

WESTERN AUSTRALIA

ANNO SEPTIMO DECIMO

VICTORIÆ REGINÆ

No. 10

An Ordinance to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Trustees and Mortgagees.

*[Assented to 20th June, 1854.]*

WHEREAS it is expedient that the laws relating to the conveyance and transfer of Real and Personal Property vested in trustees and mortgagees should be consolidated and enlarged: Be it enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, that so much of the Ordinance No. 4 of the sixth year of the reign of His late Majesty King William IV., as adopts and makes applicable in the administration of justice in this Colony an Act of Parliament passed in the first year of the reign of His said late Majesty, intituled 'An Act for amending the Laws respecting the Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain Cases,' and so much of the Ordinance No. 13 of the seventh year of the reign of Her present Majesty

Preamble

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as adopts and makes applicable in the administration of justice in this Colony an Act of Parliament passed in a session held in the first and second years of the reign of Her present Majesty, intituled 'An Act to remove doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees,' shall be and the same are hereby repealed.

Definitions of terms	2. The several words hereinafter named are herein used and applied in the manner following respectively, that is to say :—
Land	The word 'land' shall extend to and include messuages, tenements and hereditaments, corporeal and incorporeal, of every description, situated within the said Colony, whatever may be the estate or interest therein.
Stock	The word 'stock' shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established within the said Colony, or transferable by deed alone, or by deed accompanied by other formalities and any share or interest therein.
Seized	The word 'seized' shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands.
Possessed	The word 'possessed' shall be applicable to any vested estate less than a life estate at law or in equity, in possession or in expectancy, in any lands.
Contingent right	The words 'contingent right,' as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future and whether vested or contingent.
Convey	The words 'convey' and 'conveyance' applied to any person shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seized or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail.
Assign	The words 'assigned' and 'assignment' shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate.
Transfer	The word 'transfer' shall mean the execution and performance of every deed and act, by which a person entitled to stock can transfer such stock from himself to another.
Trust and trustee	The word 'trust' shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and

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include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person.

The word 'lunatic' shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo*. Lunatic

The expression 'person of unsound mind' shall mean any person not being an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs. Unsound mind

The word 'devisee' shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent. Devisee

The word 'mortgage' shall be applicable to every estate, interest or property in lands or personal estate, which would in a Court of Equity be deemed merely a security for money. Mortgage

3. When any infant or any lunatic or person of unsound mind shall be seized or possessed of any lands, or entitled to a contingent right therein, upon any trust or by way of mortgage, it shall be lawful for the Civil Court of the said Colony to make an order vesting such lands in such person or persons, in such manner, and for such estate, as the said Court shall direct, or releasing or disposing of such contingent right in such manner as the said Court shall direct; and such order shall have the same effect as if the trustee or mortgagee had been sane and twenty-one years of age, and had duly executed a conveyance or assignment of the lands, or a release or other disposition of such contingent right, in the same manner for the same estate. Court may make vesting order for infant or lunatic

4. When any infant or any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the said Civil Court to make an order vesting in any person or persons the right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any infant or any lunatic or person of unsound mind, to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid or in such last-mentioned person or persons, together with any other person or persons the said Court may appoint. Do. for receiving interest

5. When any stock is standing in the name of any deceased person, whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, When the representative of deceased holder of stock is a lunatic

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it shall be lawful for the said Civil Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for, and recover such chose in action or any interest in respect thereof, in any person or persons the said Court may appoint.

If out of jurisdiction

6. When any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the said Civil Court, or cannot be found, or it shall not be known whether such representative be living or dead, or such personal representative shall refuse or neglect to transfer such stock or to receive the dividends or income thereof for the space of twenty-eight days next after an order of the said Civil Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or to receive the dividends or income thereof in any person or persons whom the said Court may appoint.

