

1938

38374

CO 533/500

38374

KENYA

- (1) Trusts of Land Bill
 (2) Registration of Titles (Amend.) Bill

Previous	Regn of Titles Act			CLOSED UNTIL
	23059/34	297	23/9	
		309	27/9	
		Mr Parkin	26	
		297	14/10	
		309	17/10	
		Mr Parkin	15	
	934	297	17/10	
		309	19/10	
		298	18/10	
	297	297.	7	
	309	R98	11/1	
	Mr Bal	R89	11/1	
	Mr 200	Mr Parkin	12	
		96	25/1	
	Mr Smithey	298	24/1	
	Mr Parkin	98		
	Mr Smithey			
	Mr Davis			
	19/11			
	Mr Parkin			
	5/9			
	Mr Williams			
	6/9			
	Mr Parkin			
	10/9			
	Sir J. Shuckburgh			
	14/9			
	R297			
	4/9			
	303			
	25/9			
	299			
	21/9			

Cl Titles
Land
Spares to
Library

339
The copies of Trusts of Land Bill &
Registration of Titles (Land) Bill with memo
by Allah Jafar - enquires position regarding
Wakf property

16.6.38

2

The object of this Bill relating to Trusts of Land is to ensure that, when Trusts are made, the Trustees are given all the powers which experience has shown they are likely to require. The present position is that while it is possible under existing legislation for all the necessary powers to be taken by the Trustees, these powers often are not taken, in which case there is danger of grave complications arising which may only be remediable by special legislation.

The Legal Advisers will no doubt advise upon the terms of the Bill from the legal point of view. It would appear to be free from objection.

First, however, the question of the inclusion within the Bill of Wakf property requires consideration.

The point appears to be that Wakf property cannot in theory be sold and, consequently, that to make Wakf property subject to a "trust for sale" runs the danger of offending Moslem susceptibilities. From pages 71-2 of the "Land Law of Palestine" by Goadby and Doukhan it appears that in spite of the inalienable character of Wakf property there are legal devices within the law of Wakf by which the inconveniences resulting from the rule of inalienability can be escaped. In some cases Wakf property can in fact be sold. It would not, therefore, appear to be likely greatly to offend Moslem opinion if Wakf property is brought under a law conferring the power of sale upon the Trustees.

In

flagged in attached volume.

In Section 21 of the Palestine Expropriation of Lands Ordinance, 1926, powers are taken by Government of an altogether more comprehensive kind. The forcible expropriation of Wakf property is clearly a much more severe infringement upon the strict letter of Wakf law than the proposal under the Kenya Bill to permit Wakf Trustees to sell property.

There appears, moreover, already to exist in Kenya law a case in which the Trustees of Wakf property have been required to take powers, as far as the sale of property is concerned, similar to those in the present Bill. Under section 12 of the Wakf Commissioners Ordinance (Cap. 28 of the revised edition) the Commissioners have power to order the sale of land in certain circumstances.

In general it would seem that the Bill does not propose to do more as regards the power of sale than to give general application to what has already been laid down in particular cases, i.e. those in which property is held by the Wakf Commissioners. The Bill does not go as far as legislation in other Dependencies; and it appears to do no more than require powers to be taken in all cases to do what in fact is already done in some cases ^{under} ~~within the~~ ~~provisions of~~ the law of Wakf. Moreover, there is a great difference between laying down the powers which are to be taken by Wakf Trustees and requiring the Trustees to use those powers.

There

There is no question of the Bill compelling the sale of Wakf property against the wishes of the Trustees. Apart from the political danger of an outcry, which the Governor does not mention and which presumably can therefore be discounted, the only difficulty in the Bill would appear to be the inconsistency which may be thought to arise in vesting in mortal Trustees property which is considered to belong to the Almighty - see Goadby and Doukhan, page 71. This point in metaphysics appears, however, also to arise in the case of Section 6 of Cap. 28 and to have presented no difficulty there.

At the end of paragraph 2 of the despatch it is suggested that a possible solution would be to exclude from the Bill all Wakfs i.e. both present and future, in the Protectorate, but to apply it to all future Wakfs in the Colony. This suggestion is presumably based on reasons of administrative expediency alone, the majority of the Wakfs being situated in the coastal region of the Protectorate. It leaves unsettled the question of principle and would not appear to be a very happy solution since it would ~~clearly~~ leave open the possibility of two neighbouring Wakfs divided by the frontier between the Colony and the Protectorate being on an entirely different footing.

The Governor does not mention any consultation having taken place with Moslem representatives or with the Wakf Commissioners in Kenya (perhaps because this would have involved

disclosing

disclosing the contents of the Bill which it is desired to keep confidential). The most ready source of advice on the subject available here is the India Office, and a letter should go stating the position, forwarding a copy of the Bill and of Cap. 28, and asking for advice.

Charles White

25.7.38.

PS - Whether or not it is decided to exclude wakfs from the Bill relating to Trusts of Land, there will be no objection to the Bill amending the Registration of Titles Ordinance applying to wakfs, if necessary by the addition of a new special section. Registration of all wakfs property is already provided for under §7 of Cap 28, and involves none of the difficulties discussed above.

Mr. D.L.

For legal reasons on the two bills please.

(2) As regards the question of wakfs, the Mr. D.L. writing - which is correct. It should be qualified for your view on the point at "A" on p. 2 of his minutes.

H. S. S. S.
20/7/38.

There is something wrong with clause 3(1) of the Registration of Titles Bill - perhaps "of" should be omitted. Otherwise there are no objections in the hands of the Bills.

As to wakfs, I really do not know we can be expected to know how to do with them. The effect of the Bill is to give power to the trustees to sell all land. Unless there is some reason for wishing to exempt wakfs property, I should have thought, in view of the well known benevolence of religious bodies, particularly when their property is concerned, it would be best to leave them out.

Mr. D.L.

26.7

I really think that this is a matter for the Kenya Govt to decide and I should not have any objection to the bill being sent to the Kenya Govt for their advice.

H. S. S. S.

11/1/38

Mr. Paskin spoke to me about this before he went on leave and pointed out that my draft reply ignored the request in paragraph 3 of the Kenya despatch. He asked me to consult Mr. Ingrams, Mr. Downie, Mr. Acheson and Mr. Williams on the point of view of Moslem susceptibilities.

I'm afraid I have no expert knowledge of the

2. In Mr. Ingrams' opinion we should run quite a serious risk of upsetting Moslem communities in a case of this kind. He said that he thought that it was primarily a matter for the Moslem communities in Kenya, and he advised that Wakf bequests should be excepted from the provisions of the Ordinance unless the communities had asked for their inclusion. He also thought it queer that the Wakf Commissioners had not been mentioned in the despatch.

Mr. Ingrams suggested that it might be advisable to consult a leading Moslem lawyer before taking any further action. Mr. Dale, to whom I mentioned the matter, gave the name of Dr. F. M. Goadby, but frankly does not think the idea worth pursuing.

As regards consulting the India Office Mr. Ingrams thought that the answer would probably be:

- (a) in Indian law care is taken to avoid the inclusion of religious bequests, etc., and
- (b) asking us to be very careful about including Wakf bequests in the law unless the Moslem communities have specifically asked for it.

3. I am circulating this minute to Mr. Downie, Mr. Acheson and Mr. Williams in accordance with Mr. Paskin's request.

h. d. m. i. g.
19.8.38.

I have kept this to make some researches into a subject which is quite new to me.

There is a most interesting account of the Wakf system in Cyprus in a report by Mr. Seager of 1883, which appears to have been the document on which the present administration of Evkaf in Cyprus is based.

I have read some of this report, which is a lengthy and detailed document. It explains that wakf means "property granted for the sake of God and which can never be sold", and although certain classes of wakfs have been created by a process of evolution which benefited individuals much more than religious purposes, and which in certain circumstances be sold, no wakf ever lost its vakouf character. The sales, where sale was allowed, were registered, and the religious beneficiary had a residual interest in the property, which might, e.g. on failure of heirs, become ^{may} ~~circumstances~~ effective.

The Cyprus Ordinance-in-Council dealing with the administration of wakfs does not appear to provide specifically for the sale of wakfs.

The general deduction which I would draw is that this is a matter in which, as Moslem religious sentiment and custom is involved, it would be desirable to proceed with caution.

ABP
6.579
So far as West Africa is concerned, I think that so not that but the way needs

to consider Moslem susceptibilities in the matter. The only part of U.A. in which Moslem institutions are at all highly developed is the Northern provinces of Mysore (although of course the a plenty of Moslems in S. Mysore & in Gold Coast S. Leone & Gambia). But in N. Mysore all the land, whether occupied or not, has been declared to be native land & to be under the control subject to the disposition of the Governor for the use & common benefit of the natives & no title to its occupation can be valid without the Gov's consent.

If it is possible to do something like Muzaf in land may in fact exist by Customary law & is not disturbed by Govt. but let of course ~~will~~ ^{could} not be relevant to the present question.

O.G.R. Wilson
6.9.38

is a legacy from pre-British days

I have had a further talk with Mr. Ingrams on this subject, who considers that the Government of India should certainly be consulted on the proposal not to exclude Wakf property from the provisions of the Bill, and Mr. Blaxter (with whom

Mr.

Mr. Ingrams, has also discussed the matter) also considers that the Foreign Office should be consulted. This is clearly right and I submit drafts accordingly.

J.J. Bannister
10.3.38.

J.J. Bannister
10/9/38
at once

10 F.O. } W.C.I. records. (Cons) 14/10 12.11.1938
10 I.O. }
at 10: Kenya 468 (7.2+3% note). A/11-
(1 Approved.)

R/Action into draft
m/s

~~Handwritten signature~~

17/9/38
DESTROYED UNDER STATUTE: has asked Govt. of India for views.
Further communication will follow in due course.

? put by
Cloke White
24/9

J.J. Bannister
20/9
at once

~~Handwritten signature~~

B.L. No reply received to No 2, and
interim reply only to No 3. ? continue
to wait - a month

J. Jackson 297

14/10

Clotby White 14/10

Yes, but 1/1/39 if nothing
in before.

J.J. Cassin

15/10

at once.

at once

297

38374/38 - on letter of 14th Sept.

McNamee (I.O.) rang up.

The Govt of India, who have been
asked by the D.O. to consider the
matter, have asked for copies of
the Bills, which were not
enclosed in our letter to the D.O.

If we have copies, have please
send them over with ref to
our last letter. If not please

ask Kenya for say, form & the
copies (in case FO asks for same) by

3 pm

Clotby White 15/10

copies herewith
- J. Jackson 14/10

9303

If able as at
X please

6/10 To: I.O (General Bills) BISA. 18.10.38
1/11

B.L. No reply received to Nos 2 & 3.

J. Jackson 11/98

11/11

? have received LF.

Clotby White

11/1

J.J. Cassin
12/11
at once

7 70: F0

8 10: 10.

HL

} B6

24.1.39



C. O.

38374/38. Kenya.

- Mr. Paskin. 10.9.38.
- Mr.
- Mr.
- Mr. A. J. Daise.
- Sir H. Moore.
- Sir G. Tomlinson.
- X Sir J. Shackburgh. 10/9/38
- Permt. U.S. of S.
- Parly. U.S. of S.
- Secretary of State.

2 ansd by
 3 " " 5.1.1939/1/16
 Downing Street.

C. D.
 R 12 SEP
 0 13

14 September, 1938.

Sir,

I am etc. to transmit to you, for the consideration of

- (1) Viscount Halifax,
- (2) the Marquess of Zetland,

the accompanying copy of a despatch from the Governor of Kenya, with its enclosures, in regard to a proposal to enact legislation relating to Trusts of Land in the Colony. It will be observed that the Governor has asked for advice on the question whether Moslem susceptibilities elsewhere in the Empire might be injured by the non-exclusion of Wakf property from the provisions of this proposed legislation. I am

Accordingly

DRAFT.

- 1. THE UNDER SECRETARY OF STATE, FOREIGN OFFICE. SB
- 2. THE UNDER SECRETARY OF STATE, INDIA OFFICE. SB

Kenya No 339 7/16/6 (m.1)
 Mans
 Trusts of Land Bill
 [Handwritten signatures and notes]

Copy also to Kenya

FURTHER ACTION.

Copies to Kenya 1f.



19
16 June, 1938.

Handwritten initials
Sir,

I have the honour to transmit to you copies of a Bill relating to Trusts of Land in the Colony and of a Bill to Amend the Registration of Titles Ordinance (cap. 142 of the Revised Edition), together with a memorandum by the Acting Attorney General which sets out the necessity for their enactment, and to ask for advice on one important question of policy which has arisen in this connection.

2. The Bill relating to Trusts of Land, as drafted, makes no provision for the exclusion therefrom of Wakf property, and it is a matter for serious consideration as to what is to be done in connection with these Trusts. I am advised that Wakf property cannot be sold, mortgaged or charged, the Trustees having only power to grant leases, and that in fact every Wakf deed which is registered contains an express condition that the Trustees shall not sell, mortgage or charge (as the case may be) or otherwise dispose of the property.

Opinion among members of the Law Society who collaborated in the drafting of this legislation differs considerably, some holding the view that, while existing Wakfs should be protected, future Wakfs should be subject to the provisions of the Bill. The Principal Registrar of Titles and the then Commissioner of Local Government, Lands and Settlement, to whom the question was referred in August last, considered that all Wakfs in the Protectorate should be excluded, but that the

Ordinance

THE RIGHT HONOURABLE
MALCOLM MACDONALD, M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S. W. 1.

Copy sent to Kenya for their papers

*Amended by F.O. 2
Amended (2)
Further Amended (3 on 1939)*

Ordinance should apply to future Wakfs in the Colony.

3. The question whether Wakfed property should be made subject to a trust for sale is one in which Moslem susceptibilities elsewhere in the Empire might be injured by a wrong decision, and I have therefore thought it desirable to seek any advice on this point that you may be in a position to offer.

I have the honour to be,
Sir,
Your most obedient,
humble servant,

W Brooke-Popham

AIR CHIEF MARSHAL
GOVERNOR.

✓

11

MEMORANDUM ON A BILL RELATING TO
TRUSTS OF LAND.

---C---

Where land is the subject of a settlement or trust, whether by way of strict settlement or by being vested in trustees with or without a trust for sale or power of sale, there is no person who, by virtue of absolute ownership, is capable of exercising in respect of such land the usual powers incident to the ownership of land. It is clear however that, in order to obtain the maximum benefit from such land, and to save it from going to waste, it is essential (assuming that the land is not acquired in breach of trust), there should be some person capable of exercising such powers - or at least some powers of leasing, mortgaging, management, repairing, and improvement - in relation thereto: more especially so in this Colony, where, by the nature of the climate and of the uses to which the land is put, a very short period of neglect can result in very serious damage to or depreciation of the land. Nevertheless, from the very nature of a trust there cannot be any person with such powers, unless they are expressly conferred by the instrument creating the settlement or trust, or by operation of statute law; excepting only that trustees of land have been held to have certain very limited powers and duties of letting, cultivation, cutting timber, and insurance, under the English Common Law.

