

TRUSTEE

CHAPTER 5:02

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TRUSTEE

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CHAPTER 5:02

TRUSTEE

An Act relating to Trusts and Trustees

24 of 1967

[10TH NOVEMBER, 1967]

PART I
PRELIMINARY

1. This Act may be cited as the Trustee Act. Short title
- 2.—(1) In this Act except where the context otherwise requires— Interpreta-
tion and
trust
corporation
“authorized investments” means investments authorized by the

L.R.O. 1/1968

instrument, if any, creating the trust for the investment of money subject to the trust, or by law;

Cap. 47:01 "bank" means a commercial bank registered under the Banking Act;

53 & 54
Vict. c. 69 "capital money" has the meaning assigned to that expression in the Settled Land Act, 1882 to 1890, of the United Kingdom;

"contingent right" as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained also a right of entry, whether immediate or future, and whether vested or contingent;

"convey" and "conveyance" as applied to any person include the execution by that person of every necessary or suitable assurance (including an assent) for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seized or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance;

"Court" means the High Court or a judge thereof;

"land" includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, and other corporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land; and in this definition "mines" and "minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same, but not an undivided share thereof;

Cap. 58:01 "mortgage" includes a charge registered under the Registered Land Act;

"pay" and "payment" as applied in relation to stocks and securities and in connexion with the expression "into Court" include the deposit or transfer of the same in or into Court;

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

"possession" includes receipt of rents and profits or the right to receive the same, if any; and "possessed" applies to receipt of income of and to any vested estate less than a life interest in possession or in expectancy in any land;

“property” includes real, chattel-real and personal property, and any estate, share or interest in any property, real, chattel-real or personal, and any debt, money, chose in action or any other legal or equitable right or interest:

Provided that it does not include a future interest, whether vested or contingent, but the falling into possession of such an interest, or the receipt of the proceeds of the sale thereof, shall be treated for the purposes of this Act as an accrual of property to the trust fund;

“tenant for life” means a tenant for life under a will, settlement or other instrument,

“transfer” in relation to stock or securities includes the performance and execution of every deed, power of attorney, act and thing on the part of the transferor to effect and complete the title in the transferee;

“trust” does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and “trustee” where the context admits, includes a personal representative, and “new trust” includes an additional trustee;

“trust corporation” means a corporation or company

(a) carrying on business in Malawi as a commercial bank registered as such under the Banking Act; or

Cap. 44:01

(b) approved for the time being under subsection (2), and includes the Administrator General;

“trust for sale” in relation to land means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; “trustees for sale” means the persons (including a personal representative) holding land on trust for sale.

(2) The Minister responsible for Finance may approve as a trust corporation any corporation or company, empowered by its memorandum of association or other instrument constituting it to undertake trusts, if he is satisfied that it has financial resources sufficient to ensure the probability that all claims against it arising out of its trust business will be met. As a condition of such approval such Minister may require the deposit of security with the Secretary to the Treasury, and may, as a condition of continuing approval, require such security to be increased from time to time.

Application
of Act

3.—(1) This Act, except where otherwise expressly provided, shall apply to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.

(2) The powers conferred by this Act on trustees shall be in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, shall apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument.

(3) This Act shall not affect the legality or validity of anything done before the commencement of this Act, except as otherwise hereinafter expressly provided.

PART II INVESTMENT

Powers of
investment
of trustees

4.—(1) Subject to section 5 (2), a trustee may invest any property in his hands, whether at the time in a state of investment or not, in any manner specified in Part I or II of the Schedule and may also from time to time vary any such investments.

(2) No provision relating to the powers of the trustee contained in any instrument (not being a written law or an instrument made under a written law) made before the coming into operation of this Act shall limit the powers conferred by this section but those powers are exercisable only in so far as a contrary intention is not expressed in any written law or instrument made under a written law and so relating or in any other instrument so relating which is made after the coming into operation of this Act.