If neglect or refuse twenty-eight days after order

7. When any person shall neglect or refuse to transfer any stock or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the said Civil Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting all the right of such person to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

When one or two jointly entitled persons cannot be found

8. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the said Civil Court, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Civil Court to make an order vesting the right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any person or persons the said Court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said Court or cannot be found, or it shall be uncertain whether he be dead or living, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

When sole trustee out of jurisdiction

Order of Civil Court vesting

9. When any order, being or purporting to be under this Ordinance, shall be made by the said Civil Court vesting the right to any stock or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly, and the person or persons so appointed shall be authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent or in conformity with the terms of the order; and all companies and associations whatever, and all

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persons shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid to the extent and in conformity with the terms of such order as such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

10. Every order being or purporting to be made under this Ordinance by the said Civil Court and duly recorded in the said Court, shall be a complete indemnity to all companies, associations and persons for any act done pursuant thereto, and it shall not be necessary for any company, association or person to inquire concerning the propriety of such order or whether the said Court had jurisdiction to make the same.

And an indemnity

11. It shall be lawful for the said Civil Court to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Ordinance shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such declarations and directions by the same process as that by which other orders under this Ordinance may be enforced.

Persons in whose right vested, is compellable

12. That where any order shall have been made under the provisions of this Ordinance vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute in his or their own name or names any action, suit or other proceeding at law or in equity for the recovery of such chose in action in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

And may sue

13. When any person solely seized or possessed of any lands or entitled to a contingent right therein upon any trust, shall be out of the jurisdiction of the said Civil Court, or cannot be found, it shall be lawful for the said Court to make an order, vesting such lands in such person or persons, in such manner and for such estate as the said Court shall direct, or releasing or disposing of such contingent right in such manner as the said Court may direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release or disposition of such contingent right, in the same manner and for the same estate.

If out of jurisdiction, Court may dispose as effectually as if he had executed

14. When any person or persons shall be seized or possessed of any lands, or entitled to a contingent right therein, jointly with a person out of the jurisdiction of the said Civil Court, or who cannot be found, it shall be lawful for the said Civil Court to make an order vesting the lands in the person or persons so jointly seized or possessed, or in such last-mentioned person or persons, together with any other person or persons, in such manner and for such estate as the said Court shall direct, or releasing or disposing of such contingent right in such manner as the said Court may direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment, or a release

Same if one of two jointly entitled, cannot be found

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or disposition of such contingent right of the lands, in the same manner and for the same estate.

Doubtful which of two or more persons were the survivors

15. Where there shall have been two or more persons jointly seized or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the said Civil Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Court's order to operate a conveyance

16. Where any one or more person or persons shall have been seized or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seized or possessed, whether he be living or dead, it shall be lawful for the said Civil Court to make an order vesting such lands in such person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Same with intestate

17. When any person seized of any lands upon any trust shall have died intestate as to such lands, without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the said Civil Court to make an order vesting such lands in such person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

When demand on trustee

18. Where any person is or shall be jointly or solely seized or possessed of any lands or entitled to a contingent right therein, upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the said Civil Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person or persons, in such manner and for such estate as the said Court shall direct; or releasing such contingent right in such manner as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right in the same manner for the same estate.

If Court satisfied of wilful neglect, Court may act

Felony

19. When any person is or shall be jointly or solely seized or possessed of any lands, or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the said Civil Court, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock and to receive the dividends and income thereof in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and

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had duly executed a conveyance or assignment of his estate and interest in the same.

20. Whenever it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult or impracticable so to do, without the assistance of the said Civil Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or whether there be, or be not, any existing trustee at the time of making such order.

When new trustee wanted Court may act

21. That the person or persons who upon the making of such order as last aforesaid shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by a decree in a suit duly instituted.

Same powers

22. That it shall be lawful for the said Civil Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the Court shall direct ; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate.

Court's order to operate a conveyance

23. It shall be lawful for the said Civil Court, upon making any order for appointing a new trustee or trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action subject to the trust, or any interest in respect thereof, in the person or persons who, upon the appointment, shall be the trustee or trustees.

