(No. 119.)

1889.

PARLIAMENT OF TASMANIA.

TRUSTEE BILL, 1889:

REPORT OF SELECT COMMITTEE OF LEGISLATIVE COUNCIL, WITH EVIDENCE.

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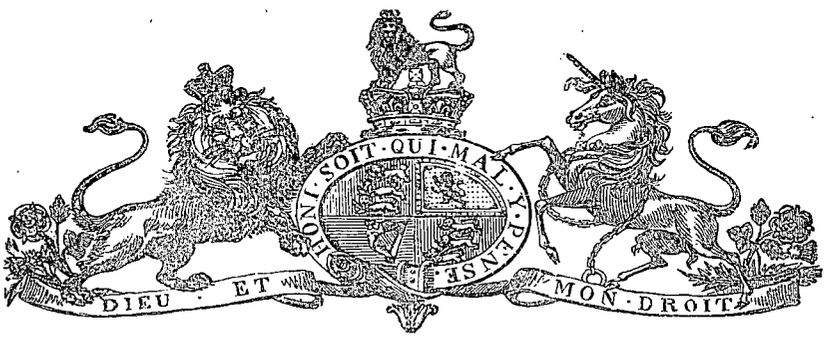

***SELECT COMMITTEE** appointed, on the 13th day of September, to consider and report upon "A Bill to amend the Law relating to the Duties, Powers, and Liability of Trustees."*

MEMBERS OF THE COMMITTEE.

Mr. Crosby.	Mr. Salier.
Mr. Fysh.	Mr. Watchorn.
Mr. Rooke.	

DAY OF MEETING.

Tuesday, 17th September.

WITNESSES EXAMINED.

The Honorable Alfred Dobson (Solicitor-General); Mr. John Roberts; Mr. John Mitchell.

MINUTES OF PROCEEDINGS.

TUESDAY, SEPTEMBER 17, 1889.

The Committee met at 4·30.

Members present.—Messrs. Fysh, Watchorn, Crosby, and Salier.

Mr. Fysh was appointed Chairman.

A copy of the Bill was laid on the Table.

The Order of the Council appointing the Committee was read.

The Solicitor-General (Mr. Alfred Dobson) was called in and examined.

Mr. John Roberts and Mr. John Mitchell were called in and examined.

The Chairman laid before the Committee the Solicitor-General's Memo. of Opinion on Clause 7.

The Committee adjourned at 6·5 P.M.

REPORT.

Your Committee having taken the evidence of the Solicitor-General and of several of the leading private Legal Practitioners on the Bill, beg to submit the same for the consideration of the Council.

After hearing the evidence, the Committee have arrived at the conclusion that the Bill is one which it is desirable to pass.

P. O. FYSH, *Chairman.*

Committee Room, 1*st October*, 1889.

EVIDENCE.

THE Chairman asked the Solicitor-General (Hon. A. Dobson) to explain the express provisions of the Bill as though he was doing so to the Members of the Legislature.

The Solicitor-General said: The Bill, which I understand to be a transcript of the English Act, comes wonderfully well recommended. I suppose there are very few Bills that have undergone what this one has been subjected to; nor do I know of any Bill in England that has received so much careful consideration and discussion. It has been introduced at the instance of the Incorporated Law Society, a Society that has a good character for improvements in legislation. It was first introduced into the House of Lords by Lord Herschell, and was afterwards referred to a Select Committee, eventually passing through all its stages. In the House of Commons it was introduced by Mr. Cozens Hardy, Queen's Counsel, who was mostly responsible for the drafting of the Bill—a gentleman whom I read with as a pupil when in England, and one who ranks high in his profession as an Equity Draftsman. After its introduction it went on to the Standing Committee on Law in the House of Commons, and eventually, after the most careful consideration, passed through all its stages. The Bill was not introduced to affect general principles of law, but to obviate one which has been found, from experience, to exist with reference to specific cases; and the Bill is of a highly technical nature. It was said that Trustees for a long time had suffered from the existing state of the law, and that in several matters Trustees had been held liable where ordinary people would not. The burden was greatly felt by them, and it was thought necessary to recommend some change in the law, or they would be unable to get private persons to act as Trustees. There is one thing which strikes me forcibly in this Colony: whilst in England you have the greatest difficulty to get men to act as Trustees, here anyone seems ready to do so, without thinking of the responsibility. In England, touching comparatively simple questions, Trustees are in the habit of taking the opinion of Counsel, and would not move until they knew exactly what they were doing. Here it is different, and people do not seem to recognise their position. The position of a Trustee is a most responsible and onerous one. He can never reap any benefit from his Trust; whilst, on the other hand, if he goes technically wrong, even though he acts honestly and from the best motives, he is liable to the extent of his last farthing, and, if he does well for the estate, he cannot reap any personal benefit. The prevailing discontent with reference to some points affecting Trustees was brought to a head in the case *re* Whitely, which went from Court to Court, and was finally decided by the House of Lords not long ago. In this case the Trustees were permitted, by the terms of their Trust, to invest the Trust Money in mortgage of freehold land. They did invest in land, upon which was a rich manufactory. They had the land valued by surveyors. They had an opinion from their Solicitor upon it, and got 5 per cent.,—a good income for tenant for life. The land deteriorated in value, and the Trustees were held responsible,—the Court holding the investment an improper one, because a trade was carried on upon the land. Although the tenant for life had received the income of 5 per cent., he was permitted to keep all that, and the Trustees were held liable for all the loss. This is only one of many instances showing the necessity for some alteration; and this Bill is the outcome of it.