2. In the case of settlements and trusts created by deed or by will, all necessary powers can of course be expressly conferred by the deed or will; and in cases where there are no such powers, the beneficiaries

if all sui juris, can by agreement remedy the defect. Still there can be, and often are circumstances in which the trust itself is not constituted by any instrument, but arises by operation of law; or in which the instrument creating the trust has, through an oversight or through no purchase of land being contemplated at the time, omitted to confer the necessary powers or some of them; and in such circumstances, if any of the beneficiaries (whether vested or contingent) are not sui juris, the defect cannot be remedied without the aid of statutory provision in that behalf.

3. That such statutory provision has for some time been recognised in England as essential is evidenced by a series of English Acts, commencing with the Settled Estates Act, 1856 ("An Act to facilitate leases and sales of Settled Estates") and continuing through the Settled Land Acts 1882-1890 upto the Law of Property Act, Trustee Act, and Settled Land Act of 1925, whereby wider and wider powers have progressively been conferred upon tenants for life and trustees of land.

The English statutory powers in relation to land the subject of a strict settlement and moneys arising therefrom are at present contained in the Settled Land Act, 1925, and are by that Act vested in the tenant for life (if sui juris). The powers are set out in Parts II, III, IV and V of that Act (sections 38-93 inclusive) and are very extensive, including powers to lease for long terms, raise money on mortgage, vary and otherwise deal with leases and mortgages, and execute improvements and recover part or the whole of

the cost thereof from capital moneys subject to the same trusts. By section 102 of the same Act special provision is made for the case of a tenant for life who is a minor; the trustees being empowered, during such minority, (inter alia) to cut timber, work mines, execute improvements and repairs, insure, and "generally to deal with the land in a proper and due course of management" - and, out of the income of the land, to pay the expenses in the exercise of the foregoing powers; in addition to which they have all the statutory powers of a tenant for life. By the same Act certain further powers relating to moneys arising out of the land are conferred upon the trustees of the settlement, including power to treat other moneys and investments subject to the same trusts, and the income therefrom, as if the same were proceeds of sale or income of the land itself. (ss. 75-78).

4. The statutory powers of trustees for sale (which, under the present English law, includes all trustees of land other than trustees of a strict settlement) are conferred by section 28 of the Law of Property Act, 1925, which provides (inter alia) that "Trustees for sale shall in relation to land and to the proceeds of sale have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority.....". That is to say that all trustees of land, other than trustees of a strict settlement, have the very full powers of leasing, management etc. referred to above in connection with the Settled Land Act, 1925; and that they further have power to pay the costs and expenses incurred in

exercising such powers out of any income arising from the land or from other properties subject to the same trusts, or in some cases out of the capital thereof.

The English Trustee Act, 1925, deals with trusts generally and is not limited to trusts of land: and by that Act certain powers of insurance and raising money by mortgage only are conferred.

5. In this Colony, unless the English Settled Land Acts 1822-1890 can be held to apply, we have only the Indian Transfer of Property Act, the Crown Lands and Registration of Titles Ordinances, and the Trustee Ordinance of 1929. The first three mentioned contain no provision of the kind required and the Trustee Ordinance, being taken from the English Trustee Act, 1925, confers only the powers of insurance and mortgaging above referred to. ~~XXXXXXXX~~
~~XXXXXXXX~~ It is generally considered that the English Settled Acts (whereby the great body of the powers of English Trustees are conferred) would not apply.

6. Inconveniences can still be avoided in many instances by express provision in the instrument creating the settlement or trust: but unfortunately land in this Colony is often held upon the trusts of an English Settlement - e.g. where the funds of such settlement are, by virtue of the express power conferred by section 4 of the Trustee Ordinance, 1929, invested in the purchase of immovable property here. Such settlements seldom confer upon the trustees any express power to deal with land, either because no purchase of land was originally contemplated (there is no general statutory power in England to invest in land) or else because the English statutory powers of

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management, etc. were relied upon. In the latter event, it seems that, whatever the intention of the settlement, the *lex situs* is the law governing the capacities of trustees in relation to immoveables, and regard can only be had to powers expressly conferred. Apart from the foregoing considerations, it should be remarked that the insertion of express powers to deal with land is ^{an} extremely cumbersome formality, and greatly increases the length and cost of the deed. A reference to Key and Elphinstone's Precedents in Conveyancing (Tenth Edition, Vol. II, pp. 609 et seq) will indicate the voluminous nature of the provisions required.

7. The present position is that trustees in this Colony are given statutory power to invest in land, but no power to deal with the land when bought, beyond the powers to mortgage and to insure. It is true that application for necessary powers in particular instances can be made to the Court under section 55 of the Trustee Ordinance, 1928, but such applications involve considerable expense, and may have to be made on several separate occasions in respect of one trust estate. Moreover, the Courts are reluctant to grant powers exceeding to any marked degree such powers as are already conferred by law. More than one trust has already found itself (e.g. by failure of a mortgage) with land on its hands, with no prospect of immediate sale and no sufficient power to keep the land in good condition until sale. It is perhaps superfluous to point out that if trust properties are allowed to go to waste it is a detriment not only to the beneficiaries but also to the Colony as a whole.

8. For these reasons it is considered that the

time has come for the powers of Trustees of land in the Colony to be clearly defined by law, and the draft Trusts of Land Bill which forms an appendix to this Memorandum is an attempt to put into statutory form legal provisions which have proved successful in England.

9. The Bill, with the exception of some four or five new Clauses, follows the law on the subject contained in the English Settled Land Act, 1925, and the English Law of Property Act, 1925.

There are eight Parts in the Bill of which Part I deals with preliminary matters, Part II deals with Implied Trusts for Sale, Part III is concerned with Statutory Trusts for Sale, Part IV gives wide powers to Trustees for Sale, Part V sets out how capital money is to be invested, Part VI deals with Improvements, Part VII makes general provisions as to Trustees of Land and Part VIII contains certain Supplementary Provisions.

In addition to this Bill there is also attached ^{to this Memorandum} a Bill to amend the Registration of Titles Ordinance (Chapter 142 of the Revised Edition) in order to provide for the Registration of Trusts under that Ordinance ^a matter which is at present in a state of doubt.

10. With regard to the Trusts of Land Bill, it will be seen that the greater part is little more than repetition from the English Acts. Part III, however, is original and requires particular attention, both in its substance and in the drafting. It is aimed against the creation or continuance of strict settlements of any kind and provides in effect that every settlement

must take the form of a trust for sale with the land and appropriate powers vested in trustees (not the tenant for life, as in a strict settlement) and the beneficial interests attaching to the proceeds of sale if and when effected.

11. While this may be regarded as a drastic departure from English Law it is noteworthy that no less an authority than Dr. Cheshire has suggested that much would be gained and little lost if settlors were required to create ^{the} trust for sale in all cases. (See page 708 of Cheshire on the Modern Real Property, 3rd Edition).

12. The Trusts of Land Bill has attached to it a Comparative Table showing the origin of the various Clauses, and a copy of the Bill, showing in red ink where the Clauses differ from the corresponding Clauses of the English Acts, is enclosed for facility of reference.

Nairobi,
31st May, 1958.

Therese White
ACTING ATTORNEY GENERAL.

COPY OF THE TRUSTS OF LAND BILL, 1938,
SHOWING IN RED INK WHERE THE CLAUSES
DIFFER FROM THE CORRESPONDING
CLAUSES OF THE ENGLISH
ACTS.

A Bill relating to Trusts of Land in the Colony

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

PART I

PRELIMINARY

1. This Ordinance may be cited as the Trusts of Land Ordinance, 1938. Short title.

2. In this Ordinance, unless the context otherwise requires— Definitions.

“building purposes” includes the erecting and the improving of, and the adding to, and the repairing of buildings; and a “building lease” is a lease for any building purpose or purposes connected therewith;

“Court” means His Majesty’s Supreme Court of Kenya;

“death duty” means duty leviable or payable on death under the provisions of the Estate Duty (Consolidation) Ordinance, 1926, or any Ordinance amending or replacing the same; No. 13 of 1926.

“disposition” and “conveyance” include a mortgage, charge, deposit of title deeds or other documents by way of security, lease, assent, disclaimer, release, and every other assurance or act or thing taking effect as an assurance of land or of an interest therein by any instrument, except a will; and “dispose of” and “convey” have corresponding meanings;

“instrument” does not include any Ordinance or Statute unless such Ordinance or Statute creates a settlement within the meaning of Part III of this Ordinance;

“land” includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings (whether the division is horizontal, vertical, or made in any other way) and other immovable property; also a rent, easement, right, privilege, or benefit in, over or derived from land, and any estate or interest in land;

"lease" includes an agreement for a lease;

"limitation" includes a trust; and "trust" includes an implied or constructive trust;

"mines and minerals" mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and "mining purposes" include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, and the erection of buildings, and the execution of engineering and other works suitable for those purposes; and a "mining lease" is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes;

"mortgage" includes any charge or lien on any land for securing money or money's worth; and "mortgage money" means money or money's-worth secured by a mortgage;

"movables" includes all property other than land;

"personal representative" means the executor or administrator for the time being of a deceased person, and where there are special personal representatives for any purpose means for such purpose those personal representatives;

"possession" includes receipt of rents and profits or the right to receive the same, if any; and "income" includes rents and profits;

"property" includes any thing in action, and any interest in property, movable or immovable;

"purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Ordinance and elsewhere where so expressly provided "purchaser" only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires "purchaser" includes an intending purchaser; "purchase" has a meaning corresponding with that of "purchaser"; and "valuable consideration" includes marriage but does not include a nominal consideration in money;

"rent" includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, "payment" includes delivery; and "fine" includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift;

"securities" include stocks, funds, and shares;

"trust corporation" includes the Public Trustee, and any other person holding any other official position prescribed by the Governor, and any corporation appointed by the Court in any particular case to be a trustee or which is for the time being a trust corporation within the meaning of the Corporations (Probate and Administration) Ordinance, 1931, as amended by the Corporations (Probate and Administration) (Amendment) Ordinance, 1931, and, in relation to the property of a bankrupt and property subject to a deed or arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the Colony which satisfies the Governor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits among any of its members, and is authorized by him to act in relation to such trusts as a trust corporation;

"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 a power at discretion to postpone the sale; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion;

"will" includes a codicil.

8. (1) A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears. Power to postpone sale.

(2) Where there is a power to postpone the sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust for sale) the trustees for sale

shall not be liable in any way for postponing the sale, in the exercise of their discretion, for any indefinite period; nor shall a purchaser be concerned in any case with any directions respecting the postponement of a sale.

(3) The foregoing provisions of this section apply whether the trust for sale is created before or after the commencement or by virtue of this Ordinance:

(4) Where a disposition or settlement coming into operation after the commencement of this Ordinance contains a trust either to retain or to sell land the same shall be construed as a trust to sell the land with power to postpone the sale.

Duration of trusts for sale.

4. (1) Where land has, either before or after the commencement or by virtue of this Ordinance, become subject to an express or implied or statutory trust for sale, such trust shall, so far as regards the safety and protection of any purchaser thereunder, be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

(2) This section applies to sales whether made before or after the commencement of this Ordinance, but operates without prejudice to an order of any court restraining a sale.

Appointment of new trustees for sale of land.

5. (1) The persons having power to appoint new trustees of land held upon trust for sale shall be 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 shall not be concerned to see whether the proper persons are appointed to be trustees of such land.

(2) This section applies whether the trust for sale or the settlement of the proceeds of sale comes into operation before or after the commencement or by virtue of this Ordinance.

Consent to the execution of a trust for sale.

6. (1) If the consent of more than two persons is by the disposition made requisite to the execution of a trust for sale of land, then, in favour of a purchaser, the consent of any two of such persons to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient.

(2) Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not *sui juris* or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust or the exercise of the

power; but the trustees shall, in any such case, obtain the separate consent of the parental or testamentary or other guardian of an infant or of the person (if any) legally entrusted with the custody or curatorship of the property and affairs of a lunatic.

(3) The trustees for sale shall, as far as practicable, give effect to the wishes of the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, or, in case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that such wishes are complied with.

7. (1) A purchaser of land from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of such land (whether made to attach to such proceeds by virtue of this Ordinance or otherwise), or affecting the rents and profits of such land until sale, whether or not those trusts are declared by the same instrument by or which, or by any instrument consequent upon which, the trust for sale is created.

Purchaser not concerned with trusts of proceeds of sale if paid to two or more trustees or to a trust corporation.

(2) Notwithstanding anything to the contrary in the instrument (if any) by or consequent upon which a trust for sale of land is created or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not 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, but this sub-section does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.

PART II

IMPLIED TRUSTS FOR SALE

8. (1) Where any land, vested in trustees by way of security, becomes, by virtue of any Ordinance relating to limitation of suits, or of an order for foreclosure, or of a purchase from or release by the person for the time being having the right of redemption, or otherwise, discharged from the right of redemption, it shall be held by them upon trust for sale.

Trust for sale of mortgaged property where right of redemption is barred

(2) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable; but this sub-section operates without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman.

(3) This section does not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or in accordance with his directions.

(4) This section applies whether the right of redemption was discharged before or after the commencement of this Ordinance, but has effect without prejudice to any dealings or arrangements made before such commencement.

Trust for sale
in settlement
of movables

9. (1) Where a settlement of movable property or of land held upon trust for sale contains a power, or where the trustees of any such settlement are empowered by law, to invest money in the purchase of land, such land shall be held by the trustees upon trust for sale, and the net rents and profits until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase-money would be payable or applicable if a sale had been made and the proceeds had been duly invested in movable property.

(2) This section applies to all settlements (including wills) whether created before or after the commencement of this Ordinance.

PART III

STATUTORY TRUSTS FOR SALE

What constitutes
settled land.

10. Any land which, at the commencement of this Ordinance, stands, or which, after the commencement of this Ordinance, under or by virtue of any deed, will, agreement, Ordinance, or other instrument, or any number of instruments, is or becomes, or purports to be or become—

- (i) limited to or in trust for any persons by way of succession; or
- (ii) limited to or in trust for any person in possession for any estate or interest subject to a limitation, gift, or disposition over on failure of his issue or in any other event; or

(iii) limited to or in trust for any person for any estate contingent on the happening of any event; or

(iv) limited to or in trust of any person under the age of majority for any estate; or

(v) limited to or in trust for a married woman of the age of majority in possession for any estate with a restraint on anticipation; or

(vi) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rent charge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same,

shall be deemed to be settled land for the purposes of this Ordinance and the deed, will, agreement, Ordinance, or other instrument or instruments (whether made or passed before or after, or partly before and partly after, the commencement of this Ordinance) under or by virtue of which the same stands or is or becomes or purports to be or become so limited or charged is in this Ordinance referred to as a settlement, or as the settlement, as the same requires.

