

PROPERTY LAW ACT, 1969-1973.

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WESTERN AUSTRALIA.

PROPERTY LAW.

No. 32 of 1969.¹

[As amended by Acts:

No. 12 of 1970,² assented to 29th April, 1970;

No. 19 of 1971, assented to 1st December, 1971;

No. 25 of 1971,³ assented to 1st December, 1971;

No. 35 of 1973, assented to 18th October, 1973;

and reprinted pursuant to the Amendments Incorporation Act, 1938.]

**AN ACT to amend and Consolidate the Law relating
to Property and for incidental purposes.**

[Assented to 19th May, 1969.]

BE it enacted—

PART I.—PRELIMINARY.

1. This Act may be cited as the *Property Law Act, 1969-1973*.

Short title.
Amended by
No. 35 of
1973, s. 1.

2. This Act shall come into operation on a date to be fixed by proclamation.¹

Commence-
ment.

¹ Came into operation 1st August, 1969. See *Gazette* 27th June, 1969, p. 1873.

² Came into operation 1st July, 1970. See *Gazette* 5th June, 1970, p. 1521.

³ Came into operation 22nd December, 1972. See *Gazette* 22nd December, 1972, p. 4755.

Arrange-
ment.
Amended by
No 19 of
1971, s. 2;
No. 35 of
1973, s. 2.

3. This Act is divided into Parts as follows:—

PART I.—PRELIMINARY (ss. 1-7).

PART II.—DEEDS AND OTHER INSTRUMENTS (ss. 8-16).

PART III.—GENERAL RULES AFFECTING PROPERTY (ss. 17-31A).

PART IV.—CONVEYANCES AND OTHER INSTRUMENTS (ss. 32-44).

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PART XIV.—PARTITION OF LAND AND DIVISION OF CHATTELS (ss. 126-129).

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PART XVI.—SERVICE OF NOTICES (s. 135).

FIRST SCHEDULE:

SECOND SCHEDULE:

THIRD SCHEDULE:

FOURTH SCHEDULE.

Repeals.

4. On the coming into operation of this Act—

- (a) the Acts of England and the United Kingdom specified in the First Schedule to this Act cease to have effect in the State and the provisions of the Acts by which the first mentioned Acts were adopted in the State are repealed; and
- (b) the Acts specified in the Second Schedule to this Act are repealed to the extent mentioned in that Schedule.

5. Without prejudice to the operation of the Interpretation Act, 1918, any alteration, by this Act, of the law whether by the repeal of an enactment, or otherwise, does not, unless otherwise expressly provided by this Act affect— Savings.

- (a) any right accrued, or obligation incurred, before the date of the coming into operation of this Act under the law so altered; or
- (b) the validity or invalidity, or any operation, effect or consequence, of any instrument executed or made, or of anything done or suffered before that date; or
- (c) any action, proceeding or thing pending on that date or uncompleted on that date and that action, proceeding and thing may be carried on and completed as if the enactment had not been repealed, or the law otherwise altered.

6. Except as in this Act expressly provided, this Act— Application
of this Act
to certain
Acts.

- (a) so far as inconsistent with the Transfer of Land Act, 1893, or the Strata Titles Act, 1966, does not apply to land that is under the provisions of either of those Acts, and
- (b) so far as inconsistent with the Bills of Sale Act, 1899, does not apply to bills of sale that are registered under the provisions of that Act.

7. In this Act unless the contrary intention appears— Definitions.

“bankruptcy” includes insolvency and liquidation by arrangement, and also any other act or proceeding in law having under any law for the time being in force, effects or results similar to those of bankruptcy;

“conveyance” includes a mortgage, charge, lease, assignment, appointment, transfer, assent, vesting declaration, disclaimer, release, surrender, extinguishment and every other assurance of property or of an interest therein by any instrument, except a will; and “convey” has a corresponding meaning;

“Court” means the Supreme Court or a Judge;

“deed” in relation to land under the Transfer of Land Act, 1893, includes an instrument having the effect of a deed under that Act;

“disposition” includes a conveyance and also a devise, bequest or an appointment of property contained in a will; and “dispose of” has a corresponding meaning;

“encumbrance” includes a legal or equitable mortgage, a trust for securing money, a lien and a charge of a portion, annuity, or other capital or annual sum; and “encumbrancee” has a corresponding meaning, and includes every person entitled to the benefit of an encumbrance or entitled to require payment or discharge of the encumbrance;

“fine” includes a premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift;

“incapable person” has the same meaning as in the Mental Health Act, 1962;

“income” in relation to land includes rents and profits;

“instrument” includes deed and will but does not include a statute, unless the statute creates a settlement;

“land” includes land of any tenure and mines and minerals whether or not they are held apart from the surface of the land, a building or part of a building, whether the division of the building is horizontal, vertical or made in any other way, and other

corporeal hereditaments, and also includes a rent and other incorporeal hereditaments and an easement, right, privilege or benefit in, over or derived from the land and an undivided share in land;

“land under the Transfer of Land Act, 1893” means any estate or interest registered under that Act;

“lease” includes an under-lease or other tenancy;

“lessee” includes an underlessee and a person deriving title under a lessee or underlessee;

“lessor” includes an underlessor and a person deriving title under a lessor or underlessor;

“mines and minerals” include any strata or seam of minerals or substances in or under any land and the right to work and get the minerals and substances;

“mortgage” includes a charge or lien on any property for securing money or money’s worth;

“mortgagee”, “mortgagee” and “mortgagor” in relation to land under the Transfer of Land Act, 1893, have the same respective meanings as they have in that Act;

“mortgage money” means the principal interest or other money or money’s worth secured by a mortgage;

“mortgagee” includes any person from time to time deriving title under the original mortgagee and “mortgagee in possession” means a mortgagee who in right of the mortgage has entered into and is in possession of the mortgaged property;

“mortgagor” includes any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property;

"notice" includes constructive notice;

"periodic tenancy" means a tenancy of no fixed duration and in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period;

"personal representative" means the executor, original or by representation or the administrator for the time being of a deceased person;

"possession" in relation to land includes the receipt of income therefrom or the right to receive the income;

"property" includes real and personal property and any estate or interest therein and any thing or chose in action;

"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; and where the context so requires "purchaser" includes an intending purchaser and "purchase" has a corresponding meaning;

"registered or duly registered" means registered in the manner provided by the Transfer of Land Act, 1893 where the land affected is under that Act, and otherwise means registered in the manner provided by the Registration of Deeds Act, 1856 (19 Vic. No. 14);

"rent" includes a rent service or a rent charge, or other rent, toll, duty, royalty or annual or periodical payment or money or money's worth reserved or issuing out of or charged upon land but does not include fee-farm rent;

"right of redemption" in relation to a mortgage includes an option to repurchase only if the option in effect creates a right of redemption;

- “sale” means a sale properly so called;
“securities” include stocks, funds and shares;
“valuable consideration” includes marriage but does not include a nominal consideration in money;
“will” includes codicil and every other testamentary disposition.

PART II.—DEEDS AND OTHER INSTRUMENTS.

8. In every deed, contract, will, order and other instrument that is executed, made or comes into operation after the coming into operation of this Act, unless the context otherwise requires—

Construction of expressions used in deeds and other instruments.
Cf. Victoria Act No. 6344, s. 61.

- (a) “month” means a calendar month;
- (b) “person” includes a body corporate;
- (c) every word in the singular number shall be construed as including the plural number;
- (d) every word in the plural number shall be construed as including the singular number;
- (e) every word of the masculine gender shall be construed as including the feminine gender;
- (f) every word of the feminine gender shall be construed as including the masculine gender;
- (g) every word in either of the said genders or numbers shall be construed as including a body corporate as well as an individual.

9. (1) Every deed, whether or not affecting property—

Formalities of deed.
Cf. N.Z. Act No. 51 of 1952, s. 4.

- (a) shall be signed by the party to be bound thereby; and
- (b) shall be attested by at least one witness not being a party to the deed but no particular form of words is required for the attestation.

(2) It is not necessary to seal any deed except in the case of a deed executed by a corporation under its common or official seal.

(3) Formal delivery and indenting are not necessary in any case.

(4) Every instrument expressed or purporting to be an indenture or a deed or an agreement under seal or otherwise purporting to be a document executed under seal and which is executed as required by this section has the same effect as a deed duly executed in accordance with the law in force immediately prior to the coming into operation of this Act.

Execution of
instruments
by or on
behalf of
corporations.
Cf.
Victoria Act
No. 6344,
s. 74.

10. (1) A deed shall be deemed to have been duly executed by a corporation aggregate in favour of a purchaser, if the seal of that corporation is affixed to the deed in the presence of and attested by a person who is its clerk, secretary or other permanent officer or his deputy, and a member of its board of directors, council or other governing body.

(2) Where a seal purporting to be the seal of a corporation aggregate has been affixed to a deed, attested by a person and a member purporting to be such a person and such a member as is referred to in subsection (1) of this section, the deed shall be deemed to have been duly executed and to have ~~taken effect~~ accordingly.

(3) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.

(4) When a person is authorised under a power of attorney or under any statutory or other power to execute any instrument in the name of, or on behalf of a corporation, sole or aggregate, he may as attorney for the corporation execute the instrument by signing the name of the corporation and adding the words "by its attorney" and his own signature in the presence of at least one witness and subject to the compliance by such person with the provisions of subsection (3) of section 85 of this Act, an instrument so executed takes effect as if duly executed by the corporation.

(5) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to execute any instrument in the name or on behalf of any other person (including another corporation), an officer of the corporation aggregate appointed for that purpose by the board of directors, council or other governing body of that corporation by resolution or otherwise, may execute the instrument in the name of that other person; and if the instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.

(6) The foregoing provisions of this section apply to transactions wherever effected, but only to instruments executed after the date of the coming into operation of this Act, except that, in the case of powers or appointments of an agent or officer, those provisions apply whether the power was conferred or the appointment was made before or after that date.

(7) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed or settlement or other instrument constituting the corporation or regulating the affairs thereof, are (in addition to the modes authorised by this section) as effectual as if this section had not come into operation.

Persons
taking who
are not
parties.
Cf.
Victoria Act
No. 6344,
s. 56;
N.Z. Act
No. 51
of 1952,
s. 7.

11. (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.

(2) Except in the case of a conveyance or other instrument to which subsection (1) of this section applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3) of this section, enforceable by that person in his own name but—

- (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
- (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
- (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.

(3) Unless the contract referred to in subsection (2) of this section otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct.

Description
of deeds.
Cf.
Victoria Act
No. 6344,
s. 57.

12. Any deed, whether or not it is an indenture, may be described (at the commencement thereof or otherwise) as a deed simply or as an agreement under seal, or as a conveyance, deed of exchange,

settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

13. (1) An exchange, a partition or other conveyance of land made by deed does not imply any condition in law.

Conditions and certain covenants not implied. Cf. Victoria Act No. 6344, s. 59.

(2) The word "give" or "grant" does not imply any covenant in law, save where otherwise provided by an Act.

14. A receipt for any consideration, money or securities in the body of a deed is a sufficient discharge therefor to the person giving, paying or delivering the consideration, money or securities, without any further receipt therefor being indorsed on that deed.

Receipt in deed sufficient. Cf. Victoria Act No. 6344, s. 67.

15. A receipt for consideration, money or other consideration in the body of a deed or indorsed thereon is, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, sufficient evidence of the payment or giving of the whole amount thereof.

Receipt in deed or indorsed evidence. Cf. Victoria Act No. 6344, s. 68.

16. Any instrument expressed to be supplemental to a previous instrument, or directed to be read as an annexure thereto, shall, as far as may be, be read and have effect, as if the instrument so expressed or directed were made by way of endorsement on the previous instrument, or contained a full recital thereof.

Construction of supplemental or annexed instrument. Cf. N.Z. Act No. 51 of 1952, s. 8.

PART III.—GENERAL RULES AFFECTING PROPERTY.

Tenant for life without impeachment of waste, not to commit equitable waste.

Cf.
U.K. 15 and
16 Geo. 5,
c. 20, s. 135.

17. An estate for life, without impeachment of waste, does not confer upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer that right expressly appears by the instrument creating that estate.

No merger at law where none in equity.

Cf.
U.K. 15 and
16 Geo. 5,
c. 20, s. 185.

18. There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Suits for possession of land by mortgagors.

Cf.
U.K. 15 and
16 Geo. 5,
c. 20, s. 98.

19. (1) Subject to subsection (2) of this section a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter upon the receipt of the rents and profits thereof has been given by the mortgagee, may sue for that possession, or for the recovery of those rents or profits, or to prevent or to recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(2) This section does not apply to a mortgagor or a mortgage to which section 117 of the Transfer of Land Act, 1893, applies.

Assignment of debts and choses in action.

Cf.
U.K. 15 and
16 Geo. 5,
c. 20, s. 136.