The First Clause deals with definitions, and one would naturally suppose that the word "Trustee" would be deemed to include an Executor or Administrator, as well as Trustee.

The second Clause provides for the receipt of money by a Solicitor as agent. This is merely extending to Trustees the law of the land as it now exists with reference to other people. The matter was partly dealt with by the 60th section of the Conveyancing and Law of Property Act, 1884, but a recent decision shows that this Section does not applied to Trustees; hence the necessity for Section 2 of this Bill. The meaning of it is this. Supposing you are making a very large purchase in Melbourne. The Trustee cannot always be present personally to receive the purchase money and give a discharge for it, and yet it might be said that the man who sells the property is justified in not giving a conveyance of that property until he sees that the money is paid into the hands of the Trustees. There is no doubt that between parties not Trustees there is a power to authorise a Solicitor to give receipts for and receive money, and if that power is given to the Solicitor the deed may be effected although the parties are at the other end of the world. It is thought absurd that Trustees cannot be allowed to act in this way. Even when all parties are in Tasmania, a man who is Trustee for a large estate could not possibly attend personally on the sale of every portion of land subject to the trust.

As to the Insurance Policies. This is another provision in the interests of freedom of trade and business between different parties which is often very useful indeed, for by it authority can be given by a Trustee to a Solicitor by virtue of which authority he can obtain a discharge for any money payable on a Policy of Insurance, but a Solicitor is not permitted to keep money longer than is reasonably necessary.

The Third Section is a very technical one, but I will endeavour to make it as plain as possible.

Mr. Crosby.—Will it not be better to ask any question of the Solicitor-General as it presents itself to us?

The Chairman.—I would suggest that we hear the Solicitor-General through, and then we shall be able to get very practical answers from Mr. Roberts and Mr. Mitchell.

Mr. Crosby.—I only wished to know whether we should ask at the particular time or wait until he has finished the Bill. With respect to the latter part of Clause 2, supposing that a Trustee gave an order to some Solicitor to receive that money, and it is misappropriated through no neglect of his own, would the Trustee still be liable?

The Solicitor-General.—No, he would not, unless he allows the Solicitor or Banker to keep it longer than was necessary. See the proviso to the Section: "Provided that nothing herein contained shall

exempt a Trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the Banker or Solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such Banker or Solicitor to pay the same to the Trustee."

Mr. Crosby.—If an application was made to the Solicitor, and it was impossible to get that money from him, then the Trustee would still be responsible for the amount?

The Solicitor-General.—If the Trustee did all he could to get the money from him, but the Solicitor turned rogue immediately, then the Trustee would not be responsible. Of course, if there were any fraudulent action, that case would stand by itself. The object of the Section really is to facilitate the transaction of business which is now somewhat retarded. The fact is, before this passed in England men were afraid to take the position, because they could not transact the business they do now every day, and otherwise they could not do it at all. If gentlemen are Trustees for many estates in different colonies they cannot possibly be running about to receive the purchase money for every sale.

Mr. Watchorn.—What do you call a reasonable time?

The Solicitor-General.—I do not think you can tie it down to any particular time; I think it would depend upon the transaction. I think I can assure the Committee that every word in this Bill has probably been weighed. It has passed through a wonderful ordeal. It faced the House of Lords, where there are many lawyers. Then the House of Commons' Standing Committee on Law and the Incorporated Law Society have also taken a great interest in it. I think it would be dangerous to define any time; that would have to be decided according to the special circumstances of the case.

The Chairman.—I do not see why a cestuique trust should expect to have his business done by the Trustee risking everything. We have heard of some cestuique trusts who allow their Trustees to take all the risk and take no profit out of their gains. A difficulty in Committee was that I found Hon. Members' minds were turning upon the responsibility which Trustees were taking or avoiding. On the other hand, there was the responsibility which must be thrown upon the cestuique trust, and you cannot in any Bill protect both. You may lay down some principle also for the Trustee to act upon and possibly protect the cestuique trust, but cannot hit upon a principle which relieves the Trustee from responsibility.

