replacement by one statute of both The Trustee and Executor Acts and of The Settled Land Act we have followed a lead first taken in New Zealand in 1956 and adopted in Western Australia in 1962. In addition we have had resort to the modern trustee legislation of the United Kingdom, of New South Wales and Victoria, and to the more recent Trustee Act of Northern Ireland. From these sources we have adopted extensively but by no means uncritically. The Commission's Working Paper has been widely circulated, and we have received a wide range of comment and criticism from many quarters, including the trustee companies, the Public Curator of Queensland, the Associated Banks, the Queensland Law Society and some individual firms of solicitors. In many instances these criticisms have been accepted and given effect in the form of changes to the original Bill; in some cases the criticism has after careful consideration been rejected for reasons which are stated in the Report; in a few instances the comment has, we have found, been based upon a misreading or misconception of the proposal in the draft. Altogether, the Commission has been greatly assisted by the

submissions received and the resulting draft Bill, if passed into legislation, will, we believe, make a significant contribution to the reform of an important branch of the law of this State.

It should be added that, although responsibility for the work of preparing this Report has rested principally with one of the Commission's members, the Commission has, at all stages of the drafting, preparation and discussion of the Bill and Commentary, had the assistance of Mr. W.A. Lee, Senior Lecturer in Law at the University of Queensland, whose knowledge and practical experience of the subject has been of outstanding advantage in formulating the proposals contained in the Report.

W. J. Campbell Chairman

B.H. McPherson Member

Member

BRISBANE
16th June, 1971.

COMMENTARY

PART I - PRELIMINARY

1. Short title and commencement. The suggested title of the proposed Bill is the Trusts Act. Hitherto legislation of the general kind here under consideration has commonly borne the title "Trustee Act" or some local variation thereof, such as in Queensland "The Trustees and Executors Act". However, in view of the changes in the scope and nature of the legislation which is proposed by the subject Bill, we consider that the title "Trusts Act" will serve to emphasise the fact that the proposed Act is not merely concerned to extend the powers of trustees, but to make those powers overriding, and to bring within the purview of the legislation trusts of all kinds including trusts of land formerly classed as settled land, as well as to make various provisions as to substantive rules of equity which are not necessarily confined in their application to trustees in a limited sense.

As to the commencement of the Act, we recommend that, if the Bill is passed into law, a period of some months should be allowed to elapse before it comes into force in order to enable the legal profession and other interested persons to become acquainted with its provisions and to prepare new precedents to take account of the changes proposed. This course was adopted in the case of The Companies Act of 1961 with a considerable degree of success. Some of the provisions of the Bill are, however, urgently and immediately required and these, such as the power of the Court to authorise variations and to extend trustees' powers, might conveniently and advantageously be brought into force immediately. This could be achieved by providing simply that the provisions of Division 4 of Part VII of the Act (Jurisdiction to make other orders - sections 94-102) should come into force at the passing of the Act, with the remaining provisions to come into force on a date to be proclaimed.

2. Division of Act. The Bill comprises in all 112 sections divided into nine Parts.

3. Repeals. The Bill proposes the repeal of several Queensland statutes currently in force, viz., The Trustees and Incapacitated Persons Act of 1867, The Trustees and Executors Acts, 1897 to 1964, including the amending Acts of 1897 (62 Vic. No. 8), 1902 (2 Edw. VII, No. 7) and 1906 (6 Edw. VII, No. 34), The Trustees (Housing Loans) Act of 1967, The Settled Land Act of 1886, and The Trustees Protection Act of 1931 (22 Geo. V, No. 31), as well as two Imperial enactments, the Charitable Uses Act 1601 (43 Eliz. I, c. 4) and Sir Samuel Romilly's Act (52 Geo. III, c. 101).

With the exception of one section (s. 53, dealing with contracts of incapacitated persons) the first of the abovementioned statutes ceased to be of any practical significance with the enactment of The Trustees and Executors Acts in 1897, which either re-enacted or, in most instances, enlarged and improved the provisions of the earlier statute. The powers conferred by s. 53 will in substance be retained in cl. 87 of the Bill, thus enabling the Act of 1867 to be repealed in its entirety.

The repeal of the principal Act of 1897 and its amending statutes is a natural consequence of the fuller and more adequate provisions which are proposed by the Bill; and, since the substance of The Trustees (Housing Loans) Act of 1967 is preserved in cl. 23 of the Bill, the retention of this statute will not be warranted.

The Trustees Protection Act of 1931 was intended to protect from liability for breach of trust directors of companies which had made voluntary arrangements with local authorities for the relief of the latter by reducing the rate of interest payable on debentures issued by local authorities. The legislation was intended to cope with economic conditions during the depression in the third decade of the century and has quite outlived its usefulness.

Of much more importance is the proposed repeal of The Settled Land Act of 1886. This statute, which is largely a rescript of the English Settled Land Act, 1882, was designed to permit and promote dealings with and dispositions of land subject to legal or equitable limitations which restricted its alienation or hampered its improvement. The particular impetus for the legislation in England was the agricultural depression of the eighteen-seventies, and its purpose has been described as being:-

> "to prevent the decay of agricultural and other interests occasioned by the deterioration of lands and buildings in the possession of impecunious life tenants".

(Lord Henry Bruce v. Marquis of Ailsbury [1892] A.C. 356, per Lord Watson, at p. 363). In England the legal and economic effects of the statute were and are far-reaching, and, although in Queensland complex settlements of land on the English model have on the whole ceased to be fashionable, the State legislation continues to perform an essential function, particularly in the not uncommon case in which agricultural land is left to a widow for life with legal remainder after her death to other members of the family.

The general scheme of the settled land legislation, both in England and throughout the Australian States, is to confer on a tenant for life who is beneficially entitled to possession wide powers of disposition (including sale and leasing) of what is defined as "settled land", and to enable the proceeds arising on such dispositions (described as "capital money") to be applied either in improving the land or in making authorised trustee investments. The statutory powers given by s. 5 of the Queensland Act to the tenant for life are by s. 6 also conferred on a wide variety of what may for convenience be called limited powers, i.e. persons who, by reason of the limited nature of the legal or equitable interest which they possess in the land, are unable to exercise powers of complete proprietorship in respect of land to which they are nevertheless for the time being beneficially entitled in possession.

In its present form the legislation of 1886 applies to land falling within the following four categories or classifications: that is to say, to land -

(1) which stands limited to persons by way of succession: section 3(1);

(2) which stands in trust for persons by way of succession: section 3(1);

(3) which is subject to a trust or direction for sale: section 66(1); and -

(4) to which an infant is absolutely entitled: section 7.

It is generally accepted that the inclusion of the third category (land held on trust for sale) was an unnecessary and unwise extension of the legislation: see Megarry and Wade: The Law of Real Property (3rd ed.) at p. 301, and the effect of the proposals in this Bill will be to eliminate

this category and to place land held on trust for sale on the same footing as other trust property: see definition (b) of "trust property" in cl. 5. As regards the fourth category (infants' land) the present position is that, by s. 27 of the Act, the statutory powers of disposition conferred on a tenant for life are exercisable by the trustees of the settlement or, if there are none, by a person appointed by the Court. The effect of the proposals of the Bill (which are set out in cll. 86 and 87 and the commentary thereto) is that, in cases where there is a trustee of infant's property (whether land or personalty), the powers of disposition conferred by the Bill upon trustees will be exercisable by the trustee and, where there is no trustee, by a person appointed by the Court.

Land within the remaining two categories represents "settled land" properly so called. Of these, the first may, in general terms, be said to embrace land which is subject to limitations taking effect at law, and the second with land which is subject to some form of trust or equitable limitation. The former thus includes, for example, the common case of land which is subject to a life estate followed by a legal remainder, as well as a wide variety of other estates and interests capable of subsisting at common law, e. g., fee tail, base fee, determinable fee simple, etc. The requirement common to both categories is, however, that the land in question should stand limited to or for persons "by way of succession":-

> "These words it has been held by the Court of Appeal have no technical force: Re Mundy and Roper's Contract, [1899] 1 Ch. 275, at p. 290. The succession, however, that is contemplated is a succession on death, or in other words it is upon the happening of an event depending upon the termination of human life, upon which the title of the successor must accrue: Attorney-General v. Noyes (1881) L. R. 8 Q. B. D. 125, at p. 139, per Jessel, M. R."

- Re Hoppe [1961] V. R. 381, at p. 403. In the result, whilst the statutory definition of settled land embraces most of the forms of qualified ownership of land which are capable of subsisting at common law or which result from dispositions of land taking their effect in equity, there are some instances which are outside the scope of the legislation: e. g., land which is limited in trust for an estate in fee simple contingently on the happening of an event which does not depend on termination of human life; land of which the income is subject to a trust in favour of discretionary objects, as in Re Toohey's Settled Estate (1887) 3 Q. L. J. 39; or land which is charged with payment of an annuity reserving a right of re-entry to the annuitant: cf. Re Podmore [1914] V. L. R. 420. In addition, the legislative concept of settled land has on occasions been held not to comprehend the situation, commonly encountered in practice, in which an individual is given a personal right to reside on land falling short of a life estate: see, e. g., Stevenson v. Myers (1930) 47 W. N. (N. S. W.) 94, and comments on cll. 21(2) and 22 hereafter.

The course adopted in New Zealand and more recently in Western Australia is to confer wide powers of dealing with and disposition of trust property which are exercisable by the trustee, irrespective of whether that property is land or personalty; and to provide, in effect, that it is only where there is no trustee that such powers shall be exercisable by the person for the time being entitled to land which is vested in him for life "or for any greater estate not being a fee simple absolute". Hence, where the limitations under which an estate in land subsists are purely legal, there being no trustee, the statutory powers conferred on trustees are exercisable by the limited owner: W. A. s. 109(1). The scheme of this legislation is thus to substitute the trustee in place of the tenant for life as active manager of trust property

which would formerly have constituted settled land, although the absolute power of the trustee is qualified by the circumstance that the person or persons beneficially entitled to an interest in possession under a trust of land (i.e. the statutory "tenant for life") are entitled to require a trustee to exercise his power to sell the land in question: W.A. s.27(4); and also by the fact that decisions of the trustee are liable to be reviewed by the Court on application thereto by any person interested in the trust property: W.A. s.94. It follows that under the foregoing scheme it is only where there is no trustee that a limited owner is entitled to exercise the statutory powers formerly vested in the tenant for life, and, even where he does so, he is required to pay to a trustee, appointed for that purpose, any capital money raised by a dealing with the land: W.A. s.109(2).

We consider that the assimilation of the powers of trustees and statutory tenants for life is both a logical and desirable step, and we agree that it is preferable that these powers should, where possible, be vested in and exercisable by the trustee rather than by a tenant for life or other limited owner. We therefore recommend the adoption of the principles of the Western Australian legislation but with certain modifications designed to ensure:-

(1) that greater prominence is given to the sections conferring upon limited owners the statutory powers of trustees: to this end, we propose the insertion in cl.7 of the Bill of the relevant provisions by which those powers are conferred and their exercise controlled (see also cl.31(3));

(2) that the powers, liabilities and duties of a limited owner are defined with greater precision and clarity: s.109(1) of the Western Australian Act simply confers the statutory powers on limited owners, and, in order to avoid difficulties of construction, we consider it necessary that such persons should be described as "statutory trustees" and should be expressly included within the definition of trustees in cl.5; and that the land in respect of which their powers are so exercisable should also be brought within the definition of "trust property" in that clause; likewise, we think that the definition of "trust instrument" should be extended to include what would now be regarded as a "settlement" under s.3(1) of the Act of 1886;

(3) that the responsibilities of limited owners are also clearly expressed so as to leave no doubt that, in exercising their statutory powers, they are bound to have regard to the interests of other persons interested in the subject land and to act in the manner expected of a trustee: cl.7(1);

(4) that land which is subject to a right of personal residence falling short of a life estate is brought within the scope of the legislation so as to avoid the problems referred to above and in the comments to cll.21(2) and 22.

With these and certain further modifications mentioned in the commentary on cl.6, we consider that the Western Australian legislative scheme may be conveniently adopted in Queensland and that The Settled Land Act of 1886 may safely be repealed.

4. Application of Act. It is proposed that the Bill, when passed into legislation, will apply to all trusts, whether constituted or created before or after the commencement of the legislation. This follows s.5 of the

Western Australian Act, but is subject to specific exceptions contained in the Bill itself, and to sub-cl. (5) which preserves the legality and validity of anything done before the commencement of the Act.

Sub-clause (4) is intended to make it clear that the powers which it is proposed should be conferred on trustees are in addition to the powers conferred in the trust instrument or by any other Act. Other Acts conferring powers on trustees include, for example, the Trustee Companies Act 1968, and The Public Curator Acts, 1915 to 1957, as well as particular provisions of statutes such as The State Electricity Commission Acts, 1937 to 1964, s. 25A(4) of which confers upon trustees power to invest trust funds in debentures, bonds, or stock issued under the authority of that Act.

It is also intended to permit a settlor to exclude provisions of the proposed Act which may appear controversial, such as the statutory power to invest in various forms of security other than government stocks, etc. To this extent the provisions of the trust instrument, if to the contrary of the provisions of the proposed Act, will apply; but there are many provisions which, as a matter of policy, must prevail over the terms of the trust instrument, e. g. the trustee's powers of sale, disposition and other dealing with the trust property specified in Part IV of the Bill. In the result, we have thought it advisable, in addition to cl. 4(4), to prescribe at the commencement of each Part the extent to which the provisions of that Part prevail over any contrary terms of the trust instrument.

Sub-clauses (2) and (3) will ensure that a settlor may, if he wishes, confer on his trustee even wider powers than those contained in the Bill.

Sub-clause (6) represents the formula adopted from recent New South Wales legislation in an attempt to ensure that the Crown, not only in right of Queensland but in right of other States, and so far as possible in right of the Commonwealth, is bound by the proposed Act.

5. Interpretation. The interpretative definitions of cl. 5 are based upon the definitions in s. 6 of the Western Australian Act, with the following material changes:-

(1) "instrument" is specifically extended to include what would at present constitute a settlement under s. 3(1) of The Settled Land Act;

(2) "statutory trustee" means a person, having in respect of land referred to in cl. 6, the powers of a trustee, but who is not, apart from the Act, a trustee of the land;

(3) "trustee" includes:-

(e) a statutory trustee, and so includes what has previously been referred to as a "limited owner" of land or what was formerly the statutory tenant for life;

(4) "trust property" includes not only trust property properly so called, including property subject to a trust for sale, but also what was formerly within the concept of settled land, i. e., what has here been described as limited ownership of land, as well as land in respect of which there is a purely personal right of residence deriving from a testamentary instrument.

6. Exercise of powers. Persons by whom powers are exercisable. Clause 6 defines the persons by whom the statutory powers of a trustee may be exercised. The scheme proposed is as follows:-

(a) Existing settled land. In respect of land which is, and at the date of commencement of the Act will be, "settled land", the position is that under the Act of 1886 the statutory powers are at present exercisable as follows:-

(i) by the tenant for life under s. 5 of that Act, or by one of the series of limited owners referred to in s. 6;

(ii) where the tenant for life is an infant, by the trustees of the settlement or by a person appointed by the Court: s. 27;

(iii) where the tenant for life is insane, by his committee or by the Public Curator: s. 29 (the use of the word "insane" in this context is necessary to ensure correspondence with the terminology of s. 29 of The Settled Land Act).

We have previously explained our reasons for recommending that the powers of a person in the position of a tenant for life should in future be exercisable by the trustee of the property wherever possible. However, we consider that many practical difficulties might arise in the administration of settled land if such powers, which have hitherto been exercised by the tenant for life, were suddenly transferred to a different person, namely the trustee. Accordingly, we recommend that, in respect of settled land existing when the proposed Bill becomes law, the person who would, under The Settled Land Act, be the tenant for life shall continue to have or be entitled to exercise the powers conferred by the Bill on trustees, provided that the person in question is not an infant or insane. (The case of infant tenants for life will be governed by cl. 87, and the property of insane persons is now usually dealt with by the Public Curator under the provisions of The Mental Health Acts, 1962 to 1964.) The foregoing is subject to the qualification that s. 69 of The Settled Land Act specifically provides for the application of that Act to settled land which is registered under The Real Property Acts, 1861 to 1964: in such case the proprietor of the land registered for an estate in fee simple in possession is invested with the statutory powers of a tenant for life, which powers he is bound to exercise upon the request in writing of the tenant for life: s. 69(2). To cover this particular case, the proviso has been added to cl. 6(2), so as to ensure continuity of the procedure at present prescribed by s. 69 of the Act of 1886.

(b) Future settled land. Land which becomes (what was formerly) settled land only after the commencement of the proposed Act will constitute "trust property" within the terms of part (c) of the definition in cl. 5, as also will land which is within part (d) of that definition. If there is a trustee of that land, then he alone will be entitled to exercise the statutory powers conferred by the proposed Act, subject to the proviso that he will be bound to exercise the statutory power of sale if directed to do so by the person or persons beneficially entitled to an interest in possession in the land or under the trust of the land: cl. 6(3)(a). If, on the other hand, there is no trustee, then the statutory powers will be exercisable by the limited owner, i.e. the person for the time being beneficially entitled to possession of the land: see cl. 6(3)(b), provided that he is not under a disability, i.e., is of full age and mental capacity: cf. definition in cl. 5 and cl. 5(3). (The expression "for the time being beneficially entitled to possession of land" derives from s. 5 of The Settled Land Act and has been the subject of a number of judicial decisions.)

(c) Other trust property. In respect of other trust property, i.e., personalty and chattels real (cf. part (c) of the definition of "trust property" in cl. 5, which is confined to "estates" in land and excludes a mere lease at rent), the statutory powers conferred by the Bill will be exercisable by the trustee.

(d) In any case. To cover any case which may not be comprehended by the foregoing, or in which there may be some doubt as to the identity of the person entitled to exercise the power, or where the persons by whom the powers are exercisable do not agree, we propose by cl. 6(5) to enable the Court to appoint a person to exercise the statutory powers "in any case".

We had originally proposed that a statutory trustee, i.e., a limited owner of land within cl. 6(1) or cl. 6(2)(a), should be entitled to exercise the powers of a trustee without the need for obtaining the consent of the Court. This represents the position under the West Australian Act, but differs from that under The Settled Land Act, where the sanction of the Court is required: see s. 39. The proposal has, however, drawn the criticism that it confers too wide a power on a statutory trustee at the possible expense of the proper protection of the other beneficial owners. On reflection we consider that there is merit in this criticism and that it is desirable that the wide powers of a statutory trustee should be qualified to the extent of requiring the sanction of the Court to the exercise of the principal powers conferred by cl. 32(1) (sale and leasing) and by cl. 45 (mortgaging): see cl. 31(3).

7. Exercise of powers of statutory trustee. Clause 7 is concerned with defining the conditions governing the exercise of the statutory powers by a person who, apart from the provisions of the Act, is not a trustee, i.e., a statutory trustee, being any of the persons referred to in cl. 6(2), 6(3)(a), and 6(5) of the Bill. The first of these conditions is that he shall have regard to the interests of all parties beneficially interested in the property: clause 7(1)(a)., and the second that he shall be in the position of a trustee and have all the duties and liabilities of a trustee for those parties. These provisions are, with minor variations, derived from s. 107 of the English Settled Land Act 1925 and s. 55 of The Settled Land Act of 1886 (Qld.). In reference to the similar provision in s. 53 of the English Settled Land Act, 1882, Stirling J. in Re Lord Stamford's Settled Estates (1889) 43 Ch. D. 84, at p. 95, expressed the position as follows:-

> "the real answer to any difficulty which arises out of the supposition of the existence of such a power [scil. of application of capital moneys] is that it ought not to be exercised arbitrarily by the tenant for life, but, under s. 53, is to be exercised as all other powers are, with a due regard to the interests of all parties entitled under the settlement. By that section the tenant for life is, in relation to the exercise of such a power, to be 'deemed to be in the position and to have the duties and liabilities of a trustee for those parties'. Therefore it is his duty in exercising the discretion which is vested in him under the Act as to application of capital moneys, to consider whether he is unduly prejudicing any of the parties by that proposed exercise of discretion, and, if he is, then it would not be proper so to exercise that discretion; but where it is a matter of doubt, in the absence of any reason for supposing that the discretion is unfairly exercised, then that discretion ought to prevail".

See also Re Earl of Radnor's Will Trusts (1890) 45 Ch. D. 402, at pp. 418-419; Chirnside v. Chirnside [1947] V.L.R. 183, and cf. Re Meadmore [1942] Q.W.N. 46. The foregoing authorities state what we conceive to be the test which would be applied in determining whether the Court should interfere with the exercise by a person of a power conferred by the proposed Act, where application is made under cl. 8 to review an act, omission, or decision of that person.

The third principal condition of the exercise of a power by a statutory trustee is that any capital moneys arising upon sale, mortgage or other dealing with the land shall be paid into Court or to a trustee

appointed by the Court or otherwise as the Court directs: cl. 7(1)(c). Our original recommendation, following s. 109(2) of the West Australian Act, was that capital money should be paid to a "trustee duly appointed and entitled to receive the same". There has, however, been criticism of this proposal on the ground that the protection it affords compares unfavourably with that provided by The Settled Land Act, s. 31 of which requires payment of capital moneys to the trustees of the settlement or into Court. Situations in which there is, apart from the Act, no trustee to receive capital moneys arising from the exercise of statutory powers will probably not be common, but we agree that there may be dangers in leaving the selection and appointment of an appropriate trustee to the sole discretion of the person beneficially entitled to possession of the land. In these circumstances the only feasible solution is to vest this power in the Court, and s. 7(1)(c) has been re-drawn accordingly.

Waste. At common law a life tenant who carries out on settled land improvements which change its character is guilty of ameliorating waste; and he is liable for voluntary waste if he makes use of resources such as timber or minerals to the damage or disadvantage of the remainderman. In practice, protection against such liability is usually expressly afforded by making the life tenant unimpeachable for waste, and cl. 7(1)(d) simply re-enacts the substance of s. 38 of The Settled Land Act by providing that a person shall not, in relation to any exercise of statutory power, be liable for impeachment of waste. We have not thought it necessary expressly to exclude equitable waste (acts of wanton destruction) from this definition both because protection from impeachment for waste has always been held not to cover equitable waste and because it is difficult to conceive of cases in which, having regard to cl. 7(1) and 7(1)(b)(i), a person could properly commit equitable waste in the course of exercising a statutory power.

Consequences of exercise of power. Clause 7(2) states the consequences which do, and those which do not, follow from the exercise of statutory powers by a person other than a trustee.

As regards land, an exercise of statutory power is, by cl. 7(2)(a), to have the same effect as if done by a trustee vested with an estate in fee simple absolute in that land. This is, of course, the essential feature of the settled land legislation, viz., to enable a limited owner effectively to dispose of an interest greater than that which he himself possesses.

Clauses 7(2)(b) and 7(2)(c) are ancillary to cl. 7(2)(a) in that they represent a restatement of the legislative policy embodied in ss. 52, 53 and 54 of The Settled Land Act to the effect that a settlor may not, by express provision or the imposition of a penalty, fetter the exercise of the statutory powers.

8. Applications to Court to review acts and decisions of trustees. It has always been the case that a trustee may be restrained from committing a breach of trust. (Milligan v. Mitchell (1837) 1 My. & K. 446; 39 E.R. 750; Fox v. Fox (1870) L.R. 11 Eq. 142). However, trustees have never been under any obligation to give reasons for the exercise of discretions vested in them, and Harman L. J. in In re Londonderry's Settlement [1965] Ch. 918, said, at p. 928, that he regarded that "as a long-standing principle which rests and rests largely I think on the view that nobody could be called on to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he were not liable to have his motives or his reasons called in question either by the beneficiaries or by the court". Writing of this decision in the Law Quarterly Review, Vol. 60 (1964), at pp. 475-7, R.E. Megarry said that the policy behind the rule "seems both debatable and worthy of debate"; and Alex Samuels, in the 28 Modern Law Review (1965) at pp. 220-224, remarks:-

> "If the settlor does not wish reasons to be given, let him expressly provide in the trust instrument. The world is full of people making secret reports and decisions upon other people, all feebly claiming that if they had to make full disclosure and give reasons they would feel unable to speak and act with unhibited freedom and candour. We live in a hierarchy of secrecy. People should be made of sterner stuff. They should be answerable for the honesty of their conduct. They should not, save in very exceptionable circumstances, say behind peoples' backs what they would not say to their faces."

Before Londonderry's case brought these criticisms to the fore in England, New Zealand (s. 68) and Western Australia (s. 94) had already provided that any person directly or indirectly interested in the trust, and who is aggrieved by any act, omission or decision of a trustee, or any apprehended act, omission or decision, may apply to the Court; the Court may then require the trustee to state his reasons and may make directions. A somewhat similar power is conferred in the case of company liquidations by s. 279 of The Companies Acts, 1961 to 1964.

In the light of the criticism of Londonderry's case it is recommended that the provision for review of trustees' discretionary decisions, which appears in the New Zealand and Western Australian Acts, be adopted. We do, however, consider that the Western Australian model should be varied by the addition, after the words "power conferred by this Act", of the words "or by the instrument (if any) creating the trust", so that the Court's power of review may extend to the exercise of powers derived from the trust instrument as well as those which are purely statutory in origin.

In one submission received by the Commission it is pointed out that remarks of Mr. Samuels quoted above assume that it would be right to allow a settlor expressly to provide that the trustee should not be bound to give reasons, and it is suggested that cl. 8 should be expressed to be "subject to any provision in the instrument creating the trust". The author of this submission remarks that it is common in the instrument creating the trust (which is frequently a will) to repose in an individual a wide discretion, e.g., to apply income for the benefit or education of infant beneficiaries, and continues: "To allow the discretion to be reviewed by a Court at the behest of a beneficiary is to place the discretion in the hands of an unknown person with a likelihood that it will not be exercised in the manner the testator would have done had he been living".

We are not indifferent to the consequences of requiring a trustee to give reasons for his decisions, particularly where the interests of infants are concerned. But to suggest that the proposed clause will confer on the Court a new power which it does not at present possess is, with respect, to overlook s. 88 of The Children's Services Act of 1965, which provides that "where in any proceeding before the court..... the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant..... the court in deciding that question shall regard the welfare of the infant as the first and paramount consideration.....". When it is borne in mind that essentially this represents no more than a statutory expression of the traditional jurisdiction of the Court of Chancery parens patriae and that an infant can be made a ward of court by the simple expedient of settling upon him a nominal sum and then applying to administer it, it is evident that the powers contemplated by the proposed clause are not novel. On a broader plane, we feel that the inevitable result of the suggested addition to cl. 8 will be the insertion as a matter of course in virtually all trust deeds of a standard form of provision designed to exclude the requirements of that clause. This will have the practical effect within a comparatively short period of time of restoring the undesirable aspects of the Londonderry decision.

In all the circumstances we consider that cl. 8 is best left in its present form. If a choice must be made, it is, we think, preferable that trustees should occasionally experience some embarrassment in publicly justifying their decisions than that beneficiaries should be left quite ignorant as to the reasons which have determined dispositions of what is, after all, beneficially their property and not that of the trustee. We might add that, if our expectations of cl. 8 prove correct, it will only be in clear cases that the Court will be likely to interfere with the discretion exercised by the trustee: see the passage from the judgment in Re Lord Stamford"s Settled Estates, set out above. It does not seem correct to suggest that the discretion of the Court will miscarry more often than that of the trustee.

Sub-section 3(a) of Western Australian s. 94 seems, however, to be a little odd. It provides that if a question of fact is involved, the Court may "direct how the question shall be determined". It is submitted that the Court should be empowered to determine questions of fact itself, if it feels able to do so. It is therefore recommended that the paragraph be redrafted in the form in which it appears in the Bill.

9. Effect of conversion of property under statutory power. Whilst one of the primary objects of the settled land legislation is to enable limited owners to dispose of the full title to the land, it is intended that this should take place with as little disturbance as possible to the rights of those beneficially interested in the settled land: the purpose of s. 31(5) of the Act of 1886 is to ensure that interests which, before sale or other disposition, exist in or to the land are, after such sale or disposition, translated into rights or interests against the proceeds, funds, or "capital money" which results from exercise of the life tenant's statutory powers. Since, under the proposed Act, the converse is also possible, namely that funds may, by investment, be converted into land, it becomes necessary for cl. 9 also to provide for this circumstance. But in other respects the clause simply adopts the language and purport of s. 31(5) of the Act of 1886.

PART II - APPOINTMENT AND DISCHARGE OF TRUSTEES DEVOLUTION OF TRUSTS

10. Application of Part. The provisions of this Part are concerned with the mechanical and administrative problems and procedures associated with limitation of the numbers of trustees, extra-judicial appointment of new trustees, the vesting of trust property in such trustees, and retirement of trustees. Being of a non-controversial nature, these provisions are, in any event, unlikely to be excluded by any reasonable settlor; but we consider it undesirable that such exclusion should be permitted in any case, and, accordingly, it is proposed that all the clauses contained in this Part should, with the exceptions specifically mentioned in cll. 16(5) and 18(1), be made to override the expression of any contrary intention in the trust instrument.

11. Limitation on the number of trustees. As the law now stands in Queensland there is no upper limit on the permissible number of trustees who may be appointed, and in practice a multiplicity of trustees is productive of considerable expense, delay and inconvenience, particularly where conveyancing is involved and where re-vesting of trust property is necessitated by successive deaths of trustees.

To avoid these problems s. 34 of the English Act introduced a numerical limitation of four trustees in the case of trusts coming into operation after the commencement of that Act, buttressed by a similar prohibition directed against increasing the number of trustees beyond four. This course has also been followed in s. 40 of the Victorian statute. The position in New South Wales (s. 16(5)) and Western Australia (s. 7(2)) is slightly more elastic but also much more complex and we prefer and recommend the adoption in cl. 11 of the English provision.

It should be observed, however, that the proposed provision departs from the English model in that it preserves only one of the exceptions prescribed by s. 34(3) of the Trustee Act 1925. Of these, the only exception of any possible local significance is that in s. 34(3)(a) in favour of charitable trusts, as to which there is in England no numerical limitation of trustees. We were inclined to recommend the omission of even this exception in Queensland but, in view of a representation from the Law Society, have decided that charitable trusts should be excepted from the limitation to four trustees.

12. Power of appointing new trustees. Clause 12 differs little from s. 10 of the existing Acts, although two additional grounds for appointment of new trustees appear in cll. 12(1)(g) and 12(1)(h). As regards the former, the general law, whilst not prohibiting an infant from being a trustee, prevents him from effectively doing any act which involves the exercise of a discretion, and because of this an infant trustee will be removed on application to the Court: see Fricke & Strauss: Law of Trusts in Victoria at p. 239. Clause 12(1) differs from the existing s. 10(1) in a further respect, namely, that it will permit the person making the appointment to appoint himself as the new trustee: under s. 10(1), as it now stands, the appointment must be of "another person or other persons" (see on this Re Sampson [1906] 1 Ch. 435): this has been productive of some inconvenience, particularly in the case of trust accounts with savings banks, and we accept the recommendation made by the Associated Banks and of the trustee companies that the law on this point should be changed so as to bring it into conformity with that in Victoria, Western Australia and the United Kingdom.

Other innovations introduced by cl. 12 are included in cl. 12(3), which provides for appointment of a new trustee in place of one who has been removed under a power contained in an instrument without necessity for an application to Court; and also in cl. 12(4), which ensures that the personal representative of the last surviving trustee will be entitled to exercise the statutory power of appointment: see Lewin, op. cit., at pp. 413, 415. The other major change which is proposed by cl. 12(2)(c) is that a trustee shall not be discharged unless there will remain either a trustee corporation or at least two individuals to act as trustees. We consider that the requirement that there should be at least two individuals is justified by a consideration of the greater need for protecting the interests of the beneficiaries in view of the wide statutory powers which will be conferred by the Act.

13. Evidence as to vacancy in a trust. Clause 13 has no counterpart in the existing Acts and is designed to protect persons who purchase from one or more new trustees.

14. Retirement of trustee without a new appointment. Clause 14 will provide a means by which a trustee may retire without necessity for his replacement, provided that thereafter there remain at least two individual trustees or a trustee corporation to perform the trust in question. Fricke & Strauss (op. cit. at p. 259) say of the provision in s. 44 of the Victorian Act that it apparently enables a trustee to retire from part of a trust; but in order to place the matter beyond question we have expressly included words to this effect in cl. 14(1). Section 9 of the Western Australian Act, from which this provision is in substance taken, makes the power of retirement subject to the terms of the trust instrument; but we consider it desirable that a trustee should be permitted to retire whatever may have been the settlor's original intention. If the services of a particular trustee are regarded by the settlor as of the essence of the trust, he may limit the trust to endure only so long as that person continues to act as trustee.

15. Vesting of property in new or continuing trustees. Clause 15 makes provision, consequential upon the preceding three clauses, for automatic

vesting of trust property in the event of appointment of new trustees or retirement. The operation of special formalities regulating transfer of various forms of property is preserved in cl. 15(3), which has been redrawn in the light of criticism that the original provision contained in the Working Paper did not take sufficient account of the very wide variety of forms of property registration under various enactments in this State, e.g., The Real Property Acts, Land Act, The Miners' Homestead Leases Acts, etc. One of the difficulties in formulating an appropriate provision is that in the case of some of these Acts the process of registration is as much the product of practice as of statutory enactment. But we believe that the provision which we now propose will cater for this contingency, as well as for that which has also been mentioned to us, namely the requirement of Ministerial or other consent to dealings with certain kinds of property.

16. Devolution of trust assets and powers upon death.

(a) On death of one of two or more trustees. The original attitude of the Courts to powers given to a trustee was that they were given to him to be exercised personally, and might not be exercised by persons upon whom the trust assets might devolve by operation of law on the trustee's death, unless the settlor originally indicated that such trustees might exercise those powers. Cf. Cole v. Wade (1807) 16 Ves. 27; 33 E.R. 894; Re Crunden & Meux's Contract [1909] 1 Ch.690.

It has become necessary for statute to abrogate that rule as it is clearly desirable that the office of trustee should be transmissible, together with the authorities, powers and discretions belonging to it.

As a necessary corollary to the policy of transmissibility of trusteeship is the provision found in s. 22(1) of the English Trustee Act 1893 and now in s. 18(1) of the 1925 Act that the surviving trustee or trustees of more than one should have all the powers of a trustee following the death of one of their number. This provision was adopted in Queensland in 1895 and its retention is recommended.

(b) On death of sole surviving trustee. At the present time, under The Intestacy Act of 1877 or s. 12 of The Trustees and Executors Acts, real property vested in a sole surviving trustee on his death vests in the Public Curator, who is given all the powers of a trustee in respect of it. The personalty of the trust, however, vests in the executor of the trustee, if he died having appointed an executor, or in the Public Curator, under section 30 of The Public Curator Acts of 1915 if he died intestate.

This obviously unsatisfactory state of affairs stems partly from the rules regarding the devolution of assets upon death in the case of estates not held on trust, and partly no doubt from the common law rule that lands held upon trust or mortgage escheated upon the death without heirs of a sole trustee or mortgagee seised in fee simple: see Challis on Real Property at p. 36.

It is considered desirable that there should be one uniform rule governing the devolution of assets immediately upon the death of the owner of them, whether he is entitled to them beneficially or as trustee. This is because it is frequently necessary to serve the owner of property with notices of various sorts - e.g., under leases as in Ex parte Callan [1968] 1 N.S.W.R. 443, and the persons serving such notices must know at all times exactly upon whom they should be served.

Despite the historical claims of the executor in this respect, it is not recommended that assets should continue to vest in him immediately upon death, because executors are not invariably appointed, and, where they are, they may predecease the deceased or renounce or be difficult to trace. The historical practice cannot meet modern requirements.

It is therefore recommended that the title to all assets, whether real or personal, and whether owned beneficially or on trust, should vest in the Public Curator, until the appointment of a new trustee or until grant of probate or letters of administration is obtained, whereupon the assets should vest in the new trustee or the executor or administrator, as the case may be. In this connexion the power of a personal representative to appoint a new trustee is important: cl. 12(4).

It is not, however, within the scope of a Trustee Act to make a generalised provision of that sort; but it is recommended that it so provide as far as trust estates are concerned. However, it has already been recommended that, when a new trustee is appointed, the trust assets should thereupon vest in him, so far as the nature of the assets allows, and that he should have all the powers of a trustee; and further that the executor of a sole surviving trustee who wishes to renounce his executorship may nevertheless appoint new trustees of the trust assets. These recommendations are in line with existing English and Australian statutory precedents and the Public Curator's position would be subject to them.

On the other hand, it is envisaged that cases may arise where the representatives of a sole surviving trustee may be impossible to trace, or may renounce without appointing new trustees, or there may be a delay in the grant of probate or letters of administration; and it is clearly desirable that some person should where necessary be able, during that time, to exercise the powers and duties of a trustee.

We have considered various submissions which have been made to us, both by the Public Curator and by members of the profession, with respect to our proposal in the Working Paper that the Public Curator should have all of the powers and duties of a trustee originally appointed. The comments we have received have persuaded us that the foregoing proposal imposed too great a responsibility on the Public Curator during a period when his function is intended to be merely a temporary expedient. For this reason we now recommend that, although the Public Curator should have the same powers as a trustee originally appointed, such powers should not be exercised, except: (a) with the sanction of the Court, or (b) in cases of salvage: see cl. 16(5). There is, in fact, a considerable body of authority illustrating, with some precision, the limits of a trustee's power to act in cases of salvage: see, for example, Le Patourel v. Aitken (1896) 22 V.L.R. 475; Perpetual Executors & Trustees Association of Australia Limited v. England (1901) 27 V.L.R. 443; Wilkie v. Equity Trustees Executors & Agency Co. [1909] V.L.R. 277; Re Toohey (1906) 6 S.R. (N.S.W.) 538; Re Reynolds [1921] V.L.R. 575; Templeton v. Leviathan Proprietary Limited (1921) 30 C.L.R. 34; Re Church of England Trusts Corporation [1924] V.L.R. 201; Re Hughes [1934] V.L.R. 345.

We may add that we have improved the provisions of cl. 16(2) the original draft of which had been the subject of some criticism.

17. Devolution of mortgage estates on death. Section 12 of the Trustees & Executors Act saw fit to combine deceased trustees and deceased mortgagees in its provision that, on the death of a sole surviving trustee or mortgagee, the trust and mortgaged property should vest in the Public Curator.

However, in view of the possibility that trust property may vest in new trustees by appointment of new trustees - a possibility which cannot appertain to mortgaged property - it seems proper to make separate provisions for the devolution of mortgaged property. It might be preferable to leave such a provision to a Law of Property Act; but, in

view of the fact that it already appears in the existing Trustees Act, cl. 17 will provide that on the death of a mortgagee the mortgaged estate passes to the Public Curator, until a grant of probate or letters of administration of the estate of the deceased mortgagee is made, whereupon the property will devolve to and vest in the grantee.

This will conform with the general proposition that all property on death devolves to and vests in the Public Curator initially.

18. Disclaimer of trusts on renunciation of probate. Under the law as it now stands, renunciation of probate by a person named in a will as executor and trustee does not of itself operate as a disclaimer of the trust, but is merely one circumstance of evidence of disclaimer: In re Clout & Frewer's Contract [1924] 2 Ch. 230; Lewin on Trusts (16th ed.) at p. 165. Clause 18(1) will make such renunciation a disclaimer of the trusts of the will, and cl. 18(2) will substitute as trustee the person who obtains letters of administration in place of the named executor and trustee.

19. Custodian trustees. Clause 19, following in this respect the New Zealand and Western Australian legislation, proposes to make available generally in Queensland a power to appoint advisory and custodian trustees, at present found only in The Public Curator Acts, 1915 to 1957, s. 42.

