

# LAWS OF THE UNITED KINGDOM

## TRUSTEE ACT 1925 (15 & 16 Geo 5 c 19)

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*An Act to consolidate certain enactments relating to trustees in England and Wales*

[9 April 1925]

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This Act consolidated enactments relating to trustees including provisions in the Law of Property Act 1922 which were repealed as soon as they came into effect. As to the application of the presumption that a consolidating Act is not intended to change the law, see *Re Turner's Will Trusts, District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA; *Re Warren, Public Trustee v Fletcher* [1939] Ch 684, [1939] 2 All ER 599. The Act forms part of the legislation commonly described as the "Birkenhead Acts" or "the property legislation of 1925", as to which, see the Preliminary Note to the title Real Property, Vol. 37.

**Northern Ireland.** This Act does not apply, except where expressly provided; see s. 71(3) *post*.

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**PART I  
INVESTMENTS**

**1** (*Repealed by the Trustee Investments Act 1961, s. 16(2), Sch 5.*)

## 2 Purchase at a premium of redeemable stocks; change of character of investment

(1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act, or any statute replaced by this Act.

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### NOTES

The proviso to sub-s (1) was repealed by the Trustee Investments Act 1961, s. 16(2), Sch 5.

**A trustee may, etc.** This section applies to trusts whether constituted or created before or after the commencement of this Act; see s. 69(1) *post*.

By s 69(2) *post*, the powers thereby conferred on trustees are in addition to the power conferred by the instrument, if any, creating the trust, but apply, if and only so far as a contrary intention is not expressed in that instrument, and have effect subject to its terms.

The powers conferred by this section are to be exercised according to the discretion of the trustees, 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 the trust funds; see s. 3 *post*. Advice may be necessary under the Trustee Investments Act 1961, s. 6(2), Sch 1, Pt II, this part of this title *post*, however, and a trustee must have regard to the factors mentioned in s. 6(1) of that Act.

**May retain.** A trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an authorised investment; see s. 4 *post*.

**Any statute replaced by this Act.** The main statute replaced by this Act is the Trustee Act 1893.

Definitions. For "securities", "stock" and "trustee", see s. 68(1), paras (13), (14) and (17) *post*, respectively.

**S 1 of this Act.** By virtue of the Trustee Investments Act 1961, s 16, Sch 4, para 1(1), this part of this title *post*, this is now to be construed as a reference to s 1 of that Act.

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## 3 Discretion of trustees

Every power conferred by the preceding sections 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 the trust funds.

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### NOTES

**Discretion of the trustee.** A trustee is not absolutely safeguarded if he invests trust funds in some of the securities authorised by the settlement or by statute. He must take such care as a reasonably cautious man

would use, having regard not only to the interests of those who are entitled to the income, but also to the interests of those who will take in future, and, if he acts honestly and prudently within the limits of his trust in the belief that his acts are the best course to take in this interest of all parties, he will not be held liable for mere errors of judgment; see e.g. *Re Chapman, Cocks v Chapman* [1896] 2 Ch 763, [1895-9] All ER Rep 1104.

The court has power to relieve a trustee from personal liability for any breach of trust, when he has acted honestly and reasonably and ought fairly to be excused; see s 61 *post*.

In a proper case the court will direct an inquiry as to whether an investment ought to be retained, even where the trustees claim to exercise their discretion as to investments; see *Re D'Epinoix's Settlement, D'Epinoix v Fettes* [1914] 1 Ch 890, 83 LJ Ch 656.

The court will not in general control the discretion of trustees in reference to the adoption of any particular species of investment; see *Lee v Young* (1843) 2 Y & C Ch Cas 532, 12 LJ Ch 478.

As to a trustee's duty in choosing investments, see the Trustee Investments Act 1961, s 6, this part of this title *post*.

**Consent or direction.** Where capital money arising under the Settled Land Act 1925 is paid to the trustees of the settlement, it is to be invested or applied according to the directions of the tenant for life in accordance with the provisions of s 73 of that Act, Pt 2 of this title *post*, and in default thereof according to the discretion of the trustees, but in this latter case subject to any consent required or direction given by the settlement; see s 75(1), (2) thereof, Pt 2 of this title *post*. By sub-s (4) of that section any investment or other application of the capital money is not, during the subsistence of the beneficial interest of the tenant for life, to be altered without his consent.

Where trustees are required by the settlement to change investments at the direction of the tenant for life they can be compelled to comply with his request, even though the investment required be in leaseholds which might impose liability on the trustees, for, being parties to the settlement, they had agreed to do it; see *Cadogan v Earl of Essex* (1854) 2 Drew 277; *Beauclerk v Ashburnham* (1845) 8 Beav 322. But if the investment proposed were improvident, though within the powers of the trustees, they would be justified in bringing the matter before the court to restrain the tenant for life from so directing; see *Re Hunt's Settled Estates, Bulteel v Lawdeshayne* [1905] 2 Ch. 418, 74 LJ Ch. 759; *affd* [1906] 2 Ch 11, 75 LJ Ch 496.

On a direction under the Settled Land Act 1882, s 22 (repealed; see now s. 75 of the 1925 Act, Pt. 2 of this title *post*) given by the tenant for life to the trustees to invest capital money in a specific mortgage of real estate, the court held that the trustees were not bound so to invest unless and until they were satisfied that the direction had been given upon a proper investigation as to title, and upon a proper report as to the value of the proposed security, and upon advice as to the form of the mortgage; see *Re Hotham, Hotham v Doughty* [1902] 2 Ch 575, 71 LJ Ch 789, CA.

It is the duty of trustees to consult the wishes of the beneficiaries with regard to the exercise not only of the trust for sale but also of all other trusts and powers arising under the Settled Land Act 1925, Pt 2 of this title *post*, and the Law of Property Acts 1925 and 1926, Vol 37, title Real Property (Pt 1); see the Law of Property Act 1925, s 26(3), and *Re Jones, Jones v Cusack-Smith* [1931] 1 Ch 375, [1930] All ER Rep 515. Where an action to administer the estate of a deceased person has been begun and a decree made thereon for general administration, the powers of the trustees of selling the property, investing moneys and managing the estate are completely suspended for the time being, and also subsequent transactions must be subject to the previous sanction of the court; see *Re Viscount Furness Wilson v Kenmare* [1943] Ch 415, [1944] 1 All ER 66 (following *Bethell v Abraham* (1873) LR 17 Eq 24, and distinguishing *Berry v Gibbons* (1873) 8 Ch App 747).

**Application.** This section applies to trusts whether created before or after the commencement of this Act; see s 69(1) *post*.

**Definitions.** For "instrument" and "trustee", see s 68(1), paras (5) and (17) *post*, respectively.

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#### 4 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 the general law.

#### NOTES

**Trustee.** For meaning, see s 68(1), para (17) *post*.

**Continuing to hold.** Apart from this Act trustees were usually required to realise a security which had become unauthorised; see *Re Morris, Bucknill v Morris* (1885) 54 LJ Ch 388; *Re Tucker, Tucker v Tucker* [1894] 1 Ch 724, 63 LJ Ch 223; but in case of a mortgage they are not bound to make continual inquiry as to its value; see *Rawsthorne v Rowley* (1907), [1909] 1 Ch 409n, 78 LJ Ch 235n (but cf *Re Brookes, Brookes v Taylor* [1914] 1 Ch 558, 83 LJ Ch 424, where trustees were held liable on the distribution of an estate, for appropriating a mortgage, which turned out to be worthless, to a share of the estate) nor to make good the loss in its value where they had retained it in the honest belief that to do so was the best course for all parties; see *Re Chapman, Cocks v Chapman* [1896] 2 Ch 763, [1895-9] All ER Rep 1104.

Where trustees were authorised to leave money with a particular firm had interest, Romer J considered it a breach of trust to continue the loan after a change in the firm had occurred; see *Re Tucker, Tucker v Tucker* [1894] 1 Ch 724, 63 LJ Ch 223; on appeal, but an appeal from this decision (reported [1894] 3 Ch 429, 63 LJ Ch 737, CA) was directed to stand over until it was ascertained whether any loss had occurred through the alleged breach of trust.

By the Trustee Investments Act 1961, s 3, this part of this title *post*, the investment powers conferred by s 1 of that Act are in addition to and not in derogation from any power of, inter alia, postponing conversion conferred otherwise than by that Act. It is doubtful, however, whether this section confers such a power of postponing conversion and probably the only effect of the 1961 Act upon this section is that by s 3(4) thereof, and Sch 3, para 2, thereto, this part of this title *post*, it does not apply where an investment ceases to be authorised by virtue of Sch 3, para 1, to that Act, which relates to certain investments made or retained in the wider-range (Sch 1, Pt III, to that Act) by or under certain court orders and enactments made before 3 August 1971. The retention of unauthorised investments may be authorised by the court under s 57 *post*. Cf, as to the review of certain authorised investments, the Trustee Investment Act 1961, s 6(3), this part of this title *post*.

**Relief by court.** The court has power to relieve a trustee from personal liability for any breach of trust, where he has acted honestly and reasonably and ought fairly to be excused; see s 61 *post*.

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## 5 Enlargement of powers of investment

(1) A trustee having power to invest in real securities may invest and shall be deemed always to have had power to invest -

(a) ...

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act 1864.

(2) A trustee having power to invest in real securities may accept the security in the form of a charge by way of legal mortgage, and may, in exercise of the statutory power, convert an existing mortgage into a charge by way of legal mortgage.

(3) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may invest in the debenture stock of a railway company or such other company as aforesaid.

(4) - (6)...

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### NOTES

Sub-ss (1)(a), (4)-(6) were repealed by the Trustee Investments Act 1961, s 16(2), Sch 5.

**Having power to invest.** It was held that the Trustee Act 1893, s 5 (repealed), which corresponded to this section, only enlarged the power of a trustee to invest where that power existed under the trust instrument independently of the power conferred by s 1 thereof (repealed), later s 1 of this Act (repealed) (*Re Tattersall, Topham v Armitage* [1906] 2 Ch 399, 75 LJ Ch 680), but see now, by virtue of the

Trustee Investments Act 1961, s 16, Sch 4, s 1(3) of that Act, this part of this title *post*.

**Real securities.** Mortgages of freehold property in England and Wales or Northern Ireland and of leasehold property therein with an unexpired term not less than sixty years and loans on heritable security in Scotland fall within the narrower range of investments in which trustees may now invest without limit but are within that category of the narrower range upon which a trustee must obtain advice; see the Trustee Investments Act 1961, ss 1(1), 6(2), Sch 1, Pt II, this part of this title *post*.

**Charge by way of legal mortgage.** See the Law of Property Act 1925, ss 1(2)(c), 87(1), with s 206 and Sch 5, Form Nos 1 and 2, Vol 37, title Real Property (Pt I). For the statutory power to convert, see s 87(2), (3) of that Act.

**Railway company.** Stock issued as compensation to shareholders in railway companies taken into public ownership under the Transport Act 1947 (repealed), the liability for which was transferred to the Treasury by the Transport Act 1962, s 36, Vol 36, title Railways, Inland Waterways and Pipelines, now falls within the narrower range investments requiring advice mentioned in the note "Real securities" above.

**Application.** This section applies to trusts whether created before or after the commencement of this Act, but, subject to a contrary intention expressed in the instrument, if any, creating the trust; see s 69(1), (2) *post*.

**Definitions.** For "securities" and "trustee", see s 68(1), paras (13) and (17) *post*, respectively. Improvement of Land Act 1864. See ss 49-71 of that Act, Vol 22, title Land Drainage and Improvement. See also the Land Drainage Act 1976, s 107, in the same title, giving powers to invest in first mortgages of drainage rates to landowners within a drainage rate having power to invest in real securities.

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**6 Power to invest in land subject to drainage charges**

A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land notwithstanding the same is charged with a rent under the powers of... the Landed Property Improvement (Ireland) Act 1847, or by an absolute order made under the Improvement of Land Act 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

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**NOTES**

The words omitted were repealed by the SLR Act 1963.

**Having power to invest.** Cf the note to s 5 *ante*.

Capital money arising under the Settled Land Act 1925 may be applied in the acquisition of land to be made subject to a settlement notwithstanding that it is subject to certain encumbrances; see s 74 of that Act, Pt 2 of this title *post*.



**Application.** This section applies to trusts whether created before or after the commencement of this Act; see s 69(1) *post*.

**Definitions.** For "land", "trust" and "trustee", see s 68 (1), paras (6) and (17) *post*, respectively.

**Land Property Improvement (Ireland) Act 1847.** 10 & 11 Vict c 32; not printed in this work.

**Improvement of Land Act 1864.** See s 51 thereof, Vol 22, title Land Drainage and Improvement.

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## 7 Investment in bearer securities

(1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to have been authorised investments:

Provided that securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) shall, until sold, be deposited by him for safe custody and collection of income with a banker or banking company.

A direction that investments shall be retained or made in the name of a trustee shall not, for the purposes of this subsection, be deemed to be such an express prohibition as aforesaid.

(2) A trustee shall not be responsible for any loss incurred by reason of such deposit, and any sum payable in respect of such deposit and collection shall be paid out of the income of the trust property.

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### NOTES

**Deposited ... for safe custody.** Before this Act it was held that trustees specially authorised to retain or invest in securities transferable by delivering with coupons attached, were justified in depositing the securities in their joint names with a bank for safe custody and for collection of the coupons; see *Re De Pothonier, Dent v Pothonier* [1900] 2 Ch 529, 69 LJ Ch 773; cf *Mendes v Guedalla* (1862) 2 John & H 259. A deposit with the solicitors to the estate or other agent does not protect the trustees; see *Field v Field* [1894] 1 Ch 425, 63 LJ Ch 233.

As to the deposit of documents relating to the trust for safe custody, see s 21 *post*, and as to the implied indemnity of trustees for the acts or defaults of persons with whom securities are deposited, see s 30 *post*.

**Application.** This section applies to trusts constituted before as well as after the commencement of this Act; see s 69(1) *post*.

**Definitions.** For "authorised investments", "instrument", "securities payable to bearer", "trust", "trustee" and "trust corporation", see s 68(1), paras (1), (5), (13), (17) and (18) *post*, respectively.

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## 8 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 can properly lend 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 -

(a) that 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 an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situated or elsewhere; and

(b) that the amount of the loan does not exceed two third parts of the value of the property as stated in the report; and

(c) that the loan was made under the advice of the surveyor or 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 such 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 only upon the ground that in effecting the purchase, 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 as well as after the commencement of this Act.

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#### NOTES

**Security of any property.** As to the power to invest in mortgages of freehold and leasehold property, see the note "Real securities" to s 5 *ante*. By the Trustee Investments Act 1961, s 6(2), this part of this title *post*, a trustee, before investing in narrower-range investments requiring advice (Sch 1, Pt II, to that Act) or wider-range investments (Sch 1, Pt III, thereto), must obtain advice as to the need for diversification of investments and as to the suitability to the trust of the investments proposed but, by s 6(7) of that Act, advice on the suitability of the particular loan is not required where the security is freehold or leasehold property in England and Wales or Northern Ireland or heritable security in Scotland, but advice should be obtained under this section.

**By reason only; only upon the ground.** This section replaces the Trustee Act 1893, s 8 (repealed), which itself replaced the Trustee Act 1888, s 4 (repealed). Prior to the 1888 Act, trustees were entitled to rely on expert advice as to the value of property but it was their duty to see that the expert was fully informed of the facts and objects of the trust and that he was acting independently of the mortgagor; having been so

advised, the trustees had themselves to determine what amount they could advance on the security in question.

Since the 1888 Act, trustees are justified in acting on expert advice not only as to the value of the property but also as to the amount they may properly advance thereon, provided that the advice is given in such a manner, and by such a person, as is contemplated in this section, and that, whatever be the nature of the property the amount advanced is not more than two-thirds of its value. Where the trustee is not acting on a report, as is contemplated by this section, the general rules for the guidance of trustees laid down before the 1888 Act apply; see *Shaw v Cates* [1909] 1 Ch 389, at 396-399, 405, 78 LJ Ch 226, and as to those general rules, see *Learoyd v Whiteley* (1887) 12 App Cas 727, at 733, 57 LJ Ch 390, HL.

**The report.** The report must itself state the value of the property and the advice as to the amount that can be advanced; see *Re Walker, Walker v Walker* (1890) 59 LJ Ch 386, 62 LT 449; *Re Stuart, Smith v Stuart* [1897] 2 Ch 583, 66 LJ Ch 780; and *Re Solomon, Nore v Meyer* [1912] 1 Ch 261, 81 LJ Ch 169.

The valuer must consider all the circumstances of the case including the nature of the property and its value with reference to income as well as capital; see *Shaw v Cates* [1909] 1 Ch 389, at 398, 78 LJ Ch 226, *Re Somerset, Somerset v Earl of Poulett* [1894] 1 Ch 231, 63 LJ Ch 41.

It seems doubtful whether badly built houses or cottage property in a town can properly be advised as a security; see *Re Olive, Olive v Westerman* (1886) 34 ChD 70, 56 LJ Ch 75; *Re Salmon, Priest v Uppleby* (1889) 42 ChD 351, 62 LT 270; *Re Bunt's Settled Estates, Bulteel v Lawdeshayne* [1905] 2 Ch 418, 74 LJ Ch 759; affd, [1906] 2 Ch 11, 75 LJ Ch 496; but the fact that newly built houses are not quite completed is not by itself an objection; see *Shaw v Cates* [1909] 1 Ch 389, 78 LJ Ch 226.

If the security, though within the words of the power, is one of a class attended with hazard it should be avoided; see *Blyth v Fladgate* [1891] 1 Ch 337, 60 LJ Ch 66; and see *Re Cowley Settled Estates*, [1926] Ch 725, [1926] All ER Rep 665.

A report is not necessary where, on the sale of an estate in fee simple or term having at least five hundred years to run, not more than two-thirds of the purchase money is allowed to remain on mortgage; see s 10(2) *post*.

**Reasonably believed to be.** Kekewich J considered that the words "believed to be" in sub-s (1) (a) above did not govern "instructed and employed" and that the valuer must in fact be so instructed and employed; see *Re Somerset, Somerset v Earl of Poulett* cited in the note "The Report" above; *Re Walker, Walker v Walker* (1890) 59 LJ Ch 386, 62 LT 449; but this is treated as doubtful in later cases; see *Shaw v Cates* [1909] 1 Ch 389, at 403, LJ Ch 226; *Re Solomon, Nore v Meyer* [1912] 1 Ch 261, at 281, 81 LJ Ch 169.

**Surveyor.** The independence of the surveyor is essential, and the surveyor or valuer must be instructed independently of the mortgagor or his solicitor; see *Shaw v Cates* cited in the note "The Report" above (valuer suggested by mortgagor); and *Re Stuart, Smith v Stuart* [1897]

2 Ch 583, 66 LJ Ch 780 (solicitor instructing valuer acted for both mortgagor and mortgagee).

The surveyor is not required to have local knowledge, as was formerly the case; see *Budge v Gummow* (1872) 7 Ch App 719, 42 LJ Ch 22. He must not be employed on terms that if the transaction falls through he is to be paid no fee, or only a preliminary fee; see *Marquis of Salisbury v Keymer* (1909) 25 TLR 278.

If the surveyor introduces the security this ought to arouse the trustees' suspicions; see *Re Dive, Dive v Roebuck* [1909] 1 Ch 328, at 343, 78 LJ Ch 248. The trustees must exercise their own discretion in the choice of a valuer, and not rely on their solicitor; see *Fry v Tapson* (1884) 28 ChD 268, 54 LJ Ch 224.

As to valuation generally, see the title *Valuers and Appraisers post*.

**Does not exceed two third parts.** The actual amount of the loan which the surveyor or valuer should advise must depend on the nature of the property and on all circumstances of the case, the two-thirds limit being only what the legislature has recognised as the standard of the normal protection which a prudent man will require for a normal risk. If the property is liable to deteriorate or is subject to fluctuation in value or depends for its value on circumstances the continuance of which is precarious a larger margin of protection should be advised; see *Shaw v Cates* cited in the note "The Report" above.

The liability of a trustee advancing on mortgage a sum in excess of what would be a proper advance on the property concerned is limited by s 9 *post*.

**Lessor's title.** Under an open contract, an intended lessee or assignee is not entitled to call for the freehold or, in most cases, any superior leasehold title by virtue of the Law of Property Act 1925, s 44(2), (3), (4), Vol 37, title Real Property (Pt 1).

**Shorter title.** Under an open contract made after 1925 but before 1970, a purchaser was not entitled to require title prior to a good root thirty years old by virtue of the Law of Property Act 1925, s 44(1), Vol 37, title Real Property (Pt 1). In the case of a contract made after 1969, the Law of Property Act 1969, s 23, Vol 37, title Real Property (Pt 1), substitutes fifteen years.

**Power of court to relieve trustees.** The court has power to relieve trustees from the consequences of their breach of trusts, by s 61 *post*; and see the note "Trustee lending on mortgage" thereto.

**Definitions.** For "the court", see s 67 *post*; for "trustee", see s 68(1), para (17) *post*.

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## 9 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 the 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 only be liable to make good the sum advanced in excess thereof with interest.

(2) This section applies to investments made before as well as after the commencement of this Act.

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#### NOTES

**Proper investment ... for a smaller sum.** If an investment was wholly unauthorised, the trustee is liable to make good the whole loss; see *Re Turner, Barker v Ivimey* [1897] 1 Ch 536, 66 LJ Ch 282. If, however, the investment was of an authorised character, but the amount advanced was excessive, then this section applies, and he is only liable for the excess beyond the amount he might properly have advanced; see *Re Salmon, Priest v Uppleby* (1889) 42 ChD 351, at 367, 62 LT 270. The amount the trustee might properly have advanced was fixed by the court in that case and also in *Re Walker, Walker v Walker* (1890) 59 LJ Ch 386, 62 LT 449; *Re Somerset, Somerset v Earl of Poulett* [1894] 1 Ch 231, 63 LJ Ch 41; and *Shaw v Cates* [1909] 1 Ch 389, 78 Ch 226.

**Trustee ... only liable to make good.** Where a trustee makes an excessive investment of an authorised description, the investment becomes part of the trust estate and the trustee is liable for any deficiency arising on realisation without any right to take over the investment, which may be realised without his consent; but if the investment is wholly unauthorised it seems that the defaulting trustee may take over the investment if he replaces the fund; see *Re Salmon, Priest v Uppleby* (1889) 42 ChD 351, 62 LT 270, except where the beneficiaries are under disability; see *Head v Gould* [1898] 2 Ch 250, 67 LJ Ch 480.

For the liability of trustees to pay interest, see 48 Halsbury's Laws (4th edn) paras 954-956.

**Definitions.** For "authorised investment" and "trustee", see s 68(1), paras (1) and (17) post, respectively.

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### 10 Powers supplementary to powers of investment

(1) Trustees lending money on the security of any property on which they can lawfully lend may contract that such money shall not be called in during any period not exceeding seven years from the time when the loan was made, provided interest be paid within a specified time not exceeding thirty days after every half-yearly or other day on which it becomes due, and provided there be no breach of any covenant by the mortgagor contained in the instrument of mortgage or charge for the maintenance and protection of the property.

(2) On a sale of land for an estate in fee simple or for a term having at least five hundred years to run by trustees or by a tenant for life or statutory owner, the trustees, or the tenant for life or statutory owner on behalf of the trustees of the settlement, 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 charge by way of legal mortgage or a mortgage by demise or sub-demise for a term of at least five hundred years (less a nominal reversion when by sub-demise), of the land sold, with or without the security of any other property, such

charge or mortgage, if any buildings are comprised in the mortgage, to contain a covenant by the mortgagor to keep them insured against loss or damage by fire to the full value thereof.

The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such charge or mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the charge or mortgage; and the trustees of the settlement shall be bound to give effect to such contract made by the tenant for life or statutory owner.

(3) Where any securities of a company are subject to a trust, the trustees may concur in any scheme or arrangement –

(a) for the reconstruction of the company;

(b) for the sale of all or any part of the property and undertaking of the company to another company;

[(bb) for the acquisition of the securities of the company, or of control thereof by another company];

(c) for the amalgamation of the company with another company;

(d) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them;

in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned 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 so accepted as aforesaid 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 such company, they may as to all or any of such securities, either exercise such right and apply capital money subject to the trust in payment of the consideration, or renounce such right, or assign for the best consideration that can be reasonably obtained the benefit of such 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:

Provided that the consideration for any such assignment shall be held as capital money of the trust.

(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 subsection (1), or the sale referred to in subsection (2), of this section is made under the order of the court, the powers conferred by those subsections respectively shall apply only if and as far as the court may by order direct.

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## NOTES

Sub-ss (3)(bb) was inserted by the Trustee Investments Act 1961, s 9(1).

**Sub-s (1): May contract.** Before 1926 it was considered that a mortgage by trustees should not contain such a provision, and it had been held in *Vickery v Evans* (1863) 33 Beav 376, 3 New Rep 286, that, where it did, the trustees would be liable for any loss that might arise, if it became necessary to realise the security before the date fixed.

**Seven years from; thirty days after.** As a general rule, the effect of defining a period in such a manner is to exclude the day on which the event in question occurs; see 45 Halsbury's Laws (4th edn) para 1127.

**Sub-s (2): Charge by way of legal mortgage or a mortgage by demise.** For the modes of mortgaging freeholds and leaseholds, see the Law of Property Act, ss85-87, Vol 37, title Real Property (Pt 1).

**Shall not be bound to obtain any report.** This removes the necessity for the report required by s 8 *ante* for the protection of trustees.

**Sub-s (3): May concur.** Before 1926 trustees with power to retain shares in companies which were reconstructed or amalgamated were in a difficulty. In some cases the court held that the shares in the reconstructed company were substantially the same security as those in the old company; see *Re Smith, Smith v Lewis* [1902] 2 Ch 667, 71 LJ Ch 885. In other cases they were considered to be new shares, which the trustees could not retain; see *Re Anson's Settlement, Earl of Lovelance v Anson* [1907] 2 Ch 424, 76 LJ Ch 641.

A scheme for the formation of a holding company, which would acquire the capital of the constituent companies and issue shares to stockholders in exchange for their holdings in those companies, having for its objects the control of the policy of the constituent companies, to effect economies in administration and to carry on other business which might advantageously be combined with that of the companies, but there being no transfer of the undertakings of the companies to the holding company, was held not to be an amalgamation of a company with another company within sub-s (3)(c) above in which trustees were entitled to concur; see *Re Walker's Settlement, Royal Exchange Assurance Corporation v Walker* [1935] Ch 567, [1935] All ER Rep 790.

**In good faith.** Cf the note to s 22 post.

**Sub-s (4): Subscribe for...securities.** The power to subscribe includes certain powers to retain under the Trustee Investments Act 1961, s 9(2), this part of this title post.

This subsection does not appear to affect the rule as to bonus distribution by companies, namely that where a company has power to power to capitalise profits and does so by distributing bonus shares, they become capital, but, unless they have been validly capitalised, they belong to the tenant for life; see *Bouch v Sproule* (1887) 12 App

Cas 385, [1886-90] All ER Rep 319 *Re Piercy, Whitwham v Piercy* [1907] 1 Ch 289, 76 LJ Ch 116.

If the company, having the power, intend to capitalise the bonus, it is capital (*Re Evans, Jones v Evans* [1913] 1 Ch 23, LJ Ch 12) and it is immaterial that the company declare a dividend at the date of issue, which they utilise to pay the call (*Re Hatton, Hockin v Hatton* [1917] 1 Ch 357, 86 LJ Ch 375), or that the form of capitalisation gives the shareholders an option (*Re Taylor, Waters v Taylor* [1926] Ch 923, 96 LJ Ch 17).

But the real transaction must be looked at, and, if from this it appears that there is no intention to capitalise the fund, it will be income (*Re Thomas, Andrew v Thomas* [1916] 2 Ch 331, 85 LJ Ch 519), and a company does not make payments out of a reserve fund capital merely by calling them such (*Re Bates, Mountain v Bates* [1928] Ch 682, [1928] All ER Rep 126). Each case of capitalisation is a question of fact (*Re Speir, Holt v Speir* [1924] 1 Ch 359, [1923] All ER Rep 640). See further *Hill v Permanent Trustee Co of New South Wales Ltd* [1930] AC 720, 99 LPC 191; *Re Sechiari, Argenti v Sechiari* [1950] 1 All ER 417, 66 (Pt 1) TLR 531.

**Sub-s (5): Consent ... required by law.** The investment or other application of capital money arising under the Settled Land Act 1925 by the trustees of the settlement is to be made according to the direction of the tenant for life and on default thereof according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement; see s 75(2) of that Act, Pt 2 of this title post. As to consent to the exercise of powers vested in trustees for sale, see the Law of Property Act 1925, s 26, Vol 37, title Real Property (Pt 1).

**Application.** This section applies to trusts whether created before or after the commencement of this Act, and the powers hereby conferred on trustees are in addition to those conferred by the instrument, if any, creating the trust, but apply, if and so far only as a contrary intention is not expressed in that instrument, and have effect subject to its terms; see s 69(1), (2) post.

**Restrictions on wider-range investments.** The Trustee Investments Act 1961, s 2, this part of this title post, is modified in relation to special-range property as defined in Sch 2, para 1, thereto, by s 3 of that Act and Sch 2 thereto. Special-range property includes property which became part of a trust fund consequent upon the exercise by the trustee, as owner of certain property, of any power conferred by sub-s (3) or (4) above.

**Definitions.** For "the court"; see s 67 post; for "instrument", "mortgage", "property", "securities" and "trust" and "trustee" see s 68(1), paras (5), (7), (11), (13) and (17) post, respectively. For "settlement", "trustees of the settlement", "statutory owner" and "tenant for life", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1 and 117(1)(xxiv), ss 30 and 117(1)(xxiv), s 117(1)(xxvi) and ss 19 and 117(1)(xxviii), respectively, Pt 2 of this title post.

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## 11 Power to deposit money at bank and to pay calls

(1) Trustees may, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account, and all interest, if any, payable in respect thereof shall be applied as income.

(2) Trustees may apply capital money subject to a trust in payment of the calls on any shares to the same trust.

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### NOTES

**Trustees may ... pay ... into a bank.** Sub-s (1) above confirms *Rowth v Howell* (1797) 3 Ves 565; *Fenwick v Clarke* (1862) 4 De GF & J 240, 31 LJ Ch 728; trustees may be liable if they have money on deposit with a banker for an unreasonable time and the bank fails. In the last-mentioned case trustees were excused from liability for leaving money with a bank for fourteen months, but in *Cann v Cann* (1884) 51 LT 770, 33 WR 40, trustees were held liable for loss through the failure of the bank for precisely the same period. In the latter case Kay J, considered that six months was the maximum time for which trustees should deposit money in a bank.

See also *Rehden v Wesley* (1861) 29 Beav 213, where trustees were held liable for money placed on deposit with a bank, though they were expressly indemnified by the testator against losses by a banker of moneys deposited for safe custody. The money must of course, be paid to a separate trust account, and not mixed with the trustee's own money; see *Re Gross, ex p Kingston* (1871) 6 Ch App 632, 40 LJ Bcy 91.

Trustees are exempted from liability for the acts, receipts, neglects or defaults of any banker with whom trust money is deposited unless any loss which occurs happens through his own wilful default; see s 30 post.

**Interest.** A trustee or other person in a fiduciary position is liable to account for any profits arising from the trust property or by reason of the fiduciary relationship; *Swain v Law Society* [1981] 3 All ER 797 at 814, [1982] 1 WLR 17 at 37, CA, per Oliver LJ, approved [1983] 1 AC 598 at 619, [1982] 2 All ER 827 at 838, HL, per Lord Brightman. In *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL, it was held that, a solicitor being in a fiduciary position, interest earned on a clients' deposit account was the client's, even though it could only be earned by aggregating the money of a large number of clients and it might be quite impracticable to determine what share of the interest should be credited to any particular client. That case related to a Scottish advocate; so far as English solicitors are concerned, that decision is modified by the Solicitors' Accounts Rules 1991, Pt III (rr 20-26) (made under the Solicitors Act 1974, ss 32, 33, Vol 41, title Solicitors). However, it is thought that the decision affects persons in fiduciary positions generally.

**Trustees may apply capital.** Sub-s (2) above confirms the practice as decided in *Todd v Moorhouse* (1874) LR 19 Eq 69.

**Application.** This section applies to trusts whether created before or after the commencement of this Act and the powers hereby conferred on trustees are in addition to those conferred by the instrument, if any, creating the trust but apply if and so far only as a contrary intention is not expressed in that instrument and have effect subject to its terms; see s 69(1), (2) post.

**Solicitor-trustees.** The keeping of bank accounts by solicitors is governed by the Solicitors' Investment Business Rules 1990, r 13, the Solicitors' Accounts Rules 1991, and the Solicitors' Accounts (Legal Aid Temporary Provisions) Rules 1992 (made under the Solicitors Act 1974, s 32, Vol 41, title Solicitors). By Pt 1 of the Solicitors' Accounts Rules 1991, every solicitor-trustee who holds or receives money subject to a trust of which he is solicitor-trustee, other than money which is paid into a client account as permitted by the Solicitors' Accounts Rules, is required without delay to pay such money into the trust bank account of the particular trust. See also the note "Interest" above.

**Definitions.** For "mortgage" and "trustee", see s 68(1), paras (7), (17) post, respectively.

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## PART II

### GENERAL POWERS OF TRUSTEES AND PERSONAL REPRESENTATIVES

#### *General Powers*

#### **12 Power of trustees for sale to sell by auction, etc**

(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter 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 re-sell, 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.

(3) This section does not enable an express power to sell settled land to be exercised where the power is not vested in the tenant for life or statutory owner.

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#### NOTES

**Trust for sale.** See the Law of Property Act 1925, ss 23-33, Vol 37, title Real Property (Pt 1).

**Concur with any other person in selling.** Apart from statute, the power of a trustee invested with a power of sale to concur with other persons in the sale of trust property jointly with adjacent or other

property, or in the sale of a share or interest subject to the trust jointly with the remaining shares or interest in the same property for one entire sum, depends on whether the trust property or share or interest can be so sold advantageously and whether a proper apportionment of the purchase money is possible; see *Re Cooper and Allen's Contract for Sale to Harlech*, (1876) 4 Ch D 802 at 814 *et seq.*, 46 LJ Ch 133; *Morris v Debenham* (1876) 2 Ch D 540, 34 LJ 205; *Rede v Oakes* (1864) 4 De GJ & Sm 505, 5 New Rep 209. The purchaser is entitled to be satisfied that the sale is not disadvantageous to the trust estate and that the purchase money has been apportioned; see *Re Cooper and Allen's Contract for Sale to Harlech* above. But the terms of the trust may render it unnecessary that the apportioned parts of the purchase money should be paid separately; *Re Parker and Beech's Contract*, (1887) 56 LJ Ch 358, at 359, CA.

As to the power of trustees to concur with other persons interested, where an individual share in the proceeds of sale of land, or in any other property, is subject to the trust, see s 24 *post*.

**In lots.** When a leasehold is sold in lots in exercise of a trust for sale, the conditions may properly provide for the granting of underleases of lots sold in the event of the whole not being disposed of; *Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch 684, 75 LJ Ch 403, CA. See also *Alexander v Clarke* [1920] 1 IR 47.

**Buy in at any auction.** In order that land may be lawfully bought in by the seller, or by any person employed by him in that behalf, the particulars or conditions of sale must comply with the provisions of the Sale of Land by Auction Act 1867, ss 5, 6, Vol 4, title Auction.

**Application.** The power conferred by this section applies to trusts created either before or after the commencement of this Act and is in addition to powers conferred by the instrument if any creating the trust, but applies if and so far only as a contrary intention is not expressed in that instrument and has effect subject to its terms; see s 69(1), (2) *post*.

**Consultation of beneficiaries.** For the duty of trustees for sale to consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale and to give effect to their wishes, see the Law of Property Act 1925, s 26(3), Vol 37, titled Real Property (Pt 1).

**Duty to obtain best price.** Trustees have an overriding duty to obtain the best price for their beneficiaries; see *Buttle v Saunders* [1950] 2 All ER 193, 66 (Pt 1) TLR 1026, where an injunction was granted to restrain trustees from selling at a lower price than was subsequently offered by another prospective purchaser, although the negotiations with the original purchaser were in an advanced stage and the trustees had considered themselves bound by commercial morality to complete the sale to him.

**Express power to sell settled land.** Notwithstanding anything in the settlement, any power of sale of settled land conferred by the settlement on the trustees of the settlement or on other persons is exercisable by the tenant for life or statutory owner as if it were an additional power conferred on the tenant for life within the Settled Land Act 1925, s 109, Pt 2 of this title *post*, and not otherwise; see s 108(2) of that Act.

**Trust or power to sell part.** Trustees for sale and personal representatives holding in trust for sale have in relation to land inter alia all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act 1925; see the Law of Property Act 1925, ss 28(1), 33, Vol 37, title Real Property (Pt 1). These powers include powers to sell any part of the land and to deal separately with the surface and the mines and minerals; see the Settled Land Act 1925, ss 38(i), 50, Pt 2 of this title post.

**Definitions.** For “land”, “property” and “trustee”, see s 68(1) paras (6), (11) and (17) post, respectively. For “settled land”, “statutory owner” and “tenant for life”, see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 2 and 117(1)(xxiv), s 117(1)(xxvi) and ss 19 and 117(1)(xxviii), respectively, Pt 2 of this title post.

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### 13 Power to sell subject to depreciatory conditions

(1) No sale made by a trustee shall 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) No sale made by a trustee shall, after the execution of the conveyance, 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 trustees at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.

(4) This section applies to sales made before or after the commencement of this Act.

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#### NOTES

**Conditions ... unnecessarily depreciatory.** To sell under such conditions prior to the Trustee Act 1888, s 3 (replaced by the Trustee Act 1893, s 14, itself replaced by this section), was a breach of trust and the court would, at the suit of a cestui que trust, restrain a purchaser from completing a sale of trust property under such conditions (*Dance v Goldingham* (1873) 8 Ch App 902, 42 LJ C 777), or refuse an action for specific performance against a purchaser by the trustees (*Dunn v Flood* (1885) 28 Ch D 586, 54 LJ Ch 661, CA).

**Application.** The power conferred by this section applies to trusts created either before or after the commencement of this Act and is in addition to powers conferred by the instrument, if any, creating the trust, but applies if and so far only as a contrary intention is not expressed in that instrument and has effect subject to the terms thereof; see s 69(1), (2) post.

**Definitions.** For "sale" and "trustee", see s 68(1), paras (3) and (17) post, respectively.

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#### **14 Power of trustees to give receipts**

(1) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for -

(a) the proceeds of sale or other capital money arising under a ... trust for sale of land;

(b) capital money arising under the Settled Land Act 1925.

(3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

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#### **NOTES**

The words omitted from sub-s (2)(a) were repealed retrospectively by the Law of Property (Amendment) Act 1926, ss 7, 8(2), Schedule.

**Writing.** Unless the contrary intention appears this includes other modes of representing or reproducing words in a visible form; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

**A trustee.** Where there are several trustees, not being charity trustees, they must all join in the receipt, unless they have effectively disclaimed or retired from the trust; see, for example, *Crewe v Dicken* (1798) 4 Ves 97; *Hall v Franck* (1849) 11 Beav 519; *Lee v Sankey* (1873) LR 15 Eq 204. As to delegation of authority to execute instruments by charity trustees to two or more of them, see the Charities Act 1993, s 82, Vol 5, title Charities.

A trustee legally entitled in fee simple but without any trust for, or power of, sale, on being requested by all the beneficiaries, can sell and give receipts for the purchase money; see *Re Baker and Selmon's Contract*, [1907] 1 Ch 238, 76 LJ Ch 235.

**Application of section.** This section applies to trusts created before as well as after the commencement of this Act (see s 69(1) *post*), but only to receipts given after 1925; receipts given between 1881 and 1894 were governed by the Conveyancing Act 1881, s 36 (repealed), and receipts given between 1893 and 1926 by the Trustee Act 1893, s 20 (repealed). By sub-s (3) above, this section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

**Employment of agents.** Trustees and personal representatives have power to employ agents to give receipts under s 23 *post*.

**Joint tenancy.** The survivor of joint tenants, solely and beneficially interested, can deal with the legal estate as if it were not held in trust for sale; see the Law of Property Act 1925, s 36(2), Vol 37, title Real Property (Pt 1). In favour of a purchaser, the survivor is deemed to be solely and beneficially interested where the conveyance falls within the Law of Property (Joint Tenants) Act 1964, s 1, Vol 37, title Real Property (Pt 1).

**Liability of trustee signing for conformity.** A trustee is chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity; see s 30(1) *post*.

**Receipt for capital money under the Settled Land Act 1925.** Capital money arising under the Settled Land Act 1925 is not to be paid to fewer than two persons as trustees of a settlement, unless the trustee is a trust corporation; see s 94(1) of that Act, Pt 2 of this title *post*. For the effect of settlement trustees' receipts, see s 95 of that Act, Pt 2 of this title *post*. For the meaning of capital money arising under that Act, see s 117(1)(ii), Pt 2 of this title *post*.

**Receipt for money arising under trust for sale of land.**

Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale of land or in the settlement of the net proceeds, the proceeds of sale or other capital money is not to be paid to, or applied by the direction of, fewer than two persons as trustees for sale, except where the trustee is a trust corporation; see the Law of Property Act 1925, s 27(2), Vol 37, title Real Property (Pt 1). The rights of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital moneys is excepted from the provisions of that section. For the powers of management of a sole personal representative, see the Administration of Estates Act 1925, ss 2, 39, Vol 17, title Executors and Administrators.

**Definitions.** For "instrument", "securities", "trust" and "trustee", "trust corporation" and "trust for sale", see s 68(1), paras (5), (13), (17), (18) and (19) *post*, respectively.

**Settled Land Act 1925.** See Pt 2 of this title *post*. For the meaning of capital money arising under that Act, see s 117(1)(ii) thereof.

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## 15 Power to compound liabilities

A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think 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 or they think 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 of 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 testator's or intestate's estate or to the trust;

and for any of these purposes may enter into, give, execute, and do such agree instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

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## NOTES

**Personal representative.** Any one of several representatives may settle an account, and the settlement is binding on the others; see *Smith v Everett* (1859) 27 Beav 446 at 454. For the power of personal representatives to appropriate property in satisfaction of legacies or any other interests or shares in the property, see the Administration of Estates Act 1925, s 41, Vol 17, title Executors and Administrators.