Transfer of stock and receiving dividends

24. That any such appointment by the said Civil Court of new trustees, and any such conveyance, assignment or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

No further than original appointment of new trustees

25. When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance of such lands, then, in any of the following cases, it shall be lawful for the said Civil Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct (that is to say) :—

Dead mortgagee

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the said Civil Court or cannot be found :

Out of jurisdiction

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or

Re-conveyance

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Twenty-eight days	shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person :
Uncertain which of several survivors	When it shall be uncertain which of several devisees of such mortgagee was the survivor :
Intestate	When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead :
Intestate	When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died, and it shall not be known who is his heir or devisee.
Court's order to operate as <i>ante</i>	And the order of the said Court, made in any one of the foregoing cases, shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.
May appoint officer of company	26. That in every case in which the said Civil Court shall, under the provisions of this Ordinance, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, or vesting the right to transfer any stock, it shall be lawful for the said Court, should it be deemed more convenient, to make an order, appointing a person to convey or assign such lands or release, or dispose of such contingent right, or appointing some officer of any company or society, at once to transfer such stock to the person or persons named in the order, which shall be a full and complete indemnity to such company or society, its officers and servants, for anything done or permitted pursuant to such order.
Indemnity	
Court may discharge the contingent right of an unborn person	27. When a decree shall have been made by the said Civil Court in the exercise of its equitable jurisdiction, directing the sale of any lands for the payment of the debts of a deceased person, every person seized or possessed of such lands or entitled to a contingent right therein, as heir or under the will of such deceased debtor, shall be deemed to be so seized or possessed or entitled, as the case may be, upon a trust, within the meaning of this Ordinance ; and the said Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.
Declare parties to suits to be trustees	28. When any decree shall be made by the said Civil Court for the specific performance of a contract concerning any lands, or for the partition or exchange of lands, or generally when any decree shall be made for the conveyance or assignment of any lands, it shall be lawful for the said Court to declare that any of the parties to the said suit, wherein such decree is made, are trustees of such lands or any part thereof, within the meaning of this Ordinance.
Any person beneficially interested may have order	29. That an order under any of the hereinbefore contained provisions for the appointment of a new trustee or trustees, or concerning any lands, stock or chose in action, subject to a trust, may be made upon the application of any person beneficially interested in such



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lands, stock or chose in action, whether under any disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order, under any of the provisions hereinbefore contained, concerning any lands, stock or chose in action, subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

30. That any person or persons, entitled in manner aforesaid, to apply for an order for the said Civil Court, may present a petition to the said Court for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition, before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

Petition and  
affidavit

31. That upon the hearing of any such petition, it shall be lawful for the said Court to direct the same to stand over, to enable the petitioner to adduce evidence or further evidence before the said Court or to enable notice or any further notice of such petition to be served upon any person or persons.

Stand over  
evidence

32. That upon the hearing of any such petition, it shall be lawful for the said Civil Court to dismiss such petition, with or without costs, or to make an order thereon in conformity with the provisions of this Ordinance.

Dismiss

33. That whensoever in any cause or matter, either by the evidence adduced therein or by the admissions of the parties, the facts necessary for an order under this Ordinance shall appear to the said Civil Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Ordinance.

Make order

34. That whenever any order shall be made under this Ordinance by the said Civil Court for the purpose of conveying or assigning any lands or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the said Court or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the said Civil Court has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any Court of Law or Equity in the said Colony upon any question as to the legal validity of the order: Provided always that nothing herein contained shall prevent the said Civil Court directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under

Order to be con-  
clusive evidence

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Costs of order  
improperly  
obtained

this Ordinance, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Ordinance, when the same shall appear to have been improperly obtained.

Absolute decree  
when party can-  
not be found

35. That where in any suit to be commenced in the said Civil Court it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause and to make such absolute decree therein against every person who shall appear to the said Court to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court and had appeared and filed his answer thereto, and had also appeared at the hearing of such cause: Provided always that no such decree shall bind, affect or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors or administrators, for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

Costs and ex-  
penses

36. That the said Civil Court may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments and transfers, to be made in pursuance of this Ordinance or any of them, to be paid and raised out of or from the lands or personal estate or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper.

Commission  
*de lunatico*

37. That upon any petition being presented under this Ordinance to the said Civil Court concerning a person of unsound mind, it shall be lawful for the said Court, if it should so think fit, to direct that a commission in the nature of a writ *de lunatico inquirendo* shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

Postpone case

38. That upon any petition under this Ordinance being presented to the said Civil Court it shall be lawful for the said Court to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

CHARLES FITZGERALD,  
GOVERNOR AND COMMANDER-IN-CHIEF.