11. (1) Where, at the commencement of this Ordinance, settled land is vested either wholly or partially in any trustee or trustees for all or any of the purposes of the settlement, the same shall, as from the commencement of this Ordinance, vest solely in such trustee or trustees to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

Transitional
provisions
converting
settlements into
trusts for sale.

(2) Where, at the commencement of this Ordinance, settled land stands vested in any person or persons solely as beneficiary or beneficiaries under or by virtue of the settlement, and not in any collateral capacity as trustee or trustees for the purposes of the settlement, the same shall, as from the commencement of this Ordinance, vest solely and absolutely in the person, or in all the persons if more than one, being of the age of majority and having any beneficial interest, whether in possession or in remainder or expectant or contingent, and not being subject to a restraint on anticipation,

NEW

under or by virtue of the settlement, to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

Attempted settlement constitutes trust for sale

12. (1) Where, by any settlement first taking effect or purporting to take effect after the commencement of this Ordinance, the settled land the subject thereof becomes vested or held, or would but for the provisions of this Ordinance become vested or held, either wholly or partially in or by any trustee or trustees for all or any of the purposes of the settlement, such settled land shall thereupon and thereby vest solely in such trustee or trustees to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

NW

(2) Where, by any settlement first taking effect or purporting to take effect after the commencement of this Ordinance, the settled land the subject thereof becomes vested or held, or would but for the provisions of this Ordinance become vested or held, in or by any person or persons solely as beneficiary or beneficiaries under or by virtue of such settlement, and not in any collateral capacity as trustee or trustees for the purposes of such settlement, such settled land shall thereupon and thereby vest solely and absolutely in the person, or in all the persons if more than one, being of the age of majority and having any beneficial interest, whether in possession or in remainder or expectant or contingent, and not being subject to a restraint on anticipation, under or by virtue of such settlement, to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

Infants cannot hold settled lands

13. (1) Where, at the commencement of this Ordinance, settled land stands vested solely in one or more persons who is or all of whom either are under the age of majority or, being of the age of majority, hold subject to a restraint on anticipation, the same shall, as from the commencement of this Ordinance, vest solely and absolutely in the Public Trustee and be held by him upon trust for sale.

NW but 4. 1. 26 S L A

(2) Where, by any settlement first taking effect or purporting to take effect after the commencement of this Ordinance, the settled land the subject thereof would but for the provisions of this Ordinance become vested solely in one or more persons who is or all of whom either are, at the time of such taking effect or purported taking effect, under the age of majority or, being of the age of majority, would hold subject to a restraint on anticipation, such settlement shall not operate

in any wise to transfer such settled land, but shall take effect merely as an agreement binding all the parties who are bound by such settlement forthwith to convey, assign or otherwise transfer such settled land to two or more persons of the age of majority upon trust for sale.

Application of rents and profits pending exercise of statutory trust for sale.

NW but 4. 1. 32 S L A

14. The net rents and profits until sale of any settled land in respect of which a trust for sale is constituted by any of the provisions of this Part, after keeping down costs of repairs and other outgoings, shall be paid or applied in like manner as the same would for the time being have been paid or applied if no such trust for sale had been constituted and all the provisions of the settlement had been permitted to take effect.

Devolution of proceeds of statutory trust for sale and income therefrom.

15. (1) Capital money arising under this Ordinance by exercise of a trust for sale constituted in respect of settled land by any of the provisions of this Part, while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises, would have been held and have gone under the settlement if such settled land had not been disposed of and all the provisions of the settlement had been permitted to take effect.

(2) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

Extent of application of this Part.

16. (1) The provisions of this Part apply to all settled land, and to every settlement whether made or arising before or after the commencement of this Ordinance.

(2) In case of conflict between the provisions of a settlement and the provisions of this Part or of this Ordinance generally relative to any vesting of the settled land the subject thereof, or to any matter in respect whereof the person or persons in whom for the time being such settled land is vested upon trust for sale under or pursuant to the provisions of this Ordinance exercises or contracts or intends to exercise any power as such under this Ordinance, the provisions of this Part or of this Ordinance generally (as the case may be) shall prevail; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation

or appointment) relating to the settled land thereby conferred upon any beneficiary or beneficiaries under the settlement or other persons exercisable for any purpose, whether or not provided for in this Ordinance, shall, after the commencement of this Ordinance, be exercisable by the person or persons in whom for the time being such settled land is vested upon trust for sale as aforesaid, as if it were an additional power conferred on such person or persons and not otherwise.

PART IV

POWERS OF TRUSTEES FOR SALE

Powers of sale and exchange

17. Trustees for sale of land—

(i) may sell such land or any part thereof or any easement, right or privilege over or in relation to such land; and

(ii) may make an exchange of such land, or any part thereof, or of any easement, right, or privilege of any kind, whether or not newly created, over or in relation to such land, or any part thereof, for other land, or for any easement, right or privilege of any kind, whether or not newly created, over or in relation to other land, including an exchange in consideration of money paid for equality of exchange: Provided that—

(a) every exchange shall be made for the best consideration in land or in land and money that can reasonably be obtained; and

(b) an exchange may be made subject to any stipulations respecting title, or evidence of title, or other things.

Leasing powers

18. (1) Trustees for sale of land may lease such land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, provided that save as hereinafter provided every lease—

(i) shall be by formal lease or demise, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;

(ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine or premium taken, and to any money laid out or to be laid out for the benefit of such land, and generally to the circumstances of the case;

(iii) shall contain a covenant or agreement by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(2) A counterpart of every lease shall be executed by the lessee and delivered to the trustees for sale, of which execution and delivery the execution of the lease by the trustees for sale shall be sufficient evidence.

(3) A statement, contained in a lease or in an indorsement thereon, signed by the trustees for sale, respecting any matter of fact or of calculation under this Ordinance in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

(4) A fine or premium received on the grant of a lease under any power conferred by this Part shall be deemed to be capital money arising by exercise of the trust for sale.

(5) A tenancy at the best rent that can reasonably be obtained without fine or premium, and whereby the tenant is not exempted from punishment for waste, may, subject to the provisions of any other law for the time being in force, be granted for a term not exceeding three years from the date of the writing by any writing under hand only containing an agreement instead of a covenant by the tenant for the payment of rent.

19. The leasing power of trustees for sale extends to the making of—

Leases on special subjects

(i) a lease for giving effect (in such manner and so far as the law permits) to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the land held upon trust for sale; and

(ii) a lease for confirming, as far as may be, a previous lease being void or voidable, but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under this Ordinance or otherwise, as the case may require.

Power on dispositions to impose restrictions and make reservations and stipulations.

20. (1) On a sale or other disposition or dealing by trustees for sale under the powers conferred by this Part—

- (a) any easement, right, or privilege of any kind may be reserved or granted over or in relation to such land or any part thereof or other land, including the land disposed of, and, in the case of an exchange, the land taken in exchange, and
- (b) any restriction with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed and made binding, as far as the law permits, by covenant, condition or otherwise, on the trustees for sale and the land held or acquired by them or any part thereof, or on the other party and any land disposed of to him; and
- (c) the whole or any part of any capital or annual sum (and in the case of an annual sum whether temporary or perpetual) charged on or payable out of the land disposed of, or any part thereof, and other land subject to the trust for sale, may as between the trustees for sale and the persons beneficially entitled to the net proceeds (but without prejudice to the rights of the person entitled to such capital or annual sum) be charged exclusively on the land disposed of, or any part thereof, or such other land as aforesaid, or any part thereof, in exoneration of the rest of the land on or out of which such capital or annual sum is charged or payable.

(2) A sale of land may be made subject to a stipulation that all or any of the timber and other trees, underwood, saplings, and plantations on the land sold or any articles attached to the land shall be taken by the purchaser at a valuation, and the amount of the valuation shall form part of the price of the land, and shall be capital money accordingly.

Separate dealing with surface and minerals

21. A sale, exchange, lease or other authorized disposition, may (in such manner and so far as the law permits) be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, ease-

ments, rights, and privileges for or incident to or connected with mining purposes, in relation to the land held or acquired by the trustees for sale, or any part thereof, or any other land.

22. (1) Trustees for sale of land may at any time, either with or without consideration, grant by writing an option to purchase or take a lease of such land, or any part thereof, or any easement, right, or privilege over or in relation to the same at a price or rent either fixed at the time of granting the option, or to be fixed at or before exercise of the option in some manner prescribed at the time of granting the option.

Powers to grant options.

(2) Every such option shall be made exercisable within an agreed number of years not exceeding ten.

(3) The price or rent shall be the best which, having regard to all the circumstances, can reasonably be obtained.

(4) An option to take a mining lease may be coupled with the grant of a licence to search for and prove any mines or minerals under the land the subject of the trust for sale, or any part thereof, pending the exercise of the option.

(5) The consideration for the grant of the option shall be deemed to be capital money arising by exercise of the trust for sale.

23. (1) Trustees for sale of land may accept, with or without consideration, a surrender of any lease of such land, whether made under this Ordinance or not, or a regrant of any land granted in fee simple, whether under this Ordinance or not, in respect of the whole land leased or granted, or any part thereof, with or without an exception of all or any of the mines or minerals therein, or in respect of mines and minerals, or any of them, and with or without an exception of any easement, right, or privilege of any kind over or in relation to the land surrendered or regranted.

Surrenders and regrants.

(2) On a surrender of a lease or a regrant of land granted in fee simple in respect of part only of the land or mines and minerals leased or granted the rent or rent charge may be apportioned.

(3) On a surrender or regrant, the trustees for sale may in relation to the land or mines and minerals surrendered or regranted, or of any part thereof, make a new or other lease, or grant in fee simple, or new or other leases, or grants in fee simple, in lots.

(4) A new or other lease, or grant in fee simple, may comprise additional land or mines and minerals, and may reserve any apportioned or other rent, or rent charge.

(5) On a surrender or regrant, and the making of a new or other lease, whether for the same or for any extended or other term, or of a new or other grant in fee simple, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's or grantee's interest in the lease surrendered, or the land regrant, may be taken into account in the determination of the amount of the rent or rent charge to be reserved, and of any fine or consideration in money to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease, or grant in fee simple.

(6) Every new or other lease, or grant in fee simple, shall be in conformity with this Ordinance.

(7) All money, not being rent, or a rent charge, received on the exercise by the trustees for sale of the powers conferred by this section, shall, unless the Court, on an application made within six months after the receipt thereof or within such further time as the court may in special circumstances allow, otherwise directs, be deemed to be capital money arising by exercise of the trust for sale.

(8) In this section "land granted in fee simple" means land so granted with or subject to a reservation thereof of a perpetual or terminable rent charge which is or forms part of the land held upon trust for sale, and "grant in fee simple" has a corresponding meaning.

24. (1) Trustees for sale of land may accept a lease of any land, or of any mines and minerals, or of any easement, right, or privilege, convenient to be held or worked with or annexed in enjoyment to the land held upon trust for sale, or any part thereof, for such period and upon such terms and conditions, as the trustees for sale think fit:

Provided that no fine shall be paid out of capital money in respect of such lease.

(2) The lease may contain an option to purchase the reversion expectant on the term thereby granted.

25. (1) Trustees for sale of land may, either with or without giving or taking any consideration in money or otherwise, compromise, compound, abandon, submit to arbitration, or otherwise settle any claim, dispute, or question whatsoever

Acceptance of
leases

Power to
compromise
claims and
release
restrictions

relating to such land, or any part thereof, including in particular claims, disputes or questions as to boundaries, the ownership of mines and minerals, rights and powers of working mines and minerals, local laws and customs relative to the working of mines and minerals and other matters, easements, and restrictive covenants, and for any of those purposes may enter into, give, execute, and do such agreements, assurances, releases, and other things as the trustees for sale may think proper.

(2) Trustees for sale of land, at any time, by deed or writing, either with or without consideration in money or otherwise, release, waive, or modify, or agree to release, waive, or modify any covenant, agreement, or restriction imposed on any other land for the benefit of the land held upon trust for sale, or any part thereof, or release, or agree to release, any other land from any easement, right or privilege, including a right of pre-emption, affecting the same for the benefit of the land held upon trust for sale, or any part thereof.

26. Trustees for sale of land may at any time, by deed or writing, either with or without consideration in money or otherwise, vary, release, waive, or modify, either absolutely or otherwise, the terms of any lease whenever made of the land held upon trust for sale or any part thereof or any covenants or conditions contained in any grant in fee simple whenever made of land with or subject to a reservation thereof of a rent which is or forms part of the land held upon trust for sale, and in either case in respect of the whole or any part of the land comprised in any such lease or grant but so that every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Ordinance if the lease had been surrendered or the land comprised in the grant had never been so comprised or had been regrant.

Power to vary
leases and give
licences and
consents.

27. (1) Trustees for sale of land may at any time, by deed or writing, either with or without consideration in money or otherwise, agree for the apportionment of any rent reserved or created by any such lease or grant as mentioned in the last preceding section, or any rent being or forming part of the land held upon trust for sale, so that the apportioned parts of such rent shall thenceforth be payable exclusively out of or in respect of such respective portions of the land subject thereto as may be thought proper, and also agree that any covenants, agreements, powers, or remedies for

Power to
apportion rents.

securing such rent and any other covenants or agreements by the lessee or grantee and any conditions shall also be apportioned and made applicable exclusively to the respective portions of the land out of or in respect of which the apportioned parts of such rent shall thenceforth be payable.

(2) Where the land held upon trust for sale, or any part thereof, is held or derived under a lease, or under a grant reserving rent, or subject to covenants, agreements or conditions, whether such lease or grant comprises other land or not, the trustees for sale may at any time, by deed or writing, with or without giving or taking any consideration in money or otherwise, procure the variation, release, waiver, or modification, either absolutely or otherwise, of the terms, covenants, agreements, or conditions contained in such lease or grant, in respect of the whole or any part of such land, including the apportionment of any rent, covenants, agreements, conditions, and provisions, reserved, or created by, or contained in, such lease or grant.

(3) This section applies to leases or grants made either before or after the commencement of this Ordinance

Provisions as to consideration

28. (1) All money, not being rent, payable by the trustees for sale in respect of any transaction to which any of the three last preceding sections relates shall be paid out of capital money arising by exercise of the trust for sale, or subject to the same trust and all money, not being rent, received on the exercise by the trustees for sale of the powers conferred by any of those sections, shall, unless the Court, on an application made within six months after the receipt thereof or within such further time as the Court may in special circumstances allow, otherwise directs be deemed to be capital money arising by exercise of the trust for sale.