**Two or more trustees acting together.** In the case of a private trust all the trustees must join, as a majority cannot bind the minority; see *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121, [1874-80] All ER Rep 1293; *Lee v Sankey* (1873) LR 15 Eq 204, 27 LT 809. The court has no jurisdiction to control a dissentient trustee in the exercise of a discretion not coupled with a duty; see *Tempest v Lord Camoys* (1882) 21 Ch D 571, [1881-5] All ER Rep 836.

**Restrictions... in regard to receipts.** For these restrictions, see s 14(2) *ante*.

Sever and apportion any blended trust funds or property. Trustees for sale have power to partition land remaining unsold, under the Law of Property Act 1925, s 28(3), Vol 37, title Real Property (Pt 1).

**Compromise.** To make a case for compromise there must be some point of real difficulty. If rights are undisputed and easily enforced, a case for compromise does not arise; see *Sneath v Valley Gold Ltd* [1893] 1 Ch 477, 68 LT 602; *Mercantile Investment and General Trust Co v International Co of Mexico* (1891) [1893] 1 Ch 484n, 68 LT 603n; *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578, 63 LJ Ch 366 (debenture holders' cases).

In a proper case an executor can compromise a claim by his co-executor against the estate, but if he has been intimated that in such case the executor would be well advised to apply to the court for directions (*Re Houghton, Hawley v Blake* [1904] 1 Ch 622, 73 LJ Ch 317; and see *De Cordova v De Cordova* (1879) 4 App Cas 692, 41 LT 43).

The power of compounding has been held to extend to the claims of residuary legatees; see *Re Warren, Weedon v Reading* (1884) 53 LJ Ch 1016, 51 LT 561. A compromise with persons who had been disinherited by the will, and had threatened proceedings to set it aside, has been upheld; see *Eaton v Buchanan* [1911] AC 253, 48 Sc LR 481; but see, contra, *Abdallah v Rickards* (1888) 4 TLR 622

The power to compromise given by para (f) above has been held to authorise the trustee of a deed of arrangement of a debtor with his creditors to grant preferential treatment to an employee of the debtor in respect of workmen's compensation payments (*Re Shenton*, [1935] Ch 651, [1935] All ER Rep 920), and to authorise a judicial trustee to make payment in compromise of a claim by purchasers of trust property for loss through delay in completion of the sale (*Re Ridsdel, Ridsdel v Rawlinson* [1947] Ch 597, [1947] 2 All ER 312).

Where under this section the trustees surrender their discretion to the court and apply for directions, the court, in approving the proposed compromise, does not force it on any beneficiary but exercises for the trustees the discretion given to them by this section; see *Re Ezekiel's Settlement Trusts, National Provincial Bank Ltd v Hyam* [1942] Ch 230, [1942] 2 All ER 244, CA.

The interests of all the beneficiaries are to be considered in determining whether a compromise desirable and fair, but it is not necessary for all the beneficiaries to consent to it before acceptance of the compromise by the trustees; see *Re Earl of Strafford, Royal Bank of Scotland v Byng* [1980] Ch 28, [1979] 1 All ER 513, CA.

**Good faith.** "Good faith" involves the exercise of active discretion on the part of the trustee, and loss arising from his supineness or carelessness is altogether outside the scope of this section; see *Re Greenwood, Greenwood v Firth* (1911) LT 509.

**Application.** The powers conferred by this section apply to trusts created either before or after the commencement of this Act and are in addition to powers conferred by any trust instrument, but subject to any contrary intention therein expressed; see s 69(1), (2) post.

**Powers of the court.** The court has a wide power under s 57 post of authorising dealings with trust property where no other power to effect a particular transaction exists and the court considers it expedient that the transaction should be carried out.

Under s 61 post the court has power to relieve trustees, who have acted honestly and reasonably and ought fairly to be excused, from personal liability for any breach of trust.

**Definitions.** For "personal representative", "property", "trusts" and "trustee" and "trust corporation", see s 68(1), paras (9), (11), (17) and (18), post, respectively.

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## 16 Power to raise money by sale, mortgage, etc

(1) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have 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.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act 1925, not being also the statutory owners.

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#### NOTES

**Where trustees are authorised.** Before 1926, a trust to raise money by mortgage did not authorise a sale; see *Drake v Whitmore* (1852) 5 De G & Sm 619. A trust for sale did not, in the absence of special circumstances, authorise a mortgage; see *Devaynes v Robinson* (1857) 24 Beav 86; but a power to mortgage might be inferred if the estate was devised charged with debts; see *Ball v Harris* (1839) 4 My & Cr 264; *Stroughill v Anstey* (1852) 1 De GM & G 635 at 645; *Re Bellinger, Durell v Bellinger* [1898] 2 Ch 534; *Re Jones, Dutton v Brookfield* (1889) 59 LJ Ch 31; *Wood v Richardson* (1840) 4 Beav 174; *Re Georges, Buckle v Carter* (1921) 127 LT 117.

This section may not be used by the trustees to authorise the mortgaging of trust property in order to acquire further property for the trust; *Re Suenson-Taylor's Settlement Trusts, Moores v Moores* [1974] 3 All ER 397, [1974] 1 WLR 1280.

**Trustees of property held for charitable purposes.** Land vested in trustees for charitable purposes is deemed for the purposes of the Settled Land Act 1925, s 29, to be settled land and the trustees, without constituting them statutory owners, have in reference to the land all the powers which are by that Act conferred on a tenant for life and on the trustees of a settlement; see s 29(1) of that Act, Pt 2 of this title post. For the meaning of "charitable purposes" see *Income Tax Special Purposes Comrs v Pemsel* [1891] AC 531, [1891-4] All ER Rep 28.

**Trustees of a settlement ... not being ... statutory owners.** Powers of sale and mortgage of settled land are conferred on the tenant for life by the Settled Land Act 1925, ss 38, 71, Pt 2 of this title post. By s 108(2) of that Act, powers (not being merely powers of revocation or appointment) relating to the settled land conferred by the settlement on the trustees of the settlement or other persons are exercisable by the tenant for life or statutory owner as if they were additional powers conferred on the tenant for life by s 109 thereof, Pt 2 of this title post, and not otherwise. For cases where Settled Land Act trustees are statutory owners, see ss 23(1), 26(1) of that Act, Pt 2 of this title post. As to who are trustees of a settlement for the purposes of the Settled Land Act 1925, see ss 30-35 of that Act.

**Application.** The powers conferred by this section apply to trusts created before as well as after the commencement of this Act; see s 69(1) post; and by sub-s (2) above, they apply notwithstanding any contrary intention in any trust instrument.

**Protection to purchasers and mortgagees.** Protection to purchasers and mortgagees dealing with trustees is given by s 17 post.

**Definitions.** For "sale", "mortgage" and "trusts" and "trustees", see s 68(1), paras (3), (7) and (17) post, respectively. For "settlement" and "statutory owner", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1 and 117(1)(xxiv) and 117(1)(xxvi) post, respectively, Pt 2 of this title post.

**Settled Land Act 1925.** See Pt 2 of this title post.

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## **17 Protection to purchasers and mortgagees dealing with trustees**

No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall 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.

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### **NOTES**

**Application.** By virtue of s 69(1) post, this provision applies to trusts created before as well as after the commencement of this Act. For the provisions protecting purchasers and mortgagees dealing with tenants for life and statutory owners, see the Settled Land Act 1925, s 110, Pt 2 of this title post. A purchaser of a legal estate from trustees for sale is not concerned with the trusts affecting the proceeds of sale of land subject to the trust for sale, or affecting the rents and profits of the land until sale; see the Law of Property Act 1925, s 27(1), Vol 37, title Real Property (Pt 1).

**Receipts of trustees.** A person paying, transferring or delivering money, securities or other personal property or effects to trustees is exonerated from seeing to the application, or being answerable for any loss or misapplication thereof, by obtaining a receipt in writing from the trustee or trustees, as the case may be; see s 14 ante, and the notes thereto.

**Definitions.** For "sale", "mortgage" and "mortgagee" and "trust" and "trustees", see s 68(1), paras (3), (7) and (17) post, respectively.

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## **18 Devolution of powers or trusts**

(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.

(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or the other trustees or trustee for the time being of the trust.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

(4) In this section "personal representative" does not include an executor who has renounced or has not proved.

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#### NOTES

**Power.** A distinction exists between bare powers and powers coupled with an interest. A bare authority committed to several persons is determined by the death of one of them, but, if coupled with an interest, it passes to the survivors (Co Litt 113(A); 181 (B)), and this rule as to bare powers has not been abrogated by this section; see *Re Harding, Harding v Paterson* [1923] 1 Ch 182 (decided under the Trustee Act 1893, s 22 (repealed)).

**Given to ... trustees jointly.** Where, in a will executed before any Act gave statutory powers to trustees, a power of sale was given to trustees by name or under the description of "my trustees", to whom the legal estate was devised, it was held that the power could be exercised by the survivors; see *Re Bacon, Toovey v Turner* [1907] 1 Ch 475, 76 LJ Ch 213. In *Re Mainwaring, Crawford v Forshaw* [1891] 2 Ch 261, 60 LJ Ch 683, CA, a power, given by will to "my executors herein named" to select charities to receive bequests of the residuary estate, was held to be given to the executors as such, and two who had proved the will could exercise it to the exclusion of one who had renounced.

A power of sale given by a testator "to my trustees" is annexed to the office and is not personal; see *Re Smith, Eastick v Smith* [1904] 1 Ch 139, 73 LJ Ch 74; *Re De Sommers, Coelenbier v De Sommers* [1912] 2 Ch 622, 82 LJ Ch 17. In *Re Symm's Will Trusts, Public Trustee v Shaw* [1936] 3 All ER 236, 80 Sol Jo 994, a power given by will to "my trustees in whom I have complete confidence" was held not to be given to the trustees personally, the expression "my trustees" being defined in the will as including their executors, administrators or assigns. But cf *Innes (Inspector of Taxes) v Harrison* [1954] 1 All ER 884, [1954] 1 WLR 668, in which a power was void as offending against the rule against perpetuities because the definition of trustees ("The trustees' means and includes the first trustees and the survivor of them and the trustees or trustee for the time being of this deed") created a single and indivisible trust unlike the last example given by Parker J, in *Re De Sommers* above.

**Until the appointment of new trustees.** The personal representatives of a sole surviving trustee, who accept the trusts and act, are liable to be ousted without their consent by an appointment of new trustees made by the person entitled to appoint; see *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280, 78 LJ Ch 136.

**Personal representatives ... of the last surviving or continuing trustee.** The personal representatives of a sole trustee or of the last surviving or continuing trustee, though capable of exercising or performing any power or trust, are not bound, and cannot be compelled to act, or to exercise any right of retainer to which they may be entitled on behalf of the cestui que trust; see *Re Benett, Ward v Benett* [1906] 1 Ch 216, 75 LJ Ch 122, approving *Re Ridley, Ridley v Ridley* [1904] 2 Ch 774, 73 LJ Ch 696.

An executor of a sole or last surviving executor of a testator is the executor of that testator, and so long as the chain of representation is unbroken, the last executor in the chain is the executor of every preceding testator; see the Administration of Estates Act 1925, s 7, Vol 17, title Executors and Administrators.

Should the last surviving personal representative fail to appoint new trustees, the power will pass to his executor, if executor by representation of the sole or last surviving trustee. Failing this, the powers may be exercised only by a person who is granted letters of administration to the estate of the last surviving trustee; see Underhill and Hayton's Law of Trusts and Trustees (14th edn) 640.

**Application.** This section applies to trusts created before as well as after the commencement of this Act, subject to any contrary intention expressed in the trust instrument; see s 69(1), (2) post.

**Restrictions imposed in regard to receipts.** For these restrictions, see s 14(2) ante.

**Trustees appointed by court.** A trustee appointed by the court has, before as well as after the trust property becomes vested in him, the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed by the instrument, if any, creating the trust; see s 43 post.

**Definitions.** For "personal representatives", "trust", "trustees" and "new trustees" and "trust corporation", see s 68(1), paras (9), (17) and (18) post, respectively.

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## 19 Power to insure

(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof 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 wholly or partly to such income.

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

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### NOTES

**May insure.** This section does not impose a duty to insure against loss or damage by fire, so that if the trustees differ as to the necessity of, or as to the amount of, the insurance nothing can be done and they are not responsible for loss if a fire ensues; see *Re McEacharn, Gambles v McEacharn* (1911) 103 LT 900. However, failure to insure trust property may, in some circumstances, be a breach of the trustees' duty of care; see Powers and Duties of Trustees (23rd Report of the Law Reform Committee, 1982 (Cmnd 8733)) para 4.29.

Executors have been held not to be personally liable for failure to insure leaseholds (*Bailey v Gould* (1840) 4 Y & C Ex 221) even though

their testator had covenanted to insure (*Fry v Fry* (1859) 27 Beav 144; and see *Dobson v Land* (1850) 8 Hare 216).

Where on a sale money is left on mortgage the trustees must see that the mortgagor insures to the full value of the buildings; see s 10(2) ante.

**Other insurable property.** Chattels settled as heirlooms are insurable within this section, and if the trustees have capital moneys in their hands subject to the same trusts, they may insure the chattels and pay the premiums out of the income of the capital money; see *Re Earl of Egmont's Trusts, Lefroy v Earl of Egmont* [1908] 1 Ch 821, 77 LJ Ch 479.

**Application.** This section applies to trusts whether created before or after the commencement of this Act, and the powers hereby conferred are in addition to the powers conferred by any trust instrument, but subject to any contrary intention therein expressed in that instrument; see s 69(1), (2) post.

**Application of insurance money.** As to the application of money received under a policy of insurance, see s 20 post.

**Definitions.** For "property", "trust" and "trustee", see s 68(1), paras (11) and (17), respectively, post.

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**20 Application of insurance money where policy kept up under any trust, power or obligation**

(1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement within the meaning of the Settled Land Act 1925, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement, as the case may be.

(2) If any such money is receivable by any person, other than the trustees of the trust or settlement, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge therefor, into court.

(3) Any such money –

(a) if it was receivable in respect of settled land within the meaning of the Settled Land Act 1925, or any building or works thereon, shall be deemed to be capital money arising under that Act from the settled land, and shall be invested or applied by the trustees, or, if in court, under the direction of the court, accordingly;

(b) if it was receivable in respect of personal chattels settled as heirlooms within the meaning of the Settled Land Act 1925, shall be deemed to be capital money arising under that Act, and shall be applicable by the trustees, or, if in court, under the direction of the

court, in like manner as provided by that Act with respect to money arising by sale of chattels as heirlooms as aforesaid;

(c) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under such trust;

(d) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(4) Such money, or any part thereof, may also be applied by the trustees, or, if in court, under the direction of the court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustees shall be subject to the consent of any person whose consent is received by the instrument, if any, creating the trust to the investment of money subject to the trust, and, in the case of money which is deemed to be capital money arising under the Settled Land Act 1925, be subject to the provisions of that Act with respect to the application of capital money by the trustees of the settlement.

(5) Nothing contained in this section prejudices or affects the right of any person to require any such money or any part thereof to be applied in rebuilding, reinstating, or repairing the property lost or damaged, or the rights of any mortgagee, lessor, or lessee, whether under any statute or otherwise.

(6) This section applies to policies effected either before or after the commencement of this Act, but only to money received after such commencement.

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**NOTES**

**Sub-s (1): Money receivable ... under a policy of insurance.** Value payments made under the War Damage Act 1943 (repealed) were not payments receivable under a policy of insurance within this section; see *Re Schofield's Will Trusts, Scholfield v Scholfield* [1949] Ch 341, [1949] 1 All ER 490.

**Policy... kept up under any ... power statutory or otherwise.** The powers of management of settled land by trustees during a minority or pending the vesting of the interest of a person contingently entitled include full power to insure against loss by fire; see the Settled Land Act 1925, s 102(1), (2)(e), (5), Pt 2 of this title post. That power is also exercisable by trustees for sale and personal representatives; see the Law of Property Act 1925, s 28, Vol 37, title Real Property (Pt 1), and the Administration of Estates Act 1925, s 39, Vol 17, title Executors and Administrators, and is not limited in its exercise by trustees for sale and personal representatives to the occasion of a minority or contingency; see *Re Gray, Public Trustee v Woodhouse* [1927] 1 Ch 242, 96 LJ Ch 159. "Trustees, generally, have a power to insure against loss or damage by fire under s 19 ante.

**In performance of... any obligation statutory or otherwise.** The tenant for life of settled land is required at his own expense to insure against damage by fire buildings or works comprised in improvements

paid for out of capital money to such an amount, if any, as the Minister of Agriculture, Fisheries and Food by certificate prescribes; see the Settled Land Act 1925, s 88(1), Pt 2 of this title post.

**Tenant for life impeachable for waste.** A tenant for life is impeachable unless made unimpeachable by the settlement (*Lowndes v Norton* (1864) 4 New Rep 452, 33 LJ Ch 583; *Pardoe v Pardoe* (1900) 82 LT 547, 16 TLR 373).

**Sub-s (2) : Pay ... into court.** See, generally, as to payment into court by trustees, s 63 post.

**Sub-s (3) : Invested or applied ... accordingly.** See the Settled Land Act 1925, ss 73, 75, Pt 2 of this title post.

**Personal chattels settled as heirlooms.** This is to be construed as extending to any chattels to which the Settled Land Act 1925, s 67, applies; see s 67(4) thereof, Pt 2 of this title post. The money arising is, by sub-s (2) of that section, to be paid, invested or applied and otherwise dealt with in like manner in all respects as by that Act directed with respect to other capital money arising under that Act (see s 73 thereof, Pt 2 of this title post), or invested in the purchase of other chattels of the same or any other nature, which, when purchased, are to be settled and held on the same trusts, and are to devolve in the same manner as those sold.

**Trust for sale.** For the powers and provisions applicable to money arising by a sale under a trust for sale, see the Law of Property Act 1925, s 28, and, in the case of mortgaged property, where the right of redemption is barred, s 31(2) thereof, Vol 37, title Real Property (Pt 1).

**Sub-s (4) : Rebuilding, reinstating, replacing or repairing.** The application of capital money by the trustees of a settlement is to be made according to the direction of the tenant for life, and in default thereof according to their discretion, but in the latter case subject to any consent required or direction given by the settlement; see the Settled Land Act 1925, s 75(2), Pt 2 of this title post.

**Other rights under statute.** Any person having an interest in any house or other building burnt down, demolished or damaged by fire may require the insurer to cause the insurance money to be laid out on rebuilding or repairing the house, unless the persons claiming the money give a sufficient security to the insurers that the money will be so laid out, or unless the money is disposed of to or amongst all the contending parties to the satisfaction of the insurers; see the Fires Prevention (Metropolis) Act 1774, s 83, Vol 22, title Insurance (Pt 1), which, despite the Act's title, applies throughout England and Wales; see also *Sinnott v Bowden* [1912] 2 Ch 414, [1911-13] All ER Rep 752. For the right of a purchaser to money payable under the vendor's insurance policy, see the Law of Property Act 1925, s 47, Vol 37, title Real Property (Pt 1).

**Rights..of any mortgagee.** A mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under the Law of Property Act 1925, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, be applied by the mortgagor in making good the loss or damage in respect of which the money is received, or,

without prejudice to any obligation to the contrary imposed by law, or by special contract, in or towards the discharge of the mortgage money; see the Law of Property Act 1925, s 108(3), (4), Vol 37, title Real Property (Pt 1).

**Definitions.** For "the court", see s 67(1) post; for "mortgagee", "property" and "trust" and "trustee", see s 68(1), paras (7), (11) and (17) post, respectively. For "settlement", "settled land" and "tenant for life", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1, 2 and 117(1)(xxiv) and 19 and 117(1)(xxviii), respectively, Pt 2 of this title post.

**Settled Land Act 1925.** See Pt 2 of this title post. For the meaning of "settlement" and "settled land", see ss 1, 2, 117(1)(xxiv) of that Act, and as to capital money arising under that Act, see s 117(1)(ii).

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## 21 Deposit of documents for safe custody

Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

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### NOTES

**Trustees may deposit.** Unless the deeds are deposited at a bank, trustees for sale may entrust the custody to one of their number; see *Cottam v Eastern Counties Rail Co* (1860) 1 John & H 243, 30 LJ Ch 217. Thus, where a trustee sold securities, forging the co-trustee's signature to the transfers, the co-trustee was not negligent in having allowed him possession of the certificates, nor, following *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650, [1952] 2 TLR 568, in failing to act as a watchdog by watching the bank pass book (though not following that case in so far as it precluded one joint-account holder from succeeding upon the other's wrongdoing); see *Welch v Bank of England (Francis and Praed, third parties)* [1955] Ch 508, [1955] 1 All ER 811. In the absence of special circumstances, a trustee is not entitled to have title-deeds and non-negotiable securities removed from the custody of a co-trustee and placed at a bank, in a box accessible only to the trustees jointly; see *Re Sisson's Settlement, Jones v Trappes* [1903] 1 Ch 262, 72 LJ Ch 212.

Whilst a suit is pending, the court may direct trust deeds to be held where it is most convenient; see *Stanford v Roberts* (1871) 6 Ch App 307, 19 WR 552. During the development of a building estate, when deeds are often required for reference, they may be left with the solicitors to the trust; see *Field v Field* [1894] 1 Ch 425, 63 LJ Ch 233.

**Documents.** A letter may come within this description; see *Carlisch v East Ham Corpn and Edwards* [1948] 2 KB 380, [1948] 2 All ER 550, and *Lewisham Borough and Town Clerk v Roberts* [1949] 2 KB 608, [1949] 1 All ER 815. So may a tape recording of a conversation (*Grant v Southwestern and County Properties Ltd* [1975] Ch 185, [1974] 2 All ER 465), and a cinematograph film (*Senior v Holdsworth, ex p*



*Independent Television News Ltd* [1976] QB 23, [1975] 2 All ER 1009, CA). See, further, 13 Halsbury's Laws (4th edn) para 37, n 4 and 2 Words and Phrases (3rd edn) 104,105.

**Application.** The power conferred by this section applies to trusts created either before or after the commencement of this Act, and is in addition to powers conferred by any trust instrument, but subject to any contrary intention expressed in that instrument; see s 69(1), (2) post.

**Deposit of bearer securities.** Securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) are, unless sold, to be deposited by him for safe custody and collection of income with a banker or banking company; see s 7(1) ante.

**Deposit of trust money.** Trust money may be paid into a bank to a deposit or other account pending investment under s 11 ante.

**Right to production.** Prima facie, and in the absence of any special circumstances, a cestui que trust, even though interested only in the proceeds of sale, is entitled, to the production and inspection of all title deeds and other documents relating to the trust estate which are in the possession of the trustees; see *Re Cowin, Cowin v Gravett* (1886) 33 Ch D 179, 56 LJ Ch 78.

**Settled land documents.** Trustees of settlements are protected from liability on account of any vesting instrument or other documents of title relating to settled land, other than securities for capital money, being placed in the possession of the tenant for life or statutory owner, by the Settled Land Act 1925, s 98(3), Pt 2 of this title post.

**Definitions.** For "trust" and "trustees", see s 68(1), para (17) post.

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## 22 Reversionary interests, valuations, and audit

(1) Where the trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same 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 they may think fit;
- (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorised investments;
- (c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable;
- (d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release;

without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith.

(2) The trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission –

(a) to place any distringas notice or apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as aforesaid 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 such securities or other property or any of them or any part thereof 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 their satisfaction for payment of the costs of any proceedings required to be taken:

Provided that nothing in this subsection shall relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on the same falling into possession.

(3) Trustees 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 any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made in good faith shall be binding upon all persons interested under the trust.

(4) Trustees may, in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such vouchers and give such information to him as he may require; and the costs of such examination or audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

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**NOTES**

**Release.** Where funds are transferred from the trustees of an old settlement to the trustees of a new or derivative settlement, a release is usually asked for and the request is generally complied with, but probably it could not be enforced; see *Re Cater's Trusts, (No 2)* (1858) 25 Beav 366. Cf *King v Mullins* (1852) 1 Drew 308, 20 LTOS 19.

**In good faith.** "Good faith" involves the exercise of active discretion on the part of the trustee and any loss arising from his supineness or carelessness will not be within the scope of this section; cf *Re Greenwood, Greenwood v Firth* (1911) 105 LT 509.

**Distringas notice ... stop or other like order.** For the rules of court relating to distringas notices and stop orders, see RSC Ord 50, rr 10,11.

**Writing.** See the note to s 14 ante.

**Obligation to get in and obtain payment or transfer.** On the trust property falling into possession it is the duty of trustees to press for payment, and, if it is not made within a reasonable time, to enforce payment by legal proceedings; the only excuse for not taking action is a well-founded belief that such action would be fruitless, the burden of proving the grounds of such belief being on the trustees; see *Re Brogden, Billing v Brogden* (1888) 38 Ch D 546, [1886-90] All ER Rep 927.

**By duly qualified agents.** For the general power of trustees to employ agents in the administration of the trust, see s 23 post.

**Application.** The power conferred by this section applies to trusts created either before or after the commencement of this Act, and is in addition to any powers conferred by any trust instrument, but subject to any contrary intention expressed therein; see s 69(1), (2) post.

**Compounding of liabilities.** Trustees have wide powers of compounding liabilities under s 15 ante, and of entering into, giving or executing agreements, instruments of composition or arrangement or releases for those purposes.

**Powers of the court.** The court has wide powers under s 57 post of authorising dealings with trust property where no other power to effect a particular transaction exists and the court considers it expedient that the transaction should be carried out.

Under s 61 post the court has power to relieve trustees, who have acted honestly and reasonably and ought fairly to be excused, from personal liability for any breach of trust.

**Definitions.** For "authorised investments", "possession", "property", "securities" and "trusts" and "trustees", see s 68(1), paras (1), (10), (11), (13) and (17) post, respectively.

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## 23 Power to employ agents

(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, 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 testator's or intestate's estate, including the receipt and payment of money, 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 if employed in good faith.

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immoveable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think

fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

(3) Without prejudice to such general power of appointing agents as aforesaid -

(a) A trustee may 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 having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

(b) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

(c) A trustee may appoint a banker 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 banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment;

Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

This subsection applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

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#### **NOTES**

**Sub-s (1) : Employ and pay an agent.** In *Re Vickery, Vickery v Stephens* [1931] 1 Ch 572 at 581, [1931 ] All ER Rep 562, Maugham J describes sub-s (1) above as having revolutionised the position of a trustee or an executor so far as regards the employment of agents: "He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not". In that case, a sole executor was held not liable for money lost through the default of a solicitor employed by him

in good faith, the loss not having happened through the *wilful* default of the executor. The words "*wilful* default" were used as implying either a consciousness of negligence or breach of duty or a recklessness in the performance of a duty; following *Re City Equitable Fire Insurance Co*, [1925] Ch 407, [1924] All ER Rep 485.

Previously trustees were entitled to employ agents when there was a "moral necessity from the usage of mankind" for the employment of such an agency", but not at their own mere wish and pleasure; see *Speight v Gaunt* (1883) 9 App Cas 1 at 5, 53 LJ Ch 419 per Lord Selborne; ie they could employ those agents normally used in the usual and regular course of business by persons acting with reasonable care and prudence on their own account, thus they might employ a broker to make investments (*Speight v Gaunt* (1883) 9 App Cas 1, 53 LJ Ch 419; *Shepherd v Harris* [1905] 2 Ch 310, 74 LJ Ch 574), an agent in a proper case to collect money (*Re Brier, Brier v Evison* (1884) 26 Ch D 238, 51 LT 133) and a solicitor without being made responsible for the agent's default, insolvency, intelligence or honesty, but not agents outside their ordinary duties, such as the employment of a solicitor to collect rents; see *Re Weall, Andrews v Weall* (1889) 42 Ch D 674, 58 LJ Ch 713.

It would appear that the right conferred by sub-s (1) above merely relieves the trustees from automatic vicarious liability for the wrongs of the agent. It does not detract from their personal liability, so that, eg, lack of prudent supervision of the agent by the trustee may amount to a breach of duty; see Underhill and Hayton's Law of Trusts and Trustees (14th edn) 550-553, and the proviso to sub-s (3) above.

For the employment of agents in valuation of property on the security of which it is proposed to advance trust money, see s 8 ante, and for the employment of agents in valuation of trust property and audit of accounts, see s 22(3), (4) ante.

As to the common law power to employ agents, see 48 Halsbury's Laws (4th edn) paras 851-853.

**In good faith.** See the note to s 22 ante.

**Sub-s (2) : Appoint any person.** A limited power is given to trustees to delegate the execution or exercise of trusts, powers and discretions vested in them by s 25 post. This section does not authorise a trustee to depute powers, similar to those which may be given in respect of trust property outside the United Kingdom under sub-s (2) above, to an agent or attorney in respect of trust property within the United Kingdom; see *Green v Whitehead* [1930] 1 Ch 38 at 45, 99 LJ Ch 153.

Trustees for sale may delegate their powers of management until sale to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period

by the Law of Property Act 1925, s 29, Vol 37, title Real Property (Pt 1), and the powers of trustees for sale are conferred on personal representatives by the Administration of Estates Act 1925, s 39, Vol 17, title Executors and Administrators.

**Executing and perfecting insurances.** The word "insurances" is "obviously a misprint for assurances"; see *Green v Whitehead* [1930] 1 Ch 38 at 45, 99 LJ Ch 153, per Eve J.

**Sub-s (3): Appoint a solicitor.** In *Re Hetling and Merton's Contract*, [1893] 3 Ch 269, 62 LJ Ch 783 (decided under the Trustee Act 1888, s 2 (repealed, which corresponded to sub-s (3) above)), Lindley J considered that the appointment of a solicitor to receive money must be made by the trustee himself and that a solicitor appointed as attorney under a general power which contained no reference to the particular sale in hand was not a person authorised to receive the money and give discharge therefor to the purchaser.

In *Re Flower and Metropolitan Board of Works*, (1884) 27 Ch D 592, it was held that all the trustees must join in to receive and give a good receipt for purchase money, unless the settlement gives such authority to a particular trustee. Underhill and Hayton's *Law of Trusts and Trustees* (14th edn) 560 suggests that this is still the case, and that this section does not enable trustees to appoint one of themselves as agent; the point is in doubt, however.

**Deed having in the body thereof or endorsed thereon a receipt.** Cf the Law of Property Act 1925, s 69, Vol 37, title Real Property (Pt 1), replacing the Conveyancing Act 1881, s 56 (repealed) and authorising payment of consideration to a solicitor who produces a deed, having in the body thereof or endorsed thereon a receipt for the consideration signed by the person entitled to give a receipt for that consideration. It was held in *Re Bellamy and Metropolitan Board of Works*, (1883) 24 Ch D 387, 52 LJ Ch 870 that s 56 did not authorise trustee-vendors to require the payment of purchase money to their solicitor on production of the deed duly executed in cases where before 1882 they could not have required the purchaser to pay the purchase money to their solicitor under special authority. The Trustee Act 1888, s 2 (repealed, which corresponded to sub-s (3) above), was passed in order to amend and extend the operation of s 56 of the 1881 Act.

**Signed.** For decisions as to the requirements for signature, see *Morton v French* 1908 SC 171 (mark in

lieu of signature held to be insufficient) ; *Re Gill* (1920) CR Rep 63 (mark in lieu of signature held insufficient); *Brydges (Cheltenham Town Clerk) v Dix* (1891) 7 TLR 215 (printed signature held sufficient); and *R v Kent Justices* (1873) LR 8 QB 305, 42 LJ MC 112, *France v Dutton* [1891] 2 QB 208, 60 LJ QB 488, *LCC v Vitamins Ltd* [1955] 2 QB 218, [1955] 2 All ER 229, CA, and *R v Gateshead justices, ex p Tesco Stores Ltd* [1981] 1 All ER 1027 at 1034, [1981] 1 WLR 419 at 427 (a document may be signed by an authorised agent in the principal's name without indicating that the signature is appended by an agent).

**Application.** The power conferred by this section applies to trusts, executorships and administratorships created either before or after the commencement of this Act, and is in addition to powers conferred by any trust instrument, but subject to any contrary intention expressed therein; see s 69(1), (2) post.

**Solicitors' Incorporated Practices.** Sub-ss (1), (3)(a)-(c) above and s 59 post are applied, with modifications, in relation to a "recognised body" under the Administration of Justice Act 1985, s 9, Vol 41, title Solicitors, by the Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2-5, Sch 1.

**Indemnity to trustees.** An indemnity is given to a trustee in respect of the acts, receipts, neglects or defaults of any other trustee, banker, broker or other person with whom trust money or securities are deposited, and any loss occasioned thereby unless the loss happens through his own default by s 30 post.

**Liability for permitting money to remain longer than reasonably necessary.** Six months was held too long to leave purchase money in the hands of a solicitor, and the trustees were liable for loss through the bankruptcy of the solicitor; see *Wyman v Paterson* [1900] AC 271, 69 LJPC 32, HL. However, trustees were not liable for loss for leaving money in the hands of a solicitor where they did not know that he had received the money and on repeated inquiries he had informed them that he had not received it; see *Re Sheppard, De Brimont v Harvey* [1911] 1 Ch 50, 80 LJ Ch 52.

**Definitions.** For "personal representatives", "property", "trust" and "trustee" and "United Kingdom", see s 68(1), paras (9), (11), (17) and (20) post, respectively.

Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

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#### NOTES

**Undivided share.** Undivided shares are now capable of creation only behind a trust for sale under the Law of Property Act 1925, s 34, Vol 37, title Real Property (Pt 1), or the Settled Land Act 1925, s 36, Pt 2 of this title post. For the transitional provisions, see the Law of Property Act 1925, s 39(4), Sch 1, Pt IV, Vol 37, title Real Property (Pt 1).

**Trust for sale; trustees for sale.** As to trusts for sale and the powers of trustees in relation thereto, generally, see the Law of Property Act 1925, ss 23-29, Vol 37, title Real Property (Pt 1).

**Application.** The power conferred by this section applies to trusts, executorships and administratorships, whether created before or after the commencement of this Act, and is in addition to powers conferred by any trust instrument creating the trust, but subject to any contrary intention therein expressed; see s 69(1), (2) *post*.

**Power to concur in sale.** Cf s 12 ante, under which trustees for sale may sell or concur with others in selling all or any part of the trust property, either together or in lots.

**Definitions.** For "land", "personal representatives", "trust" and "trustees" and "trustees for sale", see s 68(1), paras (6), (9), (17) and (19) *post*, respectively.

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### 25 Power to delegate trusts during absence abroad

[(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) The persons who may be donees of a power of attorney under this section include a trust corporation but not (unless a trust corporation) the only other co-trustee of the donor of the power.

(3) An instrument creating a power of attorney under this section shall be attested by at least one witness.

(4) Before or within seven days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation



and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated) to -

(a) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and

(b) each of the other trustees, if any;

but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee.

(5) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.]

[(6)] For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

[(7)] The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

[(8) This section applies to a personal representative, tenant for life and statutory owner as it applies to a trustee except that subsection (4) shall apply as if it required the notice there mentioned to be given -

(a) in the case of a personal representative, to each of the other personal representatives, if any, except any executor who has renounced probate;

(b) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who together with the person giving the notice constitutes the tenant for life;

(c) in the case of a statutory owner, to each of the persons, if any, who together with the person giving the notice constitute the statutory owner and, in the case of a statutory owner by virtue of section 23(1) (a) of the Settled Land Act 1925, to the trustees of the settlement.]

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#### **NOTES**

Sub-ss (1)-(5) were substituted for the original sub-ss (1)-(8), sub-ss (9) and (10) were renumbered as sub-ss (6) and (7) and sub-s (8) was substituted for the original sub-s (11), as from 1 October 1971, by the Powers of Attorney Act 1971, s 9(i)-(3), and by sub-s (4) thereof, this

part of this title post, that section applies whenever the trusts, powers or discretions in question arose but does not invalidate anything done by virtue of this section as in force at the commencement of the 1971 Act, ie 1 October 1971.

The section in its amended form is not restricted to delegation by trustees during absence abroad and the marginal note should be read accordingly.

**Sub-s (1) : Any rule of law or equity to the contrary.** It is a rule of equity that a trustee may not delegate his trust. A trustee has both by statute and otherwise power to employ agents in the execution of the trust; see s 23 and the first note thereto ante. But normally he may not delegate the exercise of a discretion vested in him; see, for example, *A-G v Scott* (1750) 1 Ves Sen 413 at 417, 418 (trustees held not able to vote by proxies where exercise of judgment involved) ; *Learoyd v Whiteley* (1887) 12 App Cas 727 (trustees held liable for loss through investment although made on the advice of competent valuers). In addition to the power to delegate the exercise of a discretion conferred by this section, trustees may employ agents to exercise their discretion in respect of trust property outside the United Kingdom under s 23(2) ante.

Trustees for sale and personal representatives may delegate their powers of management to persons of full age (not being merely annuitants) for the time being beneficially entitled in possession to the net rents and profits of the land for life or for any less period by virtue of the Law of Property Act 1925, s 29, Vol 37, title Real Property (Pt 1), and the Administration of Estates Act 1925, s 39, Vol 17, title Executors and Administrators.

**Power of attorney.** See, generally, the Powers of Attorney Act 1971, Vol 1, title Agency. A power of attorney under this section cannot be an enduring power within the meaning of the Enduring Powers of Attorney Act 1985; see s 2(8) of that Act, Vol 1, title Agency.

As to the exercise of powers of attorney by corporations, see the Law of Property Act 1925, s 74(4), Vol 37, title Real Property (Pt 1), as explained by the Powers of Attorney Act 1971, s 7(2), Vol 1, title Agency.

**Months.** This means calendar months; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

**Sub-s (4): Within seven days after, etc.** The general rule in cases where an act is to be done within a specified time is that the day from which it runs is not to be counted; see *Goldsmiths' Co v West Metropolitan Rly Co* [1904] 1 KB 1, [1900-3] All ER Rep 667, CA; *Stewart v Chapman* [1951] 2 KB 792, [1951] 2 All ER 613; and the other cases cited in 45 Halsbury's Laws (4th edn) para 1134. A requirement that something be done within a specified period means that the full amount of that period up to midnight on the last day is available; see *Manorlike Ltd v Le Vitas Travel Agency and Consultancy Services Ltd* [1986] 1 All ER 573, 278 Estates Gazette 412, CA.

**Written.** Expressions referring to writing are, unless the contrary intention appears, to be construed as including references to other

modes of representing or reproducing words in a visible form; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

**Application.** The power conferred by this section applies to trusts, executorships and administratorships whether created before 1926 or after 1925, and is in addition to the powers conferred by the instrument, if any, creating the trust, but applies if and so far only as a contrary intention is not expressed in that instrument and has effect subject to the terms thereof; see s 69(1), (2) post.

**Definitions.** For "transfer", "trust", "trustee" and "trust corporation", see s 68(1), paras (16), (17), (18) and (20) post, respectively; for "statutory owner" and "tenant for life", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, s 117(1)(xxvi) and (xxviii), respectively, Pt 2 of this title post, and, as to "tenant for life", see s 19 of that Act, Pt 2 of this title post.

**Settled Land Act 1925, s 23(1)(a).** See Pt 2 of this title post.

### *Indemnities*

## **26 Protection against liability in respect of rents and covenants**

(1) Where a personal representative or trustee liable as such 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 rent charge; 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 operates 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 applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

(3) In this section "lease" includes an underlease and an agreement for a lease or underlease 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.

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### NOTES

The words in square brackets were substituted with retrospective effect by the Law of Property (Amendment) Act 1926, ss 7, 8(2), Schedule.

**Liable as such.** This section applies where a personal representative is "liable as such". A personal representative who enters into possession of the deceased's leaseholds incurs, in addition to his liability as personal representative, the additional liability of an assignee of the term, and this section does not apply to protect a personal representative in respect of his personal liability for the obligations contained in the lease arising from the privity of estate thereby created; see *Re Owers, Public Trustee v Death* [1941] Ch 389, [1941] 2 All ER 589; *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher* [1943] 1 All ER 467, 87 Sol Jo 102.

Where a personal representative is personally liable as assignee his liability as to rent is limited to the letting value of the property; see *Re Bowes, Earl of Strathmore v Vane, Norcliff's Claim* (1887) 37 Ch D 128, [1886-90] All ER Rep 693; *Whitehead v Palmer* [1908] 1 KB 151, 77 LJKB 60; *Re Owers, Public Trustee v Death*, cited above, at 390, 589, respectively. Where personal representatives are so liable under the covenants of the lease, the court will order a sum to be set aside for their protection apart from this section; see *Re Owers, Public Trustee v Death*, cited above; see also *Re Nixon, Gray v Bell*, [1904] 1 Ch 638, 73 LJ Ch 446. A fund set aside in these circumstances is solely for the benefit of the personal representatives or trustees, and the lessor as a possible future creditor has no right to require that such a fund be provided; see *Re Lewis, Jennings v Hemsley* [1939] Ch 232, [1939] 3 All ER 269, at 236, 237 and 270, respectively; *King v Malcott* (1852) 9 Hare 692, 22 LJ Ch 157.

The liability of a personal representative entering into possession on a covenant to repair is the same as that of any other assignee; see *Tremeere v Morison* (1834) 1 Bing NC 89, 4 Moo & S 603; *Sleap v Newman* (1862) 12 CBNS 116, 6 LT 386; *Rendall v Andreae* (1892) 61 LJQB 630, 8 TLR 615.

**Any fixed and ascertained sum.** Where a fund had been set aside to indemnify personal representatives against possible and unascertained liabilities under leases, it was ordered by the court to be paid out to the

beneficiaries, such indemnity being no longer necessary; see *Dodson v Sammell* (1861) 1 Drew & Sm 575, 30 LJ Ch 799.

**Purchaser.** In *Re Lawley, Jackson v Leighton* [1911] 2 Ch 530, 81 LJ Ch 97, decided under the Law of Property Amendment Act 1859 (repealed), "purchaser" was held not to include a person who was paid money to take an assignment of an onerous lease. The expression is not defined in this Act. Cf the Law of Property Act 1925, s 205(1)(xxi), Vol 37, title Real Property (Pt 1).