The sole function of a custodian trustee (which must be a corporation) is to hold the trust property and to administer it in accordance with the directions of the other or "managing trustee": cl. 19(2)(b) and (c). The outstanding practical advantage of this provision, which has its origin in the English Public Trustee Act 1906 (as to which, see Halsbury's Laws of England (3rd ed.), vol. 38, at pp. 902-905), is that it will obviate the necessity for repeated vestings of property which now occur upon the deaths of individual trustees and which involve the expense and inconvenience already mentioned. Such custodian trusteeship may be terminated by the Court upon application thereto: cl. 19(3). Clause 19 will take effect subject to the provisions of the trust instrument (if any).

We had originally provided for appointment of "advisory trustees" but this novel concept has not been welcomed, and accordingly is omitted.

PART III - INVESTMENTS

Division 1 - Variable Investment Provisions

20. Application of Part. Part III of the Bill, which is concerned with trustee investment and ancillary powers, is divided into a variable and an invariable division, the latter comprising powers and discretions, indemnities and rules of law, of which a settlor is unlikely to wish to deprive his trustee or which, for reasons of policy, he should not be permitted to exclude by express provision in the trust instrument. Thus, for example, cll. 27 and 28 provide a protection to trustees in making investments of trust money on certain conditions, and is intended to supplement the investment powers of deficiently drawn trusts deeds. On the other hand, some of the powers of authorised investment conferred by cl. 21, such as the power of purchase of shares in cl. 21(1)(k) or of land (cl. 22), may be regarded by a settlor of conservative outlook as too extensive; accordingly, cl. 20(3) will permit him to exclude the statutory powers in this behalf. However, the possibility remains that, by severely limiting a trustee's power of investment to a particular property, a determined settlor might yet succeed in formulating a trust which suffered the disadvantages which the policy of this Bill and of The Settled Land Act of 1886 are designed to prevent. In order to preclude this possibility, cl. 20(2) will place it beyond the power of a settlor, by providing, in terms similar to s. 4(2) of the Victorian Trustee Act 1958, that the statutory powers of investment in Commonwealth or Queensland government securities and in bank and savings bank deposits will invariably be available to a trustee irrespective of the express terms

of the trust instrument. Hence it will not be possible for a settlor, by limiting his trustee's power of investment to a single property or strictly limited range of properties, to prevent the trustee from exercising the power conferred by cl. 32 of selling the property or properties and thereafter investing the proceeds in securities or deposits of the kind mentioned in cl. 20(2).

Apart from the foregoing, cl. 20(1) preserves the provision found in s. 6 of the existing Acts that the statutory powers of investment are to be exercised according to the discretion of the trustee but subject to any consent or direction required by the trust instrument, the words "or direction" being inserted in conformity with the more modern terminology of s. 10(5) of the English Trustee Act and similar legislation in the Australian States.

21. Authorised investments. Before referring to the particular investments which it is proposed should be authorised by statute, and which are for the most part derived from the provisions of s. 16 of the Western Australian Trustee Act 1962-1968, we take the liberty of observing that there is what appears to us to be a drafting error in the last-mentioned statute. Section 16(1) of the Western Australian Act empowers a trustee to invest in any investments authorised by the trust instrument or in the manner prescribed by the provisions which follow in s. 16(1). Unless (as must surely be the case) the word "or" in this provision is to be read as "and", it seems that s. 16(1) has produced in Western Australia a novel limitation upon the hitherto existing powers of a trustee to invest both in securities authorised by the trust instrument and those allowed by statute. We do not think that this result can have been intended and for this reason we prefer to retain the form of expression which is used in the introductory portion of s. 4 of the present Queensland Acts.

The range of authorised trustee investments is a topic which has received a good deal of attention in recent years both in England and Australia. Section 4 of the present Queensland Act, in its original form, prescribed a limited range of investments comprising only securities which might be described as of a governmental or semi-governmental character, together with real securities, i. e. investments in land. The original list has since been extended to include, for example, deposits in any Government Savings Bank in Queensland (inserted as s. 4(i) in 1906), and (in 1961) interest-bearing term deposits in any bank, and deposits in any savings bank authorised by the Commonwealth Banking Act 1959 to carry on banking business in Australia. On any view, the original range of investments is now in many respects archaic; but, as the matter is one of some economic as well as legal importance, we consider it desirable to indicate in detail, by reference to the existing provisions of s. 4 of the current Acts, the nature of the changes which we propose.

(a) Parliamentary stocks, public funds or Government funds of the United Kingdom: s. 4(a). In conformity with the legislation in other States, this, we propose, will be extended by cl. 21(1)(a) to stocks, funds etc., of the Commonwealth of Australia, the Australian States and New Zealand. The foregoing securities are in any event already covered by s. 4(d) of the Acts and, as regards Commonwealth Inscribed Stock, by the Commonwealth statute of that name, 1911-1946, s. 52.

(b) Real or heritable securities in Great Britain or Ireland: s. 4(b). This is omitted: we can see no good reason for perpetuating a form of investment which may have been appropriate at a relatively unsophisticated stage of the State's development when an investment in land in Great Britain was perhaps viewed in the colonies as necessarily conferring a higher form of security than an investment in land in Australia. By way of compensation for this change, we propose to allow investment in first mortgages of land in any Australian State or

Territory: see (f) below. Clause 26 will, however, protect a trustee who continues to hold this or any other form of investment which ceases to be authorised by reason of the repeal of the existing Acts.

(c) Bank of England or Bank of Ireland stock: s. 4(c). The foregoing remarks apply equally to this form of investment, the Bank of England having, in any event, been nationalised.

(d) Securities of which the interest is guaranteed by the United Kingdom, Commonwealth, Australian State or New Zealand Parliaments: s. 4(d). This provision is, with some verbal alterations, continued by cl. 21(1)(h).

(e) Debentures or securities of the Commonwealth, Australian State, or New Zealand Governments: s. 4(e). This is now embodied in cl. 21(1)(a): see (a) above.

(f) Real securities in Queensland: s. 4(f). Under the existing general law, a power to invest in "real securities" is limited to freehold interests in land, and excludes second mortgages, contributory mortgages and equitable mortgages. We consider that the exclusion should stand, but we favour extension of the power of investment in first mortgage to first mortgages of land held in fee simple in any of the Australian States, as this will serve to fill the place caused by the recommended omission of the provision mentioned in (b) above: see on this, cl. 21(1)(b) of the Bill, and note the powers of variation and purchase conferred by cl. 33(1)(i) and cl. 37. We also consider that this investment power should be extended to mortgages of Crown land held on perpetual lease in the State.

(g) Stocks, funds or securities authorised for the investment of cash under the control of the Court: s. 4(g). This will remain unaltered: cl. 21(1)(h).

(h) Debentures or securities charged on the funds or property of any local authorities in the State: s. 4(h). Subject to the express inclusion of the Brisbane City Council, this remains unaltered: cl. 21(1)(c).

(i) Bank deposits, being interest bearing term deposits or in any savings bank: s. 4(i). A question has been raised by the Associated Banks whether this includes deposits of the kind covered by the certificates of deposit recently introduced by banks in Australia, which are transferable and so might be purchased by a trustee, who in a strict sense might be said thereby not to be "investing" in the deposit. We regard the form of security conferred by such certificates as indistinguishable in substance from the other forms of deposit authorised by the existing s. 4(i) and accordingly have provided expressly for their inclusion in cl. 21(1)(d). In other respects s. 4(i) will remain unaltered.

(j) Debentures and stock issued by the Metropolitan Water Supply and Sewerage Board: s. 4(j). The functions of this Board have long since been transferred to the Brisbane City Council, and, in any event, authority for particular investments of this kind, which is frequently contained in special enactments (e.g. s. 25A(4) of The State Electricity Commission Acts, 1937 to 1964, and s. 52(1) of The Fire Brigades Act of 1964, will be continued by cl. 21(2) and by cl. 21(1)(j), which refers to "securities authorised by, or under, any Act", the term "securities" being defined in cl. 5(1) to include debentures, stock, funds and shares.

To the foregoing, cl. 21(1) proposes the addition of five further categories of authorised investment: those added by cl. 21(1)(e) and 21(1)(o) are adopted from the Western Australian Trustees Act 1962 and do not require special comment; and that contained in cl. 21(1)(c), which confers power to invest in the purchase of freehold or leasehold land, is discussed in conjunction with cl. 22 below. Clause 21(1)(f) permits investment on deposit in an incorporated building society certified by notice in the Gazette. The provision in cl. 21(1)(h) marks a new departure in the field of trustee investment under statutory authority in Queensland and must be explained in some detail.

As appears from the foregoing, the existing legislation in Queensland, and to a lesser extent that of most of the other States, has prescribed a comparatively narrow range of authorised investments, mostly of the "gilt-edged" governmental variety. Such securities provide forms of investment which, though superficially proof against loss, are in fact nowadays much more susceptible to economic factors, such as inflation and devaluation, which in modern times have considerably reduced their value as investment securities by comparison with the advantages which they offered in the gold-standard economies which existed in 1897. The position was succinctly expressed by Kitto J. in the High Court in Riddle v. Riddle (1952) 85 C.L.R. 202, where His Honour said at p. 231:-

> "It is safe to say that the weight of the practical considerations which in recent years have told in favour of the view that trustees should have power to invest in shares has been fully appreciated by the Courts. Those considerations have been urged in support of this appeal, both in the submissions of counsel and in affidavits sworn by persons experienced in financial matters. The reasoning relied upon may be sufficiently summarized in the following propositions:- (1) the inflationary trend which has been increasingly apparent in Australia for some years past is likely to continue at an accelerated rate; this means that the present purchasing power of money, its value in terms of real wealth, will decline; (2) while investment in any of the ordinary trustee securities, consisting as they do of a right to the repayment of a fixed sum of money at a future date with interest in the meantime, may be expected to ensure the safety of trust funds in terms of currency, it cannot provide any safeguard against loss of the purchasing power of money - indeed it ensures that trust funds will participate in any loss of purchasing power which money may suffer; (3) on the other hand, investment in shares on the stock exchange, if the companies are carefully selected and a reasonable spread of the invested fund over a range of companies conducting varied enterprises is observed, while probably producing at least as high an income, is likely to be more advantageous for capital in two respects: (a) the market value of the shares will probably advance more or less in proportion to the decline in the real value of money, and (b) the shares will probably produce capital increment as a result of new issues on advantageous terms; (4) therefore it is expedient that, with adequate safeguards, trustees should have some power to invest trust moneys in shares."

See also the remarks of Williams J. at p. 223 of the report of the same case.

Of course, it has always been possible for the trust instrument to confer on a trustee powers of investment extending beyond the limited range prescribed by section 4 of the Acts, and in some States the Court was able to authorise such investment under statutory power as in Riddle v. Riddle, supra. But in cases where this was not possible, increasing dissatisfaction has been felt with the present position. In England the Report of the Committee on Charitable Trusts (the Nathan Report) in 1952 recommended that trustees be permitted to invest in company shares, and this was given statutory effect in the United Kingdom by the Trustee Investments Act of 1961. This statute repealed the sections of the Trustee Act 1925 corresponding with section 4 of the Queensland Acts and substituted in their place a system by which a trustee is authorised and obliged to divide the trust fund into two parts, equal in value at the time of division, of which one may be invested in "narrower-range investments" and the other in "wider-range investments": see section 2 of the Act of 1961. Narrower-range investments, which correspond roughly with the traditional forms authorised by section 4 of the Queensland Acts, are in turn divided by the First Schedule into two classes, namely those requiring advice and those not requiring advice. Wider-range investments include shares and debentures issued in the United Kingdom by certain defined companies incorporated in the United Kingdom, with respect to which a trustee is, before investing, bound to obtain and consider proper advice, as defined in section 6(4), on the question whether the investment is satisfactory having regard to: (a) the need for diversification of investments of the trust; and (b) to the suitability to the trust of investments of the description of that proposed: section 6(1). See, generally, Lewin on Trusts (16th ed.), at pp. 323-351. The result of this legislation is to revise quite radically the terms on which investment may take place, by requiring a trustee to obtain and consider proper advice even when investing in securities of the traditional or "narrower-range" variety.

The foregoing is a greatly over-simplified account of the somewhat involved provisions of the Act of 1961 and the English legislation has been criticised by the Law Society of England and Wales, we think with justification, for introducing unnecessary complexity into the process of selecting and varying trust investments. In contrast, the Western Australian Trustees Act 1962, in adopting a simplified form of the English provisions, has dispensed with the restriction to 50% in value of the trust funds. This has the effect, at least in theory, of enabling a trustee, after taking proper advice, to invest the whole of the funds in company stock, shares, debentures (whether secured or unsecured), interest-bearing deposits or notes, secured or otherwise, or in unit trusts: see paragraphs (k), (l), (m) and (n) of section 16(1) of that Act. The Western Australian provision is, however, circumscribed by safeguards which are in some respects more stringent than those imposed by the English Act; in particular:-

(1) the company in question must have a paid up capital of not less than $2,000,000: section 16(4)(a);

(2) the company must have paid dividends on all of its ordinary shares in each of the fifteen years immediately preceding the calendar year in which the investment is made: section 16(4)(b) (cf. English Act, First Schedule, Part IV, section 3, where the period is only five years).

In addition the Western Australian legislation, following the English model, limits such investments to stock, shares or debentures quoted on a Stock Exchange in a State or Territory of the Commonwealth (which in practice restricts it to public companies), and, with an immaterial exception, to shares or debentures which are fully paid up: see section 16(3).

The desirability of broadening the statutory powers of trustees so as to include a limited range of company securities has approval in judicial precedent and is, we think, beyond argument. The English scheme has the advantage of possibly affording greater security against total loss of the whole trust fund; but, because it obliges a trustee to seek advice even with respect to most "narrower-range" investments, and because of the remarkable complexity of its provisions, it should we think be rejected as inappropriate to conditions in Queensland. On the other hand, the Western Australian system is admirably simple and, despite its superficial liberality, is, we consider, unlikely to lead to speculation with trust funds because of the relatively conservative nature of the investments which it in fact authorises.

Inquiries made of the Brisbane Stock Exchange disclose that it presently lists securities for 481 companies, of which Brisbane is the Home Exchange (i.e., the Exchange granting official quotation to a company) in respect of 126 companies in this total; of this number of 126, only 16 companies would satisfy the criteria proposed by the Bill, namely, of possessing a paid up capital of not less than $2,000,000 and of having paid fifteen annual dividends in each of the fifteen years preceding the investment. According to information supplied by the Exchange the companies in question are (at 24th March, 1970):-

Samuel Allen & Sons Ltd.
Appleton Industries Ltd.
Brisbane Gas Co. Ltd.
Brisbane Permanent Building & Banking Co. Ltd.
Carricks Ltd.
Castlemaine Perkins Ltd.
Fairymead Sugar Co. Ltd.
Gibson & Howes Ltd.
Intercolonial Boring Co. Ltd.
Millaquin Sugar Co. Ltd.
North Australian Cement Ltd.
Provincial Traders Holdings Ltd.
Queensland Cement & Lime Co. Ltd.
Walter Reid & Co. Ltd.
United Packages Ltd.
Mount Isa Mines Ltd.

The number of qualifying companies listed on the Sydney Stock Exchange is naturally very much larger, as appears from the list which is included as Schedule "A" to this commentary; but, even so, both Exchanges have pointed out that the suggested criteria will have the effect of excluding a number of well respected companies which have a record of paying regular dividends but which, by reason of having listed only within the last fifteen years or otherwise, will fail to qualify. Whilst appreciating that the proposed criteria may in this respect operate in practice in a somewhat arbitrary fashion we consider that definite and fixed statutory requirements are preferable to a system of proclaiming particular named companies by regulation, which seems to be the only feasible alternative. The latter course suffers the disadvantage that both the existence and revocation of a particular proclamation is often difficult to locate in the pages of the Gazette, and also that such proclamations may confer or appear or be thought to confer a wider form of official approval for securities of particular companies than is desirable.

What is we believe demonstrated by the information furnished by the Stock Exchanges is that, whilst the criteria laid down by clause 21(4) may in some respects be arbitrary, they are, we consider, certainly

not capable of being regarded as over-permissive, particularly in view of the obligation which will be imposed on trustees of taking, and continuing to take, "proper advice" in writing on the question whether the investment is satisfactory having regard to the need for ensuring diversification in the trust investment and to the suitability to the trust of the investment and of the description of the investment proposed: see cl. 21(5), (6) and (7). As was said by Kitto J. in Riddle v. Riddle (supra) at p. 232:-

> "The grant of power leaves the trustee with the duty of governing himself, in relation to the manner in which the funds of the trust are invested from time to time, by the standard of care which would be observed by a prudent man who is minded to make an investment for the benefit of other people for whom he feels morally bound to provide (In re Whiteley; Whiteley v. Learoyd((1886) 33 Ch. D. 347, at p. 355); Learoyd v. Whiteley ((1887) 12 App. Cas. 727). The trustee therefore has the responsibility, if he buys shares, of watching the market and making any changes of investment which the proper standard of prudence may dictate".

(We have been invited by one of those from whom a submission was received to provide a definition of the expression "proper advice" appearing in cl. 21(5), but we do not think this task should be essayed: the expression appears but is not defined in comparable legislation elsewhere, and is by its nature no more capable of precise definition than is, for example, the term "reasonable" used in similar contexts. Essentially the duty of a trustee is to act as a reasonably prudent man of business (Fouche v. Superannuation Fund Board (1952) 88 C. L. R. 609, 641) and the trustee's obligation under cl. 21(5) must be discharged conformably with that duty).

We may add that we have given careful consideration to a suggestion in the South Australian report on trustee law in that State that the power of trustees to invest in "equities" might be limited to, say, 50% of the value of the trust fund. But the difficulty of formulating in clear terms a legislative restriction of this kind is, we have found, made virtually insuperable by fluctuations in values in all investments; apart from its complexity, the only likely effect of such a provision would be to hinder the discretion of trustees who invest wisely and successfully in investments which increase in value. In any event, we question whether such a limitation would prove a deterrent to a trustee who was determined to disregard the statutory safeguards; and, indeed, it is doubtful whether even the existing narrow range of authorised investments has an inhibiting effect on a trustee who is determined to employ the trust fund for purposes of speculation. Confirmation for this view may be found in the recent report (March, 1970) of the New Zealand Law Reform Committee, which has recommended the adoption in New Zealand of the West Australian share investment provisions, but with the omission of some of the safeguards found in the Western Australian Trustees Act and in these proposals.

Our original proposal favoured the adoption of the West Australian legislation on this point, and the recommendation has been generally welcomed by those bodies and associations to whom the Commission's Working Paper has been circulated. However, both of the principal trustee companies have argued in favour of a liberalisation of the requirement that the company in which investment may be made should have declared annual dividends in each of the preceding fifteen years, and one of these trustee companies has furnished a detailed submission on the subject which we have included as Schedule "B" to this Report. In the light of arguments advanced in this submission we are persuaded that the criterion initially suggested of a fifteen-year annual dividend record is

too restrictive and will not serve the best interests of the trust, and we therefore recommend that a record of payment of dividends in each of the preceding seven years be substituted for the fifteen-year period originally proposed.

Subject to the above modifications, we recommend the adoption in Queensland of the substance of the provisions of the Western Australian legislation respecting trustee investments (s. 6 of the Trustees Act 1962-1968). In addition to other safeguards already referred to, we wish to emphasise that a settlor who doubts the wisdom of conferring the wider powers of investment, remains, as before, free to impose fetters upon the exercise by his trustee of the statutory powers: cl. 20(1); and a beneficiary who is aggrieved by any act or decision, or impending act or decision, of the trustee will now, by cl. 7, be entitled to apply to Court, which may require the trustee to appear and substantiate and uphold the grounds of his act or decision. In the result, we believe that the proposed investment provisions represent the best and most workable arrangement which can be devised for the purpose of protecting the rights of those interested in the trust property without at the same time so stultifying the discretion of the trustee as to produce depletion in the fund itself.

It is convenient to point out that cl. 30(3) and (4) provide for the acceptance and retention of securities issued, e. g. on reconstruction or take-over, in substitution for those in which the investment was initially made.

21(1)(c). Investment in purchase of land.

22. Power to purchase dwelling house.

Comment on the power conferred by cl. 21(1)(c) to invest in purchase of land has been deferred to this point in order that it may be considered in conjunction with the proposed provision enabling purchase of a dwelling house: cl. 22. The former authorises the investment of trust funds in the purchase of land in any State where the land is either held for an estate in fee simple, and leasehold land in the State held for forty years or more unexpired at the date of purchase. This provision is taken directly from s. 30(f) of The Settled Land Act of 1886 and may be compared with s. 28(c) of the Trustee Companies Act 1968, which confers power to "purchase land in fee simple in Queensland". We have received recommendations from the Associated Banks and from the Law Society that trustees should be authorised to invest in the purchase of leasehold interests under the Land Act 1962-1968 where the lease in question embodies a freeholding covenant. In practice this appears to embrace only agricultural farm and grazing homestead freeholding leases under that Act and the capacity of a trustee to hold land under the Land Act is in most cases limited by s. 91(1) and s. 235(4) of that Act to trusts in favour of children or grandchildren of the trustee. Furthermore, the restriction imposed by cl. 21(1)(c)(ii) to a leasehold held for a term of at least 40 years unexpired at the time of purchase has the effect of automatically excluding many of the forms of lease which are possible under the Land Act, most of which are ordinarily limited to a maximum term of 30 years, e. g., pastoral and preferential pastoral holdings: s. 53; agricultural farm leases: s. 123; settlement farm leases: s. 130; grazing selections: s. 131(1)(b); special leases: s. 204(1); and development leases: s. 214(2); whilst brigalow leases are limited to a term of 40 years: s. 150(4)(b). As an authorised trustee investment there is probably little to commend some of the above forms of lease, particularly in times of drought or of agricultural depression, but it is, admittedly, difficult to generalise when such a wide rnage and variety of forms of leasehold are involved. The Law Society has urged a more generous approach to the question of authorising trustee investment in Crown leaseholds; but, whilst we acknowledge that the recommendations in our original Working Paper may have been unduly restricted, we

believe that we would be justified in recommending statutory authority to invest only in agricultural farm and grazing homestead freeholding leases (which by s. 125 are capable of immediate conversion to fee simple estates). These will now be provided for in sub-para. (iii) of cl. 21(1)(c). Other forms of Crown lease, such as perpetual lease selections (s. 127) and perpetual town, suburban and country leases (s. 180) already fall within the terms of cl. 21(1)(c)(iii) of the Bill.

In addition to cl. 21(1)(c), cl. 22, which is derived from s. 4(3) of the Trustee Act 1958 (Victoria) and s. 17 of the Western Australian Act, will permit a trustee to purchase a dwelling house for the use of a beneficiary under the trust. A comparable power is conferred in Queensland by s. 28(1)(u) of the Trustee Companies Act 1968, but is, of course, confined to trustee companies under that Act. Apart from this limited statutory provision and apart from express provision in the trust instrument itself, it seems clear that trustees have no general powers of purchasing land with trust funds, and even an express power to invest in the purchase of land (such as that conferred by s. 21(1)(c))will not ordinarily authorise purchase of land for occupation by a beneficiary; at least this is so if it is necessary to pay extra for vacant possession: see Re Power's Will Trusts [1947] Ch. 572, per Jenkins J., at p. 575; Lewin, op. cit., at p. 380. In other words, a power to invest by purchasing land tends to be construed as a power of investment stricto sensu and not as a means of providing a home for a beneficiary. This produces many problems, particularly where a beneficiary is given a right for life to reside in a house forming part of the trust estate: such a right of residence may be construed as conferring a life estate so as to attract the provisions of The Settled Land Act and the powers of a tenant for life thereunder: see, for example, Re Baroness Llanover's Will [1903] 2 Ch. 16; Re Hoppe [1961] V.R. 381; or as conferring a mere personal licence falling short of a life tenancy, as in Re Wallace's Trusts [1921] V.L.R. 446 and Stevenson v. Myers (1930) 47 W.N. (N.S.W.) 94. In such cases it often happens that continued residence in the particular house in question becomes impracticable or inconvenient (e.g. where the beneficiary is an aging widow and the house consists of a grazing homestead). In the former class of case the resident beneficiary may be able to exercise the power of sale of a tenant for life under the statute, but in the latter class of case this is not possible. In any event, unless a specific power is given in that behalf, the proceeds received on sale are, on the authority of Re Power's Will Trusts (supra), not available for purchase of an alternative residence for the beneficiary but must be applied for investment purposes in the strict sense.

In the latter class of case (mere personal residence) both trustee and beneficiary are sometimes faced with an insoluble dilemma: so long as the right of personal residence exists the trustee is generally unable to sell the subject property, at any rate without the consent of the resident beneficiary; and, if the resident beneficiary consents to the sale, he loses his personal right to reside which, being exercisable with respect to a particular house or property, is incapable of being transferred to other property purchased in substitution therefor.

This position is clearly unsatisfactory and we therefore favour the adoption of the Victorian and Western Australian provisions already mentioned, subject only to (i) the insertion of additional words to make it clear that the provision of a dwelling house for residence is not confined to a beneficiary in the limited sense of a cestui que trust but extends to a person who has a personal licence to reside on land comprised in the trust property, and (ii) the addition of a power in the trustee to provide fittings and furnishings for the house: cl. 22(5).

By way of protection for other persons interested in the trust property, cl. 22 makes the report of a registered valuer, practically speaking, a prerequisite to exercise of the power of purchasing a home

which is conferred by cl. 22: a trustee who invests otherwise than pursuant to such a report may not be protected from liability in respect of any loss which results from the purchase. See also Lewin, op. cit., at pp. 380-381.

23. Power in relation to housing loans. Finally, clause 23 re-enacts the terms of The Trustees (Housing Loans) Act of 1967 which confers on a trustee, who is an "approved lender" within the meaning of the Commonwealth Housing Loans Insurance Act 1965-1966, power to lend for the purposes prescribed by the Commonwealth Act. Accepting the need for this legislation, it seems preferable that it should be consolidated with the general trustee legislation rather than that it should remain the subject of a special enactment.

24. Purchase of redeemable stocks at premium or discount. Sub-clauses (1) and (2) of cl. 24 are concerned with investment in redeemable securities and are, in substance, identical with ss. 5(1) and (2) of the existing Queensland Acts, whilst the succeeding sub-clauses of cl. 24 are directed to ensuring consequential adjustment in such cases of the rights of those entitled respectively to capital and income. In order to avoid the inconvenience and expense of trivial calculations, we have raised the sum in cl. 24(4) from one to twenty dollars.

25. Investment in bearer securities. As the law now stands a trustee may not invest in bearer securities unless expressly so authorised by the trust instrument: see Lewin, op. cit., at p. 353. Clause 25 will permit him to make or retain such an investment, unless expressly prohibited by the instrument, on condition that the security in question is lodged with a banker or banking company. This simply follows established provisions of the English, Victorian, and Western Australian Trustee Acts.

Section 57 of The Companies Acts, 1961 to 1964, now prohibits the issue of share warrants (or bearer shares), but the proposed provision may prove useful in relation to certain forms of government securities which are convertible to bearer.

26. Power to retain investment which has ceased to be authorised. Clause 26 operates to protect from liability for breach of trust a trustee who continues to hold an investment which, because of changes introduced by the Bill in the range of authorised investments, has ceased to be a statutorily authorised trustee investment, e.g., real estate in the United Kingdom under s. 4(b) of the existing Queensland Acts.

The clause appears as s. 8(3) of the current Acts, and no alteration of its terms is needed.

Division 2 - Invariable Provisions

27. Loans and investments by trustees not chargeable as breaches of trust.

28. Liability for loss by reason of improper investment.

29. Release of part of security.

Clause 27 repeats s. 8 of the existing Acts with the addition in cl. 8(1) of the words "or extending the term of any mortgage on which he has lent money", and the omission of "able practical surveyor" as an alternative to valuer, the former being an English description not generally used in this context in Australia. Otherwise the only material alterations are the addition of sub-cll. (2) and (3), which follow the English legislation and that of other Australian States, and are designed as relieving provisions in circumstances in which the trustee has in other respects acted reasonably: cf. Lewin, op. cit., at p. 367.

From two sources we have received comments that cl. 27(2) confers too wide an exemption from the duty of prudent investigation, and that a trustee should be bound to investigate the lessor's title. But this misconceives the effect of cl. 27(2): a trustee is, in making an investment, always bound to act as "a reasonably prudent man of business" (Fouche v. Superannuation Fund Board (1952) 88 C.L.R. at p. 641), and the clause does not detract from the duty, nor does it confer an indemnity on a trustee who fails to investigate a lessor's title. The emphasis of the proposed provision falls on the word "only" in cl. 27(2), and its purpose is to alter the law, which, as it now stands, requires the most minute investigation of title irrespective of the particular circumstances of the case, and which, if title happens (even after proper investigation) to be in some degree defective, automatically renders the investment a breach of trust. Clause 27(2) is adopted from identical provisions in the United Kingdom, Western Australia, Victoria, New South Wales, and New Zealand, where no difficulties or misconceptions about its scope have ever been harboured.

Likewise, cl. 28 follows the existing s. 9: it is concerned with loss caused by investment in an authorised security but in an excessive amount, in which event the trustee is liable only in respect of the excess: see Shaw v. Cates [1909] 1 Ch. 389.

Clause 29, which is new to Queensland and which is derived ultimately from the New South Wales Trustee Act, is intended to remove doubts raised in Re Morelli and Chapman's Contract [1915] 1 Ch. 162 (cf. however, Lewin, op. cit., at p. 289) whether a trustee who holds a mortgage over more than one piece of land to secure a single debt may safely release part of the security where the unreleased part of the property would continue to constitute a proper investment for the unpaid amount of the debt: see Jacob's Law of Trusts (2nd ed.) at pp. 433-434. This provision is also present in the Victorian, Western Australian and New Zealand legislation, and we recommend its adoption.

30. Powers supplementary to powers of investment. Part III of the Bill concludes with certain powers supplementary to the investment powers of a trustee. As the law now stands trustees are not justified in investing in a mortgage on terms that the mortgage should not be called in for a certain period and are personally responsible if the interests of the beneficiaries in remainder are affected by an investment on such terms: Vickery v. Evans (1864) 33 Beav. 376. Clause 30 will permit investment for a period not exceeding ten years, or for a longer period provided that the loan is capable of being called in after seven years from the date of the loan, but subject to the conditions imposed by sub-cl. (2), namely, half-yearly payment of interest, a covenant by the borrower to maintain and to insure to the full value against damage by fire and storm and tempest, and power to call up the full balance in the event of default by the borrower. As to the applicability of these provisions where the loan is made under order of the Court, see cl. 30(6).

Clause 30(3) deals with investments in companies held by trustees and, subject to conditions, confers powers of concurring in schemes of arrangement and takeovers and to take up rights issues. We consider such powers essential: similar provisions exist in s. 10 of the English legislation, in New Zealand and Western Australia, and (by amendment in 1959) in Victoria; in Queensland a closely analogous power is conferred on the trustee companies by s. 28(1)(e) of the Trustee Companies Act 1968.

The exercise of the powers conferred by the foregoing provisions are by cl. 30(5) made subject to the consent of any person whose consent is required to a change of investment.

PART IV - GENERAL POWERS OF TRUSTEES

31(1). Application of Part. The provisions of Part IV of the Bill are concerned with the general powers of trustees with respect to trust property, and in particular with their powers of selling, leasing, mortgaging, insuring and otherwise dealing with trust property, as well as conducting a business forming part of the trust property.

Clause 31(1) will make these provisions invariable, i.e. incapable of being excluded by the terms of the trust instrument. In our view the adoption of this approach is plainly necessary: it accords with the policy of The Settled Land Act with respect to land, and of the general policy adopted here of extending to trust personalty the principle of full alienability and of enabling the form of the trust property to be varied to meet the exigencies and changing conditions of the times. In this respect we find the policy underlying the provisions of the Western Australian legislation a little puzzling. The Western Australian Trustees Act 1962-1968, in pursuance of the policy of assimilating settled land and trust personalty, has repealed the Settled Land Act in that State, and has conferred both on trustees and on persons who formerly would have possessed the statutory powers of a tenant for life the wide statutory powers of a trustee in dealing with trust property and settled land. However, s. 5(2) of the Western Australian Trustees Act specifically provides that the powers conferred by the Act upon a trustee are, "unless otherwise stated", applicable "if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument". The principal sections of the Western Australian Act which authorise sale and other dealings with trust property, including what was formerly settled land, are ss. 27 and 30, and these sections do not "otherwise state". Hence, it is possible under s. 5(2) of the Western Australian Act for the settlor to exclude the statutory powers conferred by these and other sections. This has the surprising result, as we understand the matter, that in Western Australia it has now become possible to settle land in such a way as to produce the forms of inalienability and other disadvantages of settlements of land which it was the avowed purpose of the settled land legislation to prevent.

We find it difficult to believe that this result was deliberately intended in Western Australia, and, in order to ensure that it does not prevail in Queensland, cl. 31(1) provides in effect that the provisions of Part IV will be overriding, so that the powers which are thereby conferred will be exercisable by trustees and others referred to in cl. 6 of the Bill irrespective of any purported prohibition in the trust or other instrument. The powers conferred by Part IV are admittedly broad but they do not in fact go far beyond those enjoyed by tenants for life under The Settled Land Act, and, like all such powers, those conferred by the ensuing provisions of this Part of the Bill will be subject to the controlling general requirement that "a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own": Re Speight; Speight v. Gaunt (1883) 22 Ch. D. 727, per Jessel M.R. at p. 729; see also Riddle v. Riddle (1952) 85 C.L.R. 202, per Kitto J., at p. 232.

31(2): The duties and powers of a trustee terminate when the trust terminates, that is, either when it appears from the trust instrument that it is intended to terminate, or, if all the beneficiaries are of full age and sui juris, when such beneficiaries give directions to the trustee concerning the trust property. (Saunders v. Vautier (1841) Cr. & Ph. 240; 41 E.R. 482).

Nevertheless, at the termination of the trust the trust property remains vested in the trustee until he transfers it to the persons entitled, and during such time he is sometimes described as a bare trustee.

The bare trustee's lack of authority can give rise to serious difficulties of two kinds. In the first place it has already been recommended that a trustee should have extensive powers to deal with trust property. If these powers are cut off unexpectedly - e.g. by the death of an infant beneficiary in circumstances terminating the trust - it may suddenly become impossible for important decisions concerning the trust property to be taken. The trustee may, for instance, be engaged in arrangements for improving trust assets out of capital moneys, or subdividing trust land, and the sudden termination of those statutory powers could be disadvantageous. In the second place, there is the problem of the person who deals with the trustee, e.g., a purchaser of trust assets. Such persons cannot know whether the trustee's powers are still effective unless they investigate the provisions of the trust instrument.

This state of affairs is manifestly unsatisfactory, and it is submitted that the powers given to trustees by the Act should not be subject to termination except by the express direction of the persons entitled to call for the transfer of the trust property to them.

In New South Wales (s.27), Victoria (s.14) and Western Australia (s.28) there is a compromise provision: the trustee is empowered to sell the trust property, even after termination of the trust. In New South Wales and Victoria he may only do this if requested in writing "by any beneficiary"; but in Western Australia his power is not so limited.

In the interests of uniformity of trustee legislation there is some case for adopting the Western Australian provision; but it does not really solve any of the serious problems of this subject.

It is therefore recommended that the powers of sale and management of the trust property given to trustees by the Act should also be given to bare trustees. However, the authority of the beneficiaries in such case must be recognised, and it is therefore recommended that such powers should be exercisable only to the extent to which they have not been revoked by the beneficiaries.

It seems, however, to be inappropriate to give bare trustees powers of investment. If they have liquid assets in hand they should deal with them in accordance with the beneficiaries' directions, or as required by cl.7(1)(c).

31(3): Clause 31(3) has been added in deference to the criticism (referred to in the discussion of cl.6) that a limited owner of land (or "statutory trustee") should not be allowed an unqualified power of dealing with that land. Its effect will be to require the Court's sanction to exercise of the power of sale, leasing, etc., conferred by cl.32(1) or the power of mortgaging conferred by cl.45.

Powers to sell, exchange, partition, postpone, etc.

32(1)(a) Sale of property.
32(1)(b) Disposition, exchange, etc.
32(2) Variation of sale contract.
32(4) Power to postpone sale.

34. Power of trustee to sell by auction, etc.
35. Power to sell subject to depreciatory conditions.
36. Mortgage on sale of land.

Powers to sell, exchange, partition, postpone, lease, etc.:

The first two heads of power conferred by cl. 32(1) consist of a power to sell the trust property or any part of it and powers of exchange and partition thereof. As the law now stands in Queensland, the powers of sale of trust property are, in the absence of express provision in the trust instrument, limited to sales with the approval of the Court under s. 2 of The Trustees and Executors Act of 1897 Amendment Act, 1898: see Re Bennett [1948] St. R. Qd. 106; Re Kwong [1954] Q. W. N. 18; sales of land under s. 10(a) of The Settled Land Act; and sales pursuant to the obligation imposed by the Rule in Howe v. Dartmouth.

The above statute also confers powers of making an exchange of the settled land, or any part of it, and of concurring in a partition of such land: see s. 10(b) and (c), and all of these statutory powers are ordinarily exercisable by the tenant for life without reference to the Court or to any persons who may be interested in the settled land. Similar powers are also conferred by paragraphs (a), (c) and (d) of s. 18(1) of the Trustee Companies Act 1968, and by s. 58 of The Public Curator Acts, 1957 to 1968.

In accordance with policy here recommended of ensuring that property remains alienable and of eliminating the distinctions which at present exist in this respect between settled land and personalty held in trust, cl. 32(1)(a) and (b) will extend the foregoing statutory powers to trust property in all its forms. Incidentally to the powers of sale etc., cl. 32(2) also authorises the trustee to rescind or vary any contract for sale (cf. The Settled Land Act, s. 26(1)(b) and s. 19(1) of the Victorian statute, from which this provision is ultimately derived); and cl. 31(1) enables the trustee to subdivide the property, and to construct and dedicate roads, etc., and do all other things necessary or required by any Act or by-law relating to subdivisions. The latter is comparable with the power conferred by s. 21(a) of The Settled Land Act and with that in s. 28(1)(c) of the Trustee Companies Act 1968.

It may be added that, as an incident of the power of sale, "an option granted by a trustee for sale can be supported if on the facts of the particular case it appears to be a proper and reasonable method of effecting a prompt sale at the best price": Rousset v. Antunovich [1963] W. A. R. 52, per Hale J., at. p. 60.

Power to sell by auction, etc; depreciatory conditions:

As regards the mode of effecting sale, etc., s. 11 of The Settled Land Act provides in some detail that settled land shall be sold at the best price which may reasonably be obtained and that this may be achieved by auction or by private contract.

Section 28(2) of the Trustee Companies Act is, in this respect, stricter since it does not permit sale by private contract of any real property until after it has been offered for sale by public auction, unless the beneficiaries consent in writing.

We do not favour the retention of any detailed statutory regulation of the power of sale, preferring instead the reliance which is obviously placed by the Western Australian legislation (from which these

provisions are directly taken) upon the general principles of law and equity which apply to sales under express powers in trust instruments. As appears from Lewin, op. cit., at pp. 580-581, these principles are far-reaching:-

> "A trustee for sale will remember that he is bound to sell the estate under every possible advantage to his beneficiaries, and in the case of several successive beneficiaries, with a fair and impartial attention to the interests of all the parties concerned. Trustees, if they or those who act by their authority fail in reasonable diligence in inviting competition, or in the management of the sale, or if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another, or make a misstatement as to the condition of the property, whereby a reduction of the price is necessitated, may be personally responsible for the loss to the suffering party....."