20. (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or chose in action, is effectual in law (subject to equities having priority over the right of the assignee), to pass and transfer from the date of the notice—

- (a) the legal right to that debt or chose in action;
- (b) all legal and other remedies for the debt or chose in action; and
- (c) the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.

(2) Where the debtor, trustee, or other person liable in respect of the debt or chose in action referred to in subsection (1) has notice—

- (a) that the assignment so referred to is disputed by the assignor, or any person claiming under him; or
- (b) of any other opposing or conflicting claims, to the debt or chose in action,

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the debt or chose in action, or pay the debt or other chose in action into court, under the provisions of the Trustees Act, 1962.

(3) For the purposes of this section “any debt or other legal chose in action” includes a part of any debt or other legal chose in action.

21. Stipulations in a contract, as to time or otherwise, that according to rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law in accordance with the rules of equity.

Stipulations
not of the
essence of
a contract.
Cf.
U.K. 15 and
16 Geo 5,
c. 20, s. 41.

22. (1) Where the purposes of a term of years, created or limited at any time out of freehold land, become satisfied (whether or not that term either by express declaration or by construction of law becomes attendant upon the freehold reversion), that term of years merges in the reversion expectant thereon and ceases accordingly.

Satisfied
terms,
whether
created out
of freehold
or leasehold
land, to
cease.
Cf.
U.K. 15 and
16 Geo. 5,
c. 20, s. 5.

(2) Where the purposes of a term of years, created or limited at any time out of leasehold land, become satisfied, that term merges in the reversion expectant thereon and ceases accordingly.

(3) Where the purposes are satisfied as respects part only of the land comprised in a term, this section has effect as if a separate term had been created in regard to that part of the land.

Estate tail
abolished.
Cf. N.Z. Act
No. 51
of 1952,
s. 16.

23. (1) In any instrument coming into operation after the coming into operation of this Act, a limitation which, if this section had not operated, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable, as the case may be) in that land in favour of that person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail.

(2) Where at the coming into operation of this Act any person is entitled to an estate tail (legal or equitable), whether in possession, reversion, or remainder, in any land, that person, except as hereinafter mentioned in this section, shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in that land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail.

(3) In subsection (2) of this section the expression "estate tail" includes that estate in fee into which an estate tail is converted where the issue in tail is barred, but the persons claiming estates by way of remainder are not barred; also an estate in fee voidable or determinable by the entry of the issue in tail; but does not include the estate of a tenant in tail after possibility of issue extinct.

24. An estate of freehold to take effect at a future time may be created by any deed by which a present estate of freehold may be created.

Creation by deed of freehold *in futuro*.
Cf. N.Z. Act No. 51 of 1952, s. 18.

25. Any estate or interest that is capable of being created by will in any chattel real may also be created by deed.

Creation by deed of estate in chattel real.
Cf. N.Z. Act No. 51 of 1952, s. 19.

26. (1) A contingent remainder is and shall be deemed to have been capable of taking effect notwithstanding the destruction or determination by forfeiture, surrender or merger of any preceding estate of freehold in the same manner and in all respects as if the destruction or determination had not happened.

Contingent remainders to take effect notwithstanding premature failure of preceding estate.
Cf. N.Z. Act No. 51 of 1952, s. 20.

(2) Every contingent remainder in tenements or hereditaments of any tenure that would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, is capable, in the event of the particular estate determining before the contingent remainder vests, of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other limitation.

27. Where in an instrument that comes into operation after the coming into operation of this Act a remainder is limited mediately or immediately to the heir or heirs of the body of a person to whom an estate for any life in the same property is expressly given, the estate of that person shall be an estate for that life with remainder to the persons who on the death of that person intestate would be beneficially entitled to his property and in the same shares.

Rule in Shelley's Case abolished.
Cf. N.Z. Act No. 51 of 1952, s. 22.

Restriction
on executory
limitations.
Cf. N.Z. Act
No. 51 of
1952, s. 23.

28. (1) Where there is a person entitled to land for an estate in fee, or for a term of years absolute, or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation is or shall become void and incapable of taking effect if and as soon as there is living any issue that has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2) This section applies only where the executory limitation is contained in an instrument coming into operation on or after the date of the coming into operation of this Act.

Corporations
may hold
as joint
tenants.
Cf. N.Z. Act
No. 51 of
1952, s. 32.

29. (1) Subject to subsection (2) of this section a body corporate is capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or two or more bodies corporate become entitled to any property under circumstances or by virtue of any instrument that would, if the body corporate had been an individual, have created a joint tenancy they are entitled to the property as joint tenants.

(2) The acquisition and holding of property by a body corporate in joint tenancy is subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

(3) Where a body corporate is a joint tenant of any property, then on its dissolution the property devolves on the other joint tenant.

(4) For the purposes of this section and section 227 of the Transfer of Land Act, 1893, the dissolution of a corporation has the same effect as the death of a joint proprietor.

30. A married minor has power to give valid receipts for all income (including accumulations of income made during the minority) to which the minor may be entitled in like manner as if the minor were of full age.

Receipts for income by married minors.

Cf. N.Z. Act No. 51 of 1952, s. 36.

31. (1) In any instrument executed on or after the 6th day of December, 1962, a restriction upon anticipation or alienation attached to the enjoyment of any property by a woman that could not have been attached to the enjoyment of that property by a man is of no effect.

Abolition of restraint on anticipation-power of Court.

Cf. W.A. Act No. 83 of 1962, s. 25.

(2) Whether before or after the coming into operation of this Act, where a married woman is restrained from anticipation or alienation of, or is unable to dispose of or bind any property belonging to her or her interest therein, the Court may with her consent by order, remove the restraint from and bind her interest in such property in any case where the Court considers it in the interest of the married woman so to do.

31A. (1) This section shall come into operation on a date to be fixed by proclamation.¹

Illegitimates to be included in class references.

Added by No. 19 of 1971, s. 3.

(2) This section applies only if and so far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions thereof.

(3) In this Act, and in any conveyance made after the coming into operation of this section,—

- (a) any reference (whether express or implied) to the child or children of any person shall be construed as, or as including, a reference to any illegitimate child of that person; and

¹ Proclaimed 21st January, 1972. See *Gazette* 21/1/72; p. 72.

- (b) any reference (whether express or implied) to a person or persons related in some other manner to any person shall be construed as, or as including a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate.

(4) Subsection (3) of this section applies only where the reference in question is to a person who is to benefit or to be capable of benefiting under the disposition or, for the purpose of designating such a person, to someone else to or through whom that person is related.

(5) For the purposes of this section, the relationship between a father and his illegitimate child, and any other relationship traced in any degree through that relationship, shall be recognised only if paternity is admitted by or established against the father in his lifetime; and where the purpose for which the relationship is to be determined is a purpose that enures for the benefit of the father the relationship shall be recognised only if paternity has been so admitted or established in the lifetime of the child.

(6) In any proceedings where a person relies on a matter of fact made relevant by the provisions of subsection (3) of this section, that fact shall not be taken to be proved unless it is established to the reasonable satisfaction of the Court.

(7) As respects conveyances executed on or after the date of the coming into operation of this section, any rule of law that a disposition in favour of illegitimate children not in being when the disposition takes effect is void as contrary to public policy is hereby abolished.

(8) Notwithstanding the provisions of subsection (3) of this section, a person who conveys or distributes any real or personal property to or amongst the persons entitled thereto without having

ascertained that there is no person who is or may be entitled to any interest in that property by virtue of that subsection is not liable to any such person of whose claim he did not have notice at the time of the conveyance or distribution; but nothing in this section prejudices the right of any such person to follow the property, or any property representing it, into the hands of any person, other than a purchaser, who may have received it.

PART IV.—CONVEYANCES AND OTHER INSTRUMENTS.

32. (1) All lands and all interests therein lie in grant and are incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale.

Lands lie
in grant
only.
Cf.
Victoria Act
No. 6344,
s. 51.

(2) A conveyance of an interest in land may operate to pass the possession or right to possession thereof, without actual entry, but subject to all prior rights thereto.

(3) The use of the word "grant" is not necessary to convey land or to create any interest therein and any word or words that was or were prior to the commencement of this subsection, sufficient in law to convey land or to create any interest therein or any other word or words evidencing an intention to convey land or create any interest therein is or are sufficient for the purpose.

33. (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

Conveyances
to be by
deed.
Cf.
Victoria Act
No. 6344,
s. 52.

(2) This section does not apply to—

- (a) assents by a personal representative;
- (b) disclaimers made in accordance with the provisions of any law relating to bankruptcy or not required to be evidenced in writing;

- (c) surrenders by operation of law, including surrenders that may, by law, be effected without writing;
- (d) leases or tenancies or other assurances not required by law to be made in writing;
- (e) receipts not required by law to be under seal;
- (f) vesting orders of the Court or other competent authority;
- (g) conveyances taking effect by operation of law.

Instruments
required to
be in
writing.
Cf.
Victoria Act
No. 6344,
s. 53.

34. (1) Subject to the provisions hereinafter contained in this Act with respect to the creation of interests in land by parol—

- (a) no interest in land is capable of being created or disposed of except by writing signed by the person creating or conveying the interest, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
- (b) a declaration of trust respecting any land or any interest therein shall be manifested and proved by writing signed by a person who is able to declare the trust or by his will;
- (c) a disposition of an equitable interest or trust subsisting at the time of the disposition shall be in writing signed by the person disposing of the interest, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

35. (1) Any interest in land created by parol and not put in writing and signed by the person so creating it, or by his agent thereunto lawfully authorised in writing, has notwithstanding any consideration having been given for the interest, the force and effect of an interest at will only.

Creation of interests in land by parol.
Cf. Victoria Act No. 6344, s. 53.

(2) Nothing in the foregoing provisions of this Part affects the creation by parol of leases taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term.

36. Nothing in sections thirty-four and thirty-five of this Act—

- (a) invalidates dispositions by will;
- (b) affects any interest validly created before the coming into operation of this Act;
- (c) affects the right to acquire an interest in land by virtue of taking possession; or
- (d) affects the operation of the law relating to part performance.

Savings in regard to ss. 34 and 35.
Cf. Victoria Act No. 6344, s. 55.

37. (1) A disposition of freehold land by deed to a person without words of limitation or any equivalent expression passes to the grantee the fee-simple or other the whole interest that the disposer had power to dispose of by deed in that land, unless a contrary intention appears in the disposition.

Power to dispose of fee-simple by deed without words of inheritance.
Cf. Victoria Act No. 6344, s. 60.

(2) In the limitation of an estate in fee simple it is sufficient to use the words "in fee" or "in fee simple" without the use of the word "heirs" or in the case of a corporation without the word "successors".

(3) A deed in or to the effect of a duly completed form in the Fourth Schedule to this Act is effectual to convey the land or the estate or interest in the land that is expressed to be conveyed by such deed.

(4) This section applies only to deeds executed after the coming into operation of this Act.

No use to result from absence of consideration.

38. No use shall be held to result merely from the absence of consideration in a conveyance of land as to which no uses or trusts are therein declared.

Limitations may be by direct conveyance without uses.

39. Every limitation that may be made by way of use operating under the Statute of Uses or this Act may be made by direct conveyance without the intervention of uses.

No conveyance to have tortious operation.

40. No conveyance of any land shall have a tortious operation.

General words implied in conveyances. Cf. Victoria Act No. 6344, s. 62.

41. (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and all advantages of whatsoever kind, appertaining or reputed to appertain to the land, or any part thereof, at the time of conveyance.

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and all advantages of whatsoever kind, appertaining or reputed to appertain to the land, houses or other buildings conveyed, or any of them, or any part thereof at the time of conveyance.

(3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions thereof.

(4) This section shall not be construed as giving to a person a better title to any property, right or thing in this section mentioned, than the title which the conveyance gives to him to the land expressed to be conveyed, or as conveying to him any property, right or thing in this section mentioned, further or otherwise than the property, right or thing could have been conveyed to him by the conveying parties.

(5) This section applies to conveyances made after the coming into operation of this Act.

42. (1) Every conveyance is effectual to pass all the estate, right, title, interest, claim and demand that the conveying parties respectively have, in, to or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the property.

All estate
clause
implied.
Cf.
Victoria Act
No. 6344,
s. 63.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions thereof.

(3) This section shall apply to conveyances made after the coming into operation of this Act.

43. (1) A release from a rent of part of the land out of which it is payable does not extinguish the whole rent, but operates only to bar the right to recover any part of the rent out of the land released, without prejudice to the rights of any persons interested in the land remaining unreleased, and not concurring in or confirming the release.

Partial
release
of land
from rent.
Cf.
Victoria Act
No. 6344,
s. 70.

(2) This section applies to releases made after the coming into operation of this Act.

Power to
person to
convey
property to
himself, etc.
Cf. N.Z. Act
No. 51 of
1952, s. 49.

44. A person may convey property to himself or to himself and another person or persons.

PART V.—COVENANTS.