**Right ... to follow.** Trust money or property which has been wrongfully alienated or converted in breach of trust or the money or property into which it has been converted, can, so long and as far as traceable, be followed and recovered unless the money or property has come into the hands of a purchaser for valuable consideration without notice of the trust, or unless the property has passed as money or as a negotiable instrument without notice of the trust; see, for example, *Re Hallett's Estate, Knatchbull v Hallett* (1880), 13 Ch D 696, [1874-80] All ER Rep 793, CA; *Re Oatway, Hertslet v Oatway* [1903] 2 Ch 356, 72 LJ Ch 575; *Taylor v Blakelock* (1886), 32 Ch D 560, CA; *Hunter v Young* (1879), 4 Ex D 256; *Re Diplock, Diplock v Wintle*, [1948] Ch 465, [1948] 2 All ER 318, CA; approved sub nom *Ministry of Health v Simpson* [1950] 2 All ER 1137, 66 (Pt 2) TLR 1015, HL.

By the Administration of Estates Act 1925, s 38(1), Vol 17, title Executors and Administrators, an assent or conveyance by a personal representative to a person other than a purchaser does not prejudice the rights of any person to follow the property to which the assent or conveyance relates, or any property representing the same, into the hands of the person in whom it is vested by the assent or conveyance, or of any other person (not being a purchaser) who may have secured the same or in whom it may be vested.

**Application.** This section applies to trusts, executorships and administratorships, whether created before 1926 or after 1925; see s 69(1) post. Its application is not capable of being negated by any contrary intention as expressed in the instrument, if any, creating the trust, by virtue of sub-s (2) above.

**Definitions.** For "convey", "conveyance", "personal representative", "property" and "trust" and "trustee", see s 68(1), paras (3), (9), (11) and (17) post, respectively. Note as to "grant", "grantee", "lease" and "lessee", sub-s (3) above.

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## 27 Protection by means of advertisements

(1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the Gazette, and [in a newspaper circulating in the district in which the land is situated] and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two

months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section –

(a) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or

(b) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

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#### NOTES

The words in square brackets in sub-s (1) were substituted with retrospective effect by the Law of Property (Amendment) Act 1926, ss 7, 8(2), Schedule.

**Trustees... may give notice by advertisement.** There must be no undue delay in advertising; see *Re Kay, Mosley v Kay* [1897] 2 Ch 518, in which a testator had died in June, and his executors paid his widow a small immediate legacy, and continued to pay her the income of the estate; they received notice of a creditor's claim in August, and issued notices in November; the creditor issued a writ in December, and recovered judgment for a larger amount than the value of the estate. It was held that, although there was undue delay in issuing the notices, the executors were justified in the circumstances of the case in paying the legacy and the income down to the time of the issue of the writ, but not afterwards.

The Law of Property Amendment Act 1859, s 29 (repealed) (Lord St Leonard's Act), which was replaced by this section, had "creditors and others" where this section has "persons interested". As to the form of notice, it is clear from *Newton v Sherry* (1876), 1 CPD 246, that an advertisement to all persons having claims was effective not only as against creditors but also as against next-of-kin and, presumably, beneficiaries, but in *Re Aldhous deceased, Noble v Treasury Solicitor* [1955] 2 All ER 80, Danckwerts J, suggested at 81, that an advertisement following the wording of s 29 of Lord St Leonard's Act was misleading as, to a person without legal training, "claims suggests claims by creditors rather than beneficiaries.

**Newspaper circulating in the district.** This expression is not restricted to a local newspaper but includes a national newspaper and a newspaper which circulates among a limited class of persons and not among the public generally; see *Re Southern Builders and Contractors (London) Ltd* (1961) Times, 10 October, and *R v Westminster Betting Licensing Committee, ex p Peabody Donation Fund (Governors)* [1963] 2 QB 750, [1963] 2 All ER 544.

**Months.** See the note to s 25 ante.

**Having regard only to the claims ... of which the trustees or personal representatives then had notice.** A notice under this section will not, it seems, protect an executor who pays legacies after he has notice that the validity of the will is disputed and disregards that notice merely because he believes the claim against the validity of the will to be unfounded; see *Guardian Trust and Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115, [1942] 1 All ER 598, PC (decided under the provision of a New Zealand Act corresponding to s 29 of the repealed 1859 Act).

A personal representative is not free from liabilities of which he has notice though no claim has been received in answer to his advertisement; see *Re Land Credit Co of Ireland, Markwell's Case* (1872) 21 WR 135.

**Shall not ... be liable.** A personal representative who has distributed the assets of his testator after issuing advertisements and otherwise complying with this Act is in the same position as if he had administered the estate under a decree of the court; and if he should have retained any legacies as trustee after appropriating them for the benefit of the cestui que trust, he will no longer be under any liability qua executor; see *Clegg v Rowland* (1866), LR 3 Eq 368; *Hunter v Young* (1879), 4 Ex D 256.

**Any obligation to make searches.** Registration of any instrument or matter in any register kept under the Land Charges Act 1972 or any local land charges register is deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons; see the Law of Property Act 1925, s 198, Vol 37, title Real Property (Pt 1). Where a land charge which secures money is created by a company (in the case of a floating charge at any time and in other cases before 1970), registration under the Companies Act 1985, ss 395-398, Vol 8, title Companies, is of the same effect as registration under the Land Charges Act 1972; see s 3(8) of that Act, Vol 37, title Real Property (Pt 1). Accordingly, an intending purchaser would be advised to obtain official certificates of search under the Land Charges Act 1972, s 10, Vol 37, title Real Property (Pt 1), and, if there is a company on the title, to search under s 408 of the 1985 Act, Vol 8, title Companies.

For the protection of trustees and personal representatives in regard to notice when acting for the purposes of more than one trust or estate, see s 28 post.

**Application.** This section applies to trusts, executorships and administratorships, whether created before or after the commencement of this Act; see s 69(1) post. Its application is not capable of being negated by a contrary intention expressed in the instrument, if any,

creating the trust, by virtue of sub-s (3) above. It was excluded in relation to certain claims for betterment levy against personal representatives by the Land Commission Act 1967, s 77, Sch 12, para 9(4), Vol 46, title Town and Country Planning.

**Limitation of actions.** The periods of limitation of actions against personal representatives and trustees by beneficiaries in respect of trust property and by persons claiming interests in the personal estate of a deceased person under a will or an intestacy, are laid down by the Limitation Act 1980, ss 21, 22, Vol 24, title Limitation of Actions. The mere making of a claim does not prevent the period of limitation from running; see *Re Stephens, Warburton v Stephens* (1889), 43 Ch D 39, 59 LJ Ch 109.

**Notices in an action for administration.** As to the issue of advertisements for creditors or other claimants in administration actions, see RSC Ord 44, r 5. In an administration action where the deceased had contracted debts in Bolivia, the court directed an inquiry as to what advertisements or other notices would be directed by the court for the administration of the estate for creditors or other claimants; and the administrators, if they issued such advertisements or notices as were certified to be necessary, could obtain the protection afforded by this section; see *Re Holden, Isaacson v Holden*, [1935] WN 52. See also *Re Letherbrow, Hopp v Dean* [1935] WN 34,48.

In considering whether notices were sufficient the court has regard to the circumstances of the particular case, such as the testator's residence and position in life; see *Re Bracken, Doughty v Townson* (1889), 43 Ch D 1, 59 LJ Ch 18; see also *Wood v Weightman* (1872), LR 13 Eq 434, 26 LT 385. If there is any reasonable ground for supposing that there is a claimant residing in a foreign country the notice should be advertised there; see *Newton v Sherry* (1876), 1 CPD 246, at 256, 45 LJQB 257.

**Definitions.** For "conveyance", "Gazette", "instrument", "personal representative", "trust" and "trustee" and "trust for sale", see s 68(1), paras (3), (4), (5), (9), (17) and (19) post, respectively. For "settlement", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1 and 117(1)(xxiv), Pt 2 of this title post.

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## 28 Protection in regard to notice

A trustee or personal representative 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.

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### NOTES

**Trustee or personal representative.** Cf the Law of Property Act 1925, s 199, Vol 37, title Real Property (Pt 1), which restricts the operation of constructive notice in the case of a purchaser. As to the imputation of knowledge of a client's counsel, solicitor or agent to the client in relation to compensation for loss due to undisclosed land charges, cf



the Law of Property Act 1969, s 25(11), Vol 37, title Real Property (Pt 1).

**Application.** Although there was no corresponding statutory provision before 1926, this section applies retrospectively by virtue of s 69(1) post.

**Definitions.** For "personal representative", "trust" and "trustee", see s 68(1), paras (9) and (17) post, respectively.

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**29** (*Repealed by the Powers of Attorney Act 1971, s 11(2), (4), Sch 2.*)

### **30 Implied indemnity of trustees**

(1) 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 for any banker, 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 same happens through his own wilful default.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

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**NOTES**

**Trustee.** A voluntary liquidator is not a trustee within the meaning of this Act and is not entitled to the protection of this section; see *Re Windsor Steam Coal Co*, (1901), [1928] Ch 609, 97 LJ Ch 238.

**Signing.** See the note "Signed" to s 23 ante.

**Own acts, receipts, neglects or defaults.** Sub-s (1) above does not protect a trustee who misapplies trust funds coming into his hands even though as a result of an honest mistake; see *Re Windsor Steam Coal Co* (1901), [1929] 1 Ch 151, 98 LJ Ch 147, CA.

**Acts ... of any other trustee.** A trustee is not justified in leaving trust money in the hands of a co-trustee longer than the circumstances require; see *Brice v Stokes* (1805), 11 Ves 319.

**Person with whom trust money or securities ... deposited.** Securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) are to be deposited by him, for safe custody and collection of income, until sold, with a banker or banking company, unless expressly prohibited by the instrument creating the trust; see s 7(1) ante. By s 7(2) ante, the trustee is exempted from responsibility for any loss incurred by reason of such deposit. By s 11 ante, trustees are empowered to deposit trust money awaiting investment with a bank. S 21 ante authorises

the deposit of documents relating to trusts for safe custody.

If an executor or trustee properly employs an agent to collect money, and it is lost through the agent's insolvency, the burden of proof is not on the executor or trustee to show that the loss was not attributable to his own default, but on the persons seeking to charge him to show that it was; see *Re Brier, Brier v Evison* (1884), 26 Ch D 238, 51 LT 133. But the agent must be employed in the ordinary course of business (*Fry v Tapson* (1884), 28 Ch D 268, 54 LJ Ch 224; *Speight v Gaunt* (1883), 9 App Cas 1, 53 LJ Ch 419), and the trustees must exercise proper care in the selection of the agent; see *Robinson v Harkin* [1896] 2 Ch 415, 65 LJ Ch 773. See, further, as to the employment of agents by trustees, s 23 ante.

**For any other loss.** "It is impossible now to hold that the words 'for any other loss' are quite general, with the result that no trustee is ever liable for breach of trust unless the breach is occasioned by his own wilful default. In my opinion the words are confined to losses for which it is sought to make the trustee liable occasioned by his signing receipts for the sake of conformity or by reason of the wrongful acts or defaults of another trustee or of an agent with whom trust money or securities have been deposited, or for the insufficiency or deficiency of securities or some other analogous loss"; per Maugham J, in *Re Vickery, Vickery v Stephens* [1931] 1 Ch 572, at 582, [1931] All ER Rep 562. The estate of a deceased trustee is not liable for a breach committed after his death: *Re Palk, Re Drake, Chamberlain v Drake* (1892) 41 WR 28, 36 Sol Jo 626.

**His own wilful default.** These words imply either a "consciousness of negligence or breach of duty, or a recklessness in the performance of a duty", per Maugham J, in *Re Vickery, Vickery v Stephens* [1931] 1 Ch 572, at 582, [1931] All ER Rep 562; following *Re Leeds City Brewery Ltd's Trust, Leeds City Brewery Ltd v Platts* [1925] Ch 532n, and *Re City Equitable Fire Insurance Co*, [1925] Ch 407, [1924] All ER Rep 485, CA.

See also Underhill and Hayton's *Law of Trusts and Trustees* (14th edn) 552, 792.

**A trustee may reimburse himself.** Trustees, whether charitable or private, have always been allowed to reimburse themselves from the trust fund for all expenses properly incurred (*A-G v Norwich* (1837), 2 My & Cr 406, 1 JP 164) and such expenses are payable out of capital; see *Re Bennett, Jones v Bennett* [1896] 1

Ch 778, 65 LJ Ch 422. This indemnity is a charge upon income, as well as upon capital, and expenses can be retained out of income until provision is made for raising them out of the estate; see *Stott v Milne* (1884), 25 Ch D 710, 50 LT 742.

Costs of appointing a new trustee are allowed out of the estate (*Harvey v Olliver* (1887), 57 LT 239). Trustees are entitled to be indemnified out of the trust property in respect of damages recovered by a third party in an action for tort where the injury to that person occurred in the ordinary management of the trust estate; see *Bennett v Wyndham* (1862), 4 De GF & J 259; *Re Raybould, Raybould v Turner* [1900] 1 Ch 199, 69 LJ Ch 249.

Trustees who have rightly carried on a business in accordance with the provisions of a will or settlement are entitled to be indemnified out of the trust estate against any liabilities which they have properly incurred; see *Dowse v Gorton* [1891] AC 190, [1891-4] All ER Rep 1230, HL; cf *Re Oxley, John Hornby & Sons v Oxley* [1914] 1 Ch 604, [1914-15] All ER Rep 505, in which there was no power in the will for the executors to carry on the testator's business.

Trustees are entitled to be indemnified in respect even of statute barred debts which they have paid; see *Budgett v Budgett* [1895] 1 Ch 202, 64 LJ Ch 209.

Trustees are entitled to be paid out of the trust property their full costs of legal proceedings, which they have properly instituted or defended on behalf of the trust; see, for example, *Turner v Hancock* (1882), 20 Ch D 303, 51 LJ Ch 517, CA; *Re Love, Hill v Spurgeon* (1885), 29 ChD 348, 54 LJ Ch 816, CA; *In the Estate of Plant, Re, Wild v Plant* [1926] P 139, 95 LJP 87.

Difficulties may arise where the trust instrument is set aside. Generally the trustee is entitled to his costs out of the estate, if the trust instrument was originally valid; see *Re Holden ex p Official Receiver* (1887), 20 QBD 43, 57 LJQB 47; *Merry v Pownall* [1898] 1 Ch 306, 67 LJ Ch 162. But not if it was void ab initio (*Dutton v Thompson* (1883), 23 Ch D 278); and see *Smith v Dresser* (1866), LR 1 Eq 651, 52 LJ Ch 661; *Tanqueray v Bowles* (1872), LR 14 Eq 151.

As regards the costs of an administration action, trustees ought not generally to sever, but they may be justified in so doing if one trustee is a defaulter, or indebted to the estate; see *Smith v Dale* (1881), 18 Ch D 516, 50 LJ Ch 352. A trustee who severs should have an opportunity of explaining his reasons for so doing; see *Re Isaac Cronbach v Isaac* [1897] 1 Ch 251, 66 LJ Ch 160.

See generally, as to the right of trustees to reimbursement out of the trust property, Underhill and Hayton's Law of Trusts and Trustees (14th edn) 699-706, 48 Halsbury's Laws (4th edn) paras 776 et seq.

**Implied indemnity.** This section, with s 69(2) post, in effect reproduces the Trustee Act 1893, s 24 (repealed), which in its turn re-enacted the Law of Property Amendment Act 1859, s 31. It incorporates generally into instruments creating trusts the common indemnity clause which was usually inserted in such instruments before the 1859 Act; see *Re Brier, Brier v Evison* (1884), 26 Ch D 238, at 243,

51 LT 133; *Re Munton, Munton v West* [1927] 1 Ch 262, at 273, 274, 96 LJ Ch 151.

**Overpayments.** If a trustee has made overpayments in error to a cestui que trust he can recoup himself out of any other interest of the cestui que trust in the trust fund; see *Livesey v Livesey* (1827), 3 Russ 287, 6 LTOS Ch 13. But the court will not generally order the cestui que trust to refund personally; see *Downes v Bullock* (1858), 25 Beav 54; affd sub nom *Bullock v Downes* (1860), 9 HL Cas 1, [1843-60] All ER Rep 706; *Bate v Hooper* (1855), 5 De GM & G 338, 3 WR 639. But it may perhaps in the case of its own officer, eg, a trustee in bankruptcy; see *Re Condon, ex p James* (1874), 9 Ch App 609, [1874-80] All ER Rep 388; *Re Carnac, Ex party Simmonds* (1885), 16 QBD 308, [1881-5] All ER Rep 895; and see *Re Tyler, Ex party Official Receiver* [1907] 1 KB 865, [1904-7] All ER Rep 181; *Scranton's Trustee v Pearse* [1922] 2 Ch 87, [1922] All ER Rep 764.

Executors of a trustee beneficiary, who had overpaid other beneficiaries were not allowed to recover amounts overpaid or to impound future income; see *Re Horne, Wilson v Cox Sinclair* [1905] 1 Ch 76, 74 LJ Ch 25. But where executors had wrongly deducted legacy duty out of capital instead of income they were allowed to deduct it out of future income; see *Re Ainsworth, Finch v Smith* [1915] 2 Ch 96, 84 LJ Ch 701. Trustees who had omitted to deduct income tax on annuities have been permitted to deduct it from future payments; see *Re Musgrave, Machell v Parry* [1916] 2 Ch 417, 85 LJ Ch 639.

Cf *Re Hatch, Hatch v Hatch* [1919] 1 Ch 351, 88 LJ Ch 147, where permanent alimony had been granted to a wife under a decree of the Divorce Court, and a deed made pursuant thereto, and for a number of years income tax had not been deducted by the husband or his executors after his death, and the court declined to allow the overpayments made under the mistake in law to be recovered from the wife, or to be deducted either from future payments of the annuity or from the wife's share in the husband's estate.

Generally, if the mistake was a mistake of fact, the trustee can recover; see *Re Robinson, McLaren v Public Trustee* [1911] 1 Ch 502, at 507, [1911-13] All ER Rep 296.

It was laid down by Turner LJ, in *Stone v Godfrey* (1854), 5 De GM & G 76, 2 Eq Rep 866, that the court has power to relieve against mistakes of law as well as mistakes of fact, and the statement was recognised by the Court of Appeal in *Rogers v Ingham* (1876), 3 Ch D 351, at 357, [1874-80] All ER Rep 209, where it was explained by Mellish LJ: "That is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it". The jurisdiction must be carefully exercised and the facts in each case closely scrutinised to see which way the equity lies (per Stirling J, in *Allcard v Walker* [1896] 2 Ch 369, 65 LJ Ch 660, and cf *Carnell v Harrison* [1916] 1 Ch 328, [1916-17] All ER Rep 827).

**Right of indemnity from cestuis que trust.** Where the only beneficiary is a person sui juris who himself created the trust, the right of the trustee to indemnity against liabilities incident to the legal

ownership of the trust property is not limited to that property, but is enforceable in equity against the beneficiary personally, unless he is in a position to disclaim the property; see *Hardoon v Belilios* [1901] AC 118, 70 LJPC 9, where a trustee holding shares was held entitled to indemnity in respect of calls paid on the shares from the beneficiary, who was successor in title to the person who created the trust. See also *Jervis v Wolferstan* (1874), LR 18 Eq 18,43 LJ Ch 809.

**Trustees of settlements.** The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them; see the Settled Land Act 1925, s 100, Pt 2 of this title post.

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### *Maintenance, Advancement and Protective Trusts*

#### **31 Power to apply income for maintenance and to accumulate surplus income during a minority**

(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property –

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is -

(a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of [eighteen years] has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(2) During the infancy of any such person, if his interest so long continues, the trustees 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: -

(i) If any such person –

(a) attains the age of [eighteen years], or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(b) on attaining the age of [eighteen years] or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees 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

(ii) In any other case the trustees 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, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees 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) This section applies 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 five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees 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 representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

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## NOTES

The words in square brackets in sub-ss (1)(ii), (2)(i)(a), (b) were substituted by the Family Law Reform Act 1969, s 1(3), Sch 1, Pt I, for the words "twenty-one years" but by virtue of s 1(4) of that Act and Sch 3, para 5(1) thereto, Vol 6, title Children, the amendment does not affect this section in its application to interests under instruments made before 1970 or in its application by virtue of the Administration of Estates Act 1925, s 47(1)(ii), Vol 17, title Executors and Administrators, to the estate of an intestate dying before 1970 and, by virtue of s 1(4) of, and Sch 3, para 9 to, the 1969 Act, Vol 6, title Children, the amendment does not affect the construction of any statutory provision where it is incorporated in and has effect as part of any deed, will or other instrument not otherwise affected by s 1 of that Act.

**Sub-s (1) : Property ... held ... in trust.** This includes the residuary estate of an intestate held upon the statutory trusts; see the Administration of Estates Act 1925, s 47(1)(ii), Vol 17, title Executors and Administrators.

**Trustees.** It has been held that an executor holding funds to which an infant was entitled was a trustee for the purposes of the Conveyancing Act 1881, s 43; see *Re Smith, Henderson-Roe v Hitchins* (1889), 42 Ch D 302, 58 LJ Ch 860. The 1881 Act applies to trusts for the maintenance and education of infants made before 1926; for s 43 thereof (which is repealed except in relation to such trusts), see Vol 37, title Real Property (Pt 1).

**Subject to any prior interests.** Quaere whether an interest of parties, contingently entitled in the making or continuance of an accumulation under a clause of a will, can be treated as a prior interest for the purposes of this section; see per Clauson J, in *Re Spencer, Lloyds Bank Ltd v Spencer* [1935] Ch 533, at 542, 543.

**Infancy; minority.** As a general rule, infancy (or minority) now ceases on attaining the age of eighteen, by virtue of the Family Law Reform Act 1969, s 1(1), (2), Vol 6, title Children; that age is reached on the eighteenth anniversary of birth (see s 9 of the 1969 Act, Vol 6, title Children). However, in the case of trusts created before 1970, infancy ceases for the purposes of this section upon the twenty-first anniversary of birth, by virtue of the Family Law Reform Act 1969, ss 1(4), 9, Sch 3, paras 5(1), 9, although before 1970 it ceased on the day before that anniversary; see *Re Shurey, Savory v Shurey* [1918] 1 Ch 263.

**At their sole discretion.** The court will not usually interfere with the bona fide exercise of the discretion of trustees (*Re Bryant, Bryant v Hickley* [1894] 1 Ch 324, 63 LJ Ch 197; *Re Lofthouse*, (1885), 29 Ch D 921, 54 LJ Ch 1087; *Re Senior, Senior v Wood* [1936] 3 All ER 196, 80 Sol Jo 952); but in special circumstances, eg where there is a dispute between the trustees, the court will exercise its power of control over the exercise of the trustees' discretion; see *Klug v Klug* [1918] 2 Ch 67, 87 LJ Ch 569. An express power is not invalidated by the possibility that unascertained members of a class may exist; see *Re Gulbenkian's Settlement*, [1970] AC 508, [1968] 3 All ER 785; *Re Baden's Deed*

*Trusts (No 2)*, [1973] Ch 9, (1972) 2 All ER 1304, CA; *Re Hay's Settlement Trusts*, [1981] 3 All ER 786, [1981] 1 WLR 202.

**Pay to his parent or guardian ... or otherwise apply.** Where two trustees, A and B, were also guardians and B maintained the infants, it was held that A was not discharged by B's receipt, but that A would not be required to vouch the items and, if it were shown that B had properly maintained the infants, the sum proper for that purpose would be allowed against the balance found due on the account; see *Re Evans, Welch v Channell* (1884), 26 Ch D 58, 53 LJ Ch 709.

A married infant has power to give valid receipts for all income, including statutory accumulations of income made during his minority, to which the infant is entitled in like manner as if the infant were of full age; see the Law of Property Act 1925, s 21, Vol 37, title Real Property (Pt 1).

Where trustees have power under sub-s (1)(i) above to pay income to the parent or guardian of a person who has attained eighteen (as to which see the initial note to this section and the note "Infancy; minority" above) or to apply it, they are now empowered by the Family Law Reform Act 1969, s 1(4), Sch 3, para 5(2), Vol 6, title Children, to pay it to that person himself.

**Benefit.** In construing the expression "preferment or advancement or otherwise for his benefit" as used in a will, Jessel MR, in *Lowther v Bentinck* (1874) LR 19 Eq 166, at 169, 170, [1874-80] All ER Rep 362, considered "benefit" to be a term with a wide meaning and not restricted to something ejusdem generis with "preferment or advancement", and held that it included the payment of the beneficiary's debts. See also *Re Livesay's Settlement Trusts, Livesay v Livesay* [1953] 2 All ER 723, [1953] 1 WLR 1114; *Re Hayward, Kerrod v Hayward* [1957] Ch 528, [1957] 2 All ER 474, CA. See, further, the note "For the advancement or benefit" to s 32 post.

**The trustees shall thenceforth pay the income.** This is a consolidating Act and the Law of Property Act 1922, s 88(1) (repealed), was almost identical with sub-s (1) above with the result that s 69(2) post, of this Act should be construed consistently with s 88(6) (repealed) of the 1922 Act, which provided that s 88 was to apply only if and so far as a contrary intention was not expressed in the instrument. Accordingly, although sub-s (1)(ii) above is in terms imperative, it is part of and ancillary to the statutory power of maintenance conferred on trustees by this section, and s 69(2) post, applies, with the result that, where a contrary intention is expressed in the instrument creating the trust, that contrary intention prevails, as eg, where there is a direction to accumulate; see *Re Turner's Will Trusts, District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA (disapproving *Re Ricarde-Seaver's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Sandbrook* [1936] 1 All ER 580, 154 LT 599, and *Re Spencer, Lloyds Bank Ltd v Spencer* [1935] Ch 533, 104 LJ Ch 127, where sub-s (1)(ii) had been considered to impose an imperative statutory duty on the trustees to pay the income and accumulations to the beneficiary on his majority notwithstanding any direction to the contrary in the will, and provided that the limitation of the trust would



carry the intermediate income within sub-s (3) above). See also *Re Ransome's Will Trusts*, *Moberly v Ransome* [1957] Ch 348, [1957] 1 All ER 690, in which an express direction to accumulate was a contrary intention within s 69(2) post, excluding sub-s (1)(ii) although the direction was partially invalidated by the Law of Property Act 1925, s 164, Vol 37, title Real Property (Pt 7), and *Re Erskine's Settlement Trusts*, *Hollis v Pigott* [1971] 1 All ER 572, [1971] 1 WLR 162. Before 1926, a deferred legacy did not carry intermediate income, but the Law of Property Act 1925, s 175, Vol 37, title Real Property (Pt 1), not only assimilated realty to personalty, but also inadvertently assimilated deferred legacies and devises to contingent residuary bequests (which always carried intermediate income; see *Green v Ekins* (1742), 2 Atk 473; *Bective v Hodgson* (1864), 10 HL Cas 656, [1861-73] All ER Rep 324), so that a devise to the testator's daughter, not to take effect until after his wife's death, with substitution of issue if the daughter predeceased both the testator and his wife, was held in *Re McGeorge*, *Ratcliff v McGeorge* [1963] Ch 544, [1963] 1 All ER 519, to carry the intermediate income, notwithstanding a residuary bequest to the wife for life, with remainder to the son and daughter in equal shares. However the devise was subject to defeasance in the widow's lifetime, because of the substitution clause and accordingly the income ought to be accumulated until it became apparent who became entitled to the land. Thus the trustees could not pay the income to the daughter under this section, either because she has a vested interest and was therefore outside sub-s (1)(ii) above or because, by deferring the devise to the daughter until after the widow's death, the will expressed a contrary intention, albeit an intention defeated by s 175. See also *Re Hunter's Will Trusts*, *Gilks v Harris* [1963] Ch 372, [1962] 2 All ER 1050.

For an example of an intermediate income to which sub-s (1)(ii) above applied so that no liability to capital transfer tax arose at the time of the vesting event, see *Swales v IRC* [1984] 3 All ER 16, [1984] STC 413.

**Income of more than one fund is applicable.** Before this Act, if there were two funds, the court applied for maintenance the income of that one which was most to the advantage of the infant to have so applied; see *Re Weaver*, (1882), 21 Ch D 615, 48 LT 93; *Re Wells*, *Wells v Wells* (1889), 43 Ch D 281, 59 LJ Ch 113; and see *Re Burton's Will*, *Banks v Heaven* [1892] 2 Ch 38, 61 LJ Ch 702; and *Smith v Cock* [1911] AC 317, 80 LJPC 98, PC.

**Sub-s (2): Trustees shall accumulate.** Sub-s (2) above radically changed the law respecting the destination of accumulations previously governed by the Conveyancing Act 1881, s 42(5) (repealed) and s 43(2), Vol 37, title Real Property (Pt 1) (repealed except as to pre-1926 instruments). It declares statutory trusts which, in the case of an infant with a vested interest in income who dies during minority, destroy his title to the accumulations and direct them to be held, not as part of the infant's estate, but as an accretion to the capital. The effect of the subsection was described "as engrafting upon the vested interest originally conferred on the infant by the settlement or other disposition a qualifying trust of a special nature which confers on the infant a title

to the accumulations if, and only if, he attains twenty-one or marries"; see per Lord Greene MR, in *Stanley v IRC* [1944] KB 255, [1944] 1 All ER 230, CA, at 261 and 233, respectively, in which it was held that the interest of an infant in the surplus income during his minority was, in effect, contingent only and he was not assessable to surtax in respect of it.

As to the right to claim repayment of income tax, see *Re Fulford, Fulford v Hyslop* [1930] 1 Ch 71. The power of accumulation does not apply where an appointment of income provides that the fund is to be held for minor beneficiaries in equal shares "absolutely", each share being indefeasible; see *Re Delameres Settlement Trusts, Kenny v Cunningham-Reid* [1984] 1 All ER 584, [1984] 1 WLR 813, CA.

**Property.** This was held in *Re King, Public Trustee v Aldridge* [1928] Ch 330, [1927] All ER Rep 214, to mean, in the case of a class gift, the share to which each member of the class becomes ultimately entitled and it may be that *Re King* above is right upon the words "for the benefit of the person who becomes entitled to the property" in the Conveyancing Act 1881, s 43(2) (repealed), but if it applied to this section, in which the corresponding words are hold the accumulations as an accretion to the capital of the property from which such accumulations arose" in sub-s (2)(ii), it would seem that it was wrongly decided and accumulations of income of infants who fail to obtain a vested interest should be added to capital; see *Re Joel's Will Trusts, Rogerson v Brundell-Bruce* [1967] Ch 14, [1966] 2 All ER 482.

**Absolutely.** An interest in personalty, to be "absolute", must be indefeasible; *Re Sharpe's Settlement Trusts*, [1973] Ch 331, [1972] 3 All ER 151; *Re Delamere's Settlement Trusts, Kenny v Cunningham-Reid*, cited in the note "Trustees shall accumulate" above.

**Settlement ... under any statutory powers.** Before 1970, infants over twenty years, if male, or over seventeen years, if female, could make binding marriage settlements with the sanction of the High Court under the Infant Settlements Act 1855 (repealed).

**Receipt of such person after marriage.** Cf the power of married infants to give valid receipts for all income, including statutory accumulations of income during their minority, given by the Law of Property Act 1925, s 21, Vol 37, title Real Property (Pt 1).

**As an accretion to the capital.** Where one fund becomes an accretion to another subject to hotchpot, the united fund becomes subject to the hotchpot clause; see *Re Fraser, Ind v Fraser* [1913] 2 Ch 224, 82 LJ Ch 406; *Re Rydon Marriage Settlement, Barclays Bank Ltd v Everitt* [1955] Ch 1, [1954] 3 All ER 1, CA, which latter case related to property falling into a settlement (containing a hotchpot claim) under an after-acquired property clause and where *Re Fraser* supra, was preferred to *Re Cavendish v Settlement, Grosvenor v Butler* [1912] 1 Ch 794, 81 LJ Ch 400. See also *Re Wood, Wodehouse v Wood* [1913] 2 Ch 574, 83 LJ Ch 59.

**Sub-s (3): This section applies ... only.** Sub-s (3) above is mainly declaratory of the law; per Simonds J, in *Re Leng, Dodsworth v Leng* [1938] Ch 821, [1938] 3 All ER 181, at 826 and 182, respectively; but as to the effect of the Law of Property Act 1925, s 175, Vol 37, title

Real Property (Pt 1), see the reference to *Re McGeorge* in the note "The trustees shall thenceforth pay the income" to sub-s (1) above. A contingent pecuniary legacy does not carry intermediate income by virtue of that section, and there is no power under this section to apply the income for maintenance unless the testator was in loco parentis to the infant or indicated an intention by his will that the infant should be maintained out of income, or has directed his legacy to be appropriated and invested for the benefit of the infant; see *Re Raine, Tyerman v Stansfield* [1929] 1 Ch 716, 98 LJ Ch 244; *Re McGeorge* cited above. Where there is an express direction to trustees in a will to accumulate the income of a legacy during the minority of the person contingently entitled thereto for his life and to add that income to the capital sum, the contingent interest of the infant does not carry the intermediate income of the property so as to enable the trustees to apply the income for the maintenance of the infant under this section; see *Re Reade-Revell, Crellin v Melling* [1930] 1 Ch 52, [1929] All ER Rep 506; *Re Stapleton, Stapleton v Stapleton* [1946] 1 All ER 323, 174 LT 188. Where a residuary trust fund is established by a will and held in trust for the testator's children who attain majority and those shares are by subsequent provisions of the will settled upon them so that each child on attaining majority will only take a life interest in his share; the fund carries intermediate income which may be used for maintenance and any surplus income until the children attain majority is added to the corpus of the trust fund so that each child will take a life interest in the fund, as increased by the addition of the intermediate income in the meantime; see *Re Leng, Dodsworth v Leng* cited above; distinguishing *Re Reade-Revell, Crellin v Melling* cited above, on the ground that in that case there was an express direction for accumulation. For the effect of the possibility of forfeiture by the imposition of protective trusts under s 33 post, see *Re Spencer, Lloyds Bank Ltd v Spencer* [1935] Ch 533, 104 LJ Ch 127.

"It seems to me that the phrase 'carries the intermediate income' implies that the income follows the corpus. That is the connection in which, so far as I know, it is always used in speaking of legacies which do or do not carry intermediate income, and of contingent interests under which intermediate income may or may not be carried. Here you have the possibility of a complete severance between capital and income. For that reason, it seems to me that the section [s 31] does not apply"; per Lord Greene MR, in *Re Bourne's Settlement Trusts, Bourne v Mackay* [1946] 1 All ER 411 at 417, 115 LJ Ch 152, CA. In that case there were separate funds under the settlement for the capital and for the income. The classes amongst whom each fund was divisible at the date of final distribution were different and, in the case of each fund, the trustees had an absolute discretion as to which member or members of the class in question should take and in what proportion.

Where trustees of a settlement had power to pay or apply the income of the trust fund "unto or in any manner for the support or benefit of all or any one or more" of a named class of persons, "such payment or application" to be made in such shares, in such manner and on such lines as the trustees should in their discretion think fit, and they by

resolution allocated the balance of the income in specified shares to infant beneficiaries, who had contingent reversionary interests in the corpus of the fund, and then resolved that the income not required for the maintenance of the infant beneficiaries should be accumulated in accordance with the provisions of this section, it was held that the effect of the resolution was to appropriate the particular shares in the income absolutely to the infants and that, as the infants had merely contingent reversionary interests in the corpus which did not carry intermediate income, this section did not apply, and further, that the fact that the trustees wrongly thought that the sums allocated became subject to the trusts for accumulation imposed by this section did not make the allocations invalid; see *Re Vestey's Settlement, Lloyds Bank Ltd v O'Meara* [1951] Ch 209, [1950] 2 All ER 891, CA.

**Standing in loco parentis.** "The legal sense of the term is that the party has so acted to the children as that he has thereby imposed on himself a moral obligation to provide for them" per Sir L Shadwell, in *Powys v Mansfield* (1835), 6 Sim 528, at 556, and see *Ex p Pye, Ex parte Dubost* (1811), 18 Ves 140, at 154, [1803-13] All ER Rep 96, and *Re Ashton, Ingram v Papillon* [1897] 2 Ch 574, 66 LJ Ch 731.

A mother has been held not to be in loco parentis to a child who, after the death of the father, was being educated at a convent; see *Re Eyre, Johnson v Williams* [1917] 1 Ch 351.

**If and for such period as, under the general law, the legatee carries interest.** Interest runs from the death of the testator where the legatee is an infant child of the testator, or an infant to whom the testator was in loco parentis, though a time be appointed for payment, or the legacy is contingent, but the will provides no other maintenance (*Harvey v Harvey* (1722), 2 P Wins 21, 2 Eq Cas Abr 566, p 110; *Re Bowlby, Bowlby v Bowlby* [1904] 2 Ch 685, 73 LJ Ch 810), or if no time is appointed for payment (*Wilson v Maddison* (1843), 2 Y & C Ch Cas 372, 12 LJ Ch 420).

If the testator has made other arrangements for maintenance, interest only runs from the time when the legacy is payable; see *Hearle v Greenbank* (1749), 1 Ves Sen 298; *Re George*, (1877), 5 Ch D 837, 47 LJ Ch 118; and *Re West, Westhead v Aspland* [1913] 2 Ch 345, [1911-13] All ER Rep 692. But if there appears a general intention to provide maintenance, interest runs from the death of the testator; see *Pett v Fellows* (1733), 1 Swan 561; *Re Churchill, Hiscock v Lodder* [1909] 2 Ch 431, 79 LJ Ch 10; and this may be shown by reading into the will the maintenance clause of this Act; see *Re Stokes, Bowen v Davidson* [1928] Ch 716, [1928] All ER Rep 406; following *Re Moody, Woodroffe v Moody* [1895] 1 Ch 101, 64 LJ Ch 174.

Where a testator, being a parent of, or in loco parentis to, an infant, gives a legacy to that infant contingently on his attaining an age greater than twenty-one years, the court may, in a proper case, infer that the intention of the testator is that the legacy should carry interest out of which the legatee is to be maintained until the vesting of his interest; see *Re Jones, Meacock v Jones* [1932] 1 Ch 642, [1932] All ER Rep

804; and *cf Re Abrahams, Abrahams v Bendon* [1911] 1 Ch 108, 80 LJ Ch 83. In *Re Pollock, Pugsley v Pollock* [1943] Ch 338, [1943] 2 All ER 443, a distinction was drawn between a contingent pecuniary legacy given to a person to whom the testator stood in loco parentis and for whose maintenance he made no other provision, and a similar legacy given to trustees for such a person, and it was held that in the latter case the legacy carried interest only at the expiration of one year from the testator's death. *Cf Re Medlock, Rude v Medlock* (1886), 55 LJ Ch 738, 54 LT 828.

**Rules of court.** Ie rules made by the authority having power to make rules or orders regulating the practice and procedure of the court in question; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. For the relevant power to make rules, see the Supreme Court Act 1981, s 84, Vol 11, title Courts and Legal Services. For the rules of court relating to interest on legacies, see RSC Ord 44, r 10.

**Sub-s (5): Instrument ... under which the interest arises.** Where a power of appointment is exercised, the document exercising the power and not the document creating the power is for the purposes of this section the instrument under which the appointed interest arises, as a new interest is created by the appointment; see *Re Dickinson's Settlements, Bickersteth v Dickinson* [1939] Ch 27, 108 LJ Ch 40.

**Came into operation before (1926).** This Act commenced on 1 January 1926 by virtue of s 71(2) (repealed). As to maintenance where the instrument came into operation before then, see the Conveyancing Act 1881, s 43 (repealed except as to such instruments), Vol 37, title Real Property (Pt 1).

Where the Public Trustee, on the application of the administratrix of an intestate, had been appointed trustee of the intestate's estate, he was authorised under that section to allow, in his discretion, maintenance for the infant next-of-kin as from the death of the intestate; see *Re Bass, Bass v Public Trustee* [1914] WN 368.

That section applied where the infant was contingently entitled to the income (*Re Cotton*, (1875), 1 Ch D 232, 45 LJ Ch 201), and if the legacy or fund had been set apart in the hands of trustees, even though the income, if not so applied, would never belong to the infant; see *Re Boulter, Capital and Counties Bank v Boulter* [1918] 2 Ch 40, [1918-19] All ER Rep 350. But it did not apply where apart from the Act the infant on attaining twenty-one would be entitled to the legacy only without interest; see *Re Dickson, Hill v Grant* (1885), 29 Ch D 331, 54 LJ Ch 510.

**Definitions.** For "authorised investments", see s 68(1), para (1) post; for "contingent interest", see s 68(1), paras (2), (12) post for "personal representatives", "property", "trust" and "trustee", see s 68(1), paras (9), (11) and (17) post, respectively. For "settlement" and "settled land", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1, 2, 117(1)(xxiv), Pt 2 of this title post. For "entailed interest", see, by virtue of s 68(1),

para (15) post, the Law of Property Act 1925,  
s 130, Vol 37, title Real Property (Pt 1).

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### 32 Power of advancement

(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person 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:

Provided that –

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(c) no such payment or application 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 such person is in existence and of full age and consents in writing to such payment or application.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act 1925.

(3) This section does not apply to trusts constituted or created before the commencement of this Act.