The Solicitor-General.—The guiding principle of this Section is that if the Trustee acts honestly, and does all that could be expected of him, he is not to be made liable for that which is a misfortune. It ensures him against loss if he employs a Solicitor in any trust transaction as he would in his own private business, and that Solicitor turns out to be a rascal and runs away.

The Solicitor-General (continuing) said—The 3rd clause refers to "depreciatory conditions on sales by Trustees." This is a section that was very much wanted, more so possibly in England than here. The meaning of the depreciatory conditions may be said to be this: when a man sells a property he always hands the abstract of title to the Solicitor for the purchaser, and this abstract in England sometimes goes back over 50 or 60 years, and this discloses the title of the man who is selling. The vendor goes to his Solicitor and says he wants to sell his property, and wants the conditions of sale prepared. The Solicitor commences and goes through all the deeds, sometimes extending to the Crown Grant, and if there are any flaws, or any deeds lost, it is the duty of the Solicitor to cover them up by conditions. In some circumstances it is necessary to have a condition which provides that the abstract of title shall begin from a certain day in order to effect the sale, and make a title that the vendor can give. Various conditions are imposed with respect to properties passing from one man to another, conditions sometimes so stringent that they affect the sale, and are called "depreciatory." The law holds that Trustees may not take precautions similar to those taken by private people, and an unwilling purchaser sometimes escapes from his contract upon some technical objection that the conditions of sale were depreciatory. The clause states—"No sale made by a Trustee shall be impeached by any cestuique trust upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate." The section is very guarded, and it must be remembered that all conditions must be to some extent depreciatory, otherwise you would never have any conditions of sale at all. If we could all get a title directly from the Queen's Crown Grant the difficulty would be removed. But inasmuch as most titles involve the consideration of deaths, marriages, conveyances, changes of ownership, &c., there are always some complications. Where the ordinary man can go into the market and sell his property, the Trustees cannot do so under similar conditions, and the law now proposes to say that no man shall get out of a contract with a Trustee by setting up the fact of a depreciatory condition of sale as an excuse. If I am a cestuique trust, I mean one on whose behalf the Trustee sold, and I want to repudiate the sale, I may show that some of the conditions under which the property was sold were depreciatory in a technical sense, whilst all the time the title to the property may really be good and marketable. If you were not a Trustee that would not affect you, and that is why it has been found necessary to alter the law. The whole clause, as I said before, is very technical, and it would never have been here unless there were very good grounds for it.

The Chairman.—I may say that the Committee got as far as this clause and did not find any particular objection. We want you to dwell more particularly, if you please, on the next section and sub-section, as to the retrospective character of the clause, and especially on those words in the 49th and 50th lines—"by a person whom the Trustee reasonably believed to be an able practical surveyor or valuer, &c." It was pointed out that such words were very applicable in England where you have to take the valuation of a surveyor, but in these Colonies the practice is not to take the valuation of a surveyor, but from gentlemen acquainted with the property. Some Members wanted to alter the phraseology and turn the one person into two persons, and instead of the term practical surveyor use the words two persons, competent valuers. Some of the Committee object to that, but I see no difficulty whichever course is taken; but I want you to turn especially to the retrospective character as it comes out in sub-section 3.

The Solicitor-General.—There is no doubt that the question which you have raised is one of great importance, and one more for business men or solicitors and business people than a pure question of law. I quite agree that it is necessary that there should be some safeguard where the Trustee lends money, and that he should get a proper valuation, but I do not at all agree with the gentleman who said that, because he was a valuator, the law should be altered, and he should not be obliged to take the opinion of another. Probably

in that particular instance he had a knowledge of property, but the great bulk of Trustees have not. I think it would be a very wise thing indeed to have same defined principles to make the thing workable, and have one or two persons who have a practical knowledge of the subject to see that the Trustee does not go on his knowledge alone. Previously they could go to any Solicitor's office, being generally too wise to go to their own, and get responsible men to deal with; they must now follow the course laid down by Act of Parliament. I am in some doubt as to what to recommend, whether there should be two or one persons, and who they should be. I should think if you had two persons acquainted with property, that should be sufficient, and I see no objection to an amendment of that sort. Of course, if we had anyone here answering to practical surveyor or valuator, it would hardly be necessary.

The Chairman: There is no one holding the position as a practical man. Architects do what is required with regard to buildings, and a good deal of actual valuation in land is done by men who own pastoral estates.

The Solicitor-General.—I see no necessity to slavishly follow the Bill because it has been found best in England, where the conditions are different, and it is a matter that may well be left to discussion. Unlike the other portions of the Bill, this matter is not one of legal technicality. I should advise the Committee not to follow the Bill if we have not practical surveyors and valuers, because that would put the Trustee to some expense and difficulty in getting what might really be unsatisfactory valuations. I think that some such alteration as that would be an improvement in the Bill, although, as a rule, I think the Bill is carefully drafted, but I should be sorry to see it attach any other responsibility; although this particular part has reference to the condition of the Colony rather than to legal drafting. If I was in charge of the Bill I should be quite satisfied to see any alteration made either to two persons, or, if you like, one. Two would be safe if thoroughly acquainted with property.