(2) For the purpose of the three last preceding sections "consideration in money or otherwise" means—

- (a) a capital sum of money or a rent;
- (b) land being freehold or leasehold for any term of years whereof not less than forty years shall be unexpired;
- (c) any easement, right or privilege over or in relation to the land held upon trust for sale, or any part thereof, or any other land;
- (d) the benefit of any restrictive covenant or condition; and

(e) the release of the land held upon trust for sale, or any part thereof, or any other land, from any easement, right or privilege, including a right of pre-emption, or from the burden of any restrictive covenant or condition affecting the same.

29. (1) Where there is on any land held upon trust for sale timber ripe and fit for cutting, the trustees for sale may cut and sell that timber, or any part thereof.

Cutting and sale of timber and capitalization of part of proceeds.

(2) Three-fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising by exercise of the trust for sale, and the other fourth part shall go as rents and profits.

30. Where there is an incumbrance affecting any part of the land held upon trust for sale (whether capable of being over-reached on the exercise by the trustees for sale of their powers under this Ordinance or not), the trustees for sale, with the consent of the incumbrancer, may charge that incumbrance on any other part of such land, or on all or any part of the capital money or securities representing capital money subject, or to become subject, to the same trusts as capital money arising by exercise of the trust for sale, whether already charged therewith or not, in exoneration of the first mentioned part, and by a legal mortgage, charge, or otherwise, make provision accordingly.

Shifting of incumbrances.

31. (1) Where an incumbrance affects any part of the land held upon trust for sale, the trustees for sale may, with the consent of the incumbrancer, vary the rate of interest charged and any of the other provisions of the instrument, if any, creating the incumbrance, and with the like consent charge that incumbrance on any part of such land, whether already charged therewith or not, or on all or any part of the capital money or securities representing capital money subject, or to become subject, to the same trusts as capital money arising by exercise of the trust for sale, by way of additional security, or of consolidation of securities, and by a legal mortgage charge or otherwise, make provision accordingly.

Power to vary provision of an incumbrance and to charge by way of additional security

(2) "Incumbrance" in this section includes any annual sum payable during a life or lives or during a term of years absolute or determinable, but in any such case an additional security shall be effected so as only to create a charge or security similar to the original charge or security.

Power to raise money by mortgage or charge.

32. (1) Where money is required for any of the following purposes namely—

- (i) discharging an incumbrance on the land held upon trust for sale or part thereof;
- (ii) paying for any improvement authorized by this Ordinance or by the instrument, if any, creating the trust for sale;
- (iii) equality of exchange;
- (iv) payment of the costs of any transaction authorized by this section or either of the two last preceding sections.

the trustees for sale may raise the money so required, on the security of such land or any part thereof, by legal mortgage or charge, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2) "Incumbrance" in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

General powers of management, etc.

33. Trustees for sale of land may at any time or times, in addition to the special powers by this Part hereinbefore conferred, enter into and continue in possession of such land and manage or superintend the management thereof, with full power—

- (a) to fell timber or cut underwood from time to time in the usual course for repairs or otherwise; and
- (b) to erect, pull down, rebuild, and repair houses, and other buildings and erections; and
- (c) to cultivate, manure, plant, clean, till, sow, or otherwise farm such land according to the best methods of husbandry practised in the neighbourhood, including power to change the course of husbandry; and
- (d) to continue the working of mines, minerals, and quarries which have usually been worked; and
- (e) to drain or otherwise improve such land or any part thereof; and
- (f) to make allowances to and arrangements with tenants and others; and
- (g) to determine tenancies, and to accept surrenders of leases and tenancies; and

(h) to insure against loss or damage by fire or earthquake; and

(i) generally to deal with such land in a proper and due course of management.

(2) Trustees for sale of land may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, notwithstanding that power may be conferred by this Ordinance to apply capital moneys for all or any of such purposes, pay the expenses incurred in the management, or in the exercise of any power conferred by this Part, or otherwise in relation to such land, and all outgoing not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on such land.

Completion of transactions.

34. (1) On a sale, exchange, lease, mortgage, charge, or other disposition, trustees for sale of land may, as regards such land sold, given in exchange, leased, mortgaged, charged, or otherwise disposed of, or intended so to be, or, as regards easements or other rights or privileges sold, given in exchange, leased, mortgaged, charged or otherwise disposed of or intended so to be, effect the transaction by deed or writing to the extent of the estate or interest held upon trust for sale or any less estate or interest, in the manner requisite for giving effect to the sale, exchange, lease, mortgage, charge, or other disposition.

(2) Such a deed or writing, as the case may be, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Ordinance, is effectual to pass the land conveyed or transferred, or the easements, rights, privileges, or other interests created, discharged from all the limitations, powers, and provisions of the instrument, if any, creating the trust for sale, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

- (i) all rights, titles, and interests of whatsoever nature or kind having priority to the beneficial interests in the capital money arising by exercise of the trust for sale and the income thereof; and
- (ii) all mortgages, charges and liens which have been created or taken effect for securing money actually raised at the date of such deed or writing; and

(iii) all leases, all grants of easements, and all other rights or privileges which were before the date of such deed or writing granted or made for value in money or money's worth, or agreed so to be, by the trustees for sale, or are at that date otherwise binding on the successors in title of the trustees for sale.

Delegation of powers by trustees

35. (1) The powers of and incidental to leasing, accepting surrenders of leases, and management, conferred on trustees for sale of land, whether by this Ordinance or otherwise, may, until sale of such land, be revocably delegated from time to time by writing, signed by them, 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 such land during his life or for any less period: and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.

(2) Any power so delegated shall be exercised only in the names and on behalf of the trustees for sale delegating the power.

(3) The trustees for sale delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee.

General power to effect any transaction under order of court

36. (1) Any transaction affecting or concerning land held upon trust for sale, or any part thereof, or any other land (not being a transaction otherwise authorized by this Ordinance, or by the instrument, if any, creating the trust for sale) which in the opinion of the Court would be for the benefit of the land held upon trust for sale, or any part thereof, or the persons interested under the trust for sale, may, under an order of the Court, be effected by trustees for sale, if it is one which could have been validly effected by an absolute owner.

(2) In this section "transaction" includes any sale, exchange, assurance, grant, mortgage, lien, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or

option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing or arrangement, but does not include an application of capital money in payment for any improvement not authorized by this Ordinance, or by the instrument, if any, creating the trust for sale; and "effected" has the meaning appropriate to the particular transaction, and the references to land include references to restrictions and burdens affecting land.

37. (1) The provisions of this Part, other than the last preceding section, apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust for sale, and have effect subject to the terms of that instrument and to the provisions therein contained.

Extent of application of this Part and saving for additional or larger powers.

(2) In the case of conflict between the provisions of the last preceding section and the provisions of the instrument, if any, creating the trust for sale, the provisions of the last preceding section shall prevail.

(3) Nothing in this Ordinance shall preclude or affect the conferring on trustees for sale of land by the instrument, if any, creating the trust for sale, or by any supplemental instrument (if and so far as the same might otherwise be effectual) whether made before or after the commencement of this Ordinance of any powers additional to or larger than those conferred by this Ordinance; and any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Ordinance, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Ordinance.

PART V

INVESTMENT OR OTHER APPLICATION OF CAPITAL MONEY

38. Capital money arising by exercise of a trust for sale of land, subject to payment of claims properly payable thereout and to the application thereof for any special authorized object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):—

Mode of investment or application.

(i) In investment in securities or other properties or investments in which the trustees for sale are by the instrument, if any, creating the trust for sale or by law authorized to invest moneys arising by

exercise of the trust for sale, with power to vary the investment into or for any other such securities, properties or investments.

- (ii) In discharge, purchase, or redemption of incumbrances affecting all or any part of the estate subject to the same trusts as capital money arising by exercise of the trust for sale, or rents, or rent charges, charged on or payable out of such estate, or any part thereof
- (iii) In payment for any improvement authorized by this Ordinance
- (iv) In payment for equality of exchange of any land held subject to the trusts for sale.
- (v) In the purchase, with the leave of the Court, of any leasehold interest where the immediate reversion is held subject to the trust for sale, so as to merge the leasehold interest (unless the Court otherwise directs) in the reversion, and notwithstanding that the leasehold interest may have less than forty years to run.
- (vi) In payment of the costs and expenses of all plans, surveys, and schemes, including schemes under the Town Planning and Development Ordinance, 1931, or any similar enactment, made with a view to, or in connexion with the improvement or development of the land held upon trust for sale, or any part thereof, or the exercise of any statutory powers, and of all negotiations entered into by the trustees for sale with a view to the exercise of any of the said powers, notwithstanding that such negotiations may prove abortive, and in payment of the costs and expenses of opposing any such proposed scheme as aforesaid affecting the land held upon trust for sale, whether or not the scheme is made.
- (vii) In payment to a local or other authority of such sum as may be agreed in consideration of such authority taking over and becoming liable to repair a private road on the land held upon trust for sale or a road for maintenance whereof the trustees for sale are liable *ratione tenurae*, or any sum which may otherwise become lawfully payable by the trustees for sale to such local or other authority in respect of the making up, taking over, or maintenance of any road or street.

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- (viii) In financing any person who may have agreed to take a lease or grant for building purposes of the land held upon trust for sale, or any part thereof, by making advances to him in the usual manner upon the security of a legal or equitable mortgage or charge of his building agreement.
- (ix) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge.
- (x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Ordinance, including the costs and expenses incidental to any of the matters referred to in this section.
- (xi) In any other mode authorized by the instrument, if any, creating the trust for sale.

39. Where capital money arising by exercise of a trust for sale of land, or deemed to be capital money so arising, is purchase-money paid in respect of—

Application of money paid for lease or reversion.

- (a) a lease for years; or
- (b) any other estate or interest in land less than the fee simple; or
- (c) a reversion dependent on any such lease, estate, or interest.

the trustees for sale or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Ordinance, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees for sale or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest or reversion in respect whereof the money was paid, or as near thereto as may be.

40. (1) Money, not being rent, received by way of damages or compensation for breach of any covenant by a lessee or grantee contained in any lease or grant of land held upon trust for sale shall, unless in any case the Court on the application of any party interested otherwise directs, be deemed to be capital money arising by exercise of the trust for sale, and paid to or retained by the trustees for sale, or paid into Court, and invested or applied, accordingly.

As to money received by way of damages for breach of covenant.

(2) In addition to the other modes in which capital money may be applied under this Ordinance or the instrument, if any, creating the trust for sale, money so received as aforesaid or any part thereof may, if the circumstances permit, be applied at any time within twelve months after such receipt, or such extended period as the Court may allow, in or towards payment of the costs of making good in whole or in part the breach of covenant in respect of which it was so received, or the consequences thereof, and the trustees for sale, if they think fit, may cause or require any money so received or any part thereof to be so applied.

(3) In the application of any such money in or towards payment of the cost of making good any such breach or the consequences of any such breach as aforesaid, the work required to be done for the purpose shall be deemed to be an improvement authorized by Part I of the Schedule to this Ordinance.

(4) This section does not apply to money received by way of damages or compensation for the breach of a covenant to repay to the lessor or grantor money laid out or expended by him, or to any case in which if the money received were applied in making good the breach of covenant or the consequences thereof such application would not enure to the benefit of the land held upon trust for sale, or any buildings thereon.

(5) This section does not apply to money received by way of damages or compensation before the commencement of this Ordinance, but it applies whether the lease or grant was made before or after the commencement of this Ordinance.

41. Where, under an Ordinance, or under any order or scheme confirmed by or having the force of an Ordinance, relating to the compulsory acquisition of land, or under any Ordinance, whether public or private, money is at the commencement of this Ordinance in any court, or is afterwards paid into any court, and is liable to be laid out in the purchase of land to be made subject to a settlement or trust for sale, then, in addition to any mode of dealing therewith authorized by the Ordinance under which the money is in such court, that money may be invested or applied as capital money arising by exercise of a trust for sale of land, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and notwithstanding anything in this Ordinance according to the same procedure, as if the modes

Application of money in court, and derived from compulsorily acquired land.

of investment or application authorized by this Ordinance were authorized by the Ordinance under which the money is in such court.

42. Where, under any instrument coming into operation either before or after the commencement of this Ordinance money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the trusts declared by that instrument, then, in addition to such powers of dealing therewith as the trustees have independently of this Ordinance, they may, at their option, invest or apply the money as if it were capital money arising by exercise of a trust for sale of land.

Application of money in hands of trustees under powers of settlements.

43. (1) Where money or securities or the proceeds of sale of any property is or are by any instrument coming into operation either before or after the commencement of this Ordinance directed to be held on trusts declared by reference to capital money arising by exercise of a trust for sale of land constituted by that instrument or by any other instrument, the money securities or proceeds shall be held on the like trusts as if the same had been or represented money which had actually arisen by exercise of such trust for sale.

Provision as to movables settled by reference to capital money or on trusts corresponding with the limitations of land.

(2) Where money or securities or the proceeds of sale of any property is or are by any instrument coming into operation either before or after the commencement of this Ordinance directed to be held on the same trusts as, or on trusts corresponding as nearly as may be with the limitations of land settled or purporting to be settled or made subject to a trust for sale by that instrument or any other instrument, the money, securities or proceeds shall be held on the like trusts as if the same had been or represented capital money arising by exercise of a trust for sale of such land.

(3) Such money, securities, or proceeds of sale shall be paid or transferred to or retained by the trustees for sale of such land, or paid or transferred into court, and invested or applied accordingly.

(4) This section shall operate without prejudice to the rights of any person claiming under a disposition, for valuable consideration, made before the commencement of this Ordinance of any such money, securities or proceeds, as are referred to in this section.

Extent of application of this Part.

44. The provisions of this Part apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust for sale, and shall have effect subject to the terms of such instrument, and to any provisions therein contained.

PART VI

IMPROVEMENTS

Description of improvements authorized by the Ordinance

45. Improvements authorized by this Ordinance are the making or execution on, or in connexion with, and for the benefit of land held upon trust for sale, of any of the works mentioned in the Schedule to this Ordinance, or of any works for any of the purposes mentioned in that Schedule, and any operations incident to or necessary or proper in the execution or proper in the execution of any of those works or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes.

Mode of application of capital money

46. (1) Capital money arising by exercise of a trust for sale of land, or deemed to be capital money so arising, may be applied in or towards payment for any improvement authorized by this Ordinance or by the instrument, if any, creating the trust for sale, without any scheme for the execution of the improvement being first submitted for approval to, or approved by, the beneficiaries or any of them, or the Court.

(2) Where the capital money to be expended is in the hands of the trustees for sale, they may apply that money in or towards payment for the whole or any part of any work or operation comprised in the improvement, on—

- (i) a certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees for sale as an authority and discharge for any payment made by them in pursuance thereof; or
- (ii) an order of the Court directing or authorizing the trustees for sale so to apply a specified portion of the capital money;

Provided that:—

(a) In the case of improvements not authorized by Part I of the Schedule to this Ordinance or by the instrument, if any, creating the trust for sale, the trustees for sale may, if they think fit, and shall if so directed by the Court, before they make any such application of capital money make provision that that money, or any part thereof, shall be repaid to or retained by them out of the income of the land held upon trust for sale by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed.