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#### NOTES

**Sub-s (1): Pay or apply any capital money.** This may involve the creation of a sub-trust, as in *Roper-Curzon v Roper-Curzon* (1871), LR 11 Eq 452, 24 LT 406. Lord Romilly MR declined to authorise an advancement under a marriage settlement to a son of the marriage unless the son settled the funds advanced, in *Re Halsted's Will Trusts*, *Halsted v Halsted* [1937] 2 All ER 570, Farwell J allowed trustees to exercise a testamentary power of advancement by settling a sum on the

object of the power to provide for his wife and children, in *Re Ropner's Settlement Trusts*, *Ropner v Ropner* [1956] 3 All ER 322, [1956] 1 WLR 902, Harman J allowed an advancement in the form of a settlement to avoid death duties and in *Re Meux's Will Trusts*, *Gilmour v Gilmour* [1958] Ch 154, [1957] 2 All ER 630, Wynn-Parry J approved a settlement under s 53 post, and would presumably have reached the same conclusion under this section; see *Re Wills' Will Trusts*, *Wills v Wills* [1959] Ch 1, [1958] 2 All ER 472, but *delegatus non potest delegare*; see *Re May's Settlement*, *Public Trustee v Meredith* [1926] Ch 136, [1925] All ER Rep 444, and *Re Mewburn's Settlement*, *Perks v Wood* [1934] Ch 112 [1933] All ER Rep 663. The law, however, is not that trustees cannot delegate but that they cannot do so without authority. *Roper-Curzon v Roper-Curzon* above has never been impugned, has passed into the textbooks and must have formed the basis of a good deal of subsequent practice and this section must be interpreted as including power to resettle money on an infant so as to confer considerable benefit, in the form of avoidance of taxation, on her many years hence if she survives; see *Pilkington v IRC* [1964] AC 612, [1963] 3 All ER 622, HL. Where the residuary estate of a testator was, as to one moiety, held upon protective trusts defined in s 33 post during the beneficiary's life and the will incorporated this section, it was held that no distinction could be drawn between transferring Stock Exchange investments and transferring land with the result that a farm could be conveyed to the remainderman by way of advancement where the object of the transaction was to avoid estate duty on the life tenant's death; see *Re Collard's Will Trusts*, *Lloyds Bank Ltd v Rees* [1961] Ch 293, [1961] 1 All ER 821. As to the trustees discretion, cf the note "At their sole discretion" to s 31 ante.

**For the advancement or benefit.** Advancement is a payment to persons who are presumptively entitled to, or have a vested or contingent interest in, an estate or a legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled; it is not limited to minority, though as a rule only applicable during the early life of the object; see *Re Aldridge*, *Abram v Aldridge* (1886), 55 LT, 554, CA, *Re Kershaw's Trusts*, (1868), LR 6 Eq 322, 37 LJ Ch 751. The payment or application must be made for some definite purpose and not merely to put money into a person's pocket; see per Lord Romilly MR, in *Roper-Curzon v Roper-Curzon* (1871), LR 11 Eq 452, at 453, 24 LT 406. Cf *Re Moxon's Will Trusts*, *Downey v Moxon* [1958] 1 All ER 386, [1958] 1 WLR 165. "Benefit" has been given a very wide meaning and has been held to include putting out as an apprentice (*Swinnock v Crisp* (1681), Freem Ch 78); emigrating (*Re England's Estates*, (1830), 1 Russ & M 499); purchasing an outfit (*Re Welch*, (1854), 23 LJ Ch 344, 2 WR 310); furnishing a house (*Perry v Perry* (1870), 18 WR 482); creating a post-nuptial settlement to provide for the wife and children (*Roper-Curzon v Roper-Curzon* (1871), LR 11 Eq 452, 24 LT 406; *Re Halsted's Will Trusts*, *Halsted v Halsted* [1937] 2 All ER 570); the payment of debts (*Lowther v Bentinck* (1874), LR 19 Eq 166, 44 LJ Ch 197); the payment of legacy duty (*Klug v Klug* [1918] 2 Ch 67, 87 LJ

Ch 569); and establishment in business (*Re Kershaw's Trusts* (1868), LR 6 Eq 322, 37 LJ Ch 751; *Re Mead, Public Trustee v Mead* (1918), 88 LJ Ch 86, 119 LT 724; cf *Re Craven's Estate, Lloyds Bank Ltd v Cockburn (No 2)*, [1937] Ch 431, [1937] 3 All ER 33). A bequest of mortgage investments was a gift of money which could fall within a clause in a settlement relating to advancement but, on the facts, was mere bounty in *Re Livesay's Settlement Trusts, Livesay v Livesay* [1953] 2 All ER 723, [1953] 1 WLR 1114, following *Lowther v Bentinck* above. A nomination of X315 National Savings Certificates and less than a month later of £191 in the Post Office Savings Bank by a father to a married childless son aged 43 where the father subsequently died intestate leaving £1,780 was a "border-line case" but, even in relation to the intestate's other assets, was not prima facie an advancement within the Administration of Estates Act 1925, s 47(1)(iii), Vol 17, title Executors and Administrators; see *Re Hayward, Kerrod v Hayward* [1957] Ch 528, [1957] 2 All ER 474, CA. Advancement is permitted in order to discharge a moral obligation to make donations to charity if the beneficiary himself recognises that obligation; *Re Clore's Settlement Trusts, Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955.

**Entitled to the capital of the trust property.** A power of advancement applies as well to an appointed share as to a share taken in default of appointment; see *Re Hocking, Michell v Loe* [1898] 2 Ch 567, 67 LJ Ch 662; *Re Hodgson, Western v Hodgson* [1913] 1 Ch 34, 82 LJ Ch 31.

A power of advancement cannot be employed to advance a child entitled to a life interest, and to the whole fund in a certain contingency, or on failure of issue (*Re Winch's Settlement, Winch v Winch* [1917] 1 Ch 633, 86 LJ Ch 403), although settlements may and frequently do contain special powers of advancement in favour of a tenant for life; see *Lowther v Bentinck* (1874), LR 19 Eq 166, [1874-80] All ER Rep 362; *Re Brittlebank, Coates v Brittlebank* (1881), 30 WR 99.

**On the occurrence of any other event.** Where, under the trusts of a will, an infant was entitled to a share in the residuary estate contingency on survivorship and on attaining the age of twenty-one years, it was held that the expression "the occurrence of some other event" was not restricted to the occurrence of an event having no reference to a specified age, but, while excluding the single event of attaining a specified age, included the compound or double event of attaining a specified age and survivorship; see *Re Garrett, Croft v Ruck* [1934] Ch 477, [1934] All ER Rep 128.

**Any person entitled to any prior life or other interest, whether vested or contingent.** Persons who are for the time being objects of a discretionary trust or power are not persons "entitled to any prior life or other interest vested or contingent" within sub-s (1)(c) above and therefore their consent to the exercise of the statutory power of advancement is not necessary; see *Re Beckett's Settlement, Re Beckett, Eden v Von Stutterheim* [1940] Ch 279, 109 LJ Ch 81.



Where trustees hold the income of a trust fund under a voluntary settlement or the protective trusts set out in s 33(1) post, for the benefit of the settlor for life, his consent to the exercise by them of their power of advancement is sufficient and the consent of his wife and children, who for the time being constitute the class for whose benefit the trustees have a discretion under para (ii) (a) of that subsection to apply the income should the trust in his favour fail or determine in his lifetime, is not necessary; see *Re Harris' Settlement, Dent v Harris* (1940), 162 LT 358, 56 TLR 429.

**Consents.** In *Re Forster's Settlement, Forster v Custodian of Enemy Property in England* [1942] Ch 199, [1942] 1 All ER 180, where the person whose consent was required to the exercise of a power of advancement under a settlement was believed to be in enemy territory, and it was not known for certain whether she was alive or not, but the circumstances were such that she could not be presumed dead, it was held that consent could not be given by the Custodian of Enemy Property on her behalf, nor could the court dispense with the consent. Cf *Re Beale's Settlement Trusts, Huggins v Beale* [1932] 2 Ch 15, [1931] All ER Rep 637, where, in the case of a trust for sale, the requisite consent could not be obtained through refusal, and Maugham J held that the court had jurisdiction under the Law of Property Act 1925, s 30, Vol 37, title Real Property (Pt 1) and s 57 of this Act post, to direct a sale by the trustees without obtaining that consent.

Where a power of advancement is to be exercised with the consent of the tenant for life, he does not lose the power of consent on bankruptcy, but may exercise it with the consent of the trustee in bankruptcy; see *Re Cooper, Cooper v Slight* (1884), 27 Ch D 565, 51 LT 113.

**Writing.** See the note to s 14 ante.

**Sub-s (2): Property held upon trust for sale.** This section has been held to apply and the power of advancement to be exercisable where land is held on trust for sale; see *Re Stimpson's Trusts, Stimpson v Stimpson* [1931] 2 Ch 77, [1931] All ER Rep 809, and the note "Considered as land" below. The residuary estate of an intestate is brought within the section by the Administration of Estates Act 1925, s 47(1)(ii), Vol 17, title Executors and Administrators, where it is held upon the statutory trusts.

**Conversion.** Under the equitable doctrine of conversion money directed or agreed to be laid out in the purchase of land is considered as land; see, for example, *Lechmere v Lady Lechmere* (1735), Cas temp Talb 80; and see, generally, 16 Halsbury's Laws (4th edn reissue) paras 819 et seq.

**Considered as land.** Luxmoore J, in *Re Stimpson's Trusts, Stimpson v Stimpson* [1931] 2 Ch 77, at 83, [1931] All ER Rep 809, at 811, experienced difficulty in appreciating exactly the significance of these words (there being no statute or rule of equity that the proceeds of sale of property held on trust for sale are to be considered as land) but considered that they had no reference to land held on trust for sale. Capital money arising under the Settled Land Act 1925, Pt 2 of this title post, subject to payment of claims and to the application thereof for any special authorised object for which the capital money was raised, is to be invested or otherwise applied in the modes specified in s 73 of that Act, Pt 2 of this title post, and capital money so arising, while remaining uninvested or unapplied, and securities on which an investment of the capital money is made, is for all purposes of disposition, transmission and devolution to be treated as land; see s 75(5) of that Act, Pt 2 of this title post.

**Sub-s (3): Constituted or created before (1926).** The Act commenced on 1 January 1926 by virtue of s 71(2) (repealed). A trust in a will is not created until the death of the testator and accordingly the power conferred by this section is exercisable by the trustees of a will before 1926, where the testator did not die until after 1925; see *Re Darby, Farrell v Fergus* (1943), 59 TLR 418, 87 Sol Jo 381. See also *Re Taylor's Will Trusts, Public Trustee v Burge* (1950), 66 (pt 2) TLR 507, 94 Sol Jo 670. The fact that the will was made before 1926 may, however, be relevant to its construction, as in Upjohn J's explanation in *Re Rees' Will Trusts* of *Re Stimpson's Trusts*, both cited in the note "Forfeiture" below. Where a testatrix died in 1923 and the life tenant under her will was in no position to educate his children in the manner in which he would wish without a power of advancement, Buckley J varied the will so as to incorporate sub-s (1) in an application under the Variation of Trusts Act 1958, this part of this title post; see *Re Lister's Will Trusts*, [1963] 3 All ER 737, [1962] 1 WLR 1441. Where a will conferring a special power of appointment has taken effect before 1926 and the power is exercised after 1925, the trusts created by the exercise of the power are constituted before 1926 but the donee of a general power is in the position of an absolute owner so that the exercise of the power destroys the original trusts and creates new ones; see *Re Batty, Public Trustee v Bell* [1952] Ch 280, [1952] 1 All ER 425, as explained in *Re Bransbury's Will Trusts, Grace v Bransbury* [1954] 1 All ER 605, [1954] 1 WLR 496.

**Application.** The powers conferred by this section on trustees are in addition to those conferred by any trust instrument, but by s 69(2) post, 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. There need not be an express exclusion of the power of advancement or something equivalent thereto to exclude it, if, on a fair reading of the instrument, the application of this section would be inconsistent with the instrument; see *IRC v Bernstein* [1961] Ch 399, [1961] 1 All ER 320, CA, at 412, 413 and 325, respectively, per Lord Evershed MR, holding a trust for accumulation inconsistent with the power. Thus, although the inclusion of an express power of

advancement in a settlement will not necessarily exclude the statutory power, it will do so where the two powers are inconsistent with each other and cannot co-exist; see *Re Evans' Settlement, Watkins v Whitworth Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294, but cf *Gregg v Richards* [1926] Ch 521, 95 LJ Ch 209, in which a right arising under the Conveyancing Act 1881, s 6 (repealed, see now the Law of Property Act 1925, s 62, Vol 37, title Real Property (Pt 1)) was not inconsistent with a right arising outside the instrument and could co-exist.

Apart from statute, advancement may be made by trustees in suitable cases out of the capital of the personal estate in which the person to be advanced has a vested or presumptive or contingent interest, where it is authorised by the terms of the trust (*Re Aldridge, Abram v Aldridge* (1886), 55 LT 554, CA), and by the High Court out of capital in which the person has an absolute interest, or, with the consent of the other persons interested, out of capital in which he has less than an absolute interest; see 5(2) Halsbury's Laws (4th edn *reissue*) para 676.

**Forfeiture.** Where a settlement provided for the determination of the trusts in favour of the tenant for life on the happening of an event whereby the income, or any part thereof, payable to him became vested in or charged in favour of some other person, it was held that the consent of the tenant for life to the exercise by the trustees of a power of advancement expressly given by the settlement did not effect a forfeiture; see *Re Shaw's Settlement Trusts, Shaw v Shaw, Re Wisely's Settlement Trusts, Wisely v Public Trustee* [1951] Ch 833, [1951] 1 All ER 656, following *Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34, 82 LJ Ch 31; and distinguishing *Re Stimpson's Trusts, Stimpson v Stimpson* [1931] 2 Ch 77, [1931] All ER Rep 809 where the settlement contained no express advancement clause. *Re Rees' Will Trusts, Lloyds Bank Ltd v Rees* [1954] Ch 202, [1954] 1 All ER 7, followed *Re Hodgson* above, and *Re Shaw's Settlement Trusts* above, and distinguished *Re Stimpson's Trusts* above, in which the will was made in 1906 and, although it did not come into operation until 1929, the draftsman could not, in 1906, have had in mind this section enacted twenty years later. Where the income of capital money is held on protective trusts under s 33 post, the consent of "the principal beneficiary" to an advance under any statutory or express power does not cause a forfeiture of his life interest; see s 33 (1) (i) post, and *Re Harris' Settlement, Dent v Harris* (1940), 162 LT 358, 56 TLR 429.

**Valuation of advances for distribution.** For the purpose of distribution of the estate advances should be valued as at the time they are brought into account (*Watson v Watson* (1864), 33 Beav 574), but appointed sums for purposes of hotchpot are valued at the time of division (*Re Kelly's Settlement Trusts, Gustard v Berkeley* [1910] 1 Ch 78, 79 LJ Ch 60).

As to the incidence of capital transfer (now inheritance) tax, cf *Re Tollemache, Forbes v Public Trustee* [1930] WN 138 and 19 Halsbury's Laws (4th edn) para 836. Trusts on which settled property is held are not to be treated as falling outside the Inheritance Tax Act 1984, s 89(1) (trusts for disabled persons) by reason only of the powers conferred on trustees by this section; see s 89(3) of that Act, Vol 42, title Taxation.

**Definitions.** For "contingent interest", see s 68(1), paras (2) and (12) post; for "land", "possession", "property", "securities", "trust" and "trustees" and "trust for sale", see s 68(1), paras (6), (10), (11), (13), (17) and (19) post, respectively.

Settled Land Act 1925. For the definition of "capital money arising under this Act", see s 117(1) (ii) thereof, Pt 2 of this title post. For the provisions relating thereto, see ss 73-82 of that Act, Pt 2 of this title post, and for a summary of the moneys which are, or are deemed to be, capital moneys, see the note "Capital money" to s 73(1) thereof, Pt 2 of this title post.

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### 33 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 :-

(i) 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;

(ii) 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 or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say) -

(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(b) 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 trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

(3) 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.

[(4) In relation to the dispositions mentioned in section 19(1) of the Family Law Reform Act 1987, this section shall have effect as if any reference (however expressed) to any relationship between two persons were construed in accordance with section 1 of that Act.]

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**NOTES**

Sub-s 4 was added by the Family Law Reform Act 1987, s 33(1), Sch 2, para 2.

**Sub-s (1) : Directed to be held on protective trusts.** This section is new, but follows the lines of a clause often inserted in settlements for the protection of life interests. In *Re Wittke, Reynolds and Gorst v King Edward's Hospital Fund for London and Custodian of Enemy Property* [1944] Ch 166, [1944] 1 All ER 383, Vaisey J held that a testatrix who directed that the residue of her estate should be held "on protective trusts" for the benefit of her sister, but without specifying any period for the trust, had, on the true construction of the will, incorporated this section in the will, but he expressed the view that care should be taken when reference is made to statutory provisions in wills which are designed to be incorporated in them. In *Re Morris' Settlement Trusts, Adams v Napier* [1951] 2 All ER 528, 95 Sol Jo 609, CA, the imposition of protective trusts was held not to be permitted by a power of appointment of a fund between a settlor's children and remoter issue "in such shares and in such manner in all respects" as the settlor's wife should by deed or will appoint, because those words did not authorise

such a delegation nor could protective trusts be regarded as merely a device to enable a forfeiting life tenant to enjoy the income notwithstanding purported alienation. See also *Re Hunter's Will Trusts*, *Gilks v Harris* [1963] Ch 372, [1962] 3 All ER 1050.

If the trust deed in creates an immediate discretionary trust in favour of a class of beneficiaries, this section does not apply; see *Re Trafford's Settlement*, *Moore v IRC* [1985] Ch 32, [1984] 1 All ER 1108. Power to vary trusts contained in the Variation of Trusts Act 1958, this part of this title post, applies to trusts implied by this section; see s 1(1)(d), (2) of that Act.

**Sub-s (1)(i): Attempts.** See *Re Porter, Coulson v Capper* [1892] 3 Ch 481, [1891-4] All ER Rep Ext 1766 (partially inoperative settlement held to be attempt to assign reversionary interest). Suffers. This has been held to apply to an involuntary proceeding; *Re Sartoris Estate*, *Sartoris v Sartoris* [1892] 1 Ch 11, [1891-4] All ER Rep 193, but see *Re Hall, Public Trustee v Montgomery* [1944] Ch 46, [1943] 2 All ER 753.

**Other than an advance under any statutory or express power.**

Power to advance is given to trustees by s 32 ante. See, as to forfeiture, the note "Forfeiture" to that section.

**Or any part thereof.** If there is no wording to this effect, the court will imply it; *Re Dennis's Settlement Trusts*, *Dennis v Dennis* [1942] Ch 283, [1942] 1 All ER 520.

Sub-s (1)(ii) : Income shall be held. In cases of forfeiture, only the income which has accrued due in the sense of having thereby become payable to or being in the hands of the trustees before the forfeiture, is payable to the principal beneficiary; see *Re Gourju's Will Trusts*, *Starling v Custodian of Enemy Property* [1943] Ch 24, [1942] 2 All ER 605.

"The obligation of the trustees is to apply the trust income as and when they receive it for the purposes indicated in the subsection [ie, the purposes specified in sub-s (1)(ii)] with, of course, such necessary limitations upon absolute obligation as the practical necessities of the case demand. Putting it in a negative way, they are not entitled, regardless of the needs of the beneficiaries, to retain in their hands the income of the trust estate"; per Simonds J, in *Re Gourju's Will Trusts*, *Starling v Custodian of Enemy Property* above, at 34 and 609, respectively; following *Re Peel, Tattersall v Peel* [1936] Ch 161, [1935] All ER Rep 179.

Where the discretionary trusts have come into operation, money in the hands of the trustees after the death of the principal beneficiary, representing income accrued but not applied during his life, remains applicable under the discretionary trusts; see *Re Forster's Settlement*, *Forster v Custodian of Enemy Property* [1942] Ch 199, [1942] 1 All ER 180.

The trustees are entitled at their discretion to pay such part of the income of the trust fund as they might think necessary for the maintenance and support of the principal beneficiary notwithstanding that the beneficiary is indebted to the estate; see *Re Eiser's Will Trusts*, *Fogg v Eastwood* [1937] 1 All ER 244.

If all the objects of the discretionary trusts are sui juris, they are entitled between them to have the whole fund applied for their benefit; see *Re Smith, Public Trustee v Aspinall* [1928] Ch 915, [1928] All ER Rep 520; *Re Nelson, Norris v Nelson* [1928] Ch 920n, 97 LJ Ch 443n. Cf *Re Trafford's Settlement, Moore v IRC* [1985] Ch 32, [1984] 1 All ER 1108.

**Children or more remote issue.** By virtue of the Family Law Reform Act 1987, s 19, Vol 6, title Children, in relation to dispositions made on or after 4 April 1988, references in this section to any relationship between two persons are to be construed in accordance with the general principle contained in s 1 of the 1987 Act (under which, unless the contrary intention appears, relationships are to be construed without regard to whether a person's parents were married at any particular time) ; see sub-s (4) above.

**Trustees.** For meaning, see s 68(1), para (17) post.

**In their absolute discretion.** As to interference by the court in the exercise of their discretion by trustees, see the note to s 31 ante.

**Sub-s (2) : Trusts coming into operation before (1926).** See the note "Constituted or created before (1926)" to s 32(3) ante.

**Sub-s (3) : Trust...liable to be set aside.** If the settlor desires to protect his own life interest, the effect of the bankruptcy law must be borne in mind. Thus, if a husband settled his own property on his marriage giving himself the first life interest, subject to forfeiture on bankruptcy or other parting with his income, and became bankrupt, his trustee in bankruptcy could make a good title to the income during his life notwithstanding the gift over; see *Re Burroughes-Fowler, Burroughes-Fowler's Trustee v Burroughes-Fowler* [1916] 2 Ch 251, 85 LJ Ch 550.

See also the Insolvency Act 1986, ss 339-342, 423-425, Vol 4, title Bankruptcy and Insolvency, which make provision against transactions at undervalue and preferences.

**Forfeiture.** Decisions on the interpretation of the words used in express forfeiture clauses in trust instruments are a guide to the interpretation of the similar words used in this section. See also 42 Halsbury's Laws (4th edn), para 923.

Forfeiture has been held not to arise in the following cases: a garnishee order in respect of income actually accrued (*Re Greenwood, Sutcliffe v Gledhill* [1901] 1 Ch 887, [1900-3] All ER Rep 97); a direction to trustees to pay a particular creditor out of such income (*Durran v Durran* (1904), 91 LT 819); an act purporting to make a

future charge, which was cancelled before the charge took effect (*Re Mair, Williamson v French*, [1909] 2 Ch 280, 78 LJ Ch 711); an order appointing a receiver of a life interest with a direction to pay a judgment debt, where nothing had been done under the order (*Re Beaumont, Woods v Beaumont* (1910), 79 LJ Ch 744, 103 LT 124); an assignment to trustees on trusts under which the assignor was himself the beneficiary and the trustees having power to pay the expenses of managing the trusts (*Re Tancred's Settlement, Somerville v Tancred* [1903] 1 Ch 715, [1900-3] All ER Rep 251); a release of a life interest in money to be advanced under a power (*Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34, 82 LJ Ch 131; *Re Shaw's Settlement Trusts., Shaw v Shaw, Re Wisely's Settlement Trusts, Wisely v Public Trustee* [1951] Ch 833, [1951] 1 All ER 656; *Re Rees' Will Trusts, Lloyds Bank Ltd v Rees* [1954] Ch 202, [1954] 1 All ER 7); an order in divorce proceedings varying a marriage settlement (*General Accident Fire and Life Assurance Corp'n Ltd v IRC* [1963] 3 All ER 259, [1963] 1 WLR 1207, CA, overruling *Re Carew's Trusts, Gellibrand v Carew* (1910), 103 LT 658, 55 Sol Jo 140) ; an order in divorce proceedings that a beneficiary should charge his interest, the deed to be settled by conveyancing counsel of the court, although no such deed was executed as the order created an equitable charge (*Re Richardson's Will Trusts, Public Trustee v Llewelyn-Evans Trustees* [1958] Ch 504, [1958] 1 All ER 538); the appointment of a receiver in lunacy (*Re Marshall, Marshall v Whateley* [1920] 1 Ch 284, [1920] All ER Rep 190).

The creation of a rentcharge under the Settled Land Act 1925, s 85(1), Pt 2 of this title post, by the person entitled to a protected life interest under a settlement for the repayment of capital expenditure on improvements, is not a charge on the equitable life interest of the tenant for life, and does not cause a forfeiture, even though some of the improvements were not such that their cost could be met in that way; see *Re Liberty's Will Trusts, Blackmore v Stewart Liberty* [1937] Ch 176, [1937] 1 All ER 399.

By the Settled Land Act 1925, s 106(3), Pt 2 of this title post, the exercise by the tenant for life or statutory owner of any power under that Act is not



to occasion a forfeiture, notwithstanding anything in the settlement.

But forfeiture has been held to arise: on a receiving order in bankruptcy followed by adjudication (*Re Sartoris' Estate, Sartoris v Sartoris* [1892] 1 Ch 11, [1891-4] All ER Rep 193); or not so followed (*Re Laye, Turnbull v Laye* [1913] 1 Ch 298, 82 LJ Ch 218); by a petition followed by adjudication (*Re Cotgrave, Mynors v Cotgrave* [1903] 2 Ch 705, 72 LJ Ch 777); by an attempt to charge (*Re Porter, Coulson v Capper* [1892] 3 Ch 481, [1891-4] All ER Rep Ext 1766); by the assertion by trustees of their right to retain the income otherwise payable to the protected life tenant for the recoupment of capital improperly advanced to the life tenant by a deceased sole trustee in breach of trust (*Re Balfour's Settlement, Public Trustee v Official Receiver* [1938] Ch 928, [1938] 3 All ER 259).

In *Re Baring's Settlement Trusts, Baring Brothers & Co Ltd v Liddell* [1940] Ch 737, [1940] 3 All ER 20, where the income of a trust fund was payable to a tenant for life until, inter alia, some event whereby it or any part of it became vested in or payable to or charged in favour of some other person, it was held that, as on the construction of the trust instrument the life interest was to determine as soon as the personal enjoyment of the income was lost, the notice of a writ of sequestration empowering the sequestrators to take possession of the life tenant's estate until a certain contempt of court was purged resulted in a forfeiture.

As to the effect of the Trading with the Enemy Act 1939, title War and Emergency (Pt 2) post; see *Re Gourju's Will Trusts, Starling v Custodian of Enemy Property* [1943] Ch 24, [1942] 2 All ER 605; *Re Wittke, Reynolds and Gorst v King Edward's Hospital Fund for London and Custodian of Enemy Property* [1944] Ch 166, [1944] 1 All ER 383. Cf *Re Hall, Public Trustee v Montgomery* [1944] Ch 46, [1943] 2 All ER 753; and *Re Harris, Cope v Evans* [1945] Ch 316, [1945] 1 All ER 702.

The forfeiture occurs at the instant of the assignment, and cancellation of the assignment and subsequent release by the assignees is immaterial; see *Re Baker, Baker v Baker* [1904] 1 Ch 157, 73 LJ Ch 172.

Where an annuity is given by will subject to a forfeiture clause on alienation, the clause operates from the testator's death and, if at that time the principal beneficiary has been adjudicated bankrupt and has not obtained his discharge, the forfeiture clause operates, although the beneficiary subsequently obtains his discharge before he was entitled to receive any income and before there was any income available for payment of the annuity; see *Re Walker, Public Trustee v Walker* [1939] Ch 974, [1939] 3 All ER 902.

**Taxation.** By the Income and Corporation Taxes Act 1988, s 665(2)(c), Vol 44, title Taxation, certain settlements are deemed not to be irrevocable for the purposes of Pt XV, Chapter II (ss 663-670) of that Act, which relates to settlements on children.

As to the charge to inheritance tax on settlements under sub-s (1)(i), (ii), see the Inheritance Tax Act 1984, ss 73, 88, Vol 42, title Taxation. For an exemption in respect of gifts made in consideration of marriage in the case of persons entitled under a sub-s (1) trust, see s 22(4)(d) of that Act, Vol 42, title Taxation.

**Family Law Reform Act 1987, ss 1, 19(1).** See Vol 6, title Children.

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## PART III

### APPOINTMENT AND DISCHARGE OF TRUSTEES

#### 34 Limitation of the number of trustees

(1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, 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 settlements and dispositions on trust for sale of land 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) This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply –

(a) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or

(b) where the net proceeds of the sale of the land are held for like purposes; or

(c) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land.

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## NOTES

**Four trustees.** The restriction on the number of trustees imposed by this section, and the provisions of this Act relating to the appointment and discharge of trustees and to the vesting of trust property, are applied to registered land by the Land Registration Act 1925, ss 47(1), 95, Vol 37, title Real Property (Pt 2).

**Settlements ... after (1925).** This Act came into force on 1 January 1926 by virtue of s 71(2) (repealed). A conveyance of land after 1925 to more than four persons in undivided shares operates to convey the land to the first four grantees named in the conveyance, as joint tenants upon the statutory trusts; see the Law of Property Act 1925, s 34(2), Vol 37, title Real Property (Pt 1).

**Charitable, ecclesiastical or public purposes.** As to what are charitable purposes, see *Income Tax Special Purposes Comrs v Pemsel* [1891] AC 531, [1891-4] All ER Rep 28 and 5(2) Halsbury's Laws (4th edn reissue) paras 1 et seq.

Trusts of land belonging to an unincorporated society, confined to members paying an annual subscription, and the object of which is the encouragement of literature, science and art, and which comes within the Literary and Scientific Institutions Act 1854, Vol 24, title Libraries and Other Cultural and Scientific Institutions, are public trusts within this section; see *Re Cleveland Literary and Philosophical Society's Land, Bolchow v Laughton* [1931] 2 Ch 247, [1931] All ER Rep 741. By the Settled Land Act 1925, s 29, Pt 2 of this title post, all land vested in trustees for charitable, ecclesiastical or public purposes is deemed to be settled land for the purposes of that section, and the trustees have all the powers, which are by that Act conferred on a tenant for life and on the trustee of a settlement. The statute or other instrument creating the trust or under which it is administered is deemed to be the settlement but works so as not to affect, inter alia, the appointment or number of trustees of such trusts. See also the notes "Charitable trusts" and "Ecclesiastical or public trusts" to s 29 of that Act.

**Term created under the statutory remedies.** A person entitled to an annual sum charged on land, where the sum or any part of it is unpaid for forty days after the time for payment, has power to demise the land charged to a trustee for a term of years for the purpose of raising the annual sum and arrears due; see the Law of Property Act 1925, s 121(4), Vol 37, title Real Property (Pt 1).

**Number of personal representatives.** Separate provision is made for the number of personal representatives to whom probate or administration may be granted by the Supreme Court Act 1981, s 114, Vol 17, title Executors and Administrators.

**Definitions.** For "land", "trustees" and "new trustee" and "trust for sale", see s 68(1), paras (6), (17) and (19), respectively, post. For "settlement", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1, 117(1)(xxiv), Pt 2 of this title post.

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### **35 Appointments of trustees of settlements and dispositions on trust for sale of land**

(1) Appointments of new trustees of conveyances on trust for sale on the one hand and of the settlement of the proceeds of sale on the other hand, shall, subject to any order of the court, be effected by separate instruments, but in such manner as to secure that the same persons shall become the trustees of the conveyance on trust for sale as become the trustees of the settlement of the proceeds of sale.

(2) Where new trustees of a settlement are appointed, a memorandum of the names and addresses of the persons who are for the time being the trustees thereof for the purposes of the Settled Land Act 1925, shall be endorsed on or annexed to the last or only principal vesting instrument by or on behalf of the trustees of the settlement, and such vesting instrument shall, for that purpose, be produced by the person having the possession thereof to the trustees of the settlement when so required.

(3) Where new trustees of a conveyance on trust for sale relating to a legal estate are appointed, a memorandum of the persons who are for the time being the trustees for sale shall be endorsed on or annexed thereto by or on behalf of the trustees of the settlement of the proceeds of sale, and the conveyance shall, for that purpose, be produced by the person having the possession thereof to the last-mentioned trustees when so required.

(4) This section applies only to settlements and dispositions of land.

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#### **NOTES**

**Sub-s (1) : Separate instruments.** The object of sub-s (1) above is to keep equitable interests off the title, as a purchaser of a legal estate from trustees for sale is not concerned with the trusts, whether or not declared by the same instrument by which the trust for sale is created; see the Law of Property Act 1925, s 27(1), Vol 37, title Real Property (Pt 1).

**To secure that the same persons shall become the trustees.** The persons having power to appoint new trustees of a conveyance of land on trust for sale are bound to appoint the same persons (if any) who are for the time being trustees of the settlement of the proceeds of sale, but a purchaser is not concerned to see whether the proper persons are appointed to be trustees of the conveyance of the land; see the Law of Property Act 1925, s 24, Vol 37, title Real Property (Pt 1).

**Sub-s (2) : New trustees of a settlement.** The procedure on the appointment of new trustees of a settlement is governed by the Settled Land Act 1925, s 35, Pt 2 of this title post.

**Trustees ...for the purposes of the Settled Land Act 1925.** For the persons who are for the time being trustees for the purposes of the Settled Land Act 1925, see ss 30-34 of that Act, Pt 2 of this title post.

**Person having possession of the vesting instrument.** The tenant for life, or the person having the powers of a tenant for life, is entitled to possession of the title deeds (see, for example, *Re Wythes, West v Wythes* [1893] 2 Ch 369, 62 LJ Ch 663; *Re Richardson, Richardson v Richardson* [1900] 2 Ch 778, 69 LJ Ch 804), and the trustees of the settlement are protected from liability on account of any vesting instrument or other document of title relating to the settled land, other than securities for capital money, being placed in the possession of the tenant for life or statutory owner, by the Settled Land Act 1925, s 98(3), Pt 2 of this title post.

**Definitions.** For "conveyance", "land", "trustees" and "trust for sale", see s 68(1), paras (3), (6), (17) and (19) post, respectively. For "settlement", "trustees of the settlement" and "vesting instrument", see, by virtue of s 68(1), para (15) post, the Settled Land Act 1925, ss 1 and 117(1)(xxiv), ss 30-35 and 117(1)(xxiv) and s 117(1)(xxxi), respectively, Pt 2 of this title post.

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### 36 Power of appointing new or additional trustees

(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees, –

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

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) 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 desired to be

discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of any enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.

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

(5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.

(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case –

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

(b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing appoint another person or other persons 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, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

(7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have 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.

(8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

[(9) Where a trustee is incapable, by reason of mental disorder within the meaning of [the Mental Health Act 1983], of exercising his functions as trustee and is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by virtue of paragraph (b) of subsection (1) of this section unless leave to make the appointment has been given by the authority having jurisdiction under [Part VII of the Mental Health Act 1983].]

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#### NOTES

Sub-s (9) was substituted by the Mental Health Act 1959, s 149(1); Sch 7, Pt I, and the words in square brackets in that subsection were substituted by the Mental Health Act 1983, s 148, Sch 4, para 4(a).

**Sub-s (1): Trustee.** For the application of this section to Settled Land Act trustees, see s 64 post.

**Is dead.** It will be noted that sub-s (8) above extends the section to a nominated trustee who predeceases the testator.

**Remains out of the United Kingdom.** To enable the statutory power to be exercised on the ground of a trustee remaining out of the United Kingdom for more than twelve months, the condition must be strictly complied with, and the absence must have been continuous. A return for one week has been held to prevent the power coming into operation; see *Re Walker, Summers v Barrow* [1901] 1 Ch 259, 70 LJ Ch 229. A power to appoint, if either of the trustees should "be abroad", was held to arise where one of them went to reside in Normandy, coming occasionally to England on trust business; see *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288, 65 LJ Ch 134; and see *Re Moravian Society*, (1858) 26 Beav 101, 31 LTOS 377; *Re Arbib and Class's Contract*, [1891] 1 Ch 601, 60 LJ Ch 263.

A trustee who remains out of the United Kingdom for more than twelve months may be removed against his will; see *Re Stoneham's Settlement Trusts, Popkiss v Stoneham* [1953] Ch 59, [1952] 2 All ER 694.

There is no absolute bar on the appointment of a foreign resident as trustee of an English trust; *Re Whitehead's Will Trusts, Burke v Burke* [1971] 2 All ER 1334, [1971] 1 WLR 833.

**Months.** See the note to s 25 ante.

**Desires to be discharged.** Before the Trustee Act 1893, s 10 (repealed), there was no statutory power enabling an existing trustee of the whole property to retire from part of the trusts unless the aid of the court was invoked; see *Savile v Couper*

(1887) 36 Ch D 520, 56 LJ Ch 980; *Re Moss's Trusts*, (1888) 37 Ch D 513, 57 LJ Ch 423.

**Refuses... to act.** In *Re Hadley, ex parte Hadley* (1851) 5 De G & Sin 67, 21 LJ Ch 109, a power to appoint a new trustee exercisable in the event, amongst others, of a trustee refusing or declining to act, was held to authorise the appointment of new trustees in the place of a disclaiming trustee; see also *Re Birchall, Birchall v Ashton* (1889) 40 Ch D 436, 60 LT 369; *Noble v Meymott* (1851) 14 Beav 471, 20 LJ Ch 612.

Sub-s (5) above should be noted.

**Unfit to act.** As a general rule bankruptcy renders a person unfit to be a trustee; and where the property consists of money and securities, a bankrupt will not be permitted to remain a trustee if the beneficiaries require him to be removed; see *Re Barker's Trusts*, (1875) 1 Ch D 43, 45 LJ Ch 52; *Re Adams' Trust*, (1879) 12 Ch D 634, 48 LJ Ch 613. An absconding trustee is also unfit for the office; see *Re Wheeler and De Rochow*, [1896] 1 Ch 315, at 322, 65 LJ Ch 219; *Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358, 85 LJ Ch 285.

**Incapable of acting.** This has reference to personal incapacity; see *Re Watts's Settlement*, (1851), 9 Hare 106, 20 LJ Ch 337. A person of unsound mind was held incapable of acting as trustee though not so found by inquisition in *Re East, Re Bellwood's Will Trusts* (1873) 8 Ch App 735, 42 LJ Ch 480; *Re Lemann's Trusts*, (1883) 22 Ch D 633, 42 LJ Ch 480; *Re Blake*, [1887] WN 173. But if the trustee suffers from mental disorder and is entitled to a beneficial interest, sub-s (9) above applies. An alien enemy has been held incapable of acting (*Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358, 85 LJ Ch 285), but a trustee resident in an enemy occupied country is not necessarily incapable of acting; see *Re May's Will Trusts, May and Stanford v Burch* [1941] Ch 109, 110 LJ Ch 96. Probably a trustee who is suffering from a serious illness, which is likely to last for a long time, and which renders him unfit to transact any business, is incapable within the meaning of this section; see *Re Weston's Trusts*, (1898) 43 Sol Jo 29. As to a corporation, sub-s (3) above should be noted.

**Infant.** The appointment of an infant to be trustee in relation to any settlement or trust is void, but without prejudice to the power to appoint a new trustee to fill the vacancy; see the Law of Property Act 1925, s 20, Vol 37, title Real Property (Pt 1).

Before 1926 an appointment in place of an infant named a trustee in a will could not be made; see *Re Tallatire*, [1885] WN 191.

For transitional provisions, see the Law of Property Act 1925, Sch 1, Pt III, paras 3, 4. Vol 37, title Real Property (Pt 1).

**Persons nominated for the purpose of appointing new trustees.** If by the instrument creating the trust the power is conferred in general



terms without reference to any particular event or events, then the person or persons upon whom such power is conferred are "the persons nominated by the instrument" within the meaning of sub-s (1) (a) above; see *Re Walker and Hughes' Contract*, (1883) 24 Ch D 698, 53 LJ Ch 135. If, however, a person is the donee of a power to appoint new trustees in certain specified events, not including one of the particular events mentioned in the section, and the particular event happens, the appointment should be made, not by the donee of the power, but by the continuing trustees under sub-s (6)(b) above; see *Re Wheeler and De Rochow* [1896] 1 Ch 315, 65 LJ Ch 219; *Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358, 85 LJ Ch 285. In the later case an appointment of two trustees by the donee of a special power in place of one who was incapable of acting and within the power, and the other unfit and outside the power, was held bad in both cases, it being impossible to say which of the new trustees was appointed in the place of the one who was incapable of acting.

A power to appoint new trustees appears, in the absence of any indication to the contrary in the instrument by which it is conferred, to be a power in gross, and may be exercised by the donee, notwithstanding that he has alienated all his interest under the instrument which confers the power; see *Hardaker v Moorhouse* (1884) 26 Ch D 417, 53 LJ Ch 713. A judgment of the Chancery Division for the administration of a trust does not deprive the donee of a power of the right to nominate and appoint new trustees. The appointment in such a case is subject to the approval of the court, but if the nominee of the donee is a fit and proper person, the court will not interfere for the purpose of securing the appointment of some person whom it would prefer (*Re Gadd, Eastwood v Clarke* (1883) 23 Ch D 134, 52 LJ Ch 396; *Re Norris, Allen v Norris* (1884) 27 Ch D 333, 53 LJ Ch 913; *Re Sales, Sales v Sales* (1911) 55 Sol Jo 838).

Where there are two or more persons nominated for the purpose of appointing new trustees by the instrument creating the trust, and they cannot agree as to the person to be appointed, an appointment can be effected by the surviving or continuing trustees, on the ground that the persons nominated are unable or unwilling to act; see *Re Sheppard's Settlement Trusts*, [1888] WN 234. So, also, when the person nominated cannot be found (*Cradock v Witham* [1895] WN 75), or when the person nominated was a person of unsound mind (*Re Blake*, [1887] WN 173).

**Surviving or continuing trustees.** A "continuing trustee" ordinarily means one who is to continue to act after the completion of the intended appointment; see *Re Coates to Parsons*, (1886) 34 Ch D 370. A retiring trustee need not necessarily act in the appointment by his co-trustee; see *Re Norris, Allen v Norris* (1884) 27 Ch D 333, 53 LJ Ch 913.

As to the inclusion of a refusing or retiring trustee and the position of a trustee removed against his will, see the note "Refusing or retiring trustee" below.

**Personal representatives of the last surviving or continuing trustee.** This includes the executor of a deceased sole trustee; see *Re Shafto's Trusts*, (1885) 29 Ch D 247, 54 LJ Ch 885. But the power does not devolve on the personal representative of the last survivor of two persons named as trustees both of whom predecease the testator; see *Nicholson v Field* [1893] 2 Ch 511, 62 LJ Ch 1015.

The personal representatives of a sole or last surviving trustee cannot be compelled to appoint new trustees; see *Re Knight's Will*, (1884) 26 Ch D 82, 50 LT 550; see the note to s 18 ante and note also sub-ss (4), (5) above. A sole proving executor may appoint, though the others are alive (*Re Boucherett, Barnes v Erskine* [1908] 1 Ch 180, 77 LJ Ch 205).

On the appointment of trustees by the person having power to appoint, the personal representatives are displaced; see *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280, 78 LJ Ch 136.

