

Legislative Council.

No. , 1936.

A BILL

To make certain provisions with respect to trusts for charitable purposes; to amend in certain respects the law relating to trustees and trust property; to amend in certain respects the law relating to executors and administrators; to validate certain matters; for these and other purposes to amend the Conveyancing Act, 1919-1932, the Trustee Act, 1925, the Wills, Probate and Administration Act, 1898-1932, the Public Trustee Act, 1913-1936, and certain other Acts in certain respects; and for purposes connected therewith.

[MR. MANNING ;—10 *December*, 1936.]

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

5

PART I.

PRELIMINARY.

Short title.

1. (1) This Act may be cited as the "Conveyancing, Trustee and Probate (Amendment) Act, 1936."

(2) The Conveyancing Act, 1919-1932, as amended by this Act, may be cited as the Conveyancing Act, 1919-1936.

(3) The Trustee Act, 1925, as amended by subsequent Acts and by this Act, may be cited as the Trustee Act, 1925-1936.

15

(4) The Wills, Probate and Administration Act, 1898-1932, as amended by this Act, may be cited as the Wills, Probate and Administration Act, 1898-1936.

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

20

Division into Parts.

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

PART I.—PRELIMINARY—ss. 1, 2.

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

25

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

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

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

30

PART

PART II.

AMENDMENT OF CONVEYANCING ACT, 1919-1932.

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

Amendment of Act No. 6, 1919.

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

New Div. 6, Part II.

DIVISION 6.—Trusts for charitable purposes.

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

Inclusion of non-charitable purposes not to invalidate trust.

cf. Property Law Act, 1928 (Vict.), s. 131.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or of any part thereof to or for any such non-charitable and invalid purpose had been or 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 the Conveyancing, Trustee and Probate (Amendment) Act, 1936.

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

Sec. 2. (Division into Parts.)

DIVISION 6.—Trusts for charitable purposes, s. 37D.

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

Further amendment of Act No. 6, 1919.

(a) by inserting next after subsection one of section 96A the following new subsection:—

Sec. 96A. (Notice of trusts affecting mortgage debts.)

(1A) For the purposes of this section the expression "mortgagee" includes a mortgagee who, pursuant to any power conferred by a trust instrument

instrument or by law has purchased or otherwise acquired the equity of redemption in the mortgaged property.

Sec. 106.
(Leasing powers of mortgagor and of mortgagees in possession.)

- (b) by inserting at the end of subsection sixteen of section one hundred and six the following proviso:— 5

Provided that, in any case where a trust corporation has been appointed receiver pursuant to subsection (6A) of section one hundred and fifteen of this Act, the delegation by that trust corporation in its capacity of mortgagee shall be sufficiently evidenced by a statement in the lease of the decision of that trust corporation to exercise the power conferred by this subsection. 10 15

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

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

Provided that, in any case where a trust corporation has been appointed receiver pursuant to subsection (6A) of section one hundred and fifteen of this Act, the delegation by that trust corporation in its capacity of mortgagee shall be sufficiently evidenced by a statement in the deed or instrument of surrender of the decision of that trust corporation to exercise the power conferred by this subsection. 20 25

- (d) by inserting at the end of subsection five of section one hundred and nine the words “and a memorandum of mortgage or of encumbrance duly registered under that Act shall be deemed to be and always to have been a deed within the meaning of this section”; 30

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

- (e) (i) by omitting from subsection (6A) of section one hundred and fifteen the words “Where a trust corporation being a mortgagee is entitled to appoint a receiver under the power in that behalf conferred by this Act or 35