Hence clause 34(1), which is in material respects identical with section 14(1) of the existing Trustee and Executor Acts does not in any way lessen the general duty of a trustee with respect to sales of trust property, although it does by sub-clause (2) add an express power to dispose of parts of the property (whether divided vertically or horizontally) which is found in all modern trustee legislation. Likewise, in permitting sale subject to depreciatory conditions, clause 35 does no more than repeat the verbiage of section 15 of the current Queensland Acts, which also appears in the present form in the legislation of the United Kingdom and of the other Australian States.

A provision of some practical importance is contained in clause 34(3) and applies in cases where the trustee joins with some other person in selling trust property together with other property: in such event sub-clause (3) requires that the purchase moneys be apportioned between the vendors either in or before the contract of sale and a separate receipt given by the trustee for the apportioned share.

Deferred payment on sale; mortgage on sale: One statutory innovation, which does, however, owe its origin to section 28 of the New South Wales Trustee Act, and is also to be found in the legislation of Victoria, New Zealand, and Western Australia, appears in clause 37, and permits a trustee to sell trust property on terms providing for payment of the price by instalments. Such a power has been held to exist independently of statutory authority provided that the trustee possesses the power of investing in mortgages of property of the class in question: see Jacobs, op. cit., at p. 506 and cases there cited; and may also be authorised pursuant to section 11 of The Settled Land Act: see Re Henry's Trusts [1950] Q.W.N. 8. The practical effect of clause 37 will be to authorise sales on terms of deferred payment in all cases, subject to the fairly stringent conditions imposed by clause 37(3). It will be noticed that clause 37(4) provides in any event that the trustee may, after one third of the purchase money has been paid, convey the property and take a mortgage to secure the balance of the purchase money and interest, and this should be read in conjunction with clause 34, which, following Victoria and Western Australia, enables a trustee selling land, in cases where the proceeds of sale are liable to be invested, to contract on terms that payment of part of the price, not exceeding two-thirds, shall be secured by mortgage on the land sold.

Postponing exercise of power of sale: A well drawn trust deed which confers on the trustee a power of sale almost invariably adds a discretion to postpone the exercise of such power of sale. The effect of clause 32(1)(c) will be to imply such a discretion in all cases. However, clause 32(1)(c) contains an exception in respect of property which is of a wasting or speculative nature, and so is subject to the Rule in Howe v. Dartmouth which is referred to earlier in this paper.

Clause 32(4) derives from section 25 of the (English) Real Property Act 1925. It provides that where a trustee is empowered to postpone a sale of trust property he "shall not be liable in any way merely for postponing the sale....for an indefinite and unlimited period". The English section was confined to land; but it has been adopted in New South Wales (section 27B), Victoria (section 14(6)) and New Zealand (section 14(7)) and extended to trust property generally.

It is proper to comment that the subsection does not protect a trustee who postpones the sale of a wasting or speculative asset, because the power to postpone sale given in section 32(1)(c) excludes such property. It is only if the settlor himself gives the trustee a power to postpone the sale of wasting or speculative property that this sub-section would apply to such property.

Powers with respect to leases, etc.

32(1)(d) Power to let and share farm.
32(1)(e) Power to lease.
32(1)(f) Reduction of rent.
32(3) Power to grant options, compensation rights, etc.

Under the general law of trusts a trustee with general powers of management may grant a lease of property on reasonable terms; but, apart from express provision in the trust instrument, his power to do so is practically limited to leasing from year to year, and he may not grant a lease with an option of renewal or option to purchase: see Jacobs, op. cit., at pp. 508-509. These restrictive rules are to some extent modified by statute in Queensland: section 2 of The Trustees and Executors Act of 1897 Amendment Act of 1898 enables a trustee, with the sanction of the Court, to lease trust property in order to raise money for any of the purposes mentioned in section 48 of the Principal Act; section 13 of The Settled Land Act confers on the life tenant power to lease settled land for periods not exceeding 30 years (building lease), or 21 years (mining lease), or 14 years in the case of any other lease; and section 28(1)(b) of the Trustee Companies Act 1968 authorises a lease for a term not exceeding 21 years, and permits any lease to be renewed, as well as enabling share farming agreements to be made or renewed.

We agree with the view expressed in the South Australian report on trustee law that there is no reason why the powers of a trustee should be less than those of a tenant for life. Accordingly, clause 32(1)(d) will continue to allow a trustee to let at a reasonable rent for short periods not exceeding one year, and will also permit share farming agreements to be made on similar terms. With respect to long leases, clause 32(1)(e) proposes the adoption of the longer period of 21 years at present permitted by the Act of 1968 (the period in Victoria is the same), whilst retaining the period of 30 years in the particular case of building leases (which are, in any event, uncommon in Queensland); as with the power conferred upon a tenant for life, a lease effected pursuant to the power conferred by clause 32(1)(e) will be required to take effect in possession within one year after the date of grant of the lease. Section 14(2) of the Act of 1886 specifies that the lease shall

reserve "the best rent that can reasonably be obtained, regard being had to any fine taken", while cl. 32(1)(e) requires a "reasonable rent", with or without a fine or premium, which, if any is taken, is deemed to be part of and an accretion to the rental and to be considered, as between the persons beneficially entitled to the rental, as accruing from day to day. Clause 32(1)(f) authorises the trustee during the currency of the lease to reduce the rent or otherwise vary or modify the terms thereof, or concur or join in accepting a surrender of any lease. Similar powers are vested in a tenant for life by ss. 19 and 26(1)(d) of The Settled Land Act and s. 28(1)(m) of the Trustee Companies Act. Clause 32(3) provides that in exercising the statutory or other power of leasing a trustee may grant to the lessee a right of renewal for one or more terms but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term capable of being granted: cl. 32(3)(a); further, that the lease may contain an optional or compulsory purchasing clause: cl. 32(3)(b); and, further, that the lessee may be granted a right to claim compensation for improvements made upon the leased premises. Such conditions and covenants are commonplace in commercial leases - that in paragraph (b) is at present provided for in s. 28(1)(k) of the Trustee Companies Act although limited to cases in which a power of sale is conferred by that Act or by the instrument; in practice this appears to mean in all cases: cf. s. 28(1)(a) of that Act, which confers a general power of sale. A power of granting an option of renewal, similar in terms to that in cl. 32(3)(a), also appears in s. 36(3)(b) of the New South Wales Trustee Act.

The right of a trustee liable on covenants in a lease to indemnity in respect thereof is dealt with in cl. 66 hereafter.

33. Miscellaneous powers in respect of property. In addition to the powers of sale, leasing, etc. conferred by cl. 32, cl. 33 of the Bill will authorise a trustee to exercise a number of other ancillary powers with respect to property, e. g. he may expend money for repair and maintenance: cl. 33(1)(a); and in improvement or development of property: cl. 33(1)(b); and in payment of calls on shares: cl. 33(1)(c); he may pay rates, taxes, assessments, insurance premiums and other outgoings in respect of trust property: cl. 33(1)(d); he may subdivide the land: cl. 33(1)(e); contribute towards construction and maintenance of roads, etc.: cl. 33(1)(f); and he may apportion the cost of the foregoing expenditure between capital and income: cl. 33(1)(g). In addition, he may grant easements, and profits à prendre, and enter into party wall agreements: cl. 33(1)(h); as mortgagor or mortgagee, vary the terms of any mortgage: cl. 33(1)(i); make inquiries for the purpose of ascertaining beneficiaries: cl. 33(1)(j); surrender life insurance policies or vary the terms thereof: cl. 33(1)(k); appropriate any part of the trust property in satisfaction of any legacy, etc.: cl. 33(1)(l); and do or omit to do all acts and things, and execute all instruments necessary to carry into effect the powers conferred by the Act or by the trust instrument: cl. 33(1)(m). It has been suggested that express power should be given to trustees to pay premiums on life policies issued on the lives of infant beneficiaries, but we believe that this falls within the trustees' powers of advancement conferred by cll. 61 and 62: cf. Lewin on Trusts (16th ed.) at p. 137.

Many of these powers are obviously not of a controversial nature and do not require detailed comment. Accordingly, what follows is confined to those provisions of cl. 33 which will effect substantial changes in the law.

33(1)(a) and (b): Power to repair and improve property: With respect to repairs and improvements, the present position is that the tenant for life of settled land has wide powers, exercisable with the

consent of the trustees or the Court, of applying capital money for the improvement of the settled land: see The Settled Land Act of 1886, sections 34 and 35; section 37(1) imposes upon him a positive duty to maintain, repair and insure, at his own expense, the settled property. Section 28(1)(n) of the Trustee Companies Act 1968 authorises a trustee company simply to "repair any property", and section 28(1)(h) authorises the expenditure of capital (up to a limit of $4,000 without consent, and thereafter to any amount with the consent of the Court or of the beneficiaries) on the improvement or development of the estate. Apart from these statutory powers and any express powers in the trust instrument, a trustee has under the general law only the most limited power to effect repairs and improvements (see Lewin, op. cit., at p. 384), and this was, of course, one of the principal reasons for the introduction of the settled land legislation.

Clause 33(1)(a) will permit a trustee to expend money (including capital money) subject to the same trusts, for the repair, maintenance, upkeep or renovation of the property; and clause 33(1)(b) will authorise the expenditure of such money in the improvement or development of the property to an amount, for any one purpose, not exceeding $10,000, and thereafter to any amount with the consent of either the beneficiaries or of the Court. The figure of $10,000 may appear substantial but it is identical with that authorised in 1962 by section 30(1)(c) of the Western Australian Trustees Act, and is less than half of that (£10,000 sterling) allowed by the New Zealand Act in 1956. In view of persisting inflationary trends we do not believe that an authority to expend up to $10,000 without court approval can be regarded as unduly generous.

33(1)(c): Payment of calls on shares: Power to pay calls on shares is conferred by section 23 of the New South Wales Act, and section 26 of the Western Australian Act, and is plainly necessary to preserve the trust property by preventing forfeiture of such shares for non-payment of calls.

33(1)(d): Power to pay rates, taxes, etc.: Section 28(1)(p) of the Trustee Companies Act confers power to pay rates, taxes, assessments, insurance premiums and other outgoings. Section 30(1)(g) of the Western Australian Trustees Act confers a power in similar terms, except that it limits the authority to making such payments out of money subject to the same trusts. We propose the adoption of the latter provision.

(In this connexion, cf. also the powers conferred by clauses 42 and 46, discussed post, pp. 33 and 36 respectively).

33(1)(g): Power to apportion expenditure: A power of apportioning expenditure effected on the repair, maintenance, upkeep, etc., of trust property is conferred by W.A. section 30(1)(b). We consider that this power should extend to other forms of expenditure authorised by clause 33(1), including expenditure on improvements, subdivisional works, etc. The restriction in the Western Australian Act to repairs and other matters covered by clause 33(1)(a) may be explicable on the footing that in the other cases such expenditure ought only to be charged against capital. But it is difficult to reconcile this explanation with the provision for expenditure on maintenance of roads, etc., in W.A. section 30(1)(e), and we think it preferable to confer a complete power of appropriation on the trustee in the confident expectation that the power will be exercised in a manner which is just and equitable between all those interested. Except in exceptional circumstances we

do not consider that a trustee would, in the exercise of this power, be justified in departing from the natural rule that expenditure of a capital nature should be charged against capital and current expenditure against income.

33(1)(i): Power to vary terms of mortgages: Clause 33(1)(i) confers on the trustee, as mortgagor, power to renew, extend or vary a mortgage, so as to raise additional money for any of the purposes for which a trustee may under clause 45 mortgage the trust property; or as mortgagee, provided that he acts within the restrictions imposed by other provisions of the Bill relating to investment in mortgage securities.

33(1)(j): Power to make inquiries as to beneficiaries: Under this provision the trustee is authorised to make inquiries, by way of advertisement or otherwise, for the purpose of ascertaining next of kin or beneficiaries, and to charge the costs against the property.

33(1)(k): Power to surrender life policies: Where the trust property includes a life policy and there are no, or no sufficient, moneys available for payment of premiums, clause 33(1)(k), following section 30(1)(j) of the Western Australian Act, will enable the trustee either (1) to surrender the policy for money; or (2) to accept instead of the policy a fully paid policy; or (3) to vary the terms of the policy in such manner as he thinks fit. This will prove a useful provision, since, in the absence of the power which it confers, unpaid premiums are liable to be debited against the surrender value of the policy under section 100(3) of the Life Insurance Act 1945-1961 (Commonwealth).

33(1)(l): Power to appropriate in satisfaction of legacy, etc.:
33(2): Notice of appropriation by trustee to himself: Trustees have, as Lewin points out (op. cit. at p. 285), certain wide but ill-defined inherent powers of appropriation. In addition, a generalised statutory power of appropriation is conferred on trustee companies by section 28(1)(f) of the Trustee Companies Act 1968. Limitations on the inherent power to appropriate include the following:-

(a) the consent of the beneficiary in whose favour the appropriation is proposed is necessary, but not that of the other beneficiaries;

(b) appropriation of securities is valid only if the securities in question are authorised and sufficient at the date of appropriation;

(c) appropriation is not possible unless the property sought to be appropriated has a definitely ascertainable or market value, and not where the valuation is fixed by the trustee himself: Barclay v. Owen (1889) 60 L.T. 220.

Section 30(1)(k) of the Western Australian Act, following section 41 of the English Administration of Estates Act 1925 and, more particularly, section 46 of the New South Wales Trustee Act and section 31 of the Victorian Act, authorises appropriation of any part of the trust property in satisfaction of any legacy or share of the trust property, subject to the qualifications that (i) the appropriation shall not adversely affect a specific gift; and (ii) the appropriation shall not be effectual until notice has been given to all persons interested in the appropriation,

or their guardians if they are infants. The purpose of the latter provision is, as s. 30(1)(k)(ii) itself makes clear, to enable such persons to apply to Court, which may vary the appropriation.

We recommend the adoption of this general statutory power: it will have the effect of extending the inherent power of trustees to effect appropriations and will greatly reduce unnecessary verbiage in wills and trust deeds. The necessity for obtaining the consent of the beneficiary affected will be displaced by duty to give notice to all the beneficiaries, but not to the trustee himself in another capacity, although in this instance the appropriation will not be effectual unless either the consent of all the beneficiaries or the approval of the Court is obtained: cl. 33(2). Furthermore, the trustee will, for the purpose of such appropriation, be entitled to ascertain and fix the value of any trust property either by himself or by employing a qualified valuer for that purpose: cl. 33(1)(m) and cl. 51.

In the light of a submission received from the Public Curator we have improved the drafting of cl. 33(1)(l)(ii).

33(1)(m): Power to appropriate for payment of annuity: Closely related to the matter of appropriation in satisfaction of legacies is the problem of appropriation of trust property to meet annuities. As the law now stands, this is possible only if the annuitant consents, or if the Court grants its approval which will not be done unless it is virtually certain that the fund set aside will always suffice to meet the annuity: cf. Harbin v. Masterman [1896] 1 Ch. 351. Section 46(2) of the New South Wales Trustee Act confers a statutory power of appropriation, which has been adopted in Victoria, and by s. 30(1)(l) of the Western Australian Act, authorises the trustee to set aside a sum "sufficient in the opinion of the trustee" to provide an income which will pay the annuity. Under the Western Australian provision the annuitant retains his right of recourse to the capital and income of the appropriated sum, and the trustee is left free to distribute the residue in accordance with the terms of the trust.

In our view, this provision should be adopted in Queensland.

34. Power of trustee to sell by auction, etc.

35. Power to sell subject to depreciatory conditions.

36. Mortgage on sale of land.

37. Deferred payment on sale of property. See, on each of the above, the commentary to cl. 32(1)(a) above.

38. Surrender of onerous leases or property. It sometimes happens that the trust property includes a lease or other property which is of little or no value but which casts expense or onerous obligations on the trust property as a whole, e.g. in the case of a lease of land subject to repairing covenants, or valueless land which is subject to municipal rates: cf. Re Mellish (1935) 8 A.B.C. 140. Trustees in bankruptcy and liquidators of companies have long had power to disclaim property of this kind, subject to a right of proof by persons injured by the disclaimer.

For obvious reasons a trustee of private property cannot be given powers as wide and far-reaching as those of a trustee in bankruptcy; but cl. 38, following s. 35 of the New South Wales and Western Australian Acts, will enable a trustee to surrender or concur in surrendering an onerous lease or other property which it would not be in the interests of the beneficiaries to retain, and he will not be chargeable

with breach of trust for doing so if he has acted bona fide and on the advice of a registered valuer whom he reasonably believed to be competent.

39. Power to renew leases. Clause 39 is found in section 18 of the existing Queensland Acts and in the other Australian States, with the exception of Victoria, although it has no counterpart in the English legislation. By its terms a trustee is authorised, and may be required by persons having a beneficial interest in a leasehold vested in the trustee, to use his best endeavours to obtain a renewal of that leasehold on reasonable terms. Clause 39(2) authorises the trustee to apply capital money subject to the trust for the purpose of obtaining such renewal, but, by clause 39(1), the written consent of the person in possession is required if, by the terms of the trust, he is entitled to enjoy the same without obligation to renew or to contribute to the expense of renewal.

40. Power to purchase equity of redemption in lieu of foreclosure. There is, without express provision in that behalf, no power in a trustee to purchase an equity of redemption as a form of investment: see Lewin, op. cit., and it seems that, even where a trust includes a second mortgage, a trustee has no power to purchase the equity of redemption but must necessarily foreclose in order to enforce his rights as mortgagee: cf. Worman v. Worman (1889) 43 Ch. D. 296. Both New South Wales (section 32A) and Western Australia (section 37) now authorise a trustee to purchase the equity of redemption in lieu of proceeding to foreclosure where default has been made. We recommend the adoption of this provision, subject to the safeguards prescribed by the foregoing statutes, namely, that the moneys expended in such purchase should be subject to the same trusts, and that the consideration for the purchase should not exceed 5% of the amount due under the mortgage.

41. Release of equity of redemption in discharge of mortgage debt. Clause 41 is concerned with the converse case where it is the trustee who is the mortgagor and is vested with the equity of redemption. Jacobs' Law of Trusts in New South Wales (2nd ed.), at p. 513, records that it is doubtful whether in such case the trustee has power to release the equity of redemption in discharge of the whole or part of the mortgage debt, although a different view is taken by Lewin, op. cit., at p. 288. In New South Wales section 34 was introduced to meet this situation and it also appears as section 39 of the Western Australian Act. It permits a trustee to release the equity of redemption for the purpose of discharging the mortgage debt, without rendering him liable for breach of trust on the ground that the mortgaged property was of greater value than the amount of the debt, provided that the trustee acts on the advice of a registered valuer whom he reasonably believes to be competent. We recommend the adoption of this provision in Queensland.

42. Application of income by trustee - mortgagee in possession. In Re Smart's Settlement (1933) 33 S. R. (N. S. W.) 412 it was held that a trustee for persons in succession who as mortgagee went into possession of the trust property was bound to pay the interest intact to the life tenant and to meet outgoings, such as rates, repairs or otherwise, out of capital. Section 39A of the New South Wales Trustee Act set out to assimilate the position of a trustee-mortgagee in possession to that of a receiver, by authorising him to apply the net income of land of which he has taken possession as mortgagee in discharge of all such outgoings, insurance premiums, etc., and in keeping down all annual sums and other payments and the interest on principal sums having priority to the mortgage.

It is desirable that this provision (which appears as s. 40 of the Western Australian Act) should be adopted in Queensland, but it is necessary to make provision for the case of trustees in possession at the commencement of the legislation. Hence, sub-cl. (2) will apply to amounts due but unpaid at that date, and to the apportioned part of current and accruing outgoings as yet unpaid; but, as in practice, the application of this procedure will temporarily interfere with the receipt of interest by the party entitled thereto, cl. 42(3) will therefore require the trustee, upon recovery of the whole or part of the moneys secured by the mortgage, to rectify the position by apportioning to interest an amount equal to that which has previously been applied out of income in discharge of the outgoings. A question has been raised whether the arrears of interest themselves carry interest, and we think it desirable to provide expressly that no such interest is payable.

43. Power of trustee to give receipts. There is considerable variation in the precise form and requirements of the various statutory provisions regulating the power of trustees to give receipts. In England (s. 14) and Victoria (s. 18), any one of a number of trustees may give a valid receipt for money and other personal property, except in the case of capital money arising under the settled land legislation; in Western Australia, this formula has been adopted by s. 41 with the omission of the exception, which has become unnecessary after the abolition of the Settled Land Act in that State. In New South Wales the position is somewhat more complicated (see Jacobs, op. cit., at p. 526) and generally it seems that, except in the case of a sole trustee, in that State a purchaser or payer will not be protected unless all the trustees join in the receipt, or no fewer than two trustees in the case of trusts for sale, etc. The Queensland section (s. 19) in general follows the English and Victorian model and is supplemented by s. 46 of The Settled Land Act which requires payment of capital moneys to not fewer than two trustees. Section 19 differs from the other statutory provisions in that it confers efficacy not only upon the receipt of a trustee but also of a person authorised in writing by the trustee, and we believe this to be a useful provision in the conditions of this State. We know of no good reason for disturbing the present rule in Queensland, and therefore propose the retention, as cl. 43 of the Bill, of the existing s. 19.

44. Power to compound liabilities. For commentary, see cl. 50 below.

45. Power to raise money by sale or mortgage. A power to sell does not imply a power to mortgage, and, apart from statute, there is no implied power on the part of a trustee to mortgage trust property except in the case of property on trust for sale with power to postpone sale and to manage the property until sale: see Lewin, op. cit., at p. 585. Section 23 of The Settled Land Act of 1886 confers on a tenant for life a power to mortgage which is limited to raising equality money; the much more extensive powers conferred by s. 11 of the English Settled Land Act, 1890, and s. 16 of the Trustee Act, 1925, have not been adopted in Queensland, although s. 28(1)(q) of the Trustee Companies Act, 1968 has recently permitted a trustee company to borrow on the security of a mortgage of trust property up to a limit of $4,000 and thereafter without limit but with the consent of the Court or of the beneficiaries.

The difficulty presented by this want of power has in part been overcome by s. 48 of The Trustees and Executors Acts, which, following an earlier Queensland enactment, enables a trustee with the sanction of the Court to raise, by way of mortgage of the trust property or any part of it, money which it may be necessary to raise

for the purpose of preservation or improvement of trust property, its insurance against damage by fire, or for "the discharge of any debts or liabilities charged upon the trust property or for the payment of which the trust property may be made available", the rate of interest and periodicity of repayments being determined by the Court. It has been said that this provision should receive a "liberal and benignant construction": Re Berry's Trusts (1893) 7 Q.L.J. 63, per Griffith C.J., at p. 64, and it has been availed of on a number of reported occasions: see, e.g. Re Paget [1938] Q.W.N. 42; Re Irwin [1953] Q.W.N. 12; and Re Martin [1956] Q.W.N. 12 (consent to mortgage for purpose of effecting repairs).

The comparative frequency with which section 48 has been resorted to is some indication of its utility, but its limited scope, and the fact that it involves the expense of a court application, is something of a disadvantage. Clause 45 of the Bill, which is in a form common to the legislation of England, New Zealand, and three of the Australian States, will enable a trustee to raise money by mortgage, sale, etc. for the purpose of paying or applying money subject to the trust for any purpose and in any manner, this power being dependent upon his having authority by virtue of the trust instrument or by the statute so to apply capital money. Such authority will be conferred by the proposed Act in the following principal cases:-

(1) by clause 33(1)(a), which authorises expenditure of trust money for the purpose of repair, maintenance, etc., of trust property (cf. Re Martin (supra);

(2) by clause 33(1)(b), which authorises expenditure of trust money, to a limit of $10,000 without the consent of the Court, in the improvement and development of trust property, and, with the consent of the Court, to an unlimited amount (cf. section 28(1)(q) of the Trustee Companies Act);

(3) by clause 33(1)(c), in payment of calls on shares;

(4) by clause 33(1)(d), for the purpose of paying rates, taxes, insurance premiums, and other outgoings in respect of the trust property;

(5) by clause 33(1)(e), for the carrying out of subdivisions, etc.;

(6) by clause 33(1)(f), for the purpose of constructing and maintaining roads, streets, sewerage works, etc., which are likely to be beneficial to the property;

(7) by clause 39, for the purpose of renewing a leasehold under that provision.

From this it will be seen that the catalogue of cases in which the trustee may raise money by mortgage is wide, and although in terms possibly not quite so general as that conferred by section 28(1)(q) of the Trustee Companies Act, there remains in the Court a residual power, on application under clause 95, of adding to or enlarging the powers of the trustee in this regard.

46. Protection of purchasers, mortgagees, etc. Clause 46 contains a form of provision, common to all modern trustee legislation, which is intended to protect a purchaser or mortgagee dealing with a trustee and to dispense with the necessity for the former to inquire whether the trustee is acting within the limits of his power. The clause is based on section 44 of the Western Australian Act, which itself simply repeats the language of section 17 of the United Kingdom legislation; but, in considering the scope of the protection so afforded, it has become clear that the foregoing sections do not protect a purchaser or mortgagee who does not ascertain whether the trustee has a power to sell. Since we think it desirable that a purchaser or mortgagee dealing with a trustee should be put to no more inquiries than a person dealing with an absolute owner, we have accordingly extended the provision so as to ensure that a purchaser or mortgagee from a trustee is saved from making any inquiries regarding the substantive provisions of the trust.

47. Insurance.

48. Application of insurance money where policy kept up under any trust, power or obligation. By section 17(1) of the present Queensland Acts a trustee has a power, but not a duty (see Lewin, op. cit., at p. 224), to insure against loss or damage by fire any building or other property to any amount not exceeding three-quarters of the value of such building or property, and may pay the insurance premiums out of the income of the property or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled to such income. It will be noticed that the sub-section limits the power to insurance against fire, and to an amount not exceeding three-quarters in value. Similar limitations exist in the English Act, but we have been informed that in England the Public Trustee in practice insures trust property to full value. Both of the foregoing restrictions have been abandoned in Victoria, New South Wales, and Western Australia, and also by section 28(1)(o) of the Trustee Companies Act of 1968. We recommend that this step be taken in Queensland.

The State Acts are basically similar in these respects and, like section 17(1) of the Queensland statute, provide that the premiums may be paid out of income of the property. Section 23(3) of the Victorian Act expressly directs that such premiums shall be charged first against the income of the property concerned, and secondly against the income of any other property subject to the same trusts, to the extent of the income available. This requirement is not wholly satisfactory, however, since there may be circumstances in which it is inappropriate or inconvenient to follow this order: cf. Re Hoppe [1961] V.R. 381, and Fricke & Strauss, op. cit., at p. 377. It has already been mentioned that clause 33(1)(d) enables the trustee to pay premiums in respect of the property out of money (including capital money) subject to the same trusts, and, whilst we regard the Victorian provision as prescribing the usual or natural order which a reasonable trustee will ordinarily follow, we consider it preferable that the matter be left to his discretion in each instance. Section 46(2) of the Western Australian Act provides that the trustee may recover the amounts of premiums paid in respect of the insurance from "the life tenant or other person entitled to or in respect of the rents and profits of the property concerned". This does not appear in the statutes of any of the other Australian States and is probably intended to preserve against the tenant for life of settled land his statutory liability to insure; but in view of the provisions of clause 7(2)(a) we do not think this provision is necessary in Queensland. On the whole, we prefer the clarity with which the

power to issue is expressed in s. 41 of the New South Wales Act, and subject to some modification, we have adopted this as the basis of cl. 47. In deference to one query which has been raised, we may say that we are confident that cl. 47(1) covers public liability insurance in which it would be prudent to effect such insurance.

Clause 48 specifies what is to be done in respect of moneys received under an insurance policy of trust property. The clause is taken substantially from s. 42 of the New South Wales Trustee Acts and may be compared with s. 20 of the English legislation and s. 47 of the Western Australian Act. The English section, which is designed to take account of the settled legislation, is sometimes complex, particularly in the provision which it makes for the application of such moneys as between the persons respectively entitled to capital and income. The transcription, with some modifications, of s. 20 of the English Act into s. 47 of the Western Australian statute takes account of the abolition in that State of the settled land legislation although some of the vocabulary of that legislation appears to have been retained in s. 47(3).

The matter of apportionment of insurance moneys between income and capital is always bound to present problems, but the New South Wales section is, we think, the simplest of the above provisions. Omitting sub-section (2) of that section (which is concerned with trusts for sale), the clause will require the insurance moneys to be held on trusts corresponding with the trusts affecting the property in respect of which it is paid, while sub-cl. (3) allows the trustee to apply the money rebuilding, reinstating, replacing, or repairing the lost or damaged property, but subject to the consent of any person whose consent is required by the trust instrument: cf. the provision in s. 28(1)(i) of the Trustee Companies Act 1968. In common with all such legislation, the foregoing proposals will apply to all policy moneys received after the commencement of the proposed Act, irrespective of when the policy was effected.

Clause 48(5) preserves the power conferred on insurers by s. 83 of the Fires Prevention (Metropolis) Act 1774 to apply the insurance moneys towards the rebuilding, reinstatement, repair, etc. of the property lost or damaged: see on this Fricke & Strauss, op. cit., at p. 379.

49. Deposit of documents for safe-keeping. In the custody of trust property, including trust documents, a trustee is required to use the same degree of care and diligence which would be exercised by a man of ordinary prudence in the management of his own affairs: Lewin, op. cit., at pp. 221-222. In Australia a practice has grown up, which has received judicial recognition in Austin v. Austin (1906) 3 C. L. R. 516, of leaving title deeds and other similar documents in the custody of the solicitor for the trust. Without affecting the propriety of this practice in appropriate circumstances, cl. 49 (which adopts a form of provision found in the United Kingdom and other legislation) will authorise the deposit, with a bank or corporation whose business includes the undertaking of safe custody of documents, of trust documents, and also provides for payment of the cost of so doing out of income or, if necessary, out of capital.

44. Power to compound liabilities.

50. Reversionary interests. Clauses 44 and 50 are concerned with what has been described as the first duty of a trustee, namely to get in the trust property and to place it in a state of security. The power of a trustee to release or compound a debt exists under the general law, although he might be liable if he does so without sufficient

justification. Jacobs (op. cit., at p. 525) says that a provision in the form of clause 44, which in substance follows section 20 of the existing Acts, protects a trustee who has actively exercised his discretion unless he has acted mala fide. (The existing section 20 specifically confers this power on an executor or administrator, but in the case of the present Bill this is covered by the general provisions of the definition of "trust" and "trustee" in clause 5).

A somewhat similar power is conferred by clause 50 but has particular reference to the case of a reversionary interest not vested in the trustee, which is not provided for in the existing Acts. The provision is found in substantially the same form in other modern trustee legislation and we recommend its adoption without change.

51. Valuations. Section 22(3) of the English Act authorises the trustee, for the purpose of giving effect to the trust instrument, to ascertain and fix the value of any trust property, in such a way as to render the valuation (if made in good faith) binding on all persons interested under the trust. The section appears to assume that it is incumbent on the trustee to employ duly qualified valuers for this purpose: the Western Australian provision (section 50) allows the trustee greater liberty of action in this respect, by enabling him to carry out the valuation himself if qualified to do so, and by providing that the trustee shall not be bound to accept the valuation of any person whom he has consulted. The Western Australian section is thus more flexible and should, we consider, be adopted in preference to the United Kingdom provision.

52. Audit. The English Act in section 22(4) authorises a triennial audit of the trust property; section 51 of Western Australian Act, following the New South Wales and Victorian legislation, leaves the frequency of such audits to the discretion of the trustee, and we consider this to be preferable. All similar sections confer a discretion as to how the costs of such audit are to be charged but also provide that, in default of direction given in special cases, costs attributable to capital are to be borne by capital and those attributable to income by income.

There is no similar provision in the existing Acts, and we recommend that section 51 of the Western Australian Act be adopted.

53. Power to concur with others. Clause 53 has been referred to in connexion with the trustee's power of sale. It simply confers on the trustee power to concur with other co-owners of property in executing any power or trust reposed in the trustee, notwithstanding that the trustee may himself be interested in the trust share.

We recommend its adoption in the form in which it appears in section 52 of the Western Australian Act, save for a slight verbal alteration necessary to make the section accord with the definition of "trust property" in clause 6 of the Bill.

54. Power to employ agents. Apart from statute and the particular provisions of the trust instrument, the rule under the general law is that a trustee is not entitled to delegate the performance of the trust unless there exists some moral necessity for doing so: Speight v. Gaunt (1882) 9 App. Cas. 1 at p. 10; Jacobs, op. cit. at pp. 392-399; Lewin, op. cit. at p. 175. Section 16 of the existing Queensland Acts has modified this rule to the extent of permitting a trustee: (1) to appoint a solicitor to be his agent to receive trust money or property; and (2) to appoint a banker or solicitor to receive money payable under a policy of insurance. But this provision may be excluded by

the terms of the trust instrument, and it does not exempt from liability a trustee who permitted such money or trust property to remain under the control of a solicitor or banker for longer than is reasonably necessary.

Section 23 of the English Trustee Act, 1925, whilst expressly retaining specific powers of the kind conferred by Queensland section 16, very greatly enlarged the authority of a trustee by permitting the employment of a person "to transact any business or do any act required to be transacted or done in the execution of the trust", and relieved the trustee from responsibility for the default of any such agent if employed in good faith. One result of the latter provision was that, according to the decision in Re Vickery [1931] 1 Ch. 572, under U.K. section 23(1), the test of liability of a trustee for the default of an agent has ceased to be "reasonableness" and has become simply "good faith".

Clause 54 follows section 53 of the Western Australian Act which displaces the decision in Re Vickery on this point by providing in section 53(1) that the trustee shall not be responsible for the default of an agent "employed in good faith and without negligence". It also extends the range of persons who may be employed so as to include not only a solicitor, banker, and stockbroker, but also accountant and trustee corporation. Clause 54(2), following U.K. section 23(2) enables a trustee to delegate even his discretion where the act in question concerns trust property out of the State, and clause 54(3) and (4) in substance preserves the specific powers of employing agents which are conferred by section 16(1) of the Queensland Acts, as well as the limitation imposed by section 16(2).

It is plain that the complexity and volume of modern business justifies the extension of power to employ agents to the degree which is now permitted by the Western Australian section, and we recommend its adoption in Queensland.

55. Protection of bankers. It is clearly essential that trustees should have the power to open a bank account and that a banker should not be subjected to a greater liability where he is dealing with a trustee than where he is dealing with a person who is not a trustee.

Section 6 of the Queensland Trustees and Executors Acts Amendment Act of 1906 makes extensive provision to enable a trustee to employ bankers, there being at that time no general provision in any statute, and no legal authority, to enable a trustee to appoint an agent.

Provisions similar to the 1906 Queensland provision have been adopted in New Zealand (section 81), Victoria (section 25) and Western Australia (section 101). But there is no such provision in the English Trustee Act of 1925, except for section 11, which appears in New South Wales (section 15) and Victoria (section 12), which provides for the temporary deposit of trust moneys in a bank account - a provision which does not appear in the Western Australian Act at all.

It seems probable that there is no particular authority to employ a banker to be found in the English Trustee Act 1925 because it was felt that sufficient general authority to employ agents of all descriptions had been given by section 31 (Western Australia section 53). But such particular authority having been furnished in Australian statutes before general authority was furnished on English lines, the particular authority has been retained.

The advantage of the particular authority is that it may relieve the minds of bankers. Its disadvantage is that it is probably unnecessary, having regard to the breadth of the general power trustees are now given to employ agents.

It is considered, however, that the authority which this provision gives to employ bankers does not alter the general rule of the law of trusts that a trustee must not leave trust moneys in a bank for an unduly long period (see e.g., Cann v. Cann (1884) 51 L.T. 770), save where this is done as an authorised investment.

Section 11 of the English Trustee Act 1925 (adopted in New South Wales (section 15) and Victoria (section 12)) makes no difference to that rule, since, according to Halsbury's Statutes (2nd ed.), Vol. 26, at p. 70, it merely sanctions previous practice.

On the whole, then, whilst there is some argument for omitting the provision altogether on the grounds that it is redundant, it is recommended that it be adopted for the easier comprehension by trustees of the extent of their powers.

56. Power to delegate trusts. It is not entirely clear to what extent a trustee may, under a provision corresponding to section 23 of the United Kingdom Act, delegate his discretion to another: see Jacobs, op. cit., at p. 396. Under the general law a delegation of the entire discretion of the trustee was not permitted, trusteeship being an office of personal confidence. However, section 4 of The Trustees and Executors Acts Amendment Act of 1906 permits a trustee, by power of attorney under seal, to delegate all or any of his powers, authorities or discretions where he "for the time being resides out of Queensland, or is about to so reside temporarily or otherwise". Similar, but slightly more limited, provisions appear in section 25 of the English Act and section 64 of the New South Wales Act. All the foregoing sections render the trustee liable for the acts and defaults of the delegate or donee of the power. Section 54 of the Western Australian Act, although derived from the foregoing provisions, together with section 30 of the Victorian Act, is much more widely drawn and, in addition to allowing delegation in the case of (1) departure from the State, also permits it where the trustee (2) is a member of Her Majesty's forces; and (3) is or may be about to become, by reason of physical infirmity, temporarily incapable of performing his duties. Such delegation does not come into effect until the trustee is out of the State or is incapable of performing his duties, as the case may be, and is revoked by the return or recovery of the trustee. Other provisions of the section are designed to ensure that the delegate or donee of the power is placed in the same position as if he were himself the trustee and to protect persons dealing with the delegate or donee of the power.

We propose the adoption of section 54 of the Western Australian Act, save that we can see no good reason for the inclusion of subsection (2), which prohibits delegation pursuant to the section unless the co-trustees (if any) of the trust consent to this course. This provision does not appear in the English Act or any of the other State Acts, and is likely to lead to difficulties where there is a plurality of trustees; since delegation is sometimes a matter of pressing necessity, the trust may become unworkable if delegation cannot be effected except by consent of all the trustees, who are, of course, bound to act unanimously. In addition, we consider it desirable to retain section 4(3) of the Queensland Act of 1906 which provides that the trustee shall be liable for the acts and defaults of the delegate.

With this alteration and subject to the omission of subsections (2) and (8)(which is ancillary thereto), clause 56 follows the Western Australian provision.

57. Power to carry on business. Apart from statutory provision in that behalf, a trustee or, for that matter, an executor, may not carry on a business with the trust property unless there is the most distinct and positive authority and direction given in the trust instrument or will itself: see Kirkman v. Booth (1848) 11 Beav. 273, 280; Lewin, op. cit., at p. 281; Jacobs, op. cit., at pp. 521-523. This is frequently productive of grave inconvenience, particularly in the case of pastoral businesses, where it is often inopportune to sell immediately and where prolonged delay may be necessary in order to avoid losses, caused by drought or other adverse conditions in the industry. Section 2 of The Trustees and Executors Act Amendment Act of 1902 confers an authority, exercisable with the sanction of the court, to postpone sale and conversion of trust property, and to carry on any business in connection with such property, for a period limited to the minority of an infant beneficiary. It appears that, within the literal terms of this section, the court has no power to grant its sanction retrospectively to an unauthorised carrying of business, but this can, it seems, be achieved by reference to section 54 of the Principal Acts: see Re May [1948] Q. W. N. 5 and Calcino v. Fletcher [1969] Qd. R. 8, at pp. 23, 28; a somewhat similar result can be accomplished under section 40 of The Partnership Act of 1896, where the deceased was a member of a partnership which is carried on after his death for the purposes of winding up: see Powell v. Powell (1930) 31 S. R. (N. S. W.) 407.