Mr. Crosby.—Would not that alteration increase the difficulties of the Bill? If we allow it to remain as one, there is no objection to the Trustee employing a second if he does it to reduce his liability. The Trustee might have lent the money, say quite recently, and has not taken precaution in any shape or form, but has simply acted on his own judgment, and if we pass this Act and make it retrospective for 10 years, the Trustee would be liable because he obtained no guarantee whatever at the time.

The Chairman.—I tried to point out to the Committee that his position would not in any way be altered by this Bill. If the Bill were not brought in he would act under existing responsibility. If Trustees follow the wording of the Act they are protected by the Bill; if they do not follow the wording of the Act they are not protected by the Bill, and remain in the same position as if there were no Bill; but, will it be a charge upon him that he had the Bill before him and did not follow it? Suppose, for instance, from this time forth—I will take two cases—the Bill is not in existence, and I take the value of the property on my own responsibility, and I must prove to the Court by evidence that I believed it to be correct. If this Bill is in existence, and I follow the same course, it is still for me to prove to the Court that I acted *bona fide*. I call witnesses for that purpose, and still stand in the same position whether the Bill be passed or not. Might not a man's position be altered by reason of the fact that he had the law to go by, and he did not go by it—that he acted upon his own responsibility instead of taking the law as it was?

The Solicitor-General.—I think your construction is the correct one. What this section does is to say this—that if a Trustee chooses to do certain things, then no matter what happens after that, he shall be held harmless if he does them. Although the Act is made retrospective, I do not think it makes it worse for the Trustee who has not followed the rule. Speaking generally, the clause merely says, not that a man shall be liable if he does not do it, but if he does it he shall be held harmless. A man may run the risk even if it is passed. They will think that they know the land well enough on which they are lending money, and think it is sufficient value. Of course, if they are wise and wish to be completely protected they will follow the lines of the Act.

The Chairman.—On the question of its retrospective character, I was authorised to say to the Committee that this sub-section 3 provides a retrospective freedom from harm only if the Trustee has acted under the control of a portion of section 4, that is, that the retrospective effect is beneficial if he has acted principally on the instructions laid down in section 4. It is not retrospective to clear a Trustee who has neglected any act or duty usually imposed on a Trustee, but the argument used in opposition was, you have cleared the Trustee of his wrong doing by this retrospect action, therefore the cestuique will be in a worse position. To which I replied—he bears the responsibility now of doing anything wrong, and this Act will only clear him if he is acting to the best of his ability in accordance with the Act. If he disregards these principles he will be as liable as previously.

The Solicitor-General.—In effect it will be so. I think the intention of the Imperial Legislature by this clause would be, that a Trustee before he lends money should have certain valuations made, and if in the future he has these valuations to show, he will be held harmless. The retrospective effect is beneficial when it renders a Trustee harmless, because I take it you will require such things done by Trustees as though they were ordinary men of business, and therefore I do not think that he should be held responsible for losses not under his control.

Mr. Crosby.—I think it would be well to take the opinion of Mr. Roberts and Mr. Mitchell on this clause now.

The Chairman.—Very well. Will you kindly give us your opinion, Mr. Roberts?

Mr. Roberts.—I would rather leave the clause entirely as it stands, with one person. In New Zealand I may say, and I have many securities from there, valuation is a separate business. Here things are much simpler, and they do not care to be tied down in that way.

The Chairman.—Therefore you believe that "a person whom the Trustee reasonably believed to be an able practical surveyor or valuer," &c., the best definition?

Mr. Roberts.—Yes.

Mr. Watchorn.—When the Bill comes on for discussion finally we shall not have these gentlemen here to advise us, therefore we had better get what information we require now. I should like to know what my position would be supposing I was a Trustee and had lent £1000 on a property that could be shown was worth only £500 when I lent that money. Should I have to pay the difference to the estate?

The Solicitor-General.—Certainly.

Mr. Watchorn.—If I had employed a valuator at that time, and he had been of the same opinion as myself that it was worth only £500, should I still be liable?

The Solicitor-General.—If the valuator said it was right you would not be liable.

Mr. Watchorn.—Supposing I had consulted the Solicitor to the estate, who advised me to lend the money, and 10 years afterwards it can be proved that the property was really not worth £500, should I have to make good the deficiency?

Mr. Mitchell.—This section would not cover you, as you must have two-thirds of the value before you can do so.