Covenants
for title
implied.
Cf.
Victoria Act
No. 6344,
s. 76.

45. (1) In a conveyance there shall, in the several cases mentioned in this section, by virtue of this Act, be implied, a covenant to the effect stated in this section by the person or by each person who conveys, as far as regards the subject matter or share of subject matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants or with each of the persons, if more than one, to whom the conveyance is made, as tenants in common namely—

Third
Schedule
Part I.

(a) in a conveyance for valuable consideration, other than a mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part I of the Third Schedule to this Act;

Third
Schedule
Part II.

(b) in a conveyance of leasehold property for valuable consideration, other than a mortgage, a further covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part II of the Third Schedule to this Act;

Third
Schedule
Part III.

(c) in a conveyance by way of mortgage a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part III of the Third Schedule to this Act;

Third
Schedule
Part IV.

(d) in a conveyance by way of mortgage of leasehold property, a further covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part IV of the Third Schedule to this Act;

(e) in a conveyance by way of settlement, a covenant by a person who conveys and is

expressed to convey as settlor in the terms set out in Part V of the Third Schedule to this Act;

Third
Schedule
Part V.

- (f) in any conveyance, a covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as manager of the estate of an incapable person or under an order of the Court, in the terms set out in Part VI of the Third Schedule to this Act, which covenant shall be deemed to extend to every such person's own acts only, and may be implied in an assent by a personal representative in like manner as in a conveyance by deed.

Third
Schedule
Part VI.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, for the purposes of this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3) In every conveyance subject to an encumbrance, there shall be implied a covenant by the person to whom the property is conveyed with the person making the conveyance, to pay the moneys or perform the obligations secured by the encumbrance, and to perform and observe the covenants and provisions of the encumbrance and to indemnify and keep indemnified the person making the conveyance in respect of all such moneys, obligations, covenants and provisions.

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person or as manager of the estate of an incapable person or under an order of the Court, or by direction of a person as

beneficial owner, no covenant on the part of the person conveying is, by virtue of this section, implied in the conveyance.

(5) In this section a conveyance does not include a demise by way of lease at a rent.

(6) The benefit of a covenant implied by virtue of this section is annexed and incident to, and goes with, the estate or interest of the implied covenantee, and is capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7) A covenant implied by virtue of this section may be varied or extended by a deed or an assent, and, as so varied or extended, operates, as far as may be, in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied.

(8) This section applies to conveyances made after the coming into operation of this Act.

Construc-
tion of
implied
covenants.
Cf.
Victoria Act
No. 6344,
s. 83.

46. In the construction of a covenant, or other provision, implied in a deed by virtue of this Part, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

Benefits of
covenants
relating to
land.
Cf.
Victoria Act
No. 6344,
s. 78.

47. (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and has effect as if those successors and other persons were expressed.

(2) For the purposes of subsection (1) of this section in connection with covenants restrictive of the user of land, "successors in title" shall be deemed

to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

(3) This section applies only to covenants made after the coming into operation of this Act.

48. (1) Unless a contrary intention is expressed, a covenant relating to any land of a covenantor or capable of being bound by him, shall be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, has effect as if those successors and other persons were expressed.

Burden of covenants relating to land.
Cf. Victoria Act No. 6344, s. 79.

(2) Subsection (1) of this section extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

(3) For the purposes of this section in connection with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land.

(4) This section applies only to covenants made after the coming into operation of this Act.

49. (1) It is hereby declared that when the benefit of a restriction as to the user of or the building on any land is or has been annexed or purports to be annexed by any instrument to other land the benefit shall, unless it is expressly provided to the contrary, be deemed to be and always to have been annexed to the whole and to each part of that other land capable of benefiting from the restriction.

Construction of covenants affecting land.
Cf. Victoria Act No. 6344, s. 79A.

(2) In this section "land" includes land that is under the provisions of the Transfer of Land Act, 1893.

Covenants
to be joint
and several.
Cf. N.Z. Act
No. 51 of
1952, s. 67.

50. Where under a covenant whether express or implied under this or any other Act more persons than one are covenantors, the covenant shall unless a contrary intention is expressed be deemed to bind all the covenantors jointly and each of them severally.

Effect of
covenant
with two
or more
jointly.
Cf.
Victoria Act
No. 6344,
s. 81.

51. (1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Part, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond or obligation devolves, and if the covenant, contract, bond or obligation is made after the coming into operation of this Act it shall be construed as being made with each of them.

(2) This section extends to a covenant implied by virtue of this Part.

(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and has effect subject to the covenant, contract, bond or obligation, and to the provisions thereof.

(4) Except as otherwise expressly provided, this section applies to a covenant, contract, bond or obligation made or implied after the coming into operation of this Act.

Covenants
and
agreements
entered into
by a person
with himself
and another
or others.
Cf.
Victoria Act
No. 6344,
s. 82.

52. (1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section applies to covenants or agreements entered into before or after the coming into operation of this Act.

PART VI.—MORTGAGES.

53. (1) On a decree, judgment or order absolute for foreclosure, the mortgagee shall be deemed to have taken the property mentioned in the decree, judgment or order in full satisfaction of the mortgage debt and his right or equity to bring any action or to take other proceedings for the recovery of the mortgage money from the debtor, surety or other person is extinguished and the right or equity of the mortgagor to redeem the property is also extinguished.

Foreclosure extinguishes right of action for mortgage debt and equity of redemption.
Cf. Victoria Act No. 6344, s. 87.

(2) In the case of mortgages of land under the Transfer of Land Act, 1893 "order absolute" includes an order for foreclosure under the hand of the registrar when entered in the register book.

(3) Nothing in this section shall be deemed to disentitle the mortgagee (on such terms and conditions as to the Court seems just) from obtaining foreclosure of any other property over which he holds security by way of mortgage for the mortgage money or part thereof or from enforcing all or any rights, powers and remedies expressed or implied in that mortgage except the right to sue the mortgagor or any surety for the mortgagor either for the mortgage money or on any bill or note given as security for the mortgage money as if this section had not commenced.

(4) This section has effect notwithstanding any stipulation to the contrary.

54. (1) Where an order for sale is made by the Court in reference to an equitable mortgage on land the Court may, in favour of a purchaser, make a vesting order conveying the land or may appoint a person to convey the land, or may create and vest in the mortgagee a legal estate in the land to enable him to carry out the sale as the case requires, in like

Realisation of equitable charges by the Court.
Cf. Victoria Act No. 6344, s. 90.

manner as if the mortgage had been made by deed by way of legal mortgage, but without prejudice to any encumbrance having priority to the equitable mortgage unless the encumbrancee consents to the sale.

(2) This section applies to equitable mortgages made or arising before or after the coming into operation of this Act.

Sale of mortgaged property in action for redemption or foreclosure. Cf. Victoria Act No. 6344, s. 91.

55. (1) A person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

(2) In an action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that—

(a) any other person dissents; or

(b) the mortgagee or any person so interested does not appear in the action,

and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms, subject to subsection (3) of this section, as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

(3) In an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of encumbrances.

(5) This section applies to actions brought either before or after the coming into operation of this Act.

(6) In this section "mortgaged property" includes the estate or interest that a mortgagee would have had power to convey if the statutory power of sale were applicable.

(7) For the purpose of this section the Court may, in favour of a purchaser, make a vesting order conveying the mortgaged property, or appoint a person to do so, subject or not to any encumbrance, as the Court thinks fit; or, in the case of an equitable mortgage, may create and vest in the mortgagee a legal estate to enable him to carry out the sale in like manner as if the mortgage had been made by deed by way of legal mortgage.

56. (1) A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage that he seeks to redeem.

Restriction on consolidation of mortgages.
Cf. Victoria Act No. 6344, s. 93.

(2) This section has effect notwithstanding any stipulation to the contrary.

(3) This section applies only where the mortgages or one of them are or is made after the coming into operation of this Act.

57. (1) A mortgagee, where the mortgage is made by deed, has, by virtue of this Part, the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, namely—

Implied powers of mortgagees.
Cf. Victoria Act No. 6344, s. 101.

- (a) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged

property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, and for a sum payable either in one amount or by instalments, subject to such conditions respecting title, or evidence of title, or other matter, as he, the mortgagee, thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the mortgaged property as the circumstances may require and he thinks fit; and

- (b) a power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire, storm, tempest and earthquake any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest wherein is mortgaged, and the premiums paid for any such insurance is a charge on the mortgaged property or estate or interest, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and
- (c) where the mortgage is executed after the coming into operation of this Act a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof; or, if the mortgaged property consists of an interest in income, or of a rentcharge or an annual or other periodical sum, a receiver of that property or any part thereof.

(2) Where the mortgage is executed after the coming into operation of this Act, the power of sale

referred to in subsection (1) of this section, includes the following powers as incident thereto, namely—

- (a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing;
- (b) a power to sell the mortgaged property, or any part thereof, or all or any mines and minerals apart from the surface—
 - (i) with or without a grant or reservation of rights of way, rights of water, easements, rights and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof or to any property sold; and
 - (ii) with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements, rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof, or to any property sold; and
 - (iii) with or without covenants by the purchaser to expend money on the land sold.

(3) The provisions of this Part relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of

those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were contained in this Part.

(4) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and has effect subject to the terms of the mortgage deed and to the provisions thereof.

Power to appoint receiver in the case of mortgage under the Transfer of Land Act, 1893.
Cf. Victoria Act No. 6344, s. 102.

58. The provisions of subsection (1) of section 57 of this Act so far as they relate to the power to appoint a receiver apply to a mortgage registered under the Transfer of Land Act, 1893 and in applying those provisions the expression "mortgage deed" shall be construed as including an instrument of mortgage under that Act.

Regulation of exercise of power of sale.
Cf. Victoria Act No. 6344, s. 103.

59. (1) A mortgagee shall not exercise the power of sale conferred by this Part unless and until—

- (a) where the mortgage money is not payable on demand, default has been made in payment of the mortgage money or part thereof or in the performance or observance of a covenant or condition in the mortgage; and
- (b) in any case, notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment thereof for one month after service of the notice or for such other period as may be stipulated in the mortgage.

(2) This section does not apply to a mortgage that is registered under the provisions of the Transfer of Land Act, 1893.

Conveyance in exercise of power of sale.
Cf. Victoria Act No. 6344, s. 104.

60. (1) A mortgagee exercising the power of sale conferred by this Part has power, by deed, to convey to and vest in the purchaser the property sold for all the estate (including the legal estate) and interest

therein that the original mortgagor had power to dispose of, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights that have priority to the mortgage.

(2) Where a conveyance is made in exercise of the power of sale conferred by this Part, or any corresponding previous enactment, the title of the purchaser is not impeachable on the ground—

- (a) that no case had arisen to authorise the sale; or
- (b) that due notice was not given to the mortgagor; or
- (c) that the power was otherwise improperly or irregularly exercised,

and a purchaser shall not, either before or on conveyance, be concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power has his remedy in damages against the person exercising the power.

(3) A conveyance on sale by a mortgagee, made after the coming into operation of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Part unless a contrary intention appears.

61. The money that is in fact received by the mortgagee, arising from the sale, after discharge of prior encumbrances to which the sale is not made subject (if any) shall be held by him in trust to be applied by him—

Application
of proceeds
of sale.
Cf.
Victoria Act
No. 6344,
s. 105.

- (a) firstly, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and

- (b) secondly, in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage,

and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

Provisions
as to
exercise of
power of
sale.
Cf.
Victoria Act
No. 6344,
s. 106.

62. (1) The power of sale conferred by this Part may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(2) The power of sale conferred by this Part does not affect the right of foreclosure.

(3) The mortgagee is not answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Part, or of any trust connected therewith, or of any power or provision contained in the mortgage deed.

(4) At any time after the power of sale conferred by this Part has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, that a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagee's
receipts,
discharges,
etc.
Cf.
Victoria Act
No. 6344,
s. 107.

63. (1) The receipt in writing of a mortgagee is a sufficient discharge for any money arising under the power of sale conferred by this Part, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the money or securities to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage or as to the application of the money or securities so paid or transferred.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Part directed respecting money received by him arising from a sale under the power of sale conferred by this Part, except that the costs, charges and expenses payable shall include the costs, charges and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

64. (1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Part shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, the full insurable value of the buildings upon the mortgaged land or the amount owing to the mortgagee in respect of the mortgage.

Amount and application of insurance money.
Cf. Victoria Act No. 6344, s. 108.

(2) An insurance shall not, under the power conferred by this Part, be effected by a mortgagee in any of the following cases, namely—

- (a) where there is a declaration in the mortgage deed that no insurance is required;
- (b) where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed;
- (c) where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee to the amount to which the mortgagee is by this Part authorised to insure.

(3) All money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Part or on an

insurance for the maintenance of which the mortgagor is liable under the mortgage deed, shall, unless the mortgage deed otherwise provides, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

Appointment,
powers,
remuneration
and
duties of
receiver.
Cf.
Victoria Act
No. 6344,
s. 109.