Clause 57, which with some modifications is based upon section 55 of the Western Australian Act, will enable a trustee to carry on the business in which the trust property was being used at the commencement of the trust, for a period of two years from the commencement of the trust, or for such period as may be necessary for the winding up of the business, or for such further period as the Court allows. The form of the clause is such as to include the case where the deceased has been carrying on the business in partnership; but it is made "subject to the provisions of any other Act", so that the provisions of The Partnership Act and the principles stated in Powell v. Powell will be preserved. It is also subject to the provisions of the trust instrument, with the consequence that the settlor may, if he wishes, preclude the trustee from carrying on the business.

Application to court for leave to carry on a business may, by clause 57(3), be made by the trustee or any person beneficially interested in the estate. It may be made at any time, whether or not any previous authority to carry on the business has expired; and we think it desirable that the provision state expressly that an order granting such leave should be capable of being made retrospective to any particular date.

Section 55 of the Western Australian Act is a salutary provision which, in our opinion, represents a considerable improvement over the existing Queensland section, and should prove of great utility.

58. Power to convert business into a company. Jacobs, op. cit., at pp. 523-4 remarks that:-

> "Trustees, unless they have power to invest in shares of a limited liability company, cannot sell the business carried on by the trust to a company formed for the purposes of taking over the business. However, in the

> circumstances of modern commerce and taxation provisions, it is often most convenient and desirable to conduct the business through the medium of a limited liability company."

The same author points out that in New South Wales such sales were formerly authorised by the Court under its inherent jurisdiction and more recently under the statutory power corresponding with clause 95 of this Bill, citing inter alia Re Benjamin [1938] V.L.R. 76.

Clause 58, which is based on Western Australia section 56 and derives from section 33 of the New Zealand Act, will permit the trustee to carry out such conversion and sale without reference to the Court, and to retain as authorised investments any shares, debentures, etc. received by him in consequence of the power conferred by the section.

59. Trustee may sue himself in a different capacity. It is a slowly vanishing rule of practice that in legal proceedings a party may not appear on both sides of the record, i.e. may not appear both as plaintiff and defendant in the same action. This sometimes creates difficulties, e.g. where a person, who is an (or the only) executor or trustee of an estate, is also a beneficiary and wishes in that character to enforce a claim against the estate: cf. Rubin v. McNamara [1969] Q.W.N. 18. Clause 59 will enable such proceedings to be instituted, provided, however, that the trustee takes directions as to the manner in which differing interests are to be represented.

PART V - MAINTENANCE, ADVANCEMENT AND PROTECTIVE TRUSTS

60. Application of Part.

61. Power to apply income for maintenance etc. Section 31 of the English Trustee Act 1925, which has been adopted with minor variations in Victoria and Western Australia, is badly drawn. The earlier legislation (section 43 of the Conveyancing Act 1881, which appears as section 50 of the Queensland Acts) was concerned with the maintenance of infants whether absolutely or contingently entitled; but the 1925 legislation extended the trustee's power to maintain out of income to adult beneficiaries, contingently entitled. Unfortunately these two rather different powers were compressed into one sub-section - sub-section (1), and that subsection has in consequence given rise to some difficulties of interpretation. In particular, paragraph (ii) provides that in the case of an adult beneficiary, contingently entitled, "the trustees shall... pay the income of that property ... to him". But it is clear that that cannot mean what it says, because it has been held in several cases (Re Turner's Will Trusts [1937] Ch. 15; followed in Re Ransome decd. [1957] Ch. 348 and in I.R.C. v. Bernstein [1961] Ch. 399) that if the trust instrument otherwise provides the income must be paid elsewhere. It would appear indeed that the word "shall" is used merely to indicate that, if the trustees can and do decide to maintain an adult beneficiary they must pay the income to him and not to his parent or guardian as is provided in the case of an infant beneficiary by subsection (1)(i).

It is considered that it is more satisfactory to give trustees two quite separate powers of maintenance, one in respect of infants, whether absolutely or contingently entitled, the income to be paid to the parent or guardian; and one in respect of adults contingently entitled, the income to be paid direct to the beneficiary. The difficulties which troubled Re Turner's Will Trusts would then not arise.

The Victorian and Western Australian Acts extend the trustees power of maintenance to include past maintenance and education. This is desirable since it was held in Re Senior [1936] 3 All. E.R. 196, that there is no power under the 1881 Act (and therefore the present Queensland Act) to enable a trustee to recoup a parent for money expended out of the parent's income for the maintenance of his child.

The Victorian and Western Australian Acts allow trustees to use income for the advancement of beneficiaries as well as for their maintenance, education and benefit. It may appear to be a rather technical objection, but the word "advancement" has always connotated advancement out of capital, not out of income - a person who expects to be entitled to capital receives an advancement which must be taken into account when he does ultimately become entitled. (cf. the Statute of Distributions, 1660, which required advancements to children to be brought into account in determining their intestacy share). However, since the word "benefit" appears to be even broader in meaning than the word "advancement" (see Lewin on Trusts, 16th ed. (1964) at pp. 309-310; Re Moxon's Will Trusts [1958] 1 All E.R. 386), there does not seem to be much harm in including it.

Both the Victorian and Western Australian Acts provide that where there is more than one trust fund from which maintenance payments may be made, payments shall derive proportionately from each fund. There is some suggestion that formerly maintenance payments should be made from the income of the fund which was more beneficial to the infant: Re Weaver (1882) 21 Ch. D. 615; Smith v. Cock [1911] A.C. 317.

62. Power to apply capital for advancement, etc. Section 32 of the English Trustee Act has been modified in Victoria (section 38) and Western Australia (section 59) in a number of respects:-

(1) Neither State includes subsections (2) or (3) of the English section, which limit the power to the case of property held on trust for sale and to trusts constituted after the commencement of the Act.

(2) Both States allow an advancement up to $2000 or half the presumptive share of the beneficiary, whichever is the greater. In England only one-half may be advanced.

(3) Both States provide that moneys advanced under the power must be brought into account when the beneficiary advanced becomes entitled to his share. It seems desirable to state this explicitly.

(4) In Victoria (subsection 6) the trustees are expressly empowered to raise moneys for advancement purposes by the sale, mortgage or exchange of the trust property. This is a desirable inclusion.

(5) In Western Australia, where the consent of a person to an advancement is requisite but cannot be obtained, the Court may give its consent instead. This apparently offsets the decision in Re Forster's Settlement [1942] Ch. 199, that the Court has no power to dispense with a consent. It appears to be reasonable to allow a court to decide.

(6) In Western Australia an advancement may be made to a beneficiary whose entitlement later fails "by the operation of the rule against perpetuities". This, of course, relates to the context of a "wait and see" rule and it would be inappropriate to adopt it in Queensland except in that context.

(7) The Western Australian legislation allows capital to be advanced in respect of past maintenance or education. This appears to be fair where money borrowed for such purpose has to be recovered; and it has already been submitted, in discussing the power of maintenance, that the technical meaning of advancement is becoming obsolete and may well be abandoned.

On the whole the best drafted provisions appear to be that in the Victorian Act, and we recommend its adoption in substance.

The draft clause 62 includes all the above provisions which appear desirable and have been used in one or other of the Trustee Acts of other States.

63. Conditional advances for maintenance. New Zealand introduced a provision, by section 7 of the Trustee Amendment Act 1960, enabling trustees to attach conditions (e.g. of repayment or the furnishing of security) when making payments for the maintenance or advancement of beneficiaries, and Western Australia has adopted the provision in its entirety: Trustees Act 1962, section 60.

Garrow and Henderson's Law of Trusts and Trustees (3rd ed.) (1966) at pp. 349 to 351, does not throw any light on the occasion for the passage of the legislation but they seem to regard it as useful. Since the section expressly relieves a trustee of any loss which may be incurred through, for instance, failure of the security, it appears to be intended for occasional use in special circumstances rather than as a general adjunct to the maintenance and advancement power.

64. Protective trusts. The provisions of section 33 of the English Act have been closely followed in Victoria (section 39), Western Australia (section 61), New South Wales (section 45) and New Zealand (section 42) with, for the most part, only minor alterations in the drafting. The Victorian legislation differs from the English in two respects:-

(1) the numbering and lettering of subsections and paragraphs is more up-to-date;

(2) subsection (2) of the English section, which limits the operation of the section to trusts coming into effect after the date of the Act, is omitted. This is desirable because if a testator or settlor in Queensland were to settle property "on protective trusts" the gift would at present either fail for uncertainty, or succeed on the basis that the testator or settlor had the English or other Australian provisions in mind, and that such was his intention. The latter would be preferable.

The Western Australian legislation makes an attempt to redraft which is in some respects unsatisfactory, and it appears preferable to adopt the Victorian legislation as it stands.

PART VI - INDEMNITIES AND PROTECTION OF TRUSTEES

65. Application of Part.

66. Protection against liability in respect of rents and covenants. A personal representative would normally be responsible for meeting the covenants and conditions of a lease vested in him by virtue of his office in two ways:

(1) Under the doctrine of privity of contract if the lessee had originally covenanted for his heirs, successors and assigns. That liability terminated when the representative assigned the leasehold to the beneficiaries under the will or intestacy, or, by virtue of Lord St. Leonard's Act (Law of Property Amendment Act, 1859 (22 and 23 Vict. c. 35) section 26), when he sold the leasehold to a purchaser. Thereafter the liability for meeting the covenants and conditions of the lease passed to the beneficiaries, whether the lease had been assigned to them or sold to a purchaser, and, in the case of a sale, to the purchaser. Lord St. Leonard's Act did not apply, however, where the representative assigned a leasehold away without consideration, in order to get rid of an onerous obligation. In that event the representative remained liable upon the lease.

(2) Under the doctrine of privity of estate, once privity of estate was established between the lessor and the personal representative, as for example by his entering possession of the leasehold premises, the representative became liable under the lease and that liability continued despite assignment of the lease by him to beneficiaries or a purchaser.

To protect himself, a personal representative, who had become liable in any of these ways under a lease, would upon assignment of the lease reserve an indemnity fund, out of the assets of the estate, to meet any possible claims of the lessor. The fund he might reserve was limited to his possible obligation: he was not allowed to set aside an indemnity fund for future breaches of the lease unless he might be held accountable for such breaches. (In re Nixon [1904] 1 Ch. 638; In re Lawley [1911] 2 Ch. 530; In re Owers [1941] 1 Ch. 389). If the indemnity fund held by the representative was not called upon, or could not be called upon because a claim was barred by the statute of limitations, it became payable to the beneficiaries (In re Lewis [1939] 1 Ch. 232).

The English Trustee Act 1925, section 26, in effect made statutory the law as recognised by the practice of the Courts, and as revised by Lord St. Leonard's Act. It changed the law only in so far as it extended to trustees as well as executors.

The present issue is whether the section ought to be further extended so as to save trustees and personal representatives from having to set aside indemnity funds in respect of possible future breaches in the two cases where they are still liable for future breaches, viz., where they are liable by privity of estate, as exemplified in Re Owers [1941] 1 Ch. 389, and where they are liable by reason of having assigned the lease without consideration as In re Lawley [1911] 2 Ch. 530, at p. 533.

In New Zealand it was felt that the protection of the section should be extended to cover the In re Owers situation, and the New Zealand provision has been adopted in Western Australia. In the Trustee Act (Northern Ireland) 1958 - the most recent United Kingdom revaluation of trustee legislation - the section has also been extended so as to cover In re Owers situation. But in neither jurisdiction has the legislature seen fit to change the In re Lawley situation.

The limitation of the English section is governed by its reference in section 26(1) to the liabilities of personal representatives or trustees "as such"; and the gist of the judgment in Re Owers was that trustees liable by privity of estate were not merely liable as such in their capacity of trustees. In New Zealand and Western Australia a new subsection has been written in (New Zealand, section 34(2); Western Australia, section 62(2)) which "deems" a trustee to be liable as such for any liabilities arising from privity of estate which he may incur "if he is entitled to reimburse himself out of the trust property for all expenses he may incur in respect of the liabilities." This wording seems to be intended to cover Re Owers but it does not cover Re Lawley.

In Northern Ireland however (Trustee Act (Northern Ireland), 1958, section 27), all that was done was to omit the words "as such" in defining the trustee's liabilities. This seems to be intended to cover Re Owers but does not cover Re Lawley because the section still allows the trustee to convey the property to a "purchaser, legatee, devisee or other person entitled to call for a conveyance thereof" and Re Lawley held that those words do not cover a transferee without consideration.

It is submitted that the New Zealand example is not the best. It is undesirable to deem one thing (trustees "as such") to be something quite different (lessees having privity), where all that is required is to relieve trustees of liability for future breaches where that liability arises from privity of estate. Indeed, to retain the references to trustees "as such" and to "liabilities arising from privity of estate" is to retain the vocabulary of the very distinction which it is the intention of the legislation to abolish.

On the other hand, the Northern Ireland precedent of merely striking out the words "as such" in the reference to the trustee's liabilities might be felt by the diffident to be too facile a way of making a significant change in the law, although it is hard to see how anyone could maintain that the omission of these words has no effect at all.

It is therefore recommended that the Northern Ireland precedent be adopted although the words "as such" should be dropped; but that the provision should be strengthened by inserting the words "for any reason" as follows:-

"(1) Where a trustee who is for any reason liable for - "

Thereafter the clause follows the English and Victorian (section 32) wording.

It does not appear to be desirable to save the trustees in an In re Lawley situation. In such case they must still set aside an indemnity fund to meet any future possible liability.

67. Protection of trustees against claimants by means of advertisement. All the trustee statutes provide trustees with protection against unknown claimants where due notice has been given in the Government Gazette and the press of an intention to distribute the assets of a trust or deceased estate: see United Kingdom, (section 27); Victoria, (section 33); New South Wales (section 60); New Zealand (section 35); Western Australia (section 63).

The English and Victorian precedents still refer to settlements and to real and personal property, whereas the New Zealand and Western Australian precedents refer in general terms to trust property, although it is clear that assets of deceased estates are also included: cf. New Zealand (section 35(3) and (7); Western Australia (section 63(4) and (9)).

There are two kinds of unknown claimants against whom it seems desirable to protect trustees and personal representatives:-

(1) Claimants, e.g. creditors, for the settlement of whose claims the trustees may have recourse to the trust assets, e.g. National Trustees Executors and Agency Co. of Australasia Ltd. v. Barnes (1941) 64 C.L.R. 268; In re Raybould [1900] 1 Ch. 199.

(2) Claimants whose claim is to the trust assets as such, as in Re Diplock [1948] Ch. 465.

Section 27 of the English Trustee Act protects a trustee who advertises in accordance with the provisions of the section from both types of claimant, as does section 33 of the Victorian Act. It was held in Newton v. Sherry (1876) 1 C.P.D. 246 and in Re Aldhous [1955] 2 All E.R. 80 that the section protected trustees against beneficiaries, e.g., next-of-kin, as well as against creditors. But in New Zealand and Western Australia the English provisions have been limited to claimants other than beneficiaries and a separate provision has been made to trustees in respect of beneficiary claimants. This separate provision is set out in section 66 of the Western Australian Act, and it involves the making of a Court order, following an advertisement procedure. It only protects the trustees who act under the order, however, as it is provided in sub-section (8) that the section does not affect any remedy which any person may have against any person other than the trustee, including any right that he may have to follow the property and any money or property into which it is converted.

There appears to be no justification for the incorporation of this unwieldy procedure into the law.

(1) The object of a Trustee Act should be to reduce, not to increase, the number of occasions on which a trustee should be obliged to seek a court order. There is no particular reason why the Court should supervise the trustee's attempts to discover unknown possible beneficiaries.

(2) It is difficult to see how a trustee, and more particularly a personal representative, can ever be certain that there are no unknown beneficiary claimants to the estate, since a grant of probate or letters of administration is always liable to revocation in the event of the discovery of a later testamentary instrument. An over-cautious personal representative may well feel that the only real safeguard

open to him is compliance with the section. But it can hardly be intended that the section must be complied with every time.

(3) It is contrary to principle that a trustee should be obliged to engage in extensive preliminary formalities before seeking a court order. If the section is intended to limit the trustee's free access to the Court (cf. s. 92, Western Australia) it is misconceived.

(4) It is confusing and unnecessarily expensive to require two different advertisement procedures for two kinds of case which are not very different from each other.

(5) Section 63 provides adequate protection for the trustee, since if he acts in accordance with it he is as protected as if he has acted under a court order: Re Frewen (1889) 60 L. T. 953; furthermore, if the trustee is uncertain of the appropriate advertisements in a special case, it is open to him to apply to the Court for directions: Re Letherbrow [1935] W. N. 34 & 48; Re Holden [1934] W. N. 52.

Clause 67 has been widely welcomed by those to whom the Working Paper has been sent but a number of suggestions have been made which have led us to redraft the provision in what we believe is an improved form. Our attention has, however, also been drawn to the provisions of O. 71, r. 3 and r. 3A of The Rules of the Supreme Court, and it has been suggested that the terms of cl. 67 should follow those of the aforementioned Rules of Court.

Order 71, r. 3 is concerned with advertisement of notice of intended application for grant of probate, and r. 3A provides that the executor applying for probate may include in his advertisement notice requiring claims to be sent to him; if he does so, then, at the expiration of the time named in the advertisement for sending in of claims, the executor may distribute the estate assets amongst the parties of whose claims he then has notice, and publication of such notice is sufficient for the purposes of s. 22 of The Trustees and Executors Acts.

The provisions of these Rules are, of course, confined in their operation to executors, and do not extend to administrators or to trustees who are not executors applying for probate. Clause 67 will thus have a field of operation independent of the provisions of O. 71, r. 3 and r. 3A, and it therefore remains necessary to have some provision such as cl. 67. The solution to the problem, in our view, is to ensure that, when the Trusts Act comes into force, O. 71, r. 3A will be amended so as to substitute for the reference to s. 22 of the repealed Acts a reference to what will then be s. 67 of the Trusts Act. This will mean that an executor applying for probate who complies with the provisions of The Rules of the Supreme Court on this point will thereby enjoy the benefit of s. 67 of the Trusts Act without the necessity for additional compliance with the provisions of that section. To place the position quite beyond doubt we suggest O. 71, r. 3A be in due course amended to read (in the last two lines thereof) "shall be sufficient for the purposes of section 67 of the Trusts Act notwithstanding anything contained in that section".

The practical result will be that it will only be necessary to satisfy the slightly more onerous provisions of cl. 67 in cases where: (1) the notification is to be given by a trustee or a personal representative other than an executor applying for probate, or (2) where the intending executor has omitted to give notice pursuant to O. 71, r. 3A.

68. Barring of claims. A more radical method of enabling trustees to distribute assets promptly without fear of claimants whether known or unknown is to abridge the normal limitation period within which a claimant must bring his action.

The best known example of this method is the abridgment of the period within which a torts action must be brought, in the event of the death of the tortfeasor: the action must be brought within six months of the grant of probate or letters of administration of the tortfeasor's estate. (cf. section 15D of The Common Law Practice Acts, 1867 to 1964). This provision has led to difficulties and at least one serious absurdity, (cf. Airey v. Airey [1958] 1 W.L.R. 729, at p.734) and its repeal has been recommended by the Law Commission: Proceedings against estates. (Cmnd. 4010) (Law Com. No.19).

The only other form of abridgment of the limitation period is that provided by section 64 of the Western Australian Act, and derived originally from New Zealand (section 3 of the Administration Amendment Act, No. 8 of 1911). By this method the trustee may by notice oblige a claimant to come to Court to prosecute its claim, so that it may be determined. In Queensland an apparently more draconian provision is found in section 22 of the Trustee Companies Act, 1968, to the effect that if a claimant fails to respond within six months to a notice of refusal of claim, his right of recovery from the trustee company is absolutely barred. That provision is defective, however, inasmuch as the claimant's right of action is not barred against the beneficiary. Indeed, it may be criticised as protecting the trustee company whilst jeopardising the beneficiary, and is not therefore to be commended.

The provision in section 64 of the Western Australian Act is recommended for adoption as a means of expediting the distribution of trusts and deceased estates.

Nevertheless it is perhaps proper to mention some arguments against the adoption of the provision:-

(1) It may be though that there is no good reason for abridging a limitation period merely because the defendant is a trustee or has died. A plaintiff should not be in a worse position when dealing with a trustee than when dealing with an ordinary person.

(2) It may be thought that the abridgment of a limitation period should appear in the limitations legislation, and that it should not be included as a casual insertion in a trustee act.

(3) The provision can only be applied in the case of a known claimant.

As against such criticism, however, it should be pointed out that the claim must be adjudicated upon by a Court, and reliance can presumably be placed on the Court to ensure that a plaintiff is not prejudiced by the use of the procedure.

69. Protection in regard to notice when a person is a trustee etc. of more than one estate or trust. This clause follows section 28 of the English Trustee Act and has been adopted elsewhere, e.g. New Zealand (section 36), New South Wales (section 62) and Victoria

(s. 35(1)). In New South Wales and Victoria the provision refers to notices in respect of trusts and estates and is to be preferred. It is recommended that s. 35(1) of the Victorian Act be adopted as a section on its own, subject to the express exclusion of claims covered by compulsory insurance, which are referred to in the words in parenthesis in s. 68(1).

70. Exoneration of trustees in respect of certain powers of attorney. The Law Commission in its Fourth Annual Report 1968-69 refers in paragraph 75 to consultations which it has held with various bodies regarding the possibility of providing a special form of power of attorney which would remain in operation despite the subsequent incapacity of the donor.

Section 69 of the Western Australian Act follows, with minor drafting changes, s. 29 of the English Trustee Act. It protects a trustee who acts in good faith under a power of attorney which has in fact lapsed, and in effect obliges a complainant to deal thereafter not with the trustee but with the person with whom the trustee has dealt.

It is recommended that the Western Australian provision, (cf. s. 24 of the existing Queensland Act) be adopted, pending any general reform of the law relating to powers of attorney which may follow from the Law Commission's investigations.

71. Implied indemnity of trustees. It has been suggested that this clause should be expressed to be subject to cl. 56(3); but the latter is a very specific section, whereas cl. 71 is quite general in its terms, and we do not think that the proposal is desirable or necessary having regard to ordinary rules of interpretation.

72. Reimbursement of trustees out of trust property. These clauses are adopted from s. 24 of the English 1893 Act, and their counterpart is found in s. 25(1) and (2) of the present Queensland Act.

The section was repeated in s. 30 of the English 1925 Act and has been adopted in Victoria (s. 36), New Zealand (s. 38) and New South Wales (s. 59). The New Zealand section adds some provisions regarding the remuneration of trustees. As the giving of an implied indemnity to a trustee is rather different from giving him a right of reimbursement, the Western Australian precedent, which places the two provisions in different sections, is recommended as preferable in form.

73. Delivery of chattels to life tenant. There are two ways in which chattels may be subject to the law of trusts:-

(1) where they form part of the assets of a trust, in which case they may be sold by the trustee in exercise of his normal powers of sale; and

(2) where they are settled to devolve with settled land, in which case they can only be sold by the tenant for life with the consent of the Court (s. 64 of The Settled Land Act of 1886).

There are clear deficiencies in the law, and it no longer represents modern needs:-

(1) There is no longer any need to protect such chattels from sale: it may well have been desirable in England in the eighteenth and nineteenth centuries to ensure that art works

in a mansion house and personal jewellery should be retained as part of the settled estates, but such needs have probably appealed to few Australians and the considerable and clumsy legal mechanism which was contrived to protect such chattels from sale should be abolished.

(2) If there is a case for the abolition of settled land, as is recommended, then there cannot be a case for the retention of settled chattels.

It is therefore recommended that the law relating to the settlement of chattels be abolished and assimilated to the law relating to chattels held on trust.

Where the trust property includes chattels it may be appropriate for the trustee to hand over the trust chattels to the beneficiary for the time being (e.g. the life tenant). This is clearly within the settlor's intention where, for instance, a house and its contents are left to a beneficiary for life with a gift over. In such case the law is that the trustee's duty is performed if he makes an inventory of the trust chattels, which should be receipted by the person to whom he hands them over (per Lord Langdale M.R. in England v. Downs (1842) 6 Beav. 269, at p. 279; 49 E.R. 829, at p. 834). There is no general duty placed upon the trustee to take a security from such tenant for life unless there is a risk (Temple v. Thring (1887) 56 L.T. 283), and accordingly a trustee is protected, notwithstanding his failure to obtain a security, if a life tenant sells the trust chattels, although clearly the life tenant will be accountable to the trust for any loss.

As an alternative to taking a security, in a case where a trustee considers that there may be an element of risk in handing over particular chattels, section 72 of the Western Australian Act following section 39A of the New Zealand Act, provides that an inventory of such chattels, signed by the beneficiary to whom they are handed over, may be registered as a bill of sale. The precise effect of this provision is not entirely clear, although presumably the object of it is to ensure that the purchaser pays the purchase money to the trustee and not to the beneficiary.

Unfortunately, the provisions of section 72 are open to criticism in a number of respects:-

(1) Subsection (1) limits the protection of the section to cases where chattels are left under the provisions of a will. It is submitted that whatever protection is provided should be provided for all chattels held on trust.

(2) Subsection (1) provides that a trustee "may" make an inventory. It is submitted that it is always his duty to make an inventory of trust chattels: that has always been the law, and the word "may" is out of place.

(3) Subsection (1) seems to require (inter alia) an infant to sign any inventory compiled by a trustee. Presumably this means an infant having sufficient capacity to own chattels, but the provision should be better framed.

(4) Subsection (2) is not a helpful subsection: it appears to be declaratory of the law rather than reforming: as has already been pointed out a trustee's duty is (in the absence of risk) only to take an inventory. Further, the subsection enables a trustee to lay down terms and conditions, but it is difficult to see how any such terms or conditions can or should protect the trustee or the beneficiary. It is conceived that the ordinary law of trusts is sufficient to deal with the protection of trustees and the accountability of beneficiaries in this context and that this subsection, particularly as it only relates to chattels left by will, is an unnecessary complication.

(5) Subsection (3) requires the registration of an inventory as a bill of sale but it does not say whose responsibility the registration is, or what are the consequences of registration or failure to register. Furthermore, subsection (4) excludes subsection (3) where all the trust chattels consist of household furniture. This is an absurd provision because it means that if there is any chattel comprised in the trust property which cannot be described as "household furniture", then all the chattels must be inventoried and registered as a bill of sale.

We consider that there is no need to change the existing law relating to trust chattels, and section 73 is intended simply to state the law as it now stands. We do not consider that the Western Australian and New Zealand legislative provisions are satisfactory, and we do not recommend their adoption.

74. Delivery of chattels to an infant. Where an infant beneficiary is absolutely entitled to property held on trust for him there is nothing to prevent the trustee from transferring to him property, e.g. chattels, which the beneficiary has the capacity to hold. Since an infant is a capable donee (cf. Halsbury's Laws of England (3rd ed.), Vol. 18, at p. 372, para. 708) there is no reason why the trust assets cannot be delivered to him; and there is nothing inconsistent with the trustee's duty if the infant is entitled to the assets beneficially and immediately (i.e. not upon attaining 21). The provisions of section 73 of the Western Australian legislation enabling a trustee to hand chattels to an infant are therefore declaratory of the existing law.

However, an executor or trustee cannot discharge himself by paying a legacy to the infant's parent (Rotherham v. Fanshaw (1748) 3 Atk. 628, at p. 629; 26 E.R. 461, at p. 1162) and the English Administration of Estates Act, 1925, section 42 empowers personal representatives to appoint trustees to hold property left to infants: there is no suggestion there that a personal representative may discharge himself by handing the legacy to a parent of the infant.

It appears quite reasonable, however, to allow a trustee to discharge his obligation by delivering trust chattels to the infant's parents - the example of a musical instrument, or books comes to mind - and accordingly a specific provision to this effect is desirable. The adoption of section 73 is therefore recommended.

There is one serious drafting error in the section, however, and that is the reference to chattels "absolutely vested" in the infant. The chattels are clearly vested in the trustee, and the object of the section is to enable the trustee to vest them in the infant. What the draftsman meant was that where the infant is beneficially entitled the trustee may vest. The draft clause 74 has been amended accordingly (cf. section 82).

75. Personal representative relieved of liability for calls made on shares after transfer. This clause enables a personal representative to transfer to legatees shares upon which calls may be made, without himself retaining assets to meet the calls.

It has been recognised since Armstrong v. Burnet (1855) 20 Beav. 424; 52 E.R. 666, (followed in Addams v. Ferick (1859) 26 Beav. 384; 53 E.R. 946, and cf. Bothamley v. Sherson (1872) L.R. 20 Eq. 304) that future calls on shares specifically bequeathed were payable not by the personal representative out of the general assets of the testator but by the specific legatee, who took the bequest cum onere.

Consequently the administration of estates rule was that the representative might not reserve assets from the estate as a contingency fund to meet future calls (cf. In re Nixon [1904] 1 Ch. 638). Under certain companies legislation however, any person who had been registered as a shareholder might be made liable for future calls and in such case it seemed proper to indemnify a trustee so liable (Day v. Day (1904) 4 S.R. (N.S.W.) 22). But since calls on shares are comparatively unusual it would not be desirable for trust funds to be retained indefinitely to meet that contingency - hence this provision, exonerating the trustee.

We recommend the adoption of this clause, even though shares subject to calls are these days a comparatively rare phenomenon (Gower: Modern Company Law (3rd. ed.), at p. 415).

76. Power of Court to relieve trustee from personal liability. Section 3 of the (English) Judicial Trustees Act, 1896 first provided for the giving of general relief by the Court to trustees in respect of technical breaches of trust where the trustee has acted honestly and reasonably.

The section was adopted in the Queensland statute (section 51) and appears in the English 1925 Act (section 61), Victorian (section 68) and New South Wales (section 85).

It has attracted the attention of all the leading commentators, and appears to be working satisfactorily. It is recommended that the section be retained substantially in its present form.

77. Power of Court to make beneficiary indemnify for breach of trust.

Section 44 of the present Queensland Act enables the Court to order a beneficiary to indemnify a trustee who has committed a breach of trust at the instigation or request or with the consent in writing of the beneficiary.

The Queensland section was amended in 1952 by s. 6 of 1 Eliz. II No. 36, by the omission of words therefrom relative to married women's property.

The provision appears in the English Trustee Act (s. 62), the Victorian (s. 68) and the New South Wales (s. 86).

It is recommended that the foregoing section be adopted. This will slightly modify the present Queensland section as it involves the omission of the reference, in sub-s. (2) to proceedings pending on 5th August, 1889.

78. Abolition of the rule in Allhusen v. Whittell.

Where a testator leaves property to persons in succession it is presumed that he intended their enjoyment to be in the same fund. But if the debts, duties or legacies are substantial and are not paid at once, this intention will be frustrated unless some adjustment is made, because, until payment, the tenant for life will be receiving the income from the gross estate instead of from the net residue. The rule in Allhusen v. Whittell (1867) L.R. 4 Eq. 295 settles the method of apportionment which must be made between capital and income in such cases.

However, the rule is disliked because it obliges trustees to make quite complex arithmetical calculations, which are generally of insignificant advantage to the estate, and in New Zealand (s. 84), New South Wales (Wills, Probate and Administration Act, s. 46D), Victoria (s. 74) and Western Australia (s. 104) it has been abolished, except where the testator expressly retains it. The statutes provide, in effect, that such debts, duties and legacies shall be paid out of capital.

A difficulty arises, however, where the estate is liable to pay an annuity for some reason, as the rule in Allhusen v. Whittell does apply to such annuities, requiring them to be paid out of both capital and income or by a complicated apportionment procedure - cf. Re Perkins [1907] 2 Ch. 596 and Re Poyser [1910] 2 Ch. 444 - but the statutory provisions which in effect abolish Allhusen v. Whittell in most cases are not clearly apt to cover the case of a continuing liability such as an annuity. Accordingly the New Zealand and Western Australian sections provide that they shall not apply "to any annuity that is payable out of the estate of the deceased". Presumably in these States, therefore, apportionments in accordance with Re Perkins will continue to be made, whereas in Victoria (where no such exception is made) the payment of an annuity will presumably be made out of capital.

It is submitted that it is undesirable to put trustees to the complex calculations of Re Perkins and that adequate justice is done if the trustee either purchases the annuity out of capital, in which case the income of the estate will be reduced accordingly, or pays the annuity each year out of capital, in which case also the income will be reduced as time goes by.

It is recommended that sub-s. (1) be taken from the Victorian s. 74, as that is better drafted than the Western Australian section. The proposed draft is taken from the Victorian section, except for sub-s. (2) which is taken from sub-s. (2) of s. 104 of the Western Australian Act.

Section 8 of The Acts Interpretation Acts, 1954 to 1962, will ensure that the reference in sub-cl. (5) to the Succession and Probate Duties Acts will apply to any legislation which may be substituted therefor.

PART VII - FURTHER POWERS OF THE COURT

Division 1 - Application of Part

79. Application of Part.

Division 2 - Appointment of New Trustees

80. Power of Court to appoint new trustees. Although wide powers are given to the trustees and personal representatives of a deceased sole trustee to appoint new trustees, it is nevertheless desirable that a specific power should be given to the Court enabling it to appoint new trustees whenever it is inexpedient, difficult or impracticable to effect an appointment by the usual means.

Such a provision is to be found in the existing Queensland Act, (section 26), and in the English 1925 Act, (section 41), Victorian (sections 48 to 50) and New South Wales (section 70). Subsection (2) of the Western Australian legislation sets out at length particular occasions (not limiting the generality of the provision) when the Court may act but it is submitted that so detailed a list is redundant and that the Victorian wording is to be preferred. Subsection (5) of the Western Australian section is found as a separate section in the English Act (section 43), in Victoria (section 50) and in the existing Queensland Act (section 37). It is recommended that it be retained as a separate section, placed immediately after the present clause. It is further recommended that references to a trustee being a lunatic or person of unsound mind be deleted, and replaced by a reference to a person who appears for any reason to the Court to be undesirable as a trustee: cf. section 40 of the Trustee Act (Northern Ireland) 1958.

81. Powers of new trustee. See commentary on clause 80 above.

Division 3 - Vesting Orders

82. Vesting Orders. It is desirable that the Court should have ample jurisdiction to vest trust property in any case of change of trusteeship or doubt as to the vesting of the trust assets. Accordingly all the trustee statutes empower the Court to vest property in a wide range of circumstances, in which there would be difficulty if it were desired to furnish title.

The existing Queensland and English provisions are, however, cumbersome, inasmuch as they make separate provision regarding the vesting of land from that regarding the vesting of stocks and choses in action. In Queensland section 27 relates to the vesting of land and section 35 to the vesting of stock. In Victoria (section 51), New South Wales (section 71) and Western Australia (section 78) a general provision relative to all forms of trust property has been drawn.

Clause 82 follows section 71(1) to (3) of the New South Wales Act of 1925; but it makes some improvements of a minor nature, which it is recommended should be adopted, viz., in paragraph (d) it refers to a trustee "under a disability" instead of "a lunatic or person of unsound mind" and "an infant" (cf. paragraphs (d) and (e) of the Victorian and New South Wales sections); and in paragraph (g) it makes provision for property vested in a corporation to be subject to the section where the corporation has ceased to carry on business, or is in liquidation or is dissolved; whereas the other statutes only make provision where a company has been dissolved: (cf. Victoria, section 51(2)(g) and New South Wales, section 71(2)(h)).

83. In whom property to be vested. New South Wales and Victoria provided the precedents for section 79 of the Western Australian legislation which is concerned with the scope of the vesting order which the Court may make.

Both the New South Wales and Victorian Acts provide that where the making of a vesting order is consequential upon the appointment of a new trustee, the property shall be vested in the persons who, on the appointment, are the trustees (New South Wales, section 71(4), Victoria, section 52(1)); and that where the order is consequential on the retirement of a trustee, the property may be vested in the continuing trustees alone (New South Wales, section 71(5), Victoria, section 52(2)); but these provisions are omitted from the Western Australian section. It is submitted that it is highly desirable that as far as is possible the legal title to trust property should always be vested in the trustees, particularly if purchasers are to be encouraged to deal with them with the same degree of security as if they were dealing with beneficial owners (cf. comment on clause 44) and that therefore the New South Wales and Victorian precedents should be followed in preference to the Western Australian. Subsections (2), (3) and (4) of the Western Australian section appear as section 52(4), (5) and (6) in Victoria and as section 71(7), (8) and (9) in New South Wales.

It is recommended that these precedents be adopted.

84. Orders as to contingent rights of unborn persons. The present Queensland Act, section 28, provides that where land is subject to a contingent right in an unborn person, the Court may release the land from the contingent right or vest it in any person. This provision appeared in the English Trustee Acts of 1850, (section 16), 1893 (section 27) and is now section 45 of the 1925 Trustee Act. Examples of the exercise of the power appear in Wake v. Wake (1853) 1 W.R. 283 and Hargreaves. v. Hargreaves (1853) 1 W.R. 408.

The current Victorian (section 53), New South Wales (section 72) and Western Australian (section 80) provisions extend the provisions of the section from land to property generally and are therefore to be preferred.

It is recommended that the Victorian precedent be adopted, as having superior punctuation, but nevertheless with the omission of the words "in respect thereof" which are not used in the Western Australian section and do not appear to perform any useful function of reference.

85. Vesting order in place of conveyance by mortgagee under a disability. To the extent to which -

(a) a person under a disability may become owner of or beneficially entitled to property as a security for a loan (e.g. where a mortgagee dies leaving only infant children surviving him); and

(b) a mortgagee may become disabled (e.g. by becoming of unsound mind)

- it is desirable to provide machinery for the release of the property from the mortgage and its return to the borrower upon repayment without the concurrence of the person under the disability, since an assignment or reconveyance of property executed by a person under a disability could not be safely accepted, due to the possibility of later avoidance.

The present Queensland section (section 29) is limited to the case of an infant mortgagee of land. It follows section 28 of the English Trustee Act, 1893, which derives from the 1850 Trustee Act. In New South Wales (section 74), Victoria (section 54) and Western Australia (section 81), the section has been extended to all categories of property and to all forms of disability. The Western Australian section is recommended for adoption as it refers generally to disability, rather than to specific instances (infancy and lunacy) as do the others.

86. Contracts by guardians on behalf of infants. As the law of Queensland now stands, the only provisions enabling the property of an infant to be effectively disposed of are those contained in sections 53, 59 and 60 of the Trustees and Incapacitated Persons Act of 1867, section 27 of The Settled Land Act of 1886, and section 29 of The Trustees and Executors Acts. Section 53 of the former statute (which authorises the guardian of an infant, with the approbation of the Court, to enter into any agreement for or on behalf of the infant) appears to be the only source of power in Queensland to enable a compromise to be effected on behalf of an infant before action brought: see Katundi v. Hay (Infants) [1940] St. R. Qd. 39, per Philp J., at p. 44; Scholes v. Douglas [1911] St. R. Qd. 183. On the other hand it has been held that section 53 of the Act of 1867 does not confer jurisdiction to authorise sale of an infant's land, and that the sole source of such jurisdiction is section 27 of The Settled Land Act of 1886: see Re Willmott [1948] St. R. Qd. 256, at p. 258, not following on this point Re McGill [1944] Q. W. N. 31: but cf. Re Joyce [1939] Q. W. N. 51. The effect of section 27 of the Act of 1886, read with section 7 of that Act, is that land to which an infant is beneficially entitled is settled land within the meaning of the Act, and the powers of the infant as tenant for life are exercisable by the trustees of the settlement or by such person and in such manner as the Court may order: for examples of the application of section 27, see Re Bowen [1949] Q. W. N. 6, and Re Francis [1949] Q. W. N. 45.