The Solicitor-General.—I should say, in answer to the question, that if 10 years ago a competent valuator certified that such and such a value was two-thirds of the value, and you lent two-thirds upon his certificate, you would be protected.

Mr. Watchorn.—If I had taken no valuation at all should I be liable?

The Solicitor-General.—Yes. The clause, as I understand it, is that you may employ valuators or not. If you do not employ them you take the risk; if you do you are relieved of risk.

Mr. Crosby.—Is there no provision in the present law for valuators?

The Solicitor-General.—No Statute law, but only the law of Equity, which would make the Trustee liable if he played tricks in that way.

Mr. Roberts.—I quite agree with the position the Solicitor-General takes.

The Chairman.—And you would rather retain the phraseology already in the Bill. Then, as to what amount a man shall lend, shall it be half or two-thirds?

Mr Roberts.—The Colony is at present progressive, and may be left to the discretion of the lender. I often lend two-thirds, but it generally depends upon the nature of the property. On broad acres you could lend that amount.

The Solicitor-General.—As the law now stands the Trustee is allowed to lend one-half on house property, and two-thirds on landed estates. The reason for that rule in England was that it was thought that one sort of property was more fluctuating than another, but I think they have come to the conclusion that agricultural property fluctuates just as much as house property. It is a new departure in the Bill, and it now makes both properties alike, and you may lend two-thirds on either property.

Mr. Roberts.—I think it would have been better not to have altered the old rule. On town property one-half is quite enough, and on broad acres two-thirds.

The Solicitor-General.—I do not think they are doing wrongly in making both equal. But, of course, this is a question for people who understand the value and the fluctuation of value in landed property.

The Chairman.—If we fall back upon the old principles we shall find that we always manage about every five years to secure some advance upon property. If you take the Assessment Roll you will see we have steadily advanced year by year.

Mr. Roberts.—I shall never depart from the old rule. I have always regarded the broad acres as safest, because so many of the town properties fluctuate.

The Chairman.—Mr. Mitchell, will you kindly give the Committee your opinion on this clause?

Mr. Mitchell.—With reference to the number of valuators, I should certainly take the one valuator, but I think some difficulty would be found in interpreting "the practical surveyor or valuator," as there are none such in Tasmania. Generally, men in the district in whom we have confidence are selected, and we get the value from them. The practice in our office is to take the opinion of two. Under this Bill it is quite sufficient to take one, because you have only two-thirds of the value to go, and that in itself should be sufficient protection for any one advancing money on mortgage. I should certainly keep to the two-thirds. In the matter of private loans we look at the man who wants the loan, and if we know him this is often a guide. Where, however, you have Trustees advancing money, this ought not to be considered. Trustees should be guided by some recognised rules, and confined to those rules; therefore, one valuator, together with the two-thirds value, should be sufficient protection. I should certainly insert the words "whom the Trustee believes to be a competent valuator." The two-thirds value might simply clear up a lot of difficulties in years to come, where difficulties might arise if it were left out.

The Chairman.—Its retrospective character will apply, I suppose, to wills now in existence, although the testator is still alive.

Mr. Mitchell.—The law says the will does not speak until the death of the testator.

The Chairman.—Suppose I have said in my will that the Trustee may lend money upon Corporation Bonds or Government Stocks, I am not going to-morrow to run and alter that will because this Act is passed. If I do not die for some years after it is passed, is it applicable to that will?

The Solicitor-General.—I think you mean this: if the trusts of your will really differed from the Act of Parliament, what is the result? Of course, you may give Trustees power to invest in any sort of stock you please, and so long as the Trustee follows the instructions in your will he will be held harmless. In the absence of any directions in the instrument creating the trust, the law provides, by Section 42 of "The Conveyancing Act," a list of seven different securities in which trust funds may be invested. These securities are in addition to any securities mentioned in the trust.

The Chairman.—Will you please explain "the Trustees can lawfully lend"?

The Solicitor-General.—I take it that the Trustee can lawfully lend upon any real or personal property authorised by the deed or will creating his trust, and he may also lawfully lend upon the securities mentioned in Section 42 of "The Conveyancing Act."

The Chairman.—Have Trustees now power by that Act to lend upon personalty?

The Solicitor-General.—The securities mentioned in the Section are—(1) Debentures or Treasury Bills issued by the Government of Tasmania; (2) Debentures of which the Interest is guaranteed by the Government; (3) Debentures of Australian Colonies or New Zealand; (4) Stocks, &c. of British Government; (5) Mortgage of Real Estate in Tasmania; (6) Mortgage of Leasehold Estate in Tasmania held for terms of not less than 200 years; (7) Fixed deposit in any Bank in Tasmania.

The Chairman.—Trustees having trust money to lend, by Section 42 of "The Conveyancing Act"

may invest in Treasury Bills or Government Debentures, bonds in this and other colonies—in fact, upon anything of that nature, and upon real estate in Tasmania.