65. (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Part shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Part, or by the Transfer of Land Act, 1893, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) A receiver appointed under the powers conferred by this Part, shall be deemed to be the agent of the mortgagor; and the mortgagor is solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

(3) The receiver has power to demand and recover all the income of which he is appointed receiver, by action or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest that the mortgagor could dispose of, and to give effectual receipts accordingly for the income, and to exercise any powers that may have been delegated to him by the mortgagee pursuant to this Part.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver is for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, entitled to retain out of any money received by him, a commission at such rate, not exceeding five per centum on the

gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent (if any) to which the mortgagee might have insured and keep insured against loss or damage by fire, storm, tempest and earthquake, out of the money received by him, any building, effects or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

66. Subject to the provisions of this Part as to the application of insurance money, the receiver shall apply all money received by him as follows, namely—

Application
of money
received by
receiver.
Cf.
Victoria Act
No. 6344,
s. 110.

- (a) in discharge of all rents, taxes, rates and outgoings whatever affecting the mortgaged property;
- (b) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;
- (c) in payment of his commission, and of the premiums on fire, life or other insurances (if any) properly payable under the mortgage deed or under this Part, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- (d) in payment of the interest accruing due in respect of any principal sum due under the mortgage; and
- (e) in or towards discharge of the principal money if so directed in writing by the mortgagee,

and shall pay the residue (if any) of the money received by him to the person who, but for the possession of the receiver, would have been

entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

Effect of
advance on
joint
account.
Cf.
Victoria Act
No. 6344,
s. 112.

67. (1) Where—

- (a) in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account; or
- (b) a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly and not in shares,

the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor is a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section applies if and so far as a contrary intention is not expressed in the mortgage, obligation or transfer, and has effect subject to the terms of the mortgage, obligation, or transfer, and to the provisions thereof.

(3) This section applies to any mortgage, obligation or transfer made after the coming into operation of this Act.

(4) In the case of mortgages under the Transfer of Land Act, 1893 this section applies subject to the provisions of that Act relating to the entry of survivorship and the registration of a discharge.

68. (1) Where a mortgage has been discharged, released or postponed as to the whole or any part of the mortgaged property a person dealing in good faith with the mortgagee or with the mortgaged property, shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not he has notice of the trust, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage,

Notice of trusts affecting mortgage money. Cf. Victoria Act No. 6344, s. 113.

- (a) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account; and
- (b) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof,

without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.

(2) This section applies to mortgages made before or after the date of the coming into operation of this Act, but only with respect to dealings effected after that date.

(3) This section does not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust.

PART VII.—LEASES AND TENANCIES.

Division 1.—General.

69. Subject to subsection (1) of section 83B of this Act, the provisions of this Part apply to leases and sub-leases of land under the Transfer of Land Act, 1893, notwithstanding anything contained in that Act, and for the purposes of this Part "lease" includes so far as circumstances will admit any instrument of letting whether under seal or not.

Heading added by No. 35 of 1973, s. 3. This Part to apply to leases under the Transfer of Land Act, 1893. Amended by No. 35 of 1973, s. 3. Cf. Victoria Act No. 6344, s. 136.

Tenant not
prejudiced
by assign-
ment before
notice.

Cf.
Victoria Act
No. 6344,
s. 138.

70. A lessee shall not be prejudiced or damaged by payment of any rent to any grantor, transferor or assignor of any reversion or by breach of any condition for non payment of rent before notice is given to him by the grantee, transferee or assignee to whom the grant, transfer or assignment is made by the grantor, transferor or assignor.

Tenancy
from year
to year not
implied.

Cf. N.Z. Act
No. 51 of
1952, s. 105.

Termination
of tenancies.

71. No tenancy from year to year is implied by payment of rent.

72. (1) Without prejudice to any other lawful mode of termination available or to any express agreement by the parties to a periodic tenancy or tenancy of uncertain duration as to its termination, a periodic tenancy or a tenancy of uncertain duration may be terminated by one month's written notice by either party thereto to the other expiring at any time whether at the end of a rent period or not.

(2) Notwithstanding anything in this section any mode of termination of a periodic tenancy or a tenancy of uncertain duration that was lawful before the date of the coming into operation of this Act whether by shorter notice than that provided for by subsection (1) of this section or otherwise is as effectual as if this Act had not come into operation.

Waiver of
a covenant
in a lease,
not to
operate as
general
waiver.

Cf.
Victoria Act
No. 6344,
s. 148.

73. (1) Where any actual waiver by a lessor or the persons deriving title under him, of the benefit of any covenant or condition in any lease, is proved to have taken place in any particular instance, the waiver shall not be deemed to extend to any instance, or to any breach of covenant or condition except that to which the waiver specially relates, nor operate as a general waiver of the benefit of the covenant or condition.

(2) Subsection (1) of this section applies unless a contrary intention appears and shall extend to waivers effected after the coming into operation of this Act.

(3) After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice does not operate as a waiver of the notice or revive or create a tenancy.

74. (1) The doctrine of *interesse termini* is abolished.

Abolition of *interesse termini*, and as to reversionary leases and leases for lives.
Cf. Victoria Act No. 6344, s. 149.

(2) As from the date of the coming into operation of this Act all terms of years absolute are, whether the interest is created before or after that date, capable of taking effect at law or in equity, according to the estate, interest or powers of the grantor, from the date fixed for commencement of the term, without actual entry.

(3) A term, at a rent or granted in consideration of a fine, limited after the date of the coming into operation of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, is void, and any contract made after that date to create such a term is likewise void; but this subsection does not apply to any term taking effect under a settlement, or created out of an interest under a settlement, or under a power for mortgage, indemnity or other like purposes.

(4) Nothing in subsections (1) and (2) of this section prejudicially affects the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, as respects terms or interests created before the coming into operation of this Act, operates to vary any statutory or other obligations imposed in respect of those terms or interests.

(5) Nothing in this Part affects the rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term and that rule is hereby confirmed.

Effect of
extinguish-
ment of
reversion.
Cf.
Victoria Act
No. 6344,
s. 139.

75. (1) Where a reversion expectant on a lease of land is surrendered or merged, the estate or interest which as against the lessee for the time being confers the next vested right to the land, shall be deemed the reversion for the purpose of preserving the same incidents and obligations as would have affected the original reversion had there been no surrender or merger thereof.

(2) This section shall apply to surrenders or mergers effected after the coming into operation of this Act.

Apportion-
ment of
conditions
on sever-
ance.
Cf.
Victoria Act
No. 6344,
s. 140.

76. (1) Notwithstanding—

- (a) the severance by conveyance, surrender or otherwise of the reversionary estate in any land comprised in a lease; and
- (b) the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein,

every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each several part is reversionary, or the term in the part of the land as to which the term has not been surrendered, or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2) In this section “right of re-entry” includes a right to determine the lease by notice to quit or otherwise; but where the notice is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate therein a counter notice expiring at the same time as the original notice.

77. (1) Rent reserved by a lease, and the benefit of every covenant or provision contained in the lease, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.

Rent and benefit of lessee's covenants to run with the reversion. Cf. Victoria Act No. 6344, s. 141.

(2) Any rent, covenant or provision referred to in subsection (1) of this section is capable of being recovered, received, enforced and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or of any part as the case may require, of the land leased.

(3) Where that person becomes entitled by conveyance or otherwise, the rent, covenant or provision referred to in subsection (1) of this section may be recovered, received, enforced or taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable, but this subsection does not render enforceable any condition of re-entry or other condition waived or released before that person becomes so entitled.

(4) This section applies to leases made before or after the date of the coming into operation of this Act, but does not affect the operation of—

- (a) any severance of the reversionary estate;
or
- (b) any acquisition by conveyance or otherwise of the right to receive or enforce any rent, covenant or provision, effected before that date.

Obligation
of lessor's
covenants
to run with
reversion.
Cf.
Victoria Act
No. 6344,
s. 142.

78. (1) The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, that obligation may be taken advantage of and enforced against any person so entitled.

(2) This section applies to leases made before or after the date of the coming into operation of this Act but not to any severance of the reversionary estate which was effected before that date.

(3) This section takes effect without prejudice to any liability affecting a covenantor or his estate.

Effect of
licences
granted to
lessees.
Cf.
Victoria Act
No. 6344,
s. 143.

79. (1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only—

- (a) to the permission actually given thereby;
- (b) to the specific breach of any provision or covenant specified in the licence; or
- (c) to any other matter so specified and authorised thereby,

and the licence does not prevent any proceeding for any subsequent breach unless otherwise so specified.

(2) Notwithstanding any such licence—

- (a) all rights under covenants and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, condition

or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and

- (b) the condition or right of entry remains in force in all respects as if the licence had not been granted, except in respect of the particular matter authorised to be done.

(3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence; and a licence is granted—

- (a) to any one of two or more lessees to do any act, or to deal with his share or interest; or
- (b) to any lessee, or to any one of two or more lessees, to assign or underlet part only of the property, or to do any act in respect of part only of the property,

the licence does not operate to extinguish the right of entry in case of any breach of covenant or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property, as the case may be, in respect of those shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence.

(4) This section applies to licences granted after the coming into operation of this Act.

80. (1) In every lease containing a covenant, condition or agreement against assigning, underletting or parting with the possession, or disposing of the land or property leased without licence or consent, that covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a condition to the effect that the consent shall not be unreasonably withheld and that no fine or sum of money in the nature of a fine shall be

Consent to assign or sublet not to be unreasonably withheld.

Cf. Victoria Act No. 6344, s. 144.

payable for or in respect of the licence or consent, but the last mentioned condition does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to the licence or consent.

(2) In any instrument executed before or after the coming into operation of this Act a reference to section 4 of the Landlord and Tenant Act, 1912 shall be read and construed as a reference to this section.

Restrictions
and relief
against
forfeiture
of leases
and under-
leases.
Cf.
Victoria Act
No. 6344,
s. 146.

81. (1) A right of re-entry or forfeiture under any provision or stipulation in a lease for a breach of any covenant or condition in the lease is not enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—

- (a) specifying the particular breach complained of;
- (b) where the breach is capable of remedy, requiring the lessee to remedy the breach; and
- (c) in any case, requiring the lessee to make compensation in money for the breach,

and the lessee fails, within a reasonable time after the service of the notice on him, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a lessor is proceeding, by action or otherwise, to enforce or has enforced without the aid of the Court such a right of re-entry or forfeiture, the lessee may, in the lessor's action (if any) or in any action brought by himself apply to the Court for relief, and the Court—

- (a) may grant or refuse relief, as the Court having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances thinks fit; and

- (b) in case of relief may grant it on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case, thinks fit.

(3) (a) A lessor is entitled to recover as a debt due to him from a lessee and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture that, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Part either by the Court or by the operation of subsection (1) of this section.

Costs in connection with forfeiture and waiver.

(b) The lessor is so entitled to recover whether the lessee has or has not rendered forfeiture unenforceable against him under that subsection.

(4) Where a lessor is proceeding by action or otherwise to enforce or has enforced a right of re-entry or forfeiture—

(a) under any covenant, provision or stipulation in a lease; or

(b) for non-payment of rent,

the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by that person for that purpose, make an order vesting for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in the property, upon such conditions,

(c) as to execution of any deed or other document;

- (d) payment of rent, costs, expenses, damages, compensation or giving security or otherwise,

as the Court in the circumstances of each case thinks fit, but in no case is the under-lessee entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

(5) For the purposes of this section except so far as is otherwise provided,

- (a) "lease" includes an original or derivative under-lease; an agreement for a lease where the lessee has become entitled to have his lease granted, and a grant securing a rent by condition;
- (b) "lessee" includes an original or derivative under-lessee, and the persons deriving title under a lessee, and a grantee under any grant securing a rent by condition and the persons deriving title under him;
- (c) "lessor" includes an original or derivative under-lessor, and the persons deriving title under a lessor, a person making a grant securing a rent by condition and the persons deriving title under him;
- (d) "under-lease" includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted;
- (e) "under-lessee" includes any person deriving title under an under-lessee.

(6) This section applies although the condition or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act.

(7) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant is and takes effect as a lease to continue for any longer term for which it could subsist, but determinable by a condition for re-entry on the breach.

(8) This section does not extend—

- (a) to a covenant or condition against assigning, underletting, parting with the possession or disposing of the land leased;
- (b) to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest; or
- (c) in the case of a lease of any licensed premises as defined in the Liquor Act, 1970, to a covenant not to do or omit any act or thing by which the licence granted in respect thereof, may be forfeited.

(9) This section does not except as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(10) This section has effect notwithstanding any stipulation to the contrary.