Clause 87 will enable the Court, where it considers it necessary or desirable in the interest of the infant, to appoint a person to sell and convey etc., or otherwise to exercise such of the powers as are conferred upon a trustee by other provisions of the Bill, in cases where an infant is beneficially entitled to any property which is not subject to a trust. Thus, the result is in effect to preserve a power of disposition of infant's property similar in effect to that now given by section 27 of The Settled Land Act but to extend that power beyond land to property in general.

On the other hand, clause 87 might possibly be regarded as falling short of authorising contracts other than those disposing of property of infants, e. g. contracts of compromise before action brought as in Scholes v. Douglas (supra). We therefore consider it desirable to retain an express provision in the general form of section 53 of the Act of 1867, and clause 86 is intended to give effect to this recommendation. It will be noticed that, unlike section 53 of the Act of 1867, clause 86 will enable the District Court, or a judge of the District Court, to exercise the power of authorising a compromise or other contract on behalf of an infant in cases otherwise falling within the general jurisdiction of that Court.

Hence the combined effect of the provisions of the Bill with respect to infants' property and contracts will be as follows:-

(1) where at the commencement of the Act an infant is beneficially entitled in possession to land or beneficially entitled to the whole interest in land, such land will remain settled land within section 7 of The Settled Land

Act, and the powers of the tenant for life will be exercisable, as before, in accordance with section 27 of that Act: see clause 6(1)(a) and 6(1)(b)(ii);

(2) in respect of land which is "trust property" as defined in clause 5, and of which there is a trustee, the power of sale will be exercisable by the trustee: see clause 6(b)(ii);

(3) in respect of any other property of an infant (whether land or personalty) the power of sale will be exercisable by the guardian of the infant, or some other fit and proper person, appointed by the Court under clause 87 of the Bill;

(4) contracts may be made for or on behalf of the infant by his guardian, or some other fit and proper person, appointed by the Court (including the District Court) under clause 86.

87. Vesting orders, etc. in relation to infant's beneficial interests. Clause 87 is based on section 82 of the Western Australian Act, which in turn derives from section 53 of the English 1925 Act, which has a long history; but it also corrects a deficiency in it.

Section 53 was itself designed to correct a deficiency in section 30 of the English 1893 Trustee Act, which is section 29 of the present Queensland Act.

The deficiency of the present Queensland Act, which was exposed in In re Hambrough's Estate [1909] 2 Ch. 620, is that the section was not sufficient to authorise the Court to make an effective mortgage of an infant's reversionary interest, for the purpose of maintaining the infant. The object of section 53 of the English 1925 Act was to enable such a mortgage to be made, and in Re Gower's Settlement [1934] Ch. 365 it was held that, by virtue of the new section, an infant might be permitted to mortgage his reversionary interest, as if he were of full age and able to dispose of a fee simple by virtue of the Fines and Recoveries Act, 1833, section 15.

But section 53 was itself shown to have undesirable limitations in In re Heyworth's Contingent Reversionary Interest [1956] 1 Ch. 364 where it was held that the Court had no power to enable an infant to sell out his reversionary interest for cash to the life tenant, although that would save estate duty and be to the infant's benefit, because such a transaction could not be described as being entered into "with a view to the application of the capital or income thereof for the maintenance, education or benefit" of the infant. In the later cases of In re Meux's Will Trusts [1958] Ch. 154 and In re Lansdowne's Will Trusts [1967] 1 Ch. 603 similar transactions were held to be within the section where the resultant capital was re-settled on the same trusts for the infant's benefit: because such re-settlement was regarded as an "application" for the infant's benefit, whereas a direct payment to him was apparently not. Heyworth's case has been strongly and cogently criticised by O.R. Marshall in an article entitled "The Scope of s. 53 of the Trustee Act, 1925": (1957) 21 Conv. (N.S.) 448, who maintains that the Court always has jurisdiction where the transaction is for the infant's benefit, a word which has, as Re Vestey's Settlement [1951] Ch. 209 shows, the widest import. Nevertheless the law is not complicated by the implied acceptance of the Heyworth decision in the Meux and Lansdowne cases, and by the undesirable distinctions which the Court felt it necessary to make in them.

88. Vesting orders in relation to mortgages of land. The object of this section is to enable the Court to make vesting orders in a case where it gives a judgment or makes an order directing the sale or mortgage of any land as it possesses in the case of land held on trust under the Western Australian s. 78. It derives from s. 30 of the English 1893 Act and is found as s. 31 in the present Queensland Act. It has been retained in England (s. 47 of the 1925 Act) and in Victoria (s. 56), New South Wales (s. 76) and New Zealand (s. 55).

It is recommended that the existing provision be retained, with an updating of the reference to the Real Property Acts.

89. Vesting order consequential on judgment for specific performance. Where an order for specific performance is made it may be difficult to give effect to it if the defendant refuses to obey it, or if the interest of a person under a disability, or an unborn person is involved.

The object of this provision is to enable the Court to declare that any parties to an action are trustees of any interest in the property the subject of the order, or that the interests of any unborn persons which are affected are interests of persons who, upon coming into existence, would be trustees within the meaning of the Act. Thereupon the Court may make a vesting order relating to such rights. The leading cases are Basnett v. Molton (1875) L. R. 20 Eq. 182, where the Court dealt with the interest of an heir; Hall v. Hall (1884) 51 L. T. 226, where the Court appointed a person to execute a lease, the unsuccessful defendant in a specific performance action having failed to do so; and In re Bolton (1888) W. N. 243 where the Court dealt with the interest of a lunatic tenant in tail in common, where the land was to be sold in lieu of partition.

The provision originally appeared as s. 30 of the English Trustee Act, 1850, then as s. 31 of the English Trustee Act, 1893; s. 32 of the present Queensland Act, s. 48 of the English Trustee Act, 1925; s. 77 of the New South Wales Act, and s. 57 of the Victorian Act.

It is recommended that it be retained.

90. Effect of vesting order. It is essential that the fullest effect should be given to the Court's power to make a vesting order. Nevertheless, where the property the subject of a vesting order is land the subject of The Real Property Acts or other special enactment, or is shares, a bank account, a chose in action, or otherwise subject to the control of a third person who may not be a party to the action, it is not possible for the vesting order to do more than authorise the person in whose favour it is made to require that third person to act in accordance with the order. In the case of land under the provisions of the Real Property Acts, the appropriate section is s. 46 of the Act of 1877.

The present Queensland section, s. 33, is not adequate for present day needs as it relates solely to vesting orders of land and merely follows s. 31 of the English Trustee Act, 1893, which was concerned only with unregistered land. Section 35 deals separately with vesting orders affecting choses in action, but, as mentioned in the commentary on cl. 78 it is desirable to assimilate the law relating to realty and personalty as far as possible and the effects of a vesting order should accordingly be brought together in one section.

The Western Australian legislation is taken from the New South Wales s. 78, which is also borrowed by the Victorian Act (s. 58). There are some drafting improvements in the Western Australian section, and an additional sub-section, viz., sub-s. (8) which provides that a vesting order shall not vest in any person shares which are not fully paid-up unless that person applies for the order or consents to the making of it: see sub-cl. (7) of the Bill.

The provisions appear to be comprehensive and well drafted, but they have been subjected to the criticism mentioned in the commentary to cl. 15. Accordingly, we have redrafted cl. 90 to provide in wider and more general terms for a duty to ensure registration or recording of a vesting order affecting trust property which is subject to the provisions of a special enactment.

91. Directions as to manner of transferring stock. This clause will enable the Court to make declarations and give directions regarding the manner of vesting stock. It is consequential upon the section which precedes it and appears as s. 35(6) of the present Queensland Act. It is found as s. 51(5) of the English Trustee Act of 1925, and as s. 59 of the Victorian Act.

It is recommended that the provision be retained.

92. Appointment by Court of person to convey in lieu of vesting order. All the Trustee Acts (viz., England - s. 33 of 1893, s. 50 of 1925; Queensland - s. 34; New South Wales - s. 79; Victoria - s. 60) enable the Court, in all cases where it may make a vesting order, to appoint, if convenient, a person to convey or release any right, such conveyance or release to have the same effect as a vesting order. Whilst ordinarily it is more convenient to make a vesting order (cf. Jones v. Davies (1940) 84 Sol. Jo. 334) it may be preferable to appoint a person to convey, e. g. where the Court order is that a property be sold in lots, for all of which purchasers have not been found.

In Hipkin v. Hipkin [1962] 2 All E. R. 155 the Court appointed the sequestrator of property of a husband who had failed to pay alimony to convey the property to purchasers.

It is recommended that the provision be retained.

93. Vesting orders of charity property. All the Trustee Acts, (viz., England, 1893 - s. 39 and 1925 - s. 52; Queensland - s. 39; New South Wales - s. 80 and Victoria - s. 61) specifically provide that the powers of the Court to make vesting orders extend to property held on charitable trusts.

It is recommended that the provision be retained, using the Western Australian wording.

Division 4 - Jurisdiction to make other orders

94. Court's jurisdiction to make other orders. Trustee Acts modelled on the English Trustee Act of 1925 all enable the Court to make orders allowing transactions which cannot be effected by the trustees.

The power in s. 57 of the English Act, which has been adopted in New South Wales (s. 81) and Victoria (s. 63) is, however, limited. It has been held that it can only be utilised for reasons of management or administration and cannot therefore be used to effect any changes in the substantive dispositive provisions of the trust, however advantageous such changes might be: Chapman v. Chapman [1954] A.C. 429; [1954] 1 All E.R. 798, although the views of the majority of the High Court of Australia in Riddle v. Riddle (1952) 85 C.L.R. 202 perhaps display a somewhat more liberal approach.

The other major limitation of the section is that if the transaction can be carried out under existing powers the Court has no jurisdiction. Whilst this is a desirable restriction where the trustee has a clear power which can easily be exercised it may work hardship if there is no clear power or there are difficulties of exercise. Cf. In re Pratt's Will Trusts [1943] Ch. 326. It is understandable, therefore, that the Western Australian section has extended the Court's jurisdiction to make orders where it is "inexpedient or difficult or impracticable" to effect the transaction.

The section has proved to be particularly useful in that it enables the Court to enlarge the investment powers of trustees: cf. Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society [1959] 2 All E.R. 51; Riddle v. Riddle (supra); and there is no doubt that it should be adopted in Queensland.

It is recommended that the provisions of section 89 of the Western Australian Act be adopted.

95. Power to authorise substantive variations of trust. The House of Lords held in Chapman v. Chapman [1954] A.C. 299 that the Court has no inherent jurisdiction to approve the variation of trusts on behalf of infant, unborn, or unascertained beneficiaries merely on the ground that the variation is for their benefit. The main need which had arisen was to re-arrange trusts so as to minimise fiscal imposts. There followed the English Variation of Trusts Act 1958 which empowered the Court to make orders varying the substantive trust provisions where the variation is for the benefit of the beneficiaries. The English legislation has been adopted by Victoria (section 63A) and, with minor amendments, by New Zealand (section 64A) and Western Australia.

In discussions with Mr. P.V. Baker, the editor of Snell's Equity and Mr. Brian Morcom, the author of the leading work on Estate Duty Saving, in England, both practitioners with considerable experience of applications under the Act, it emerged that there is one respect in which it is felt by practitioners that the provisions of the Act cause unnecessary difficulty. The Act requires that, except in the re-arrangement of a discretionary trust, a re-arrangement ordered by the Court must be "for the benefit of" the person on whose behalf it is ordered. Whilst normally a re-arrangement can be made so as to benefit all the beneficiaries (because tax or estate duty is saved) sometimes a re-arrangement which is beneficial tax-wise cannot be ordered because there is a benefit provided in the trust instrument for a contingent beneficiary whose interest must be protected, but the value of which is exceedingly difficult to assess. The most frequent example is where a fund is provided for a beneficiary and the spouse of a beneficiary. It may be an advantage tax-wise to divide the benefit of a fund between a beneficiary and his or her spouse - it would probably save income tax in Australia - but if later one spouse dies, it might be advantageous for the survivor to release his interest in the fund altogether in consideration of the payment of a lump sum, as this might save probate or succession duty. However, the surviving spouse is often unable to do this because the original provision is apt to benefit a second as well as the first spouse, and that second spouse's contingent interest has to be taken into account. Sometimes it is extremely unlikely that the surviving spouse will re-marry, and difficult to evaluate the contingent spouse's interest, so as to ensure that he will benefit by a proposed re-arrangement. This problem is referred to by practitioners as the problem of "the spectral spouse".

To alleviate this difficulty it is proposed to empower the Court to disregard, in ordering the re-arrangement of a trust, the interests of persons whose benefit is dependent upon a future event which the Court is satisfied is unlikely to occur. A proposed draft appears as paragraph (a) of the proviso to sub-section (1).

Another difficulty which apparently arose in the early days of the administration of the Act in England was that the Court construed the requirement that a re-arrangement be for the "benefit" of every beneficiary rather narrowly, so as to exclude any benefit other than financial benefit. Thus in In re Tinker's Settlement [1960] 1 W.L.R. 1011 by mistake one beneficiary's future children were excluded from benefit. A re-arrangement was sought whereby another beneficiary's future children should give up half their benefit in favour of the excluded children. The Court refused to order such a re-arrangement as it would not be for the benefit of the children losing their share. When New Zealand adopted the Variation of Trusts Act, by section 9(1) of the Trustee Amendment Act 1960, it empowered the Court to have regard to "the welfare and honour of the family" of the beneficiary on whose behalf a re-arrangement is proposed, and this provision appears to have been made with a view to mitigating the hardship of Tinker's case, as there was then no other reported case to that effect and there was no prior New Zealand experience. The New Zealand adaptation appears in the Western Australian legislation.

It is recommended that the English precedent be adopted in preference to the New Zealand for three reasons:-

(1) The expression "the welfare and honour of the family" is imprecise and will encourage frivolous proposals.

(2) In Tinker's case a blunder was made: the failure to provide for the future children of one of the beneficiaries was simply an error and the application was described by Russell J., at p.1013 as "one of the thinnest and weakest claims for rectification that I have seen". If, as seems possible, the New Zealand variation was designed to correct the unfortunate result of one blunder, it is suspect. Amendments of statutes should be more firmly grounded.

(3) In any case, Tinker's case has now been rationally distinguished in In re C.L. [1969] 1 Ch. 587; [1968] 1 All E.R. 1104 where a re-arrangement was made for the benefit of a lunatic beneficiary's children and Cross J. even suggested ([1968] 1 All E.R. at p.1110) that it might be a benefit to a beneficiary to give trust money to charity, as happened in Re Clore's Settlement [1966] 2 All E.R. 272, a case on trustees' powers of advancement. "I see no reason why the carrying out of the arrangement could not be considered as being for his benefit although it was financially to his detriment. It would be odd if the word "benefit" had a narrower meaning in the context of a variation than it has in the context of an advancement" (per Cross J., ibid.).

In 1955 Western Australia made provision empowering the Court, on the application of the trustee, to vary the amount of any periodic payment (e.g. annuity) made to a beneficiary under a trust. This provision now appears as section 91 of the Western Australian Act.

There is no precedent for the legislation which appears to have been based on the sentimental proposition that such beneficiaries may suffer as a result of inflation. (See comment in 3 W.A. Law Review at pp. 509-510). But if the Court increased an annuity payable to one beneficiary it would inevitably be at the expense of another beneficiary, and presumably without his consent.

Since far more comprehensive provisions for the variation of trusts are now included in the Act (viz., W.A. section 90) there seems to be no advantage in adopting this provision, which seems, in any case, difficult to justify.

96. Right of trustee to apply to Court for directions. Section 30 of the Law of Property Amendment Act 1859 (22 & 23 Vict. c. 35) first provided that a trustee might apply to the Court for directions, and that section appears as section 45 of the present Queensland Act. It also appears, slightly amended, in New South Wales (section 63). In New Zealand (section 66) it appears in the abbreviated form which has been used in Western Australia. It has, however, been omitted altogether from the English Trustee Act, 1925, and trustees' summonses for directions are now provided for by Rules of the Supreme Court (O. 85, r. 2, reprinted in the 1970 Annual Practice at p. 1193). Cf. Queensland R.S.C. O. 75.

Some of the provisions of the Queensland section, namely that a trustee acting upon the direction of the Court shall be deemed to have discharged his duty as trustee (sub-section (1)) and that a trustee will not be indemnified if he defrauds the Court, are moved into a separate section (Western Australia section 95). The value of this is that these provisions now apply to all sorts of Court orders and directions made upon the application of the trustee or of any other person.

It is recommended that the New Zealand and Western Australian form be adopted.

97. Protection of trustee while acting under direction of Court. Section 45(1) and (2) of the existing Queensland Acts provides that where a trustee acts in accordance with the opinion, advice or direction of the Court given in consequence of an application made under that section, then he shall be deemed to have discharged his duty as trustee and shall be indemnified unless he has been guilty of fraud or wilful concealment.

However, since section 45 was first drawn (as section 30 of the English Law of Property Amendment Act 1859), the jurisdiction of the Court to make orders and directions has been considerably extended, and it is desirable that trustees should enjoy the same protection where the Court order or directions are made under some other section, e.g. a variation of trusts order.

For this reason these provisions have been placed in an independent place as clause 97.

It is recommended that the New Zealand and Western Australian precedent be adopted.

98. Persons entitled to apply to Court. This provision specifies what persons may make applications to Court concerning the appointment of trustees or concerning the trust property.

It derives from section 36 of the English Trustee Act 1893 and appears as section 36 of the Queensland Trustee Act, 1893. It has been retained in the English Trustee Act, 1925, section 58, and appears in New South Wales (section 92) and Victoria (section 64). It is recommended that the form of provision in section 93 of the Western Australian Act be adopted.

99. Power of Court to make orders in absence of parties.

Sub-clause (1). It is clearly desirable that the Court should be able to give judgment against a trustee in his absence, where diligent search has been made for him and he cannot be found. Section 43 of the English Trustee Act 1893 made this provision which now appears as section 59 of the English Trustee Act, 1925, and has been adopted in New South Wales (section 88), Victoria (section 65), New Zealand (section 70) and Western Australia (section 96(1)). It appears as section 42 of the Queensland Acts. It is recommended that it be retained.

Sub-clause (2). This provision enables the Court to appoint someone to represent the interests of any person who should be a party to any action but who is out of the jurisdiction, under a disability, cannot be found, is unborn, unidentifiable or unascertainable. It is found only in the Western Australian Act, although it has close affinities with the provisions of O. 15, r. 13 of the current English Rules of the Supreme Court. In Queensland The Rules of the Supreme Court are deficient in this respect (see Re Park [1969] Q.W.N. 37), and we recommend that clause 99(2) be adopted, particularly in view of the proposed powers of the Court to vary trusts.

100. Power of Court to charge costs on trust estate. This provision gives the Court a wide power to charge upon the trust property the costs of any application made to the Court. It appears as section 38 of the present Queensland Acts, being derived from section 38 of the English Trustee Act, 1893. It is now to be found as section 60 of the English Trustee Act, 1925, and in Victoria (section 66), New Zealand (section 71) and Western Australia (section 97).

It is recommended that it be retained.

101. Remuneration of trustees. The long-standing rule of English law has been that a trustee is entitled to no remuneration whatever for his services as trustee. See e.g., Barrett v. Hartley (1866) L.R. 2 Eq. 789. The Court has an inherent jurisdiction to award remuneration to a trustee, and although it exercises this jurisdiction sparingly it has been known to exercise it generously (cf. Phipps v. Boardman [1966] 3 W.L.R. 1009).

The changing function of the modern trust and the growth in the use of professional trustees has led to the virtually invariable inclusion in trust instruments of common forms of charging clause; and it is probable that the omission of such a clause would nowadays be regarded as an oversight.

New Zealand (section 72), Victoria (section 77) and Western Australia (section 98) have all made provision empowering the Court to remunerate trustees. But these provisions are in effect, even if not in intention, in derogation of the Court's inherent jurisdiction, mentioned above, for they all provide that a trustee's commission shall not exceed 5%. It is submitted that, particularly in the light of Phipps v. Boardman, this limitation is undesirable: it may sometimes be desirable for the Court to award commission on a more generous scale if circumstances warrant it. It is therefore recommended that a simple provision be adopted which is declaratory of the existing law.

It is further considered that the time has now come to dispense with the necessity for the inclusion of specific charging clauses in a will or trust instrument. It has been one of the functions of trustee statutes traditionally to save unnecessary verbiage in instruments by placing common-form clauses into the statute, so that they may be read into an instrument automatically. Section 98(5) of the Western Australian Act does this and it is recommended that it be adopted. In the recommended draft, sub-s.(1) is a copy of s.41 of the Trustee Act (Northern Ireland) 1958.

102. Payment into Court by trustee. Section 41 of the current Queensland Acts enables trustees to pay trust moneys into Court in the circumstances therein mentioned. It derives from s.42 of the English Trustee Act 1893, which has been retained as s.63 of the English Trustee Act, 1925, with slight drafting alterations. It also appears as s.69 of the Victorian Act, s.95 of the New South Wales Act and s.99 of the Western Australian Act.

It is recommended that it be adopted, following the form of s.63 of the English Trustee Act, 1925.

PART VIII - CHARITIES

The law of charities embraces both charitable trusts and charitable gifts effected without the intervention or appointment of a trustee. In a sense, therefore, the inclusion in an enactment relating to trusts and trustees of provisions regulating charitable gifts simpliciter may not seem wholly appropriate; but in practice the great majority of substantial charities are established by trusts and, indeed, almost the only practical difference between charitable trusts and gifts is that the latter, if in favour of charity generally without specification of particular objects, are administered by the Crown without reference to the Courts: see, generally, Tudor on Charities (6th ed.) at pp.302-305. Accordingly, for this and the reasons given in our Report on Perpetuities and Accumulations (see commentary to cl.16), we consider it desirable to include in the present Bill appropriate recommendations for reform of the law of charities.

103. Meaning of charity. In Queensland, as in other jurisdictions, in which English law prevails, the question whether a particular gift or trust is charitable is determined according to principles settled by the Courts and derived by analogy from the preamble to the Charitable Uses Act, 1601 (43 Eliz.I, c.4). The Bill proposes the repeal of this statute, but the effect of cl.103(1) is to ensure that such repeal will not affect the established rules of law relating to charity. This form of legislative preservation of repealed statutes is sometimes criticised, but, although as a general principle we regard such a course as undesirable, we consider that it is a justifiable step in the present instance. In the first place, it is not the statute itself but only its preamble which will be indirectly preserved by cl.103(1); secondly, there is, as we have said, a series of principles defining the meaning of charity and developed by the Courts which are now virtually if not entirely independent of the Act of 1601; and, finally, the course proposed by cl.103(1) has without difficulty been adopted in England by the Mortmain and Charitable Uses Act of 1888 and in New South Wales by the Imperial Acts Application Act 1969, s.9(2)(a).

We do not propose any codification of or major alteration in the definition of what is now legally regarded as charitable. Any attempt to do so would probably not succeed in attaining the degree of comprehensiveness and elasticity which is necessary in this branch of the law. However, there are certain dicta in the House of Lords in I.R.C. v. Baddeley [1955] A.C. 572 which suggest a doubt as to the charitable

nature of a disposition intended to provide facilities for recreational activities of members of the public. Tudor on Charities (op. cit. at pp. 113-114) takes the view that the ratio of the decision must be read in a narrow, and therefore unrestrictive, fashion, but it has resulted in Australia in the invalidation of at least one reported attempt to create a charitable trust (see Re Wilson's Grant [1960] V.R. 514), and the doubts to which it gave rise were sufficient in England to prompt legislation designed to ensure that certain gifts, trusts and institutions continued to be construed as charitable: see the Recreational Charities Act, 1958, s.1 of which (subject to conditions) declares it to be and always to have been charitable to provide or assist in the provision of facilities for recreation or other leisure time occupation if the facilities are provided in the interests of social welfare. That the provision of such facilities would be regarded by the community as charitable, desirable and necessary seems to us to be plain, and with some slight local adaptation we propose the adoption in sub-cll.(2) to (4) of cl.103(1) of the relevant provisions of the English legislation.

104. Inclusion of non-charitable purpose not to invalidate trust. Where a trust is created for purposes, as opposed to beneficiaries, it will fail unless those purposes are exclusively charitable. Even if a trust fund is given for purposes some of which are undoubtedly charitable, the gift will fail if any non-charitable purpose is included in the purposes. Since the definition of a charitable purpose is technical, important trusts have sometimes failed because there has been a failure to appreciate exactly where the boundary between charitable and non-charitable purposes lies.

An outstanding Australian case is In the Will of Forrest [1913] V.L.R. 425, where a bequest of £100,000 for "such charities hospitals philanthropical institutions or objects free libraries or mechanics' institutes, churches or any other objects of a like or similar nature" failed because some of the objects were non-charitable. In England a £225,000 bequest in In re Diplock [1948] Ch. 485 failed because it was made for "charitable or benevolent" purposes, and benevolent purposes are not charitable.

In Victoria the decision in Forrest's case was countered by a provision which now appears as s.131 of the Property Law Act 1958, and which has been adopted in New South Wales as s. 37D of the Conveyancing Act 1919-1964.

In England rather different provisions were adopted by the Charitable Trusts (Validation) Act, 1954.

In New Zealand by s.4 of the Charitable Trusts Amendment Act, 1963 a new section (s.61B) was added to the Charitable Trusts Act 1957, which is in substance taken from the Victorian provision, though some of the drafting of the English statute has been borrowed. In Western Australia the New Zealand precedent has been adopted in the main by s.102 of the Trustee Act 1962.

It is recommended that the Victorian and New South Wales precedent be adopted, in preference to the English Act and the New Zealand and Western Australian variants, for a number of reasons:-

(1) The provisions have been subject to judicial scrutiny in numerous cases, and have been found to work well. A body of judicial understanding has been built up, perhaps the most encouraging being Leahy v. Attorney-General (N.S.W.) [1959] A.C. 457 and the Australian cases there referred to. The provisions are clear, as is their object. The limitations which have been placed on its operation - as for instance in In re Hollole [1945] V.L.R. 295 - are acceptable.

(2) The Report of the (English) Committee on the Law and Practice relating to Charitable Trusts (the Nathan Committee) referred to these provisions as having "worked well in preserving for charity trusts which have mixed objects" (para. 532 of the Report, Cmnd. 8710). Indeed some of the members of the Commission were in favour of adopting them in England (para. 534). Nevertheless the Committee made rather different recommendations, only some of which were later used in the Charitable Trusts (Validation) Act, 1954.

(3) The English Act has been criticised on a number of counts - see in particular the article by Spencer Maurice in vol. 26 Conf. (1962) at p. 200 in which it is shown that ss. 1 and 2 present considerable difficulties of construction, and the criticism of P. S. Atiyah in vol. 18 Modern Law Review (1955) at p. 152 that it is "utterly indefensible to legislate retrospectively as this statute does without regard to future dispositions". Several words and expressions have raised judicial doubts and required explanation, in particular the expression "imperfect trust provision" in Re Harpur's Will Trusts [1962] Ch. 78; see also Stratton v. Simpson (1970) 44 A. L. J. R. 487, where the Western Australian s. 102 was considered by the High Court of Australia; "instrument" and "disposition" in Re Gillingham Bus Disaster Fund [1959] Ch. 62; and "invalid" in Vernon v. Inland Revenue Commissioners [1956] 1 W. L. R. 1169. The Act in any case only applies to a limited number of cases, and its reference to "covenants" in s. 2 is related to the taxation disadvantages of institutions having mixed charitable and non-charitable objects.

All in all the English Act has not proved effective as a measure of general law reform, and is in any case difficult of application. We accordingly recommend adoption of the Victorian and New South Wales precedents.

105. Occasions for applying property cy-près. Where a valid charitable trust for some reason fails (e. g. because the object of the charity ceases to exist) the subject-matter of the trust will be applied by the Court cy-près to some object analogous to that chosen by the settlor, a result which is in general achieved by the direction and settlement by the Court of a scheme for the application of the trust fund: see Tudor on Charities (op. cit. at pp. 308 et. seq.). However, two principal conditions must be satisfied before trust property can be applied cy-près in this fashion:-

(1) There must have been a failure of the original purpose of the trust or some other circumstance attracting the jurisdiction of the Court to direct an application cy-près.

(2) The settlor in making the disposition must have manifested a "paramount" or general intention of benefitting charity, as distinct from an intention of benefitting only the particular named charity. In the latter event the trust property cannot be applied cy-près but passes on resulting trust to the settlor or his personal representatives.

So far as condition (1) is concerned, the principle has been adopted by the Courts that an application cy-près may be made only if the charity is positively incapable of being administered according to the directions of the founder: see e. g. Re Weir Hospital [1910] 2 Ch. 124, 133. Hence the fact that the original trusts have become largely outdated through changing circumstances is not of itself ordinarily sufficient to attract the application of the cy-près doctrine: cf. Tudor, op. cit. at p. 583.

As regards condition (2), the principal difficulty has arisen in cases in which funds have been raised by public subscription, often by cash box collections and usually with a view to mitigating hardships sustained by the victims of a particular disaster. In the case of such funds it is usually difficult to attribute to the donors of contributions a general, as distinct from a particular, charitable intent, and accordingly unless (which seldom happens) it is possible to identify the particular donors, the funds remain in Court indefinitely: see e.g. Re Ulverston and District New Hospital Building Trusts [1956] Ch. 622.

In England the foregoing two problems have been made the subject of the Charities Act, 1960, ss.13 and 14. The first of these sections, whilst in s.13(2) preserving the requirement of a general charitable intent, extends the circumstances in which a charitable gift may be applied cy-près even though it may still be possible literally to carry out the directions of the settlor. Section 14, on the other hand, is concerned with the particular case of funds raised by public subscription and, subject to certain safeguards, provides that where the donors are not identifiable a scheme may be directed for the application cy-près of property which has been donated for charitable purposes which have failed.

There is in Queensland no provision analogous to s.13 of the Charities Act 1960, and we recommend the adoption of that section with such local variations as appear in cl.105. As regards s.14 of the English Act the position is different, for the disposition of funds raised by public appeals has been dealt with in a remarkable Queensland statute The Charitable Funds Acts, 1958 to 1964. This enactment is different from and wider than the English provision and the comparable Dormant Funds Act, 1942 (N.S.W.) in several respects:-

(1) It is not confined to funds raised for purposes which are strictly charitable in the legal sense, but extends to funds raised for "any benevolent or philanthropic purpose", and to any analogous purpose declared by the Governor in Council: s.2.

(2) Although an analysis of the circumstances in which funds may be applied to a new purpose shows that these are substantially alike in England: s.13(1)(a), and in Queensland: s.5, the latter are somewhat wider, in that they include for example cases where the purpose is uncertain or illegal, which are not property speaking occasions for the application of the cy-près doctrine although they do represent instances in which a scheme might be directed.

(3) Whereas the English Act is in principal confined to funds subscribed by unidentifiable donors in respect of which the Court directs a scheme, the Queensland legislation requires the preparation of a scheme in all cases (except those involving less than $1,200) by those who contributed to the funds at meetings of contributors called pursuant to advertisements given for that purpose: ss.6, 7.

In our opinion the Queensland legislation satisfactorily meets the purpose for which it was enacted. We have considered whether it would not be possible to combine the essential provisions of The Charitable Funds Acts with those of s.13 of the English Act, or whether it would be desirable to retain the former but to include those provisions in the Bill rather than in a separate Act. However, after due consideration we have concluded that the scope and nature of The Charitable Funds Acts are such that they cannot satisfactorily or appropriately be combined with or included in a statute, or a Part of a statute, which is concerned essentially with

charities in the limited legal sense. Accordingly, we make no recommendation with respect to the repeal or amendment of those Acts, and instead propose that the operation of cl. 105 should not affect the application of The Charitable Funds Acts to property received by virtue of public collections.

Another Queensland statute which contains provisions relating to the administration of charitable funds is The Patriotic Funds Acts, 1942 to 1953. In view of the particular nature of this enactment we propose that it should also be exempted from the provisions of cl. 105.

106. Proceedings in case of breach of charitable trust. The Act 52 Geo. III, c. 101, commonly known as Sir Samuel Romilly's Act, is in force in Queensland and other Australian jurisdictions: see In the Will of Kenny (1889) 6 W. N. (N. S. W.) 106. Its purpose is to enable (subject to certain safeguards) proceedings to be brought to remedy breaches of trusteeship in the case of charitable trusts. It also empowers the Court to effect variations in the terms of the trust, and in this context it is commonly resorted to in New South Wales: see Jacob's Law of Trusts (2nd ed.) at pp. 286-287. The Act does not appear to have been utilised to the same extent in Queensland, but we think it would be wise to retain it in substantially the same form as that in which it has now been re-enacted in Victoria (No. 3270, s. 32) and in New South Wales (Imperial Acts Application Act, s. 27). Clause 106 follows these two provisions.

PART IX - MISCELLANEOUS

107. Application of Part.

108. Indemnity. Section 58 of the present Queensland Acts, adapted from s. 49 of the English Trustee Act, 1893, provides that the Act, and every order purporting to be made under it, shall be a complete indemnity to all persons for any acts done pursuant thereto.

It states further that it shall not be necessary for any person to inquire into the propriety of the order. It seems strange that in other States the similar provision has been in effect restricted in operation by references (e.g. in s. 100 of the Western Australian Act) to "every bank, company, society, association or person". It could conceivably be argued that some persons or bodies might be excluded as not being ejusdem generis with this list. In any case, in The Acts Interpretation Act of 1954 (3 Eliz. II No. 3) "person" is defined in s. 36 as including a body corporate.

It is therefore recommended that the present Queensland provision should be retained.

The provision appears, slightly modified, in England (Trustee Act 1925, s. 66); Victoria (s. 78); New South Wales (s. 103) and New Zealand (s. 80.).

109. Remedies for wrongful distribution of trust assets. Section 65 of the Western Australian legislation follows s. 30B of the New Zealand Administration Act and is an attempt to improve the state of the law from what it has appeared to be ever since In re Diplock (1948) Ch. 465 was decided.

(1) Although it became plain after Diplock's case that where a personal representative distributes the estate to a person not entitled to it, the person to whom it should have been distributed has a personal claim against that person for recovery of the amount wrongfully paid over, doubt has been expressed (in Ministry of Health v. Simpson (1951) A. C. 251, per Lord Simonds at pp. 265-266) as to whether the same rule applies

in the case of a trustee who makes a wrongful payment. Section 65(3) ends this doubt by giving a statutory personal right of recovery in every case.

(2) It has also become plain (as a result of the decision of the House of Lords in Jones v. Waring & Gillow (1926) A.C. 670, followed in Diplock's case) that a person to whom a wrongful distribution has been made has no defence to an action on the ground that, in reliance on the propriety of the distribution to him, he has changed his position to such an extent that it would cause undue hardship to him to be obliged to repay. Section 65(8) makes the defence of change of position available to an innocent person to whom a wrongful distribution has been made.

(3) Diplock's case also made it clear that a rightful beneficiary must first exhaust all remedies against the personal representatives making the wrongful distribution, before embarking on any remedies against the persons to whom the distribution had been made. The trustees in Diplock's case suffered great hardship in consequence of this rule. Section 65(7) reverses the rule by providing that the plaintiff must first exhaust his remedies against the persons to whom the distribution was made, before seeking any remedy against the trustees.

Although there is no doubt as to the desirability of a clarification of the law as regards (1), and that the denial of the defence of change of position is regrettable, (it has been criticised by leading authors, particularly Goff & Jones: The Law of Restitution at pp. 482-487) there seems to be no virtue whatever in placing the primary responsibility for a wrongful distribution on the distributee. By s. 63 (cl. 67 of this Bill) a trustee who advertises is protected; if he fails to advertise or distributes despite known claims (whether formal or informal) it seems proper that he should be primarily liable, not the person to whom the distribution is made. This part of s. 65 seems, accordingly, to be misconceived and its adoption cannot be recommended.

It is recommended, however, that some provisions should be included making it clear that beneficiaries rightfully entitled have a right of action after exhausting their rights against the trustee, against distributees, but subject to the defence of change of position. Nevertheless, it is considered that the form of the provision should be declaratory of the rights of beneficiaries and of the availability of the defence: there appears to be no particular need to create a special statutory right, over and above all other rights, as s. 65 seems to do.

The proposed clause is intended to do three things:-

In (1) it provides that the remedies for the wrongful distribution of trust property are the same as in the case of the wrongful distribution of a deceased estate, i.e. the law in Ministry of Health v. Simpson is not to be confined to deceased estates.

In (2) it is declared that, except with the leave of the Court, a claimant must exhaust all claims against the trustee or personal representative before moving against the distributee.

In (3), the only substantive reform, a distributee is allowed the defence of change of position. If any cases come before the Court, it will be necessary for the Court to develop some sort of practice.

Lastly, although in Western Australia this section is side-noted "Following of Assets", it has nothing to do with the following of assets as such. It applies to all remedies, i.e. the personal remedy and the tracing remedy.

Accordingly it is suggested that the section be headed: "Remedies for wrongful distribution of trust property".

110. Fees and Commission deemed a testamentary expense.

111. Costs of inquiring regarding beneficiaries.

112. Regulations.

The foregoing provisions of the Bill are self-explanatory and do not require specific comment.

Provisions considered but not recommended for adoption.

In addition to the various clauses of the Bill referred to above, the Commission has also considered, but recommends against the adoption of, certain statutory provisions present in the Western Australian Trustees Act which affect to alter what is known as the Rule in Howe v. Dartmouth and to resolve the problem of purchased annuities. The reasons for the view which we have formed on these topics are as follows:-

1. The Rule in Howe v. Dartmouth

We have considered representations that the rule in Howe v. Dartmouth, and the related rule in Re Chesterfield's Trusts should be abolished, and it is noted that in New Zealand (section 85) and Western Australia (section 105) it has been displaced.

The doctrine of Howe v. Dartmouth is that a trustee must maintain an even hand between the life tenant and the remainderman. Thus, where residuary personalty is settled by will to be enjoyed by persons in succession, the trustees are under a duty to convert into money such parts of it as are of a wasting, future or reversionary character, or which consist of unauthorised securities, and to invest such money in authorised securities.

However, it may prove impossible or imprudent to effect the sale of such a wasting asset, and in that event the rule in Howe v. Dartmouth applies in a particular way: it requires the trustee to make a valuation of the capital value of such wasting assets and to pay to the tenant for life 4% of that valuation, instead of whatever income the assets actually yield. Any surplus income yielded must be retained by the trustee and invested in authorised securities as capital moneys.

The New Zealand provisions, from which the Western Australian provisions are taken, are difficult to follow inasmuch as in section 15(2) (N.Z.) followed in section 30(2) (W.A.) the trustee is given a general power to take part of the income from the life tenant and use it to set up a depreciation or replacement fund in respect to the property producing the income; but in section 85 (N.Z.), followed in section 105 (W.A.) it is provided that "the whole of the net income" of property settled in a residuary gift, shall pending sale be applied as income, notwithstanding that the property may be of a wasting, speculative or reversionary nature. It is not clear what the effect of the first provision is, in the light of the second.

Another difficulty arises with respect to receipts of annuity income by a residuary estate. The rule is that such receipts must be invested, the life tenant receiving only the income proceeding from the investment (Crawley v. Crawley (1835) 7 Sim. 427; 58 E.R. 901), which seems to be a reasonable rule and which incidentally corresponds with the recommendation made regarding the abolition of the rule in Allhusen v. Whittell, supra (clause 79) that obligations to pay annuities out of a residuary estate should be met out of capital. It is by no means clear whether the New Zealand and Western Australian provisions affect this rule, although the learned editors of the 3rd edition of Garrow & Henderson's Law of Trusts and Trustees (N.Z.) treat Crawley v. Crawley (at pp. 277-278) as still applicable.