Where there are both general executors and special executors, it would seem the general executors are the persons to appoint; see *Re Parker's Trusts* [1894] 1 Ch 707, 63 LJ Ch 316; *Re Cohen's Executors and LCC*, [1902] 1 Ch 187, 71 LJ Ch 164.

A surviving or continuing trustee cannot by will appoint his successors in the office. Where the surviving trustee of a will by his will appointed two persons general executors thereof, and two other persons executors of his will "for the purpose of executing in continuation to himself the trusts of the will" of which he was the surviving trustee, it was held, first, that the trustee's will did not operate as an appointment of the two last-mentioned executors as trustees of the will of the original testator; and, secondly, that probate having been granted to the general executors, and they, before any grant was made to the limited executors, having appointed new trustees of the will, such appointment was valid; see *Re Parker's Trusts* above.

The beneficiaries under a trust cannot control the exercise of the power of appointing new trustees conferred on a continuing trustee by this section; see *Re Brockbank, Ward v Bates* [1948] Ch 206, [1948] 1 All ER 287, where the court refused to order a continuing trustee to concur with his retiring co-trustee in appointing a trust corporation as sole trustee, as desired by the beneficiaries.

**May ... appoint.** Before 1926 the appointor could not appoint himself; see *Re Skeat's Settlement, Skeats v Evans* (1889), 42 Ch D 522, [1886-90] All ER Rep 989; *Re Newen, Newen v Barnes* [1894] 2 Ch 297, 63 LJ Ch 763; *Re Sampson, Sampson v Sampson* [1906] 1 Ch 435, 75 LJ Ch 302. The words "whether or not being the persons exercising

the power" now allow this to be done. There is no significance in the difference between "one or more other persons" in sub-s (1) above, and "another person or persons" in the Trustee Act 1893, s 10(1) (repealed) retained in sub-s (6) above, but the words in the parentheses in sub-s (1) are not to be read into sub-s (6) so as to enable the appointor to appoint himself under that subsection; see *Re Power's Settlement Trusts, Power v Power* [1951] Ch 1074, [1951] 2 All ER 513, CA.

Persons who may be appointed are not limited to such persons as would be appointed by the court, and the following appointments have been held good: testator's widow and another (*Forster v Abraham* (1874) LR 17 Eq 351, 43 LJ Ch 199); solicitor of tenant for life (*Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288, 65 LJ Ch 134). In *Re Norris, Allen v Norris* (1884) 27 Ch D 333, 53 LJ Ch 913, it was intimated that the appointment of a son of the testator would have been good if the court had not been administering the trusts.

If, however, an infant, nominated to appoint new trustees, makes an appointment prejudicial to his interests, and not one which the court would make, the appointment will be invalid; see *Re Parsons, Barnsdale and Smallman v Parsons* [1940] Ch 973, [1940] 4 All ER 65, where an infant purported to appoint his mother as sole trustees of a trust fund, any surplus income of which, after provision for the maintenance, education and benefit of the infant, was payable at the discretion of the trustee to his mother, and the appointment was held invalid.

**Writing.** See the note to s 14 ante.

**Sub-s (2): Trustee.** The Public Trustee may be appointed by the Public Trustee Act 1906, s 5, this part of this title ante. As to power to appoint a custodian trustee, see s 4 of that Act, this part of this title ante. As to bodies corporate, see the Bodies Corporate (Joint Tenancy) Act 1899, s 1, Vol 37, title Real Property (Pt 1), and *Re Thompson's Settlement Trusts, Thompson v Alexander* [1905] 1 Ch 229, 74 LJ Ch 133.

**New trustee ... may be appointed.** See s 41 post.

**Sub-s (3) : Corporation.** Before 1926, where a term of years was vested in a limited company that had been dissolved without assigning the term, the court on the application of a mortgagee appointed a new trustee in place of the company and made a vesting order; see *Re Nos 56 and 58 Albert Road, Norwood* [1916] 1 Ch 289, 85LJ Ch 187.

The court has power under the Law of Property Act 1925, s 181, Vol 37, title Real Property (Pt 1), to create legal estates corresponding to those which have determined by reason of the dissolution of a corporation, and to vest the estate in the person who would have been entitled to the estate which determined had it remained a subsisting estate.

**Sub-s (4) : Executors ... who have proved.**

Proving executors have all the powers conferred on personal representatives, whether or not power is reserved to other persons named as executors to prove; see the Administration of Estates Act 1925, s 8, Vol 17, title Executors and Administrators.

**Sub-s (6) : Additional trustees.** Before 1926 an addition to the number of trustees could only be made (out of court) to supply a vacancy; if an additional trustee was desired where there was no vacancy the appointment had to be made by the court; see *Re Gregson's Trusts*, (1886), 34 Ch D 209, 62 LJ Ch 764; cf now s 37(1)(a) post.

The appointor cannot appoint himself; see the note "May ... appoint" above.

Where the settlement is created by will or has arisen by the effect of an intestacy and a sole personal representative, not being a trust corporation, becomes the only trustee for the purpose of the Settled Land Act 1925, it is obligatory for the personal representative to appoint an additional trustee to act with him and the provisions of this Act relating to the appointment of new trustees and the vesting of the trust property apply accordingly; see the Settled Land Act 1925, s 30(3), Pt 2 of this title post.

Where an infant is absolutely entitled under the will or on intestacy to a devise or legacy or to the residue of the estate of the deceased, or any share therein, and the devise, legacy, residue or share thereof is not under the will, if any, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four, to be the trustee or trustees of the property; see the Administration of Estates Act 1925, s 42(1), Vol 17, title Executors and Administrators.

Nothing in this Act authorises the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, will not be able to give valid receipts for all capital money arising under the trust; see s 37(2) post.

Notwithstanding sub-s (6) above, the number of trustees of the Shakespeare Memorial Trust may be increased by virtue of appointments made under that subsection up to seven, and appointments may be made thereunder notwithstanding that the number of trustees of the trust for the time being exceeds three; see the National Theatre Act 1949, s 2(2), Vol 45, title Theatres and Other Places of Entertainment.

**Sub-s (7) : New trustee.** New trustees are not affected by notice of matters known only to retiring trustees and not discoverable by reference to the documents relating to the trust; see *Hallows v Lloyd* (1888) 39 Ch D 686, 58 LJ Ch 105. As to the duty of a new trustee on acceptance of trust, see *Underhill and Hayton's Law of Trusts and Trustees* (14th edn) 408.

A retiring trustee is not liable for breach of trust by his successors, unless it is shown that he contemplated it when his retirement took place; see *Head v Gould* [1898] 2 Ch 250, 67 LJ Ch 480.

**Sub-s (8) : Refusing or retiring trustee.** A trustee who is removed against his will for remaining out of the United Kingdom for more than twelve months is not a refusing or retiring trustee within this subsection and his concurrence is therefore not required under sub-s (1)(b) above to the appointment of his successor; see *Re Stoneham's Settlement Trusts*, *Popkiss v Stoneham* [1953] Ch 591, [1952] 2 All ER 694.

**Sub-s (9) : Incapable, by reason of mental disorder.** No person other than a co-trustee, or other person with power to appoint a new trustee, may make an application to the court under sub-s (9) above for leave to appoint a new trustee in place of a patient; see the Court of Protection Rules 1994, SI 1994/3046, r 18.

As to land held on trust for sale, see the Law of Property Act 1925, s 22, Vol 37, title Real Property (Pt 1). As to the jurisdiction of the court, see s 54 post.

**Application.** Sub-ss (1), (7) and (8) reproduce with amendments the Trustee Act 1893, s 10(1), (3), (4) (repealed) respectively, the remaining subsections being new, but the whole section applies to trusts constituted or created whether before 1926 or after 1925, and the powers hereby conferred are in addition to those conferred by the instrument, if any, creating the trust, but apply if and so far only as a contrary intention is not expressed in that instrument, and have effect subject to its terms; see s 69(1), (2) post.

As to the appointment of new trustees of the Shakespeare Memorial Trust, see the National Theatre Act 1949, s 2, Vol 45, title Theatres and Other Places of Entertainment.

Where executors of a last surviving deceased executor became executors by representation and Settled Land Act trustees, they were not empowered by the Settled Land Act 1925, s 30(3), Pt 2 of this title post, to appoint new trustees, as that provision only related to a sole personal representative but, by virtue of s 64(1) post, and the definition of "instrument" in s 68(1), para (5) post, they could appoint new trustees under this section; see *Re Dark*, *Glover v Dark* [1954] Ch 291, [1954] 1 All ER 681.

**Evidence of vacancy in trust.** A statement, contained in any instrument coming into operation after 1925 by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, is conclusive evidence in favour of a purchaser of the legal estate of the matter stated; see s 38(1) post.

**Definitions.** For "instrument", "personal representatives", "trust", "trustee" and "new trustee", "trust corporation" and "United Kingdom", see s 68(1), paras (5), (9), (17), (18) and (20) post, respectively. For "infant", see the Family Law Reform Act 1969, ss 1(1), (2), 9, Vol 6, title Children.

Mental Health Act 1983. See Vol 28, title Mental Health. For the meaning of "mental disorder", see s 1 of that Act; and as to the authority having jurisdiction under Pt VII of that Act, see s 93 thereof.

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### **37 Supplemental provisions as to appointment of trustees**

(1) On the appointment of a trustee for the whole or any part of trust property –

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

(b) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed; and

(c) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust; and

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

(2) Nothing in this Act shall authorise the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust.

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#### NOTES

**Subject to the restrictions, etc.** The number of trustees of settlements of land and dispositions on trust for sale of land is limited by s 34 ante. S 36(6) ante limits the number of additional trustees that may be appointed under the statutory power.

**Separate ... trustees ... for any part.** Separate trustees may be appointed under sub-s (1)(b) above for a part of the trust property held on distinct trusts although those trusts may ultimately coalesce with the trusts of other parts of the trust property; see *Re Hetherington's Trusts*, (1886) 34 Ch D 211. Before the Trustee Act 1893 it was not possible for trustees to retire from part of the trust on separate trustees being appointed for that part without the aid of the court; see *Saville v Couper* (1887) 36 Ch D 520, as explained in *Re Moss' Trusts*, (1888) 37 Ch D 513. Where a trustee had absconded with part of the trust property, the court appointed trustees of the remainder which was subject to separate trusts; see *Re Aston's Trusts*, (1890) 25 LR Ir 96.

**Application.** Sub-s (1) above replaces, with amendments, the Trustee Act 1893, s 10(2) (repealed), but sub-s (2) above is new. This section applies to trusts constituted or created before 1926 as well as after 1925, and the powers hereby conferred have effect subject to any contrary intention expressed in the instrument, if any, creating the trust; see s 69(1), (2) post.

**Where more than one trustee required.** Two or more trustees, if none is a trust corporation, are required to give a valid receipt for the proceeds of sale or other capital money arising under a trust for sale of land by the Law of Property Act 1925, s 27(2), Vol 37, title Real Property (Pt 1) or for capital money arising under the Settled Land Act 1925 by ss 18(1)(c), 94 of that Act, Pt 2 of this title post.

The Public Trustee may be appointed, under the Public Trustee Act 1906, s 5, this part of this title ante; sole trustee of a settlement notwithstanding that the settlement contains a provision that the trustees shall not at any time be less than three; see *Re Leslie's Hassop Estates*, [1911] 1 Ch 611, 80 LJ Ch 486; *Re Moxon*, [1916] 2 Ch 595, [1916-17] All ER Rep 438.

**Vesting the trust property.** Land, chattels and choses in action will usually be vested in the trustees by the vesting declaration inserted in appointments before 1926, or implied on their appointment by s 40(1)(b) post in appointments after this Act; mortgages and securities will have to be transferred, and consents obtained to the assignment of land held on lease containing a covenant against assignment.

**Definitions.** For "trustee" and "trust" and "trust corporation", see s 68(1), paras (17) and (18) post, respectively.

(1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.

(2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

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#### NOTES

**Commencement of this Act.** Ie 1 January 1926, by virtue of s 71(2) (repealed).

**Remained out of the United Kingdom.** See the corresponding note to s 36 ante.

**Months.** See the note to s 25 ante.

**Not entitled to a beneficial interest ... in possession.** Statements to this effect are relevant where a new trustee is appointed to take the place of a trustee incapable because of mental disorder; see s 36(9) ante.

**Conclusive evidence.** The tendering of evidence declared by statute to be conclusive precludes evidence to the contrary unless the evidence adduced is inaccurate on the face of it or fraud is shown, but other evidence to the same effect is not made inadmissible; see 17 Halsbury's Laws (4th edn) para 28.

This section is relevant to the circumstances under which the statutory power to appoint new or additional trustees arises under s 36 ante. Cf the Settled Land Act 1925, s 35(3), Pt 2 of this title post, whereby statements in a deed of declaration as to the persons entitled to appoint new trustees of the settlement are conclusive in favour of a purchaser of a legal estate. Cf also Sch 2, para 3(1)(iv) to that Act, Pt 2 of this title post, under which certain statements as to the parents of an infant are similarly conclusive.

**Vesting declaration ... consequent on the appointment.** As to vesting declarations, see s 40 post.

**Definitions.** For "land", "trustee" and "new trustee" and "United Kingdom", see s 68(1), para (6), (17), (20) post, respectively. "Legal estate" and "purchaser" are not defined by this Act. Cf the Law of Property Act 1925, s 205(1)(x), (xxi), Vol 37, title Real Property (Pt 1).

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### 39 Retirement of trustee without a new appointment

(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent 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 shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

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## NOTES

**Desirous of being discharged from the trust.** Cf s 36(1) ante, which refers to a trustee desiring to be discharged from "all or any of the trusts"; presumably this section can apply only where the trustee desires to be discharged from all the trusts.

Where the Public Trustee has been appointed a trustee of any trust, a co-trustee may retire from the trust under and in accordance with this section without such consents as are required by this section; see the Public Trustee Act 1906, s 5(2), this part of this title ante.

**Vesting ... of the trust property.** As to the vesting of the trust property in the continuing trustees, see s 40 post.

**Application.** This section reproduces, with amendments, the Trustee Act 1893, s 11 (repealed), which in turn replaced the Conveyancing Act 1881, s 32 (repealed). It applies to trusts whether constituted or created before 1925 or after 1926, but only if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust, and has effect subject to the terms of that instrument; see s 69(1), (2) post.

This section applies to the retirement of trustees for the purposes of the Settled Land Act 1925; see s 64(1) post. By s 35(1) of that Act, Pt 2 of this title post, whenever a trustee for the purposes of that Act is discharged from the trust without a new trustee being appointed, a deed is to be executed supplemental to the last or only principal vesting instrument containing a declaration that the persons therein named, being the persons who after such discharge are the trustees of the trust instrument for the purposes aforesaid, are the trustees of the settlement for those purposes; and a memorandum is to be endorsed on or annexed to the last or only principal vesting deed in accordance with s 35(2) ante.

This section is modified in its application to trustees for trust property of trade unions and unincorporated employers' associations by the Trade Union and Labour Relations (Consolidation) Act 1992, s 13, Vol 16, title Employment.

**Application to court for discharge.** The court has no power under this Act to release a trustee from his trust without appointing a new trustee in his place, but it has inherent jurisdiction to do so in an administration action, if there are sufficient continuing trustees in which the trust property may be vested; see *Re Chetwynd's Settlement, Scarisbrick v Nevinson* [1902] 1 Ch 692, 71 LJ Ch 352. If, however, a sole trustee wishes to retire from his trust and is unable to find a successor he may either ask the court to appoint a new trustee or to make an administration order. If no person will accept his trust, the court will not be able to discharge the trustee, but, in working out the

administration order, it will take care that he does not suffer; see *Courtenay v Courtenay* (1846) 3 Jo & Lat 519. Where a trustee wishing to retire from the trust without the appointment of a new trustee in his place is physically incapable of executing the necessary deeds required under this section, the court has inherent jurisdiction in an administration action order the vesting of the trust property in the continuing trustees and to discharge the trustee; see *Re Stretton v Clegg* [1942] WN 95.

**Definitions.** For “trustee” and “trust” and “trust corporation”, see s 68(1), paras (17) and (18) post, respectively.

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#### **40 Vesting of trust property in new or continuing trustees.**

(1) Where by a deed a new trustee is appointed to perform any trust, then –

(a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and

(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates interests and rights with respect to which a declaration could have been made.

(2) Where by a deed a retiring trustee is discharging under the statutory power without a new trustee being appointed, then –

(a) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates; and

(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by such persons as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.

(3) An express vesting declaration, whether made before or after the commencement of this Act, shall, notwithstanding that the estate, interest or right to be vested is not expressly referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary contained in the deed of appointment or discharge) to vest in the persons respectively referred to in subsections (1) and (2) of this section, as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons.

(4) This section does not extend -

(a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;

(b) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;

(c) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under an Act of Parliament.

In this subsection "lease" includes an underlease and an agreement for a lease or underlease.

(5) For purposes of registration of the deed in any registry, the person or persons making the declaration expressly or impliedly, shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(6) This section applies to deeds of appointment or discharge executed on or after the first day of January, eighteen hundred and eighty-two.

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#### NOTES

**Sub-s (1) : Deed.** Ie by virtue of sub-s (6) above, a deed made after 1881.

A memorandum evidencing the appointment or discharge of a trustee under the Charities Act 1993, s 83(1), if executed as a deed, has the like operation under this section as if the appointment or discharge were effected by deed; see s 83(2), (4) of the 1993 Act, Vol 5, title Charities. See also s 83(5) of the 1993 Act, which applies s 83 in relation to any institution to which the Literary and Scientific Institutions Act 1854, Vol 24, title Libraries and Other Cultural and Scientific Institutions, applies.

**Any trust.** This includes the case where the mortgagor declares himself, on a mortgage by deposit of deeds, to be a trustee of the legal estate for the mortgages, and an appointment of new trustees containing a vesting declaration carries the legal estate; see *London and County Banking Co v Goddard* [1897] 1 Ch 642, 66 LJ Ch 261.

The scope of this section is defined by its opening words and accordingly sub-s (1) (a) and (b) above are applicable only to estates and interests forming part of the existing trust property so that, where a legal estate is vested in a trustee but as a personal representative, what can vest under this section is not the estate or interest itself but the right to insist on a transfer thereof; see *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833.

**Declaration by the appointor.** Vesting declarations under this section, whether express or implied, operate to convey the legal estate disposed of in like manner as if the declaration had been a conveyance executed by the estate owner of that legal estate; see the Law of Property Act 1925, s 9(1), Vol 37, title Real Property (Pt 1). The exercise of the power of appointing new trustees by deed containing a vesting declaration operates to oust the executors of the last surviving trustee for all purposes from the trust; see *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280, 78 LJ Ch 136.

**Deed is made after (1925).** The Act commenced on 1 January 1926, by virtue of s 71(2) (repealed).

A vesting declaration made by the diocesan authority pursuant to the Incumbents and Churchwardens (Trusts) Measure 1964, Vol 14, title Ecclesiastical Law (Pt 5), has the operation specified in sub-s (1)(b) above; see s 3(3) of the 1964 Measure, Vol 14, title Ecclesiastical Law (Pt 5).

**Sub-s (2): Discharged under the statutory power.** The statutory power providing for the discharge of a retiring trustee without a new trustee being appointed is contained in s 39 ante.

**Sub-s (4): Land conveyed by way of mortgage.** The exception in sub-s (4)(a) above does not apply where a mortgagor declares himself trustee of the land on behalf of an equitable mortgagee; see *London and County Banking Co v Goddard* [1897] 1 Ch 642, 66 LJ Ch 261.

The mortgage debt, being a chose in action, may be vested by the express or implied declaration under sub-s (1) above, leaving the legal estate in the land, now the mortgage term, outstanding; see *Webb v Crosse* [1912] 1 Ch 323, at 327, 81 LJ Ch 259. The mortgage term must be conveyed in the ordinary way by a separate deed of transfer. Persons dealing in good faith with a mortgagee are not concerned with the trusts affecting the mortgage money, whether disclosed or not, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage, that the mortgagees have power to give valid receipts for the purchase money without investigating the appointment or discharge of trustees in reference thereto; see the Law of Property Act 1925, s 113, Vol 37, title Real Property (Pt 1).

**Lease which contains ... covenant ... against assignment.** As to the statutory implied provision in leases containing a covenant not to assign etc, without consent, see the Landlord and Tenant Act 1927, s

19, Vol 23, title Landlord and Tenant (Pt 1), and the notes thereto. For restrictions on and relief against forfeiture of leases, see the Law of Property Act 1925, s 146, Vol 37, title Real Property (Pt 1).

Any vesting effected under the powers conferred by the Settled Land Act 1925, in relation to settled land does not operate as a breach of covenant or condition against alienation or give rise to forfeiture; see s 14(1) of that Act, Pt 2 of this title post.

**Sub-s (5) : Registration.** The Registrar is required to give effect on the register to any vesting declarations (express or implied) relating to registered land made on the appointment or discharge of a trustee or otherwise, and the provisions of this Act, relating to the appointment and discharge of trustees and the vesting of trust property, apply to registered land subject to the proper entry being made on the register; see the Land Registration Act 1925, s 47, Vol 37, title Real Property (Pt 2).

**Sub-s (6) : 1st January 1882.** Is the date of commencement of the Conveyancing Act 1881, s 34, which this section replaces.

**Application.** This section is modified in its application to trust property of trade unions and unincorporated employers' associations by the Trade Union and Labour Relations (Consolidation) Act 1992, s 13, Vol 16, title Employment.

**Stamp duty.** Where there is an express vesting declaration, a stamp not exceeding 50p is required for the appointment and it seems in certain cases a further stamp of 50p for the declaration, on the principle laid down by the judgment in *Hadgett v IRC* (1877) 3 Ex D 46; and see the Stamp Act 1891, s 62, Vol 41, title Stamp Duties. Where the deed appointing a new trustee does not contain such a declaration, as under sub-ss (1)(b), (2)(b) above, the extra 50p stamp is considered by the Inland Revenue Commissioners not to be required in respect of the implied vesting declaration.

**Vesting orders.** Where a transfer of the trust property not transferred by a vesting declaration cannot be obtained the court has power to make a vesting order; see ss 44(i), 51(1)(i) post; or to appoint a person to convey the land or make the transfer; see ss 50, 51(2) post, although the appointment of the new trustees has been made out of court.

**Definitions.** For "conveyance", "land", "stock" and "trust", "trustee" and "new trustee", see s 68(1), paras (3), (6), (14) and (17) post, respectively.

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## PART IV

### POWERS OF THE COURT

#### *Appointment of new Trustees*

#### **41 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 so to do 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.

In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who ... is [incapable, by reason of mental disorder within the meaning of [the Mental Health Act 1983], of exercising his functions as trustee], or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

(2) The power conferred by this section may, in the case of a deed of arrangement within the meaning of the Deeds of Arrangement Act 1914, be exercised either by the High Court or by the court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed.

(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 gives power to appoint an executor or administrator.

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#### NOTES

The words omitted from sub-s (1) were repealed by the Criminal Law Act 1967, s 10, Sch 3, Pt III. The words in the first (outer) pair of square brackets in that subsection were substituted by the Mental Health Act 1959, s 149(1), Sch 7, Pt I, and those in the second (inner) pair of square brackets were substituted by the Mental Health Act 1983, s 148, Sch 4, para 4(b).

**Sub-s (1): Court.** The court will not as a rule make an order under this section if there is a person able and willing to appoint new trustees out of court (*Re Higginbottom*, [1892] 3 Ch 132, [1891-4] All ER Rep 1070), even if the donee of the power to appoint has disclosed an intention or desire to exercise his power corruptly (*Re Hodson's Settlement*, (1851) 9 Hare 118, 20 LJ Ch 551).

The county court has jurisdiction under sub-s (1) above, and under ss 42, 51, 57, 60-62 post, in a case where the trust estate or fund to be dealt with in the court does not exceed in amount or value the county court limit (ie £30,000); see s 63A(1), (5) of this Act and the notes thereto post; or, by virtue of the County Courts Act 1984, s 24, Vol 11, title County Courts, by agreement of the parties.

**Whenever it is expedient.** The existence of an equitable right or a right under s 62 post by a trustee in breach of trust for indemnity against a beneficiary who instigated the breach is no bar to the appointment of new trustees under this section, as those rights are not dependent upon the trustee continuing in office; see *Re Pauling's Settlement, Younghusband v Coutts & Co (No 2)* [1963] Ch 576, [1963] 1 All ER 857. The court has considered it expedient, inter alia, where

the donee of the power to appoint was abroad (*Re Humphry's Estate*, (1855) 1 Jur NS 921); where there was a joint power of appointment and one of the donees was abroad (*Re Somerset*, [1887] WN 122); where there was difficulty in obtaining administration to a deceased trustee (*Re Matthew's Settlement*, (1853), 22 LTOS 211, 2 WLR 85; *Davis v Chanter* (1858) 27 LJ Ch 577, 31 LTOS 70); in case of an infant trustee (*Re Porter's Trusts*, (1856) 25 LJ Ch 482, 27 LTOS 26; *Re Shelmerdine*, (1864) 33 LJ Ch 474, 11 LT 106; and see now the Law of Property Act 1925, s 20, Vol 37, title Real Property (Pt 1); *Re Brunt*, [1883] WN 220); where a trustee had gone to reside abroad permanently (*Re Bignold's Settlement Trust*, (1872) 7 Ch App 223, 41 LJ Ch 235); on the trustee becoming incapable through age and infirmity (*Re Lemann's Trusts*, (1883) 22 Ch D 633, 52 LJ Ch 560); on the trustee becoming a debtor in liquidation (*Re Adam's Trust*, (1879) 12 Ch D 634, 48 LJ Ch 613); where a trustee had allowed a co-trustee to commit a breach of trust (*Ex parte Reynolds*, (1800) 5 Ves 707); where the trustees had all predeceased the testator (*Re Smirthwaite's Trusts*, (1871) LR 11 Eq 251, 40 LJ Ch 176); where no trustee was named (*Re Davis' Trusts*, (1871) LR 12 Eq 214, 40 LJ Ch 566); *Re Gillett's*, (1876) 25 WR 23; *Pollock v Ennis* [1921] 1 IR 181); where it was doubtful if a power in the settlement applied (*Re Woodgate's Settlement*, (1857) 5 WR 448); where a vesting order was required, the trustee being of unsound mind (*Re Davies*, (1851) 3 Mac & G 278); where a trustee was in enemy-occupied territory (*Re May's Will Trusts, May and Stanford v Burch* [1941] Ch 109, 110 LJ Ch 96); where there was friction between the trustees, to replace a trustee, who had agreed to the appointment of the Public Trustee in his place, but who subsequently without good ground refused to concur in the appointment (*Re Henderson, Henderson v Henderson* [1940] Ch 764, [1940] 3 All ER 295).

The court has declined to appoint where a trustee was temporarily absent abroad; see *Re Moravian Society* (1858) 26 Beav 101, 31 LTOS 377.

Where a solicitor is adjudicated bankrupt, the court may under this section remove him from his trusteeship of his clients' account and, although prima facie the Law Society is not entitled to apply under this section, it can become entitled by subrogation, if it makes a token payment to a professional creditor out of its compensation fund and, in that case, the court would be inclined to appoint the Law Society's nominee and the trustee in bankruptcy jointly as trustees, under this section; see *Re A Solicitor*, [1952] Ch 328, [1952] 1 All ER 133.

**To appoint a new trustee.** The jurisdiction of the court under this section is confined to the appointment of new or, by virtue of s 68(1), para (17) post, additional, trustees, and it is not the practice of the court to act on the fiction of re-appointing the continuing trustees in the place of those trustees themselves and a trustee desiring to be discharged, in order to give itself power to discharge the trustee, where no new or additional trustee is being appointed; see *Re Stretton v Clegg* [1942] WN 95, following *Re Chetwynd's Settlement, Scarisbrick v Nevinson* [1902] 1 Ch 692, 71 LJ Ch 352, where it was held that the court had

inherent jurisdiction in an administration action, apart from statute, to release a trustee from his trust without the appointment of a new trustee in his place, if there were sufficient continuing trustees in whom the trust property might be vested.

The court is not confined to the original number; see *Re Welsh*, (1838) 3 My & Cr 292; *Re Tunstall's Will, ex parte Tunstall* (1851) 4 De G & Sin 421, 17 LJOS 251.

Eve J considered that, under the Trustee Act 1893 (repealed), the court was not bound to keep up the number of trustees fixed by the settlor; and as far as jurisdiction was concerned could appoint two trustees or even a sole trustee notwithstanding the settlor's direction that the minimum number should be three; see *Re Leslie's Hassop Estates* [1911] 1 Ch 611, at 616, 80 LJ Ch 486.

The court has made orders vesting the trust estate in fewer trustees than were originally appointed when one trustee was an absconding bankrupt (*Re Lees' Settlement Trusts*, [1896] 2 Ch 508, 65 LJ Ch 770; *Dugmore v Suffield* [1896] WN 50); and where a trustee had gone abroad (*Re Price*, (1894) 8 R 621).

For the appointment of the Public Trustee as a new or additional trustee, see the Public Trustee Act 1906, s 5(1), this part of this title ante.

The main principles which guide the court in the exercise of its discretion were declared in *Re Tempest* (1866) 1 Ch App 485, 35 LJ Ch 632 to be: (1) In selecting a person for the office, the court will have regard to the wishes of the author of the trust, expressed in, or plainly deduced from, the instrument creating it; (2) the court will not appoint a person with a view to the interest of some of the beneficiaries, in opposition to the interest of others; (3) the court will have regard to the question whether the appointment will promote or impede the execution of the trust, though it would appear that the mere fact of the continuing trustee refusing to act with the proposed new trustees would not be sufficient to induce the court to refrain from appointing him.

Before the Variation of Trusts Act 1958, this part of this title post, the court would not as a rule appoint persons out of its jurisdiction (*Re Guibert's Trust Estate*, (1852) 16 Jur 852) except in exceptional circumstances, eg where the cestuis que trustent were resident in Australia (*Re Liddiard*, (1880) 14 Ch D 310, 49 LJ Ch 373); or the cestui que trust was an infant resident in Australia with no friends in this country (*Re Simpson, Re Whitchurch* [1897] 1 Ch 256, 66 LJ Ch 166). Where the cestuis que trust were resident in America or Canada and the court appointed two Canadians and an Englishman (who was to receive a commission for collecting the income), the court required an undertaking not to appoint any new trustee out of the jurisdiction without its consent; see *Re Freeman's Settlement Trusts*, (1887) 37 Ch D 148, 57 LJ Ch 160. In *Re Seale's Marriage Settlement* [1961] Ch 574, [1961] 3 All ER 136, the parties to the



settlement had emigrated to Canada with their children and many years later the court approved an arrangement under the 1958 Act which substituted the trusts of a Canadian settlement and made a Canadian trust corporation trustee, Buckley J regarding it as easier for him to make that order than it had been for Malins V-C because the trust in *Re Liddiard* above, remained an English one. But in *Re Weston's Settlement*, [1969] 1 Ch 223, [1968] 3 All ER 338, CA, an order under this section appointing trustees resident in Jersey and the substitution of a Jersey settlement for an English one was refused where the family had only recently emigrated to Jersey in order to avoid capital gains tax, the case differing from *Re Seale's Marriage Settlement* above, in that there it was obviously advantageous to substitute a Canadian settlement irrespective of tax advantages, whereas the exodus of the family in *Re Weston's Settlement* above, to Jersey was done to avoid English taxation and there might be wider opportunities for the beneficiaries if they returned here. Cf *Re Windeatt's Will Trusts* [1969] 2 All ER 324, [1969] 1 WLR 692.

A beneficiary or the husband of a beneficiary under the trust will not be appointed a trustee by the court except where a suitable independent person cannot be found to undertake the office, or there are other special circumstances; see, for example, *Ex parte Conybeare's Settlement*, (1853) 1 WR 458; *Ex parte Clutton*, (1853) 17 Jur 988; *Re Parrott*, (1881), 30 WR 97. In *Re Hattatt's Will*, (1870) 21 LT 781, 18 WR 416 (beneficiary's husband appointed), and *Re Lightbody's Trusts*, (1884) 33 WR 452, 52 LT 40 (beneficiary appointed), the court required an undertaking that in the event of the new trustee becoming a sole trustee he would obtain the appointment of a co-trustee.

The court has on several occasions stated that it would not appoint the solicitor of a tenant for life or beneficiary; see *Re Kemp's Settled Estates*, (1883) 24 Ch D 485, 52 LJ Ch 950; *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288, 65 LJ Ch 134; *Re Cotter, Jennings v Nye* [1915] 1 Ch 307, 84 LJ Ch 337. The fact that the testator has appointed such solicitor to be trustee of his will does not take the case out of the rule; see *Re Spencer's Settled Estates*, [1903] 1 Ch 75, 88 LT 159.

The solicitor of a trustee will not in general be appointed a trustee; see *Re Norris, Allen v Norris* (1884) 27 Ch D 333, 53 LJ Ch 913.

Power to appoint new trustees of a settlement is given to the court by the Settled Land Act 1925, s 34, Pt 2 of this title post. As to the persons who will be appointed, see the notes to that section. Orders have been

made appointing separate sets of trustees for different parts of the trust property (*Re Hetherington's Trusts* (1886) 34 Ch D 211, 56 LJ Ch 174); allowing trustees to retire from one part and appointing new trustees of that part (*Re Moss's Trusts* (1888) 37 Ch D 513, 57 LJ Ch 423); and appointing new trustees to act with a sole trustee of part only of the trust property (*Re Paine's Trusts*, (1885) 28 Ch D 725, 54 LJ Ch 735).

For the persons entitled to apply, see s 58(1) post.

The consent of the proposed trustee to act is sufficiently evidenced by writing signed by him and verified by the signature of some other person; see RSC Ord 38, r 11. In the case of incapacity of a trustee, there must be medical evidence to show that he was incapable at the date of the issue of the originating summons and that the incapacity is continuing at the date of the swearing of the affidavit. Where a vesting order of stocks and shares is asked for, the affidavit should also show incapacity to execute transfers. The trustee under disability is to be made respondent to the summons but need not be served unless he is sole trustee or has a beneficial interest; see *Practice Direction* [1948] WN 273. For the power of the court to determine actions in the absence of trustees who cannot be found, as if service of process had been duly made, see s 59 post.

The affidavit of fitness of the new trustee should show something of the pecuniary means of the proposed trustee (*Re Castle Sterry's Trusts*, [1888] WN 179); but a general statement is sufficient (*Re Smith's Policy Trusts, Smith v Smith* [1894] WN 68). Only one affidavit is necessary (*Re Arden*, [1887] WN 166).

For the power of the court to charge the costs of an application for an order to appoint a new trustee on the trust estate; see s 60 post.

**Incapable by reason of mental disorder.** See also s 54 post, and the Mental Health Act 1983, s 96, Vol 28, title Mental Health.

**Sub-s (2): Deed of arrangement.** For the deeds of arrangement to which the Deeds of Arrangement Act 1914 applies, see s 1 of that Act, Vol 4, title Bankruptcy and Insolvency. See also, for a saving for this subsection, the Insolvency Act 1986, s 263(5), Vol 4, title Bankruptcy and Insolvency.

**High Court.** Ie Her Majesty's High Court of Justice in England; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. For the constitution of the court, see the Supreme Court Act 1981, s 4, Vol 11, title Courts and Legal Services, and as to its divisions, see ss 5 and 7 of that Act.

**Court having jurisdiction in bankruptcy.** Provision as to jurisdiction in bankruptcy is made by the Insolvency Act 1986, s 373, Sch 9, para 1, Vol 4, title Bankruptcy and Insolvency.

**Resided.** A lodging in which a party resided permanently has been held sufficient to give jurisdiction, though a mere temporary lodging at a

place by a person who had a permanent residence elsewhere has been held not sufficient; see *Massey v Burton, Re Bloomsbury County Court* (1857) 2 H & N 597; *MacDougall v Paterson* [1851], 11 CB 755; *Marsh v Conquest* (1864) 17 CBNS 418. Cf *Alexander v Jones* (1866) LR 1 Exch 133. A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing.

A person resides where in common parlance he lives, and a temporary absence is immaterial provided there is an intention to return and a house or lodging to which to return; see *R v St Leonard's, Shoreditch, Inhabitants* (1865) LR 1 QB 21, and *R v Glossop Union* (1866) LR 1 QB 227. The word "reside" implies a degree of permanence (*Levene v IRC* [1928] AC 217 at 222, 223, [1928] All ER Rep 746 at 749, 750, HL; *Fox v Stirk* [1970] 2 QB 463 at 477, [1970] 3 All ER 7 at 13, CA; *Brokelmann v Barr* [1971] 2 QB 602, [1971] 3 All ER 29), but a person may be resident in more than one place at the same time (*Levene v IRC* above; *Langford Property Co Ltd v Tureman* [1949] 1 KB 29, sub nom *Langford Property Co Ltd v Athanassoglou* [1948] 2 All ER 722, CA; *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA; and contrast *Beck v Scholz* [1953] 1 QB 570, [1953] 1 All ER 814, CA). Whether a person is resident in a particular place and whether that residence is permanent are questions of fact and degree and it is possible to be resident in accommodation such as a tent or a vehicle; moreover the legality or lawfulness or otherwise of the residence is not generally a relevant consideration; see *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] 1 QB 1060, [1985] 2 All ER 456, CA.

**Carried on business.** The words "carry on business" denote something of a permanent character, not merely an isolated transaction and a business is carried on only where there is some degree of management or control; see *Brown v London and North Western Rly Co* (1863) 32 LJQB 318, [1861-73] All ER Rep 487; *Graham v Lewis* (1888) 22 QBD 1, CA; and *Cain v Butler* [1916] 1 KB 759 at 762; but contrast *Cornelius v Phillips* [1918] AC 199, [1916-17] All ER Rep 685, HL. See also *Kirkwood v Gadd* [1910] AC 422 at 423, [1908-10] All ER Rep 768 at 771, HL; *Newman v Oughton* [1911] 1 KB 792; *Transport and General Credit Corp'n Ltd v Morgan* [1939] Ch 531, [1939] 2 All ER 17; *Re Brauch (a debtor), ex p Britannic Securities and Investments Ltd* [1978] Ch 316, [1978] 1 All ER 1004, CA; and *Re Sarflax Ltd* [1979] Ch 592, [1979] 1 All ER 529. Cf the meaning of "business", see 47 Halsbury's Laws (4th edn) paras 2, 3, and 1 Words and Phrases (3rd edn) 204 et seq.

"Carried on business" implies something more than mere service from which the person may be discharged at a moment's notice; see per Pollock CB in *Sangster v Kay* (1850) 5 Exch 386. But cf *Re Bowie, ex p Breull* (1880) 16 Ch D 484, where a debtor, employed as a

clerk in a bank, was held to be carrying on business at that place, and see *Graham v Lewis* (1888) 22 QBD 1, distinguishing the last-mentioned case.

**Sub-s (3) : Vesting order.** The court now has power to make vesting orders in respect of the trust property where it appoints the trustee and also where the trustee has been appointed out of court; see ss 44(i), 51(1)(i) post. Cf *Re Vicat*, (1886) 33 Ch D 103, 55 LJ Ch 843n, CA, and *Re Dewhirst's Trusts*, (1886) 33 Ch D 416, 55 LJ Ch 842, CA, where the court refused to re-appoint trustees already properly appointed out of court in order to give itself jurisdiction to make a vesting order.

**Sub-s (4) : Power to appoint an executor or administrator.** Where the personal representative has paid all the expenses and debts and cleared the estate he stands in the position of trustee of the residue of the estate for the residuary legatees or persons entitled on intestacy, as the case may be, and the court can appoint a new trustee to act jointly with him; see *Re Ponder*, *Ponder v Ponder* [1921] 2 Ch 59, [1921] All ER Rep 164 followed in *Re Pitt*, (1928) 44 TLR 371, but doubted in *Harvell v Foster* [1954] 2 QB 367, [1954] 2 All ER 736, CA.

Under the Judicial Trustees Act 1896, s 1(1), this part of this title ante, the court may appoint a judicial trustee and by s 1(2) of that Act, the administration of the property of a deceased person, whether a testator or intestate, is to be a trust, and the executor of administrator a trustee, within the meaning of that Act. The court has power to appoint additional personal representatives during the minority of a beneficiary or the subsistence of a life interest and until the estate is fully administered, under the Supreme Court Act 1981, s 114(4), Vol 17, title Executors, and Administrators, and to appoint special or additional personal representatives in respect of settled land under the Administration of Estates Act 1925, s 23(2), Vol 17, title Executors and Administrators.

**Application.** This section applies to trusts created or constituted before 1926, as well as after 1925; see s 69(1) post.

This section is applied to the appointment of a new trustee under the Solicitors Act 1974, Sch 1, para 11(1) by s 35 of, and Sch 1, para 11(2) to, that Act, Vol 41, title Solicitors.

**Definitions.** For "the court", see s 67 post. For "conveyance", see s 68(1), para (3) post. For "trustee" and "new trustee", see, subject to sub-s (4) above, s 68(1), para (17) post.

Where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit.

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## NOTES

**Court.** For the jurisdiction of the county court, see the note to s 41(1) ante.

**Other than the Public Trustee.** The Public Trustee has statutory power to charge fees under the Public Trustee Act 1906, s 9, this part of this title ante.

**Trustee.** It is a well-established rule of equity that a trustee is not allowed to make any profit out of his office and, unless there is an express or implied direction in the trust instrument to the contrary, or an express stipulation has been made with the beneficiaries before accepting the trust or under an express order of the court, he has no right to charge for his time and trouble; see, for example, *Williams v Barton* [1927] 2 Ch 9 [1927] All ER Rep 751; *Re Bignell, Bignell v Chapman* [1892] 1 Ch 59, 61 LJ Ch 334, CA; *Re Gee, Wood v Staples* [1948] Ch 284, [1948] 1 All ER 498; *Re Northcote's Will Trusts, Northcote v Northcote* [1949] 1 All ER 442; and see, generally, 48 Halsbury's Laws (4th edn), paras 799 et seq.