The Solicitor-General.—Under the law of the land the Trustee can lawfully invest in fixed deposits in banks, but you have a perfect right to make your will so that the Trustee may invest either in debentures or real estate. In that case they could lend it in whatever manner you directed. If people die without wills it is necessary to have the law of the land to tell you where their money may legally be invested. The meaning of the Section in "The Conveyancing Act" is that a person may lend by the instrument creating their Trust if any direction is given in that instrument directing the Trustee, or by the law of the land.

Mr. Mitchell.—Sub-section 2 should be struck out. If that section stands as it is a case like this may happen: I may bring a title, and say here is a lease for 300 years on a piece of land, and you take that lease without investigating the title; the man who let it to me might turn up and the title prove to be worthless. But that Section would protect the man lending the title.

Mr. Crosby.—Is not this a transcript of the English law?

The Chairman.—I understand it to be a transcript of the English Act.

Mr. Mitchell.—I say No. 2 should be struck out.

Mr. Roberts.—I think it is a very arbitrary clause indeed, because it says "if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted."

Clause 5.—Liability for loss by reason of improper investment.

The Solicitor-General.—This clause is merely carrying out the provisions of the 4th Section; at least, it is supplementary to that.

The Chairman.—It practically means he shall only make good loss which he could foresee or avoid.

Mr. Roberts.—This would enable a man to pay into Court the difference.

The Chairman.—Is there any objection to the retrospective character of the sub-section?

The Solicitor-General.—I think there is no objection to having the sub-section retrospective.

Mr. Roberts.—If it is good for the future it should be good for the past.

The Chairman.—The law can only apply to cases which shall be hereafter discovered.

Mr. Mitchell.—A mortgage may have been made 10 years ago. Take the case given, say for £1000, and afterwards it is only worth £500. The security in this case has gone down, but the Trustee would only be liable for whatever loss there was beyond the proper sum, and not for the whole amount.

Clause 6.—Indemnity for breach of Trust.

Solicitor-General.—It may appear strange to see a Clause of this nature in a Bill, but it is a fact that Trustees are very often importuned, by those for whom they act, to commit a breach of trust, and to do it in such a way that there is no moral delinquency in the matter at all. Pressure is very often brought to bear, most unpleasant to the Trustee. For instance,—a Trustee, by the terms of his trust, may only be allowed to invest trust money in stocks that bring in say two and a half per cent. Naturally, if the family are starving they ask for it to be put out on mortgage in order to get 5 per cent. The Trustee says I cannot do it. They bring all the pressure they can upon him, and, finally, he believing it is perfectly safe, invests it on some property where the investment fails, and then he actually finds out that the very people who urged him to do this turn round upon him, and make him pay back the money lost by their importunity. One cannot excuse the Trustee who departs from the letter of his trust, but it is only fair to punish the cestuique trust, as well as the Trustee, if he is guilty of a breach of trust. A Trustee may be doing all he can for his trust, and if he departs from the letter of his trust, then they turn round upon him if it turns out unfortunately. It might be a woman who was restrained from anticipating her income,—an expedient to prevent the husband getting hold of it, by getting her to mortgage her income before it became legally due. To meet such a case, a celebrated Lord Chancellor invented the Clause against anticipation. This woman was not allowed to mortgage her income before it was due, therefore it could only be paid on such day as it was due; therefore a mortgage on it would not be lawful, and might turn out useless. If a woman has passed the age of child-bearing, the trust fund may sometime be divided upon the supposition that there cannot possibly be any children of the woman. There are many cases where a Trustee commits a breach of trust at the importunity of a woman to serve her husband.

The Chairman.—I take it that this Bill does not relieve the Trustee except to this extent, that it makes the person who contributes to the breach of trust to a certain extent liable.

The Solicitor-General.—Yes. He is only relieved to this extent, that if the parties consent in writing to have the balance of their own trust estate dealt with in this way, any loss occasioned thereby is made good out of any funds they may have.

The Chairman.—That is, that persons who sign any writing to the breach of trust must be responsible, but a person who does not cannot be responsible? Yes.

Mr. Roberts.—I think the clause goes too far, and by it you are defeating the object of the set law. For instance, you have property in trust for a married woman, without power of anticipation, and the Trustee is exposed to her importuning to allow her to anticipate her income. There is now encouragement held out to Trustees to do this, for the responsibility is partially taken from them; and, should the income be thus anticipated, if afterwards she became a widow, she might starve.

The Solicitor-General.—The safeguard is that the Court, in making an order, would look at the circumstances of the case.

Mr. Roberts.—It is hard not only upon the cestuique trust, but upon the Trustee, and also upon the widow. Whilst the section is good in many respects, I think it goes too far.

The Chairman.—If the husband importunes the wife, and the wife importunes the Trustee, he may say, Well, give it me in writing and I will do it.