Although the application of the rule in Howe v. Dartmouth can cause some difficulties it is difficult to accept that the tenant for life should be allowed to take the entire income of wasting assets. Since the provisions do not abrogate or abridge the general duty of the trustee to maintain an

even hand between life tenants and remaindermen, the effect of the provisions would appear to be that a greater compulsion to sell wasting assets is placed on the trustees than formerly. The advantage of the making of a Howe v. Dartmouth apportionment is that it enables the trustee to retain a wasting asset the immediate sale of which might not be advantageous to the estate, without detriment to the tenant for life or remainderman.

Another possible solution to the burden of making Howe v. Dartmouth apportionments has been considered and that is to give the trustee a general discretion to make such apportionments as seem to him to be fit. But it is hard to see how a trustee could ever justify exercising such a discretion in a manner substantially different from the manner settled in Howe v. Dartmouth and the numerous other decisions which have been made on the rule, in particular Re Fawcett (1940) Ch. 402 and Re Parry (1947) Ch. 23.

Moreover, if the trustee were to exercise a discretionary apportionment power in a manner substantially different from the settled practice, and an aggrieved beneficiary were to raise the matter in Court, under provisions already recommended in this Report, it is hard to see how the Court could support a novel practice without giving rise to new rules about the manner in which such a discretion should be exercised.

The rule in Howe v. Dartmouth has been the subject of much case application. Its operation can be negatived by a settlor if he so chooses. A trustee, and particularly a professional trustee has ready access to the settled practice. Once valuation of wasting assets has been made the calculation of income to be paid is simple.

In these circumstances we consider that the rule should not be altered.

2. The problem of purchased annuities

As has been mentioned above, where the assets of a residuary estate settled in succession include the right to receive an annuity, the receipts of that annuity are credited to capital, and only the income arising from the investment of the annuity receipts goes to the tenant for life (Crawley v. Crawley).

However, it appears that this rule may cut across the intention of a testator where he has, during his lifetime, purchased an annuity (e.g. by way of an insurance policy) for a particular person (e.g. his wife) to be paid to that person from the date of the testator's death, because if the benefit of the contract with the insurance company is regarded as forming a part of the estate of the testator, the annuity will pass under the provisions of the will, and the wife will not necessarily receive it: even if the testator leaves his estate to her for life she will only receive the income produced by the investment of annuity receipts.

In an apparent attempt to resolve this problem Victoria (section 75) and Western Australia (section 106) have provided that any receipt of such annuities or periodic payments purchased by a deceased or payable pursuant to an insurance policy on the life of a deceased person shall be applied as if it were income of the estate of the deceased person. So that if an annuity is purchased for a wife and she is the life tenant of assets which include that annuity, she will receive the annuity payments as income. However, if the annuity is purchased for someone other than the tenant for life of the residuary estate, the tenant for life will still apparently receive it all, which seems to be an unforeseen and undesirable consequence of these provisions.

We consider that the problem of ensuring that a nominated beneficiary under an insurance policy or other contract takes the benefit is a general problem, and that the partial and imperfect solution to it which appears in the Victorian and Western Australian legislation is worse than no solution at all.

It is therefore recommended that this particular provision be not adopted in Queensland.

As to whether any general solution to the problem of third party beneficiaries to contracts can be found, it is considered that this is beyond the scope of trustee legislation. However, it is suggested that a solution to the problem might be found by a statutory provision that the product of an insurance policy, payable upon the death of a policy holder, should be payable to any person nominated by the policy holder to receive it, in preference to any beneficiary entitled under his will or intestacy, though not in preference to the deceased's creditors.

Any provision along these lines would, however, be more appropriately placed in an Administration of Estates Act.

3. Re Livanos [1955] St. R. Qd. 362

It has also been suggested that consideration be given to altering the effect of the decision in Re Livanos, supra. This was a case in which two brothers George and Nicholas Livanos entered into a partnership as cane farmers and registered title to their farm, a partnership asset, as tenants in common at law. Since section 23(2) of The Partnership Act provides that the legal estate or interest in any partnership land is to devolve according to the nature and tenure thereof and the general rules of law applicable thereto, the result of this course was that when George Livanos died (intestate) his interest as legal tenant in common descended as by law prescribed and did not accrue to the surviving partner as on joint tenancy. Since The Partnership Act also provides in section 23(1) that partnership assets are held on trust for the partnership, it followed that the legal estate of George as tenant in common was held by him on trust, and, accordingly, upon his death the legal estate vested in the Public Curator pursuant to section 12 of The Trustees and Executors Acts.

The result is highly inconvenient in practice, but it is a result which follows from adopting the course of vesting partnership land in the partners as tenants in common and not as joint tenants. The problem is not one in which a statutory provision will or legitimately can afford a solution but rather one which is brought about by unsatisfactory conveyancing practice.

We therefore make no recommendation with respect to the decision in Re Livanos, other than that which appears as cl. 16 of the Bill.

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SCHEDULE A

Companies with $2m issued capital and unbroken dividends since 1954 listed on the Sydney Stock Exchange as Home Exchange

A.R.C. Industries Limited
W. Adams & Co. Ltd.
Adelaide Steamship Co.
Samuel Allen & Sons
Allied Mills Limited
Amalgamated Holdings
Amalgamated Wireless (Australasia)
Ampol Petroleum Limited
Angus & Coote (Holdings)
Angus & Robertson Limited
Ansett Transport Industries Limited
Appleton Industries Limited
Argo Investments Limited
Associated Pulp & Paper
Associated Securities
A.C.I. Ltd.
Australian Controls Ltd.
Australian Fertilizers Limited
A.G.L. Co.
Australian Guarantee Corporation
A.P.M. Ltd.
Australian United Investment Co.
Bank of Adelaide
Bank of N.S.W.
Beau Monde (Aust.) Limited
Blue Metal Industries
Bond's Industries Limited
Boral Limited
Bradford Kendall Limited
Bradmill Industries
Braemar Industries Limited
Brickworks Limited
British Tobacco Co.
BHP
Buckley & Nunn
Burns Philp & Co. Ltd.
Burns Philp (S.S.)
Camelec Limited
C.U.B. 'Z'
Carlton Brewery Limited
Cascade Brewery Co.
Castlemaine Perkins
Clyde Industries Ltd.
G.J. Coles & Co. Ltd.
Colonial Gas Holdings
C.S.R.
Comeng Holdings Ltd.
Commercial Banking Co. of Sydney
Commercial Bank of Australia Limited
Commonwealth Industrial Gases
Consolidated Metal Products
Containers Limited

Sidney Cooke Limited
Courtaulds Hilton Limited
G.E. Crane (Holdings)
Custom Credit Corporation
Cyclone Co. Aust. Limited
Dickson Primer
Direct Acceptance Corporation
Dunlop Australia Limited
Edments Holdings Limited
Edwards Dunlop Co.
Electrical Equipment Aust.
Electronic Ind.
Email Limited
F. & T. Industries Ltd.
G. Fielder & Co.
J. Fielding & Co.
Finance & Guarantee
Gibson & Howes Ltd.
Gordon & Gotch
J. Hardie Asbestos
Herald & Weekly Times
Hume Ind.
Huttons Limited
I.A.C. Holdings Ltd.
IRH Industries Ltd.
Icianz
Industrial Engineering Ltd.
Intercolonial Boring Co.
International Combust. Aust.
M.B. John & Hattersley
Johnson Leather Co. Ltd.
David Jones Ltd.
H. Jones
Kelvinator Aust. Ltd.
Larke Consolidated Ind.
Life Savers (A'sia) Ltd.
K.G. Luke Group Inds.
Malleys Ltd.
Marrickville Holdings Ltd.
Mauri Bros. Thompson
Mayne Nickless Ltd.
John McIlwraith Ind.
McIlwraith McEachern
Ralph McKay Ltd.
McPhersons Ltd.
Melbourne Co-op. Brewery
Mercantile Credits Ltd.
Mercantile Mutual Insurance
Michaelis Bayley Ltd.
Millaquin Sugar Co.
Mindrill Ltd.
Mutual Acceptance Co. Ltd.
Myer Emporium Ltd.
Myttons Ltd.
National Bag Co. of Aust.
National Bank of A'sia
National Consolidated
Nestle Co. Ltd.
Newbold Gen. Refract.
News Limited

New Zealand Insurance
North Shore Gas Co. Ltd.
Nylex Corporation Ltd.
Olympic Sonold. Ind.
Overseas Corporation (Aust.)
P.G.H. Industries Ltd.
Permewan Wright Ltd.
Peters Ice Cream (W.A.)
Petersville Aust. Ltd.
Pizzey Ltd.
Plessey Co. Ltd.
Prestige Limited
Provincial Traders
Queensland Insurance Co.
Queensland Cement
G.N. Raymond Ltd.
Repco Limited
H. Rowe Co.
Silverton Trans. Gen.
H.C. Sleigh Ltd.
Howard Smith Ltd.
Softwood Holdings Ltd.
W.H. Soul Pattinson
Southern Elect. Authority of Queensland
Steamship Trading Co.
James Stedman Ltd.
Swan Brewery Co.
Swans Limited
Taubman's Industries Ltd.
Thompsons (C'maine)
Tooheys Ltd.
Tooth & Co. Ltd.
Transport Devel.
United Packages Ltd.
F.J. Walker Ltd.
Waltons Limited
Warburton Franki Ltd.
Watson Victor Holdings
Winchcombe Carson Ltd.
Woolworths Ltd.
Woolworths N.Z.
Wormald Bros. Ind. Ltd.

SCHEDULE B

Extract from letter from Queensland Trustees Limited to Law Reform Commission dated 18th January, 1971.

We note, with appreciation, that you have attempted to widen substantially the scope of trustee investments to bring proposed legislation more in keeping with modern day requirements. However, we are a little concerned at the arbitrary restrictions on the investments in shares in companies to those which have a paid-up share capital of at least $2 million and have paid annual dividends in the fifteen years immediately preceding the year in which the investment is to be made. We rather share the Stock Exchange's doubts, which you refer to in your commentary at page 19. We have looked at the list of companies quoted on the Brisbane Stock Exchange, which you stated would satisfy the criteria proposed by the Bill, with a view to ascertaining which of these companies in fact demonstrate some measure of capital growth. We submit that the main purpose which occasions a trustee to invest in equity shares is a desire to preserve the capital of the Trust, particularly against erosion by inflationary trends, on the basis that equity shares will at least maintain their relationship with rising price levels. Apart from capital preservation we also think a trustee could be motivated - dependent on the terms of the Trust - by a desire for capital appreciation in addition to the maintaining of relativity with current price levels.

On this basis, therefore, we investigated the sixteen companies and have taken out calculations which demonstrate that of the sixteen companies listed, five of these would have shown negative growth when prices existing as at 30th June, 1966 are compared with the prices existing as at 30th June, 1970. We have calculated that one dollar invested on the 30th June, 1966 in the following five companies would have been worth less than a dollar as at 30th June, 1970, viz. -

Samuel Allen & Sons	$1	invested	in	1966	would	be worth 94c as at 30th June, 1970.
Carricks Limited	$1	"	"	"	"	be worth 95c as at 30th June, 1970.
Millaquin Sugar	$1	"	"	"	"	be worth 99c as at 30th June, 1970.
North Aust. Cement	$1	"	"	"	"	be worth 87c as at 30th June, 1970.
United Packages Ltd.	$1	"	"	"	"	be worth 83c as at 30th June, 1970.

In addition $1 invested in another six of the companies listed would have shown virtually no growth - certainly insufficient growth to maintain relativity with inflation which has been occurring at the rate of 4% to 5% per annum. These companies are -

Brisbane Gas Co. Ltd.	$1	invested	on	30th June, 1966 would be worth $1.01 as at 30th June, 1970.
Fairymead Sugar	$1	"	"	30th June, 1966 would be worth $1.01 as at 30th June, 1970.
Gibson & Howes	$1	"	"	30th June, 1966 would be worth $1.05 as at 30th June, 1970.
I.B.C.	$1	"	"	30th June, 1966 would be worth $1.05 as at 30th June, 1970.
Provincial Traders	$1	"	"	30th June, 1966 would be worth $1.00 as at 30th June, 1970.
Queensland Cement	$1	"	"	30th June, 1966 would be worth $1.04 as at 30th June, 1970.

Only four of the remaining five shares listed showed substantial capital appreciation in the four-year period (note - Appleton Industries were taken over and removed from the Stock Exchange Lists on 3rd June, 1970. However, their price in 1966 was $2.30 per share, and the cash value of the take-over offer was $3.20 per share).

The other four shares are -

Bank of Queensland	$1 invested on 30th June, 1966 would be worth	$1.36 as at 30th June, 1970.
Castlemaine Perkins	$1 " " 30th June, 1966 would be worth	$1.43 as at 30th June, 1970.
Walter Reid	$1 " " 30th June, 1966 would be worth	$2.13 as at 30th June, 1970.
Mt. Isa Mines	$1 " " 30th June, 1966 would be worth	$3.51 as at 30th June, 1970.

It is likely that the companies mentioned in the annexure to your comments and listed on the Sydney Stock Exchange would also demonstrate proportionately a similar performance record.

You have considered (page 18 of your commentary) the possibility of adopting the English Act provisions where the period of paying dividends is only five years. This period could be a more favourable criterion when it is appreciated that classically, companies go through varying cycles of growth. In this regard we quote from "Investing for Profit" by A. Donnelly, at page 164 -

> " The life phases or categories in which stocks could be classed are these:
>
> 1. Growth - these are generally stocks of increasing dividends and earnings, newly floated companies, which have been floated at a premium; they are affected to some extent by cyclical forces; a growth rate in a favourable market may reach 150 per cent per annum or more.
>
> 2. Cyclical Stocks - these are stocks which were former growth stocks but now tend to follow the business cycle or the market cycle with the movements being accentuated to some extent. Here timing is very important.
>
> 3. Recessive - these are companies which are at an "old age" of their development, perhaps accompanied by declining earnings and dividends, where there can be depreciation of 50 per cent or more.
>
> 4. Income Defensive - these stocks include many market leaders where the increase in earnings relatively is not great, and where prices are relatively stable. In this type of stock, the appreciation rates in a favourable market would be likely to be between 5 per cent and 20 per cent, probably with most of them averaging out at about 10 per cent.
>
> If you are aware of this general picture of the types of stocks or the various life phases in a particular stock, you can make sounder decisions. Obviously the person who is going to watch his stocks very closely, and who is aiming for the greatest possible growth, would not be very interested in the income defensive stocks. "

We are inclined to think that the criteria proposed by you would include many "income defensive" stocks which offer restricted possibilities to allow the trustee to achieve his objectives, viz. (1) capital

preservation and (2) capital growth. Accordingly if the objective is to preserve capital and to possibly enhance it, we suggest that less restrictive criteria be established than the $2 million capital and fifteen years dividend performance.

No. of 197

A Bill to Consolidate and Amend the Law Relating to Trusts, Trustees, Settled Land and Charities.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short title and commencement. (1) This Act may be cited as the Trusts Act 197 .

(2) This Act shall come into operation on the first day of

2. Division of Act. This Act is divided into Parts as follows:-

PART I - PRELIMINARY, ss.1-9;

PART II - APPOINTMENT AND DISCHARGE OF TRUSTEES; DEVOLUTION OF TRUSTS, ss.10-19;

PART III - INVESTMENTS

Division 1 - Variable Investment Provisions, ss.20-26
Division 2 - Invariable Investment Provisions, ss.27-30;

PART IV - GENERAL POWERS OF TRUSTEES, ss.31-59;

PART V - MAINTENANCE, ADVANCEMENT, AND PROTECTIVE TRUSTS, ss.60-64;

PART VI - INDEMNITIES AND PROTECTION OF TRUSTEES, ETC., ss.65-78;

PART VII - FURTHER POWERS OF THE COURT

Division 1 - Application of Part, s.79
Division 2 - Appointment of New Trustees, ss.80-81
Division 3 - Vesting Orders, ss.82-93
Division 4 - Jurisdiction to make other Orders, ss.94-102;

PART VIII - CHARITIES, ss.103-106

PART IX - MISCELLANEOUS, ss.107-112.

Abbreviations. The following abbreviations are used in the marginal notes to this Act: W.A. - Trustees Act 1962-1968 (Western Australia); U.K. - Trustee Act 1925 (United Kingdom); Vic. - Trustee Act (No. 6401 of 1958 - Victoria); N.S.W. - Trustee Act 1925-1942 (New South Wales); N.I. - Trustee Act 1958 (Northern Ireland); N.Z. - Trustee Act (No. 61 of 1956 - New Zealand); Qld. - The Trustees and Executors Acts, 1897 to 1964 (Queensland); T.C. - Trustee Companies Act 1968 (Queensland); S.L.A. - The Settled Land Act of 1886 (Queensland).

3. Repeals. (1) The Acts specified in the First Schedule to this Act are repealed to the extent mentioned in that Schedule.

W.A. s.4; cf. N.Z. s.89.

(2) Without limiting the provisions of The Acts Interpretation Acts, 1954 to 1962, the repeal of any enactment by this Act does not affect any document made or anything whatsoever done under the enactment

so repealed or under any corresponding former enactment, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.

W.A. s.5.

4. Application. (1) Except where otherwise provided, this Act applies to every trust, as defined in section five of this Act, whether constituted or created before or after the commencement of this Act.

cf. S.L.A. s.59.

(2) Nothing in this Act shall preclude a settlor from conferring on a trustee or other person exercising the powers of a trustee under this Act any powers additional to or larger than those conferred by this Act.

(3) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, and unless a contrary intention is expressed in the instrument (if any) creating the trust, operate and be exercisable in the like manner and with all the like incidents, effects and consequences as if conferred by this Act.

N.Z. s.2(4) as amended 1960.

(4) The powers conferred by or under this Act on a trustee are in addition to the powers given by any other Act and by the instrument (if any) creating the trust; but the powers conferred on the trustee by this Act, unless otherwise provided, apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.

(5) Except where otherwise provided, this Act does not affect the legality or validity of anything done before the commencement of this Act.

cf. N.S.W. Imperial Acts Application Act, 1969, s.6.

(6) This Act binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

5. Interpretation. (1) In this Act, unless the context otherwise requires: -

W.A. s.6; cf. Qld. s.3.

"authorised investments" means investments authorised for the investment of money subject to the trust by the instrument (if any) creating the trust or by this Act or any other Act;

"benefit", in relation to any person, includes insurance on the life of that person;

"contingent right", in relation to land, includes a contingent or executory interest and a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained; and also a right of entry, whether immediate or future, and whether vested or contingent;

"bank" and "savings bank" mean any bank or savings bank authorised under Part II of the Commonwealth Banking Act 1959 (including any Commonwealth enactment in substitution or amendment thereof) to carry on banking business in Australia;

"bankrupt" includes "insolvent";

"conveyance", as applied to any person, includes the execution or doing by that person of every necessary or suitable assurance, act, and thing for conveying, transferring, assigning, appointing, surrendering or otherwise disposing of property; and "to convey" has a corresponding meaning;

"Court" means the Supreme Court of Queensland or a Judge thereof;

"execute" includes the doing of all acts and things necessary for a conveyance, and with reference to an instrument not under seal means sign, and derivatives of "execute" have corresponding meanings;

"instrument creating the trust" includes any deed, will, agreement for a settlement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act;

"land" includes -

(a) land of any tenure, and any estate or interest, whether vested or contingent, in land;

(b) mines and minerals, whether or not severed from the surface;

(c) buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way;

(d) a unit comprised in a building units plan registered in the manner provided by or under The Building Units Titles Act of 1965;

(e) any other corporeal hereditaments;

(f) rent and any incorporeal hereditament; and

(g) an easement, right, privilege, share, interest or benefit in, over or derived from land,

and, in this definition, "mines and minerals" includes any strata or seams or minerals or substances in or under any land, and powers of working or getting them and "hereditament" means real property which under an intestacy might at common law devolve on an heir;

"lease" includes a bailment;

"mortgagee" includes every person having an estate or interest regarded at law or in equity as merely a security for money and every person deriving title to the mortgage under the original mortgagee; and "mortgage" has a corresponding meaning;

"payment", in relation to stocks and securities, includes the deposit or transfer of them; and "to pay" has a corresponding meaning;

"person" includes a trustee corporation and a corporation sole;

"person not under a disability", and any like expression, means a person of full age and full mental capacity;

"personal representative" means the executor, original or by representation, or the administrator for the time being of the estate of a deceased person;

"possession" includes receipt of income or the right to receive the income, if any; and "possessed" applies to receipt of income of and to any vested estate less than a life interest, at law or in equity, in possession or in expectancy in any land;

"property" includes real and personal property and any estate, share, and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

"public accountant" means a public accountant as defined by The Public Accountants Registration Acts, 1946 to 1968;

"Public Curator" means the Public Curator of Queensland constituted by The Public Curator Acts, 1915 to 1957;

"registered valuer" means a valuer registered under the Valuers Registration Act 1965-1969;

"Registrar" means the Registrar of Titles appointed under "The Registrar of Titles Act of 1884";

"rent" includes a rent service or a rent charge, or other rent, toll, duty, royalty or annual or periodic payment in money or money's worth reserved or issuing out of or charged upon land, but does not include mortgage interest;

"repealed Acts" mean The Trustees and Executors Acts, 1897 to 1964;

"sale" includes an exchange; and "to sell" has a corresponding meaning;

"securities" includes debentures, stock and shares; and "securities payable to bearer" includes securities transferable by delivery or by delivery and endorsement;

"State" means the State of Queensland;

"statutory trustee" means a person -

(a) who, in respect of land referred to in section six, may exercise the powers by this Act conferred or capable of being conferred on a trustee; but -

(b) who, apart from this Act, is not a trustee of such land;

"stock" includes shares, and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity or security transferable in books kept by any corporation or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein;

"transfer", in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

"trust" does not include the duties incidental to an estate conveyed by way of mortgage, but with that exception "trust" extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative;

"trust property" includes -

(a) property settled on any trust, whether express, implied, resulting, bare, or constructive;

(b) property subject to a trust or direction for sale, however arising;

(c) land which is lawfully vested in any person for an estate for his own or any other life, or for a term of years determinable on life not being a mere lease at rent, or for any greater estate not being a fee simple absolute; and

(d) land in respect of which any person has, by virtue of any will, a personal licence to reside for his own life, or for the life of any other person or persons, or for any lesser period;

"trustee" includes -

(a) a trustee corporation;

(b) any other corporation in which property subject to a trust is vested;

(c) any person who immediately before the commencement of this Act was a trustee of the settlement or in any way a trustee under The Settled Land Act of 1886; and

(d) a personal representative; and

(e) a statutory trustee within the meaning of this Act;

"trustee corporation" means the Public Curator or any corporation authorised by the Trustee Companies Act 1968 to administer the estates of deceased persons and other trust estates.

(2) Any reference to the investment, loan or advance of trust money by a trustee on the security of property shall be construed to include a reference to such investment, loan or advance on the transfer of an existing security as well as on a new security.

6. Exercise of powers. (1) Subject to subsection (3) of section thirty-one, the powers by this Act conferred on a trustee or capable of being conferred by the Court on a trustee may be exercised by or conferred upon the persons mentioned in this section.

cf. S.L.A. ss. 5, 6, 27, 29, 69.

(2) In respect of land which immediately before the commencement of this Act was settled land within the meaning of The Settled Land Act of 1886 (in this section referred to as "the repealed Act") - by the person being of full age and not insane who was, or, if more than one, by the persons being of full age and not insane who were, in respect

of that land, the tenant for life within the meaning of the repealed Act, or who had the powers of the tenant for life under the repealed Act, whether or not such powers were or any of such powers was exercisable only with the consent, approval or sanction of some other person or persons or of the Court:

Provided that where, under the repealed Act, a power was exercisable by any person or persons only upon the written request of the tenant for life, then such person or persons shall have, and shall and may exercise, the powers conferred by this subsection upon the written request of the tenant for life, but not otherwise.

cf. W.A. s.109(1); N.Z. s.88; S.L.A. ss. 4, 5, 6.

(3) In respect of any other land which is trust property -

(a) if there is, apart from this Act, no trustee of the land - by the person or persons, not under a disability, for the time being beneficially entitled to possession thereof, or to the rents and profits therefrom; or

cf. W.A. s. 30(4).

(b) if there is, apart from this Act, a trustee of the land - by the trustee:

Provided that the trustee shall, unless otherwise directed by the Court, exercise the power conferred by section thirty-two to sell the land if so required in writing by the person (if not under a disability) or, if more than one, all of the persons (if not under a disability) at that time beneficially entitled to an interest in possession in the land or under the trust of the land.

(4) In respect of any other trust property - by the trustee of that property.

cf. S.L.A. s.42.

(5) In any case, or where the persons by whom, or at whose direction, the powers conferred by this section are exercisable do not agree - by such person or persons and in such manner as the Court may order or direct on application thereto of any person who has, directly or indirectly, an interest, whether vested or contingent, in that property.

cf. S.L.A. s.55; Eng. S.L.A. 1925, s.107(1).

7. Exercise of powers by statutory trustee. (1) Subject to any order or direction of the Court, in exercising any power under this Act, a statutory trustee -

(a) shall have regard to the interests of all parties beneficially interested in the property;

(b) shall be in the position of a trustee, and, in relation to the exercise of any power, have -

(i) all the duties and liabilities of a trustee for the parties beneficially interested in the property; and

(ii) all the rights of a trustee and be entitled to all the indemnities and protection of a trustee;

cf. S.L.A. s. 31(1).

(c) shall, in order to its being invested or otherwise applied in accordance with this Act, pay or procure the payment of any capital money arising on any sale, mortgage, or other dealing with any land -

(i) into Court; or

(ii) to a trustee appointed by the Court under section eighty; or

(iii) otherwise as the Court may direct;

cf. S. L. A. s. 38.

(d) shall not, in relation to any such exercise of power, be liable to impeachment of waste.

(2) The exercise of any power under this Act by a statutory trustee -

(a) shall, in respect of any land, have the same force and effect as if it had been done by a trustee in whom that land was for the time being vested for an estate in fee simple absolute;

cf. S. L. A. s. 54.

(b) shall not occasion any forfeiture; and

cf. S. L. A. ss. 52, 53.

(c) shall not, except as provided by this Act, be capable of being restrained, prohibited, prevented or impaired by any provision of, or limitation in, any contract, covenant, settlement, will, assurance, or other instrument.

W. A. s. 94; N. Z. s. 68; cf. S. L. A. s. 42.

8. Application to Court to review acts and decisions. (1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which he will be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and may make such order in the premises (including such order as to costs) as the circumstances require.

(2) An order of the Court under subsection (1) of this section shall not -

(a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the Court; or

(b) affect any right acquired by any person in good faith and for valuable consideration.

(3) Where any application is made under this section, the Court may -

(a) if any question of fact is involved, determine that question or give directions as to the manner in which that question shall be determined; and

(b) if the Court is being asked to make an order which may adversely affect the rights of any person who is not a party to the proceedings, direct that that person shall be made a party to the proceedings.

cf. S. L. A. s. 31(5).

9. Effect of conversion of property under statutory power. Where in consequence of the exercise of any power under this Act realty is converted into personalty or personalty is converted into realty, such personalty or realty shall be held -

(a) upon trusts corresponding as nearly as the law and circumstances permit with the trusts (if any) affecting the property prior to conversion; or

(b) if there are no trusts, subject to limitations, conditions, powers, or directions corresponding as nearly as the law and circumstances permit with those affecting the property prior to conversion.

PART II - APPOINTMENT AND DISCHARGE OF TRUSTEES; DEVOLUTION OF TRUSTS

10. Application of Part. Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

U.K. s. 34; Vic. s. 40.

11. Limitation of the number of trustees. (1) Where, at the commencement of this Act, there are more than four trustees of any property no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.

(2) In the case of trusts made or coming into operation after the commencement of this Act -

(a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

(b) the number of the trustees shall not be increased beyond four.

(3) Nothing in this section shall apply to property vested in trustees for charitable purposes.

(4) A custodian trustee shall not be counted as a trustee for the purpose of this section.

(5) The provisions of section eighty of The Real Property Acts, 1861 to 1963, shall have effect subject to this section.

W.A. s. 7; N.S.W. s. 6; Vic. s. 41; N.Z. s. 43; U.K. s. 36; cf. Qld. s. 10.

12. Power of appointing new trustees. (1) Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise -

(a) is dead; or

(b) remains out of the State for more than one year without having properly delegated the execution of the trust; or

(c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on him; or

(d) refuses to act therein; or

(e) is unfit to act therein; or

(f) is incapable of acting therein; or

(g) is an infant; or

(h) being a corporation, has ceased to carry on business, is under official management, is in liquidation or has been dissolved,

then the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustee or trustees for the time being, or the personal representative of the last surviving or continuing trustee, may by writing appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the trustee first in this subsection mentioned.

cf. U.K. s. 37.

(2) On the appointment of a trustee or trustees for the whole or any part of the trust property -

(a) the number of trustees may, subject to the restriction imposed by this Act on the number of trustees, be increased; and

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part, and whether or not new trustees are or are to be appointed for any other part of the trust property; and any existing trustee may be appointed or remain one of the separate set of trustees; or if only one trustee were originally appointed, then one separate trustee may be so appointed for the part of the trust first in this paragraph mentioned; and

(c) it is not obligatory to fill up the original number of trustees where two or more trustees were originally appointed; but a trustee is not discharged under this section unless there will remain either a trustee corporation or at least two individuals to act as trustees of the trust; and

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

N.Z. s.43(3); Vic. s.41(2); U.K. s.36(2).

(3) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation had been dissolved, and the provisions of this section shall apply accordingly.

N.S. s.43(4); Vic. s.41(4); cf. U.K. s.36 (4), (5).

(4) The power of appointment given by subsection (1) of this section, or any similar previous enactment, to the personal representative of the last surviving or continuing trustee is and shall be deemed always to have been exercisable by the administrator for the time being of that trustee or the executor for the time being, whether original or by representation, of that surviving or continuing trustee who has proved the will of his testator without the concurrence of any executor who has renounced or has not proved.

cf. U.K. s.36(6).

(5) Where, in the case of any trust, there are not more than three trustees (none of them being a trustee corporation), then -

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or

(b) where there is no person nominated for the purpose of appointing new trustees by the instrument creating the trust, or no such person able and willing to act, then the trusteeor trustees for the time being,

may, by writing, appoint a person or persons (whether or not being the person or persons exercising the power) to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee unless the instrument (if any) creating the trust, or any statutory enactment, provides to the contrary; but on any appointment of additional trustees under this subsection the number of trustees shall not be increased beyond four.

cf. U.K. s. 36(7).

(6) Every new trustee appointed under this section has the same powers, authorities, and discretions and may in every respect act, as if he had originally been appointed a trustee by the instrument (if any) creating the trust, both before and after all the trust property becomes by law or by assurance or otherwise vested in him.

cf. U.K. s. 36(8).

(7) The provisions of this section which are brought into effect by the circumstance that a person nominated trustee (whether sole or otherwise) in a will is dead are brought into effect whether the death of that person occurred before or after the death of the testator; and the provisions relative to a continuing trustee relate also to a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(8) The provisions of this section relating to a person nominated for the purpose of appointing new trustees apply whether the appointment is made in a case specified in this section or in a case specified in the instrument (if any) creating the trust, but where a new trustee is appointed under this section in a case specified in that instrument, the appointment shall be subject to the terms applicable to an appointment in that case under the provisions of that instrument.

(9) In this section, the term "trustee" does not include a personal representative as such.

cf. W.A. s. 8; Vic. s. 43; N.Z. s. 44; N.S.W. s. 13; U.K. s. 38.

13. Evidence as to a vacancy in a trust. (1) Where any instrument appointing a new trustee contains a statement as to how a vacancy in the office of trustee occurred, that statement is conclusive evidence, in favour of a subsequent purchaser in good faith, of the circumstances under which the vacancy occurred.

(2) Any vesting of trust property consequent upon an appointment of a new trustee containing a statement as to how a vacancy in the office of trustee occurred is valid in favour of any subsequent purchaser in good faith.

(3) The protection afforded to a purchaser by this section extends to the Registrar or other person registering or certifying title.

(4) This section applies to instruments of appointment signed either before or after the commencement of this Act.

W.A. s. 9; Vic. s. 44; cf. Qld. s. 11.

14. Retirement of trustee without a new appointment. (1) This section applies where a trustee declares by writing that he is desirous of being discharged from all or any or any part of the trusts reposed in him, and after his discharge there will be a trustee corporation or at least two individuals to act as trustees to perform the trust or part of the trust from which that trustee desires to be discharged.

(2) In any case to which this section applies, if the co-trustees and such other person, if any, as is empowered to appoint trustees consent

by writing to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged -

(a) shall be deemed to have retired from the trusts from which he has declared he desires to be discharged; and

(b) shall, by the writing by which consent is given to his discharge, be discharged from the trusts under this Act,

without any new trustee being appointed in his place.

cf. W.A. s.10; Vic. s.45; Qld. s.13.

15. Vesting of trust property in new and continuing trustees.

(1) Where a new trustee is appointed the instrument of appointment vests, subject to the provisions of any other Act, the trust property in the persons who become and are the trustees as joint tenants without any conveyance, transfer or assignment.

(2) Where a trustee is discharged in accordance with the provisions of section fourteen of this Act the instrument of discharge divests the trust property from the discharged trustee and, subject to the provisions of any other Act, vests it in the continuing trustees as joint tenants without any conveyance, transfer or assignment.

(3) Where, by reason of the provisions of any other Act or for the protection of any trust property, it is requisite that the vesting in a new trustee or divesting from a discharged trustee should be notified to or registered or recorded by the Registrar or other person having under that Act the duty or function of registering or recording any discharge or appointment of trustees or divesting or vesting or other dealings under that Act, the trustees shall -

(a) execute and produce to the Registrar or such other person such instrument or instruments as may be necessary; and

(b) do such other act or acts as may properly be required by the Registrar or such other person -

for the purpose of effecting such notification, registration or recording.

(4) Where the consent of any person is requisite to the conveyance, transfer or assignment of any trust property the vesting of that property in accordance with the provisions of this section is subject to that consent:

Provided that -

(a) the consent may be obtained after the execution of the instrument of appointment or discharge by the persons who are then trustees; and

(b) an instrument of appointment or discharge shall not operate as a breach of covenant or condition or occasion any forfeiture of any lease, underlease, agreement for lease, or other property.

cf. U.K. s.18; Vic. s.22; N.S.W. s.57; W.A. s.45.

16. Devolution of trust assets and trust powers upon death.

(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

Qld. s.12.

(2) Upon the death of a sole trustee or, where there were two or more trustees, of the last surviving or continuing trustee, the trust

property shall devolve to and vest in the Public Curator and shall remain vested in him until -

(a) an appointment of a new trustee is made by the person if any nominated for the purpose of appointing new trustees, whereupon the trust property shall devolve to and vest in the person so appointed subject to and in accordance with the provisions of section fifteen of this Act; or

(b) if no such appointment is made, a grant of probate or letters of administration of estate of the deceased trustee is made, whereupon the trust property shall devolve to and vest in the person to whom the grant was made who shall be deemed to be the person appointed by the person nominated for the purpose of appointing new trustees.

(3) Trust property vested by virtue of this section in the Public Curator shall vest in him, notwithstanding the fact that no instrument has been executed appointing him as trustee, in the like manner and subject to the same provisions as trust property which vests in a new trustee by virtue of section fifteen of this Act.

(4) Trust property vested by virtue of this section in a person to whom a grant of probate or letters of administration of the estate of a deceased trustee has been made shall vest in him in like manner and subject to the same provisions as trust property which vests in a new trustee by virtue of section fifteen of this Act.

(5) While the trust property is vested in the Public Curator under this section the Public Curator shall have the same powers, authorities and discretions, and may in every respect act, as if he had originally been appointed a trustee by the instrument (if any) creating the trust:

Provided that no such power, authority or discretion shall be exercised by the Public Curator except -

(a) with the sanction of the Court on application thereto of the Public Curator or of a person beneficially interested in the trust property; or

(b) for the salvage of trust property which is endangered.

(6) Where the trust property vests by virtue of this section in the person to whom a grant of probate or letters of administration of the estate of the deceased trustee is made that person shall have all the powers, authorities and discretions and may in every respect act, as if he had originally been appointed a trustee by the instrument (if any) creating the trust.

(7) In this section the expression "trust property" includes any property vested in the trustee as mortgagee.

cf. Qld. s.12.

17. Devolution of mortgage estates on death. (1) An estate or interest in property vested solely in any person not being a trustee by way of mortgage shall upon his death devolve to and vest in the Public Curator until a grant of probate or letters of administration to the estate of the deceased mortgagee is made when the mortgaged property shall devolve to and vest in the person to whom the grant is made.

(2) While the property is vested in the Public Curator as aforesaid the Public Curator shall have the same powers, authorities and discretions and may in every respect act, as if he were originally the mortgagee of the property.

W. A. s. 12; Vic. s. 46.

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

(2) Where any person appointed by will both executor and trustee thereof -

(a) renounces probate; or

(b) after being duly cited or summoned fails to apply for probate; or

(c) dies before probate is granted to him,

and letters of administration with the will annexed are granted to any other person, the person who obtains the grant shall, by virtue of the grant and without further appointment, be deemed to be appointed trustee of the will in the place of the person who was appointed by the will.

W. A. s. 15; N. Z. s. 50; cf. The Public Curator Acts, 1915 to 1957, s. 42.

19. Custodian trustees. (1) Subject to the provisions of this section and to the instrument (if any) creating the trust, any corporation may be appointed to be custodian trustee of any trust in any case where, and in the same manner as, it could be appointed to be trustee.

(2) Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust -

(a) the trust property shall be vested in the custodian trustee as if the custodian trustee were the sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act;

(b) the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall be and remain vested in managing trustees other than the custodian trustee (in this Act called "the managing trustees") as fully and effectually as if there were no custodian trustee;

(c) the sole function of the custodian trustee shall be to get in and hold the trust property and invest its funds and dispose of the assets as the managing trustees in writing direct, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustees in writing direct;

(d) for the purposes of paragraph (c) of this subsection, a direction given by the majority of the managing trustees, where there are more than one, shall be deemed to be given by all the managing trustees;

(e) the custodian trustee shall not be liable for acting on any direction to which paragraph (c) of this subsection refers; but if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the Court for directions in the matter; and any order giving directions shall bind both the custodian trustee and the managing trustees; and the Court may make such order as to costs as it thinks proper;

(f) the custodian trustee shall not be liable for any act or default on the part of any of the managing trustees;

(g) all actions and proceedings touching or concerning the trust property shall be brought or defended in the name of the custodian trustee at the written direction of the managing trustees, and the custodian trustee shall not be liable for the costs thereof apart from any payable out of the trust property;

(h) a person dealing with the custodian trustee shall not be concerned to inquire as to any direction, concurrence or otherwise of the managing trustees or be affected by notice of the fact that the managing trustees have not concurred; and

(i) the power of appointing new trustees, when exercisable by the trustee, shall be exercisable by the managing trustees alone, but the custodian trustee shall have the same power as any other trustee of applying to the Court for the appointment of a new trustee.

(3) On the application of the custodian trustee or of any of the managing trustees or of any beneficiary and on satisfactory proof that it is the general wish of the beneficiaries or that on other grounds it is expedient to terminate the custodian trusteeship, the Court may make an order for that purpose and may also make such vesting orders and give such directions as in the circumstances seem to the Court to be necessary or expedient.

PART III - INVESTMENTS

Division 1 - Variable Investment Provisions

cf. W.A. s.19; U.K. s.10(5); Vic. s.4(2); Qld. s.6.