In *In the Estates of Young* (1934) 103 LJP 75, 151 LT 221 the court was held to have the power, in giving a grant of letters of administration de bonis non to a trust corporation, to authorise the corporation to charge according to the authorised rate, in view of s 68(1), para (17) post. That case was followed in *Re Masters, Coutts & Co v Masters* [1953] 1 All ER 19, [1953] 1 WLR 81, in which Danckwerts J also held the court to have an inherent jurisdiction to authorise remuneration of a trustee, whether appointed by the court or not, following *Re Freeman's Settlement Trusts*, (1887), 37 Ch D 148, 57 LJ Ch 160 and *Marshall v Holloway* (1820) 2 Swan 432, [1814-23] All ER Rep 395. See also *Re Macadam*, [1946] Ch 73, [1945] 2 All ER 664. But the jurisdiction should be exercised sparingly and only in exceptional cases; see *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677, [1954] 1 WLR 526.

When considering whether to exercise this jurisdiction, the court must take care to safeguard the interests of the beneficiary; see *Re Duke of Norfolk's Settlement Trusts*, [1981] 3 All ER 220, [1981] 3 WLR 455, CA.

A trustee duly authorised to receive remuneration by the trust instrument is not bound to account for that remuneration; *Re Orwell's Will Trusts, Dixon v Blair* [1982] 3 All ER 177, [1982] 1 WLR 1337.

**To charge ... remuneration.** The court is also empowered to assign remuneration to a judicial

trustee under the Judicial Trustees Act 1896, s 1(5), this part of this title ante.

A corporation entitled by rules under the Public Trustee Act 1906 to act as custodian trustee has power to charge fees; see s 4(1), (3) of that Act, this part of this title ante; but the appointment of a trust corporation as managing trustee and also as custodian trustee with the purpose of enabling the corporation to charge fees is ineffective; see *Forster v Williams Deacon's Bank Ltd* [1935] Ch 359, [1935] All ER Rep 374; *Arning v James* [1936] Ch 158, 105 LJ Ch 27.

A trustee who receives payment for his services is expected to display a higher standard of care and expertise than an unpaid trustee; *Bartlett v Barclay's Bank Trust Co Ltd (No 1)* [1980] Ch 515, [1980] 1 All ER 139.

For the power of trustees to employ and pay agents, see s 23(1) ante.

**Definitions.** For "the court", see s 67 post. For "trustee", s 68(1), para (17) post.

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### 43 Powers of new trustee appointed by the court

Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have 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.

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#### NOTES

**The same powers.** The effect of the Trustee Act 1893, s 37 (repealed), which this section replaces, and of the authorities was stated by Farwell J in *Re Smith, Eastick v Smith* [1904] 1 Ch 139, at 144, 73 LJ Ch 74:

"Every power given to trustees which enables them to deal with or affect the trust property is prima facie given them ex officio as an incident of their office and passes with the office to the holders or holder thereof for the time being; whether a power is so given ex officio or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the prima facie presumption, and little regard is now paid to such minute differences as those between 'my trustees', 'my trustees A and B' and 'A and B my trustees'; the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language." In that case it was held that a discretion to pay capital to the testator's widow was not personal to his trustees, but could be exercised by their successors.

As to whether powers given by the trust instrument are given to the trustees generally or to the trustees named therein, see the note "Given to trustees jointly" to s 18 ante, and the cases there cited. As to persons incapable by reason of mental disorder of exercising functions as trustees, see s 54 post, and the Mental Health Act 1983, s 96, Vol 28, title Mental Health.

**Definitions.** For "the court", see s 67 post. For "instrument", "trust" and "trustee", see s 68(1), paras (5), (17) post, respectively.

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#### 44 Vesting orders of land

In any of the following cases, namely:-

- (i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;
- (ii) Where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person –
  - (a) is under disability; or
  - (b) is out of the jurisdiction of the High Court; or
  - (c) cannot be found, or, being a corporation, has been dissolved;
- (iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any interest in land;
- (iv) Where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead;

(v) Where there is no personal representative of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land;

(vi) Where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey the land or interest or to release the right, and has wilfully refused or neglected to convey the land or interest or release the right for twenty-eight days after the date of the requirement;

(vii) Where land or any interest therein is vested in a trustee whether by way of mortgage or otherwise, and it appears to the court to be expedient;

the court may make an order (in this Act called a vesting order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that –

(a) Where the order is consequential on the appointment of a trustee the land or interest therein shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled or formerly entitled jointly with another person, and such trustee is under disability or out of the jurisdiction of the High Court or cannot be found, or being a corporation has been dissolved, the land interest or right shall be vested in such other person who remains entitled, either alone or with any other person the court may appoint.

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## NOTES

**Para (i) : Trustee ... appointed out of court.** The power of the court to make vesting orders under the Trustee Act 1893, s 26 (repealed), did not extend to the making of a vesting order where the trustees had been appointed out of court and the court refused to adopt the device of re-appointing continuing trustees as trustees in order to give itself jurisdiction; see, for example, *Re Vicat* (1886) 33 Ch D 103, 55 LJ Ch 843, n, CA; *Re Dewhirst's Trusts* (1886) 33 Ch D 416, 55 LJ Ch 843, n CA.



**Para (ii) : Solely or jointly.** Jointly included coparcener in *Re Greenwood's Trusts*, (1884) 27 Ch D 359, 54 LJ Ch 623. Cf, as to stock, s 51 (1)(ii) post.

**Under disability.** These words replaced the words "an infant" in the Trustee Act 1893, s 26(ii)(a) (repealed). An infant cannot now hold a legal estate or be appointed a trustee; see the Law of Property Act 1925, ss 1(6), 20, Vol 37, title Real Property (Pt 1). As to who is an infant, see the note "Infant" to s 46 post.

As to persons incapable by reason of mental disorder of exercising functions as trustees, see s 54 post, and the Mental Health Act 1983, s 96, Vol 28, title Mental Health.

Where there were four trustees and the affairs of one of them were under the control of the Court of Protection, an application by two of the remaining trustees, which was opposed by the third, to vest the property in the three remaining trustees under this section and s 51 post, without removing the mental patient was refused in *Re Harrison's Settlement Trusts, Morris v Harrison-Sleap* [1965] 3 All ER 795, [1965] 1 WLR 1492, as, though there is no power under the statute to remove a trustee without appointing a new trustee in his place, the court has an inherent jurisdiction to do that and there would have been no difficulty whatsoever in applying both for a vesting order and for an order under the inherent jurisdiction.

A person of unsound mind, who, before his incapacity, entered into a contract for sale of land became, on payment of the purchase money, trustee for the purchaser, and a vesting order would be made; see *Re Pagani, Re Pagani's Trust* [1892] 1 Ch 236, 66 LT 244; *Re Cuming*, (1869), 5 Ch App 72, 21 LT 739.

**Out of the jurisdiction.** This does not include temporary absence, as of a sailor; see *Hutchinson v Stephens* (1834), 5 Sim 498, 3 LJ Ch 239. See also *Re Skitters Mortgage Trust*, (1856) 4 WR 791; *Hooper v Strutton* (1871) 19 WR 522.

**High Court.** See the note to s 41 ante.

**Being a corporation, has been dissolved.** These words were not in the Trustee Act 1893, s 26(ii)(c) (repealed) and overcome the difficulty that a corporation known to be non-existent could not appropriately be described as not to be found; see, for example, *Re Ruddington Land*, [1909] 1 Ch 701, [1908-10] All ER Rep 377; and *Re Taylor's Agreement Trusts*, [1904] 2 Ch 737, 73 LJ Ch 557.

For the effect of the dissolution of a corporation on property held by it, see the note to the Law of Property Act 1925, s 181, Vol 37, title Real Property (Pt 1). Property held by a registered company on trust for any other person immediately before its dissolution is exempted from being

bona vacantia and belonging to the Crown under the Companies Act 1985, s 654, Vol 8, title Companies.

Where a resolution was passed at an extraordinary general meeting of a company owning freehold properties that the company be wound up voluntarily and it was agreed that the properties should be distributed in equal shares among the shareholders, but the legal estate was not conveyed to the shareholders before dissolution, it was held that the company had become trustee of the freehold property for the shareholders, that the legal estate in fee simple of the freehold properties was not determined by the dissolution of the company but continued in existence subject to the trusts, and that the court could make an order under this section vesting the properties in the shareholders as joint tenants on trust for sale; see *Re Strathblaine Estates Ltd*, [1948] Ch 228, [1948] 1 All ER 162.

Where a rector contracted to sell the rectory house but died before completion and no successor to the living was appointed or likely to be appointed, it was held that the court had power to declare the late rector to have been trustee at the time of his death, to appoint new trustees and to make a vesting order; see *Re Peek's Contract*, (1921), 65 Sol Jo 220.

See, also, *Richard Mills & Co (Brierly Hill) Ltd, Smith v Richard Mills & Co (Brierly Hill) Ltd* [1905] WN 36; *Re General Accident Assurance Corporation Ltd*, [1904] 1 Ch 147, 73 LJ Ch 84; *Re 12 Cable Road, Hoylake, Cheshire*, [1904] WN 8.

**Para (iii) : Uncertain who was the survivor.** Cf the Law of Property Act 1925, s 184, Vol 37, title Real Property (Pt 1), and the Administration of Estates Act 1925, s 46(3), Vol 17, title Executors and Administrators.

**Para (iv) : Uncertain whether the last trustee... is living or dead.** Cf, as to stock, s 51(1) (iii) Post.

**Para (v) : No personal representative of a deceased trustee.** Real estate held on trust (including settled land) to which a deceased person was entitled for an interest not ceasing on his death devolves on his personal representative; see the Administration of Estates Act 1925, ss 1, 3, 45, Vol 17, title Executors and Administrators. By s 3(4) of that Act the interest of a deceased person under a joint tenancy, where another tenant survives the deceased, is an interest ceasing on his death. Estates vested in trustees as joint tenants cannot be severed so as to create a tenancy in common; see the Law of Property Act 1925, s 36(3), Vol 37, title Real Property (Pt 1), and so must pass to the survivors.

See, generally, as to the devolution of trust estates, Underhill and Hayton's *Law of Trusts and Trustees* (14th edn) 638 et seq.

Until administration is granted, the estate of an intestate vests in the President of the Family Division of the High Court, see the Administration of Estates Act 1925, ss 9, 55(1)(xv), Vol 17, title Executors and Administrators.

**Uncertain who is the personal representative.** This uncertainty may arise from a delay in probate if the will is disputed; see *Re Coolis Mortgage*, [1895] 1 Ch 700, 64 LJ Ch 624.

**Para (vi): Trustee.** Cf, as to stock, s 51 (1)(ii)(d) post. A mortgagor, against whom an order for foreclosure absolute has been made in favour of a mortgagee, having an equitable charge on the mortgaged property, requiring the mortgagor to make an absolute conveyance or assignment of the property to the mortgagee, has been held to be a trustee within the meaning of this paragraph; see *Jones v Davies* (1940), 84 Sol Jo 334, following *Re Crowe's Mortgage*, (1871) LR 13 Eq 26.

**Wilfully refused or neglected.** A refusal is not wilful within the meaning of this paragraph if the title of the person asking for the conveyance is disputed, and the trustee holds a bona fide doubt as to it; see *Re Mills' Trusts*, (1888), 40 Ch D 14, 60 LT 442.

If the court considers the refusal of the trustee has been unjustifiable he may be ordered to pay the costs; see *Re Knox's Trusts*, [1895] 2 Ch 483, 64 LJ Ch 402. A person who is unable to do something or has a reasonable excuse for not doing it cannot be said to neglect or refuse to do it; cf, in particular, *Re London and Paris Banking Corpn*, (1875) LR 19 Eq 444; *Re Richmond Gas Co and Richmond (Surrey) Corpn*, [1893] 1 QB 56; *Partridge v Partridge* [1894] 1 Ch 351; *Re Edwards, Lloyd v Boyes* [1910] 1 Ch 541; and *Re Quinin Dick, Lord Cloncurry v Fenton* [1926] Ch 992, [1926] All ER Rep 644.

**For twenty-eight days after the date of the requirement.** Jurisdiction to make the order does not arise before the twenty-eight days after the request in writing have expired, and the court cannot make an order on an application made before that date; see *Re Knox's Trusts* [1895] 1 Ch 538, 64 LJ Ch 402.

For calculation of this period, cf the note "Seven years from; thirty days after" to s 10 ante.

**Requirement.** If the request in writing is made by letter, posting the letter is prima facie evidence of its delivery to the person to whom it is addressed, and proof of addressing and posting by registered post, with an affidavit that the letter had not been returned through the dead letter office, was accepted in *Re Struve's Trusts* (1912), 56 Sol Jo 551.

**Para (vii) : Where land ... is vested in a trustee.** Cf as to stock, s 51(1)(v) post, and the note thereto.

**The court.** The powers of the court to make vesting orders extend to all property in any part of Her Majesty's Dominions except Scotland; see s 56 post. The county court has jurisdiction under this section and ss 45, 46 post where the trust estate in question does not exceed in amount or value the county court limit (ie £30,000) unless the parties agree to the exercise of greater jurisdiction; see the County Courts Act 1984, s 24(1), (2) (b), Vol 11, title County Courts, and s 63A(2), (5) of this Act and the notes thereto post.

**Land or interest therein.** Cf, as to stock and things in action, s 51 post.

**In any such person.** Wherever a vesting order can be made under this section, the court has an alternative power under s 50 post. Procedure by vesting order is usually more convenient than by appointing a person

to convey and should be adopted wherever possible; see *Jones v Davies* (1940), 84 Sol Jo 334.

For the effect of vesting orders, see ss 49, 55 post.

**Application.** This section applies to trusts constituted or created before 1926 as well as after 1925; see s 69(1) post. The provisions of this Act relating to vesting orders (ie this section to s 56 post) and to orders appointing a person to convey (s 50 post) apply to vesting orders authorised to be made by the Settled Land Act 1925; see s 113(9) of that Act, Pt 2 of this title post; to vesting orders authorised to be made by the Law of Property Act 1925, Pt I (ie ss 1-39); see s 9(3) of that Act, Vol 37, title Real Property (Pt 1); and to vesting orders made under the Administration of Estates Act 1925, ss 38(2), 43(2), Vol 17, title Executors and Administrators.

**Definitions.** For "contingent right", "conveyance", "land", "mortgage", "personal representative", "possessed" and "trustee", see s 68(1), paras (2), (3), (6), (7), (9), (10) and (17) post, respectively; for "the court", see s 67 post.

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#### 45 Orders as to contingent rights of unborn persons

Where any interest in land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of that interest on any trust, the court may make an order releasing the land or interest therein 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 land.

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#### NOTES

**Unborn person.** For meaning, see the note to s 48 post.

**Court may make an order.** For the jurisdiction of the county court to make an order under this section, see the note "The court" to s 44 ante.

**Application.** For the application of this section to vesting orders made under other Acts of 1925, see the note to s 44 ante.

**Definitions.** For "contingent right", "land" and "trust", see s 68(1), paras (2), (6), (17) post, respectively; for "the court", see s 67 post.

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#### 46 Vesting order in place of conveyance by infant mortgagee

Where any person entitled to or possessed of any interest in land, or entitled to a contingent right in land, by way of

security for money, is an infant, the court may make an order vesting or releasing or disposing of the interest in the land or the right in like manner as in the case of a trustee under disability.

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#### NOTES

**Person entitled to ... land, etc.** A legal estate is not capable of being held by an infant and a grant or transfer of a legal mortgage of land to an infant operates only as an agreement for valuable consideration to execute a proper conveyance when the infant attains full age, and in the meantime to hold any beneficial interest in the mortgage debt in trust for the persons for whose benefit the conveyance was intended to be made; see the Law of Property Act 1925; s 1(6), 19(6), Vol 37 title Real Property (Pt 1). Under the Trustee Act 1850, s 7 (repealed and replaced by the Trustee Act 1893, s 28 (repealed), which was in similar terms to this section), the court vested in the executors of a mortgagee a legal estate which had devolved on his infant heir-at-law (*Re Franklyn's Mortgage*, [1888] WN 217). Real estate held by way of mortgage or security now devolves on the personal representatives; see the Administration of Estates Act 1925, ss 1, 3(1)(ii), Vol 17, title Executors and Administrators. When a minor is appointed as executor, the appointment will not act so as to vest the estate in the minor, or to constitute him a personal representative for any purpose, unless and until probate is granted in accordance with the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 32, 33, as amended by SI 1991/1876; see the Supreme Court Act 1981, s 118 and the notes thereto, Vol 17, title Executors and Administrators.

**Infant.** After 1969 a person attains full age on the eighteenth anniversary of his date of birth or on 1 January 1970, whichever first occurred, instead of on the day before the twenty-first anniversary of that date, and "infant" is construed accordingly; see the Family Law Reform Act 1969, ss 1(1), (2), 9, Vol 6, title Children and the General Note to s 9 of that Act.

**Court.** For the jurisdiction of the county court to make an order under this section, see the note "The court" to s 44 ante.

**In like manner as in the case of a trustee under disability.** As to the making of vesting or other

orders in the case of an infant trustee, see s 44(ii)  
(a) ante.

**Definitions.** For "contingent right", "land" and "possessed", see s 68(1), paras (2), (6), (10) post, respectively; for "the court", see s 67 post.

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#### 47 Vesting order consequential on order for sale or mortgage of land

Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in 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 for the purposes of this Act, and the court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate or interest as that court thinks fit in the purchaser or mortgagee or in any other person:

Provided that, in the case of a legal mortgage, the estate to be vested in the mortgagee shall be a term of years absolute.

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#### NOTES

**Court.** For the courts having jurisdiction under this section, see s 67 post. The county court has jurisdiction in cases where the judgment is given or order made by that court; see s 63A(3)(a) post.

**Order directing the sale or mortgage of any land.** If the order is made without jurisdiction it is not an order directing sale or mortgage of land under this section, and a subsequent vesting order founded thereon will equally be made without jurisdiction and the provisions of this Act will not support it; see *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620, 79 LJ Ch 19, in which it was held that the court had no jurisdiction to authorise a mortgage of the interest of an infant tenant in tail in remainder for the purpose of raising money for her maintenance and that an order of the court purporting to have that effect was not an order directing a mortgage within the meaning of the Trustee Act 1893, s 30 (repealed). The court now has the power to authorise such a mortgage under s 53 post; see *Re Gower's Settlement*, [1934] Ch 365, [1934] All ER Rep 796.

An order of the court under any statutory or other jurisdiction is not to be invalidated, as against a purchaser, on the ground of want of jurisdiction, or of want of any concurrence, consent, notice or service, whether the purchaser has notice of any such want, or not; see the Law of Property Act 1925, s 204, Vol 37, title Real Property (Pt 1).

An order may be made under this section where the sale of partnership property has been ordered by the court and part of the property was vested in a partner who is of unsound mind; see *Herring v Clark* (1868), 4 Ch App 167.

**Otherwise bound by the judgment or order.** By RSC Ord 44, r 2, where, in an action for the administration of the estate of a deceased person or the execution of a trust or for the sale of any property, the

court gives a judgment or makes a direction which affects persons not parties to the action the court may direct that notice of the judgment be served on any such person. After such notice those persons served will be bound by the proceedings in the same manner as if they had originally been made parties, but may within one month after service apply for the discharge, variation or addition to the judgment.

A person, not a party nor technically bound by a judgment, may nevertheless be bound thereby in effect as by estoppel if, being fully cognisant of the proceedings, he stands by and takes the benefit of those proceedings; see, for example, *Re Lart, Wilkinson v Blades* [1896] 2 Ch 788, 65 LJ Ch 846.

**Application.** For the application of this section to vesting orders made under other Acts of 1925, see the note to s 44 ante.

**Appointment of person to convey.** The court may, instead of making a vesting order, appoint a person to convey; see s 50 post.

**Estate to be vested in the mortgage.** The purpose of the proviso is to comply with the Law of Property Act 1925, s 85 or 86, Vol 37, title Real Property (Pt 1).

**Definitions.** For "contingent right", "sale", "land", "mortgage" and "mortgagee" and "possessed", see s 68(1), paras (2), (3), (6), (7) and (10) post, respectively.

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#### 48 Vesting order consequential on judgment for specific performance, etc

Where a judgment is given for the specific performance of a contract concerning any interest in land, or for sale or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest in land either in cases arising out of the doctrine of election or otherwise, the court may declare –

(a) that any of the parties to the action are trustees of any interest in the land or any part thereof within the meaning of this Act; or

(b) that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was during his lifetime a party to the contract or transaction

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.

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#### NOTES

**Judgment... for... specific performance.** Where a defendant had refused to obey an order of the court requiring his specific performance of an agreement to grant a lease the court held that it had jurisdiction under the Trustee Act 1850, s 30 (repealed), predecessor of the Trustee

Act 1893, s 31 (repealed) and this section, to appoint another to execute the lease, declared the defendant a trustee and made such an appointment in *Hall v Hale* (1884), 51 LT 226. Cf *Grace v Baynton* (1877), 25 WR 506, where the court held that it had no power under the Trustee Acts to appoint a person to execute a lease in place of a lessee who refused to execute the lease; but see now the Supreme Court Act 1981, s 39, Vol 11, title Courts and Legal Services. In *Wellesley v Wellesley, Mornington v Mornington, ex p Countess of Mornington* (1853), 4 De GM & G 537, 22 LJ Ch 966, a donee of a power of jointuring under a settlement, against whom a decree of specific performance had been made, was declared to be a trustee and the court appointed a person to execute the requisite deed.

Where lands of a tenant in tail of unsound mind had been put up for sale in lots, part of which were sold, the court made an order with regard to those sold, but thought it a dangerous precedent to make it as to the lots not sold and directed the rest of the petition to stand over; see *Re Bolton*, [1888] WN 243.

**Doctrine of election.** As to the doctrine of election, see 16 Halsbury's Laws (4th edn reissue) para 957 et seq, and see *Re Montagu, Faber v Montagu* [1896] 1 Ch 549, 65 LJ Ch 372, where an infant tenant in tail became entitled under a will to certain land subject to his conveying the land of which he was tenant in tail in accordance with the terms of the will. The court elected on behalf of the infant that it was for his benefit to take in accordance with the will, declared him to be a trustee in respect of the land to be conveyed and appointed a person to convey the land discharged from the estate tail and remainders over.

**Court.** For the courts having jurisdiction under this section, see s 67 post. The county court has jurisdiction in cases where the judgment is given or the order made by that court; see s 63A(3) (a) post.

**Unborn persons.** In construing this expression as used in the Trustee Act 1850, s 30 (repealed), Jessel MR held that it meant "non-existent in the character to entitle a person to the property in question" (the object of the provision being to enable the court to convey a future legal estate devolving upon a person who could not be made a party to the suit) and included the heir of a living person, who, although a "living man", would not be a "living heir", as in the character of heir he comes into existence at a future period. Moreover, "person" does not necessarily mean a man, but applied by the interpretation clause to a corporation. "Unborn" applied to any person so far not in existence so that he could not be properly made a party to the suit; see *Basnett v Moxon* (1875), LR 20 Eq 182, 44 LJ Ch 557.

**As if they had been trustees.** For the power of the court to make vesting orders in relation to trustees, see s 44 ante, and for the power of the court to make orders as to the contingent rights of unborn persons, see s 45



ante. As to applications to the court and the making and forms of vesting orders, see the notes to s 44 ante.

**Appointment of person to convey.** The court may, instead of making a vesting order, appoint a person to convey; see s 50 post. See also the Supreme Court Act 1981, s 39, Vol 11, title Courts and Legal Services, under which the High Court may, where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, order that the conveyance, contract or other document be executed by a person nominated for that purpose.

**Definitions.** For "conveyance" and "land", see s 68(1), paras (3) and (6) post respectively; for "the court", see s 67 post.

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#### 49 Effect of vesting order

A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a trustee, have the same effect –

(a) as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate or interest as the court directs; or

(b) if there is no such person, or no such person of full capacity, as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate or interest as the court directs;

and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

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#### NOTES

**Under any of the foregoing provisions.** Ie under ss 44-48 ante.

**Vesting order consequential on the appointment of a trustee.** The court has power to make a vesting order in this case under s 44(i) ante.

**All proper conveyances.** "Conveyance" as applied to any person includes the execution by that person of every necessary or suitable assurance (including an assent) for conveying, assigning, appointing, surrendering or otherwise transferring or disposing of land whereof he is seized or possessed, or wherein he is entitled to a contingent right, either for the whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance; see s 68(1), para (3) post.

**Application.** For the application of this section to vesting orders made under other Acts of 1925, see the note to s 44 ante.

**Court.** For the courts having jurisdiction, see s 67 post, and as to county court jurisdiction, see the notes to the respective sections under which the vesting orders are made.

**Effect of vesting orders.** Every vesting order, made by any court for the purpose of vesting or conveying a legal estate, operates to convey or create the legal estate disposed of in like manner as if it had been a conveyance executed by the estate owner of the legal estate to which the order relates and, where made in favour of a purchaser, overreaches any equitable interest or power affecting that estate, whether or not he has notice thereof, if the equitable interest or power is bound by the order and any capital money arising from the transaction is paid into, or in accordance with the order of, the court; see the Law of Property Act 1925, ss 2(1)(iv), 9(1)(a), (2), Vol 37, title Real Property (Pt 1).

The effect of the order is to vest the property without any further formality though there has been no actual conveyance; see *In the Goods of Woodfall, Woodfall v Arbuthnot* (1873) LR 3 P & D 108, 42 LJP&M64.

An order vesting or appointing a person to convey the estate of an infant tenant in tail in possession bars the entail and the remainders over; see *Re Montagu, Faber v Montagu* [1896] 1 Ch 549, 65 LJ Ch 372.

An order vesting trust property in new and continuing trustees does not sever the joint tenancy; see *Re Marquis of Bute's Will*, (1859) John 15, 33 LTOS 178; and see now the Law of Property Act 1925, s 36(3), Vol 37, title Real Property (Pt 1).

Where a lessor, after entering into a binding agreement which contained an express covenant for quiet enjoyment, became of unsound mind before the lease was granted, it was held that an order might be made vesting the term in the lessee pursuant to the contract, but that such an order would not give the lessee the benefit of the covenant for quiet enjoyment by the lessor; see *Cowper v Harmer* (1887) 57 LJ Ch 460, 57 LT 714.

**Stamp duties.** Every order of any court whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction, is included in the definition of "Conveyance on sale" contained in the Stamp Act 1891, s 54, Vol 41, title Stamp Duties. For rates of duty, see the Finance Act 1963, s 55, Vol 41, title Stamp Duties. Every order of any court, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in a person, is to be charged with duty as a conveyance or transfer of property but a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 50p; see s 62 of the 1891 Act, Vol 41, title Stamp Duties.

**Definitions.** For "land" and "trustees", see s 68(1), paras (6) and (17) post, respectively.

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## 50 Power to appoint person to convey

In all cases where a vesting order can be made under any of the foregoing provisions, the court may, if it is more convenient, appoint a person to convey the land or any interest therein 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.

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### NOTES

**Vesting order ... under any of the foregoing provisions.** See under ss 44-48 ante.

**Court.** For the courts having jurisdiction under this Act, see s 67 post. The county court has jurisdiction where a vesting order can be made by that court; see s 63A(3)(b) post. The jurisdiction of the county court to make vesting orders under ss 44-48 ante is as noted to those sections.

**If it is more convenient.** The procedure by way of vesting order has advantages over the appointment of a third person to convey and is generally the more convenient procedure; see *Jones v Davies* (1940) 84 Sol Jo 334.

On a sale in lots where the parties under disability were numerous the court appointed a person to convey; see *Hancox v Spittle* (1857), 3 Sm & G 478; but a vesting order was preferred where it would prove less expensive; see *Shepherd v Churchill* (1857) 25 Beav 21.

Where a person is directed to execute a conveyance, contract or other document by the High Court, and that person either neglects or refuses to do so, or cannot be found, then the court may nominate another person to complete the execution; see the Supreme Court Act 1981, s 39, Vol 11, title Courts and Legal Services.

**Conveyance ... in conformity with the order.** The conveyance should recite the order; see, for example, *Hancox v Spittle* (1857), 3 Sm & G 478.

There is deemed included in any conveyance by a person who conveys and is expressed to convey under an order of the court the covenant set out in the Law of Property Act 1925, Sch 2, Pt VI, Vol 37, title Real Property (Pt 1), that he has not done or suffered any act whereby the subject-matter of the conveyance is or may be impeached, charged, affected or incumbered in title, estate or otherwise; see s 76(1)(f) of that Act, Vol 37, title Real Property (Pt 1).

**Same effect as an order.** For the effect of a vesting order, see s 49 ante.

**Application for appointment.** Applications in the county court are by originating application, as to which, see CCR Ord 3, r 4, and proceedings must be commenced in the county court for the district in which the persons making the application or any one of them resides; see CCR Ord 4, r 2. For persons entitled to apply for orders under this section, see s 58 post.

Where the court has ordered a sale of land and a person entitled, being a party to the proceedings, refuses to execute the deed, the person having carriage of the sale, and not the purchaser, is the proper person

to take out a summons to have a person appointed under this section; see *Moorhead v Kirkwood* [1919] 1 IR 225.

**Application.** For the application of this section to vesting orders made under other Acts of 1925, see the note to s 44 ante.

**Definitions.** For "contingent right", "convey", "conveyance" and "land", see s 68(1), paras (2), (3) and (6) post, respectively.

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## 51 Vesting orders as to stock and things in action

(1) In any of the following cases, namely:-

(i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;

(ii) Where a trustee entitled, whether by way of mortgage or otherwise, alone or jointly with another person to stock or a thing in action –

(a) is under disability; or

(b) is out of the jurisdiction of the High Court; or

(c) cannot be found, or, being a corporation, has been dissolved; or

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled; or

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action for twenty-eight days next after an order of the court for that purpose has been served on him;

(iii) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a thing in action is alive or dead;

(iv) Where stock is standing in the name of a deceased person whose personal representative is under disability;

(v) Where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient;

the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint:

Provided that –

(a) Where the order is consequential on the appointment of a trustee, the right shall be vested in the persons who, on the appointment, are trustees; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer:

Provided that the person appointed to make or join in making a transfer of stock shall be some proper officer of the bank, or the company or society whose stock is to be transferred.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act, may transfer the stock to himself or any other person, according to the order, and the Bank of England and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) 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.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

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#### NOTES

**Sub-s (1)(i): The court appoints.** Cf as to land, s 44(i) ante. As to the jurisdiction of the county court, see the note “Court” to s 41(1) ante.

**Trustee ... appointed out of court.** The power of the court to make vesting orders as to stock under the Trustee Act 1893, s 35 (repealed), did not extend to the making of a vesting order where the trustees had been appointed out of court to a last surviving trustee who had died without leaving a personal representative, the court refusing to re-appoint the existing trustees in order to give it jurisdiction; see *Re Cane’s Trusts*, [1895] 1 IR 172. Cf s 44(i) ante.

**Sub-s (1)(ii): Stock.** For definition, see s 68(14) post. See also *Re New Zealand Trust and Loan Co*, [1893] 1 Ch 403, 62 LJ Ch 262, CA

("stock" includes shares in a limited company whether fully paid up or not).

**Thing in action.** See, generally, 6 Halsbury's Laws (4th edn reissue) paras 1 et seq. Patent rights are things in action and the court has jurisdiction to make a vesting order in respect of those rights under this section; see *Re Heath's Patent*, (1912) 56 Sol Jo 538, 29 RPC 389.

**Under disability.** These words replaced "an infant" in the Trustee Act 1893, s 35(1)(ii)(a) (repealed). Cf, as to land, s 44(ii) ante. The appointment of an infant to be a trustee in relation to any settlement or trust is void; see the Law of Property Act 1925, s 20, Vol 37, title Real Property (Pt 1). Formerly where an infant and another were trustees of stock to which the infant himself was beneficially entitled the court made an order under the Trustee Act 1893, s 35 (repealed), vesting the right to transfer the stock in the infant's guardian; see *Re Dehaynin*, [1910] 1 Ch 223, 79 LJ Ch 131; approving *Re Harwood (Infants)*, (1882) 20 Ch D 536, 51 LJ Ch 578; *Re Barnett, Foster v Barnett* (1889) 61 LT 676.

**Out of the jurisdiction.** Cf, as to land, s 44(ii)(b) ante. This section has been applied to the case of Scottish executors who were entitled to prove the will in England but had not done so; see *Re Trubee's Trusts*, [1892] 3 Ch 55, 61 LJ Ch 715. The court has, however, no jurisdiction to make a vesting order as to property in Scotland; see s 56 post.

**High Court.** See the note to s 41 ante.

**Being a corporation, has been dissolved.** These words were not in the Trustee Act 1893, s 35(1)(c) (repealed). Cf, as to land, s 44(ii) ante. See also the note thereto.

As to the making of a vesting order in respect of a patent, inadvertently overlooked and not assigned on the dissolution of a company, and which still appeared on the register of patents in the name of the company, see *Re Dutton's Patents*, (1923) 67 Sol Jo 403, 40 RPC 84.

As to the amendment of patents granted under the Patents Act 1949, Vol 33, title Patents and Designs by the comptroller where the applicant died or, in the case of a body corporate, ceased to exist before the patent was sealed, see s 20 of the 1949 Act.

**Neglects or refuses to transfer.** Cf, as to land, s 44(vi) ante. If the court considers the refusal of the trustee to have been unjustifiable he may be ordered to pay the costs of the application; see *Re Knox's Trusts* [1895] 2 Ch 483, 64 LJ Ch 402.

An order was made where an executor of a surviving trustee had not proved his will, and neglected to transfer stock to new trustees, and on the objection of the bank the court directed the circumstances to be stated in the order; see *Re Ellis's Settlement*, (1857) 24 Beav 426.

Cf the note "Wilfully refused or neglected" to s 44 ante.

**Person absolutely entitled.** New trustees are persons absolutely entitled to request the transfer under para (ii)(d) of sub-s (1) above; see *Re Russell's Trust*, (1851) 1 Sm NS 404, 20 LJ Ch 196; *Re Trubee's Trusts*, [1892] 3 Ch 55. A tenant for life is absolutely entitled to income accrued at the date of the request, but not to income accrued or to

accrue subsequent to that date; see *Re Hartnall, ex parte Hodges* (1852) 5 De G & Sm 111, 21 LJ Ch 384.

**For twenty-eight days.** Jurisdiction to make the order does not arise before twenty-eight days after the request in writing has expired, and the court cannot make an order on an application made before that date; see *Re Knox's Trusts* [1895] 2 Ch 483, 64 LJ Ch 402.

**Request in writing.** If the request in writing is made by letter, posting the letter is prima facie evidence of its delivery to the person to whom it is addressed, and proof of addressing and posting by registered post, with an affidavit that the letter had not been returned through the dead letter office, was accepted in *Re Struve's Trusts* (1912) 56 Sol Jo 551. As to "writing", see the note to s 14 ante.

**Sub-s (1)(iii): Uncertain whether a trustee ... is alive or dead.** Cf, as to land, s 44(iv) ante. Sub-s (1)(iv): Personal representative is under disability. Cf, as to a trustee, sub-s (1)(ii)(a) above.

**Sub-s (1)(v): Stock ... vested in a trustee.** Where a person dies intestate, his real and personal estate vests, pending a grant of administration, in the President of the Family Division of the High Court in the same manner and to the same extent as personal estate formerly vested in the ordinary (see the Administration of Estates Act 1925, ss 9, 55 (1)(xv), Vol 17, title Executors and Administrators) but the President's position differs from that of the ordinary in that he is under no obligation to discharge the deceased's debts or hold the balance of the estate to pious uses and a grant of administration provides the only method by which he can be divested of the property with the result that the court has no jurisdiction under this section; see *Re Deans, Westminster Bank Ltd v Official Solicitor* [1954] 1 All ER 496, [1954] 1 WLR 332.

**Sub-s (2): Appoint some proper person to make or join in making the transfer.** Cf s 50 ante, and the notes thereto.

**Sub-s (3): Bank of England.** For meaning, see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes; and for the legislation relating to the Bank of England, see Vol 4, title Banking. The Bank of England is indemnified by s 66 post for acts done pursuant to this Act and orders made hereunder.

**Sub-s (5): Court.** For the jurisdiction of the county court, see the note to s 41(1) ante.

**Directions concerning ... transfer.** The form of order vests in the trustees the right to call for a transfer, and to transfer the stock, and to receive the dividends or income thereof, and directs the trustees to transfer into their own names (see *Re Gregson*, [1893] 3 Ch 233, 62 LJ Ch 764; *Re Jolie's Trusts*, (1893) 68 LT 747, 3 R 718; *Re Price*, (1894) 8 R 621), but, if there is a liability on the shares, the direction to transfer into the trustees' names may be omitted (*Re New Zealand Trust and Loan Co* [1893] 1 Ch 403, 62 LJ Ch 262); and if the investment be unauthorised the trustees may be given a right to call for a transfer to a purchaser (*Re Peacock*, (1880) 14 Ch D 212, 49 LJ Ch 228).

**Sub-s (6): Shares in ships.** Provisions relating to the registration of ships are contained in the Merchant Shipping Act 1988, Vol 39, title Shipping and Navigation, and the Merchant Shipping (Registration) Act 1993, in the same title.

**Forms.** The order should recite the facts giving rise to jurisdiction under this section; see, for example, *Re Mainwaring* (1858) 26 Beav 172, 28 LJ Ch 261. In the case of incapacity of a trustee, there must be medical evidence to show that he was incapable at the date of the issue of the originating summons and that the incapacity is continuing at the date of swearing of the affidavit. Where a vesting order is sought in respect of stocks and shares, incapacity to execute transfers must also be shown. The trustee under disability must be made a respondent, but need not be served unless he is a sole trustee or has a beneficial interest; see *Practice Direction* [1948] WN 273.

**Stock in name of local authority.** Under the Local Government Act 1972, s 146(1)(c), Vol 25, title Local Government, the court has power to make vesting orders in respect of stock standing in the name of a local authority, or dividends thereon, and to which another local authority has become entitled, and this Act applies as if the order had been made under this section.

**Definitions.** For "the court", see s 67 post; for "mortgage", "personal representative", "transfer" and "trustee", see s 68(1), paras (7), (9), (16) and (17) post, respectively.



The powers conferred by this Act as to vesting orders may be exercised for vesting any interest in land, stock, or thing in action 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.

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#### NOTES

**Powers ... as to vesting orders.** For these powers, see ss 44-51 ante.

**Jurisdiction.** For the courts having jurisdiction under this Act, see s 67 post. For the statutory jurisdiction of the Charity Commissioners or the Secretary of State, concurrently with the High Court, see the Charities Act 1993, s 16, Vol 5, title Charities. For the jurisdiction of the court to vest charity property in the official custodian for charities, see s 21 of that Act, in the same title.

**Definitions.** For "instrument", "land" and "stock", see s 68(1), paras (5), (6) and (14) post, respectively.

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### 53 Vesting orders in relation to infant's beneficial interests

Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order –

(a) appointing a person to convey such property; or

(b) in the case of stock; or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit.

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#### NOTES

**General Note.** The purpose of this section was to avoid the difficulty which emerged in *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620, 79 LJ Ch 19, in the way of the court directing an effectual mortgage of the fee by disentailing an infant's tenancy in tail; see per Clauson J, in *Re Gower's Settlement*, [1934] Ch 365, at 371, [1934] All ER Rep 796. Before 1926 the court could charge real estate to which an infant was entitled in fee simple with expenses for his maintenance (*Re Howarth*, (1878) 8 Ch D 415, 42 LJ Ch 316), but not a reversionary interest in real estate to which he was entitled (*Re Hamilton*, (1886) 31 Ch D 291, 55 LJ Ch 282; *Cadman v Cadman* (1886) 33 Ch D 397, 55 LJ Ch 833; *Re Badger, Badger v Badger* [1913] 1 Ch 385, 82 LJ Ch 264. Thus where an order charging the estate tail in reversion of an infant for his maintenance and directing the trustees to raise money by mortgage for the purpose had in fact been made, and a mortgage and disentailing deed were executed pursuant

thereto, it was held that the order was made per incuriam and without jurisdiction, and that the order and deeds were inoperative and were not saved by the Trustee Act 1893, s 30 (repealed; see now s 47 of this Act ante); see *Re Hambrough's Estate, Hambrough v Hambrough*, above. Where a vesting order in respect of the estate tail in possession of an infant is made, or a person is appointed to convey the same, the effect is to bar the entail and the remainders over; see *Re Montagu, Faber v Montagu* [1896] 1 Ch 549, 65 LJ Ch 372.

Under this section it has been held that the court has jurisdiction, with a view to the application of the capital or income of settled property for the maintenance of an infant tenant in tail in remainder, to authorise a mortgage of the settled land, subject to interests having priority over the infant's tenancy in tail, so framed as to vest in the mortgagee a security which would be as effective a bar against the infant's issue and subsequent remaindermen as if the infant were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act 1833, Vol 37, title Real Property (Pt 1), see *Re Gower's Settlement* above.

**Infant.** See the note to s 46 ante.

**Court.** The county court has jurisdiction in cases where the amount or value of the property to be dealt with in the court does not exceed the county court limit (ie £30,000), unless the parties agree that the court shall exercise a greater jurisdiction; see the County Courts Act 1984, s 24(1), (2)(b), Vol 11, title County Courts, and s 63A(3)(c), (5) of this Act and the notes thereto post.

**Application ... for the maintenance, education, or benefit.** Cf ss 31, 32 ante, and, as to "benefit", see the note "For the advancement or benefit" to s 32 ante. Cf also s 57 post and the first and second notes thereto.