(b) No capital money shall be applied by the trustees for sale in payment for improvements not authorized by Parts I and II of the Schedule to this Ordinance, or by the instrument, if any, creating the trust for sale, except subject to provision for the repayment or retention thereof being made in manner mentioned in the preceding paragraph of this proviso.

(3) Where the capital money to be expended is in any court, such court may, if it thinks fit, on a report or certificate of a competent engineer or able practical surveyor approved by such court, or on such other evidence as such court may think sufficient, make such order and give such directions as it thinks fit for the application of the money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement.

(4) Where any court authorizes capital money to be applied in payment for any improvement or intended improvement not authorized by Part I of the Schedule to this Ordinance or by the instrument, if any, creating the trust for sale, such court, as a condition of making the order, may in any case require that the capital money or any part thereof, and shall as respects an improvement mentioned in Part III of that Schedule (unless the improvement is authorized by the instrument, if any, creating the trust for sale), require that the whole of the capital money shall be repaid to or retained by, the trustees for sale out of the income of the land held upon trust for sale by a fixed number of periodical instalments

to be paid or retained at the times appointed by such court, and may require that any incumbrancer of such income shall be served with notice of the proceedings.

(5) All money received by the trustees for sale in respect of any instalments under this section shall be held by them as capital money arising by exercise of the trust for sale, unless the Court otherwise directs.

47. The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by this Ordinance, whether executed before or after the commencement of this Ordinance notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval to the Court, and notwithstanding that no capital money is immediately available for the purpose.

48. The provisions of this Part apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust for sale, and shall have effect subject to the terms of such instrument, and to any provisions therein contained.

PART VII

GENERAL PROVISIONS AS TO TRUSTEES OF LAND

49. Subject as provided by sub-section (2) of section 7 the provisions of this Ordinance referring to trustees for sale of land apply to the surviving or continuing trustees or trustee for sale for the time being.

50. The receipt or direction in writing of or by the trustees for sale of land, or where a sole trustee for sale of land is a trust corporation or personal representative, or of by that trustee, or of or by the personal representative of the last surviving or continuing trustee for sale of land, for or relating to any money or securities, paid or transferred to or by the direction of the trustees, trustee, or representatives, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Ordinance, or that no more than is wanted is raised.

51. Each person who is for the time being a trustee for sale of land is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and

Court may order payment for improvements executed.

Extent of application of this Part.

Surviving or continuing trustees can act.

Trustee's receipts.

Protection of each trustee individually.

in respect of his own acts, receipts and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

52. Trustees for sale of land, personal representatives, or other persons who have in good faith, pursuant to a trust for sale of land or this Ordinance, executed a conveyance, transfer, assent, assignment, or other disposition of the land held upon trust for sale, or a deed of discharge of trustees, shall be absolutely discharged from all liability in respect of the equitable interests and powers taking effect under the settlement (if any) constituting the trust for sale, and shall be entitled to be kept indemnified at the cost of the trust estate from all liabilities affecting the land held upon trust for sale, but the person to whom the land held upon trust is conveyed, transferred, assigned, or otherwise disposed of (not being a purchaser taking free therefrom) shall hold such land upon the trusts (if any) affecting the same.

53. Trustees for sale of land may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

PART VIII

SUPPLEMENTARY PROVISIONS

54. (1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Ordinance a provision is inserted—

- (a) purporting or attempting, by way of direction, declaration, or otherwise, to forbid trustees for sale of land to exercise any power under this Ordinance herein expressed to be exercisable or impliedly conferred without regard to or notwithstanding the provisions of the instrument (if any) constituting the trust for sale; or
- (b) attempting, or tending, or intended, by a limitation, gift, or disposition over of land held upon trust for sale, or by a limitation, gift or disposition of other immovable or any movable property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent them from exercising, or to induce them to abstain

Indemnities to personal representatives and others.

Trustee's reimbursement.

Prohibition or limitation against exercise of powers void, and provision against forfeiture.

from exercising, or to put them into a position inconsistent with their exercising, any such power as aforesaid.

that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same.

(3) Notwithstanding anything in an instrument constituting a trust for sale of land or settlement, the exercise by a trustee for sale of any power under this Ordinance herein expressed to be exercisable or impliedly conferred without regard to or notwithstanding the provisions of such instrument or settlement shall not occasion a forfeiture.

Powers of Court where trustees for sale refuse to exercise powers

55. If trustees for sale of land refuse to sell or to exercise any of the powers conferred by this Ordinance, or any requisite consent cannot be obtained, any person interested may apply to the Court for a vesting order or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the Court may make such order as it thinks fit.

Application to personal representatives

56. The provisions of this Ordinance relating to trustees for sale of land apply to personal representatives holding land upon trust for sale, but without prejudice to their rights and powers for purposes of administration.

Power to make rules

57. The Court shall have power to make rules concerning the following matters—

- (a) the fees to be paid in respect of any registration or court proceedings, or to the Public Trustee in respect of the performance of any duties imposed or the exercise of any powers conferred upon him under or by virtue of any of the provisions of this Ordinance;
- (b) the procedure to be adopted in respect of any matters disputes or transactions arising under or by virtue of this Ordinance and not herein expressly provided for; and
- (c) generally for the better carrying into effect of the provisions of this Ordinance.

58. Nothing in this Ordinance contained shall in any way prejudice or affect the operation of the Registration of Titles Ordinance or any Ordinance from time to time amending or replacing the same and the provisions of this Ordinance shall in respect of land registered under the Registration of Titles Ordinance only take effect if and so far and in such manner as provided for by that Ordinance or so far as not inconsistent therewith.

SCHEDULE

PART I

Improvements, the Costs of which are not Liable to be Replaced by Instalments

- (i) Drainage, including the straightening, widening, or deepening of drains, streams and watercourses.
- (ii) Bridges.
- (iii) Irrigation and permanent measures for the prevention of soil erosion.
- (iv) Drains, pipes and machinery for supply and distribution of sewage as manure.
- (v) Embanking or weiring from a river or lake, or from the sea, or a tidal water.
- (vi) Groynes, sea walls; defences against water.
- (vii) Fencing; redivision of fields.
- (viii) Reclamation.
- (ix) Farm roads, private roads, roads or streets in villages or towns.
- (x) Clearing; cleaning; trenching; planting.
- (xi) Cottages, quarters, or huts for labourers, farm servants, and artisans, whether squatters or otherwise, and whether employed on the land held upon trust for sale or not.
- (xii) Farm houses, offices, and outbuildings, and other buildings for farm purposes, including siles, bomas, and cattle dips.
- (xiii) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the land held upon trust for sale for agricultural purposes or as woodland or otherwise.

(xiv) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption.

(xv) Tramways; railways; canals; docks.

(xvi) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes.

(xvii) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land.

(xviii) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid.

(xix) Trial pits for mines, and other preliminary works necessary or proper in connexion with the development of mines.

(xx) Reconstruction enlargement, or improvement of any of these works.

(xxi) The provision of small dwellings, either by means of building new buildings or by means of the reconstruction, enlargement, or improvement of existing buildings, if that provision of small dwellings is, in the opinion of the Court, not injurious to the land upon trust for sale.

(xxii) Additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.

(xxiii) Erection of buildings in substitution for buildings taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof.

(xxiv) The building of a permanent homestead on the land held upon trust for sale: Provided that the sum to be applied under this head shall not exceed one-half of the annual rental of the land held upon trust for sale.

PART II

Improvements, the Costs of which the Trustees for Sale or the Court may require to be repaid by Instalments out of Income

(i) Residential houses for land or mineral agents, managers, clerks, bailiffs, woodmen, and other persons employed on the land held upon trust for sale, or in connexion with the management for development thereof.

(ii) Any offices, workshops and other buildings of a permanent nature required in connexion with the management or development of the land held upon trust for sale or any part thereof.

(iii) The erection and building of dwelling houses, shops, electric light or power works, or any other works necessary or proper in connexion with the development of the land held upon trust for sale, or any part thereof as a building estate.

(iv) Restoration or reconstruction of buildings damaged or destroyed by dry rot or white ants.

(v) Structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let.

(vi) Boring for water and other preliminary works in connexion therewith.

PART III

Improvements, the Costs of which the Trustees for Sale and the Court must require to be repaid by Instalments out of Income

(i) Heating, hydraulic or electric power apparatus for buildings, and engines, pumps, lifts, rams, boilers, flues, and other works required or used in connexion therewith.

(ii) Engine house, engines, dynamos, accumulators, cables, pipes, wirings, switchboards, plant and other works required for the installation of electric or other artificial light, in connexion with any principal mansion house or other house or buildings, but not electric lamps or decorative fittings required in any such house or buildings.

(iii) Steam rollers, traction engines, motor lorries and movable machinery for farming or other purposes.

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COLONY AND PROTECTORATE OF KENYA



A BILL RELATING TO TRUSTS OF LAND
IN THE COLONY

A Bill relating to Trusts of Land in the Colony

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

PART I

PRELIMINARY

1. This Ordinance may be cited as the Trusts of Land Ordinance, 1938. Short title.

2. In this Ordinance, unless the context otherwise requires— Definitions.

"building purposes" includes the erecting and the improving of, and the adding to, and the repairing of buildings; and a "building lease" is a lease for any building purpose or purposes connected therewith;

"Court" means His Majesty's Supreme Court of Kenya.

"death duty" means duty leviable or payable on death under the provisions of the Estate Duty (Consolidation) Ordinance, 1926, or any Ordinance amending or replacing the same. No. 11 of 1926.

"disposition" and "conveyance" include a mortgage, charge, deposit of title deeds or other documents by way of security, lease, assent, disclaimer, release, and every other assurance or act or thing taking effect as an assurance of land or of an interest therein by any instrument, except a will; and "dispose of" and "convey" have corresponding meanings;

"instrument" does not include any Ordinance or Statute unless such Ordinance or Statute creates a settlement within the meaning of Part III of this Ordinance;

"land" includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings (whether the division is horizontal, vertical, or made in any other way) and other immovable property; also a rent, easement, right, privilege, or benefit in, over or derived from land, and any estate or interest in land;

"lease" includes an agreement for a lease;

"limitation" includes a trust; and "trust" includes an implied or constructive trust;

"mines and minerals" mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and "mining purposes" include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, and the erection of buildings, and the execution of engineering and other works suitable for those purposes; and a "mining lease" is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes;

"mortgage" includes any charge or lien on any land for securing money or money's worth; and "mortgage money" means money or money's worth secured by a mortgage;

"movables" includes all property other than land;

"personal representative" means the executor or administrator for the time being of a deceased person, and where there are special personal representatives for any purpose means for such purpose those personal representatives;

"possession" includes receipt of rents and profits or the right to receive the same, if any; and "income" includes rents and profits;

"property" includes any thing in action, and any interest in property, movable or immovable;

"purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Ordinance and elsewhere where so expressly provided "purchaser" only means a person who acquires an interest in or charge on property for money or money's worth, and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires "purchaser" includes an intending purchaser; "purchase" has a meaning corresponding with that of "purchaser"; and "valuable consideration" includes marriage but does not include a nominal consideration in money;

"rent" includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, "payment" includes delivery; and "fine" includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift;

"securities" include stocks, funds, and shares;

"trust corporation" includes the Public Trustee, and any other person holding any other official position prescribed by the Governor, and any corporation appointed by the Court in any particular case to be a trustee or which is for the time being a trust corporation within the meaning of the Corporations (Probate and Administration) Ordinance, 1931, as amended by the Corporations (Probate and Administration) (Amendment) Ordinance, 1931, and, in relation to the property of a bankrupt and property subject to a deed or arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the Colony which satisfies the Governor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof, by way of profits among any of its members, and is authorized by him to act in relation to such trusts as a trust corporation;

"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 a power at discretion to postpone the sale; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale; and "power to postpone a sale" means power to postpone in the exercise of a discretion;

"will" includes a codicil.

3. (1) A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears.

(2) Where there is a power to postpone the sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust for sale) the trustees for sale

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Power to
postpone sale

shall not be liable in any way for postponing the sale, in the exercise of their discretion, for any indefinite period; nor shall a purchaser be concerned in any case with any directions respecting the postponement of a sale.

(3) The foregoing provisions of this section apply whether the trust for sale is created before or after the commencement or by virtue of this Ordinance.

(4) Where a disposition or settlement coming into operation after the commencement of this Ordinance contains a trust either to retain or to sell land the same shall be construed as a trust to sell the land with power to postpone the sale.

Duration of trusts for sale.

4. (1) Where land has, either before or after the commencement or by virtue of this Ordinance, become subject to an express or implied or statutory trust for sale, such trust shall, so far as regards the safety and protection of any purchaser thereunder, be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

(2) This section applies to sales whether made before or after the commencement of this Ordinance, but operates without prejudice to an order of any court restraining a sale.

Appointment of new trustees for sale of land.

5. (1) The persons having power to appoint new trustees of land held upon trust for sale shall be 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 shall not be concerned to see whether the proper persons are appointed to be trustees of such land.

(2) This section applies whether the trust for sale or the settlement of the proceeds of sale comes into operation before or after the commencement or by virtue of this Ordinance.

Consents to the execution of a trust for sale.

6. (1) If the consent of more than two persons is by the disposition made requisite to the execution of a trust for sale of land, then, in favour of a purchaser, the consent of any two of such persons to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient.

(2) Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not *sui juris* or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust or the exercise of the

power; but the trustees shall, in any such case, obtain the separate consent of the parental or testamentary or other guardian of an infant or of the person (if any) legally entrusted with the custody or curatorship of the property and affairs of a lunatic.

(3) The trustees for sale shall, as far as practicable, give effect to the wishes of the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, or, in case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that such wishes are complied with.

7. (1) A purchaser of land from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of such land (whether made to attach to such proceeds by virtue of this Ordinance or otherwise), or affecting the rents and profits of such land until sale, whether or not those trusts are declared by the same instrument by or which, or by any instrument consequent upon which, the trust for sale is created.

Purchaser not concerned with trusts of proceeds of sale if paid to two or more trustees or to a trust corporation.

(2) Notwithstanding anything to the contrary in the instrument (if any) by or consequent upon which a trust for sale of land is created or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not 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, but this sub-section does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.

PART II

IMPLIED TRUSTS FOR SALE

8. (1) Where any land, vested in trustees by way of security, becomes, by virtue of any Ordinance relating to limitation of suits, or of an order for foreclosure, or of a purchase from or release by the person for the time being having the right of redemption, or otherwise, discharged from the right of redemption, it shall be held by them upon trust for sale.

Trust for sale of mortgaged property where right of redemption is barred.

(2) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable; but this sub-section operates without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman.

(3) This section does not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or in accordance with his directions.

