
A BILL

To give to Trustees Mortgagees and others certain powers now commonly inserted in Settlements Mortgages and Wills.

[Mr. HOLROYD;—25 October, 1861.]

WHEREAS it is expedient that certain powers and provisions which Preamble.
it is now usual to insert in Settlements Mortgages Wills and other Instruments should be made incident to the estates of the persons interested so as to dispense with the necessity of inserting the same in terms of every such Instrument Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows :—

PART I.

10 *Powers of Trustees for Sale &c. and Trustees of renewable Leaseholds.*

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

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

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

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

any contract for sale or exchange and to re-sell the hereditaments which shall be so bought in or as to which the contract shall be so rescinded without being responsible for any loss which may be occasioned thereby and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase money in the purchase of any other hereditaments or otherwise. 5

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

3. For the purpose of completing any such sale or exchange as aforesaid the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question either by way of revocation and appointment of the use or otherwise as may be necessary. 10

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

4. The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will deed or other instrument containing the power of sale or exchange or if no such indication be therein contained as to all or any part of such money then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in New South Wales or of lands of a leasehold tenure which in the opinion of the persons making the purchase are convenient to be held therewith or with any other hereditaments for the time being subject to the subsisting uses or trusts of the same will deed or other instrument of settlement in which the power of sale or exchange was contained And all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses upon and for the trusts intents and purposes and with under and subject to the powers provisoes and declarations to which the hereditaments sold or given in exchange were or would have been subject or as near thereto as the deaths of parties and other intervening accidents will admit of but not so as to increase or multiply charges And all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold tenure shall be settled and assured upon and for such trusts intents and purposes and with under and subject to such powers provisoes and declarations as shall as nearly as may be correspond with and be similar to the aforesaid uses trusts intents and purposes powers provisoes and declarations but not so as to increase or multiply charges and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years And any such 35

such purchase as aforesaid shall be made subject to any special conditions as to title or otherwise Provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

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

or in payment of incumbrances.

6. No money arising from any such sale or exchange of lands or hereditaments in New South Wales shall be laid out in the purchase of
15 lands or hereditaments situate elsewhere than in New South Wales And no lands situate in New South Wales shall under any such power as aforesaid be exchanged for any lands or hereditaments situate elsewhere than in New South Wales.

Money arising from sales &c. to be laid out and lands exchanged in the country in which lands sold or exchanged are situated.

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

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

25 8. It shall be lawful for any Trustees of any leaseholds for lives or years which are renewable from time to time either under any covenant or contract or by custom or usual practice if they shall in their discretion think fit and it shall be the duty of such Trustees if thereunto required by any person having any beneficial interest present or future or contingent
30 in such leaseholds to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms and for that purpose it shall be lawful for any such Trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting and to do all such other acts
35 as shall be requisite in that behalf but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same.

Trustees of renewable leaseholds may renew.

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

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

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

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

PART II.

Powers of Mortgagees.

Powers incident to Mortgagees.

11. Where any principal money is secured or charged by deed on any hereditaments of any tenure or on any interest therein the person to whom such money shall for the time being be payable his executors administrators and assigns shall at any time after the expiration of one year from the time when such principal money shall have become payable according

according to the terms of the deed or after any interest on such principal money shall have been in arrear for six months or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge
5 have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge namely—

1st—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract subject to any reasonable conditions he
10 may think fit to make and to rescind or vary contracts for sale or buy in and re-sell the property from time to time in like manner.

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

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

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

13. No such sale as aforesaid shall be made until after six months notice in writing given to the person or one of the persons entitled to the property subject to the charge or affixed on some conspicuous part of such property but when a sale has been effected in professed exercise of the powers hereby conferred the title of the purchaser shall not be liable to be
25 impeached on the ground that no case had arisen to authorize the exercise of such power or that no such notice as aforesaid had been given but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling. Notice to be given before sale but purchaser relieved from inquiry as to circumstances of sale.

14. The money arising by any sale effected as aforesaid shall be
35 applied by the person receiving the same as follows—first in payment of all the expenses incident to the sale or incurred in any attempted sale—secondly in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made—and thirdly in discharge
of

of all the principal moneys then due in respect of such charge And the residue of such money shall be paid to the person entitled to the property subject to the charge his heirs executors administrators or assigns as the case may be.

Conveyance to the purchaser.

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

Owner of charge may call for title deeds and conveyance of legal estate.

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

Appointment of receiver.

17. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time if any person or persons has or have been named in the deed of charge for that purpose appoint such person or any one of such persons to be receiver or if no person be so named then may by writing delivered to the person or any one of the persons entitled to the property subject to the charge or affixed on some conspicuous part of the property require such last-mentioned person or persons to appoint a fit and proper person as receiver and if no such appointment be made within ten days after such requisition then may in writing appoint any person he may think fit.

Receiver deemed to be the agent of the mortgagor.

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

Powers of receiver.

19. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents issues and profits of the property of which he is appointed receiver by action suit
distress

distress or otherwise in the name either of the person entitled to the property subject to the charge or of the person entitled to the money secured by the charge to the full extent of the estate or interest which the person who created the charge had power to dispose of.