The court's inherent jurisdiction does not extend to modifying a trust merely because that would benefit an infant except for: (a) cases where the court has changed the nature of an infant's property, eg, by directing investment of personalty in the purchase of freeholds; (b) cases where the court has allowed trustees to enter into some business transaction not authorised by the settlement; (c) cases where the court has allowed maintenance out of income which the settlor or testator had directed to be accumulated; and (d) cases where the court has approved a compromise on behalf of infants and possible after-born beneficiaries; see *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL. Accordingly, in *Re Heyworth's Settlements*, [1956] Ch 364, [1956] 2 All ER 21, the court had no jurisdiction, either inherently or under this section, to approve an arrangement made subject to the sanction of the court which would have had substantial fiscal and other advantages for an infant beneficiary in almost every conceivable circumstance giving her an immediate absolute interest in exchange for a future contingent interest, because this was not with a view to the application of capital or income for her maintenance, education or benefit as she had been maintained by advances out of other funds for some two years and she was within a few months of attaining her majority. Cf *Re Cockerell's Settlement Trusts, Cockerell v National Provincial Bank Ltd* [1956] 1

Ch 372, [1956] 2 All ER 172, where the court had jurisdiction under s 57(1) post to sanction the sale, for fiscal reasons, of a reversionary interest to the life tenant so as to enlarge her life interest into an absolute one, as this did not alter any of the trusts subsisting under the settlement. Similarly, following *Re Gower's Settlement*, cited in the General Note to this section, *Re Heyworth's Settlements* above did not preclude the court from appointing a person to convey an infant's entailed interest in remainder to the tenant for life in possession, being protector of the settlement, in consideration of a proper purchase price to be paid to trustees and resettled; see *Re Meux's Will Trusts, Gilmour v Gilmour* [1958] Ch 154, [1957] 2 All ER 630. Where property was settled upon the usual strict settlement limitations but subject to a proviso postponing the first tenancy in tail by purchase until the expiration of a perpetuity period during which the holder of that tenancy in tail was to have a life interest upon certain trusts with remainders over in tail male, the postponed tenancy in tail was vested in possession in the Marquess of Bath and the tenancy in tail in remainder upon his life interest in possession was vested in his infant son Lord Jermyn. The result was that there were two tenants in tail capable between them, but for Lord Jermyn's infancy, of disposing of the fee simple, though neither could dispose of it by himself. A proposed arrangement under the Variation of Trusts Act 1958, s 1 post, resettled the property and, as this would apply Lord Jermyn's beneficial interest in the capital and income for his benefit within the meaning of this section, the court sanctioned the arrangement which included an order under this section appointing someone to execute a disentailing assurance on Lord Jermyn's behalf with his father's consent as protector of the settlement; see *Re Bristol's Settled Estates, Bristol v Jermyn* [1964] 3 All ER 939, [1965] 1 WLR 469. Similarly, in *Re Lansdowne's Will Trusts, Marquis of Lansdowne v Earl of Shelburne* [1967] Ch 603, [1967] 1 All ER 888, the tenant for life in possession was the Marquis of Lansdowne, there was a remainder for life to his eldest son the Earl of Shelburne followed by remainders in tail male and tail general to the unborn sons and daughters of the Earl and then followed a tenancy in tail male for the Marquis's second son Lord Robert, an infant, with further remainders thereafter. For fiscal reasons, an arrangement was proposed under s 1 of the 1958 Act and, although there was no indication of any need for any money or property to be applied for Lord Robert's benefit nor any certainty that he would receive any capital or income under the proposed arrangement, the case differed from *Re Heyworth's Settlements* above, in that Lord Robert would be the prime object of a discretionary trust of income during a perpetuity period, and, contingently on his surviving Lord Shelburne, have a power to appoint capital in his own favour, instead of having remote and speculative expectations under the existing limitations and the court therefore had jurisdiction under this section to facilitate the barring of Lord Robert's entail. That jurisdiction was properly exercisable as the arrangement was beneficial not only to Lord Robert but also to unborn male issue of Lord Shelburne.

**Definitions.** For "convey", "stock" and "transfer", see s 68(1), paras (3), (14) and (16) post, respectively; for "the court", see s 67 post.

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#### **[54 Jurisdiction in regard to mental patients**

(1) Subject to the provisions of this section, the authority having jurisdiction under [Part VII of the Mental Health Act 1983] shall not have power to make any order, or give any direction or authority, in relation to a patient who is a trustee if the High Court has power under this Act to make an order to the like effect.

(2) Where a patient is a trustee and a receiver appointed by the said authority is acting for him or an application for the appointment of a receiver has been made but not determined, then, except as respects a trust which is subject to an order for administration made by the High Court, the said authority shall have concurrent jurisdiction with the High Court in relation to -

(a) mortgaged property of which the patient has become a trustee merely by reason of the mortgage having been paid off;

(b) matters consequent on the making of provision by the said authority for the exercise of a power of appointing trustees or retiring from a trust;

(c) matters consequent on the making of provision by the said authority for the carrying out of any contract entered into by the patient;

(d) property to some interest in which the patient is beneficially entitled but which, or some interest in which, is held by the patient under an express, implied or constructive trust.

The Lord Chancellor may make rules with respect to the exercise of the jurisdiction referred to in this subsection.

(3) In this section "patient" means a patient as defined by [section 94 of the Mental Health Act 1983], or a person as to whom powers are [exercisable under section 98 of that Act and have been exercised under that section or section 104 of the Mental Health Act 1959].]

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#### **NOTES**

This section was substituted by the Mental Health Act 1959, s 149(1), Sch 7, Pt I. The words in square brackets in sub-ss (1), (3) were substituted by the Mental Health Act 1983, s 148, Sch 4, para 4(c).

**Authority having jurisdiction.** Ie the Lord Chancellor, a judge nominated by him under the Mental Health Act 1983, s 93(1), Vol 28, title Mental Health, the Master of the Court of Protection or any other officer of that Court nominated by the Lord Chancellor under s 93(4) of that Act, the functions of the nominated officer being subject to any directions of the Master and being exercisable so far only as the instrument nominating him provides; see s 111(2), (3), (4) of the 1983 Act, Vol 28, title Mental Health.

**Power to make any order.** This refers to the powers of the judge as to the patient's property and affairs contained in the Mental Health Act 1983, ss 95, 96, Vol 28, title Mental Health, which include powers to make orders and to give such directions and authorities as he thinks fit for the purposes of s 95 of that Act and particularly those listed in s 96(1) thereof.

**Power under this Act to make an order.** The High Court has power under ss 44(ii) (a), 51(1)(ii)(a) ante, to make an order in relation to trustees who are under disability, and under s 41(1) ante, to appoint other trustees in place of trustees who are of unsound mind or defective.

**High Court.** See the note to s 41 ante.

**Receiver appointed.** The judge has power to appoint a receiver for a patient under the Mental Health Act 1983, s 99, Vol 28, title Mental Health.

Before 1926 the High Court had exclusive jurisdiction in certain circumstances by virtue of the amendment to the Lunacy Act 1890, s 135 (repealed), by the Lunacy Act 1922, s 2(3) (repealed), which was passed to meet the difficulties disclosed, for example, in *Re James' Mortgage Trusts*, [1919] 1 Ch 61, 88 LJ Ch 17.

After 1925, the High Court and the Judge or Master in Lunacy had concurrent jurisdiction in those circumstances under this section as originally enacted. Since 1 November 1960 there has been concurrent jurisdiction under sub-s (2) as set out above.

**Property to some interest in which the patient is beneficially entitled.** In the circumstances mentioned in sub-s (2)(d) above, which, as originally enacted, read: "a lunatic or defective is beneficially entitled to some interest in the property but holds the property or some interest therein under an express, implied or constructive trust", Romer LJ, held in *Re Jackson*, (1932), unreported, that if the lunatic or defective had no beneficial interest at all in any substantial part of the trust property, the application should be made in the Chancery Division.

**Express, implied or constructive trust.** As to express trusts, see 48 Halsbury's Laws (4th edn) paras 542 et seq. As to constructive trusts, see 48 Halsbury's Laws (4th edn) paras 584 et seq. "Implied" trusts are another name for constructive trusts; see 48 Halsbury's Laws (4th edn) para 524 n 2.

**Definitions.** For "mortgage", "property" and "trustee", see s 68(1), paras (7), (11) and (17) post, respectively.

**Mental Health Act 1983, ss 94, 98, Pt VII.** See Vol 28, title Mental Health.

**Mental Health Act 1959, s 104.** Repealed by the Mental Health Act 1983, s 148, Sch 6 and replaced by s 98 of that Act, Vol 28, title Mental Health.

**Rules under this section.** The Court of Protection Rules 1994, SI 1994/3046. See in particular, r 17 thereof.

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## 55 Orders made upon certain allegations to be conclusive evidence

Where a vesting order is made as to any land under this Act or under [Part VII of the Mental Health Act 1983], as amended by any subsequent enactment, or under any Act relating to lunacy in Northern Ireland, founded on an allegation of any of the following matters namely -

- (a) the personal incapacity of a trustee or mortgagee; or
- (b) that a trustee or mortgagee or the personal representative of or other person deriving title under a trustee or mortgagee is out of the jurisdiction of the High Court or cannot be found, or being a corporation has been dissolved; or
- (c) that it is uncertain which of two or more trustees, or which of two or more persons interested in a mortgage, was the survivor; or
- (d) that it is uncertain whether the last trustee or the personal representative of or other person deriving title under a trustee or mortgagee, or the last surviving person interested in a mortgage is living or dead; or
- (e) that any trustee or mortgagee has died intestate without leaving a person beneficially interested under the intestacy or has died and it is not known who is his personal representative or the person interested;

the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section does not prevent the court from directing a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained.

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### NOTES

The words in square brackets were substituted, except as far as this section applies to existing orders made before 30 September 1983, by the Mental Health Act 1983, s 148, Sch 4, para 4(d).

**Vesting order ... under this Act.** For the making of vesting orders as to land founded on the allegations mentioned in this section, see s 44 ante.

**Vesting order ... under Part VII of the Mental Health Act 1983.** See s 96(2) of the 1983 Act, Vol 28, title Mental Health.

**High Court.** See the note to s 41 ante.

Being a corporation has been dissolved. Cf the note to s 44 ante.

**Conclusive evidence.** See the note to s 38 ante.

**Definitions.** For "land", "mortgage" and "mortgagee", "personal representative" and "trustee", see s 68(1), paras (6), (7), (9), (17) post, respectively.

**Mental Health Act 1983, Part VII.** See Vol 28, title Mental Health.

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## 56 Application of vesting order to property out of England

The powers of the court to make vesting orders under this Act shall extend to all property in any part of His Majesty's dominions except Scotland.

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### NOTES

**Court.** The county court has jurisdiction under this section where a vesting order can be made by that court; see s 63A(3) (b) post. The jurisdiction of the county court to make vesting orders under ss 44-53 ante is as noted to those sections.

**His Majesty's dominions.** This signifies the independent or dependent territories under the sovereignty of the Crown; see further, as to the meaning of this expression, 6 Halsbury's Laws (4th edn reissue) para 803.

**Appointment of persons to convey.** The court has power to appoint a person to convey or transfer property instead of making a vesting order where an appointment would be the more convenient procedure; see ss 50, 51(2) ante.

**Definitions.** For "the court", see s 67 post; for "property", see s 68(1), para (11) post.

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### *Jurisdiction to make other Orders*

## 57 Power of court to authorise dealings with trust property

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of and power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, 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 as 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.

(3) 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.

(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act 1925.

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## NOTES

**General Note.** Before 1926, the court had an inherent jurisdiction to authorise deviations from a trust, the extent of which jurisdiction was explained by Romer LJ in *Re New, Re Leavers, Re Morley* [1901] 2 Ch 534 at 544, 545, [1900-3] All ER Rep 763, CA: "As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust authorised by the terms . . . But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interests of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to." In that case the court authorised trustees to concur in a scheme for the reconstruction of a limited company, as to which, see now s 10(3) ante. Cf *Re Morrison, Morrison v Morrison* [1901] 1 Ch 701, 70 LJ Ch 399, where the court refused to sanction the conversion of a partnership into a limited company, and *Re Hazeldine, Public Trustee v Hazeldine* [1918] 1 Ch 433, 87 LJ Ch 433, where the court authorised the temporary retention of unauthorised investments, which were, owing to the war, practically unrealisable; and see, for further illustration of the circumstances in which the court has exercised its inherent jurisdiction, the judgment of Kekewich J in *Re Tollemache*, [1903] 1 Ch 457, 72 LJ Ch 225 affd, [1903] 1 Ch 955, 72 LJ Ch 539, CA.

The court had no unlimited inherent jurisdiction; see *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL, summarised in the note "Application for maintenance, education, or benefit" to s 53 ante. This section does not codify the inherent jurisdiction but, it would appear, creates new powers which may overlap the previous jurisdiction; see Underhill and Hayton's *Law of Trusts and Trustees* (14th edn) 437.

In relation to settled land, cf the Settled Land Act 1925, s 64, Pt 2 of this title post. As to the jurisdiction on or after granting divorce, nullity or judicial separation to vary marriage settlements, cf the Matrimonial Causes Act 1973, s 24, Vol 27, title Matrimonial Law (Pt 3).

The new jurisdiction created by the Variation of Trusts Act 1958, this part of this title post, does not limit the jurisdiction conferred by the said s 64, this section or the Mental Health Act 1983, Pt VII, Vol 28, title Mental Health; see s 1(6) of the 1958 Act, this part of this title



post. Cf the impact of the Trustee Investments Act 1961, this part of this title post, upon the 1958 Act; see the note "The court may approve any arrangement" to s 1 of that Act.

In general, this section enables the court to authorise a particular transaction whereas the 1958 Act enables the court to vary the trusts generally; see *Re Coates' Will Trusts* [1959] 2 All ER 51, [1959] 1 WLR 375. See also the note "In the management or administration" below.

**In the management or administration.** The scope of this section was discussed by Wynn-Parry J in *Municipal and General Securities Co Ltd v Lloyds Bank Ltd* [1950] Ch 212, [1949] 2 All ER 937, 223, 224 and 944, 945, respectively, where these words were considered to have a limiting effect on the jurisdiction conferred on the court and to support the view there taken that the section could not be construed as having such wide import as would allow a complete re-writing of a trust deed or a substitution of a completely different object from that which the trust was created to achieve. It is no part of the legislative aim of this section to disturb the rule that the court will not re-write a trust; see *Re Downshire's Settled Estates, Marquis of Downshire v Royal Bank of Scotland* [1953] Ch 218, [1953] 1 All ER 103, CA (reversed as to inherent jurisdiction sub nom *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL). See also *Re Forster's Settlement, Michelmores v Byatt* [1954] 3 All ER 714, [1954] 1 WLR 1450. Nevertheless, in *Re Brassey's Settlement, Barclay's Bank Ltd v Brassey* [1955] 1 All ER 577, [1955] 1 WLR 496, a settlement made in 1936 empowered trustees to invest inter alia, in stock or shares of any company in any British colony or dependency and it was held that, having regard to the Statute of Westminster 1931, s 4, Vol 7, title Commonwealth and Other Territories (Pt 1(a)) and the dictum of Viscount Sankey LC in *British Coal Corporation v Regem* [1935] AC 500 at 520, [1935] All ER Rep 139 at 146, PC, the court must have regard to realities and not to abstract theory and accordingly the trustees were not authorised to invest in Canadian banking companies (though it was strange that a draftsman in 1936 should have omitted the word "dominion" before "colony and dependency's and the court made an order under this section empowering the trustees to invest in shares of banking companies in any British Dominion. (Cf, however, *Re Rider's Will Trusts, Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974 relating to a similar clause in a will of 1908 of a testator who died in 1909.)

An ambiguity in an old fashioned investment clause was held not to found jurisdiction to substitute an entirely new "well drawn modern investment clause" in *Re Powell-Cotton's Re-Settlement, Henniker Major v Powell-Cotton* [1956] 1 All ER 60, [1956] 1 WLR 23. In *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society Charity*, [1959] Ch 220, [1958] 3 All ER 465, Danckwerts J made an order under this section extending investment powers contained in the Shipwrecked Fishermen and

Mariners' Royal Benevolent Society's Act 1850, s 11 (not printed in this work), although he was aware that in *Re Royal Society's Charitable Trusts, Royal Society v A-G* [1956] Ch 86, [1955] 3 All ER 14, Vaisey J had said such a matter did not come within this section at all nor within the court's general jurisdiction relating to ordinary trusts but Danckwerts J considered Vaisey J's dictum to be made per incuriam, as Vaisey J was able to make the order sought in his jurisdiction relating to charities. In *Re Coates' Will Trusts* [1959] 2 All ER 51, [1959] 1 WLR 375, Harman J invited counsel to add "In the matter of the Variation of Trusts Act 1958" to the headings of summons originally intitled "In the matter of the Trustee Act 1925" and invoking this section, as this seemed a happy solution to the doubt whether investment powers could be extended under this section. In *Re Kolb's Will Trusts, Lloyds Bank Ltd v Ullmann* [1962] Ch 531, [1961] 3 All ER 811, Cross J had no doubt that, following *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society Charity* above, the court had jurisdiction under this section to extend investment powers in the case of a charitable trust but, although the Trustee Investments Act 1961, s 15 this part of this title post, preserved the existing powers of the court to widen trustees' investment powers beyond those conferred by that Act, the powers given by the Act must be taken to be prima facie sufficient and should only be extended if, on the particular facts, a very special case could be made out.

In *Re Cockerell's Settlement Trusts, Cockerell v National Provincial Bank Ltd* [1956] 1 Ch 372, [1956] 2 All ER 172, a half share in a reversionary interest stood vested in trustees to sell it but not until it fell into possession. The trustees, for fiscal reasons, desired to sell it immediately to the tenant for life and the court made an order under this section enabling their to do so; distinguishing *Re Heywurth's Settlement* [1956] Ch 364, [1956] 2 All ER 21, as decided under s 53 ante.

Where it is considered expedient for the administration of the trust, the court may, under this section, substitute an investment clause giving a wider power of investment not limited to those investments permitted by the Trustee Investments Act 1961, this part of this title post; *Mason v Farbrother* [1983] 2 All ER 1078, CA.

**Court.** For the jurisdiction of the county court, see the note to s 41(1) ante.

**Expedient.** The making of the order must be expedient for the trust as a whole; see *Re Craven's Estate, Lloyd's Bank Ltd v Cockburn (No 2)* [1937] Ch 431, [1937] 3 All ER 33, where the court refused to sanction an advance of a sum to be applied and invested with the trustees of Lloyd's as a fund to enable one of the beneficiaries to become an underwriter. Cf *Re Mair, Richards v Doxat* [1935] Ch 562, [1935] All ER Rep 736 where the court exercised its power under this section to authorise the raising of money for the benefit of life tenants.

**Absence of any power... by the trust instrument ... or by law.** Where the transaction sought to be authorised can be carried out under other powers, the court usually has no jurisdiction to make an order under this section; see *Re Pratt's Will Trusts, Barrow v McCarthy* [1943] Ch 326, [1943] 2 All ER 375, where an application for authorisation of the sale of investments was refused, there being power in the trustees to vary investments under s 1 (repealed); see also *Municipal and General Securities Co Ltd v Lloyds Bank Ltd* [1950] Ch 212, [1949] 2 All ER 937 (power of sale in certain circumstances conferred by trust instrument); *Re Basden's Settlement Trusts, Basden v Basden* [1943] 2 All ER 11 (power to effect desired transaction without the aid of the court). Cf the Variation of Trusts Act 1958, s 1(6), this part of this title post. Where, in a case of a trust for sale, a requisite consent cannot be obtained, because the person from whom it must be obtained refuses it, the court, under the Law of Property Act 1925, s 30, Vol 37, title Real Property (Pt 1), and this section, can direct the trustees for sale to sell; see *Re Beale's Settlement Trusts, Higgins v Beale* [1932] 2 Ch 15, [1931] All ER Rep 637.

Where two testatrices, who were sisters, made identical residuary bequests to found a home for poor and aged persons to be called the "T.H. Memorial Home", the court authorised the trustee of both wills to blend the two residuary funds for the purpose of founding one joint home, there being no power so to do under the wills themselves; see *Re Harvey, Westminster Bank Ltd v Askwith* [1941] 3 All ER 284, 85 Sol Jo 481.

The court has sanctioned under this section the sale of chattels by trustees, where the testator had attempted to create an entailed interest in the chattels but failed, with the result that the trustees

had no power of sale under the Law of Property Act 1925, s 130(5), Vol 37, title Real Property (Pt 1) ; see *Re Hope's Will Trusts, Hope v Thorp* [1929] 2 Ch 136, 98 LJ Ch 249.

A partition which is otherwise desirable but which cannot be effected under the Law of Property Act 1925, s 28(3), Vol 37, title Real Property (Pt 1), because not all the shares are vested, may be effected with the aid of the court under this section; see *Re Thomas, Thomas v Thompson* [1930] 1 Ch 194, [1929] All ER Rep 129.

The court has the discretion to order the sale of a matrimonial home held on a trust for sale, provided that this is just and equitable and considers the interests of both parties; see *Jackson v Jackson* [1971] 3 All ER 774, [1971] 1 WLR 1539.

**Application to the court.** Application to the High Court under this section is made by originating summons; see RSC Ord 5, r 3.

Applications in the county court are made by originating applications and the general rules relating to procedure by originating application apply, as to which, see CCR Ord 3, r 4.

As to the persons entitled to apply for orders, see s 58 post.

**Effect of an order on protected life interests.** An order of the court under this section giving power to the trustees to raise capital moneys for the benefit of life tenants will not cause a forfeiture of their protected life interests, although it has the effect of reducing the income payable, because the section gives an overriding power deemed to be read into every trust instrument, and the forfeiture clause is left to operate on so much of the income as is still payable; see *Re Mair, Richards v Doxat* [1935] Ch 562, [1935] All ER Rep 736. If, however, the scheme sanctioned by the court involves, as in *Re Salting, Baillie-Hamilton v Morgan* [1932] 2 Ch 57, [1932] All ER Rep 857, a covenant by the tenant for life to pay premiums on an assurance policy to secure repayment of the capital raised, with a proviso that if the premiums are not duly paid the trustees are to pay them out of income, the failure by the tenant for life will create a forfeiture.

**Extension of jurisdiction.** The jurisdiction of the court under this section is extended by the Settled Land and Trustees' Acts (Court's General Powers) Act 1943, s 1, Pt 2 of this title post, to authorise by order the treatment of any expense of action taken or proposed for the management of, inter alia, land held in trust for sale as a capital outgoing, where the court is satisfied that the action taken or proposed is for the benefit of the persons entitled under the trust for sale, and the income available to meet the expense is insufficient.

**Definitions.** For "the court", see s 67 post; for "sale", "instrument", "mortgage", "property", "settlement" and "trust" and "trustees", see s 68(1), paras (3), (5), (7), (11), (15) and (17) post, respectively.

**Settled Land Act 1925.** See Pt 2 of this title post.

(1) An order under this Act for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any interest in land, stock, or thing in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

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#### NOTES

**Thing in action.** As to things in action generally, see 6 Halsbury's Laws (4th edn reissue) paras 1 et seq.

**Person beneficially interested.** The application may be made by a person contingently entitled to a beneficial interest (*Re Sheppard's Trusts*, (1862) 4 De GF & J 423, 1 New Rep 76); or by a purchaser (*Ayles v Cox* (1853) 17 Beav 584, 22 LTOS 232); or by creditors in an administration action (*Re Wragg, Re Mousley's Estate, Gregory v Mousley* (1863) 1 De GJ & Sin 356, 2 New Rep 49).

**Under disability.** In *Re Bourke*, (1864) 2 De GJ & Sin 426, where an application was made by the committee of beneficiaries of unsound mind alone, the court directed the amendment of the petition by making the persons of unsound mind, by their next friend, co-petitioners.

**Definitions.** For "land", "mortgage", "stock", "new trustee", "trust" and "trustee", see s 68(1), paras (6), (7), (14) and (17) post, respectively.

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### 59 Power to give judgment in absence of a trustee

Where in any action 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 action 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 and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

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#### NOTES

**Action.** "Action" is defined in the Supreme Court Act 1981, s 151(1), Vol 11, title Courts and Legal Services, as "any civil proceeding commenced by writ or in any other manner prescribed by rules of court".

Where, therefore, rules of court prescribed an originating summons as a method of procedure, the proceedings so commenced constitute an action; see *Re Fawsitt, Galland v Burton* (1885) 30 Ch D 231; *Gee v Bell* (1887) 35 Ch D 160.

**Court.** The county court has jurisdiction in the case of any proceedings before the court; see s 63A(4) post.

**Solicitors' Incorporated Practices.** This section is applied, with modifications, in relation to a "recognised body" under the Administration of Justice Act 1985, s 9, Vol 41, title Solicitors, by the Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2-5, Sch 1.

**Definitions.** For "the court", see s 67 post; for "trustee", see s 68(1), para 17 post.

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## 60 Power 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, to be raised and paid out of the property 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.

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### NOTES

**Court.** For the jurisdiction of the county court, see the note to s 41(1) ante.

**Costs and expenses.** By s 30(2) ante, a trustee is entitled to reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

For the amount of costs to be allowed and for the form of order, see *Practice Direction* [1953] 2 All ER 1159, [1953] 1 WLR 1365, and *Practice Direction* [1953] 2 All ER 1408, 97 Sol Jo 832 sub nom *Practice Note* [1953] 1 WLR 1452.

**By such persons as to the court may seem just.** Where a trustee refuses without good cause to transfer property after being required by a person entitled to require the transfer, the court may order the recusant to pay the costs of the application; see *Re Knox's Trusts* [1895] 2 Ch 483, 64 LJ Ch 402.

Costs of a reconveyance fall on the mortgagor, and the cost of a vesting order required where the legal estate is in an absconding trustee-mortgagee is no exception; see *Webb v Crosse* [1912] 1 Ch 323, 81 LJ Ch 259.

**Definitions.** For "the court", see s 67 post; for "conveyance", "income", "property", "transfer" and "new trustee", see s 68(1), paras (3), (10), (11), (16) and (17) post, respectively.

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## 61 Power 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 such breach, then the court may relieve him either wholly or partly from personal liability for the same.

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## NOTES

**If it appears to the court.** The matter is essentially within the discretion of the judge and the Court of Appeal is reluctant to decide that a judge misdirected himself or left out something which he should have taken into account; see *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, CA. For the jurisdiction of the county court, see the note "Court" to s 41(1) ante.

No general rules or principles can be laid down as those to be acted upon, but each case must be dealt with according to its own circumstances; see *Re Turner, Barker v Ivimey* [1897] 1 Ch 536, 66 LJ Ch 282; *Re Kay, Mosley v Kay* [1897] 2 Ch 518, 66 LJ Ch 759.

**Is or may be personally liable.** It is not necessary for the court to decide that the trustee is under any personal liability. It is enough that in the opinion of the court he may be under some personal liability; see *Re Mackay, Griessemann v Carr* [1911] 1 Ch 300, 80 LJ Ch 237.

The jurisdiction will not be exercised by anticipation so as to authorise a trustee to undertake an operation outside his trust; see *Re Tollemache* [1903] 1 Ch 457, 72 LJ Ch 225; affd [1903] 1 Ch 955, 72 LJ Ch 539. But the court can now authorise any transaction it considers "expedient"; see s 57 ante.

**Honestly and reasonably.** To be entitled to relief a trustee must act both honestly and reasonably; see *Re Barker, Ravenshaw v Barker* (1898) 77 LT 712, 46 WR 296. "Reasonably" means acting with such a degree of prudence as a person of ordinary intelligence and diligence may reasonably be expected to display in the conduct of his own affairs; see *Re Turner, Barker v Ivimey* [1897] 1 Ch 536, 66 LJ Ch 282; *Wynne v Tempest* (1897) 13 TLR 360. Farwell J in *Re Lord De Chord's Estate, Lord De Chord v Quitter* [1900] 2 Ch 707 at 716, 69 LJ Ch 828 said: "I am not prepared to say that a trustee has acted honestly and reasonably and ought fairly to be excused as a trustee merely on the ground that he has acted in exactly the same way with respect to his own money. The fact that he has acted with equal foolishness in both cases will not justify relief under this statute."

Cf *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* [1934] AC 529, 103 LJPC 161, PC, where a trustee, who made unsecured loans, was held not entitled to relief under a corresponding provision in a Straits Settlements Ordinance because, although he had acted honestly, he had not considered whether the unsecured loans were dispositions which it was prudent and right for him to make as trustee, but had treated it as sufficient that the testator himself had made similar loans in his lifetime.

A trustee who does nothing and accepts without inquiry what is done by his co-trustee is not entitled to relief; see *Re Second East Dulwich 745th Starr-Bowkett Building Society*, (1899) 68 LJ Ch 196, 79 LT 726. This section is not confined to cases where the breach of trust arose from some executive or administrative blunder, but might extend to cases where money was paid to a person not entitled according to the true construction of the instrument by a trustee acting on the erroneous advice of a solicitor; see *Re Allsop, Whittaker v Bamford* [1914] 1 Ch

1, [1911-13] All ER Rep 834, CA, doubting the principles on which, *Davies v Hutchings* [1907] 1 Ch 356, 76 LJ Ch 272 was decided). Executors who, in reliance on the statement of their solicitors as to sums required for purposes of administration, had paid them these amounts, part of which was not so applied and consequently was lost to the estate, were considered to have acted honestly and reasonably and ought to be relieved under the section; see *Re Lord De Clifford's Estate* above and cf *Bacon v Bacon* (1800) 5 Ves 331.

Trustees who held leaseholds with no power of sale, and were required to raise a sum of money, acting on the advice of a surveyor who reported that the property was not suitable for retention by trustees, and of a solicitor who erroneously advised that they could sell, sold the leaseholds, and were relieved under this section; see *Perrins v Bellamy* [1899] 1 Ch 797, 68 LJ Ch 397.

Merely taking advice from one solicitor is not a passport to relief but the court must pay some regard to the station in life of the people concerned, the character of any business involved and the difficulties (in that case fratricidal strife) with which they are confronted and to say that a personal representative ought to have taken further advice from counsel or applied to the judge would have shocked the common sense of many people in all the circumstances of *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423 at 482, 434, CA, respectively per Sir Raymond Evershed MR.

Where a bank, as professional trustee, had acted honestly but neither reasonably nor in accordance with their solicitors' advice, so that advancements to beneficiaries made in breach of trust were paid into their mother's current account with the bank in reduction of her overdraft with the consent of the beneficiaries but without separate advice, the bank was not entitled to relief under this section; see *Re Pauling's Settlement Trusts, Young-husband v Coutts & Co* [1961] 3 All ER 713, [1962] 1 WLR 86; affd [1964] Ch 303, [1963] 3 All ER 1, CA. See also *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139.

This section does not authorise the court to relieve a trustee in respect of an anticipated breach; see *Re Rosenthal, Schwarz v Bernstein* [1972] 3 All ER 552, [1972] 1 WLR 1273.

**Ought fairly to be excused.** Although a trustee, who has committed a breach of trust, may have acted both honestly and reasonably, relief does not follow as a matter of course, but the court must look at all the circumstances to determine whether he ought fairly to be excused for the breach; see *National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373, 74 LJPC 73, PC, and the note "Paid trustee" below.

**For omitting to obtain the directions of the court.** "The jurisdiction, however, [under this section's predecessor] requires great care and caution in its exercise. The procedure by originating summons to determine questions of construction is inexpensive and speedy, and should be resorted to when the proper construction of an instrument is open to any serious doubt; the trustee should not in doubtful cases act upon any view without the opinion of the court being first obtained.



But the amount of the fund is a matter to be taken into consideration in determining whether an originating summons should be issued"; see *Re Allsop, Whittaker v Bamford* [1914] 1 Ch 1, [1911-13] All ER Rep 834, CA, per Swinfen Eady LJ.

Where an executor compromised a claim of his co-executrix in the estate, the court considered that it would have been well for the executor to apply to the court for directions as to whether he was at liberty to make the compromise, but, nevertheless, holding that he had acted honestly and reasonably, they upheld the compromise; see *Re Houghton, Hawley v Blake* [1904] 1 Ch 622, 73 LJ Ch 317.

**May relieve him ... from personal liability.** Relief has been granted under this section's predecessor to an executor who committed a devastavit by payment of a small legacy out of an apparently large estate, which turned out to be insolvent, notwithstanding that he had been guilty of delay in issuing advertisements for creditors' claims (*Re Kay, Mosely v Kay* [1897] 2 Ch 518, 66 LJ Ch 759) ; to executors, holding the estate in trust to maintain it in the like mode of investment as at the death of the testator until one of the testator's sons attained the age of twenty-four, who allowed a debt due on a promissory note, by a debtor believed to be of good credit, to remain outstanding with the result that it was ultimately lost through the debtor's insolvency (*Re Grindey, Clews v Grindey* [1898] 2 Ch 593, 67 LJ Ch 624); to a sole trustee, who acted on a forged letter, purporting to come from the solicitors of the trust (*Re Smith, Smith v Thompson* (1902), 71 LJ Ch 411, 86 LT 401).

Trustees who receive notice of an assignment of the interest of a tenant for life, which does not require them to pay the income to the assignee, have been held not liable for continuing to pay the income to the tenant for life, and the court further held that, if this view was wrong, the trustees were entitled to be relieved under this section for so doing; see *Re Pawson's Settlement, Higgins v Pawson* [1917] 1 Ch 541, 86 LJ Ch 380).

Where trustees paid the income of the trust fund to a beneficiary who had adopted German nationality in 1917 and this became known to the trustees in 1927, but they continued to make payments to her which therefore were illegal, the Treaty of Peace Order 1919, SR & O 1919/1517 (now spent) was held not to be a statutory assignment to the Administrator of German Property and it was held that in the circumstances of that case the trustees ought fairly to be excused under this section; see *Holland v German Property Administrator* [1937] 2 All ER 807, 156 LT 373, CA.

Relief was refused to trustees who left money in the hands of a solicitor, who made away with it, on the ground that although they had acted honestly, they had not acted reasonably; see *Williams v Byron* (1901) 18 TLR 172.

**Application for relief.** It is not necessary specifically to plead this section by way of defence; see *Re Pawson's Settlement, Higgins v Pawson* [1917] 1 Ch 541, 86 LJ Ch 380.

Application is made by originating summons; see RSC Ord 5, r 3. Where the beneficiaries are hostile to the application and there is a dispute on questions of fact, procedure by writ and not originating summons is the proper procedure; see *Re Dove's Will Trusts; Hedley v Dove* (1939) 161 LT 10.

**Company officers and auditors.** Cf the Companies Act 1985, s 727, Vol 8, title Companies, empowering the court to grant relief to officers of a company or persons employed by a company as auditor in cases, inter alia, of breach of trust.

**Onus of proof.** The burden of proving that he has acted honestly and reasonably is on the trustee concerned; see *Re Stuart, Smith v Stuart* [1897] 2 Ch 583 at 590, 66 LJ Ch 780.

**Paid trustee.** The position of a paid trustee company which carries on business of acting as trustee and solicitors for profit is, however, widely different from that of a gratuitous trustee, and the court declined to relieve such a trust company which had paid to the wrong person under legal advice, but which, when the mistake was discovered, took no measures to recover the property, though the court was satisfied as to the honesty and the reasonableness of the

company's action (*National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373, 74 LJPC 73, PC); and a chartered accountant, who acts as liquidator, and is paid for his services if, without taking the opinion of the court, he pays money of the company to persons who are not entitled, ought not to be excused under this section (*Re Windsor Steam Coal Co* (1901) [1929] 1 Ch 151, 97 LJ Ch 238).

The standard of diligence expected of a paid trustee is higher than that expected of an unpaid trustee; see *Bartlett v Barclay's Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139.

**Trustee lending on mortgage.** In ordinary cases s 8 ante furnishes a standard by which reasonable conduct in investment on mortgage may be judged, but non-compliance therewith is not necessarily fatal to an application for relief under this section; see *Re Stuart, Smith v Stuart* [1897] 2 Ch 583, 66 LJ Ch 780.

That section is a relieving section and does not impose a statutory obligation upon trustees to obtain a valuation, and where trustees had made an advance on a valuation which did not conform to the section but the circumstances at the time of the loan were such that they were justified in lending the amount advanced, it was held that the trustees were not liable; and even assuming that they had advanced a larger sum than was justifiable they should be relieved under this section; see *Palmer v Emerson* [1911] 1 Ch 758, 80 LJ Ch 418.

Trustees who had advanced money in reliance on the report of a valuer who was not properly and independently instructed within the meaning of s 8 ante were held not entitled to relief under this section (*Shaw v Cates* [1909] 1 Ch 389, 78 LJ Ch 226), and a trustee who had advanced money on a contributory mortgage, though he had relied on the advice of a valuer and of his solicitor, was considered not to have acted reasonably and was refused relief (*Re Dive, Dive v Roebuck* [1909] 1 Ch 328, 78 LJ Ch 248); as also was a trustee who without professional advice had advanced money on a third mortgage (*Chapman v Browne* [1902] 1 Ch 785, 71 LJ Ch 465).

Trustees who, before anything had occurred to suggest that the security was in jeopardy, appropriated a mortgage to a settled share and distributed the rest of the estate without inspecting the mortgaged property or making inquiry as to its then value, were held guilty of breach of trust and not entitled to relief under this section (*Re Brookes, Brookes v Taylor* [1914] 1 Ch 558, 83 LJ Ch 424).

**Definitions.** For "the court", see s 67 post; for "trustee", see s 68(1), para (17) post.

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## 62 Power 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.

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### NOTES

The words omitted were repealed by the Married Women (Restraint upon Anticipation) Act 1949, s 1(4), Sch 2.

**At the instigation or request or with the consent.** To enable the trustees to obtain an order under this section, the beneficiary must have instigated, requested or consented in writing to an act or omission which is itself a breach of trust and not an act or omission which only becomes a breach of trust by reason of the want of care of the trustees; and the beneficiary should know the facts which constitute the breach of trust (*Re Somerset, Somerset v Earl of Poulett* [1894] 1 Ch 231, 68 LJ Ch 41, CA; *Mara v Browne* [1895] 2 Ch 69, at 91-94, 64 LJ Ch 594 (reversed on another point, [1896] 1 Ch 199, 65 LJ Ch 225, CA)).

In the former case an investment of trust funds on mortgage of property of insufficient value was made by trustees at the instigation and request and with the consent in writing of the tenant for life; but it did not appear that he intended to be a party to any breach of trust, or to an investment on the property without inquiry, and in effect he left it to the trustees to determine whether the investment was a proper one for moneys proposed to be advanced. The court held that the trustees were not entitled to have the life interest impounded.

**In writing.** The words "in writing" apply only to consent, not to instigation; see *Re Somerset, Somerset v Earl of Poulett* [1894] 1 Ch 231 at 265, 63 LJ Ch 41, CA; *Griffith v Hughes* [1892] 3 Ch 105, 62 LJ Ch 135. See also the note "Writing" to s 14 ante.

**Court.** For the jurisdiction of the county court, see the note to s 41(1) ante.

**The court may, if it thinks fit.** The section does not impose on the court the duty in all events of impounding the interest of the beneficiary, but invests the court with a discretionary power to be

exercised judicially if it thinks fit to make such order as to the court seems just; per Davey LJ, in *Re Somerset, Somerset v Earl of Poulett* [1894] 1 Ch 231, 63 LJ Ch 41, CA.

The interest of a married woman restrained from anticipation could be impounded under this section, by virtue of the words now repealed, but in such cases the discretion of the court was sparingly exercised in favour of the trustee (*Ricketts v Ricketts* (1891) 64 LT 263; *Bolton v Curre* [1895] 1 Ch 544 at 551, 64 LJ Ch 164). Her interest would, however, be impounded if the facts warranted it (*Griffith v Hughes* [1892] 3 Ch 105, 62 LJ Ch 135). As to the abolition of restraints upon anticipation, see the Married Women (Restraint upon Anticipation) Act 1949, Vol 27, title Matrimonial Law (Pt 2).

**Impounding ... the interest of the beneficiary in the trust estate.** The interest of the beneficiary may be impounded although he derived no benefit from the breach of trust; see *Fletcher v Collis* [1905] 2 Ch 24, 74 LJ Ch 502; *Chillingworth v Chambers* [1896] 1 Ch 685, 65 LJ Ch 343.

The interest must be in the actual estate of which the trustee seeking to impound it is trustee; see *Ricketts v Ricketts* (1891) 64 LT 263.

**Indemnity.** There is an ordinary right, which exists in equity apart from statute, and also the right conferred by this section. The nature of the equitable right depends on two things, first that the money paid back to capital is in its origin the trustee's and that the trustee, who has provided the money, has, a better right than the beneficiary who instigated the breach of trust. Alternatively, the trustee who is in breach of trust is subrogated to the rights of the beneficiary. The right is not analogous with the executor's right to retain. Similarly, with the statutory right, it would be an absurdity to suppose that, as a condition of obtaining an impounding order that the trustee, who is ex hypothesi in breach of trust, must although the existing trustee has rights of indemnity; see *Re Pauling's Settlement, Younghusband v Coutts & Co* (No 2) [1963] Ch 576, [1963] 1 All ER 857.

See, generally, as to the indemnification of trustees. for breaches of trust, 48 Halsbury's Laws (4th edn) paras 973 et seq; Underhill and Hayton's Law of Trusts and Trustees (14th edn) 793 et seq.

**Practice.** A trustee who pleads instigation by a beneficiary as a defence in an action against him for breach of trust may be given leave to apply in chambers for ascertaining and enforcing his claim to indemnity; see *Re Holt, Re Rollason, Holt v Holt* [1897] 2 Ch 525, 66 LJ Ch 734; *Molyneux v Fletcher* [1898] 1 QB 648, at 656, 67 LJQB 392.

**Definitions.** For "the court", see s 67 post; for "trustee", see s 68(1), para (17) post.

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### *Payment into Court*

## **63 Payment into court by trustees**

- (1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court; ...
- (2) The receipt or certificate of the proper officer shall be a sufficient discharge to 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 depository, 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.

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#### NOTES

The words omitted from sub-s (1) were repealed by the Administration of Justice Act 1965, s 36(4), Sch 3.

**Trustees.** Trustees for the time being can make the lodgment in court; see *Re Parry*, (1848) 6 Hare 306 (stock standing in joint names of surviving and deceased trustees).

Charity trustees can lodge trust funds in court without the consent of the Charity Commissioners (*Re Poplar and Blackwell Free School*, (1878) 8 Ch D 543).

A local housing authority, having in its hands surplus moneys, arising from the sale of materials from a house demolished by the authority under a demolition order or in execution of an obstructive building order, which is payable to owners, who do not agree as to the division of the surplus, is trustee of the money and may pay it into court under this section; see the Housing Act 1985, ss 272(4), 288(4), Vol 21, title Housing, and as to the jurisdiction of the county Court in such a case, see ss 272(5), 288(5) of that Act.

A bank, holding money on deposit in respect of which there are conflicting claims, have been held not to be trustees so as to enable them to pay the money into court; see *Re Sutton's Trusts*, (1879) 12 Ch D 175.