20. Application of Part. (1) Subject to subsection (2) of this section the provisions of Division 1 of this Part shall apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust; and every power conferred by the provisions of Division 1 of this Part shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument (if any) creating the trust or by statute with respect to the investment of funds.

(2) The provisions of paragraph (a) (so far as relates to the parliamentary stocks or public funds or government securities of the Commonwealth of Australia or of the State of Queensland) and of paragraph (e) of subsection (1) of section twenty-one shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

(3) The provisions of Division 2 of this Part shall apply whether or not a contrary intention is expressed in any other Act or in the instrument (if any) creating the trust.

W.A. s.16; cf. Qld. s.4; S.L.A. s.30; U.K. Trustee Investments Act 1961.

21. Authorised investments. (1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say -

(a) in any of the parliamentary stocks, public funds or government securities of the United Kingdom, of the Commonwealth of Australia, of any of the States of the Commonwealth of Australia, or of the Dominion of New Zealand;

(b) on first legal or first statutory mortgage of an estate in fee simple in land in any State or Territory of the Commonwealth of Australia; or first statutory mortgage of Crown land held on perpetual lease in the State;

(c) in the purchase:-

(i) of land in fee simple in any State or Territory of the Commonwealth of Australia;

(ii) of leasehold land in the State held for a term of forty years or more unexpired at the time of the purchase; or

(iii) subject to the provisions of the Land Act, 1962-1970, of any agricultural farm lease or grazing homestead freeholding lease of land held from the Crown under that Act;

(d) in debentures or other securities charged on the funds or property of the Brisbane City Council or of any Local Authority in the State;

(e) in any one or more of the following, namely -

(i) on any interest bearing term deposit in any bank;

(ii) on the security of a certificate of deposit issued by any bank; and

(iii) on deposit in any savings bank;

(f) on deposit in any incorporated building society carrying on business in the State and certified by notice in the Gazette, signed by the Treasurer, as a society in which trustees may invest;

(g) with any dealer in the short term money market, approved by the Reserve Bank of Australia, as an authorised dealer, who has established lines of credit with that bank as a lender of last resort;

(h) in any security in respect of which repayment of the amount secured and payment of interest thereon is guaranteed by the Parliament of the United Kingdom or the Commonwealth or any State of the Commonwealth or New Zealand;

(i) in any of the stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court;

(j) in any security or in any manner authorised by, or under, any Act;

(k) subject to the provisions of subsections (3), (4), (5), (6), (7) and (8) of this section, in the purchase of the preference or ordinary stock or shares issued in the Commonwealth of Australia by a company incorporated in a State or Territory of the Commonwealth of Australia, being stock or shares registered in a State or Territory of the Commonwealth of Australia;

(l) subject to the provisions of subsections (3), (4), (5), (6), (7) and (8) of this section, in debentures, including

debenture stock and bonds, and whether constituting a charge on assets or not, issued by any company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares;

(m) subject to the provisions of subsections (4), (5), (6), (7) and (8) of this section, on deposit or notes, whether secured or unsecured, at interest either for a fixed term not exceeding seven years or at call, with any company in which at the time of investment it would have been proper to invest in the purchase of ordinary stock or shares;

(n) subject to the provisions of subsections (5), (6), (7) and (8) of this section, in the units, or other shares of the investments subject to the trust, of a unit trust scheme in respect of which there is in existence at the time of investment an approved deed under any law of the State relating to Companies; and

(o) in the common trust fund of a trustee corporation under the Trustee Companies Act 1968,

and may also from time to time vary any such investment.

(2) A reference in any Act to an authorised investment under the provisions of section four of the repealed Acts shall be deemed a reference to an authorised investment under the provisions of this section.

(3) The stock, shares and debentures mentioned in paragraphs (k) and (l) of subsection (1) of this section do not include -

(a) any stock, shares or debentures the price of which is not quoted on a Stock Exchange in a State or Territory of the Commonwealth; or

(b) shares or debenture stock not fully paid up, except shares or debenture stock which, by the terms of issue, are required to be fully paid up within nine months of the date of issue.

(4) An investment under paragraphs (k), (l) and (m) of subsection (1) of this section shall not be made in any company which -

(a) has a paid up share capital of less than two million dollars;

(b) has not paid seven annual dividends in the seven years immediately preceding the calendar year in which the investment is made on all the ordinary stock or shares issued by the company, excluding any shares issued after the dividend was declared; but for the purposes of this paragraph a company formed to take over the business of another company or other companies is deemed to have paid the requisite dividend in any year in which such a dividend was paid by the other company or all the other companies, as the case may be.

(5) A trustee who proposes to make any investment under the power conferred by paragraphs (k), (l), (m) and (n) of subsection (1) of this section shall first obtain and consider proper advice in writing on the question whether the investment is satisfactory having regard to the

need for ensuring that investments of the trust are, so far as circumstances allow, sufficiently diversified in respect of the descriptions of investment and, where diversification within a particular description would be prudent, in respect of the investments within that description.

(6) A trustee who retains any investment made under the power conferred by paragraphs (k), (l), (m) and (n) of subsection (1) of this section shall determine at what intervals the circumstances and in particular the nature of the investment make it desirable to obtain the advice mentioned in subsection (5) of this section, and shall obtain and consider that advice accordingly.

(7) For the purposes of subsections (5) and (6) of this section, proper advice is the advice of a person who is believed on reasonable grounds by the trustee to be qualified by his ability in and practical experience of financial matters; and that advice may be given notwithstanding that the person gives it in the course of his employment as an officer or servant.

(8) Subsections (5) and (6) of this section do not apply to one of two or more trustees where he is the person giving the advice required by this section to his co-trustee or co-trustees, and do not apply where powers of a trustee are lawfully exercised by an officer or servant competent under subsection (7) of this section to give proper advice.

(9) The Treasurer may, by notice in the Gazette, revoke any notice given under paragraph (f) of subsection (1) of this section.

W.A. s.17; Vic. s.4(3).

22. Power to purchase dwelling house. (1) Where a trustee is of opinion that it is desirable to purchase a dwelling house for the use of any beneficiary under the trust or for a person having a personal licence to reside (whether for life or for any lesser period) on land comprised in the trust property, the trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in the purchase of land in fee simple in the State used for the purpose of a dwelling house only, and may permit the beneficiary or that person to reside on the land upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(2) A trustee purchasing land in exercise of the power conferred by this section or by paragraph (c) of subsection (1) of section twenty-one shall not be chargeable with breach of trust by reason only of the relation borne by the purchase price to the value of the land at the time when the purchase was made if it appears to the Court that -

(a) in making the purchase the trustee was acting upon a report as to the value of the land made by a registered valuer whom he reasonably believed to be competent, instructed and employed independently of any owner of the land, whether that valuer carried on business in the locality where the land is situate or elsewhere;

(b) the purchase price did not exceed the value of the land as stated in the report; and

(c) that the purchase was made under the advice of the valuer expressed in the report.

(3) A trustee may retain as an asset of the trust any land purchased under this section, notwithstanding that no beneficiary under the trust is residing on the land.

(4) Where a trustee is of opinion that it is desirable that a dwelling house which forms part of the trust shall be retained for the use of any beneficiary he may, notwithstanding any trust for conversion contained in the instrument creating the trust, retain the dwelling house and permit the beneficiary to reside therein, upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(5) A trustee purchasing a dwelling house in accordance with the provisions of this section may also purchase therefor such furnishings and fittings as he thinks fit.

Qld. Trustees (Housing Loans) Act of 1967.

23. Powers in relation to housing loans. (1) A trustee who is an approved lender may, unless expressly forbidden by the instrument (if any) creating the trust, for the purpose of making an insurable loan lend on an approved security such amount as the trustee thinks fit, but not exceeding in any case such amount as is the subject of a contract of insurance in respect of the loan entered into by the Corporation pursuant to the provisions of the Commonwealth Housing Loans Insurance Act 1965-1966.

(2) Where a trustee lends money on an approved security in accordance with the provisions of subsection (1) of this section, the trustee is not chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property on which the loan is secured.

(3) In this section the expressions -

(a) approved lender;

(b) approved security;

(c) contract of insurance;

(d) insurable loan;

(e) the Corporation,

have the meanings respectively assigned to them by the Commonwealth Housing Loans Insurance Act 1965-1966.

W.A. s.18; cf. Qld. s.5; N.Z. s.5.

24. Purchase of redeemable stocks at a premium or discount. (1) A trustee having authority to invest in any of the securities mentioned in section twenty-one of this Act may invest in any of those securities notwithstanding that the securities may be redeemable, and that the price is greater or less than the redemption value.

(2) A trustee may retain until redemption any redeemable security that may have been purchased in accordance with the powers of this Act, or of any statute replaced by this Act.

(3) Where any security to which subsection (1) of this section applies is purchased by a trustee, after the commencement of this Act, at a price greater or less than its redemption value, and in terms of the trust the beneficial interest in the income from the security is not vested in the same persons as the beneficial interest in the capital thereof, then -

(a) if the purchase price exceeds the redemption value, the trustee shall recoup to the capital out of which the purchase was made, by rateable instalments from the income derived from the security over the period between the date of purchase and the earliest date on which the security can be repaid or redeemed, the amount of the

difference; and the amount so recouped to capital from time to time shall be deemed to be received as capital repaid;

(b) if the redemption value exceeds the purchase price, the amount of the difference shall be distributable as if it were income accruing from day to day over the period between the date of the purchase and the latest date on which the security can be repaid or redeemed; and the trustee may, by rateable instalments over the period, appropriate or raise out of the capital of the security or out of the capital of other assets subject to the same trusts the amounts required from time to time to be distributed as income; and, if the security is repaid or redeemed before the latest date on which the same can be repaid or redeemed, any remaining balance of the difference shall, on the repayment or redemption, immediately become distributable as if it were income then due and payable.

(4) Where the amount to be recouped to or deducted from capital in any year in accordance with paragraph (a) or (b) of subsection (3) of this section is less than twenty dollars, it shall not be necessary for the trustee to comply with the provisions of that subsection.

W.A. s.21; N.Z. s.9; Vic. s.7; U.K. s.7.

25. Investment in bearer securities. (1) A trustee may invest in or retain securities payable to bearer which, if not so payable, would have been authorised investments; but any securities retained or taken as an investment by a trustee (not being a trustee corporation) shall, until sold, be deposited by him for safe custody and collection of income with a bank.

(2) A direction that investments shall be retained or made in the name of a trustee shall, for the purposes of subsection (1) of this section, be deemed not to be an expression of a contrary intention within the meaning of subsection (1) of section twenty.

(3) A trustee shall not be responsible for any loss incurred by reason of any deposit made pursuant to subsection (1) of this section and any sum payable in respect of any such deposit or the collection of income shall be paid out of the income of the trust property.

W.A. s.20; Vic. s.6; U.K. s.4; N.Z. s.8; Qld. s.8(3).

26. Power to retain investment which has ceased to be authorised. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by this or any other Act.

Division 2 - Invariable Investment Provisions

W.A. s.22; Vic. s.8; N.Z. s.10; cf. U.K. s.8; Qld. s.8.

27. Loans and investments by trustees not chargeable as breaches of trust. (1) A trustee lending money on the security of any property on which he may properly lend or extending the term of any mortgage on which he has lent money shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the Court that -

(a) in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be competent to value the property, being a person instructed and employed independently of any owner of the property, whether that valuer resided or carried on business in the locality where the property is situate or elsewhere;

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

(c) the loan was made under the advice of the valuer expressed in the report.

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

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

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

W.A. s.23; Vic. s.9; N.Z. s.11; U.K. s.9; Qld. s.9.

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

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

W.A. s.24; Vic. s.10; N.S.W. s.20.

29. Release of part of 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 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; and

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

(2) A subsequent purchaser of the released part of any property, or the Registrar of Titles or other person registering or certifying title, shall not be concerned to inquire whether the release was authorised by this section.

W.A. s.25; Vic. s.11 (amended 1959); N.Z. s.12; cf. U.K. s.10.

30. Powers supplementary to powers of investment. (1) A trustee lending money on the security of any property on which he may lawfully lend -

(a) may lend for any period not exceeding ten years from the time when the loan was made; or

(b) may contract that money so lent shall not be called in during any period, not exceeding ten years, from the time when the loan was made.

(2) The terms upon which a loan mentioned in subsection (1) of this section is made shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely, that -

(a) interest shall be paid within a specified time, not exceeding thirty days after every half-yearly or other day on which it becomes due;

(b) the borrower shall maintain and protect the property, and keep all buildings, if any, erected thereon insured against loss or damage by fire and by storm and tempest to the full insurable value thereof; and

(c) if the borrower fails to comply with any term of the mortgage, the whole of the moneys secured by the mortgage shall immediately become due and payable.

(3) Where any securities of a company are subject to a trust, the trustees may -

(a) concur in any scheme or arrangement -

(i) for, or arising out of, the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the company;

(ii) for the sale of all or any part of the property and undertaking of the company to another company;

(iii) for the amalgamation of the company with another company; or

(iv) for the release, modification or variation of any rights, privileges or liabilities attached to the securities or any of them; and

(b) accept or carry out any proposal made in writing by or on behalf of another company for the purchase by that other company of any securities in the first-mentioned company, in consideration of the allotment of securities in that other company, whether with or without any other consideration, where -

(i) the proposal is conditional upon the holders of a proportion (being not less than seventy-five per centum in value) of such of the securities in the firstmentioned company as have not already been acquired by that other company agreeing to deal with those securities in accordance with the proposal; and

(ii) a sufficient number of the holders of the securities in question (including the trustees) agree in writing to deal with the shares in accordance with the proposal,

in like manner as if they were entitled to such securities beneficially, with power to accept any securities or other property of any denomination or description in addition to, or in lieu of, or in exchange for, all or any of the firstmentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith; and may retain any securities or other property accepted as in this paragraph provided for any period for which they could have properly retained the original securities.

(4) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in that company or any other company, the trustees may, as to all or any of those securities -

(a) exercise the right and apply capital moneys subject to the trust in payment of the consideration, and retain the securities subscribed for during any period during which they could properly retain the holding in respect of which the right to subscribe was offered; or

(b) renounce the right; or

(c) assign for the best consideration that can reasonably be obtained (which consideration shall be held as capital money of the trust) the benefit of the right, or the title thereto, to any person, including any beneficiary under the trust,

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

(5) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument (if any) creating the trust.

(6) Where the loan referred to in subsections (1) and (2) of this section is made under the order of the Court, the powers conferred by those subsections apply only if and as far as the Court may by order direct.

PART IV - GENERAL POWERS OF TRUSTEES

cf. S.L.A. s. 53.

31. Application of Part. (1) Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

cf. W.A. s. 28; Vic. s. 14; N.S.W. s. 27.

(2) The powers conferred on a trustee by this Part are exercisable by him notwithstanding any lapse of time, or that all the beneficiaries are absolutely entitled to the trust property and are not under a disability, except so far as such powers are expressly revoked by all such beneficiaries by notice in writing to the trustee.

(3) A statutory trustee shall not, except with the sanction of the Court, exercise any of the powers conferred by subsection (1) of section thirty-two or by section forty-five.

W.A. s. 27; N.Z. s. 14; cf. S.L.A. ss. 10-26; T.C. s. 28(1).

32. Powers to sell, exchange, partition, postpone, lease, etc. (1) Subject to the provisions of this section, every trustee, in respect of any trust property, may -

(a) sell the property or any part of the property;

(b) dispose of the property by way of exchange for other property in the State of a like nature and a like or better tenure, or, where the property consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition;

(c) postpone the sale, calling in, and conversion of any property which he has a duty to sell, other than property which is of a wasting, speculative or reversionary nature;

(d) let or sublet the property at a reasonable rent for any term not exceeding one year, or from year to year, or for a weekly, monthly, or other like tenancy or at will; or enter into any sharefarming agreement with respect to the property on reasonable terms for any period not exceeding one year; and renew any such lease or tenancy or sharefarming agreement;

(e) grant a lease or sublease of the property for any term not exceeding -

(i) in the case of a building lease, thirty years; or

(ii) in the case of any other lease (including a mining lease), twenty-one years;

to take effect in possession within one year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift, any of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be aportioned over the term of the lease or sublease; or

(f) at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.

[cf. Vic. s.19 (1)(g).]

(2) Any trustee may, on such conditions as he thinks proper, rescind, cancel, modify or vary any contract or agreement for the sale and purchase of any land, or agree to do so, or compromise with or make allowances to any person with whom such a contract or agreement has been made, or who is the assignee thereof in respect of any unpaid purchase money secured on mortgage or otherwise; and without prejudice to the generality of this subsection, a trustee may, by writing, waive or vary any right exercisable by him that arises from a failure to comply at or within the proper time with any term of any agreement for sale, mortgage, lease, or other contract.

(3) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may -

(a) grant to the lessee or sublessee a right of renewal for one or more terms, at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original sublease, but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term that could be granted in the exercise of the power;

(b) grant a lease with an optional or compulsory purchasing clause; or

(c) grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by him in, upon or about the property which is leased or subleased.

cf. W.A. s.27(5); U.K. s.25; N.S.W. s.27B; N.Z. s.14(7); Vic. s.14(6).

(4) Where there is a power (whether statutory or otherwise) to postpone the sale of any land or authorised investment which a trustee has a duty to sell by reason only of a trust or direction for sale, then, subject to any express direction to the contrary in the instrument (if any) creating the trust, the trustee shall not be in any way liable merely for postponing the sale in the exercise of his discretion for an indefinite and unlimited period, whether or not that period exceeds the period during which the trust or direction for sale remains valid; nor shall a purchaser of the land or authorised investment be in any case concerned with any directions respecting a sale; but nothing in this subsection applies to any property of a wasting or speculative nature.

W.A. s.30 (as amended 1968); N.Z. s.15.

33. Miscellaneous powers in respect of property. (1) Every trustee, in respect of any trust property, may -

(a) expend money (including capital money) subject to the same trusts for the repair, maintenance, upkeep or renovation of the property, whether or not the work is necessary for the purpose of salvage of the property;

(b) expend money (including capital money) subject to the same trusts, but not, except with the sanction of the Court, exceeding ten thousand dollars in the improvement or development of the property;

W.A. s.26; N.S.W. s.23.

(c) expend money (including capital money) subject to the same trusts, in payment of calls on shares subject to those trusts;.

(d) pay out of money (including capital money) subject to the same trusts any rates, premiums, taxes, assessments, insurance premiums and other outgoings in respect of the property;

(e) where the property is land, subdivide or apply for approval to subdivide the land into blocks and for that purpose construct and dedicate all such roads, streets, access ways, service lanes and footpaths and make all such reserves, and do all such other things and pay all such money (including capital money), as he thinks necessary or as are required by, or under, any Act or by-law relating to subdivisions;

(f) pay out of money (including capital money) subject to the same trusts such sum as he thinks reasonable by way of expenditure upon or contribution toward the construction and maintenance of such roads, streets, access ways, service lanes, and footpaths, and such sewerage, water, electricity, drainage and other works as are in the opinion of the trustee likely to be beneficial to the property, notwithstanding that they are intended to be constructed wholly or partly on land not subject to the same trusts;

(g) subject to this Act and to any direction of the Court, apportion any payment or expenditure made in pursuance of the preceding paragraphs of this subsection between capital and income or otherwise among the persons entitled thereto in such manner as he considers equitable, with power, where the whole or part of the payment or expenditure is made out of capital moneys, to recoup capital from subsequent income, if that course would be equitable in all the circumstances;

(h) grant easements and profts à prendre and enter into party wall agreements and agreements that relate to fencing, and execute all necessary documents to give effect thereto;

(i) as mortgagor or mortgagee, agree to the renewal, extension or variation of the mortgage for such period and on such terms and conditions as he thinks fit; but -

(i) the powers conferred by this paragraph may be exercised by a trustee as mortgagor for the purpose of raising additional money on the security of a mortgage of any property, where the trustee would have power under section forty-five of this Act to raise money by a mortgage of the property, and not otherwise;

(ii) nothing in this paragraph authorises any trustee to advance money on the security of any mortgage that would not be an authorised investment in respect of the amount advanced;

(iii) any variation of a mortgage that would require the trustee to release part of the security shall comply with the requirements of section twenty-nine of this Act; and

(iv) the powers conferred by this paragraph shall not be exercised in relation to a mortgage made under the powers conferred by section thirty of this Act, so as to exclude or vary any of the provisions inserted in the mortgage pursuant to subsection (2) of that section;

(j) make such inquiries, by way of advertisement or otherwise, as he thinks necessary for the purpose of ascertaining the next-of-kin or beneficiaries;

(k) where the property includes a life policy and there is no money or insufficient money available for the payment of premiums on the policy, surrender the policy for money or accept instead of the policy a fully paid up policy or vary the terms of the policy in such manner as the trustee thinks fit;

(as amended by W.A. No. 18 of 1968).

(l) appropriate any part of the property in or towards satisfaction of any legacy payable thereout or in or towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property in accordance with section fifty-one of this Act; but -

(i) the appropriation shall not be made so as to affect adversely any specific gift; and

(ii) before any such appropriation is effectual, notice thereof shall be given to all persons not under a disability who are interested in the appropriation, and to the parent or guardian of any infant who is interested in the appropriation, and to the person having the care and management of the estate of any person who is not of full mental capacity, and any such person may within one month after receipt of the notice or, upon his application to the Court within that month, within

such extended period as the Court may allow, apply to the Court to vary the appropriation, and the appropriation shall be conclusive save as varied by the Court;

(m) where provision is made in any instrument creating a trust for payment of an annuity or other periodic payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust property or upon any part thereof, set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of appropriation to provide out of the income thereof the amount required to pay the annuity or periodic payment, and so that after the appropriation shall have been made -

(i) the annuitant shall have the same right of recourse to the capital and income of the appropriated sum as he would have had against the trust property if no appropriation had been made; and

(ii) the trustee may forthwith distribute the residue of the trust property and the income thereof (which residue and income shall no longer be liable for the annuity) in accordance with the trusts declared of and concerning the same; and

(n) do or omit all acts and things, and execute all instruments necessary to carry into effect the powers and authorities given by this Act or by or under the instrument creating the trust.

(2) Nothing in paragraph (l) of subsection (1) of this section shall be read as requiring a trustee to give to himself, in some other capacity, notice of an appropriation; but, where a trustee would, but for this subsection, be obliged to give to himself such a notice, the appropriation is not effectual until it has been approved by all the beneficiaries being persons not under a disability, or by the Court on the ex parte application of the trustee or otherwise.

(3) Any notice which is to be served in accordance with paragraph (l) of subsection (1) of this section may be served -

(a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at his usual or last known place of abode or business; or

(b) in such other manner as may be directed by the Court.

(4) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

(5) Where a trustee desires to distribute, under the provisions of subparagraph (ii) of paragraph (m) of subsection (1) of this section, any land subject to the provisions of The Real Property Acts, 1861 to 1963, or any other Act, he shall in writing notify the Registrar or other person (if any) having the duty or function of registering or recording dealings under such Act, that the land is, by reason of an

appropriation made in pursuance of the said sub-paragraph, distributable, and the Registrar of such other person shall not be concerned to make any inquiry as to the sufficiency of the appropriated sum.

W.A. s.31; N.Z. s.16; Vic. s.13; N.S.W. s.26; U.K. s.12; Qld. s.14.

34. Power of trustee to sell by auction, etc. (1) A trustee may sell or concur with any other person in selling all or any part of the trust property, either subject to prior encumbrances or not, and either together or in lots, by public auction, by public tender or by private contract, subject to any such conditions respecting title or evidence of title or other matters as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical or made in any other way; and also includes a trust or power to sell or dispose of any building, fixture, timber or other thing affixed to the soil apart and separately from the land itself.

Vic. s.13(4).

(3) If a trustee joins with any other person in selling trust property and other property, the purchase money shall be apportioned in or before the contract of sale, and a separate receipt shall be given by the trustee for the apportioned share; but a contravention of this subsection does not invalidate and shall not be deemed to have invalidated any instrument intended to affect or evidence the title to the trust property, and no person being a purchaser, lessee, mortgagee, or other person who, in good faith and for valuable consideration, acquires the trust property or an interest in it or a charge over it, and neither the Registrar of Titles nor any other person registering or certifying title, shall be affected by notice of, or be concerned to inquire whether there has been, a contravention of this subsection.

W.A. s.32; Vic. s.15; N.Z. s.18; U.K. s.13; N.S.W. s.30; Qld. s.15.

35. Power to sell subject to depreciatory conditions. (1) A sale by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) A sale by a trustee shall not, after the execution of the conveyance or transfer, be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) A purchaser, upon any sale by a trustee, shall not be at liberty to make any objection against the title upon any of the grounds in this section mentioned.

W.A. s.33; cf. Vic. s.16.

36. Mortgage on sale of land. (1) Where a trustee sells land for an estate in fee simple, the trustee may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds of the purchase money shall be secured by a first legal or first statutory mortgage of the land sold, with or without the security of any other property, and the mortgage shall, if any buildings or other improvements are comprised in the mortgage, contain a covenant by the mortgagor to keep them insured against loss or damage by fire and by storm and tempest to their full insurable value.

(2) The trustee shall not be bound to obtain any report as to the value of the land or other property to be comprised in such a mortgage as is mentioned in subsection (1) of this section, or any advice as to the making of the loan, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the mortgage.

(3) Where the sale referred to in subsection (1) of this section is made under the order of the Court, the powers conferred by that subsection shall apply only if and so far as the Court may by order direct.

W.A. s.34; Vic. s.17; N.Z. s.17; N.S.W. s.28.

37. Deferred payment on sale of property. (1) A sale of property by a trustee, in exercise of any power vested in him in that behalf by the instrument creating the trust or by or under this Act or any other enactment, may be on terms of deferred payment.

(2) The terms of deferred payment may provide that the purchase money and interest (if any) shall be paid by instalments.

(3) The terms upon which property is sold shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely that -

(a) the part of the purchase money to be paid by deposit shall not be less than the sum which a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case shall not be less than one-tenth of the purchase money;

(b) the balance of the purchase money shall be payable by such instalments and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid at such rate as a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case the whole purchase money shall be payable within a period not exceeding ten years from the date of sale;

(c) if any instalment or interest or part thereof is in arrear and unpaid for six months, or for such less period as may be specified, the whole of the purchase money shall become due and payable; and

(d) the purchaser shall maintain and protect the property, and, in the case of land, keep all buildings, (if any) thereon insured against loss or damage by fire and by storm and tempest to their full insurable value.

(4) Notwithstanding that the property has been sold on terms of deferred payment, the trustee may, at any time after one-third of the purchase money has been paid, convey the property and take a mortgage to secure payment of the balance of the purchase money and interest, with or without the security of any other property.

(5) Whether the sale is made under the order of the Court or otherwise, the Court may make such order as it thinks fit as to the terms of deferred payment.

(6) A trustee selling property on terms authorised by this section or by any order of the Court shall not be affected by section twenty-one or section twenty-seven of this Act in respect of so much of the purchase money as is payable under an agreement for sale or is secured by a mortgage, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the agreement or mortgage.

(7) For the purposes of any consent or direction required by the instrument (if any) creating the trust or by statute, a trustee selling property on terms of deferred payment shall be deemed not to be lending money or investing trust funds.

W.A. s. 35; N.S.W. s. 35.

38. Surrender of onerous leases or property. (1) Where a leasehold is vested in a trustee and the property is subject to onerous covenants of such a nature that it would not be in the interests of the beneficiaries to retain the property, the trustee may surrender, or concur in surrendering, the lease; and the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the covenants were not of such a nature, if the trustee has acted bona fide and on the advice of a registered valuer, whom he reasonably believed to be competent, instructed and employed independently of the lessor, whether the valuer carried on business in the locality where the property is situate or elsewhere.

(2) Where a freehold is vested in a trustee and the property is of so onerous a nature that it would not be in the interests of the beneficiaries to retain the property, if the Crown agrees to accept the surrender of the freehold, the trustee may surrender, or concur in surrendering, it to the Crown; and the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the property was not of such a nature, if the trustee has acted bona fide and on the advice of a registered valuer, whom he reasonably believed to be competent, whether that valuer carried on business in the locality where the property is situate or elsewhere.

(3) A subsequent purchaser or the Registrar of Titles or other person registering or certifying title shall not be concerned to inquire whether a surrender was authorised by this section.

W.A. s. 36; cf. N.S.W. s. 37; Qld. s. 18.

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

(2) A trustee obtaining a renewal of a lease under the powers conferred by this section or otherwise may pay or apply capital money subject to the trust, for the purpose of obtaining the renewal.

W.A. s. 37; cf. N.S.W. s. 32A.

40. Power to purchase equity of redemption in lieu of foreclosure. A trustee may, in lieu of proceeding to foreclosure, purchase the equity of redemption of land the subject of a mortgage held by the trustee under which default has been made where the moneys expended in that purchase are subject to the same trusts as the mortgage debt; but 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.

W.A. s. 39; cf. N.S.W. s. 34.

41. Release of equity of redemption in discharge of mortgage debt. (1) Where an equity of redemption is vested in a trustee and the mortgaged property is not of greater value than the amount of the mortgage debt, the trustee may release the equity of redemption to the mortgagee in discharge of the mortgage debt or part thereof; and the trustee shall not be chargeable with breach of trust nor shall the release be impeached by any beneficiary upon the ground only that the mortgaged property was of greater value than the amount of the mortgage debt or of the part thereof discharged, if the trustee has

acted bona fide and on the advice of a registered valuer, whom he reasonably believed to be competent, instructed and employed independently of the mortgagee, whether the valuer carried on business in the locality where the property is situate or elsewhere.

(2) A subsequent purchaser or the Registrar of Titles or other person registering or certifying title shall not be concerned to inquire whether a release was authorised by this section.

W.A. s.40; cf. N.S.W. s.39A.

42. Application of income by trustee-mortgagee in possession. (1) Where a trustee is entitled, whether severally or as a co-mortgagee, to a debt secured by a mortgage of land in trust as to the whole or part of that debt for persons by way of succession, and the trustee is at the date of commencement of this Act, or at any time after that date becomes, mortgagee in possession of the mortgaged land, the trustee shall apply the net income of the mortgaged land received by him after that date or after he becomes mortgagee in possession, -

(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 on the mortgaged property; and

(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,

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

(2) The rents, taxes, outgoings, premiums, costs, annual sums, payments and interest to be discharged, kept down and paid, pursuant to subsection (1) of this section, shall be those accruing due -

(a) after the date of the commencement of this Act, where the trustee is in possession of the mortgaged land at that date; and

(b) after the date of possession by the trustee, where the entry into possession is after the date of commencement of this Act;

but if at the date of commencement of this Act, 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 paragraph (a), (b) or (c) of subsection (1) of this section were or are due and unpaid, and such of those rents, taxes, rates, outgoings, annual sums, payments, and premiums as are periodic payments were payable wholly or in part in respect of any period subsequent to the date of commencement or to the date of possession, as the case may be, then the lastmentioned 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 paragraph (a), (b) and (c) of subsection (1) of this section as would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt shall, as between

the persons respectively entitled to the income and corpus of the mortgage debt, be deemed to be arrears of interest payable without interest thereon 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 thinks it necessary so to do, apply income of the mortgaged property received by him after the date of commencement of this Act 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 (2) of this section; but the person entitled to the interest on the mortgage debt shall be entitled to recoupment out of the capital of the mortgage debt of all payments made by the trustee under the authority conferred by this subsection.

Qld. s.19; cf. W.A. s.41; U.K. s.14; Vic. s.18.

43. Power of trustee to give receipts. The receipt in writing of a trustee or of any person thereto authorised by him in writing, or, where there are several trustees, of any person or of any one or more of such trustees thereto respectively authorised by the trustees in writing for any money, securities, or other personal property or effects, payable, transferable, or deliverable to him or them, as the case may be, under any trust or power is a sufficient discharge for the same, and effectually exonerates the person paying, transferring, or delivering the same from seeing to the application of being answerable for any loss or misapplication thereof.

W.A. s.42; cf. Vic. s.19; N.Z. s.20; U.K. s.15; N.S.W. s.40; Qld. s.20.

44. Power to compound liabilities. A trustee may, if and as he thinks fit, -

(a) accept any property, real or personal, before the time at which it is made transferable or payable; or

(b) sever and apportion any blended trust funds or property; or

(c) pay or allow any debt or claim on any evidence that he thinks sufficient; or

(d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or

(e) allow any time for payment of any debt; or

(f) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust or to the trust property,

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith.

W.A. s.43; N.Z. s.21; Vic. s.20; U.K. s.16; N.S.W. s.38.

45. Power to raise money by sale or mortgage. Where a trustee is authorised by the instrument (if any) creating the trust or by or under this Act or any other Act or by law to expend, pay or apply capital money subject to the trust for any purpose or in any manner, he has and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession; and where a trustee, in the exercise of his powers in that behalf, purchases any

property for the trust, he has and shall be deemed always to have had power to make the purchase on terms of deferred payment or on mortgage of that property.

cf. W.A. s.44; N.Z. s.22; Vic. s.21; U.K. s.17; N.S.W. s.39.

46. Protection to purchasers and mortgagees dealing with trustees. A purchaser or mortgagee paying or advancing money to the trustee on a sale or mortgage of trust property shall not be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof, or that the trustee has power to effect such sale or mortgage.

cf. N.S.W. s.41; U.K. s.19; Vic. s.23; W.A. s.46; Qld. s.17.

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

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

(3) Subject to any direction expressed in the instrument (if any) creating the trust or to any direction of the Court, the trustee may, as he thinks fit, pay the premiums out of:-

(a) the income of the property concerned; or

(b) the income of any other property subject to the same trusts; or

(c) any capital money subject to the same trusts; or

(d) any one or more of (a), (b) or (c) in such proportions as the trustee considers equitable.

cf. N.S.W. s.42; W.A. s.47; Vic. s.24; U.K. s.20.

48. Application of insurance money. (1) Where a policy of insurance against the loss or damage of any property subject to a trust, whether by fire or otherwise, has been kept up under any trust in that behalf, or under any power statutory or otherwise, or in performance of any obligation statutory or otherwise, the money receivable by a trustee under the policy shall be capital money for the purposes of the trust.

(2) The money receivable shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(3) The money receivable or any part thereof may also be applied by the trustee or, if in Court, under the direction of the Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged.

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

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

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

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

(8) This section applies to trusts and to policies created or effected either before or after the commencement of this Act, but only to money received after the commencement of this Act.

W.A. s.48; N.Z. s.26; U.K. s.21; Vic. s.25(1); N.S.W. s.50.

49. Deposit of documents for safe custody. Subject to the provisions of section twenty-five of this Act, a trustee may deposit any document held by him relating to the trust, or to the trust property, with any bank or corporation whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of any such deposit shall be paid out of the income of the trust property, and so far as there is no available income out of the capital of the trust property.

W.A. s.49; N.Z. s.27; Vic. s.26; N.S.W. s.40; U.K. s.22.

50. Reversionary interests. (1) Where trust property includes any share or interest in property not vested in the trustee, or the proceeds of sale of any such property, or any other thing in action, the trustee, on its or their falling into possession or becoming payable or transferable, may -

(a) agree or ascertain the amount or value thereof or any part thereof in such manner as he thinks fit;

(b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value that he may think fit, any authorised investments;

(c) allow any deductions for duties, costs, charges, and expenses that he thinks proper or reasonable; and

(d) execute any release in respect thereof, so as effectually to discharge all accountable parties from all liability in respect of any matter coming within the scope of the release,

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

(2) The trustee shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission -

(a) to give any notice in respect of, or apply for any charging or other like order upon, any securities or other property out of or in which the share or interest or other thing in action mentioned in subsection (1) of this section is derived, payable or charged; or

(b) to take any proceedings on account of any act, default or neglect on the part of the persons in whom the securities or other property mentioned in paragraph (a) of this subsection of any of them or any part of them are for the time being, or had at any time been, vested,

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to his satisfaction for payment of the costs of any proceedings required to be taken.

(3) Nothing in subsection (2) of this section relieves the trustee of the obligation to get in and obtain payment or transfer of the share or interest or other thing in action upon its falling into possession.

W.A. s.50; N.Z. s.28; Vic. s.26; N.S.W. s.52; U.K. s.22.

51. Valuations. (1) A trustee may, for the purpose of giving effect to the trust, or any of the provisions of the instrument (if any) creating the trust or of this Act or any other Act from time to time ascertain and fix the value of any trust property, or of any property which he is authorised to purchase or otherwise acquire, in such manner as he thinks proper; and where the trustee is not personally qualified to ascertain the value of any property he shall consult a duly qualified person (whether employed by him or not) as to that value; but the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult.

(2) Any valuation made by the trustee in good faith under this section is binding on all persons beneficially interested under the trust.

W.A. s.51; Vic. s.27; N.S.W. s.51; U.K. s.22(4).

52. Audit. (1) A trustee may, in his absolute discretion, from time to time, cause the accounts of the trust property to be examined or audited by a public accountant, and shall for that purpose produce such vouchers and give such information to that person as he may require.

(2) The costs of the examination or audit, including the fee of the person making the examination or audit, shall be charged against the capital or income of the trust property, or partly in one way and partly in the other, as the trustee may in his absolute discretion think fit, but, in default of any direction by the trustee to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

(3) Where the trustee or one of the trustees is the Public Curator or a trustee corporation, nothing in this section authorises, except in the case of a business forming part of the trust property, any costs or fee to be paid out of, or borne by, the capital or income of the trust property, unless the Court approves of the costs or fee being so paid out or borne.

W.A. s.52; N.Z. s.30; U.K. s.24; N.S.W. s.56; Vic. s.29.

53. Power to concur with others. Where trust property includes an undivided share in any property, the trustee may (without prejudice to any trust or power in relation to the entirety of the property) execute or exercise any trust or power vested in him in relation to that share in conjunction with the persons entitled to, or having power in that behalf over, the other share or shares, and notwithstanding that the trustee or any one or more of several trustees may be entitled to or interested in any such share, either in his or their own right or in a fiduciary capacity.

W.A. s.53; N.Z. s.29; cf. Vic. s.28; N.S.W. ss.53 and 55; U.K. s.23.

54. Power to employ agents. (1) A trustee may, instead of acting personally, employ and pay an agent, whether a solicitor, accountant, bank, trustee corporation, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property, including the receipt and payment of money, and the keeping and audit of trust accounts, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent employed in good faith and without negligence.

(2) A trustee may appoint any person to act as his agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property real or personal, movable or immovable, subject to the trust in any place outside the State, or executing or exercising any discretion or trust or power vested in him in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions, as he may think fit,

including a power to appoint substitutes, and shall not, by reason only of his having made any such appointment, be responsible for any loss arising thereby.

(3) Without limiting the generality of the powers conferred by subsection (1) and (2) of this section, a trustee may -

(a) appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed or instrument having in the body thereof or endorsed thereon a receipt for the money or valuable consideration or property, the deed or instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration; or

(b) appoint a bank or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the bank or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee,

and the production, by the solicitor, of any such deed or instrument as is mentioned in paragraph (a) of this subsection shall have the same validity and effect as if the person appointing the solicitor had not been a trustee.

(4) A trustee shall not be chargeable with a breach of trust, by reason only of his having made, or concurred in making, any appointment such as is mentioned in subsection (3) of this section; but nothing in that subsection exempts a trustee from any liability that he would have incurred if this Act and any enactment replaced by this Act had not been passed, where he permits any money, valuable consideration or property therein mentioned to remain in the hands or under the control of the bank or solicitor for a longer period than is reasonably necessary to enable the bank or solicitor, as the case may be, to pay or transfer it to the trustee.

(5) Subsections (3) and (4) of this section apply whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

V.A. s.101; N.S.W. s.54; Vic. s.25(2); Imp. Qld. 1906, s.6.