(4) This section applies whether the right of redemption was discharged before or after the commencement of this Ordinance, but has effect without prejudice to any dealings or arrangements made before such commencement.

Trust for sale
in settlement
of movables.

9. (1) Where a settlement of movable property or of land held upon trust for sale contains a power, or where the trustees of any such settlement are empowered by law, to invest money in the purchase of land, such land shall be held by the trustees upon trust for sale; and the net rents and profits until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase-money would be payable or applicable if a sale had been made and the proceeds had been duly invested in movable property.

(2) This section applies to all settlements (including wills) whether created before or after the commencement of this Ordinance.

PART III

STATUTORY TRUSTS FOR SALE

What constitutes
settled land.

10. Any land which, at the commencement of this Ordinance, stands, or which, after the commencement of this Ordinance, under or by virtue of any deed, will, agreement, Ordinance, or other instrument, or any number of instruments, is or becomes, or purports to be or become—

- (i) limited to or in trust for any persons by way of succession; or
- (ii) limited to or in trust for any person in possession for any estate or interest subject to a limitation, gift, or disposition over on failure of his issue or in any other event; or

(iii) limited to or in trust for any person for any estate contingent on the happening of any event; or

(iv) limited to or in trust of any person under the age of majority for any estate; or

(v) limited to or in trust for a married woman of the age of majority in possession for any estate with a restraint on anticipation; or

(vi) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rent charge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same.

shall be deemed to be settled land for the purposes of this Ordinance and the deed, will, agreement, Ordinance, or other instrument or instruments (whether made or passed before or after, or partly before and partly after, the commencement of this Ordinance) under or by virtue of which the same stands or is or becomes or purports to be or become so limited or charged is in this Ordinance referred to as a settlement, or as the settlement, as the same requires.

11. (1) Where, at the commencement of this Ordinance, settled land is vested either wholly or partially in any trustee or trustees for all or any of the purposes of the settlement, the same shall, as from the commencement of this Ordinance, vest solely in such trustee or trustees to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

Transitional
provisions
converting
settlements into
trusts for sale.

(2) Where, at the commencement of this Ordinance, settled land stands vested in any person or persons solely as beneficiary or beneficiaries under or by virtue of the settlement, and not in any collateral capacity as trustee or trustees for the purposes of the settlement, the same shall, as from the commencement of this Ordinance, vest solely and absolutely in the person, or in all the persons if more than one, being of the age of majority and having any beneficial interest, whether in possession or in remainder or expectant or contingent, and not being subject to a restraint on anticipation,

under or by virtue of the settlement, to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

Attempted settlement constitutes trust for sale.

12. (1) Where, by any settlement first taking effect or purporting to take effect after the commencement of this Ordinance, the settled land the subject thereof becomes vested or held, or would but for the provisions of this Ordinance become vested or held, either wholly or partially in or by any trustee or trustees for all or any of the purposes of the settlement, such settled land shall thereupon and thereby vest solely in such trustee or trustees to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

(2) Where, by any settlement first taking effect or purporting to take effect after the commencement of this Ordinance, the settled land the subject thereof becomes vested or held, or would but for the provisions of this Ordinance become vested or held, in or by any person or persons solely as beneficiary or beneficiaries under or by virtue of such settlement, and not in any collateral capacity as trustee or trustees for the purposes of such settlement, such settled land shall thereupon and thereby vest solely and absolutely in the person, or in all the persons if more than one, being of the age of majority and having any beneficial interest, whether in possession or in remainder or expectant or contingent, and not being subject to a restraint on anticipation, under or by virtue of such settlement, to the exclusion of all others (if not already so vested) and be held by him or them upon trust for sale.

Infants cannot hold settled lands.

13. (1) Where, at the commencement of this Ordinance, settled land stands vested solely in one or more persons who is or all of whom either are under the age of majority or, being of the age of majority, hold subject to a restraint on anticipation, the same shall, as from the commencement of this Ordinance, vest solely and absolutely in the Public Trustee and be held by him upon trust for sale.

(2) Where, by any settlement first taking effect or purporting to take effect after the commencement of this Ordinance, the settled land the subject thereof would but for the provisions of this Ordinance become vested solely in one or more persons who is or all of whom either are, at the time of such taking effect or purported taking effect, under the age of majority or, being of the age of majority, would hold subject to a restraint on anticipation, such settlement shall not operate

in any wise to transfer such settled land, but shall take effect merely as an agreement binding all the parties who are bound by such settlement forthwith to convey, assign or otherwise transfer such settled land to two or more persons of the age of majority upon trust for sale.

14. The net rents and profits until sale of any settled land in respect of which a trust for sale is constituted by any of the provisions of this Part, after keeping down costs of repairs and other outgoings, shall be paid or applied in like manner as the same would for the time being have been paid or applied if no such trust for sale had been constituted and all the provisions of the settlement had been permitted to take effect.

Application of rents and profits pending exercise of statutory trust for sale.

15. (1) Capital money arising under this Ordinance by exercise of a trust for sale constituted in respect of settled land by any of the provisions of this Part, while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land, and shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises, would have been held and have gone under the settlement if such settled land had not been disposed of and all the provisions of the settlement had been permitted to take effect.

Devolution of proceeds of statutory trust for sale and income therefrom.

(2) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

16. (1) The provisions of this Part apply to all settled land, and to every settlement whether made or arising before or after the commencement of this Ordinance.

Extent of application of this Part.

(2) In case of conflict between the provisions of a settlement and the provisions of this Part or of this Ordinance generally relative to any vesting of the settled land the subject thereof, or to any matter in respect whereof the person or persons in whom for the time being such settled land is vested upon trust for sale under or pursuant to the provisions of this Ordinance exercises or contracts or intends to exercise any power as such under this Ordinance, the provisions of this Part or of this Ordinance generally (as the case may be) shall prevail; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation

or appointment) relating to the settled land thereby conferred upon any beneficiary or beneficiaries under the settlement or other persons exercisable for any purpose, whether or not provided for in this Ordinance, shall, after the commencement of this Ordinance, be exercisable by the person or persons in whom for the time being such settled land is vested upon trust for sale as aforesaid, as if it were an additional power conferred on such person or persons and not otherwise.

PART IV

POWERS OF TRUSTEES FOR SALE

Powers of sale and exchange.

17. Trustees for sale of land—

- (i) may sell such land or any part thereof or any easement right or privilege over or in relation to such land; and
- (ii) may make an exchange of such land, or any part thereof, or of any easement, right, or privilege of any kind, whether or not newly created, over or in relation to such land, or any part thereof, for other land, or for any easement, right or privilege of any kind, whether or not newly created, over or in relation to other land, including an exchange in consideration of money paid for equality of exchange: Provided that—
 - (a) every exchange shall be made for the best consideration in land or in land and money that can reasonably be obtained; and
 - (b) an exchange may be made subject to any stipulations respecting title, or evidence of title, or other things.

Leasing powers

18. (1) Trustees for sale of land may lease such land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, provided that save as hereinafter provided every lease—

- (i) shall be by formal lease or demise, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;

- (ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine or premium taken, and to any money laid out or to be laid out for the benefit of such land, and generally to the circumstances of the case;
 - (iii) shall contain a covenant or agreement by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.
- (2) A counterpart of every lease shall be executed by the lessee and delivered to the trustees for sale, of which execution and delivery the execution of the lease by the trustees for sale shall be sufficient evidence.
- (3) A statement, contained in a lease or in an indorsement thereon, signed by the trustees for sale, respecting any matter of fact or of calculation under this Ordinance in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.
- (4) A fine or premium received on the grant of a lease under any power conferred by this Part shall be deemed to be capital money arising by exercise of the trust for sale.
- (5) A tenancy at the best rent that can reasonably be obtained without fine or premium, and whereby the tenant is not exempted from punishment for waste, may, subject to the provisions of any other law for the time being in force, be granted for a term not exceeding three years from the date of the writing by any writing under hand only containing an agreement instead of a covenant by the tenant for the payment of rent.

19. The leasing power of trustees for sale extends to the making of—

Leases in special subjects.

- (i) a lease for giving effect (in such manner and so far as the law permits) to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the land held upon trust for sale; and
- (ii) a lease for confirming, as far as may be, a previous lease being void or voidable, but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under this Ordinance or otherwise, as the case may require.

Power on dispositions to impose restrictions and make reservations and stipulations.

20. (1) On a sale or other disposition or dealing by trustees for sale under the powers conferred by this Part—

- (a) any easement, right, or privilege of any kind may be reserved or granted over or in relation to such land or any part thereof or other land, including the land disposed of, and, in the case of an exchange, the land taken in exchange; and
- (b) any restriction with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed and made binding, as far as the law permits, by covenant, condition or otherwise, on the trustees for sale and the land held or acquired by them or any part thereof, or on the other party and any land disposed of to him; and
- (c) the whole or any part of any capital or annual sum (and in the case of an annual sum whether temporary or perpetual) charged on or payable out of the land disposed of, or any part thereof, and other land subject to the trust for sale, may as between the trustees for sale and the persons beneficially entitled to the net proceeds (but without prejudice to the rights of the person entitled to such capital or annual sum) be charged exclusively on the land disposed of, or any part thereof, or such other land as aforesaid, or any part thereof, in exoneration of the rest of the land on or out of which such capital or annual sum is charged or payable.
- (2) A sale of land may be made subject to a stipulation that all or any of the timber and other trees, underwood, saplings, and plantations on the land sold or any articles attached to the land shall be taken by the purchaser at a valuation, and the amount of the valuation shall form part of the price of the land, and shall be capital money accordingly.

Separate dealing with surface and minerals

21. A sale, exchange, lease or other authorized disposition, may (in such manner and so far as the law permits) be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, ease-

ments, rights, and privileges, or or incident to or connected with mining purposes, in relation to the land held or acquired by the trustees for sale, or any part thereof, or any other land.

22. (1) Trustees for sale of land may at any time, either with or without consideration, grant by writing an option to purchase or take a lease of such land, or any part thereof, or any easement, right, or privilege over or in relation to the same at a price or rent either fixed at the time of granting the option, or to be fixed at or before exercise of the option in some manner prescribed at the time of granting the option.

Powers to grant options.

(2) Every such option shall be made exercisable within an agreed number of years not exceeding ten.

(3) The price or rent shall be the best which, having regard to all the circumstances, can reasonably be obtained.

(4) An option to take a mining lease may be coupled with the grant of a licence to search for and prove any mines or minerals under the land the subject of the trust for sale, or any part thereof, pending the exercise of the option.

(5) The consideration for the grant of the option shall be deemed to be capital money arising by exercise of the trust for sale.

23. (1) Trustees for sale of land may accept, with or without consideration, a surrender of any lease of such land, whether made under this Ordinance or not, or a regrant of any land granted in fee simple, whether under this Ordinance or not, in respect of the whole land leased or granted, or any part thereof, with or without an exception of all or any of the mines or minerals therein, or in respect of mines and minerals, or any of them, and with or without an exception of any easement, right, or privilege of any kind over or in relation to the land surrendered or regranted.

Surrenders and regrants.

(2) On a surrender of a lease or a regrant of land granted in fee simple in respect of part only of the land or mines and minerals leased or granted the rent or rent charge may be apportioned

(3) On a surrender or regrant, the trustees for sale may in relation to the land or mines and minerals surrendered or regranted, or of any part thereof, make a new or other lease, or grant in fee simple, or new or other leases, or grants in fee simple, in lots.

(4) A new or other lease, or grant in fee simple, may comprise additional land or mines and minerals, and may reserve any apportioned or other rent, or rent charge.

(5) On a surrender or regrant, and the making of a new or other lease, whether for the same or for any extended or other term, or of a new or other grant in fee simple, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's or grantee's interest in the lease surrendered, or the land regranted, may be taken into account in the determination of the amount of the rent or rent charge to be reserved, and of any fine or consideration in money to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease, or grant in fee simple.

(6) Every new or other lease, or grant in fee simple, shall be in conformity with this Ordinance.

(7) All money, not being rent, or a rent charge, received on the exercise by the trustees for sale of the powers conferred by this section, shall, unless the Court, on an application made within six months after the receipt thereof or within such further time as the court may in special circumstances allow, otherwise directs, be deemed to be capital money arising by exercise of the trust for sale.

(8) In this section "land granted in fee simple" means land so granted with or subject to a reservation thereout of a perpetual or terminable rent charge which is or forms part of the land held upon trust for sale, and "grant in fee simple" has a corresponding meaning.

24. (1) Trustees for sale of land may accept a lease of any land, or of any mines and minerals, or of any easement, right, or privilege, convenient to be held or worked with or annexed in enjoyment to the land held upon trust for sale, or any part thereof, for such period and upon such terms and conditions, as the trustees for sale think fit:

Provided that no fine shall be paid out of capital money in respect of such lease.

(2) The lease may contain an option to purchase the reversion expectant on the term thereby granted.

25. (1) Trustees for sale of land may, either with or without giving or taking any consideration in money or otherwise, compromise, compound, abandon, submit to arbitration, or otherwise settle any claim, dispute, or question whatsoever

Acceptance of leases

Power to compromise claims and release restrictions

relating to such land, or any part thereof, including in particular claims, disputes or questions as to boundaries, the ownership of mines and minerals, rights and powers of working mines and minerals, local laws and customs relative to the working of mines and minerals and other matters, easements, and restrictive covenants, and for any of those purposes may enter into, give, execute, and do such agreements, assurances, releases, and other things as the trustees for sale may think proper.

(2) Trustees for sale of land, at any time, by deed or writing, either with or without consideration in money or otherwise, release, waive, or modify, or agree to release, waive, or modify any covenant, agreement, or restriction imposed on any other land for the benefit of the land held upon trust for sale, or any part thereof, or release, or agree to release, any other land from any easement, right or privilege, including a right of pre-emption, affecting the same for the benefit of the land held upon trust for sale, or any part thereof.

26. Trustees for sale of land may at any time, by deed or writing, either with or without consideration in money or otherwise, vary, release, waive, or modify, either absolutely or otherwise, the terms of any lease whenever made of the land held upon trust for sale or any part thereof or any covenants or conditions contained in any grant in fee simple whenever made of land with or subject to a reservation thereout of a rent which is or forms part of the land held upon trust for sale, and in either case in respect of the whole or any part of the land comprised in any such lease or grant but so that every such lease, or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Ordinance if the lease had been surrendered or the land comprised in the grant had never been so comprised or had been regranted.

27. (1) Trustees for sale of land may at any time, by deed or writing, either with or without consideration in money or otherwise, agree for the apportionment of any rent reserved or created by any such lease or grant as mentioned in the last preceding section, or any rent being or forming part of the land held upon trust for sale, so that the apportioned parts of such rent shall thenceforth be payable exclusively out of or in respect of such respective portions of the land subject thereto as may be thought proper, and also agree that any covenants, agreements, powers, or remedies for

Power to vary leases and give licences and consents.