Mr. Roberts.—I think it defeats the object of the set law, in providing that a widow should always have that course open to her.

The Solicitor-General.—I would also point out that the Trustee would run a risk, as it is only under exceptional circumstances he could do it.

Mr. Roberts.—It is directly against the very word "anticipate." The clause against anticipation, which is a most valuable one, is defeated by this.

Mr. Mitchell.—The clause is well framed to prevent the married ladies backing on their own acts. There are cases where married women have implored a Trustee to give them the money to save their husbands from ruin, and have then turned round on him and insisted that he should pay the money back; but here he says give me the instructions in black and white, and then, if you force me to do it, I can go to the Court and get you prevented from getting any more. It would also help married women to strengthen the Trustee not to make advances, because they would know, if the Trustees did make those advances, their own property would be liable for them.

Mr. Crosby.—How would such a clause bear upon Mrs. Smith in the action against the late Chief Justice? If the Trustees had advanced the money at her request, they could not have recovered it.

Mr. Mitchell.—Assuming that the Trustees had acted in a breach of trust at the request of the lady named, then her interest in the fund could have been charged with such portion of the advance as the Court might think equitable; and this is a most just position to enforce.

Mr. Roberts.—I do not think the provision necessary. I know that a properly minded woman would do anything at the time to relieve the pressure on her husband. Now, you are just defeating all that has worked well for years and years.

The Chairman.—No, not always.

Mr. Crosby.—The question is, whether we should strike out the clause or allow it to stand.

The Solicitor-General.—In a case of this sort there must be a difference of opinion. I do not think you can have a better guide than the English Parliamentary School, in which every word and line of this Bill has been thought over; for that reason I certainly recommend the retention of the clause.

Mr. Crosby.—They are very fond of anticipating things in England.

The Chairman.—It is very difficult, in altering any word in this Bill in Committee before having legal experience or advice, to say what is the particular result of such alterations. When you have the advantage and experience of men who have been Lord Chancellors, and who have weighed every word of the bill, it is a difficult matter to alter it. The question is, whether we should recommend this clause should be retained or not?

The Solicitor-General.—In my own independent judgment I think it best to retain the clause. Mr. Roberts is afraid of what will happen in the case of married women. We will say that a married woman was entitled to an income of £200 per annum; the Trustee would not be such a fool as to allow her to anticipate, unless her life was insured, as she might die any minute. I do not think the majority of Trustees would listen to her importunities. It is for an outside case that I think the Trustees should be protected.

Mr. Mitchell.—The Trustee has to go to the Court and get an order for such part of the sum as the Court thinks reasonable, and in order to apply to the Court to give him that order, the whole of the circumstances would be gone into. The consent or request of the married lady should be witnessed by some recognised person, such as a J.P.

Mr. Roberts.—But the clause commences "Where a Trustee shall have committed, &c." He does not go to the Court to get sanction, nor does he go to the Court to give effect to the settlement in any way; but when he is in a scrape he goes to the Court, and I say it is opposing the views of the set law of the testator, and encouraging the Trustee to commit a breach, and encouraging the cestuique trust to worry him to do so.

The Chairman.—I rather agree with Mr. Mitchell.

Clause 7.—Trustee may insure buildings.

The Solicitor-General.—This defines really what the duties of the Trustee or what his rights are with reference to insurances, not well defined now, and it says:—

7.—(1.) "It shall be lawful for, but not obligatory upon, a Trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to 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."

And it gives you the amount which you may insure; and it says if he does that he may reimburse himself out of the trust funds. As the law stands now it is not certain that he may reimburse himself out of trust funds.

The Chairman.—As this is an important clause, I asked Mr. Dobson to favour me with a written opinion thereon, and he has kindly done so. If you have no objection, Mr. Dobson, I will hand it in as evidence.

The Solicitor-General.—Certainly.

The opinion was as follows:—

"It appears to me that, apart from the special trusts undertaken by a Trustee under a deed or will, a Trustee is not liable for omitting to insure trust property real or personal. But if a Trustee suffer a policy of insurance to become forfeited through neglect to pay the premiums, he is bound to make good the loss to the cestuique trust (Lewin, p. 903), provided that he had funds in hand for the payment of the premiums. As to whether a Trustee may insure and debit the trust funds with the premiums, it is laid down in Lewin, p. 580—'A Trustee would, it is conceived, under special circumstances and in due course of management, be justified in insuring the property, but where there is a tenant for life he could not be advised to do so out of the income without the tenant for life's consent; but if an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the Trustee is to pay the premiums out of the income. A mortgagee is not regarded as a Trustee; and if, in the absence of any stipulation on the subject, he effects an insurance, it is on his own account, and he cannot claim to be entitled to the premiums under just allowances: it is the same as if a lessor or lessee insured, in which case the other would have no claim to the benefit of the policy.'