A mortgagee is trustee of surplus proceeds of sale in his hands; see the Law of Property Act 1925, s 105,

Vol 37, title Real Property (Pt 1), and *Banner v Berridge* (1881) 18 Ch D 254; and, where there is any doubt as to whom the surplus money should be paid, the mortgagee can pay it into court; see, for example, *Re Walhampton Estate*, (1884) 26 Ch D 391.

**Money or securities belonging to a trust.** This section is only meant to extend to a case where there is an existing trust fund in the hands of some person as trustee and is not intended to allow a purchaser of an estate subject to a pecuniary charge to pay the amount of the charge into court. In such a case there is no money in the hands of the purchaser subject to any trust, and to allow the purchaser to pay the money into court would throw upon the persons entitled to the charge the costs of the payment; see *Re Buckley's Trust*, (1853) 17 Beav 110.

**Pay ... into court.** Money paid into court is dealt with as provided by the Administration of Justice Act 1982, ss 38-118, Vol 11, title Courts and Legal Services. Rules dealing with the deposit, payment, delivery and transfer in, into and out of court of funds are made under s 38(7) of that Act; see the Court Funds Rules 1987, SI 1987/821, as amended by SI 1988/817, SI 1990/518, SI 1991/1227. See also, as to procedure, RSC Ord 92, r 2 and CCR Ord 49, r 20.

The county court has jurisdiction under this section in cases where money or securities to be paid into court do not exceed in amount or value the county court limit (ie £30,000), unless the parties agree that the court shall exercise a greater jurisdiction; see the County Courts Act 1984, s 24(1), (2)(b), Vol 11, title County Courts, and s 63A(3)(d), (5) of this Act and the notes thereto post.

**Costs.** Costs of payment in may be deducted if no dispute is likely to arise; but the proper course is to pay in the whole fund, leaving it to the court to settle the amount of costs on an application for payment out; see *Beaty v Curson* (1868) LR 7 Eq 194, 38 LJ Ch 161.

If it can be shown that the costs and expenses deducted by the trustees from the fund before payment in have been improperly retained, separate proceedings must be taken against them to recover the amount, as repayment cannot be ordered in an application under the Act; see *Re Parker's Will*, (1888) 39 Ch D 303, 58 LJ Ch 23, CA.

The costs incurred in payment into the county court are to be taxed and the amount of taxed costs may be retained by the person making the payment; see CCR Ord 49, r 20(3).

**Effect of payment into court.** By payment into court of a trust fund the trustee retires from the trust (*Re William's Settlement*, (1858) 4 K & J 87, 32 LTOS 9); and cannot afterwards exercise a discretion, nor can the court do so (*Re Coe's Trust*, (1858) 4 K & J 199, 32 LTOS 239; *Re Nettlefold's Trusts*, (1888) 59 LT 315); but he is not actually deprived of his office by payment in (*Thompson v Tomkins* (1862) 2 Drew & Sm 8, 31 LJ Ch 633; *Barker v Peile* (1865) 2 Drew & Sm 340, 5 New Rep 425); and he is usually served with any application to deal with the fund, not as trustee, but because he is the person who possesses the most knowledge of the particulars of the trust, and can therefore give the court information respecting it (*Re Poplar and Blackwell Free School*, (1878) 8 Ch D 543, at 546, 39 LT 88).

Donees of a power to appoint new trustees may appoint another in place of the trustee who has paid the fund into court (*Re Bailey's Trust*, (1854) 3 WR 31).

Payment of money into court under the Law of Property Act 1925 or the Settled Land Act 1925, effectively exonerates therefrom the person making the payment; see the Law of Property Act 1925, s 203(1), Vol 37, title Real Property (Pt 1), and the Settled Land Act 1925, s 113(4), Pt 2 of this title post.

As to the exemption from liability of personal representatives who, before 1926, invested infants' property instead of paying it, into court, see the Administration of Estates Act 1925, s 42(2), Vol 17, title Executors and Administrators.

Payment into court should not be made into a general account; the trustee must take responsibility for the appropriation of payment to a particular account; see *Re Joseph's Will*, (1850) 11 Beav 625; *Re Everett*, (1850) 12 Beav 485.

**Payment out.** Applications for payment out are currently made under RSC Ord 92, r 5 or CCR Ord 49, r 20(6)-(8), as the case may be. Rules governing payment out of court funds are made under the Administration of Justice Act 1982, s 38(7), Vol 11, title Courts and Legal Services; see the Court Funds Rules 1987, SI 1987/821, as amended by SI 1988/817, SI 1990/518, SI 1991/1227.

Payment out is not usually made to a sole trustee other than a trust corporation but it may be ordered in special circumstances; see *Leigh v Pantin* [1914] 2 Ch 701, 84 LJ Ch 345.

For provision for making good defaults, see the Administration of Justice Act 1982, s 43, Vol 11, title Courts and Legal Services.

**When payment into court is justifiable.** Payment into court has been considered justifiable where there was a real doubt as to the person entitled (*Re Wyllly's Trust*, (1860) 28 Beav 458, 2 LT 788; *Re Jones*, (1857) 3 Drew 679, 5 WR 336); or when there were conflicting claims (*Re Headington's Trust*, (1857) LJ Ch 175, 6 WR 7; *Re Davies' Trusts*, (1914) 59 Sol Jo 234); but in such cases it must be considered whether an originating summons to determine the point may not be more prudent (*Re Giles*, (1886) 55 LJ Ch 695, 55 LT 51). Payment into court is also justified where the trustee cannot get a discharge, as in the case of an infant cestui que trust (*Re Hodges*, (1855) 4 De GM & G 491, 35 Eq Rep 123; *Re Richard*, (1869) LR 8 Eq 119); or where the cestui que



trust is deaf, dumb, and blind (*Re Biddulph's Trusts, Re Poole's Trusts* (1852) 5 De G & Sm 469), or of unsound mind (*Re Parker's Will* (1888) 39 Ch D 303, 58 LJ Ch 23); or where the cestui que trust is abroad and the trustees were uncertain whether he was living or dead (*Re Elliot's Trusts*, (1873) LR 15 Eq 194 at 197, 42 LJ Ch 289).

As to the power of debtors, trustees and other persons liable in respect of debts and other legal things in action to pay them into court, where the assignment of the debts or thing in action is disputed or where there are conflicting claims thereto, see the Law of Property Act 1925, s 136, Vol 37, title Real Property (Pt 1).

But a trustee is not justified in paying money into court to avoid an action threatened against him (*Re Fagg's Trust*, (1850) 19 LJ Ch 175); or when there is no reasonable doubt as to the person entitled (*Re Elliot's Trusts* (1873) LR 15 Eq 194, 42 LJ Ch 289) ; or because the beneficiary has become a nun and gone to a foreign convent (*Re Metcalfe's Trusts*, (1864) 2 De GJ & Sm 122, 3 New Rep 657); or because of the existence of a power of appointment, when there is no notice of its existence and no ground for believing that it has been exercised (*Re Cull's Trusts*, (1875) LR 20 Eq 561, 44 LJ Ch 664); or on the ground of claims which are clearly unfounded (*Re Thakeham Sequestrian Moneys*, (1871) LR 12 Eq 494, 24 LT 902); or because the beneficiaries have refused to execute a release (*Re Cater's Trusts No 2*, (1858) 25 Beav 366; *Re Robert's Trusts*, (1869) 38 LJ Ch 708, 17 WR 639).

**Definitions.** For "the court", see ss 67, 68(2) post; for "transfer" and "trustee", see s 68(1), paras (16), (17) post respectively; as to paying into court, see s 68(2) post.

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### [63A Jurisdiction of County Court

(1) The county court has jurisdiction under the following provisions where the amount or value of the trust estate or fund to be dealt with in the court does not exceed the county court limit –

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(2) The county court has jurisdiction under the following provisions where the land or the interest or contingent right in land which is to be dealt with in the court forms part of a trust estate which does not exceed in amount or value the county court limit

section 44;  
section 45;  
section 46.

(3) The county court has jurisdiction -

(a) under sections 47 and 48 of this Act, where the judgment is given or order is made by the court;

(b) under sections 50 and 56, where a vesting order can be made by the court;

(c) under section 53, where the amount or value of the property to be dealt with in the court does not exceed the county court limit; and

(d) under section 63 (including power to receive payment of money or securities into court) where the money or securities to be paid into court do not exceed in amount or value the county court limit.

(4) Any reference to the court in section 59 of this Act includes a reference to the county court.

(5) In this section, in its application to any enactment, 'the county court limit' means the amount for the time being specified by an Order in Council under section 145 of the County Courts Act 1984 as the county court limit for the purposes of that enactment (or, where no such Order in Council has been made, the corresponding limit specified by Order in Council under section 192 of the County Courts Act 1959).]

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#### **NOTES**

This section was inserted by the County Courts Act 1984, s 148(1), Sch 2, Pt I, para 1.

**County court.** Is a court held for a district under the County Courts Act 1984; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. As to county court districts, see ss 1, 2 of the 1984 Act, Vol 11, title County Courts.

**Jurisdiction.** The jurisdiction of the county court may be extended by agreement of the parties; see the County Courts Act 1984, s 24(1), (2) (b), Vol 11, title County Courts.

**County court limit.** For meaning, note sub-s (5) above. Up to 1 January 1995, no Order had been made under the County Courts Act 1984, s 145, Vol 11, title County Courts, specifying the county court limit for the purposes of this section but (by virtue of sub-s (5) above) the relevant limit, ie £30,000, specified in the County Court Jurisdiction Order 1981, SI 1981/1123, as amended by SI 1991/724, applies for the purposes of the enactments cited in sub-ss (1), (2), (3)(c), (d) above.

**County Courts Act 1984, s 145.** See Vol 11, title County Courts.

**County Courts Act 1959, s 192.** Repealed by the County Courts Act 1984, s 148(3), Sch 4.

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## **64 Application of Act to Settled Land Act Trustees**

(1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the Settled Land Act 1925, and trustees for the purpose of the management of land during a minority, whether such trustees are appointed by the court or by the settlement, or under provisions contained in any instrument.

(2) Where, either before or after the commencement of this Act, trustees of a settlement have been appointed by the court for the purposes of the Settled Land Acts 1882 to 1890, or of the Settled Land Act 1925, then, after the commencement of this Act –

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the settlement, though no trustees for the purposes of the said Acts were thereby appointed; or

(b) if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being for the purposes of the said Acts or the personal representatives of the last surviving or continuing trustee for those purposes,

shall have the powers conferred by this Act to appoint new or additional trustees of the settlement for the purposes of the said Acts.

(3) Appointments of new trustees for the purposes of the said Acts made or expressed to be made before the commencement of this Act by the trustees or trustee or personal representatives referred to in paragraph (b) of the last preceding subsection or by the persons referred to in paragraph (a) of that subsection are, without prejudice to any order of the court made before such commencement, hereby confirmed.

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#### NOTES

**Appointment; discharge; retirement of trustees.** For the provisions relating to the appointment of new trustees and the discharge and retirement of trustees, see Pt III (ss 34-40) ante, and ss 41-43 ante (appointment by the court). Cf the power of the court to appoint trustees of the settlement under the Settled Land Act 1925, s 34, Pt 2 of this title post.

**Trustees for the purposes of the Settled Land Act 1925.** As to who are purposes of the Settled Land Act 1925, see s 30 of that Act, Pt 2 of this title post.

**Trustees for the purpose of the management ... during a minority.** As to trustees for the management of land during minority, see the Settled Land Act 1925, s 102, Pt 2 of this title post. Personal representatives have power to appoint trustees of infants' land during minority for the purposes of that section, by the Administration of Estates Act 1925, s 42(1), Vol 17, title Executors and Administrators.

**Any instrument.** Where executors of a last surviving deceased executor became executors by representation and Settled Land Act trustees, they were not empowered by the Settled Land Act 1925, s 30(3), Pt 2 of this title post, to appoint new trustees as that provision only related to a sole personal representative but as the Settled Land Act 1925 is within the definition of "instrument", contained in s 68(1), para (5) post, they could, by virtue of sub-s (1) above, appoint new trustees under s 36 ante; see *Re Dark's Will Trusts, Glover v Dark* [1954] Ch 291, [1954] 1 All ER 681.

**Commencement of this Act.** Ie 1 January 1926, by virtue of s 71(2) (repealed).

**Powers conferred by this Act to appoint new or additional trustees.** Powers to appoint new or additional trustees, whether the former trustees were appointed by the court or otherwise, are conferred by s 36 ante, on persons described in similar terms to those used in paras (a) and (b) of sub-s (2) above. For the meaning of the phrases "persons nominated for the purpose of appointing new trustees", "surviving or continuing trustees" and "personal representatives of the last surviving or continuing trustee", see the notes to s 36 ante.

Where a settlement is created by will, or a settlement has arisen by the effect of an intestacy and there are no trustees of the settlement for the purposes of the Settled Land Act 1925, then the personal representatives are to be trustees of the settlement, until other trustees are appointed; but where there is a sole personal representative, not being a trust corporation, it is obligatory on them to appoint an additional trustee to act with him for the purposes of that Act, and the provisions of this Act, relating to the appointment of new trustees and the vesting of trust property, apply accordingly; see s 30(3) of that Act, Pt 2 of this title post.

**Definitions.** For "instrument", "new trustees", "personal representatives", "settlement" and "trustees", see s 68(5), (9), (15), (17) post.

**Settled Land Act 1925.** See Pt 2 of this title post.

**Settled Land Acts 1882 to 1890.** The Acts which may by virtue of the Short Titles Act 1896 be cited together by this collective title are the Settled Land Act 1882, the Settled Land Act 1884, the Settled Land Acts (Amendment) Act 1887, the Settled Land Act 1889, and the Settled Land Act 1890, all of which (with the exception of the Settled Land Act 1882, s 30, Vol 22, title Land Drainage and improvement) have been repealed without prejudice to transactions completed and instruments made before 1926.

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**65** (*Repealed by the Criminal Law Act 1967, s 10, Sch 3, Pt 1.*)

### **66 Indemnity to banks, etc**

This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Bank of England, and to all persons for any acts done pursuant thereto, and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the court by which the order was made had jurisdiction to make it.

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#### **NOTES**

**Bank of England.** See the note to s 51 ante.

The Bank of England is required to obey every order under s 51 according to its tenor; see sub-s (3) thereof ante.

**Court.** For the courts having jurisdiction under this Act, see s 67 post.

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### **67 Jurisdiction of the "court"**

(1) In this Act "the court" means the High Court ... or the county court, where those courts respectively have jurisdiction.

(2) The procedure under this Act in .... county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

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#### **NOTES**

The words omitted were repealed by the Courts Act 1971, s 56, Sch 11, Pt II.

**High Court.** See the note to s 41 ante. All proceedings in the High Court commenced under this Act are assigned to the Chancery Division; see RSC Ord 93, r 4. They should be commenced by originating summons; see RSC Ord 5, r 3.

**County court.** See the note to s 63A ante. Proceedings in the county court should be commenced by originating application; see CCR Ord 3, r 4. They may be commenced in the court most convenient having regard to the places where the parties reside or carry on business or the subject matter of the proceedings is situated; see CCR Ord 4, r 4 (subject to Ord 49, r 20(2)).

**Where those courts ... have jurisdiction.** For the jurisdiction of the county court, see s 63A ante and the notes thereto.

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## 68 Definitions

[(1)] In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:-

- (1) “Authorised investments” mean investments authorised by the instrument, if any, creating the trust for the investment of money subject to the trust, or by law;
- (2) “Contingent right” as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent;
- (3) “Convey” and “conveyance” as applied to any person include the execution by that person of every necessary or suitable assurance (including an assent) for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance; “sale” includes an exchange;
- (4) “Gazette” means the London Gazette;
- (5) “Instrument” includes Act of Parliament;
- (6) “Land” includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way,

and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derive from land, but not an undivided share in land; and in this definition “mines and minerals” include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same, but not an undivided share thereof; and “hereditaments” mean real property which under an intestacy occurring before the commencement of this Act might have devolved on an heir;

- (7) “Mortgage” and “mortgagee” include a charge or chargee by way of legal mortgage, and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee;
- (8) .....
- (9) “Personal representative” means the executor, original or by representation, or administrator for the time being of a deceased person;
- (10) “Possession” includes receipt of rents and profits or the right to receive the same, if any; “income” includes rents and profits; and “possessed” applies to receipt of income of and to any vested estate less than a life interest in possession or in expectancy in any land;
- (11) “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;
- (12) “Rights” include estates and interests;
- (13) “Securities” include stocks, funds, and shares; ... and “securities payable to bearer” include securities transferable by delivery or by delivery and endorsement;
- (14) “Stock” includes fully paid up 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 company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein;
- (15) “Tenant for life,” “statutory owner,” “settled land,” “settlement,” “trust instrument,” “trustees of the settlement”... “term of years absolute” and “vesting instrument” have the same meanings as in the Settled Land Act 1925, and “entailed interest” has the same meaning as in the Law of Property Act 1925;



- (16) “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;
- (17) “Trust” does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and “trustee” where the context admits, includes a personal representative, and “new trustee” includes an additional trustee;
- (18) “Trust corporation” means the Public Trustee or a corporation either appointed by the court in any particular case to be a trustee, or entitled by rules made under subsection (3) of section four of the Public Trustee Act 1906, to act as custodian trustee;
- (19) “Trust for sale” in relation to land means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; “trustees for sale” mean the persons (including a personal representative) holding land on trust for sale;
- (20) “United Kingdom” means Great Britain and Northern Ireland.
- [(2) Any reference in this Act to paying money or securities into court shall be construed as referring to paying the money or transferring or depositing the securities into or in the Supreme Court or into or in any other court that has jurisdiction, and any reference in this Act to payment of money or securities into court shall be construed –
- (a) with reference to an order of the High Court, as referring to payment of the money or transfer or deposit of the securities into or in the Supreme Court; and
- (b) with reference to an order of any other court, as referring to payment of the money or transfer or deposit of the securities into or in that court.]

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#### NOTES

Sub-s (1), para (8), and the words omitted from para (13), were repealed, and sub-s (2) was inserted, by the Administration of Justice Act 1965, s 17(1), Sch 1. The words omitted from sub-s (1), para (15) were repealed by the Mental Health Act 1959, s 149(2), Sch 8, Pt I.

**Sub-s (1), para (1) : Authorised investments.** As to investments authorised by law, see the Trustee Investments Act 1961, ss 1, 16(1), Sch 4, para 1, this part of this title post, and see, also, the supplementary provisions as to investment in ss 2, 5, 6, 10 ante. The

powers of investment conferred by statute are in addition to powers conferred by the instrument, if any, creating the trust, but subject, however, to any contrary intention expressed in that instrument; see s 69(2) post, and see also s 1(3) of the 1961 Act, this part of this title post. As to the authorisation of investments by the instrument creating the trust, see Underhill and Hayton's Law of Trusts and Trustees (14th edn) 511 et seq, and 48 Halsbury's Laws (4th edn) para 854 et seq. Cf the modes of investment or application of capital money arising under the Settled Land Act 1925; see ss 73, 74 of that Act, Pt 2 of this title post.

**Para (2) : Contingent right.** See also para (12).

**Para (3) : Convey; conveyance.** This definition differs from the definitions contained in the Trustee Act 1850, s 2 (repealed) and the Trustee Act 1893, s 50 (repealed), which it replaced by the omission, inter alia, of the words "including the acts to be performed by ... tenants in tail in accordance with the provisions of the Acts for abolition of fines and recoveries" after the words "validity of the conveyance". It was held, however, that the omission of these words did not operate to cut down the meaning of "convey" in s 53 ante, so as to preclude the court from appointing a person to make a conveyance of an infant's tenancy in tail, which would operate to pass the fee simple under the Fines and Recoveries Act 1833, s 15, Vol 37, title Real Property (Pt 1). S 53 ante is substantially identical with the Law of Property Act 1922, s 114 (repealed), which, by s 127 thereof (repealed), was to be construed with the 1893 Act. The omission could be amply accounted for by the fact that the words omitted merely included explicitly in the preceding words something which was implicit in them, and by the fact that the outstanding formality, ie enrolment, was made obsolete by the 1925 legislation; see *Re Gower's Settlement* [1934] Ch 365, [1934] All ER Rep 796 at 372, 373 and 799, respectively.

As to "contingent right", see para (2) ; and as to "land" and "possessed", see paras (6), (10).

Cf the Law of Property Act 1925, s 205(1)(ii), Vol 37, title Real Property (Pt 1), and the note "Conveyance" thereto.

**Para (5) : Instrument.** The Settled Land Act 1925 is an instrument for the purposes of this Act and executors of a last surviving deceased trustee could accordingly appoint new trustees under s 36 ante, by virtue of s 64(1) ante; see *Re Dark's Will Trusts, Glover v Dark* [1954] Ch 291, [1954] 1 All ER 681.

Cf the Law of Property Act 1925, s 205(1)(viii), Vol 37, title Real Property (Pt 1), the Land Registration Act 1925, s 3(vii), Vol 37, title Real Property (Pt 2), and the Settled Land Act 1925, s 117 (1) (viii), Pt 2 of this title post, in which an instrument does not include a statute unless the statute creates a settlement.

**Para (6) : Land.** There are substantially identical definitions in the Law of Property Act 1925, s 205(1)(ix), Vol 37, title Real Property (Pt 1), the Land Registration Act 1925, s 3(vii), Vol 37, title Real Property (Pt 2) and the Settled Land Act 1925, s 117(1)(ix), Pt 2 of this title post.

By s 12(2) ante, 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.

A statutory trust for sale is imposed on all land held in undivided shares in possession by the Law of Property Act 1925, ss 34-36, Vol 37, title Real Property (Pt 1), and the Settled Land Act 1925, s 36, Pt 2 of this title post. The statutory trust for sale operates to convert the realty into personalty; see *Re Price*, [1928] Ch 579, 97 LJ Ch 423; *Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268, [1929] All ER Rep 495.

**Mines and minerals.** The Law of Property Act 1925, s 205(1)(ix), Vol 37, title Real Property (Pt 1), and the Land Registration Act 1925, s 3(xiv), Vol 37, title Real Property (Pt 2), contain identical definitions. Cf the Settled Land Act 1925, s 117(1)(xv), Pt 2 of this title post.

The fee simple in all bituminous and cannel coal and anthracite and all mines of coal and rights annexed thereto was vested in the British Coal Corporation by virtue of the Coal Act 1938, s 3(1) (repealed), the Coal Industry Nationalisation Act 1946, s 38(1) (repealed), and the Coal Industry Act 1987, s 1 (repealed). The Corporation's interests in unworked coal and coal mines are now vested in the Coal Authority established under the Coal Industry Act 1994, s 1, Vol 29, title Mines, Minerals and Quarries.

For restrictions on minerals in relation to atomic energy, see the Atomic Energy Act 1946, s 10, Vol 47, title Trade and Industry (Pt 2(a)).

**Hereditaments.** This coincides with the definitions in the Law of Property Act 1925, s 205(1) (ix), Vol 37, title Real Property (Pt 1), the Land Registration Act 1925, s 3(viii), Vol 37, title Real Property (Pt 2), and the Settled Land Act 1925, s 117 (1) (vii), Pt 2 of this title post. See also the note to the said s 205 (1) (ix), Vol 37, title Real Property (Pt 1).

**Para (7) : Mortgage.** Cf the Law of Property Act 1925, s 205(1)(xvi), Vol 37, title Real Property (Pt 1), and the Settled Land Act 1925, s 117(1)(xi) Pt 2 of this title post. By the Law of Property Act 1925, ss 85-87, Vol 37, title Real Property (Pt 1), the only forms of legal mortgage which can be created are mortgages by demise or subdemise and charges expressed to be by way of legal mortgage. As to the latter, see the note "Charge by deed by way of legal mortgage" to the Law of Property Act 1925, s 85, Vol 37, title Real Property (Pt 1).

**Para (9) : Personal representative.** Similar definitions appear in the Administration of Estates Act 1925, s 55(1)(xi), Vol 17, title Executors and Administrators, the Law of Property Act 1925, s 205(1)(xviii), Vol 37, title Real Property (Pt 1), the Land Registration Act 1925, s 3(xvii), Vol 37, title Real Property (Pt 2), and the Settled Land Act 1925, s 117(1)(xviii), Pt 2 of this title post, but, except in the last mentioned case, the definitions also include, as regards liability for death duties, an executor de son tort, and, except in the said ss 55(1)(xi) and 205(1)(xviii), special personal representatives are specifically provided for. As to executors by representation, see the Administration of Estates Act 1925, s 7, Vol 17, title Executors and Administrators.

**Para (10) : Possession; income; possessed.** "Possession" and "income" have the same definitions as in the Law of Property Act 1925, s 205(1) (xix), Vol 37, title Real Property (Pt 1); that of "possessed" is here added. "Possession" has the same definition in the Land Registration Act 1925, s 3(xviii), Vol 37, title Real Property (Pt 2). Cf also the Settled Land Act 1925, s 117(1)(xix), Pt 2 of this title post. Possession is used in distinction to reversion or remainder and not as opposed to possession by another or the existence of incumbrances; see, for example, *Re Jones* (1884) 26 Ch D 736, 53 LJ Ch 807, CA; *Re Clitheroe Estate* (1885) 31 Ch D 135, 34 WR 169; *Re Strangeways, Hickley v Strangeways* (1886) 34 Ch D 423, 56 LJ Ch 195, CA.

**Para (11) : Property.** This definition is more explicit than the definitions of "property" in the Law of Property Act 1925, s 205(1)(xx), Vol 37, title Real Property (Pt 1); the Settled Land Act 1925, s 117(1)(xx), Pt 2 of this title post; and the Administration of Estates Act 1925, s 55(1)(xvii), Vol 17, title Executors and Administrators.

**Para (13): Securities.** Cf the Law of Property Act 1925, s 205(1)(xxv), Vol 37, title Real Property (Pt 1), the Settled Land Act 1925, s 117(1)(xxiii), Pt 2 of this title post, and the Administration of Estates Act 1925, s 55(1)(xxiii), Vol 17, title Executors and Administrators. In its strict sense the word "securities" denotes a debt or claim the payment of which is in some way secured. The security generally consists of a right to resort to some fund or property for payment, but may include a personal guarantee. In this strict sense, apart from any enlargement as is provided by this section, it does not include shares or stock in a company; see *Singer v Williams* [1921] 1 AC 41 at 49, 89 LJKB 1218, per Lord Cave. See, further, for the interpretation of "securities" as used in settlements and wills, *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176, [1900-03] All ER Rep 107; *Re Gent and Eason's Contract* [1905] 1 Ch 386, 74 LJ Ch 333; *Re Smithers, Watts v Smithers* [1939] Ch 1015, [1939] 3 All ER 689.

**Para (14): Stock.** In *Re New Zealand Trust and Loan Co* [1893] 1 Ch 403, 62 LJ Ch 262, a case under the Trustee Act 1850 (repealed), and the Trustee Act 1852 (repealed), "stock" was held to include shares in a limited company whether fully paid up or not.

For the power of the court to make vesting orders as to stock, see s 51 ante.

**Para (15) : Settled Land Act definitions.** The meanings given to the expressions mentioned are to be found in the Settled Land Act 1925, as follows: "tenant for life" in ss 19, 117(1)(xxviii), "statutory owner" in s 117(1)(xxvi), "settled land" in ss 2, 117(1)(xxiv), "settlement" in ss 1, 117(1)(xxiv), "trust instrument" in s 117(1)(xxxi), "trustees of the settlement" in ss 30-35, 117(1)(xxiv), "term of years absolute" in s 117(1)(xxix), and "vesting instrument" in s 117(1)(xxxi), all Pt 2 of this title post.

**Entailed interest.** For the meaning of this expression in the Law of Property Act 1925, see s 130(1), (7) of that Act, Vol 37, title Real Property (Pt 1).

**Para (17): Trust; trustee.** With slight variations the definitions of "trust" and "trustee" are reenacted from the corresponding provisions in the Trustee Act 1850, s 2 (repealed) and the Trustee Act 1893, s 50 (repealed), but the words at the end of the clause from "and trustee where the context admits" etc are new. "Personal representative" is defined in para (9). Where a mortgagor of land by deposit of deeds declares himself a trustee of the legal estate for the mortgagee the case is not within the exception, and he is a trustee within the meaning of the Act; see *London and County Banking Co v Goddard* [1897] 1 Ch 642, 66 LJ Ch 261.

Maugham J held that a liquidator in the voluntary winding-up of a company was not a trustee, and added: "Neither directors nor liquidators, speaking generally, are to be regarded as trustees within the meaning of the Trustee Acts." He considered a voluntary liquidator's position was more rightly described as the agent of the company; see *Re Windsor Steam Coal Co* (1901) [1928] Ch 609, 97 LJ Ch 238; on appeal [1929] 1 Ch 151, 98 LJ Ch 147, CA. The case went to the Court of Appeal which did not decide the point, holding that, assuming the liquidator was a trustee, he could not succeed in the action; see [1929] 1 Ch 151, 98 LJ Ch 147, CA.

As to auditors, see *Re City Equitable Fire Insurance Co* [1925] Ch 407, [1924] All ER 485, especially at 523, 524, and 499, 500 respectively, per Warrington LJ.

Implied and constructive trusts are expressly saved by the Law of Property Act 1925, s 53(2), " Vol 37, title Real Property (Pt 1), from the requirements as to writing; see, further, the notes to that subsection.

A constructive trust arises whenever a trustee gains some advantage by availing himself of his position as trustee, a common instance being where a tenant for life or trustee of leaseholds renews the lease on his own account (*Keech v Sandford* (1726) Sel Cas Ch 61, [1558-1774] All ER Rep 230; *Re Biss, Biss v Biss* [1903] 2 Ch 40, [1900-03] All ER Rep 406; *Re Knowles' Will Trusts, Nelson v Knowles* [1948] 1 All ER 866, 92 Sol Jo 322, CA) ; so also where a father purchased from a mortgagee property belonging, subject to the mortgage, to his infant children, at less than its full value (*Griffith v Owen* [1907] 1 Ch 195, [1904-7] All ER Rep 718).

Similarly, where property is devised to trustees on trusts which do not exhaust the income during a particular period, although there is a resulting trust for the heir (or next-of-kin), it is really a trust construed by the court of the income which the trustees so hold and which they cannot apply in accordance with any express trust, and comes within the general meaning of implied or constructive trusts; see *Re Llanover Settled Estates*, [1926] Ch 626, [1926] All ER Rep 631.

Where a married woman trustee charged with default, handed her property over to her sister after the pleadings were closed, the sister was held a constructive trustee of the property, at the suit of the married woman's cestui que trust; see *Green v Weatherill* [1929] 2 Ch 213, [1929] All ER Rep 428. See also *Bannister v Bannister* [1948] 2 All ER 133, 92 Sol Jo 377, CA (conveyance of cottages by owner, subject to oral undertaking by purchaser to allow vendor to live rent free for remainder of life in one of them. Undertaking not included in conveyance but purchase price lower than vacant possession value. Held that the purchaser held cottage on trust for vendor during life).

**Para (18) : Trust corporation.** This definition (which is identical with those in the Law of Property Act 1925, s 205(1)(xxviii), Vol 37, title Real Property (Pt 1), the Settled Land Act 1925, s 117(1)(xxx), Pt 2 of this title post, the Administration of Estates Act 1925, s 55(1)(xxvi), Vol 17, title Executors and Administrators, and the Supreme Court Act 1981, s 128(1), in the same title) has been extended retrospectively by the Law of Property (Amendment) Act 1926, s 3, Vol 37, title Real Property (Pt 1), and now includes: the Treasury Solicitor, the Official Solicitor, other officials prescribed by the Lord Chancellor, a trustee in bankruptcy and a trustee under a deed of arrangement. It also includes, in relation to charitable, ecclesiastical or public trusts, any local or public authority so prescribed, and any other corporation, constituted under the laws of the United Kingdom and authorised by the Lord Chancellor so to act. By the Clergy Pensions Measure 1961, s 31, Vol 14, title Ecclesiastical Law (Pt 3), the Church of England Pensions Board is a trust corporation for the purposes of, inter alia, this Act.

The reference to a corporation appointed by the court in any particular case to be a trustee is deemed to have always included a reference to a corporation appointed by the Charity Commissioners under the

Charities Act 1993 to be a trustee; see s 35 of that Act, Vol 5, title Charities.

For the establishment of the office of, and the powers of, the Public Trustee, see the Public Trustee Act 1906, ss 1, 2, this part of this title ante. As to the rules mentioned in the definition, see the note "Body corporate entitled by rules" to the Public Trustee Act 1906, s 4, this part of this title ante.

**Para (19) : Trust for sale.** This definition is identical with those contained in the Law of Property Act 1925, s 205(1), (xxix), Vol 37, title Real Property (Pt 1), the Land Registration Act 1925, s 3(xxviii), Vol 37, title Real Property (Pt 2), and the Administration of Estates Act 1925, s 55(1), (xxviii), Vol 17, title Executors and Administrators.

For the interpretation of the expression "immediate binding trust for sale", see the notes to ss 23 and 205(1)(xxix) of the first mentioned Act, Vol 37, title Real Property (Pt 1), and to the Settled Land Act 1925, s 1(7), Pt 2 of this title post. A power to postpone sale is implied in every trust for sale in the absence of the expression of a contrary intention; see the Law of Property Act 1925, s 25(1), Vol 37, title Real Property (Pt 1).

A personal representative holds on trust for sale on an intestacy; see the Administration of Estates Act 1925, s 33, Vol 17, title Executors and Administrators. Whether personal representatives are trustees for sale or not depends on the facts at the time the question arises for determination; see *Re Wakeman, National Provincial Bank Ltd v Wakeman* [1945] Ch 177, [1945] 1 All ER 421, where trustees of a will, holding on trust to sell and invest in authorised securities, sought to determine whether they had power as trustees for sale to purchase land under the statutory powers of management, and it was held that as soon as they had sold and converted they ceased to be trustees for sale and had not those statutory powers. Cf *Re Wellsted's Will Trusts, Wellsted v Hanson* [1949] Ch 296, [1949] 1 All ER 577, CA.

**Para (20): Great Britain.** Ie England, Scotland and Wales; see the Union with Scotland Act 1706, preamble, Art I, Vol 10, title Constitutional Law (Pt 1), as read with the Interpretation Act 1978, s 22(1), Sch 2, para 5(a), Vol 41, title Statutes.

**Sub-s (2) : Supreme Court.** Ie the Court of Appeal and the High Court together with the Crown Court; see the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes. The expressions "Court of Appeal", "Crown Court" and "High Court" are defined by the same Schedule. As to the constitution of the Supreme Court, see the Supreme Court Act 1981, Pt I, Vol 11, title Courts and Legal Services.

**High Court.** See the note to s 41 ante.

**Public Trustee Act 1906, s 4(3).** See this part of this title ante.

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## 69 Application of Act

(1) This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.

(2) The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, 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.

(3) ...

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#### NOTES

Sub-s (3) was repealed by the SL(R) Act 1978.

**Except where otherwise expressly provided.** Express provision negating the application of this Act to trusts created before 1926 is made by s 31(5) ante (power of maintenance); s 32(3) ante (power of advancement); s 33(2) ante (protective trusts); s 34(1) ante (limitation of number of trustees).

**Commencement of this Act.** Ie 1 January 1926, by virtue of s 71(2) repealed.

**Powers conferred by this Act.** Sub-s (2) above is expressly excepted from the Trustee Investments Act 1961, Sch 4, para 1(1), whereby references in this Act to s 1 (repealed) thereof or to provisions which include that section are to be construed as references to s 1 of the 1961 Act, this part of this title post, or as including references to s 1 of that Act; see s 16(1) of the 1961 Act and Sch 4, para 1(1) thereto, this part of this title post.

**Unless otherwise stated.** For provisions overriding any contrary intention expressed in the trust instrument, see, for example, s 14 ante (receipts of trustees) ; s 16 ante (power to raise money by sale, conversion, calling in or mortgage) ; s 26 ante (protection against liability in respect of rents and covenants after distribution of property) ; and s 27 ante (protection by advertisement).

**Contrary intention.** This is a consolidating Act. The Law of Property Act 1922, s 88(1) (repealed) was identical with s 31(1) of this Act ante, and s 88(6) (repealed) of the 1922 Act provided that that section was to apply only if and so far as a contrary intention was not expressed in the instrument.

Accordingly, though s 31(1) (ii) does not confer a power in the strict sense, this subsection should be construed as having the same effect upon s 31(1) ante, as s 88(6) (repealed) would have had upon s 88(1) (repealed) and the totality of the provisions in s 31 ante, was "one of the powers conferred by this Act" so as to enable s 31 (1) (ii) to be overridden by provisions in a will; see *Re Turner's Will Trusts, District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA. But cf *Re Rees' Will Trusts, Lloyds Bank Ltd v Rees* [1954] Ch 202, [1954] 1 All ER 7, in which a will provided for a life interest to be held upon protective trusts but, instead of incorporating s 33 ante, the will provided its own definition of protective trusts and it was held that s 32 ante, must be read into the will and that if the statutory power of advancement was exercised, the will would operate merely upon what remained in the settlement from time to time, following *Re Garrett* [1934] Ch 477, in which a beneficiary was held capable of consenting



to advancements by the trustees, notwithstanding that the will imposed on her a restraint upon anticipation. By analogy with *Re Turner's Will Trusts* above, s 32 ante, is excluded by this subsection if, on a proper reading of the instrument, one finds a contrary intention though no express exclusion; see *IRC v Bernstein* [1961] Ch 399, [1961] 1 All ER 320, CA, in which express directions for accumulation were held to be inconsistent with an advancement under s 32 ante. In *Re Delamere's Settlement Trusts, Kenny v Cunningham-Reid* [1984] 1 All ER 584, [1984] 1 WLR 813, CA, a direction to hold a fund for certain appointees in "equal shares absolutely" in a trustee's deed of appointment was held to show sufficient contrary intention to exclude accumulation under s 31 ante. In *Re Geering (deceased), Gulliver v Geering* [1964] Ch 136, [1962] 3 All ER 1043, a testamentary power to make payments to certain beneficiaries was held to be inconsistent with the direction to accumulate contained in s 31(2) ante, and so, following *Re Turner's Will Trusts* above, to exclude s 31(1)(ii) ante. *Gregg v Richards* [1926] Ch 521, 95 LJ Ch 209, upon the Conveyancing Act 1881, s6 (repealed), was not cited to the Court of Appeal in *Bernstein's Case* above, but in *Re Evans' Settlement, Watkins v Whitworth Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294, Stamp J said that, in *Gregg's Case* above, two rights, one arising outside an instrument and the other by the effect of the instrument were not in the least inconsistent and could exist side by side whereas, in the case before him, the settlor could not have intended an express power of advancement to co-exist with s 32 ante.

In *Re Warren, Public Trustee v Fletcher* [1939] Ch 684, [1939] 2 All ER 599, "so far only as a contrary intention is not expressed in the instrument" was held, in relation to s 1 (repealed) of this Act, to be synonymous with "Unless expressly forbidden by the instrument" in the Trustee Act 1893, s 1 (repealed), which corresponded to s 1 of this Act and accordingly an investment clause in a will did not preclude investments authorised by s 1 but not by the clause. Where, however, an investment clause ended "but not otherwise" it was held to override s 1 (repealed) in *Re Rider's Will Trusts, Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974. Similar cases will now be governed by the Trustee Investments Act 1961, s 1(3), this part of this title post, and not by sub-s (2) above but the same results may well follow; see Underhill and Hayton's *Law of Trusts and Trustees* (14th edn) 518, note 13.

**Definitions.** For "instrument" and "trusts" and "trustees", see s 68(1), paras (5) and (17) ante, respectively.

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## 70 Enactments repealed

... without prejudice to the provisions of section thirty-eight of the Interpretation Act 1889:

- (a) Nothing in this repeal shall affect any vesting order or appointment made or other thing done under any enactment so repealed, and any order or appointment so made may be revoked or varied in like manner as if it has been made under this Act;

- (b) References in any document to any enactment repealed by this Act shall be construed as references to this Act or to the corresponding enactment in this Act.

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#### NOTES

The words omitted were repealed by the SLR Act 1950.

**Nothing in this repeal.** The words repealed were repealing words. The repeals by this section and Sch 2 (repealed), extended to England and Wales only; see s 71(3) post.

Interpretation Act 1889, s 38. Repealed by the Interpretation Act 1978, s 25(1), Sch 3, and replaced by ss 16 (1),17 (2) (a) of, and Sch 2, para 3 to, that Act, Vol 41, title Statutes.

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#### 71 Short title, commencement, extent

- (1) This Act may be cited as the Trustee Act 1925.
- (2) ...
- (3) This Act, except where otherwise expressly provided, extends to England and Wales only.
- (4) The provisions of this Act bind the Crown.
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#### NOTES

Sub-s (2) was repealed by the SLR Act 1950.

**Bind the Crown.** The Crown is not bound by an Act of Parliament unless the contrary is expressly stated or there is a necessary implication that it was intended to be bound (*Thomas v Pritchard* [1903] 1 KB 209 at 212). The Crown for this purpose includes the great departments of State (*Cooper v Hawkins* [1904] 2 KB 164 at 172) and servants or agents of the Crown or similar persons when acting within the scope of their authority or in pursuance of Crown purposes (*Chare v Hart* (1918) LJKB 833; *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA). However, statutory corporations and similar bodies created for a purpose of a commercial nature are not servants or agents of the Crown for this purpose, though controlled by the State, if it is not expressly provided that the corporation shall act on behalf of the Crown (*Tamlin v Hannaford* [1950] 1 KB 18, [1949] 2 All ER 327, CA; *BBC v Johns (Inspector of Taxes)* [1965] Ch 32, [1964] 1 All ER 923, CA).

It appears that the Crown is entitled to the benefit of an Act (*Willion v Berkley* (1561), 1 Plowd 223 at 243; and note the saving in the Crown Proceedings Act 1947, s 31(1), Vol 13, title Crown Proceedings), unless this is expressly or impliedly prohibited (*R v Cruise* (1852) 2 I Ch R 65).

See, generally, as to the application of statutes to the Crown, 8 Halsbury's Laws (4th edn) para 958. **Extent.** The powers of the court

under this Act to make vesting orders extend to property in any part of Her Majesty's dominions, except Scotland; see s 56 ante.

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*(Sch 1 repealed by the SL(R) Act 1978; Sch 2  
repealed by the SLR Act 1950.)*

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