55. Protection of bankers. (1) Where there are two or more trustees of a trust and the trustees by writing under their hands authorise a banker -

(a) to pay bills of exchange drawn upon the banking account of the trustees by the trustee or trustees named in that behalf in the authority; or

(b) to recognise as a valid indorsement upon any bill of exchange payable to the order of the trustees the indorsement thereon by the trustee or trustees named in that behalf in the authority; or

(c) to pay money out of any account of the trust in a savings bank, on presentation of withdrawal forms signed in the manner specified in the authority,

the banker acting in pursuance of that authority shall not be deemed privy to a breach of trust on the ground only of notice that the persons

giving the authority were trustees, or that the instrument (if any) by which the trust was created did not contain any express power to give such an authority.

(2) The protection afforded to bankers by subsection (1) of this section does not apply in the case of anything done by a banker, in pursuance of an authority given under that subsection, after the banker has received notice in writing of the revocation, by death or otherwise, of the authority.

(3) This section does not affect any question of the liability of any trustee for breach of trust in authorising a banker as provided by subsection (1) thereof.

(4) Nothing in this section or in any rule of law prevents trustees opening a bank account named as an imprest account and authorising any one or more of their number or any other person or persons to operate upon the imprest account.

(5) In this section "bill of exchange" has the same meaning as in the Bills of Exchange Act 1909-1971 of the Commonwealth, and any Act passed in substitution for or amendment thereof.

cf. W.A. s.54; N.Z. s.31; Vic. s.30; U.K. s.25; N.S.W. s.64; Qld. 1906, s.4.

56. Power to delegate trusts. (1) A trustee who for the time being is out of the State or is about to depart therefrom, or is a member of Her Majesty's forces, or who is, or may be about to become, by reason of physical infirmity, temporarily incapable of performing all his duties as a trustee may, subject to the provisions of this section, and notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person resident in the State the execution or exercise during his absence from the State or during his incapacity, as the case may be, of all or any trusts, powers, authorities, and discretions vested in him as such trustee, whether alone or jointly with any other person or persons; but a person being the only other co-trustee and not being a trustee corporation shall not be appointed to be an attorney under this subsection.

(2) Where any delegation has under this section been duly made to and accepted by any person and is for the time being in operation, that person has, within the scope of the delegation, the same trusts, powers, authorities, discretions, liabilities, and responsibilities (except the power of delegation conferred by this section) as he would have if he were then the trustee.

(3) Every trustee shall be liable for the acts and defaults of every such delegate as if they were his own acts and defaults.

(4) All jurisdictions and powers of any Court apply to the donee of a power of attorney given under this section in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates, as if the donee were acting in relation to the trust or estate in the same capacity as the donor of the power.

(5) A power of attorney given under this section does not come into operation unless and until the donor is out of the State or is incapable of performing all his duties as a trustee, and is revoked by his return or by his recovery of that capacity, as the case may be.

(6) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee, is, notwithstanding that the power has never come into operation or has been revoked, whether by the act of the donor of the power or by operation of law, as valid and effectual as if the power

had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of the revocation of the power.

(7) A statutory declaration by the donee of a power of attorney given under this section relating to any trust or estate that the power has come into operation, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, is, in favour of a person dealing with the donee of the power, conclusive evidence of that fact.

(8) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not affect with notice of the trust any person dealing in good faith with the donee.

(9) Where it is intended that the donee of a power of attorney given under this section shall be entitled to transfer, or otherwise deal with, land under the operation of The Real Property Acts, 1861 to 1963, the power of attorney shall be in the form, and executed and attested in the manner prescribed by those Acts.

cf. W.A. s.55; N.Z. s.32.

57. Power to carry on business. (1) Subject to the provisions of any other Act and of the instrument (if any) creating the trust, where at the commencement of the trust the trust property or any part of it was being used by the settlor in carrying on any business, whether alone or in partnership, the trustee may continue to carry on that business for any one or more of the following periods, namely -

(a) two years from the commencement of the trust;

(b) such period as may be necessary for the winding up of the business; or

(c) such further period or periods as the Court may approve.

(2) In the exercise of the powers conferred by this section or by the instrument (if any) creating the trust, a trustee may -

(a) employ any part of the trust property which is subject to the same trusts;

(b) from time to time increase or diminish the part of the trust property employed as provided by paragraph (a) of this subsection;

(c) purchase stock, machinery, implements, and chattels for the purpose of the business referred to in subsection (1) of this section;

(d) employ such managers, agents, servants, clerks, workmen and others as he thinks fit;

(e) at any time enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the commencement of the trust or at any time thereafter and notwithstanding that the trustee was a partner of the settlor in his own right; and

(f) enter into share-farming agreements.

(3) Application to the Court for leave to carry on a business may be made by the trustee or any person beneficially interested in the estate at any time, whether the business has been carried on before or after the commencement of this Act and whether or not any previous authority to carry on the business has expired; and the Court may make such an order, and may make such order retrospective to any particular date, or may order that the business be not carried on, or be carried on subject to conditions, or may make such other order as, in the circumstances, it thinks fit.

(4) Nothing in this section affects any other authority to do the acts thereby authorised to be done.

(5) Where a trustee is in any manner interested or concerned in a trade or business, he may make such subscriptions as it would be prudent for him to make, if he were acting for himself, out of the income of the assets affected, to any fund created for objects or purposes in support of any trade or business of a like nature and subscribed to by other persons engaged in a like trade or business.

W.A. s.56; cf. N.Z. s.33.

58. Power to convert business into a company. (1) Subject to the provisions of the instrument (if any) creating the trust, a trustee may at any time, at the expense of the trust property, convert or join in converting any business into a company limited by shares in such manner as he thinks fit; and may, at the like expense, promote and assist in promoting a company for taking over the business; and may sell or transfer the business and the capital and assets and goodwill thereof, or any part thereof, to the company, or to any company having for its objects the purchase of such a business, in consideration, in either case, wholly or in part of ordinary or preference shares wholly or partially paid up of any such company, or wholly or in part of debentures, debenture stock, or bonds of any such company, and as to the balance (if any) in cash payable immediately, or by any instalments with or without security.

(2) A trustee may retain as an authorised investment of the trust any shares, debentures, debenture stock or bonds received by him in consequence of the exercise by him of any power conferred by sub-section (1) of this section.

W.A. s.57; N.Z. s.33A (1960 Amendment).

59. Trustee may sue himself in a different capacity. Notwithstanding any rule of law or practice to the contrary, a trustee of any property in that capacity may sue, and be sued by, himself in any other capacity whatsoever, including his personal capacity; but in every such case the trustee shall obtain the directions of the Court in which the proceedings are taken as to the manner in which differing interests are to be represented.

PART V - MAINTENANCE, ADVANCEMENT AND PROTECTIVE TRUSTS

60. Application of Part. The provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

cf. W.A. s.58; Vic. s.37; U.K. s.31; N.S.W. s.43; Qld. s.50.

61. Power to apply income for maintenance, etc., and to accumulate surplus income during a minority. (1) When any property is held by trustees in trust, whether absolutely or contingently for a beneficiary who is an infant, the trustee may, at his sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.

(2) During the infancy of any such person, if his interest so long continues, the trustee shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows:-

(a) if any such person -

(i) attains full age, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(ii) on attaining full age or on marriage under that age becomes entitled to the property from which income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest,

the trustee shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

(b) in any other case the trustee shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes;

but the trustee may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) Where any property is held by a trustee in trust for a beneficiary of full age who has a contingent interest in that property, the trustee may, at his sole discretion, pay to such beneficiary or otherwise apply for or towards his maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof.

(4) This section shall apply in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of Court to the contrary) be four dollars per centum per annum:

Provided that where in the case of a contingent interest the limitation or trust would, but for the operation of a protective trust (whether created or statutory) carry the intermediate income of the property, that limitation or trust shall for the purposes of this sub-section be deemed notwithstanding the protective trust to carry the intermediate income.

(5) This section applies to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representative absolutely.

(6) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

W.A. s.59; cf. Vic. s.38; N.S.W. s.44; U.K. s.32; Qld. s.49.

62. Power to apply capital for advancement, etc. (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee, in such manner as he in his absolute discretion thinks fit, may from time to time out of that capital pay or apply for the maintenance, education (including past maintenance or education), advancement or benefit of that person, an amount not exceeding in all $2000 or half that capital (whichever is the greater) or with the consent of the Court an amount greater than that amount.

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

(3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or in reversion.

(4) Any money so paid or applied shall be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.

(5) No payment or application pursuant to this section shall be made so as to prejudice any person entitled to any prior life or other interest whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application, or unless the Court, on the application of the trustee, so orders.

(6) For the purposes of this section the trustee may raise money by sale, mortgage or exchange of the trust property.

W.A. s.60; N.Z. Amending Act 1960, s.7.

63. Conditional advances for maintenance, etc. (1) Where a power to pay or apply any property for the maintenance, education, advancement, or benefit of any person, or for any one or more of those purposes, is vested in a trustee, the trustee when exercising the power shall have authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise: Provided that at any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

(2) In determining the amount or value of the property which a trustee who has imposed such a condition may pay or apply in exercise of the power, any money repaid to the trustee or recovered by him shall be deemed not to have been so paid or applied by the trustee.

(3) Nothing in this section shall impose upon a trustee any obligation to impose any such condition; and a trustee, when imposing any condition as to giving security as aforesaid, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).

(4) A trustee shall not be liable for any loss which may be incurred in respect of any money that is paid or applied as aforesaid, whether the loss arises through failure to take security, or through the security being insufficient, or through failure to take action for its protection, or through the release or abandonment of the security without payment, or from any other cause.

cf. W.A. s.61; Vic. s.39; U.K. s.33; N.S.W. s.45; N.Z. s.42.

64. Protective trusts. (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:-

(a) upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

(b) if the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance, education (including past maintenance or education), advancement or benefit, of all of any one or more exclusively of the other or others of the following persons (that is to say) -

(i) the principal beneficiary and his or her wife or husband (if any), and his or her issue (if any); or

(ii) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund (if any), or arrears of the annuity, as the case may be -

as the trustee in his absolute discretion, without being liable to account for the exercise of such discretion, thinks fit.

(2) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

PART VI - INDEMNITIES & PROTECTION OF TRUSTEES ETC.

65. Application of Part. Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

cf. N.I. s.27; U.K. s.26; Vic. s.32; W.A. s.62; N.Z. s.34; Qld. s.21.

66. Protection against liability in respect of rents and covenants. (1) Where a trustee who is for any reason liable for -

(a) any rent, covenant or agreement reserved by or contained in any lease; or

(b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or

(c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs -

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

(i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or as the case may be, the trust estate other than the fund (if any) set apart as aforesaid to or amongst the persons entitled thereto without appropriating any part, or any further part (as the case may be) of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;

(ii) notwithstanding such distribution he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

(2) This section shall operate without prejudice to the right of the lessor or grantor or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and shall apply notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust.

(3) In this section "lease" includes an under-lease and an agreement for a lease or under-lease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; "grant" applies to a grant whether the rent is created by limitation, grant, reservation or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant; "lessee" and "grantee" include persons respectively deriving title under them.

cf. Vic. s. 33; U.K. s. 27; W.A. ss. 63, 66.

67. Protection of trustees by means of advertisements. (1) With a view to the distribution of any trust property or estate a trustee or personal representative may give notice by advertisement in:-

(a) the Gazette; and

(b) a newspaper published in Brisbane, Rockhampton or Townsville; and

(c) a newspaper circulating in the district in which is situate any land to which the notice relates; and

(d) in the case of the administration of the estate of a deceased person, a newspaper circulating in the district where the deceased resided and, if he carried on a business, in the district where he carried on that business,

and such other notices as would be directed by the Court to be given in an action for administration, requiring any person having any claim, whether as creditor or beneficiary or otherwise, to send particulars of his claim not later than the date fixed in the notice, being a date at least six weeks after the date of publication of the notice.

(2) Notice by advertisement shall be sufficient if given in the form specified in the Second Schedule to this Act, or to the like effect.

(3) After the date fixed by the last of the notices to be published the trustee or personal representative may distribute the trust property or estate having regard only to the claims, whether formal or not, of which he has notice at the time of the distribution; and he shall not, as respects any trust property or estate so distributed, be liable to any person of whose claim he had no notice at the time of the distribution.

(4) Nothing in this section -

(a) prejudices the right of any person to enforce (subject to the provisions of section one hundred and nine of this Act) any remedy in respect of his claim against a person to whom a distribution of any trust property or estate has been made; or

(b) relieves the trustee or personal representative of any obligation to make searches or obtain certificates of search similar to those which an intending purchaser would be advised to make or obtain.

W.A. ss. 64, 67; N.Z. s.75 (amended 1960).

68. Barring of claims. (1) Where a trustee wishes to reject a claim (not being a claim in respect of which any insurance is on foot, being insurance required by any Act) which has been made, or which he has reason to believe may be made -

(a) to or against the estate or property which he is administering; or

(b) against the trustee personally, by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property which he is administering,

the trustee may serve upon the claimant or the person who may become a claimant a notice calling upon him, within a period of six months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

(2) At the expiration of the period stipulated in a notice served under subsection (1) of this section, the trustee may apply to the Court for an order under subsection (3) of this section, and shall serve a copy of the application on the person concerned.

(3) Where, on the hearing of an application made under subsection (2) of this section, the person concerned does not satisfy the Court that he has commenced proceedings and is prosecuting them will all due diligence, the Court may make an order -

(a) extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and

(b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the Court thinks fit.

(4) Where a trustee has served any notices under this section in respect of claims on two or more persons, and the period specified in each of those notices has expired, he may, if he thinks fit, apply for an order in respect of the claims of those persons by a single application, and the Court may, on that application, make an order accordingly.

(5) This section applies to every claim therein mentioned, whether the claim is or may be made as creditor or next-of-kin or beneficiary under the trust or otherwise; but it does not apply to any claim under Part V of the Succession Acts, 1867-1968 and no order made under this section shall affect any application for revocation of any grant of probate or of letters of administration, whether that application is made before or after the order.

(6) Where any person beneficially entitled to the estate or property is not made a party to an application by a trustee under this section an order made by the Court on the application shall not affect the right of that person to contest the claim of the trustee to be entitled to indemnify himself out of the estate or property.

(7) Any notice or application which is to be served in accordance with the provisions of this section may be served -

(a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at his usual or last known place of abode or business; or

(b) in such other manner as may be directed by an order of the Court.

(8) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

W.A. s. 68; Vic. s. 35; N.S.W. s. 62; U.K. s. 28; N.Z. s. 36.

69. Protection in regard to notice when a person is trustee, etc. of more than one estate or trust. A trustee acting for the purposes of more than one trust or estate shall not, in the absence of fraud be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

W.A. s. 69; N.Z. s. 37; Vic. s. 35(2); cf. U.K. s. 29; Qld. s. 24.

70. Exoneration of trustees in respect of certain powers of attorney. (1) A trustee acting or paying money in good faith in reliance on any power of attorney and on a statutory declaration or other sufficient evidence that the power of attorney had not been revoked shall not be liable for that act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

(2) Nothing in this section affects the right of any person entitled to money paid by a trustee, in circumstances mentioned in subsection (1) of this section, against the person to whom the payment is made; and the person so entitled shall have the same remedy against the person to whom payment is made as he would have had against the trustee.

W.A. s.70; N.Z. s.38; Vic. s.36; N.S.W. s.59; U.K. s.30; cf. Qld. s.25.

71. Implied indemnity of trustees. A trustee shall be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity; and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor those of any bank, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the insufficiency, deficiency or loss occurs through his own default.

W.A. s.71.

72. Reimbursement of trustee out of trust property. A trustee may reimburse himself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

W.A. s.72; N.Z. s.39A.

73. Delivery of chattels to life tenant. Where any chattels are included in the trust property the trustee may, at the request of any beneficiary entitled to a life or other limited interest therein, deliver such chattels to that beneficiary upon the beneficiary signing and delivering to the trustee an inventory of all such chattels.

W.A. s.73; N.Z. s.39B.

74. Delivery of chattels to infant. (1) A trustee may in his discretion deliver to an infant, or to the guardian or any of the guardians of an infant, any chattels to which the infant is beneficially entitled, and the receipt of the infant or guardian shall be a complete discharge to the trustee for any chattels so delivered.

(2) The powers conferred by this section are in addition to the powers conferred by section sixty-two of this Act and, for the purposes of subsection (1) of that section, the value of the chattels delivered pursuant to this section shall not be taken into account in any way.

W.A. s.74; Vic. s.34; N.S.W. s.61A.

75. Personal representatives relieved from personal liability in respect of calls made after transfer of shares. A personal representative 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 that deceased person as soon as the personal representative 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 that registration, whether made by the company or its directors or by its liquidator in a winding up, but nothing in this section affects any right which the company or its liquidator may have to follow the assets of the deceased person into the hands of any persons to or amongst whom they have been transferred or distributed.

W.A. s.75; N.Z. s.73; N.S.W. s.85; Vic. s.67; U.K. s.61; cf. Qld. s.51.

76. Power of Court to relieve trustee from personal liability. If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for that breach.

W.A. s.76; N.Z. s.74; Vic. s.68; N.S.W. s.86; U.K. s.62; cf. Qld. s.44.

77. Power of Court to make beneficiary indemnify for breach of trust. (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.

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

W.A. s.104; Vic. s.74; N.Z. s.84; N.S.W. Wills, Probate & Admin. Act, s.46D.

78. Abolition of Rule in Allhusen v. Whittell. (1) Where, under the provisions of the will of a person, in this section called "the deceased", who dies on or after the day of One thousand nine hundred and , any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the debts and liabilities which have accrued at the date of death or in payment of the funeral, testamentary and administration expenses, or of any legacies bequeathed by the will.

(2) Subsection (1) of this section does not apply to any commission which is payable to the trustee in respect of any such income as is mentioned in that subsection or to any testamentary or administration expenses which, apart from that subsection, would be payable wholly out of income.

(3) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the debts, liabilities, funeral, testamentary and administration expenses, and legacies, after the date of the death of the deceased and up to the payment thereof, and the balance of the income shall be payable to the person for the time being entitled to the income of the property.

(4) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the debts, liabilities, funeral, testamentary and administration expenses, and legacies, arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.

(5) In this section "administration expenses" includes duty payable under the Succession and Probate Duties Act 1892-1969 and estate duty payable under any Commonwealth Act and any other duty payable in any State or country outside Queensland on or consequent on or arising out of the death of the deceased to the extent to which such duties are payable out of residue.

(6) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.

(7) This section shall have effect subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on the property of the deceased.

PART VII - FURTHER POWERS OF THE COURT

Division 1 - Application of Part

79. Application of Part. Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

Division 2 - Appointment of New Trustees

cf. W.A. s.77; Vic. s.48; N.S.W. s.70; U.K. s.41; N.Z. s.51; N.I. s.40; Qld. s.26.

80. Power of Court to appoint new trustees. (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) In particular and without prejudice to the generality of subsection (1) the Court may make an order appointing a new trustee in substitution for a trustee who desires to be discharged, or who is convicted of a crime or misdemeanour, or is a bankrupt, or is a corporation which is under official management or is in liquidation or has been dissolved, or who for any other reason whatsoever appears to the Court to be undesirable as a trustee.

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

(4) Nothing in this section confers power to appoint an executor or administrator.

W.A. s.77(5); U.K. s.43; Vic. s.50; cf. Qld. s.37.

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

Division 3 - Vesting Orders

W.A. s.78; Vic. ss.51, 51; N.Z. ss.52, 59; U.K. ss.44, 51; N.S.W. s.71.

82. Vesting Orders. (1) The Court may make an order, in this Act called a "vesting order", which has effect as provided in section ninety of this Act.

(2) A vesting order may be made in any of the following cases, namely -

(a) where the Court appoints or has appointed a new trustee;

(b) where a new trustee has been appointed out of Court under any statutory or express power;

(c) where a trustee retires or has retired;

(d) where a trustee is under a disability;

(e) where a trustee is out of the jurisdiction of the Court;

(f) where a trustee cannot be found;

(g) where a trustee, being a corporation, has ceased to carry on business or is under official management or is in liquidation or has been dissolved;

(h) where a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue or recover any property according to the direction of the person absolutely entitled to the same for twenty-eight days next after a request in writing has been made to him by that person;

(i) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any property;

(j) where it is uncertain whether the last trustee known to have been entitled to or possessed of any property is alive or dead;

(k) where there is no personal representative of the last trustee who was entitled to or possessed of any property or where it is uncertain who is the personal representative of that trustee or where the personal representative of that trustee cannot be found;

(l) where any person neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property in accordance with the terms of an order of the Court;

(m) where a deceased person was entitled to or possessed of any property and his personal representative is under a disability; or

(n) where property is vested in a trustee and it appears to the Court to be expedient to make a vesting order.

(3) Where the provisions of subsection (2) of this section are applicable, they extend to a trustee entitled to, or possessed of, any property either solely or jointly with any other person and whether by way of mortgage or otherwise.

cf. W.A. s.79; Vic. s.52; N.S.W. s.71.

83. In whom property to be vested, etc. (1) Where the making of a vesting order is consequential on the appointment of a new trustee, the property shall be vested in the persons who, on the appointment, are the trustees.

(2) Where the making of such order is consequential on the retirement of one or more of a number of trustees, the property may be vested in the continuing trustees alone.

(3) Subject to the provisions of subsection (1) of this section, a vesting order may vest the property in any such person in any such manner and for any such estate or interest as the Court may direct, or may release or dispose of any contingent right to such person as the Court may direct.

(4) The fact that a vesting order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in section eighty-two of this Act shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order.

(5) Nothing in this Act shall prevent the Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.

(6) A vesting order shall not vest in any person shares which are not fully paid up unless that person applies for the order or consents to the order being made or unless the Court directs that his consent be dispensed with.

cf. Vic. s.53; N.S.W. s.72; W.A. s.80; U.K. s.45; Qld. s.28.

84. Orders as to contingent rights of unborn persons. Where any property is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would become entitled to or possessed of the property on any trust, the Court may make an order releasing the property from the contingent right or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the property.

W.A. s.81; cf. Vic. s.54; N.S.W. s.74; U.K. s.28; Qld. s.29.

85. Vesting order in place of conveyance by mortgagee under disability. Where any person entitled to or possessed of any property by way of mortgage is under a disability the Court may make an order vesting or releasing or disposing of the property in like manner as in the case of a trustee under like disability.

cf. Trustees & Incapd. Persons Act, 1867, s.53.

86. Contracts by guardians on behalf of infants. (1) The Court, where it considers it necessary or desirable in the interest of an infant or of an infant and some other person, may on the application of a guardian or next friend of the infant, make an order appointing the guardian of the infant, or some other fit and proper person, to enter into any agreement for or on behalf of such infant.

(2) An agreement entered into in accordance with this section shall be as effectual and binding as if the infant had been a person of full age and mental capacity and had himself entered into that agreement.

(3) In this section "Court" includes, where the amount of subject-matter is within the jurisdiction of a District Court, a District Court within the meaning of the District Courts Act 1967-1969 or any Judge thereof.

cf. W.A. s.82; cf. Vic. s.55; N.S.W. s.73; S.L.A. s.27.

87. Vesting orders, etc. in relation to infant's beneficial interests. (1) Where an infant is beneficially entitled to any property of which there is no trustee, the Court, where it considers it necessary or desirable in the interest of the infant or of the infant and some other person, may on the application of a guardian or next friend of the infant make an order -

(a) appointing the guardian of the infant, or some other fit and proper person, to sell and convey, lease, mortgage or charge the property, or otherwise to exercise such of the powers as are conferred by or under this Act on a trustee, as the Court may in the order specify; or

(b) in the case of stock or a thing in action, vesting in the guardian of the infant, or some other fit and proper person, the right to transfer or call for a transfer of that stock, or to receive the dividends or income thereof, or to sue for and recover that thing in action, upon such terms as the Court thinks fit.

(2) An act done in accordance with this section shall be as effectual and binding as if the infant had been a person of full age and mental capacity and had himself done that act.

cf. W.A. s.83; Qld. s.30; Vic. s.56; N.Z. s.56; N.S.W. s.76; U.K. s.47.

88. Vesting order consequential on order for sale or mortgage of land. When the Court gives a judgment or makes an order directing the sale or mortgage or the release of a mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as the Court thinks fit in the purchaser or mortgagee or mortgagor or in any other person.

cf. W.A. s.84; Qld. s.32; Vic. s.57; N.Z. s.56; N.S.W. s.77; U.K. s.48.

89. Vesting order consequential on judgment for specific performance. When a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, and generally when a judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the Court may declare that any of

the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the Court may make a vesting order, relating to the rights of those persons, born and unborn, as if they had been trustees.

cf. W.A. s.85; Vic. s.58; N.Z. ss.57, 59; N.S.W. s.78; U.K. ss.49, 51; Qld. ss.33, 35.

90. Effect of vesting order. (1) Subject to the provisions of any other Act, a vesting order vests the property to which it relates in the persons named in the order as trustees without any conveyance, transfer or assignment.

(2) Where more than one person is named in the order, the order vests as aforesaid the property to which it relates in those persons as joint tenants.

(3) Where, by reason of the provisions of any other Act or for the protection of any trust property to which the order relates, it is requisite that the order should be notified to or registered or recorded by the Registrar or other person having under that Act the duty or function of registering or recording the order, the trustees shall -

(a) produce the order to the Registrar or such other person; and

(b) do such other act or acts as may properly be required by the Registrar or such other person -

for the purpose of effecting the notification, registration or recording of that order.

(4) Where the consent of any person is requisite to the conveyance, transfer or assignment of any trust property to which a vesting order relates the order shall, unless it otherwise specifies, be subject to such consent:

Provided that -

(a) the consent may be obtained after the making of the order by the persons named in the order as trustees; and

(b) the order, or the registration or recording thereof, shall not operate as a breach of covenant or condition or occasion any forfeiture of any lease, underlease, agreement for lease, or other property.

(5) The person in whose favour a vesting order is made has and may exercise in relation to the property the subject of the order all the powers by this Act conferred or capable of being exercised by a trustee:

Provided that the Court may by the order limit or, under section ninety-five, enlarge those powers as it thinks fit.

W.A. s.86; Qld. s.35(6); U.K. s.51(5); Vic. s.59.

91. Directions, etc., as to transferring stock, etc. The Court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Act is to be exercised.

W.A. s.87; Qld. s.34; U.K. s.50; N.S.W. s.79; Vic. s.60.

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

W.A. s.38; cf. Qld. s.39; N.S.W. s.80; Vic. s.61; U.K. s.52.

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

Division 4 - Jurisdiction to make other orders.

W.A. s.89; cf. N.Z. s.64; U.K. s.57; W.A. s.57; N.S.W. s.81; Vic. s.63.

94. Court's jurisdiction to make other orders. (1) Where in the opinion of the Court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the Court, or it or they cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income.

(2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the Court to rescind or vary the order.

(3) An order may be made under this section, notwithstanding anything to the contrary contained or expressed in the instrument creating the trust.

(4) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

cf. U.K. Variation of Trusts Act, 1958; W.A. s.90; Vic. s.63A; N.Z. s.64A.

95. Power of Court to authorise variations of trust. (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any instrument creating the trust, the Court may if it thinks fit by order approve on behalf of -

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a

member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or

(c) any person unborn; or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined -

any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except -

(a) in the case of an unascertained person whose entitlement is dependent on a future event which the Court is satisfied is unlikely to occur; or

(b) by virtue of paragraph (d) of subsection (1) of this section -

the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) In the foregoing subsection "protective trusts" means the trusts specified in paragraphs (a) and (b) of subsection (1) of section sixty-four of this Act or any like trusts, "the principal beneficiary" has the same meaning as in the said subsection (1) and "discretionary interest" means an interest arising under the trust specified in paragraph (b) of the said subsection (1) or any like trust.

(3) Notice of an application to the Court for an order pursuant to subsection (1) of this section shall be given to such persons as the Court may direct.

(4) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.

(5) Nothing in this section shall limit the powers conferred by section ninety-four of this Act.

cf. W.A. s.92; N.Z. s.66; Qld. s.45; N.S.W. s.63.

96. Right of trustee to apply to Court for directions. (1) Any trustee may apply upon a written statement of facts to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the Court thinks expedient.

W.A. s.95; N.Z. s.69; cf. Qld. s.45.

97. Protection of trustees while acting under direction of Court. (1) Any trustee acting under any direction of the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as trustee in the subject-matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.

(2) This section does not indemnify any trustee in respect of any act done in accordance with any direction of the Court if he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the Court making the order giving the direction.

cf. Qld. s. 36; W. A. s. 93; U.K. s. 58; Vic. s. 54; N. Z. s. 67.

98. Persons entitled to apply to Court. (1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof or intended to be so appointed.

(2) An order under this Act concerning any interest in any property subject to a mortgage may be made on the application of any person beneficially interested in the property, whether under disability or not, or of any person interested in the money secured by the mortgage.

W. A. s. 96(1); U.K. s. 59; Vic. s. 65; N. S. W. s. 88; N. Z. s. 70.

99. Power of Court to make orders in absence of parties. (1) Where in any proceedings the Court is satisfied that diligent search has been made for any person, who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the proceedings and give judgment therein against that person, in his character of a trustee, as if he had been duly served or had entered an appearance in the action, and had also appeared by his counsel or solicitor at the hearing, but (except as provided in subsection (2) of this section) without prejudice to any interest he may have in the matters in question in the proceedings in any other character.

(2) Where any party to any proceedings relating to a trust, or where any person or class of persons that the Court thinks should be made a party or parties to those proceedings or otherwise be given an opportunity to attend and be heard in those proceedings, at the time of the proceedings -

(a) is not within the jurisdiction; or

(b) is under disability; or

(c) cannot be found; or

(d) is unborn; or

(e) is not capable of being identified or ascertained,

the Court may appoint some person to represent that party, person or class, or may proceed in his or their absence, and all orders made in the proceedings are as binding on that party, person or class as if personally present and of full capacity.

Qld. s. 38; W. A. s. 97; cf. U.K. s. 60; N. S. W. s. 93; Vic. s. 66.

100. Power of Court to charge costs on trust estate. The Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, or for the directions of the Court, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

cf. N. I. s. 41; W. A. s. 98; Vic. s. 77; N. Z. s. 72.

101. Remuneration of trustee. (1) The Court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for his services as trustee as the Court may think fit.

(2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the Court for remuneration under subsection (1) of this section, the Court may take into account any charges that have been paid out of the trust property under this subsection.

(3) For the purpose of this section "trustee" includes a custodian trustee.

U.K. s.63; cf. Qld. s.41; W.A. s.99; Vic. s.95.

102. Payment into Court by trustee. (1) A trustee or trustees, or the majority of trustees, having in his or their hands or under his or their control money or securities belonging to a trust, may pay the same into Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the Court.

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

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

(4) Where any such money or securities are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into Court.

(5) Every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered.

PART VIII - CHARITIES

cf. N.S.W. No. 30 of 1969, s.9(2)(a).

103. Meaning of charity. (1) The repeal by this Act of the statute 43 Elizabeth chapter 4 (The Charitable Uses Act, 1601), shall not affect the established rules of law relating to charity.

cf. Eng. 6 & 7 Eliz. 2, s.17 (Recreational Charities Act, 1958), s.1.

(2) Notwithstanding any rule of law to the contrary, it shall be and be deemed always to have been charitable to provide, or to assist in the provision of, facilities for recreation or other leisuretime occupation, if the facilities are provided in the interests of social welfare.

(3) The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be satisfied unless -

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

(b) either -

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

(ii) the facilities are to be available to the members or to the male members or to the female members of the public at large.

(4) Nothing in this section shall be taken to derogate from the principle that, in order to be charitable a gift, trust or institution must be for the public benefit.

Vic. Property Law Act 1958, s.131; N.S.W. Conv. Act 1919-1969, s.37D; cf. W.A. s.102.

104. Inclusion of non-charitable purpose not to invalidate trust. (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or funds or any part thereof is by such trust directed or allowed.

(2) Any such trust shall be construed and given effect in the same manner in all respects as if no application of the trust property or funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should 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 this Act.

cf. 8 & 9 Eliz.2, c.58 (Charities Act, 1960), s.13.

105. Occasions for applying property cy-près. (1) Subject to subsection (2) of this section, the circumstances in which the original purposes of a charitable trust can be altered to allow the property given or part of it to be applied cy-près shall be as follows:-

(a) where the original purposes, in whole or in part, -

(i) have been as far as may be fulfilled; or

(ii) cannot be carried out; or

(iii) cannot be carried out according to the directions given and to the spirit of the trust;

(b) where the original purposes provide a use for part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the trust, be made applicable to common purposes; or

(d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the trust, or to be practical in administering the trust; or

(e) where the original purposes, in whole or in part, have, since they were laid down, -

(i) been adequately provided for by other means; or

(ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

(2) Subsection (1) above shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près, except in so far as those conditions require a failure of the original purposes.

(3) References in the foregoing subsections to the original purposes of a trust shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.

(4) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-pres, to secure its effective use for charity by taking steps to enable it to be so applied.

(5) Nothing in this section shall affect the application of the provisions of:-

(a) "The Charitable Funds Acts, 1958 to 1964"; or

(b) "The Patriotic Funds Acts, 1942 to 1953"

to the funds to which those Acts respectively apply.

. 52 Geo. 3, 101; S.W. No. 30 1969, s.17; c. No. 3270, 32.

106. Proceedings in case of breach of charitable trust. (1) In any case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court is deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Court stating such complaint and praying such relief as the nature of the case may require.

(2) The petition shall be heard in a summary way, and the Court shall upon affidavits and such other evidence as is produced upon such hearing determine the same, and make such other order therein and with respect to the costs of the application as may be just.

(3) Every petition so to be presented shall be, -

(a) signed by the persons presenting the same, in the presence of and shall be attested by the solicitor for such petitioners; and -

(b) submitted to and allowed by the Attorney-General or Solicitor General, and such allowance shall be certified by him before any such petition is presented.

PART IX - MISCELLANEOUS

107. Application of Part. Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument creating the trust.

ld. s.58; . U.K. s.66; .A. s.100; .c. s.78; .S.W. s.103.

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

cf. W.A. s.65.

109. Remedies for wrongful distribution of trust property. (1) In any case where a trustee has wrongfully distributed trust property any person who has suffered loss by that distribution may enforce the same remedies against the trustee and against any person to whom the distribution has been made as in the case where a personal representative has wrongfully distributed the estate of a deceased person.

(2) Except by leave of the Court, no person who has suffered loss by reason of the wrongful distribution of trust property or of the estate of a deceased person may enforce any remedy against any person to whom such property or estate has been wrongfully distributed until he has first exhausted all remedies which may be available to him against the trustee or personal representative.

(3) Where any remedy is sought to be enforced against a person to whom a wrongful distribution of trust property or the estate of a deceased person has been made and that person has received the distribution in good faith and has so altered his position in reliance on the propriety of the distribution that, in the opinion of the Court, it would be inequitable to enforce the remedy, the Court may make such order as it considers to be just in all the circumstances.

W.A. s.107; N.Z. s.86.

110. Fees and commission deemed a testamentary expense. The fees, commission, remuneration, and other charges payable to a personal representative of the administration of the estate of a deceased person shall be deemed to be testamentary expenses.

W.A. s.108; N.Z. s.87.

111. Costs of inquiring regarding beneficiaries. The costs, expenses, and charges of the trustee of any property in respect of any inquiries made by him to ascertain the existence or whereabouts of any person or persons entitled to any legacy, money or distributive share in the property, or otherwise incurred in relation thereto, shall be borne by and paid out of the legacy, money or distributive share of the person or persons in respect of whom the inquiries were made, unless a contrary intention appears in the instrument (if any) creating the trust.

cf. W.A. s.110.

112. Regulations. The Minister may make such regulations as may be necessary for the carrying out of the provisions of, and giving effect to, section twenty-one of this Act.

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s. 3.

FIRST SCHEDULE

No. of Act	Short Title (if any)	Extent of Repeal
43 Eliz., cap. 4	The Charitable Uses Act 1601	The whole
52 Geo. III, cap. 101	Sir Samuel Romilly's Act	The whole
31 Vic. No. 19	The Trustees and Incapacitated Persons Act of 1878	The whole
50 Vic. No. 13	The Settled Land Act of 1886	The whole
61 Vic. No. 10	The Trustees and Executors Acts, 1897 to 1964	The whole (other than section fifty-nine)
22 Geo. V, No. 31	The Trustees Protection Act of 1931	The whole
No. 25 of 1967	The Trustees (Housing Loans) Act of 1967	The whole

s. 67.

SECOND SCHEDULE

TRUSTS ACT 197 , SECTION 67

The Estate of A. B. deceased [or "The Trusts of A. B. "*]

Any creditor, beneficiary or other person having any claim or claims in respect of the estate of A. B. deceased, late of [set out address and occupation of deceased] who died on [set out date of death of deceased], is required to send particulars of any such claim or claims to [set out names], the personal representative (or trustee)* of the said A. B. at [set out address to which claims may be sent], not later than the day of 19 .

NOTE: By virtue of section 67 of the Trusts Act a personal representative or trustee may, after the date referred to in this notice, distribute the estate of the deceased having regard only to those claims of which he then has notice.

* Omit if not applicable.

CIRCULATION LIST

A Working Paper on this topic was circulated to the following:-

The Minister for Justice and Attorney-General for Queensland
Ministers of Queensland Cabinet
Judges of the Supreme Courts, Brisbane, Townsville, Rockhampton
The Chairman of the District Courts, Brisbane
The Dean of the Faculty of Law, University of Queensland
The Vice-Chancellor, University of Queensland
The Honourable Sir Harry Gibbs, Sydney
Sir George Paton, Law Foundation, Melbourne
The Law Commission, London
The Law Reform Commission, Sydney
The Law Reform Committee, Adelaide
The Law Reform Committee, Perth
The Law Reform Committee, Hobart
The Law Reform Commission, New Zealand
Parliamentary Draftsman, Brisbane
Parliamentary Draftsman, Melbourne
* The Solicitor General, Brisbane
The Under Secretary, Department of Justice, Brisbane
* The Under Secretary, Lands Department, Brisbane
* The Public Curator, Brisbane
The Registrar of Titles, Brisbane
The Bar Association of Queensland
* The Queensland Law Society Inc.
The North Queensland Law Association, Townsville
The Central District Law Association, Rockhampton
The Gold Coast District Law Association, Surfers Paradise
* The Downs and South-Western Law Association, Toowoomba
* Ipswich and District Law Association
Biggs & Biggs, Solicitors, Brisbane
Cannan & Peterson, Solicitors, Brisbane
Chambers McNab & Co., Solicitors, Brisbane
Feez Ruthning & Co., Solicitors, Brisbane
Henderson & Lahey, Solicitors, Brisbane
* John P. Kelly & Co., Solicitors, Brisbane
King & Company, Solicitors, Brisbane
* Morris Fletcher & Cross, Solicitors, Brisbane
O'Shea Corser & Wadley, Solicitors, Brisbane
Thynne & Macartney, Solicitors, Brisbane
Tully & Wilson, Solicitors, Brisbane
McCullough & Robertson, Solicitors, Brisbane
MacDonnell Harris & Co., Solicitors, Cairns
Butler & Ker, Solicitors, Childers
* Queensland Trustees Ltd., Brisbane
* The Union Fidelity Trustee Co. of Aust. Ltd., Brisbane
* The Federation of Housing & Building Societies of Queensland
* The Associated Banks (Queensland) & Commonwealth Banking Corp.
* The United Discount Co. of Aust. Ltd., Brisbane
* A.M.P. Discount Corporation Limited, Brisbane

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* those from whom comment was received.