- 5 or by the mortgage deed, or is in possession of the mortgaged property, such trust corporation may appoint itself receiver, and in that event” and by inserting in lieu thereof the words “Where a mortgagee or
- 10 two or more co-mortgagees is or are entitled to appoint a receiver under the power in that behalf conferred by this Act or by the mortgage deed, or is or are in possession of the mortgaged property, and such mortgagee or one of such co-mortgagees is a trust corporation, such mortgagee or co-mortgagees may appoint such trust corporation receiver and in that event such trust corporation”;
- 15 (ii) by omitting from the proviso to the same subsection the words “so appoints itself” and by inserting in lieu thereof the words “is so appointed”;
- 20 (iii) by inserting in paragraph (d) of subsection eight of the same section after the word “interest” the words “due and unpaid and”;
- 25 (iv) by inserting next after the same paragraph the following word and new paragraph:—
and
(e) in or towards discharge of the principal money due under the mortgage if so directed in writing by the
- 30 mortgagee;
- (v) by inserting in the same subsection after the word “residue” the words “if any”;
- (vi) by inserting at the end of the same subsection the following proviso:—
- 35 Provided that, in any case where a trust corporation has been appointed receiver pursuant to subsection (6A) of this section, the
decision

decision of such trust corporation to effect the insurances mentioned in subsection seven of this section or to apply moneys received by it as receiver in payment of the costs of executing necessary or proper repairs or in or towards discharge of the principal money due under the mortgage shall, for all purposes and on all occasions be deemed to be the equivalent of a direction in writing of that trust corporation in its capacity of mortgagee, so to apply the mortgage moneys. 5 10

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

Receiver—
appointment
of not to
affect cer-
tain rights.

(9) In any case in which a trustee who is the owner of a mortgage debt either severally or as a co-mortgagee in trust for persons by way of succession appoints or joins with his co-mortgagee in appointing a receiver under the power in that behalf conferred by this Act, nothing contained in subsection eight of this section shall affect the right of any person entitled to the income of the mortgage debt to recoupment out of the capital of the mortgage debt the whole or any part of the moneys applied by the receiver under the provisions of that subsection in expenditure properly chargeable to capital. 15 20 25

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

(f) by omitting paragraph (d) of subsection one of section 151b and by inserting in lieu thereof the following paragraph:— 30

(d) On such appointment—

(i) the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue or share; 35

(ii)

- 5 (ii) the rights to which the infant is entitled in virtue of such devise, legacy, residue or share shall be restricted to the property which, by the operation of this section and section nine of the Trustee Act, 1925, is vested in the trustees for the infant and shall not extend to any other property;
- 10 (iii) the devise, legacy, residue or share may be retained in its existing condition or state of investment or may be converted into money and such money may be invested in any authorised investment.
- 15

PART III.

AMENDMENT OF TRUSTEE ACT, 1925.

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

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

25 (3A) In the case of any property subject to the provisions of the Closer Settlement Acts or the Mining Act, 1906-1935, or the Crown Lands Consolidation Act, 1913, or any other Act relating to Crown lands, the property shall not vest until either—

30 (a) the appropriate transfer is executed and registered so that the property is duly transferred; or
(b)

Amendment
of Act No. 14,
1925.

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

(b) an entry of the vesting is made in the appropriate register kept under the provisions of such Act or Acts.

Any such entry shall have the same effect as if the property were duly transferred. 5

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

(iii) by omitting from paragraph (c) of the same subsection the words "paragraphs (a) and (b) of this subsection" and by inserting in lieu thereof the words "subsections three and (3A) of this section"; 10

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

(b) (i) by omitting from subsection two of section ten the word "solely"; 15

(ii) by inserting next after the same subsection the following new subsections:—

(2A) Where, pursuant to subsection one of section 75A of the Wills, Probate and Administration Act, 1898-1932, the Public Trustee or a trustee company has been appointed executor of a will in the place or stead of a person by such will appointed both executor and trustee thereof, and probate of such will has been granted to the Public Trustee or the trustee company, as the case may be, then, by virtue of such grant and without further appointment, the Public Trustee or the trustee company, as the case may be, shall be deemed to be appointed trustee of the will in the place or stead of such person. 20 25 30

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

(a) where the Supreme Court or a Judge thereof, sitting in its probate or equity jurisdiction, appoints a trustee company administrator in the place or stead of a person 35

person who, by the will, was appointed both executor and trustee thereof; or

5 (b) where, pursuant to section eighteen of the Public Trustee Act, 1913-1936, the court, upon the application of any executor who was, by the will, appointed both executor and trustee thereof, by order,
10 transfers to the Public Trustee, for administration, the estate of the deceased person; or

15 (c) where, pursuant to subsection two of section 75A of the Wills, Probate and Administration Act, 1898-1932, an executor who was, by the will, appointed both executor and trustee thereof, by deed appoints the Public Trustee or a trustee company to be executor in his place or
20 stead,

then the trustee company or the Public Trustee, as the case may be, shall, by virtue of such appointment, order or deed, and
25 without further appointment, be deemed to be appointed trustee of the will in the place or stead of the person thereby appointed.