"It is also laid down in Bunyon on Fire Insurance, p. 11—'A Trustee may insure in respect of the legal estate or right of possession vested in him, and recover from the insurance office in case of fire, although the name of the cestuique trust or person beneficially interested is not interested in the policy. The law will not dispute the legal interest which is the legal result of the legal ownership, although it will also recognise the equitable interest as entitling the owner of it to enter into the legal contract. A Trustee is not as a rule responsible for not insuring, but is now authorised to insure by statute in the management of the estate when it belongs to an infant.' The statute as to the infant refers to the English Conveyancing Act; a similar Act is now law in Tasmania."

Clause 8.—Statute of Limitations may be pleaded by Trustees.

The Solicitor-General.—As things stand now an ordinary person may plead the statute, bnt in some cases a Trustee cannot do so. So that any Trustee, however innocent he may be, or whatever time may have elapsed, cannot plead the statute. He may have taken the best advice, but if he is dead, and 50 years after the same transaction is opened, some person may come of age, the same beneficiary may hold him liable for a technical breach of trust which, if it had been any other man, he could have pleaded statute of limitation. The policy of the law now is to shorten the periods of limitation, and on our own statute book we have in some cases altered the law of limitation from 20 to 12 years. The clause means that the statute of limitation might be pleaded by a Trustee, except in the case of fraud, and then it is not applicable. There are other safeguards in the Section. For sub-section (3) says:—

(3.) This section shall apply only to suits or other proceedings commenced after the first day of January one thousand eight hundred and ninety-one, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

The Chairman.—The only question I noted in the margin is as to when the Statute of Limitations would begin to apply with reference to minors. Do I rightly interpret the law, that the Statute of Limitations would not begin to date until the minor became of age?

The Solicitor-General.—It would depend very much upon the nature of the claim.

The Chairman.—Then any Trustee in possession of property, or Trustee for a minor, would be obliged to bring up his accounts to the day he came of age?

The Solicitor-General.—Yes.

The Chairman.—The Statute begins to run, then, when he becomes of age?

The Solicitor-General.—Yes; but it would depend what sort of an action it was,—whether for a money debt or recovery of land.

The Chairman.—I am satisfied if it does not begin to run until he is of age.

Clause 10.—Trustees of renewable leasehold may renew.

The Solicitor-General.—This is a very sensible thing. Supposing Trustees hold mining property, and they want to get a renewal of the lease. Perhaps if the Trustee is not allowed to do it, the estate might lose the mine or their lease altogether. But this encourages him to do it for the benefit of the estate, and the expense may be met out of the trust fund.

Clause 11.—Power to Trustees to raise money to meet fines on renewal of lease.

The Solicitor-General.—This, of course, is only following up the legislation in the preceding clause.

Clause 12.—Application of Act.

The Chairman.—The clause says, "This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act." You say this Act applies to trusts where the instrument might have been created 10 years ago, and this Act applies to trusts created under that instrument? At least, that is how I read it.

The Solicitor-General.—Except in cases of the Statute of Limitations.

The Chairman.—Yes, but we were saying that the Trust was not created until a person is dead.

Mr. Mitchell.—It does not operate until the death of the person.

The Solicitor-General.—Supposing a man died last year, and left a will which was proved, this Act would apply to anything in that will or marriage settlement. I think that is the correct view.

Mr. Mitchell.—Before the Committee adjourns I should like to suggest that the Section—recognition of our Assessment Books—struck out of the Bill in the other House, be reinserted. The Assessment Books, as Hon. Members well know, have been prepared at great trouble and expense. Returns have been brought in by owners of property themselves, and revised by competent valuers. Owners have had the right of appeal to the Supreme Court, and in many instances have appealed, but that in my mind attaches very great value to the Assessment Books, and the Government having gone to that trouble in getting these books, they should be recognised on subsequent occasions, and be the foundation on which investment can be made.

(2.) For the purpose of making any loan of Trust Funds, the Capital Value of any land as shown in any Assessment Book made under the provisions of "The Assessment Act, 1887," not more than Four years before making such loan, shall be of the same force and effect as if the Trustee had duly made such loan upon the report of such surveyor or valuer as aforesaid; and all loans already made by Trustees to the amount of not more than two-thirds of the Capital Value of any land as shown by any Assessment Book hitherto made under the provisions of "The Assessment Act, 1887," shall be deemed to have been duly made so far as relates to the value of the land.

The Chairman.—Would you put that in as a proviso, or in connection with Clause 4?

Mr. Mitchell.—I should put it in as an independent section, to read as Clause 4. I think it is an excellent provision, and it is simply the Colony backing its own assessment, instead of casting it aside as worth nothing.

Mr. Roberts.—I do not agree with it. I do not value the assessment twopence.

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