Power to apportion rents

securing such rent and any other covenants or agreements by the lessee or grantee and any conditions shall also be apportioned and made applicable exclusively to the respective portions of the land out of or in respect of which the apportioned parts of such rent shall thenceforth be payable.

(2) Where the land held upon trust for sale, or any part thereof, is held or derived under a lease, or under a grant reserving rent, or subject to covenants, agreements or conditions, whether such lease or grant comprises other land or not, the trustees for sale may at any time, by deed or writing, with or without giving or taking any consideration in money or otherwise, procure the variation, release, waiver, or modification, either absolutely or otherwise, of the terms, covenants, agreements, or conditions contained in such lease or grant, in respect of the whole or any part of such land, including the apportionment of any rent, covenants, agreements, conditions, and provisions, reserved, or created by, or contained in, such lease or grant.

(3) This section applies to leases or grants made either before or after the commencement of this Ordinance.

Provisions as to consideration

28. (1) All money, not being rent, payable by the trustees for sale in respect of any transaction to which any of the three last preceding sections relates shall be paid out of capital money arising by exercise of the trust for sale, or subject to the same trust and all money, not being rent, received on the exercise by the trustees for sale of the powers conferred by any of those sections, shall, unless the Court, on an application made within six months after the receipt thereof or within such further time as the Court may in special circumstances allow, otherwise directs be deemed to be capital money arising by exercise of the trust for sale.

(2) For the purpose of the three last preceding sections "consideration in money or otherwise" means—

- (a) a capital sum of money or a rent;
- (b) land being freehold or leasehold for any term of years whereof not less than forty years shall be unexpired;
- (c) any easement, right or privilege over or in relation to the land held upon trust for sale, or any part thereof, or any other land;
- (d) the benefit of any restrictive covenant or condition; and

(e) the release of the land held upon trust for sale, or any part thereof, or any other land, from any easement, right or privilege, including a right of pre-emption, or from the burden of any restrictive covenant or condition affecting the same.

29. (1) Where there is on any land held upon trust for sale timber ripe and fit for cutting, the trustees for sale may cut and sell that timber, or any part thereof.

Cutting and sale of timber and capitalization of part of proceeds.

(2) Three-fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising by exercise of the trust for sale, and the other fourth part shall go as rents and profits.

30. Where there is an incumbrance affecting any part of the land held upon trust for sale (whether capable of being over-reached on the exercise by the trustees for sale of their powers under this Ordinance or not), the trustees for sale, with the consent of the incumbrancer, may charge that incumbrance on any other part of such land, or on all or any part of the capital money or securities representing capital money subject, or to become subject, to the same trusts as capital money arising by exercise of the trust for sale, whether already charged therewith or not, in exoneration of the first mentioned part, and by a legal mortgage, charge, or otherwise, make provision accordingly.

Shifting of incumbrances.

31. (1) Where an incumbrance affects any part of the land held upon trust for sale, the trustees for sale may, with the consent of the incumbrancer, vary the rate of interest charged and any of the other provisions of the instrument, if any, creating the incumbrance, and with the like consent charge that incumbrance on any part of such land, whether already charged therewith or not, or on all or any part of the capital money or securities representing capital money subject, or to become subject, to the same trusts as capital money arising by exercise of the trust for sale, by way of additional security, or of consolidation of securities, and by a legal mortgage charge or otherwise, make provision accordingly.

Power to vary provision of an incumbrance and to charge by way of additional security.

(2) "Incumbrance" in this section includes any annual sum payable during a life or lives or during a term of years absolute or determinable, but in any such case an additional security shall be effected so as only to create a charge or security similar to the original charge or security.

Power to raise money by mortgage or charge.

32. (1) Where money is required for any of the following purposes namely—

- (i) discharging an incumbrance on the land held upon trust for sale or part thereof;
- (ii) paying for any improvement authorized by this Ordinance or by the instrument, if any, creating the trust for sale;
- (iii) equality of exchange;
- (iv) payment of the costs of any transaction authorized by this section or either of the two last preceding sections,

the trustees for sale may raise the money so required, on the security of such land or any part thereof, by legal mortgage or charge, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2) "Incumbrance" in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

General powers of management, etc.

33. Trustees for sale of land may at any time or times, in addition to the special powers by this Part hereinbefore conferred, enter into and continue in possession of such land and manage or superintend the management thereof, with full power—

- (a) to fell timber or cut underwood from time to time in the usual course for repairs or otherwise, and
- (b) to erect, pull down, rebuild, and repair houses, and other buildings and erections; and
- (c) to cultivate, manure, plant, clean, till, sow, or otherwise farm such land according to the best methods of husbandry practised in the neighbourhood, including power to change the course of husbandry, and
- (d) to continue the working of mines, minerals, and quarries which have usually been worked; and
- (e) to drain or otherwise improve such land or any part thereof, and
- (f) to make allowances to and arrangements with tenants and others; and
- (g) to determine tenancies, and to accept surrenders of leases and tenancies; and

(h) to insure against loss or damage by fire or earthquake; and

(i) generally to deal with such land in a proper and due course of management.

(2) Trustees for sale of land may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, notwithstanding that power may be conferred by this Ordinance to apply capital moneys for all or any of such purposes, pay the expenses incurred in the management, or in the exercise of any power conferred by this Part, or otherwise in relation to such land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on such land.

34. (1) On a sale, exchange, lease, mortgage, charge, or other disposition, trustees for sale of land may, as regards such land sold, given in exchange, leased, mortgaged, charged, or otherwise disposed of, or intended so to be, or, as regards easements or other rights or privileges sold, given in exchange, leased, mortgaged, charged or otherwise disposed of or intended so to be, effect the transaction by deed or writing to the extent of the estate or interest held upon trust for sale or any less estate or interest, in the manner requisite for giving effect to the sale, exchange, lease, mortgage, charge, or other disposition.

(2) Such a deed or writing, as the case may be, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Ordinance, is effectual to pass the land conveyed or transferred, or the easements, rights, privileges, or other interests created, discharged from all the limitations, powers, and provisions of the instrument, if any, creating the trust for sale, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

- (i) all rights, titles, and interests of whatsoever nature or kind having priority to the beneficial interests in the capital money arising by exercise of the trust for sale and the income thereof; and
- (ii) all mortgages, charges and liens which have been created or taken effect for securing money actually raised at the date of such deed or writing; and

(iii) all leases, all grants of easements, and all other rights or privileges which were before the date of such deed or writing granted or made for value in money or money's worth, or agreed so to be, by the trustees for sale, or are at that date otherwise binding on the successors in title of the trustees for sale.

Delegation of powers by trustees

35. (1) The powers of and incidental to leasing, accepting surrenders of leases, and management, conferred on trustees for sale of land, whether by this Ordinance or otherwise, may, until sale of such land, be revocably delegated from time to time by writing, signed by them, 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 such land during his life or for any less period: and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.

(2) Any power so delegated shall be exercised only in the names and on behalf of the trustees for sale delegating the power.

(3) The trustees for sale delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee.

General power to effect any transaction under order of court

36. (1) Any transaction affecting or concerning land held upon trust for sale, or any part thereof, or any other land (not being a transaction otherwise authorized by this Ordinance, or by the instrument, if any, creating the trust for sale) which in the opinion of the Court would be for the benefit of the land held upon trust for sale, or any part thereof, or the persons interested under the trust for sale, may, under an order of the Court, be effected by trustees for sale, if it is one which could have been validly effected by an absolute owner.

(2) In this section "transaction" includes any sale, exchange, assurance, grant, mortgage, lien, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or

option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing, or arrangement; but does not include an application of capital money in payment for any improvement not authorized by this Ordinance, or by the instrument, if any, creating the trust for sale; and "effected" has the meaning appropriate to the particular transaction, and the references to land include references to restrictions and burdens affecting land.

37. (1) The provisions of this Part, other than the last preceding section, apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust for sale, and have effect subject to the terms of that instrument and to the provisions therein contained.

Extent of application of this Part and saving for additional or larger powers

(2) In the case of conflict between the provisions of the last preceding section and the provisions of the instrument, if any, creating the trust for sale, the provisions of the last preceding section shall prevail.

(3) Nothing in this Ordinance shall preclude or affect the conferring on trustees for sale of land by the instrument, if any, creating the trust for sale, or by any supplemental instrument (if and so far as the same might otherwise be effectual) whether made before or after the commencement of this Ordinance of any powers additional to or larger than those conferred by this Ordinance; and any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Ordinance, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Ordinance.

PART V

INVESTMENT OR OTHER APPLICATION OF CAPITAL MONEY

38. Capital money arising by exercise of a trust for sale of land, subject to payment of claims properly payable thereout and to the application thereof for any special authorized object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):—

Mode of investment or application

(i) In investment in securities or other properties or investments in which the trustees for sale are by the instrument, if any, creating the trust for sale or by law authorized to invest moneys arising by

exercise of the trust for sale, with power to vary the investment into or for any other such securities, properties or investments.

- (ii) In discharge, purchase, or redemption of incumbrances affecting all or any part of the estate subject to the same trusts as capital money arising by exercise of the trust for sale, or rents, or rent charges, charged on or payable out of such estate, or any part thereof.
- (iii) In payment for any improvement authorized by this Ordinance.
- (iv) In payment for equality of exchange of any land held subject to the trusts for sale.
- (v) In the purchase, with the leave of the Court, of any leasehold interest where the immediate reversion is held subject to the trust for sale, so as to merge the leasehold interest (unless the Court otherwise directs) in the reversion, and notwithstanding that the leasehold interest may have less than forty years to run.
- (vi) In payment of the costs and expenses of all plans, surveys, and schemes, including schemes under the Town Planning and Development Ordinance, 1931, or any similar enactment, made with a view to, or in connexion with the improvement or development of the land held upon trust for sale, or any part thereof, or the exercise of any statutory powers, and of all negotiations entered into by the trustees for sale with a view to the exercise of any of the said powers, notwithstanding that such negotiations may prove abortive, and in payment of the costs and expenses of opposing any such proposed scheme as aforesaid affecting the land held upon trust for sale, whether or not the scheme is made.
- (vii) In payment to a local or other authority of such sum as may be agreed in consideration of such authority taking over and becoming liable to repair a private road on the land held upon trust for sale or a road for maintenance whereof the trustees for sale are liable *ratione tenurae*, or any sum which may otherwise become lawfully payable by the trustees for sale to such local or other authority in respect of the making up, taking over, or maintenance of any road or street.

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- (viii) In financing any person who may have agreed to take a lease or grant for building purposes of the land held upon trust for sale, or any part thereof, by making advances to him in the usual manner upon the security of a legal or equitable mortgage or charge of his building agreement.
- (ix) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge.
- (x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Ordinance, including the costs and expenses incidental to any of the matters referred to in this section.
- (xi) In any other mode authorized by the instrument, if any, creating the trust for sale.

39. Where capital money arising by exercise of a trust for sale of land, or deemed to be capital money so arising, is purchase-money paid in respect of—

Application of money paid for lease or reversion

- (a) a lease for years; or
- (b) any other estate or interest in land less than the fee simple; or
- (c) a reversion dependent on any such lease, estate, or interest.

the trustees for sale or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Ordinance, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees for sale or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest or reversion in respect whereof the money was paid, or as near thereto as may be.

40. (1) Money, not being rent, received by way of damages or compensation for breach of any covenant by a lessee or grantee contained in any lease or grant of land held upon trust for sale shall, unless in any case the Court on the application of any party interested otherwise directs, be deemed to be capital money arising by exercise of the trust for sale, and paid to or retained by the trustees for sale, or paid into Court, and invested or applied, accordingly.

As to money received by way of damages for breach of covenant.

Extent of application of this Part.

44. The provisions of this Part apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust for sale, and shall have effect subject to the terms of such instrument, and to any provisions therein contained.

PART VI IMPROVEMENTS

Description of improvements authorized by the Ordinance

45. Improvements authorized by this Ordinance are the making or execution on, or in connexion with, and for the benefit of land held upon trust for sale, of any of the works mentioned in the Schedule to this Ordinance, or of any works for any of the purposes mentioned in that Schedule, and any operations incident to or necessary or proper in the execution or proper in the execution of any of those works or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes.

Mode of application of capital money

46. (1) Capital money arising by exercise of a trust for sale of land, or deemed to be capital money so arising, may be applied in or towards payment for any improvement authorized by this Ordinance or by the instrument, if any, creating the trust for sale, without any scheme for the execution of the improvement being first submitted for approval to, or approved by, the beneficiaries or any of them, or the Court.

(2) Where the capital money to be expended is in the hands of the trustees for sale, they may apply that money in or towards payment for the whole or any part of any work or operation comprised in the improvement, on—

(i) a certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees for sale as an authority and discharge for any payment made by them in pursuance thereof; or

(ii) an order of the Court directing or authorizing the trustees for sale so to apply a specified portion of the capital money;

Provided that:—

(a) In the case of improvements not authorized by Part I of the Schedule to this Ordinance or by the instrument, if any, creating the trust for sale, the trustees for sale may, if they think fit, and shall if so directed by the Court, before they make any such application of capital money make provision that that money, or any part thereof, shall be repaid to or retained by them out of the income of the land held upon trust for sale by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed.

(b) No capital money shall be applied by the trustees for sale in payment for improvements not authorized by Parts I and II of the Schedule to this Ordinance, or by the instrument, if any, creating the trust for sale, except subject to provision for the repayment or retention thereof being made in manner mentioned in the preceding paragraph of this proviso.

(3) Where the capital money to be expended is in any court, such court may, if it thinks fit, on a report or certificate of a competent engineer or able practical surveyor approved by such court, or on such other evidence as such court may think sufficient, make such order and give such directions as it thinks fit for the application of the money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement.

(4) Where any court authorizes capital money to be applied in payment for any improvement or intended improvement not authorized by Part I of the Schedule to this Ordinance or by the instrument, if any, creating the trust for sale, such court, as a condition of making the order, may in any case require that the capital money or any part thereof, and shall as respects an improvement mentioned in Part III of that Schedule (unless the improvement is authorized by the instrument, if any, creating the trust for sale), require that the whole of the capital money shall be repaid to or retained by, the trustees for sale out of the income of the land held upon trust for sale by a fixed number of periodical instalments

to be paid or retained at the times appointed by such court, and may require that any incumbrancer of such income shall be served with notice of the proceedings.

(5) All money received by the trustees for sale in respect of any instalments under this section shall be held by them as capital money arising by exercise of the trust for sale, unless the Court otherwise directs.

47. The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by this Ordinance, whether executed before or after the commencement of this Ordinance notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval to the Court, and notwithstanding that no capital money is immediately available for the purpose.

48. The provisions of this Part apply only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust for sale, and shall have effect subject to the terms of such instrument, and to any provisions therein contained.