(c) (i) by omitting from paragraph (f) of subsection two of section fourteen the words "in the Government Savings Bank of New South Wales" and by inserting in lieu thereof the words "in the Commonwealth Savings Bank of Australia or in the Rural Bank of New South Wales or in any corporation which, at the date of commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936, was carrying on in New South Wales the business of banking as its principal business";

Sec. 14.
(Authorised investments.)

35 (ii)

(ii) by inserting at the end of subsection eight of the same section the following words “or on mortgage of a conditional lease under the said Acts held in virtue of any such conditional purchase or in virtue of any conditional purchase which has become freehold, either alone or together with the conditional purchase or freehold in virtue of which it is held, or on mortgage of land of any other tenure under the said Acts or the Closer Settlement Acts which is or may be converted into freehold whether subject to a rent to the Crown or not or which is a lease in perpetuity”;

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

(d) by omitting subsection one of section twenty and by inserting in lieu thereof the following subsection:— 15

(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— 20

(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; 25

(b) may, on a sale by the mortgagor of part of the mortgaged property and on the receipt by the trustee of the whole of the purchase money thereof after deduction of the expenses of the sale, release such part from the mortgage. 30

Sec. 26.
(Powers incident to sale.)

(e) by inserting next after subsection four of section twenty-six the following new subsection:— 35

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

(f)

(f) (i) by omitting from paragraph (b) of subsection three of section twenty-eight the word "equal"; Sec. 28. (Deferred payment on sale of land.)

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

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

10 No instalment which is made payable during the first three years from the date of the contract of sale shall be of an amount less than five per centum of the purchase money, and all instalments which are made payable after the third year from the date of the contract of sale shall be equal in amount.

15

(g) by inserting next after section thirty-two the following new section:— New s. 32A.

20 32A. A trustee unless expressly forbidden by the instrument, if any, creating the trust, may, in lieu of proceeding to foreclosure, purchase or acquire the equity of redemption of land in New South Wales the subject of a mortgage held by the trustee under which default has been made where the moneys expended in such purchase or acquisition are subject to the same trusts as the mortgage debt: Provided that in no case shall the moneys expended in such purchase or acquisition exceed five per centum of the amount due under the mortgage. Power to acquire equity of redemption in lieu of foreclosure.

25

30

(h) by inserting next after subsection one of section thirty-eight the following new subsection:— Sec. 38. (Raising money.)

35 (1A) Where a trustee holds land in respect of which moneys are due and payable for rates or in respect of which the trustee is under a statutory obligation to expend moneys and the trustee has no moneys subject to the same trusts

as

as such land wherewith to pay such rates or discharge such statutory obligation the trustee shall have and shall be deemed always to have had power to raise the money required to make such payment or discharge such obligation by sale or mortgage of the whole or part of such land or by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as such land. 5
10

New ss.
39A, 39B.

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

Application
of income by
trustee-
mortgagee in
possession.

39A. In any case in which any debt secured by a mortgage of land is owned by a trustee, either severally or as a co-mortgagee, in trust for persons by way of succession, and such trustee has before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936, entered into possession, or at any time after such commencement enters into possession of the mortgaged property, or, either before or after such commencement, the land has become discharged from the right of redemption, the trustee may apply the income of the mortgaged property received by him after such commencement as follows, namely— 15
20
25

- (a) in discharge of all rents, taxes, rates and outgoings affecting the mortgaged property;
- (b) in payment of the premiums on any insurances properly payable under the mortgage instrument or under this Act and the costs of executing necessary repairs; 30
- (c) in keeping down all annual sums and the interest on all principal sums having priority to the mortgage in right whereof he is in possession. 35

The

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

5 (i) where the trustee has entered into possession of the mortgaged property or the land has become discharged from the right of redemption before the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936, after such commencement;