Restrictions
on wider
range in-
vestment

5.—(1) In this Act “narrower range investment” means an investment falling within Part I of the Schedule and “wider range investment” means an investment falling within Part II of the Schedule.

(2) A trustee not being a trust corporation shall not have power by virtue of section 4 to make a wider range investment unless before so doing he has obtained and considered proper advice on the question whether the investment is satisfactory having regard to the matters mentioned in section 8.

How proper
advice to be
obtained
and given
and
responsi-
bility of
trust
corporation
for advice

6.—(1) A trustee who desires to make or retain a wider range investment may request a trust corporation to provide proper advice. Such request shall be accompanied by adequate particulars of the trusts on which the trust property is held and of the existing state of investment of such trust property.

(2) A trust corporation which receives a request for proper advice under this section may itself give such advice or may seek the advice of a suitable expert in or outside Malawi.

(3) The advice of the trust corporation and the advice of the expert selected by the trust corporation obtained in response to a request made in accordance with subsection (1) shall be deemed to be proper advice for the purposes of this section, if given or confirmed in writing.

(4) A trust corporation shall not be responsible for any loss which may result to the trust property by reason of the advice furnished under subsection (3)—

(a) if the advice was given in good faith; and

(b) where advice is furnished by an expert, if the person furnishing such advice was an expert of good repute at the time when the trust corporation applied to him for advice.

7.—(1) The powers conferred by section 4 are in addition to and not in derogation from any other power of investment or postponing conversion exercisable by a trustee (hereinafter referred to as a “special power”).

Relationship between Act and other powers of investment

(2) Any special power (however expressed) to invest property in any investment for the time being authorized by law for the investment of trust property, being a power conferred on a trustee before the passing of this Act or conferred on him under any written law passed or made before the commencement of this Act, shall have effect as a power to invest property in like manner and subject to the like provisions as under sections 4 and 5.

8.—(1) In the exercise of his powers of investment a trustee shall have regard—

Duty of trustees in choosing and retaining investments

(a) to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust;

(b) to the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description.

(2) A trustee retaining any wider range investment made in the exercise of a power of investment conferred by this Act shall determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain advice under section 6, and shall obtain and consider such advice accordingly.

9.—(1) A trustee may, under the powers of this Act, invest in any of the securities mentioned or referred to in section 4 (1), notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

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

(2) A trustee may retain until redemption any redeemable

stock, fund or security which may have been purchased in accordance with the powers conferred by this Act, or any written law replaced by this Act.

Discretion
of trustees

10. Every power conferred by section 4 and section 9 shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument, if any, creating the trust or by law with respect to the investment of the trust funds. A trustee may consider advice other than advice received from a trust company.

Power to
retain
investment
which has
ceased to be
authorized

11. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the trust instrument or by the general law.

Enlargement
of powers of
investment

12.—(1) A trustee having power to invest in freehold securities may invest and shall be deemed always to have had power to invest on mortgage of property held for an unexpired term of not less than forty years, and not subject to a reservation of rent greater than four per centum of the unimproved value thereof, or to any right of redemption or to any condition for re-entry, except for non-payment of rent.

Cap. 58:01

(2) A trustee having power to invest in freehold securities may accept the security in the form of a registered charge under the Registered Land Act.

(3) Land purchased in exercise of the power of investment conferred by section 4 shall be held upon trust for sale. Land may be so purchased whether or not other land remains in the trust and notwithstanding that the property invested in the purchase comprises wholly or in part the proceeds of the sale of a similar investment or of other land held upon trust for sale.

(4) Trust funds shall not be employed in executing any improvement authorized by law on, or in connection with, or for the benefit of, any land held upon trust for sale unless the trustee has obtained and considered proper advice obtained in accordance with section 6.

Investment
in bearer
securities

13.—(1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to bearer which, if not so payable, would have been authorized investments:

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

(2) A direction that investments shall be retained or made in the name of a trustee shall not, for the purposes of subsection (1), be deemed to be such an express prohibition as aforesaid.