82. No assignment or underletting—

- (a) by the official assignee of a bankrupt;
- (b) by the liquidator of a company (except in the case of a member's voluntary winding up);
- (c) by the sheriff or bailiff under an execution; or
- (d) by a personal representative pursuant to a bequest in a will,

Certain assignments not to be deemed a breach.

shall be deemed a breach of a covenant, condition or agreement against assigning, underletting, parting with possession or disposing of the land leased unless the contrary is expressly declared in the lease.

Surrender
of head
lease to
grant new
lease not to
prejudice
under-
lease.
Cf.
Victoria Act
No. 6344,
s. 150.

83. (1) A lease not being a lease registered under the Transfer of Land Act, 1893, may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any under-lease derived out of the lease so surrendered.

(2) A new lease may be granted and accepted, in place of a lease so surrendered, without a surrender of an under-lease as provided in subsection (1) of this section, and the new lease operates as if all under-leases derived out of the surrendered lease had been surrendered before the surrender of that lease was effected.

(3) The lessee under the new lease and any person deriving title under him is entitled to the same rights and remedies in respect of the rent reserved by and the covenants, agreements and conditions contained in any under-lease as if the original lease had not been surrendered but was or remained vested in him.

(4) Each under-lessee and any person deriving title under him is entitled to hold and enjoy the land comprised in his under-lease (subject to the payment of any rent reserved by and to the observance of the covenants, agreements and conditions contained in the under-lease) as if the lease out of which the under-lease was derived had not been surrendered.

(5) The lessor granting the new lease and any person deriving title under him is entitled to the same remedies by entry in and upon the land comprised in any such under-lease for rent reserved by or for breach of any covenant, agreement or conditions contained in the new lease (so far only as the rents reserved by or the covenants, agreements or conditions contained in the new lease do not exceed or impose greater burdens than those reserved by or contained in the original lease out of which the under-lease is derived) as he would have had—

- (a) if the original lease had remained on foot;
or

- (b) if a new under-lease derived out of the new lease had been granted to the under-lessee or a person deriving title under him,

as the case may require.

(6) This section does not affect the powers of the Court to give relief against forfeiture.

Division 2.—Options in Leases.

Heading
added by
No. 35 of
1973.

83A. In this Division—

Interpreta-
tion.
Added by
No. 35 of
1973, s. 3.

- (a) a reference to an option contained in a lease is a reference to a right on the part of the lessee to require the lessor—
 - (i) to sell, or offer to sell, to the lessee the reversion expectant on the lease; or
 - (ii) to grant, or offer to grant, to the lessee a renewal or extension of the lease, or a further lease, of the demised premises or a part thereof,
 whether the right is conferred by the lease or by an agreement collateral to the lease; and
- (b) a reference to a breach by a lessee of his obligations under a lease containing an option is a reference to a breach of those obligations by act or omission in so far as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.

83B. (1) In respect of leases of land under the Transfer of Land Act, 1893, this Division shall be read and construed subject to section 68 of that Act.

Construc-
tion and
application
of Division.
Added by
No. 35 of
1973, s. 3.

(2) This Division applies to and in respect of leases granted only after the coming into operation of the Property Law Act Amendment Act, 1973, and options contained therein.

(3) This Division has effect notwithstanding any stipulation to the contrary.

Breach of certain obligations not to preclude lessee from exercising option except in certain circumstances. Added by No. 35 of 1973, s. 3.

83C. (1) In this Division "prescribed notice" means a notice in writing that—

- (a) specifies an act or omission; and
- (b) states that, subject to any order of the Court under section 83D of this Act, a lessor giving the notice proposes to treat that act or omission as having precluded a lessee on whom the notice is served from exercising an option contained in the lease.

(2) Where an act or omission that constituted a breach by a lessee of his obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of fourteen days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and—

- (a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the Court before the expiration of the period of one month next succeeding service of the notice; or
- (b) where such relief is so sought—
 - (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting relief; or
 - (ii) where relief is granted upon terms to be complied with by the lessee before compliance by the lessor with the order granting relief, the lessee

fails to comply with those terms within the time stipulated by the Court for the purpose.

83D. (1) Relief referred to in section 83C of this Act may be sought—

Court may grant relief from breach of certain obligations. Added by No. 35 of 1973, s. 3.

(a) in proceedings instituted in the Court for the purpose; or

(b) in proceedings in the Court in which—

(i) the existence of an alleged breach by the lessee of his obligations under the lease; or

(ii) the effect of the breach from which relief is sought,

is in issue.

(2) The Court may, in proceedings in which relief referred to in section 83C of this Act is sought—

(a) make such orders (including orders affecting an assignee of the reversion) as it thinks fit for the purpose of granting the relief sought; or

(b) refuse to grant the relief sought.

(3) The Court may, in proceedings referred to in subsection two of this section, take into consideration—

(a) the nature of the breach complained of;

(b) the extent to which, at the date of the institution of the proceedings, the lessor was prejudiced by the breach;

(c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice;

(d) the rights of persons other than the lessor and the lessee;

(e) the operation of section 83E of this Act; and

- (f) any other circumstances considered by the Court to be relevant.

(4) The Court—

- (a) may make an order under subsection (2) of this section on such terms as to costs, damages, compensation or penalty, or on such other terms, as the Court thinks fit; and
- (b) may make any consequential or ancillary order it considers necessary to give effect to an order made under that subsection.

Lease to
continue in
force until
issue
decided.
Added by
No. 35 of
1973, s. 3.

83E. (1) Subject to any order of the Court and to this section—

(a) where—

- (i) an option is contained in a lease;
 - (ii) the lessee exercises, or purports to exercise, the option; and
 - (iii) the lease would, but for this paragraph, expire within the period of fourteen days after the exercise, or purported exercise, of the option,
- the lease shall be deemed to continue in force until the expiration of that period;

(b) where—

- (i) a prescribed notice is duly served on a lessee; and
- (ii) the lease in respect of which the notice is served would, but for this paragraph, expire within the period of one month referred to in paragraph (a) of subsection (2) of section 83C of this Act,

the lease shall be deemed to continue in force until the expiration of that period; and

- (c) where, in relation to a lease continued in force under paragraph (b) of this subsection, relief referred to in section 83C

of this Act is sought by a lessee, the lease shall, subject to subsections (2) and (3) of this section, be deemed to continue in force until—

- (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting the relief; or
- (ii) effect is given to orders made by the Court in granting that relief in so far as they affect the lessor or relate to an assurance to the lessee.

(2) Paragraph (c) of subsection (1) of this section—

- (a) does not apply to or in respect of a lease that, but for that paragraph, would continue in force for a period longer than the period for which it is, by the operation of that paragraph, continued in force; and
- (b) does not, where a lessee fails to comply with terms imposed upon him pursuant to paragraph (a) of subsection (4) of section 83D of this Act, operate to continue the lease in force beyond the time of that failure by the lessee.

(3) Where, under subsection (1) of this section, a lease continues in force after the day on which, but for that subsection, it would expire, the lease so continues in force subject to the provisions, stipulations, covenants, conditions and agreements in the lease (other than those relating to the term and the option contained in the lease) but without prejudice to any rights or remedies of the lessor or lessee in relation to the lease.

(4) Subject to subsection (5) of this section, where, pursuant to an option contained in a lease continued in force under subsection (1) of this section, the lease is renewed or a new lease is granted, the period during which the lease was so continued in force shall be deemed to be part of the term for

which the lease was renewed or the new lease granted, and any lease granted pursuant to an exercise of the option shall be expressed to have commenced when the lease containing the option would, but for subsection (1) of this section, have expired.

(5) Subsection (4) of this section does not apply to or in respect of a lease that stipulates for the commencement of any lease granted pursuant to an exercise of the option contained therein on a day that is later than the day on which the lease so granted would, but for this subsection, commence under subsection (4) of this section.

PART VIII.—POWERS OF ATTORNEY.

Execution
by attorney
in his
own name.
Cf. N.Z. Act
No. 51 of
1952, s. 134.

84. (1) The donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power.

(2) Every assurance, instrument and thing so executed and done shall be as effectual in law to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(3) This section applies to powers of attorney created by instruments executed either before or after the coming into operation of this Act.

Continuance
until
notice of
death or
revocation
received.
Cf. N.Z. Act
No. 51 of
1952, s. 135.

85. (1) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, the power, so far as concerns any act or thing done or suffered thereunder in good faith, operates and continues in force until notice of the death of the donor of the power or until notice of other revocation thereof has been received by the donee of the power.

(2) Every act or thing within the scope of the power done or suffered in good faith by the donee of the power after the death of the donor of the power or other revocation referred to in subsection (1) of this section, and before notice thereof has been received by him, is effectual in all respects as if that death or other revocation had not happened or been made.

(3) A statutory declaration by the donee of a power under the power of attorney to the effect that he has not received any notice or information of the revocation of the power of attorney by death or otherwise is, if made immediately before or if made after any such act as is mentioned in subsection (2) of this section, conclusive proof of the non-revocation at the time when the act was done or suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of the death of the donor of the power or other revocation of the power of attorney.

(4) Where the donee of the power is a corporation aggregate the statutory declaration is sufficient if—

- (a) it is made by any director, manager, or secretary of the corporation or by any officer thereof discharging the functions usually appertaining to any of those offices or by any officer of the corporation appointed for that purpose either generally or in the particular instance by the board of directors, council or other governing body by resolution or otherwise; and
- (b) it is to the effect that to the best of the declarant's knowledge and belief neither the donee of the power nor any servant or agent of the donee of the power has received any such notice or information as is mentioned in subsection (3) of this section.

(5) Where the statutory declaration referred to in subsection (4) of this section contains a statement that the declarant is a director, manager, or

secretary of the corporation or is an officer of the corporation discharging the functions usually appertaining to any of those offices or is an officer of the corporation appointed for the purpose of making the declaration, that statement is conclusive evidence in favour of the persons mentioned in subsection (3) of this section.

(6) This section applies to powers of attorney created by instruments executed in or out of the State and whether executed before or after the coming into operation of this Act.

(7) Nothing in this section prejudices or affects the operation of section 143 of the Transfer of Land Act, 1893.

Irrevocable
power of
attorney for
value.
Cf. N.Z. Act
No. 51 of
1952, s. 136.

86. (1) Where a power of attorney given for valuable consideration (whether executed in or out of the State) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

- (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental incapacity or bankruptcy of the donor; and
- (b) any act done at any time by the donee of the power in pursuance of the power is as valid as if anything done by the donor without the concurrence of the donee, or the death, mental incapacity or bankruptcy of the donor, had not been done or had not happened; and
- (c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the

donor without the concurrence of the donee, or of the death, mental incapacity, or bankruptcy of the donor.

(2) This section applies to powers of attorney created by instruments executed either before or after the coming into operation of this Act.

87. (1) Where a power of attorney (whether executed in or out of the State, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding two years from the date of the instrument, then, in favour of a purchaser—

Power of attorney made irrevocable for fixed time.
Cf. N.Z. Act No. 51 of 1952, s. 137.

- (a) the power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, mental incapacity or bankruptcy of the donor; and
- (b) any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee, or the death, mental incapacity or bankruptcy of the donor had not been done or had not happened; and
- (c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor of the power during that fixed time without the concurrence of the donee, or of the death, mental incapacity or bankruptcy of the donor within that fixed time.

(2) This section applies to powers of attorney created by instruments executed either before or after the coming into operation of this Act.

Application
to corpora-
tions.

Cf. N.Z. Act
No. 51 of
1952, s. 139.

88. (1) The provisions of this Part of this Act apply with the necessary modifications with respect to any power of attorney executed by any corporation to the same extent as if the corporation were an individual and the dissolution of the corporation (however occurring) were the death of that individual within the meaning of this Part of this Act.

(2) The provisions of subsection (1) of this section are in addition to and not in derogation of the provisions of section 35 of the Companies Act, 1961.

(3) The provisions of subsection (1) of this section do not apply to a corporation that is dissolved before the date of the coming into operation of this Act, but do apply to powers of attorney created by instruments executed either before or after that date.

PART IX.—VOIDABLE DISPOSITIONS.

Voluntary
conveyances
to defraud
creditors
voidable.

Cf.
Victoria Act
No. 6344,
s. 172.

89. (1) Except as provided in this section, every alienation of property made, whether before or after the coming into operation of this Act, with intent to defraud creditors is voidable, at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property alienated for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the alienation, notice of the intent to defraud creditors.

90. Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

Voluntary disposition to defraud purchasers voidable.
Cf. Victoria Act No. 6344, s. 178.

91. For the purposes of section 90 of this Act, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent disposition for valuable consideration was made.

Subsequent conveyance not to be evidence of intent to defraud.
Cf. Victoria Act No. 6344, s. 174.

92. (1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, is liable to be opened or set aside merely on the ground of under value.

Acquisitions of reversions at an under value.
Cf. Victoria Act No. 6344, s. 175.

(2) In this section "reversionary interest" includes an expectancy or possibility.

(3) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

PART X.—POWERS OF APPOINTMENT.