10 (ii) where the trustee enters into possession or the land becomes discharged from the right of redemption after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936, after the trustee has entered into possession or after the land has so become discharged, as the case may be:

20 Provided that if at the date of commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936, or on the date on which after such commencement the trustee enters into possession of the mortgaged property, or the land becomes discharged from the right of redemption, as the case may be, any rents, taxes, rates, outgoings, annual sums, interest or premiums mentioned in paragraphs (a), (b) or (c) of this section were or are overdue and unpaid, and such of those rents, taxes, rates, outgoings, annual sums and premiums as are periodical payments, were payable wholly or in part in respect of any period subsequent to such date of commencement or of entry into possession, or of the land so becoming discharged, as the case may be, then such last-mentioned rents, taxes, rates, outgoings, annual sums 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.

40 Subject

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

Provided that nothing in this section contained shall affect the right of a person entitled to the income of the mortgage debt or his personal representative to recoupment out of the capital of the mortgage debt of the whole or any part of the moneys so applied by the trustee. 5
10

Validation
of certain
payments by
trustee-
mortgagee in
possession.

39B. In any case in which, prior to the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936, any debt secured by a mortgage of land was owned by a trustee, either severally or as a co-mortgagee, 15
in trust for persons by way of succession and the trustee, having entered into possession of the mortgaged property, has before such commencement, bona fide applied the income of the mortgaged property received by him in payment 20
of any rates, taxes or insurance premiums on the mortgaged property or of the interest on prior incumbrances on the mortgaged property, in each case accruing due after he entered into possession thereof, or accrued due not more than 25
twelve months before such entry, or in executing necessary repairs thereto, the trustee shall not be liable for breach of trust by reason only of his having so applied the income of the mortgaged property: 30

Provided that nothing hereinbefore in this section contained shall affect any right of a person entitled to the income of the mortgage debt or his personal representative to recoupment out of the capital of the mortgage debt of the 35
whole or any part of the moneys so applied by the trustee after the twenty-fifth day of May, one thousand nine hundred and thirty-three. 40

(j)

- (j) by inserting in subsection one of section forty-four after the words "one half of the value of the property or share for the" the words "maintenance education"; Sec. 44.
(Advance
ment.)
- 5 (k) (i) by inserting at the end of paragraph (b) of subsection two of section forty-six the following new paragraph:— Sec. 46.
(Appropriation.)
- 10 (c) setting apart a sum of money in or towards the satisfaction of a legacy share or interest;
- (ii) by inserting at the end of subsection four of the same section the following words: "which may be dealt with or disposed of freed from any such rights";
- 15 (iii) by inserting next after subsection eight of the same section the following new subsection:—
- 20 (8A) Notwithstanding anything contained in paragraph (b) of subsection one or in subsection five or subsection seven of this section the consent of the annuitant shall not be necessary in any case in which the trustee, after having set apart a fund to answer the annuity, which fund at the time of appropriation would be sufficient, if it were invested in Government securities of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least twenty per centum thereof, has actually invested the fund in such securities.
- 25 (iv) by inserting in subsection twelve of the same section before the word "disposition" the words "appropriation or";
- 30 (l) (i) by inserting at the end of paragraph (a) of subsection one of section fifty-four the words "or by the Public Trustee or a trustee company if one of the trustees and so named in that behalf in the authority"; Sec. 54.
(Banks.)
- 35 (ii)

(ii) by inserting at the end of paragraph (b) of the same subsection the words "or if the indorsement is for collection and credit of any account of the trustees with the bank the indorsement of any one or more of the trustees so named"; 5

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

Provided that where the trustee or one of the trustees named in any such authority 10 is the Public Trustee or a trustee company the duration of the authority need not be limited to three months.

New s. 82A.

(m) by inserting next after section eighty-two the following new section:— 15

Improve-
ments and
repairs
without
authority
of the court.