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

14.—(1) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—

Loans and investments by trustees not chargeable as breaches of trust

(a) that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and

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

(c) that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security, of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

(4) This section shall apply to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Act.

15.—(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

Liability for loss by reason of improper investment

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

Powers
supplemen-
tary to
powers of
trustees

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

(2) On a sale of land held on a freehold or registered title, or for a term having at least forty years to run, by trustees or by a tenant for life, the trustees, or, as the case may be, the tenant for life on behalf of the trustees of the settlement, may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by a mortgage of the land sold, with or without the security of any other property, such mortgage, if any buildings are comprised in the mortgage, to contain a covenant by the mortgagor to keep them insured against loss or damage by fire to the full value thereof.

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

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

(a) for the reconstruction of the company; or

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

(c) for the acquisition of the securities of the company, or of control thereof, by another company; or

(d) for the amalgamation of the company with another company; or

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

in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or

new company in lieu of or in exchange for all or any of the first-mentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith, and may retain any securities so accepted as aforesaid for any period for which they could have properly retained the original securities.

(5) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in such company, they may, as to all or any of such securities, either exercise such right and apply capital money subject to the trust in payment of the consideration, and may retain such securities for any period for which the trustees have power to retain the holding in respect of which the right to subscribe for the securities was offered, but subject to any conditions subject to which the trustees have that power, or may renounce such right, or assign for the best consideration that can be reasonably obtained the benefit of such right or the title thereto to any person, including any beneficiary under the trust, without being responsible for any loss occasioned by any act or thing so done by them in good faith:

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

(6) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by any written law or by the instrument, if any, creating the trust.

(7) Where the loan referred to in subsection (1) or the sale referred to in subsection (2), is made under an order of the court, the powers conferred by subsections (1), (2) and (3) respectively shall apply only if and as far as the Court may by order direct.

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

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

18.—(1) So much of the property in the hands of a trustee shall, for the purposes of this Act, constitute one trust fund as is held on trusts which (as respects the beneficiaries or their respective interests or the purposes of the trust or as respects the powers of the trustee) are not identical with those on which any other property in his hands is held. Trust property and trust funds

(2) Where property is taken out of a trust fund by way of

appropriation so as to form a separate fund, the trustees shall obtain proper advice on the valuation of the trust fund and the separate fund and the constitution of both funds in relation to the narrower range and wider range parts of the investments thereof.

Saving for powers of Court

19. The investment powers of trustees authorized by this Act shall not lessen any power of the Court to confer wider powers of investment on trustees, or affect the extent to which any such power is to be exercised.

Powers of Minister to amend Schedule

20. The Minister of Finance may, if he considers it expedient to do so, by order published in the *Gazette*, delete from, vary or add to Part I or Part II of the Schedule:

Provided that any such order shall not come into operation unless and until the same shall have been approved by a resolution of the National Assembly, on notice given by the Minister responsible for Finance.

PART III

GENERAL POWERS OF TRUSTEES AND PERSONAL REPRESENTATIVES

General Powers

Power of trustees for sale to sell by auction, etc.

21.—(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof.

Power to sell subject to deprecia-tory conditions

22.—(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears

that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

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

(4) This section shall apply to sales made before as well as after the commencement of this Act.

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

Power of trustees to give receipts

(2) This section shall not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for the proceeds of sale or other capital money arising under a disposition on trust for sale of land.

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

24. A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by law, a sole trustee is authorized to execute the trusts and powers reposed in him, may, if and as he or they think fit—

Power to compound liabilities

(a) accept any property, movable or immovable, before the time at which it is made transferable or payable; or

(b) sever and apportion any blended trust funds or property; or

(c) pay or allow any debt or claim on any evidence that he or they think sufficient; or

(d) accept any composition or any security, movable or immovable, for any debt or for any property, movable or immovable, claimed; or

(e) allow any time for payment of any debt; or

(f) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to him or them seem expedient,

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

Power to raise money by sale, mortgage, etc.