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

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

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

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

30 24. The powers and provisions contained in this part of this Act relate only to Mortgages or charges made to secure money advanced or to be advanced by way of loan or to secure an existing or future debt. This part to relate to charges by way of mortgage only.

PART III.

Provisions as to investment of Trust Funds appointment and powers of Trustees and Executors &c.

35 25. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty at their discretion to invest the same in Colonial bank or other shares or in Government securities and such Trustees shall also be at liberty at their discretion to call in any trust On what securities trust funds may be invested.

trust funds invested in any other securities than as aforesaid and to invest the same on any such securities as aforesaid and also from time to time at their discretion to vary any such investments as aforesaid for others of the same nature Provided always that no such original investment as aforesaid and no such change of investment as aforesaid shall be made where there 5 is a person under no disability entitled in possession to receive the income of the trust fund for his life or for a term of years determinable with his life or for any greater estate without the consent in writing of such person.

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

26. In all cases where any property is held by Trustees in trust for an infant either absolutely or contingently on his attaining the age 10 of twenty-one years or on the occurrence of any event previously to his attaining that age it shall be lawful for such Trustees at their sole discretion to pay to the guardians (if any) of such infant or otherwise to apply for or towards the maintenance or education of such infant the whole or any part of the income to which such infant may be entitled in 15 respect of such property whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not And such Trustees shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in proper 20 securities for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen Provided always that it shall be lawful for such Trustees at any time if it shall appear to them expedient to apply the whole or any part of such accumulations as if the same were part of the income arising in the then 25 current year.

Provisions for appointment of new Trustees on death &c.

27. Whenever any Trustee either original or substituted and whether appointed by the Supreme Court of New South Wales in its Equitable Jurisdiction or otherwise shall die or desire to be discharged from or refuse or become unfit or incapable in the trusts or powers in him 30 reposed before the same shall have been fully discharged and performed it shall be lawful for the person or persons nominated for that purpose by the deed will or other instrument creating the trust (if any) or if there be no such person or no such person able and willing to act then for the surviving or continuing Trustees or Trustee for the time being or the acting 35 executors or executor or administrators or administrator of the last surviving and continuing Trustee or for the last retiring Trustee by writing to appoint any other person or persons to be a Trustee or Trustees in the place of the Trustee or Trustees so dying or desiring to be discharged or refusing or becoming incapable to act as aforesaid and so often as any new Trustee 40 or Trustees shall be so appointed as aforesaid all the trust property (if any) which

which for the time being shall be vested in the surviving or continuing Trustees or Trustee or in the heirs executors or administrators of any Trustee shall with all convenient speed be conveyed assigned and transferred so that the same may be legally and effectually vested in such
 5 new Trustee or Trustees either solely or jointly with the surviving or continuing Trustees or Trustee as the case may require And every new Trustee or Trustees to be appointed as aforesaid as well before as after such conveyance or assignment as aforesaid and also every Trustee appointed by the said Supreme Court in its equitable jurisdiction either
 10 before or after the passing of this Act shall have the same powers authorities and discretions and shall in all respects act as if he had been originally nominated a Trustee by the deed will or other instrument creating the trust.

23. The power of appointing new Trustees hereinbefore contained
 15 may be exercised in cases where a Trustee nominated in a will has died in the life-time of the Testator.

Appointment of new Trustees.

29. The receipts in writing of any Trustees or Trustee for any
 money payable to them or him by reason or in the exercise of any trusts
 or powers reposed or vested in them or him shall be sufficient discharges
 20 for the money therein expressed to be received and shall effectually exonerate the persons paying such money from seeing to the application thereof or from being answerable for any loss or misapplication thereof.

Trustees receipts to be discharges.

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

Executors may compound &c.

PART IV.

General Provisions.

35 31. For the purposes of this Act a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property although his estate may be charged or incumbered either by himself or by any former owner or otherwise howsoever to any extent but the estates or interests of the parties entitled to any such
 charge

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

charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid unless they shall concur therein.

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

32. None of the powers or incidents hereby conferred or annexed to any particular offices estates or circumstances shall take effect or be 5 exercisable if it is declared in the deed will or other instrument creating such offices estates or circumstances that they shall not take effect and where there is no such declaration then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed will or other instrument such powers or incidents shall be 10 exercisable or shall take effect only subject to such variations or limitations.

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

33. Nothing in this Act contained shall be deemed to empower any Trustees or other persons to deal with or affect the estates or rights of any persons soever except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed will or 15 other instrument under which such Trustees or other persons are empowered to act had contained express powers for such Trustees or other persons so to deal with or affect such estates or rights.

Commencement of Act.

34. The provisions contained in this Act shall except as hereinbefore otherwise provided extend only to persons entitled or acting under 20 a deed will codicil or other instrument executed after the passing of this Act or under a will or codicil confirmed or revised by a codicil executed after that date.

Short Title.

35. This Act may be cited as the "Trustees and Mortgagees Powers Extension Act." 25