93. A person to whom any power, whether coupled with an interest or not, is given may by deed disclaim, release or contract not to exercise the power, and after the disclaimer, release or contract is not capable of exercising or joining in the exercise of the power.

Disclaimer, etc., of powers.
Cf. Victoria Act No. 6344, s. 155.

94. On such disclaimer, release or contract as is referred to in section 93 of this Act being effected, the power may be exercised by the other person or persons or the survivor or survivors of the other persons to whom the power is given unless the contrary is expressed in the instrument creating the power.

Effect of disclaimer, etc.
Cf. Victoria Act No. 6344, s. 156.

Protection of
purchasers
claiming
under
certain void
appoint-
ments.
Cf.
Victoria Act
No. 6344,
s. 157.

95. (1) An instrument purporting to exercise a power of appointment over property, that, in default of and subject to any appointment, is held in trust for a class or number of persons of whom the appointee is one, is not, except as provided in subsection (2) of this section, void on the ground of fraud on the power as against a purchaser in good faith.

(2) If the interest appointed exceeds, in amount or value, the interest in that property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in his favour and to any hotchpot provision, the protection afforded by this section to a purchaser does not extend to such excess.

(3) In this section "a purchaser in good faith" means a person dealing with an appointee of the age of not less than twenty-five years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.

(4) Persons deriving title under any purchaser entitled to the benefit of this section is entitled to the like benefit.

(5) This section applies only to dealings effected after the coming into operation of this Act.

Validation
of appoint-
ments
where
objects are
excluded
or take
illusory
shares.
Cf.
Victoria Act
No. 6344,
s. 158.

96. (1) An appointment made in exercise of a power to appoint any property among two or more objects is not invalid on the ground that—

- (a) An unsubstantial, illusory or nominal share only is appointed to or left unappointed to devolve upon any one or more of the objects of the power; or

- (b) any object of the power is thereby altogether excluded—

but the appointment is valid notwithstanding that any one or more of the objects is not thereby, or in default of appointment, to take any share in the property.

(2) This section does not affect any provision in the instrument creating the power that declares the amount of any share from which any object of the power is not to be excluded.

(3) This section applies to any appointment made before or after the coming into operation of this Act.

97. (1) A deed executed in the manner in which a deed is required to be executed by this Act, so far as respects the execution and attestation thereof, is a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is expressly required that a deed or instrument in writing, made in exercise of the power, is to be executed or attested with some additional or other form of execution or attestation or solemnity.

Execution of powers not testamentary.
Cf. Victoria Act No. 6344, s. 159.

(2) This section does not operate to defeat any direction in the instrument creating the power that—

- (a) the consent of any particular person is to be necessary to a valid execution;
- (b) in order to give validity to any appointment, any act is to be performed having no relation to the mode of executing and attesting the instrument.

(3) This section does not prevent the donee of a power from executing it in accordance with the power by writing, or otherwise than by an instrument executed and attested as a deed, and if a power is so executed this section does not apply.

(4) This section shall apply to appointments by deed made after the coming into operation of this Act.

Application
of this
Part to
existing
powers.
Cf.
Victoria Act
No. 6344,
s. 160.

98. This Part applies to powers created or arising either before or after the coming into operation of this Act.

PART XI.—PERPETUITIES AND ACCUMULATIONS.

Application.
Cf. W.A. Act
No. 83 of
1962, s. 3.

99. (1) Except where otherwise expressly provided in this Part, this Part—

- (a) insofar as it applies to wills, applies only to the wills of testators dying after the sixth day of December, nineteen hundred and sixty-two; and
- (b) insofar as it applies to instruments other than wills, applies only to instruments executed after that date.

(2) This Part binds the Crown.

Interpreta-
tion.
Cf. W.A. Act
No. 83 of
1962, s. 4.

100. In this Part, unless the context otherwise requires—

“Court” means the Supreme Court or a judge;

“decision of the Court” includes the decision of a court hearing an appeal from the Court;

“instrument” includes a will and also includes an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special, even if the power were created before this Part comes into operation; but does not include an Act of Parliament;

“limitation” includes any provision in an instrument by which any property, or any interest in any property, or any right, power,

authority or discretion in or over or in connection with any property, is or purports to be devised or bequeathed to, or created for, or given or granted or appointed to or conferred upon, or otherwise limited to, any person or purpose, and whether subject to a condition, precedent or subsequent, or not;

“property” includes any thing in action, and any interest in real or personal property;

“trust” and “trustee” have the same meaning as in the Trustees Act, 1962;

“will” includes a codicil.

101. In determining whether any limitation is invalid as infringing the rule against perpetuities, the perpetuity period is, for the purposes of that rule, such period of years not exceeding eighty as may be specified in the instrument creating that limitation or, if no such period of years is specified, the period that is applicable under the rule at law.

The perpetuity period.
Cf. W.A. Act No. 83 of 1962, s. 5.

102. (1) This section applies whenever, in determining whether any limitation is invalid as infringing the rule against perpetuities, or in determining the right of any persons to put an end to a trust or accumulation, or generally in the management or administration of any trust, estate or fund, or for any purposes relating to the disposition, transmission or devolution of property, it becomes relevant to enquire whether any person is or at a relevant date was or will be capable of procreating or bearing a child or whether any person would on or after a relevant date adopt a child.

Capacity to procreate or bear a child.
Amended by No. 25 of 1972, s. 3.
Cf. W.A. Act No. 83 of 1962, s. 6.

(2) Where this section applies, there is a presumption, rebuttable by sufficient evidence to the contrary tendered at the time at which the

matter falls for decision (but not subsequently), that—

- (a) a woman who has attained the age of fifty-five years is incapable of bearing a child;
- (aa) a woman will not, after she has attained the age of fifty-five years, adopt a child; and
- (b) a male or female who has not attained the age of twelve years is incapable of procreating or bearing a child.

(3) Where this section applies, medical evidence that a male or female of any age is or at a relevant date was or will be incapable of procreating or bearing a child is admissible in proceedings in order to establish that incapacity, and the Court may accept any such evidence of a high degree of improbability of procreating or child-bearing as it thinks proper as establishing the incapacity.

(4) Any decision of the Court, in which any such presumption as is mentioned in subsection (2) of this section is applied or in which any such evidence as is mentioned in subsection (3) of this section is accepted remains effective notwithstanding the subsequent birth of a child or, in the case of the presumption mentioned in paragraph (aa) of that subsection (2), the subsequent adoption of a child; but if a limitation, that is not itself invalid as infringing the rule against perpetuities, confers upon that child or his spouse, or upon his issue or the spouse of any of his issue, a right to any property, that right (including any right to follow or trace the property) is not affected by the decision of the Court.

Wait and
see rule.
Cf. W.A. Act
No. 83 of
1962, s. 7.

103. (1) A limitation shall not be declared or treated as invalid, as infringing the rule against perpetuities, unless and until it is certain that the interest that it creates cannot vest within the perpetuity period or, if the limitation creates or confers a general power of appointment over or in connection with property, that the power cannot

become exercisable within the perpetuity period, but if the power becomes exercisable, within that period, it is valid.

(2) Where a limitation creates a power exercisable over or in connection with any property, whether that power be a special power of appointment, or a power of advancement or of distribution under a discretionary trust, or any other power (not being a general power of appointment or a power that is exempted from the application of the rule against perpetuities by section 29 of the Trustees Act, 1962), that limitation is valid, so far as the rule against perpetuities is concerned—

- (a) if the power is exercisable only during the perpetuity period; or
- (b) if and to the extent that the power is exercised during the perpetuity period.

(3) Nothing in this section makes any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been reckoned a life in being for that purpose if this section had not been enacted.

104. (1) A trustee of any property, or any person interested under, or on the invalidity of, a limitation of property, may at any time apply to the Court for a declaration as to the validity, in respect of the rule against perpetuities, of a limitation of that property.

Power of Court to make declaration as to validity of limitations. Cf. W.A. Act No. 83 of 1962, s. 8.

(2) The Court may, on an application under subsection (1) of this section, make a declaration, on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the limitation in respect of which the application is made; but the Court shall not make a declaration in respect of any limitation the validity of which cannot be determined at the time at which the Court is asked to make the declaration.

Invalid
age con-
tingencies.
Cf.
W.A. Act
No. 83
of 1962,
s.9;
Law Reform
(Miscel-
laneous
Provisions)
Act, 1941,
s. 5.

105. (1) Where in an instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by any person of an age exceeding twenty-one years, and the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation or trust arising on the total or partial failure of the original gift, would, but for this section, be rendered invalid as infringing the rule against perpetuities, the instrument takes effect for the purposes of that gift, gift over, remainder, executory limitation or trust as if the absolute vesting or ascertainment had been made to depend on the person attaining the age of twenty-one years, and that age shall be substituted for the age stated in the instrument.

(2) This section applies to any instrument other than a will executed after the twenty-fourth day of October, nineteen hundred and forty-two and to any testamentary appointment (whether made in exercise of a general or special power), devise or bequest contained in the will of a person dying after that date, whether the will was made before or after that date; but, in the case of an instrument executed, and the will of a person dying, after the sixth day of December, nineteen hundred and sixty-two, this section applies only to the extent provided in section 107 of this Act.

(3) This section applies without prejudice to any provision whereby the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the instrument is attained.

Class gifts.
Cf. W.A. Act
No. 83 of
1962, s. 10.

106. (1) A limitation to a class of persons is not invalid as infringing the rule against perpetuities by reason of the failure of the limitation as to some only of the members of the class, but the limitation

shall, in that case, be construed and take effect as a limitation only to those members of the class who attain a vested interest within the perpetuity period.

(2) This section applies only to the extent provided in section 107 of this Act.

107. (1) The provisions of section 105 of this Act shall not be applied—

Order of
applying
rules.
Cf. W.A. Act
No. 83 of
1962, s. 11.

(a) unless and until it is certain that a limitation as worded is invalid as infringing the rule against perpetuities; and

(b) unless either—

(i) the application of the provisions of that section would render the limitation valid; or

(ii) the application of the provisions of that section, in conjunction with the provisions of section 106 of this Act, would render the limitation valid.

(2) The provisions of section 106 of this Act shall not be applied unless and until—

(a) it is certain that a limitation as worded is invalid as infringing the rule against perpetuities; and

(b) any invalid age contingency in that limitation has been reduced in accordance with the provisions of section 105 of this Act as applied by subsection (1) of this section.

108. The widow or widower of a person who is a life in being for the purpose of the rule against perpetuities shall be deemed a life in being for the purpose of—

Unborn
spouses.
Cf. W.A. Act
No. 83 of
1962, s. 12.

(a) a limitation in favour of that widow or widower; and

(b) a limitation in favour of a person who attains, or of a class the members of which attain, according to the limitation, a vested interest on or after the death of the survivor of that person and his spouse.

Dependent
limitations.
Cf. W.A. Act
No. 83 of
1962, s. 13.

109. (1) A limitation, that itself complies with the rule against perpetuities, is not invalidated solely by reason of its being proceeded by one or more invalid limitations, whether or not it expressly or by implication, takes effect after, or subject to, or is dependent upon, those invalid limitations or any of them.

(2) Where a limitation is invalid as infringing the rule against perpetuities, any subsequent valid limitation is thereby accelerated.

Options.
Cf. W.A. Act
No. 83 of
1962, s. 14.

110. (1) The rule against perpetuities does not apply to—

- (a) an option granted to a lessee in respect of the property demised, being an option exercisable only during the currency of the lease or within one year after the expiration thereof and enabling the lessee or the lessee for the time being to purchase the freehold or other superior interest in the demised property; or
- (b) an option to acquire an interest in land, not being an option to which paragraph (a) of this subsection refers.

(2) An option to which paragraph (b) of subsection (1) of this section refers, and which according to its terms is, or may be, exercisable at a date more than twenty-one years from the date of its grant, becomes void, on the expiry of twenty-one years from the date of its grant, as between the original parties to that grant and all persons claiming through them.

(3) Nothing in this section affects an option for renewal contained in a lease or a pre-emptive right to acquire an individual unit or individual units of accommodation in a building containing several units.

111. (1) The rule against perpetuities as amended by this Part applies—

Application of the rule to possibilities of reverter, rights of entry and resulting trusts.

Cf. W.A. Act No. 83 of 1962, s. 15.

- (a) to a possibility of reverter in land consequent upon a fee simple determinable; and so that, if the fee simple does not determine within the perpetuity period, it thereafter continues as a fee simple absolute;
- (b) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent; and so that, if the right of entry is not exercised within the perpetuity period, the fee simple thereafter continues as a fee simple absolute; and
- (c) to an interest in property by way of resulting trust analogous to a possibility to a reverter in land; and so that, if the initial trust does not determine within the perpetuity period, the interest it creates thereafter continues as an absolute interest.

(2) The provisions of subsection (1) of this section apply as therein provided, whether the determinable or conditional estate or interest is charitable or not, except that the rule against perpetuities does not apply to a gift over from one charity to another.