25.—(1) Where trustees are authorized by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession.

(2) This section shall apply notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but shall not apply to trustees of property held for charitable purposes.

Protection to purchasers and mortgagees dealing with trustees

26. No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

Devolution of powers or trusts

27.—(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

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

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

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

Power to insure

28.—(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, for the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

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

29.—(1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf, or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, be capital money for the purposes of the trust.

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

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

(3) Any such money—

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

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

(4) Such money, or any part thereof, may also be applied by the trustees, or, if in Court, under the direction of the Court, in rebuilding, reinstating, replacing or repairing the property lost or damaged, but any such application by the trustees shall be subject to the consent of any person whose consent is required by the instrument, if any, creating the trust to the investment of money subject to the trust.

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

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

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

Deposit of documents for safe custody

Rever-
sionary
interests,
valuations
and audit

31.—(1) Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees, on the same falling into possession, or becoming payable or transferable, may—

(a) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit;

(b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorized investments;

(c) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable;

(d) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release,

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

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

(a) to apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as aforesaid is derived, payable or charged; or

(b) to take any proceedings on account of any act, default, or neglect on the part of the persons in whom such securities or other property or any of them or any part thereof are for the time being, or had at any time been, vested,

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken:

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

(3) Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any law, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made in good faith shall be binding upon all persons interested under the trust.

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

32.—(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a legal practitioner, bank, stock broker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

Power to
employ
agents

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in and executing and perfecting assurances of, or managing or cultivating or otherwise administering, any property, real or personal, movable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside Malawi or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

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

(a) a trustee may appoint a legal practitioner to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the legal practitioner to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

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

(c) a trustee may appoint a bank or a legal practitioner to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the bank or the legal practitioner to have the custody of, and to produce, the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment:

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

(4) This section shall apply whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

Power to
concur with
others

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

Power to
delegate
trusts during
absence
abroad

34.—(1) A trustee intending to remain out of Malawi for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from Malawi of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons:

Provided that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this subsection.

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

(3) The power of attorney shall not come into operation unless and until the donor is out of Malawi, and shall be revoked by his return.

(4) The power of attorney shall be attested by at least one witness and shall have annexed thereto a statutory declaration by the donor that he intends to remain out of Malawi for a period exceeding one month from the date of such declaration, or from a date therein mentioned.

(5) The statutory declaration aforesaid and a statutory declaration by the donee of the power of attorney that the power has come into operation and has not been revoked by the return of the donor shall be conclusive evidence of the facts stated in favour of any person dealing with the donee.

(6) In favour of any person dealing with the donee, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has become revoked by the act of the donor or by his death or otherwise, be as valid and effectual as if the donor were alive and of full capacity, and had himself done such act or executed such instrument, unless such person had actual notice that the power had never come into operation or of the revocation of the power before such act was done or instrument executed.

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

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

(9) In this section "trustee" includes a tenant for life.

Power for
trust
corporations
to act
jointly as
trustees and
hold
property as
joint tenants

35.—(1) A trust corporation shall be capable of being appointed a trustee jointly with another trust corporation or with an individual and of acquiring and holding any property, movable or immovable, in joint tenancy in the same manner as if it were an individual; and where a trust corporation and an individual, or two or more trust corporations, become entitled to any such property under circumstances or by virtue of any instrument which would, if the trust corporation had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants.

(2) Where a trust corporation is a joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.

Indemnities

Protections
against
liability in
respect of
rents and
covenants

36.—(1) Where a personal representative or trustee liable as such for—

(a) any rent, covenant, or agreement reserved by or contained in any lease; or

(b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rent charge; or

(c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs,

satisfies all liabilities under the lease or grant which may have accrued, or been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof, and thereafter—

(i) he may distribute the residuary movable and immovable estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;

(ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