82A. (1) Where any freehold land is vested in a trustee for any infant or in trust for any person in succession and in the opinion of the trustee it is expedient in the interest of all persons beneficially interested in the land to 20 expend capital moneys subject to the trust for any one or more of the purposes specified in paragraphs (a) to (f) both inclusive of subsection one of section eighty-two of this Act the trustee may, without the authority of the Court, 25 expend on all or any of such purposes capital moneys subject to the trust not exceeding in all five hundred pounds or one-third of the value of the land whichever is the less.

(2) Where in the opinion of the trustee 30 it is expedient to exercise the power conferred by subsection one of this section he may without the authority of the Court exercise any of the powers specified in subsection four of the last preceding section, and he shall throw upon the 35 respective interests of the persons beneficially interested a proper proportion of the moneys so expended.

(3)

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

5 (4) This section applies to trusts created either before or after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1936.

PART IV.

10 AMENDMENT OF WILLS, PROBATE AND ADMINISTRATION
Act, 1898-1932.

6. The Wills, Probate and Administration Act, 1898-1932, is amended— Amendment
of Act No.
13, 1898.

15 (a) by inserting next after section seventy-five the following new section:— New s. 75A.

20 75A. (1) Any person who has been appointed executor of the will of a deceased person and has not renounced probate or taken probate thereof may by deed appoint the Public Trustee or a trustee company to be executor of the will in his place or stead and upon the filing prescribed by subsection five of this section such will shall be construed and take effect in all respects as if the name of the appointee had been originally inserted in such will as the executor or one of the executors thereof in lieu of the person in whose stead it has been appointed:

25
30 Provided no such appointment shall be made if the testator has by his will directed or intimated that the office of executor should not be delegated or that the appointee should not act in the trusts of the will.

35 (2) Any executor who has obtained probate or any administrator who has obtained letters of administration notwithstanding that he

has acted in the administration of the deceased's estate and notwithstanding the existence of any other executor or administrator may by deed appoint the Public Trustee or a trustee company to be executor or administrator in his place or 5
stead and upon the registration and filing prescribed by subsections four and five of this section the estate and interest of the appointor as such executor or administrator in and to the estate of the deceased left unadministered and 10
all rights and obligations in respect thereof shall without any conveyance or other assurance except as otherwise provided in this section vest in the appointee as executor or administrator as the case may be, or, when the appointor is one 15
of several executors or administrators then in the appointee and the continuing executors or administrators as joint tenants, and, subject to the provisions of this Act, the appointee shall have all the powers of such executor or 20
administrator and such executor or administrator shall not be in any way liable in respect of any act or default in reference to such estate subsequent to the date of such deed other than the act or default of himself or of persons other 25
than himself for whose conduct he is in law responsible:

Provided that where any portion of such estate is subject to the provisions of the Closer Settlement Acts, the Mining Act, 1906-1935, the Crown 30
Lands Consolidation Act, 1913, or the Real Property Act, 1900, the necessary and appropriate transfers shall be executed and registered so as to transfer such property to the appointee, and, until such transfers are so executed and regis- 35
tered, such executor or administrator shall not be discharged from the trusts in respect of such portions of the estate.

(3) In the case of the appointment of a trustee company the capital both paid and un- 40
paid and all other assets of the company and the manager,

5 manager, assistant manager and directors and their respective estates shall be liable for the due administration of the estates of which the company shall be so appointed executor or administrator.

10 (4) Any such deed as is referred to in subsection two of this section shall be registered in the office of the Registrar-General in the manner and on payment of the fees prescribed by regulation under the Conveyancing Act, 1919-1932.

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

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

20 (b) (i) by inserting at the end of subsection one of section one hundred and fifty-two the following new paragraph:— Sec. 152. (Registrar to keep records.)

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

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

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

PART V.

AMENDMENT OF PUBLIC TRUSTEE ACT, 1913-1936.

Amendment
of Act No.
19, 1913.
Sec. 18.
(Grant of
probate or
administra-
tion to the
Public
Trustee.)

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

- (a) by inserting in subsection one of section eighteen after the words "next of kin shall" the words "if an application has been lodged by them or any of them"; 5.
- (b) by inserting at the end of the same subsection the following new paragraph:—

The fact that an application for the grant of 10 letters of administration to the Public Trustee is supported by a majority in value of the interests under the intestacy shall be deemed to be good cause within the meaning of this subsection.