112. For all purposes connected with the rule against perpetuities, a power of appointment under which there is a sole donee who is at all time free, without the concurrence of any other person, to appoint the whole of the property to himself is a general power, and every other power of appointment is a special power; but, notwithstanding the foregoing provisions of this section, an appointment made by will under a power that would, but for the fact that it was made exercisable only by will, have been a general power is to be treated as having been made under a general power for all purposes connected with the rule against perpetuities.

Powers of appointment.

Cf. W.A. Act No. 83 of 1962, s. 16.

Accumulations of income.
Cf. W.A. Act No. 83 of 1962, s. 17.

113. (1) Where property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is, or may be, valid and not otherwise.

(2) Nothing in this section affects the right of any person or persons to terminate an accumulation that is for his or their benefit or any jurisdiction or power of the Court to maintain or advance out of accumulations or any powers of a trustee under Part V of the Trustees Act, 1962.

(3) For the avoidance of doubt, it is hereby declared that this section has effect only as provided by section 99 of this Act.

Rule in *Whitby v. Mitchell* abolished.
Cf. W.A. Act No. 83 of 1962, s. 18.

114. The rule of law prohibiting the limitation after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.

Superannuation funds, etc.
Cf. W.A. Act No. 83 of 1962, s. 19; W.A. Companies Act, 1961, s. 421; Victoria Trustee Act 1958, s. 73 (1).

115. (1) The rule against perpetuities does not apply and shall be deemed never to have applied to—

- (a) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for the employees of any employer or the widows, widowers, children, grandchildren, parents or dependants of any of those employees or for any persons duly selected or nominated for that purpose pursuant to the provisions of the trust or fund; and
- (b) a trust or fund established for the purpose of making provision by way of superannuation for persons (not being

employees) engaged in any lawful profession, trade, occupation or calling or the widows, widowers, children, grandchildren, parents or dependants of any of those persons or for any persons duly selected or nominated for that purpose pursuant to the provisions of the trust or fund.

(2) In paragraph (a) of subsection (1) of this section, "employee" includes any director, officer, servant or person at any time in the employment—

- (a) of an employer;
- (b) of an employer that is a subsidiary of an employer; or
- (c) of an employer that is allied to, or associated with, an employer; or
- (d) of an employer that is allied to, or with, a subsidiary of an employer; or
- (e) of an employer having a subsidiary; or
- (f) of an employer whose business is acquired by an employer,

that establishes or contributes to a trust or fund such as is mentioned in that paragraph; and in this subsection "employer" includes a company.

PART XII.—SUCCESSION.

116. [Repealed by No. 12 of 1970, s. 3.]

117. [Repealed by No. 12 of 1970, s. 3.]

118. (1) A contingent or future specific or residuary devise or bequest of property, and a specific or residuary devise or bequest of property upon trust for a person whose interest is contingent or executory, carries, the intermediate income of that property from the death of the testator, except so far as the income or any part thereof may be otherwise expressly disposed of.

Inter-
mediate
income of
executory
or con-
tingent
gifts.
Cf. W.A. Act
No. 83 of
1962, s. 22;
N.Z. Act
No. 51 of
1952, s. 35;
N.S.W. Con-
veyancing
Act 36B;
U.K. 15 and
16 Geo. 5,
c. 20, s. 175.

(2) Where, under an instrument other than a will, property stands limited to a person for a contingent or future interest, or stands limited to trustees upon trust for a person whose interest is contingent or executory, that interest carries the intermediate income of that property from the time when the instrument comes into operation, except so far as the income or any part thereof may be otherwise expressly disposed of.

(3) In determining whether any devise or bequest or other limitation of property carries the intermediate income of that property any uncertainty whether the devise or bequest or limitation will ultimately prove void for perpetuity shall be disregarded.

(4) Subsection (1) of this section applies only in relation to wills made after the sixth day of December, nineteen hundred and sixty-two.

Application
of s. 120.
Cf. W.A. Act
No. 60 of
1960, s. 3.

119. (1) Section 120 of this Act applies in respect of—

- (a) all property of any person that devolves according to the law of this State;
- (b) all appointments of trustees where the appointments have to be made according to the law of this State.

(2) Section 120 of this Act so applies whether the deaths occurred in this State or elsewhere.

Devolution
of property
in cases of
simul-
taneous
deaths.
Cf. W.A. Act
No. 60 of
1960, s. 4.

120. Where, after the sixth day of December, nineteen hundred and sixty-two, two or more persons have died at the same time or in circumstances that give rise to reasonable doubt as to which of them survived the other or others—

- (a) the property of each person so dying shall devolve and if he left a will it shall take effect, unless a contrary intention is shown

by the will, as if he had survived the other person or persons so dying and had died immediately afterwards;

- (b) every *donatio mortis causa* made by a person so dying to another person so dying is void and of no effect;
- (c) if the life of a person so dying is insured under any policy of life or accident insurance, and any other person or persons so dying would be entitled (otherwise than under a will or on the intestacy of any person) to the proceeds payable under the policy or any part of the proceeds if he or they survived the person so insured, the proceeds shall, unless a contrary intention is shown by the instrument governing the distribution of the proceeds, be distributed as if the person so insured had survived every other person so dying and had died immediately afterwards;
- (d) any property owned jointly and exclusively by two or more of the persons so dying, other than property so owned by them as trustees, shall devolve as if it were owned by them when they died as tenants in common in equal shares;
- (e) where, under any will or trust or other disposition, any property would have passed, whether in consequence of section 33 of the Wills Act 1837 of the United Kingdom Parliament or otherwise to any of two or more possible beneficiaries (being persons who have so died) if any of them could be shown to have survived the other or others of them, then, unless a contrary intention is shown by the will, trust or disposition, it takes effect as if the property were given to those possible beneficiaries as tenants in common in equal shares, and the property devolves accordingly, but this paragraph does not apply in any case to which paragraph (c) or paragraph (f) of this section applies;

- (f) where a power of appointment could have been exercised in respect of any property by any of two or more persons so dying if any of them could be shown to have survived the other or others of them, unless a contrary intention is shown by the instrument creating the power, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons, and as if each of those persons had the power of appointment in respect of the share of the property so set apart for appointment by him, and that share shall devolve in default of appointment by him in the manner in which the property would have devolved in default of appointment by him if he had been the survivor of those persons, but this paragraph does not apply in any case to which paragraph (c) of this section applies;
- (g) where, by any will or other testamentary instrument, any property is devised or bequeathed or appointed to the survivor of two or more of the testator's children or other issue within the meaning of section 117¹ of this Act and all or the last survivors of those children or issue are persons so dying that section (where it applies) takes effect as if the devise or bequest or appointment were in equal shares to those of them who so die and leave a child or children living at the death of the testator;
- (h) where the persons so dying include a testator and one or more of his issue, however remote, then for the purposes of section 33 of the Wills Act 1837 of the United Kingdom Parliament where that section applies, the testator shall be deemed to have survived all his issue so dying and to have died immediately afterwards, and accordingly, unless a contrary intention is shown by the

¹ Section 117 repealed by Act No. 12 of 1970, s. 3.

will, a devise or bequest by the testator to any of his issue who so dies or has already died in the testator's lifetime—

- (i) lapses unless any of the donee's issue, other than the persons so dying, is living at the time of the death of the testator;
- (ii) takes effect in accordance with the provisions of section 33 of the Wills Act 1837 of the United Kingdom Parliament if any such other issue of the donee is living at that time;
- (i) for all other purposes affecting the title to property or the appointment of trustees, the deaths of the persons so dying shall be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

PART XIII.—EASEMENTS, ENCROACHMENTS AND MISTAKE.

121. After the coming into operation of this Act no right to the access or use of light or air to or for any land shall be granted or be capable of coming into existence—

Easement of light and air only by registered grant or instrument. Cf. N.Z. Act No. 51 of 1952, s. 124.

- (a) for a term exceeding twenty-one years, without the written consent of the Governor; and
- (b) in any case, unless the grant or other instrument creating the right, is registered against the title to the servient tenement.

122. (1) Where any building on land encroaches on a part of adjoining land, whether the building was erected by the owner of the first mentioned land (in this section referred to as the encroaching owner) or by any of his predecessors in title, either the encroaching owner or the owner of the adjoining

Power of Court to grant special relief in cases of encroachment. Cf. N.Z. Act No. 51 of 1952, s. 129.

land may apply to the Court, whether in an action or proceeding then pending or in progress and relating to the land encroached upon or by an originating summons, to make an order in accordance with this section.

(2) If it is proved to the satisfaction of the Court that the encroachment was not intentional and did not arise from gross negligence, or, where the building was not erected by the encroaching owner, if in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the encroaching owner or any other person, the Court, without ordering the encroaching owner or any other person to give up possession of the piece of land encroached upon or to pay damages, and without granting an injunction, may if it thinks fit make an order—

- (a) vesting in the encroaching owner or any other person any estate or interest in any part of the adjoining land; or
- (b) creating in favour of the encroaching owner or any other person any easement over any part of the adjoining land; or
- (c) giving the encroaching owner or any other person the right to retain possession of any part of the adjoining land.

(3) Where the Court makes an order under this section the Court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the adjoining land, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, or contract affecting or relating to that piece of land.

(4) An order under this section, or any provision of the order, may be made upon, and subject to such terms and conditions, as the Court thinks fit, whether as to the payment by the encroaching owner or any other person of any sum or sums of

money, or the execution by the encroaching owner or any other person of any mortgage, lease, easement, contract or other instrument, or otherwise.

(5) (a) Every person having any estate or interest in the adjoining land or in the adjoining land of the encroaching owner, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, contract, or easement affecting or relating to any such land, is entitled to apply for an order in accordance with this section or to be heard in relation to any application for or proposal to make any order under this section.

(b) For the purposes of this subsection, the Court may, if in its opinion notice of the application or proposal should be given to any person referred to in this subsection, direct that such notice, as it thinks fit, shall be so given by such person as the Court directs.

(6) The Court shall not make an order under this section without the prior consent of the Town Planning Board established under the Town Planning and Development Act, 1928 and the council of the municipality in whose municipal district the land to which the order will relate, lies.

(7) For the purposes of this section "building" includes any structure and "land" includes the surface and the subsurface of and the airspace above the land.

123. (1) Where (whether before or after the coming into operation of this Act) a person who has or had an estate or interest in any piece of land (in this section referred to as the original piece of land) has, while he had that estate or interest, erected a building on any other piece of land (that other piece together with any land reasonably required as curtilage and for access to the building being in this section referred to as the piece of land wrongly built upon), if the building has been so erected

Relief in cases of mistake as to boundaries or identity of land.
Cf. N. Z. Act No. 51 of 1952, s. 129A.

because of a mistake as to any boundary or as to the identity of the original piece of land, that person, or any other person for the time being in possession of the building or having an estate or interest in either the original piece of land or the piece of land wrongly built upon, or any other person mentioned in subsection (6) of this section, may apply to the Court, whether in any action or proceeding then pending or in progress and relating to the piece of land wrongly built upon or by an originating summons, to make an order in accordance with this section.

(2) If in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the applicant or any other person, the Court may if it thinks fit make an order—

- (a) vesting the piece of land wrongly built upon in the person or persons specified in the order;
- (b) allowing any person or persons specified in the order to remove the building and any chattels and fixtures or any of them from the piece of land wrongly built upon;
- (c) where it allows possession of the building to any person or persons having an estate or interest in the piece of land wrongly built upon, requiring all or any of the persons having an estate or interest in that piece of land to pay compensation in respect of the building and other improvements to the piece of land wrongly built upon to such person or persons as the Court may specify in the order;
- (d) giving the person who erected the building or any person or persons claiming through him the right to possession of the piece of land wrongly built upon for such period and on such terms and conditions as the Court may specify in the order.

(3) Where appropriate, the Court may make any such order without ordering the applicant or any other person to give up possession of the piece of

land wrongly built upon, or to pay damages, and without granting an injunction.

(4) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest in the piece of land wrongly built upon to be free from any mortgage, lease, easement, or other encumbrance affecting that piece of land, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to that piece of land.

(5) Any order under this section, or any provision of the order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by any person of any sum or sums of money, or the execution by any person of any mortgage, lease, easement, contract, or other instrument, or otherwise.

(6) Every person for the time being in possession of the building or having any estate or interest in the piece of land wrongly built upon or in the original piece of land, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, is entitled to apply for an order in accordance with this section, or to be heard in relation to any application for or proposal to make any order under this section.

(7) For the purposes of subsection (6) of this section the Court may, if in its opinion notice of the application or proposal should be given to any person, whether referred to in that subsection or not, direct that such notice as it thinks fit be so given by such persons as the Court directs.

(8) The Court shall not make an order under this section, other than an order under paragraph (b) of subsection (2) of this section, without the prior consent of the Town Planning Board established under the Town Planning and Development Act,

1928, and the council of the municipality in whose municipal district the land to which the order will relate, lies.