PART VII

GENERAL PROVISIONS AS TO TRUSTEES OF LAND

49. Subject as provided by sub-section (2) of section 7 the provisions of this Ordinance referring to trustees for sale of land apply to the surviving or continuing trustees or trustee for sale for the time being.

50. The receipt or direction in writing of or by the trustees for sale of land, or where a sole trustee for sale of land is a trust corporation or personal representative, or of by that trustee, or of or by the personal representative of the last surviving or continuing trustee for sale of land, for or relating to any money or securities, paid or transferred to or by the direction of the trustees, trustee, or representatives, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Ordinance, or that no more than is wanted is raised.

51. Each person who is for the time being a trustee for sale of land is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and

Court may order payment for improvements executed

Extent of application of this Part.

Surviving or continuing trustees can act.

Trustee's receipts

Protection of each trustee individually.

in respect of his own acts, receipts and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

52. Trustees for sale of land, personal representatives, or other persons who have in good faith, pursuant to a trust for sale of land or this Ordinance, executed a conveyance, transfer, assent, assignment, or other disposition of the land held upon trust for sale, or a deed of discharge of trustees, shall be absolutely discharged from all liability in respect of the equitable interests and powers taking effect under the settlement (if any) constituting the trust for sale, and shall be entitled to be kept indemnified at the cost of the trust estate from all liabilities affecting the land held upon trust for sale, but the person to whom the land held upon trust is conveyed, transferred, assigned, or otherwise disposed of (not being a purchaser taking free therefrom) shall hold such land upon the trusts (if any) affecting the same.

53. Trustees for sale of land may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

PART VIII

SUPPLEMENTARY PROVISIONS

54. (1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Ordinance a provision is inserted—

(a) purporting or attempting, by way of direction, declaration, or otherwise, to forbid trustees for sale of land to exercise any power under this Ordinance herein expressed to be exercisable or impliedly conferred without regard to or notwithstanding the provisions of the instrument (if any) constituting the trust for sale; or

(b) attempting, or tending, or intended, by a limitation, gift, or disposition over of land held upon trust for sale, or by a limitation, gift or disposition of other immovable or any movable property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent them from exercising, or to induce them to abstain

Indemnities to personal representatives and others.

Trustee's reimbursements.

Prohibition or limitation against exercise of powers void, and provision against forfeiture.

from exercising, or to put them into a position inconsistent with their exercising, any such power as aforesaid.

that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same.

(3) Notwithstanding anything in an instrument constituting a trust for sale of land or settlement, the exercise by a trustee for sale of any power under this Ordinance herein expressed to be exercisable or impliedly conferred without regard to or notwithstanding the provisions of such instrument or settlement shall not occasion a forfeiture.

Powers of Court where trustees for sale refuse to exercise powers

55. If trustees for sale of land refuse to sell or to exercise any of the powers conferred by this Ordinance, or any requisite consent cannot be obtained, any person interested may apply to the Court for a vesting order or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the Court may make such order as it thinks fit.

Application to personal representatives.

56. The provisions of this Ordinance relating to trustees for sale of land apply to personal representatives holding land upon trust for sale, but without prejudice to their rights and powers for purposes of administration.

Power to make rules

57. The Court shall have power to make rules concerning the following matters—

- (a) the fees to be paid in respect of any registration or court proceedings, or to the Public Trustee in respect of the performance of any duties imposed or the exercise of any powers conferred upon him under or by virtue of any of the provisions of this Ordinance;
- (b) the procedure to be adopted in respect of any matters disputes or transactions arising under or by virtue of this Ordinance and not herein expressly provided for, and
- (c) generally for the better carrying into effect of the provisions of this Ordinance.

58. Nothing in this Ordinance contained shall in anywise prejudice or affect the operation of the Registration of Titles Ordinance or any Ordinance from time to time amending or replacing the same and the provisions of this Ordinance shall in respect of land registered under the Registration of Titles Ordinance only take effect if and so far and in such manner as provided for by that Ordinance or so far as not inconsistent therewith. Saving
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SCHEDULE

PART I

Improvements, the Costs of which are not Liable to be Replaced by Instalments

- (i) Drainage, including the straightening, widening, or deepening of drains, streams and watercourses.
- (ii) Bridges.
- (iii) Irrigation and permanent measures for the prevention of soil erosion.
- (iv) Drains, pipes and machinery for supply and distribution of sewage as manure.
- (v) Embanking or weiring from a river or lake, or from the sea, or a tidal water.
- (vi) Groynes, sea walls, defences against water.
- (vii) Fencing, redivision of fields.
- (viii) Reclamation.
- (ix) Farm roads, private roads, roads or streets in villages or towns.
- (x) Clearing; cleaning; trenching; planting.
- (xi) Cottages, quarters, or huts for labourers, farm servants, and artisans, whether squatters or otherwise, and whether employed on the land held upon trust for sale or not.
- (xii) Farm houses, offices, and outbuildings, and other buildings for farm purposes, including siles, bomas, and cattle dips.
- (xiii) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the land held upon trust for sale for agricultural purposes or as woodland or otherwise.

(xiv) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption.

(xv) Tramways; railways; canals; docks.

(xvi) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes.

(xvii) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land.

(xviii) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid.

(xix) Trial pits for mines, and other preliminary works necessary or proper in connexion with the development of mines.

(xx) Reconstruction enlargement, or improvement of any of these works.

(xxi) The provision of small dwellings, either by means of building new buildings or by means of the reconstruction, enlargement, or improvement of existing buildings, if that provision of small dwellings is, in the opinion of the Court, not injurious to the land upon trust for sale.

(xxii) Additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.

(xxiii) Erection of buildings in substitution for buildings taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof.

(xxiv) The building of a permanent homestead on the land held upon trust for sale: Provided that the sum to be applied under this head shall not exceed one-half of the annual rental of the land held upon trust for sale.

PART II

Improvements, the Costs of which the Trustees for Sale or the Court may require to be repaid by Instalments out of Income

(i) Residential houses for land or mineral agents, managers, clerks, bailiffs, woodmen, and other persons employed on the land held upon trust for sale, or in connexion with the management for development thereof.

(ii) Any offices, workshops and other buildings of a permanent nature required in connexion with the management or development of the land held upon trust for sale or any part thereof.

(iii) The erection and building of dwelling houses, shops, electric light or power works, or any other works necessary or proper in connexion with the development of the land held upon trust for sale, or any part thereof as a building estate.

(iv) Restoration or reconstruction of buildings damaged or destroyed by dry rot or white ants.

(v) Structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let.

(vi) Boring for water and other preliminary works in connexion therewith.

PART III

Improvements, the Costs of which the Trustees for Sale and the Court must require to be repaid by Instalments out of Income

(i) Heating, hydraulic or electric power apparatus for buildings, and engines, pumps, lifts, rams, boilers, flues, and other works required or used in connexion therewith.

(ii) Engine houses, engines, dynamos, accumulators, cables, pipes, wirings, switchboards, plant and other works required for the installation of electric or other artificial light, in connexion with any principal mansion house or other house or buildings; but not electric lamps or decorative fittings required in any such house or buildings.

(iii) Steam rollers, traction engines, motor lorries and movable machinery for farming or other purposes.

COMPARATIVE TABLE OF SECTIONS WITH
ENGLISH LAW

(N.B.—"L.P.A." represents English Law of Property Act, 1925;
"S.L.A." represents English Settled Land Act, 1925; and "L.P.A.A."
represents English Law of Property Amendment Act, 1926.)

Sections of Draft Ordinance	Corresponding English Law
2	L.P.A. s. 205 and S.L.A. s. 117.
3	L.P.A. s. 25.
4	L.P.A. s. 23.
5	L.P.A. s. 24.
6	L.P.A. s. 26.
7	L.P.A. s. 27.
8	L.P.A. s. 31.
9	L.P.A. s. 32.
10	L.P.A. s. 1.
11	New.
12	New.
13	New (but cp. S.L.A. ss. 26, 27).
14	New (but cp. L.P.A. s. 32).
15	S.L.A. s. 75 (5) and (6).
16	New (but cp. S.L.A. s. 108).
17	S.L.A. s. 38, and s. 40.
18	S.L.A. s. 41 and 42.
19	S.L.A. s. 43.
20	S.L.A. s. 49.
21	S.L.A. s. 50.
22	S.L.A. s. 51.
23	S.L.A. s. 52.
24	S.L.A. s. 53.
25	S.L.A. s. 58.
26	S.L.A. s. 59.
27	S.L.A. s. 60.
28	S.L.A. s. 61.
29	S.L.A. s. 66.
30	S.L.A. s. 69.
31	S.L.A. s. 70.
32	S.L.A. s. 71.
33	S.L.A. s. 102 and L.P.A. s. 28.
34	S.L.A. s. 72.
35	L.P.A. s. 29.
36	S.L.A. s. 64.
37	S.L.A. ss. 102 (6) and 109.
38	S.L.A. s. 73.
39	S.L.A. s. 79.
40	S.L.A. s. 80.
41	S.L.A. s. 76.
42	S.L.A. s. 77.
43	S.L.A. s. 78.
44	New (but e.g., S.L.A. s. 78 (5)).
45	S.L.A. s. 83.
46	S.L.A. s. 84.
47	S.L.A. s. 87.
48	New.
49	S.L.A. s. 94.
50	S.L.A. s. 95.
51	S.L.A. s. 96.
52	S.L.A. s. 99.
53	S.L.A. s. 100.
54	S.L.A. s. 106.
55	L.P.A. s. 30.
56	L.P.A. s. 33.
57	New.
58	New.
Schedule	Third Schedule to S.L.A.



A BILL TO AMEND THE REGISTRATION
OF TITLES ORDINANCE

A Bill to Amend the Registration of Titles Ordinance

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

1. This Ordinance may be cited as the Registration of Titles (Amendment) Ordinance, 1938, and shall be read as one with the Registration of Titles Ordinance (Chapter 142 of the Revised Edition), hereinafter referred to as the Principal Ordinance. Short title.

TRUSTS

2. Subject to the provisions hereinafter contained as to land held upon trust for sale and as to registration of caveats neither the registrar nor in the absence of actual fraud any other person dealing with land registered subject to the Principal Ordinance shall be affected with notice of a trust express implied or constructive and the registrar shall not enter in the register particulars of any such trust or register any instrument setting out the terms of a trust. Mere knowledge that any such trust is in existence shall not of itself be imputed as fraud. Registrar or person dealing with land registered not to be affected with notice of a trust.

3. (1) Where land registered under the Principal Ordinance is subject to a trust for sale express or implied whether or not there is a power to postpone the sale of the land shall be registered in the names of the trustees for sale. Registration of land subject to a trust for sale.

(2) Where by virtue of any Ordinance land registered under the Principal Ordinance is made subject to a trust for sale the land shall be transferred in Form F of Schedule I to the Principal Ordinance to the trustees for sale (unless already registered as proprietors) and in the event of the registered proprietor refusing to execute a transfer or his execution of a transfer being unobtainable or only obtainable after undue delay or expense they shall apply to the registrar in writing signed by themselves or by their advocate for registration as proprietors.

(3) Where an application is made under the provisions of the last preceding sub-section the registrar may—

- (a) after **due notice** under this sub-section to the registered proprietors;
- (b) on **production of the grant** or certificate of title unless the registrar dispenses with its production; and
- (c) on **such other evidence as he may deem sufficient** that the land is by virtue of a specified Ordinance made subject to a trust for sale and that the applicants are the trustees thereof.

make such entry in or correction of the register as under the circumstances he shall deem fit for the purpose of vesting the registered land in such trustees for sale.

(4) Where upon any such application as aforesaid the registrar refuses to make such entry in or correction of the register the person claiming to be trustee for sale may apply to the court by originating summons or by plaint for a vesting order to be made accordingly. Provided that any costs and expenses incurred by such application to the court shall not be given against the registrar.

4. (1) Where the registered proprietor of any land made or about to be made subject to a trust for sale desires to place restrictions on transferring or charging the land or on disposing of or dealing with the land in any manner in which he is by the Principal Ordinance as amended by this Ordinance authorized to dispose of or deal with it or on the deposit by way of charge of any documents of title to the land the registered proprietor may apply in Form W of Schedule I to the Principal Ordinance as amended by this Ordinance to the registrar to make an entry in the register that no dealing to which the application relates shall be effected unless the following things or such of them as the registered proprietor may determine are done that is to say—

- (a) unless notice of any application for the dealing is transmitted by post to such address as he may specify to the registrar;
- (b) unless the consent of some person or persons to be named by the registered proprietor is given to the dealing; and
- (c) unless some other matter or thing is done as may be required by the applicant and approved by the registrar

Mode of placing restrictions on transferring, charging or disposing of land subject to a trust.

(2) The registrar shall thereupon if satisfied of the right of the applicant to give the directions and upon payment of the prescribed fee and production of the grant or certificate of title for endorsement enter the requisite restriction on the register and no dealing to which the restriction relates shall be effected except in conformity therewith but it shall not be the duty of the registrar to enter any restriction that the registrar may deem unreasonable or calculated to cause inconvenience.

(3) In the case of there being more than one registered proprietor the restriction may be to the effect that when the number of registered proprietors is reduced below a certain specified number no dealing shall be registered except under an order of the court.

(4) Any such restrictions except such as are provided for under sub-section (3) of this section may at any time be withdrawn or modified in Form X of Schedule I to the Principal Ordinance as amended by this Ordinance at the instance of all persons for the time being appearing by the register to be interested in such directions and shall also be liable to be set aside by an order of the court.

(5) Nothing in this section contained shall in anywise affect or derogate from the general right of registration of caveats otherwise conferred by the Principal Ordinance.

5. The First Schedule to the Principal Ordinance is hereby amended by the addition of the following forms after Form V thereof:—

"FORM W

Application to Register a Restriction under Section 4 of the Registration of Titles (Amendment) Ordinance, 1938

To the Registrar of Titles.

Take notice that I (the registered proprietor) of hereby apply to enter the following restriction against Title No.

Restriction:

Dated the day of 19.....

Signed in the presence of:

.....
Signature

Amendment of Schedule I to the Principal Ordinance.

FORM X

Application to Withdraw or Modify a Restriction

To the Registrar of Titles.

Take notice that I (A, B, etc.) of
hereby apply to withdraw (or modify) the restriction registered
on (date) against Title No.

Dated the day of 19.....

Signed in the presence of:

.....

.....
"Signature"

Amendment of
Schedule II to
the Principal
Ordinance

6. The Second Schedule to the Principal Ordinance is hereby amended by the addition of the following items after Item 21 thereof:—

- "22. For making entry in or correction of the register under section 3 (3) of the Registration of Titles (Amendment) Ordinance, 1938 Sh. 20
- 23. For entering restriction under section 4 (2) of the Registration of Titles (Amendment) Ordinance, 1938 Sh. 20
- 24. For entering withdrawal or modification of restriction under section 4 (4) of the Registration of Titles (Amendment) Ordinance, 1938 Sh. 6."