Recovery of
payments
made under
mistake of
law.

Cf. W.A. Act
No. 83 of
1962, s. 23;
N.Z.
Judicature
Act, 1908
(as amended
1958),
s. 94A.

124. (1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any court, whether in an action or other proceeding or by way of defence, set off, counterclaim or otherwise, and that relief could be granted if the mistake were wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.

(2) Nothing in this section enables relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of payment.

Payments
made under
mistake of
law or
fact not
always
recoverable.
Cf. W.A. Act
No. 83 of
1962, s. 24;
Ibid 94B.

125. (1) Relief, whether under section 124 of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full.

(2) Where the Court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that the repayment shall be by periodic payments or by instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

PART XIV.—PARTITION OF LAND
AND DIVISION OF CHATTELS.

126. (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of a half share or upwards in the land to which the action relates request the Court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale accordingly.

In action
for partition
Court may
direct land
to be sold.
Cf. N.Z. Act
No. 51 of
1952, s. 140.

(2) The Court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the Court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstance, a sale of the land would be for the benefit of the parties interested.

(3) The Court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale; and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.

(4) On directing a sale or valuation to be made under subsection (3) of this section the Court may give also all necessary or proper consequential directions.

(5) Any person may maintain such an action as is referred to in subsection (1) of this section against any one or more of the parties interested without serving the other or others, and—

- (a) it is not competent to any defendant in the action to object for want of parties; and

- (b) at the hearing of the cause the Court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration,

but all persons who, if this Act had not come into operation would have been necessary parties to the action—

- (c) shall be served with notice of the decree or order on the hearing;
- (d) are bound, after the notice is so served, by the proceedings, as if they had originally been parties to the action and shall be deemed parties to the action; and
- (e) have liberty to attend the proceedings and any of those persons may within a time limited by rules of Court apply to the Court to add to the decree or order.

(6) On any sale under this section the Court may allow any of the parties interested in the land to bid at the sale, on such terms as the Court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters.

Proceeds
of sale,
now applied.
Cf. N.Z. Act
No. 51 of
1952, s. 141.

127. (1) All money received under any sale under section 126 of this Act may, if the Court thinks fit, be paid to trustees appointed by the Court, and applied, as the Court from time to time directs—

- (a) in the discharge of any encumbrance affecting the land directed to be sold; and
- (b) subject to that encumbrance, in the payment of the residue to the parties interested.

(2) Where the Court so directs, the trustees (if any) may apply the money in manner referred to in subsection (1) of this section, but if the Court does not so direct, any party interested may apply to the Court for an order that the money be so applied.

(3) Until the money can be applied as referred to in subsection (1) of this section it shall be from time to time invested in such securities as the Court may approve and the income thereof shall be paid to the parties interested.

128. In an action for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing.

Costs in
partition
suits.
Cf. N.Z. Act
No. 51 of
1952, s. 142.

129. Where any chattels belong to persons jointly or in undivided shares, the persons interested to the extent of a half share or upwards may apply to the Court for an order for division of the chattels or of any of them, according to a valuation or otherwise or for sale and division of the proceeds and the Court may make such order and give such consequential directions as the Court thinks fit.

Division
of chattels.
Cf. N.Z. Act
No. 51 of
1952, s. 143.

PART XV.—APPORTIONMENT.

130. (1) In this Part of this Act, unless the contrary intention appears—

Inter-
pretation.
Cf. N.Z. Act
No. 51 of
1952, s. 144.

“annuities” includes salaries and pensions;

“dividends” includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other companies or corporations, divisible between all or any of the members thereof, whether those payments are usually made or declared at any fixed times or otherwise; but “dividends” does not include payments in the nature of a return or reimbursement of capital;

“rent” includes rents and all periodical payments or renderings in lieu of or in the nature of rent.

(2) All such divisible revenue as is referred to in the interpretation “dividends” shall for the purposes of this section be deemed to have accrued by equal daily increments during and within the period for or in respect of which the payment of the same revenue is declared or expressed to be made.

Income
apportion-
able in
respect of
time.
Cf. N.Z. Act
No. 51 of
1952, s. 145.

131. All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Time when
apportioned
part
payable.
Cf. N.Z. Act
No. 51 of
1952, s. 146.

132. The apportioned part of any such rent, annuity, dividend, or other payment as is referred to in section 131 of this Act is payable or recoverable in the case of a continuing rent, annuity, or other payment as soon as the entire portion of which the apportioned part forms part becomes due and payable, and not before; and where the payment is determined by re-entry, death, or otherwise, as soon as the next entire portion of the rent, annuity, dividend or other payment would have become payable if it had not so determined, and not before.

Recovery of
apportioned
parts.
Cf. N.Z. Act
No. 51 of
1952, s. 147.

133. (1) Subject to subsection (2) of this section, all persons and their respective personal representatives and assigns, and also the personal representatives and assigns respectively of persons whose interests determined with their own death, have such or the same remedies, legal and equitable, for recovering such apportioned parts as are referred to in section 132 of this Act when payable

(allowing for a proportionate part of all just allowance) as they respectively would have had for recovering such entire portions as are so referred to if entitled thereto respectively.

(2) Where a person is liable to pay rent reserved out of or charged on lands or other hereditaments of any tenure, that person and the lands or other hereditament shall not be resorted to for any apportioned part forming part of an entire or continuing rent as provided in section 132 of this Act; but the entire or continuing rent, including the apportioned part, shall be recovered and received by the person who, if the rent had not been apportionable under this Part of this Act or otherwise, would have been entitled to the entire or continuing rent; and the apportioned part is recoverable from the last mentioned person by the personal representatives, or other parties entitled thereto under this Part of this Act.

134. (1) Nothing in this Part of this Act renders apportionable any annual sums payable under policies of assurance of any description.

Exceptions
and
application.
Cf. N.Z. Act
No. 51 of
1952, s. 148.

(2) This Part of this Act does not extend to any case in which it is expressly stipulated that apportionment shall not take place.

PART XVI.—SERVICE OF NOTICES.

135. (1) (a) A notice required or authorised by this Act to be served on any person or any notice served on any person under any instrument or agreement that relates to property may be served on that person—

Mode of
service.
Cf. N.Z. Act
No. 51 of
1952, s. 152.

- (i) by delivering the notice to him personally;
- (ii) by leaving it for him at his usual or last known place of abode, or if he is in business as a principal, at his usual or last known place of business;

(iii) by posting it to him as a letter addressed to him at his usual or last known place of abode, or if he is in business as a principal, at his usual or last known place of business; or

(iv) in the case of a corporation by leaving it or by posting it as a letter addressed in either case to the corporation at its registered office or principal place of business in the State.

(b) A notice so posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post the notice would be delivered.

(2) (a) If the person is absent from the State, the notice may be delivered as provided in subsection (1) of this section to his agent in the State.

(b) If he is deceased, the notice may be so delivered to his personal representative.

(3) If the person is not known, or is absent from the State and has no known agent in the State or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of the Court.

(4) Notwithstanding anything in the foregoing provisions of this section, the Court may in any case make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery thereof.

(5) This section does not apply to notices served in proceedings in the Court, or to notices served pursuant to the provisions of the Transfer of Land Act, 1893.

(6) This section applies unless a contrary method of service of a notice is provided in the instrument or agreement.

FIRST SCHEDULE.

S. 4.

ADOPTED ACTS CEASING TO HAVE EFFECT.

Reference to Acts.	Subject or Title.
8 and 9 Vic. Cap. 106 Adopted by 12 Vic. No. 21.	An Act to amend the Law of Real Property.
8 and 9 Vic. Cap. 119 Adopted by 12 Vic. No. 21.	An Act to facilitate the Conveyance of Real Property.
8 and 9 Vic. Cap. 124 Adopted by 12 Vic. No. 21.	An Act to facilitate the granting of certain Leases.
22 and 23 Vic. Cap. 35 Adopted by 31 Vic. No. 8.	An Act to further amend the Law of Property and to relieve Trustees.
23 and 24 Vic. Cap. 38 Adopted by 31 Vic. No. 8.	An Act to further amend the Law of Property.
23 and 24 Vic. Cap. 145 Adopted by 31 Vic. No. 8.	An Act to give to Trustees, Mortgages and other certain Powers now commonly inserted in Settlements, Mortgages and Wills.

SECOND SCHEDULE.

Reference to Act.	Subject or Title	Extent of Repeal
2 Gul. IV No. 7.	Real Property Transfer Act, 1832.	The Whole.
7 Vict. No. 4.	Freehold Estates Conveyancing Act, 1843.	The Whole.
42 Vict. No. 1.	The Partition Act, 1878.	The Whole.
42 Vict. No. 2.	Contingent Remainders Act, 1878.	The Whole.
54 Vict. No. 8.	The Apportionment Act, 1891.	The Whole.
60 Vict. No. 3.	Powers of Attorney Act, 1896.	The Whole.
1 & 2 Edw. VII No. 29 as amended by Act No. 26 of 1922.	Light and Air Act, 1902-1922.	The Whole.
No. 63 of 1912.	Landlord and Tenant Act, 1912.	The Whole.
No. 36 of 1935 as amended up to and including Act No. 39 of 1964.	Supreme Court Act, 1935-1964.	Subsections (3), (4), (5), (7) & (8) of section 25.
No. 60 of 1960 as amended by Act No. 85 of 1962.	Simultaneous Deaths Act, 1960-1962.	The Whole.
No. 83 of 1962.	Law Reform (Property, Perpetuities and Succession) Act, 1962.	The Whole.

S. 45
Cf.
Victoria Act
No. 6344,
Schedules.

THIRD SCHEDULE.

IMPLIED COVENANTS.

PART I.

S. 45 (a). *Covenant implied in a Conveyance for Valuable Consideration other than a Mortgage, by a Person who conveys and is expressed to Convey as Beneficial Owner.*

That, notwithstanding anything by the person who so conveys or any one through whom he derives title otherwise than by purchase for value, made, done, executed or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person (if any) conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made), through whom the person who so conveys derives title, otherwise than by purchase for value:

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, encumbrances, claims and demands, other than those subject to which the conveyance is expressly made, as, either before or after the date of the conveyance, have been or shall be made, occasioned or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under or in trust for the person who so conveys, or by, through or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value:

And further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through or under any one through whom the person who so conveys derives title, otherwise

than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage.

PART II.

S. 45 (b).

Further Covenant implied in a Conveyance of Leasehold Property for Valuable Consideration, other than a Mortgage, by a Person who Conveys and is expressed to Convey as Beneficial Owner.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed up to the time of conveyance.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage.

PART III.

S. 45 (c).

Covenant implied in a Conveyance by way of Mortgage by a person who Conveys and is expressed to Convey as Beneficial Owner.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed:

And also that, if default, is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thence forth quietly hold, occupy and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made);

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, encumbrances, claims and demands whatever other than those subject whereto the conveyance is expressly made:

And further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

S. 45 (d).

PART IV.

Covenant implied in a Conveyance by way of Mortgage of Leasehold Property by a Person who Conveys and is expressed to Convey as Beneficial Owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid and effectual lease or grant of the land conveyed and is in full force, unforfeited and unsurrendered and has in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in, the lease or grant, and on the part

of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed up to the time of conveyance:

And also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains owing on the security of the conveyance, pay, observe and perform, or cause to be paid, observed and performed all the rents reserved by, and all the covenants, conditions and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands (if any) to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions and agreements, or any of them.

PART V.

S. 45 (e).

Covenant implied in a Conveyance by way of Settlement, by a Person who conveys and is expressed to Convey as Settlor.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, as by them or any of them shall be reasonably required, subject as if so expressed, and in the manner in which the conveyance is expressed to be made.

PART VI.

S. 45 (f).

Covenant implied in any Conveyance, by every Person who Conveys and is expressed to Convey as Trustee or Mortgagee, or as Personal Representative of a Deceased Person, or as Manager of the Estate of an incapable person or under an Order of the Court.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to any deed or thing, whereby or by means whereof the subject-matter of the conveyance or any part thereof, is or may be impeached, charged, affected or encumbered in title, estate, or otherwise, or whereby or by means whereof the person

who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

The foregoing covenant may be implied in an assent in like manner as in a conveyance by deed.

S. 37.

FOURTH SCHEDULE.

CONVEYANCE.

This Deed made this day of 19
Between A.B. of (address and occupation) of the one part
and C.D. of (address and occupation) of the other part
Witnesseth that in consideration of the sum of
dollars paid by the said C.D. to the said A.B. (the receipt
whereof is hereby acknowledged) the said A.B. as beneficial
owner (if it is not intended to include the usual covenants
for title, omit the words "beneficial owner") hereby conveys
to the said C.D. in fee simple (or as the case may be) all
that piece of land being—

(description of land)

SIGNED by the said A.B. }
in the presence of: }