Chapter XI
Definition and Distinctions

"There is no trust where obligation is absent."

—*Allahabad Bank* v. *CIT*, 1954 SCR 195

"As between trustee and beneficiary, the law recognises the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary and is so enabled to personate or represent him in dealings with the world at large."

—Salmond

The Indian beneficiary is not an equitable owner, he has only "rights" against the trustees.

—Indian Trusts Act, 1882, Section 3

"Put not your trust in money, put your money in trust."

—An Adage

SYNOPSIS

1. THE PROBLEM OF DEFINITION

All efforts to produce a logical and satisfactory definition of trust have so far remained unsuccessful, as has been noted by Snell[1], Hanbury[2] and others. Hanbury goes to the extent of laying down that: "It is not thought that a dissection and criticism of earlier definitions are very rewarding; rather it is better to describe than to define a trust, and than to distinguish it from related but distinguishable concepts".[3]

In spite, however, we may venture to state Underhill's[4] definition of a trust, which was adopted in *Marshall case* and *Green case*[5]. Accordingly, "a trust is "an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (called the trust property), for the benefit of persons (called the beneficiaries), of whom he may himself be one, and anyone of whom may enforce the obligation".

1. *Snell's Principles of Equity*, p. 87.
2. Hanbury: *Modern Equity*, p. 85.
3. *Ibid.*
4. *Law of Trust*, 12th Edn., 1970, p. 3.
5. Cited by *Snell's Principles of Equity*, p. 87.

Professor Keeton,[6] defines a trust as a "relationship which arises wherever a person called the trustee is compelled in equity to hold the property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestui que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to trustee, but to the beneficiaries or other objects of the trust".

Lewin's classical definition[7] cannot be overlooked. According to him, it is: "A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which the *cestui que trust* has no remedy but by subpoena in the chancery".

Story defines it to be an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof. Smith defines it as a duty deemed in equity to rest on the conscience of the legal owner. Snell calls it a beneficial interest in, or a beneficial ownership of, real or personal property unattended by the legal ownership.

Underhill's definition is narrow, in the sense that it cannot contain in itself trusts for charitable purposes or purpose trusts which lack human beneficiaries and yet may be valid as trusts, and other trusts which lack beneficiaries who can enforce them, e.g., trusts of imperfect obligations or honorary trusts. Keeton's definition that a person is compelled to hold property in trust for another seems far from the elementary rule that no one can be compelled to undertake a trust. As the definition connotes, the legal title vests in the trustee but he is the nominal owner as the real benefit does not accrue to him, while a beneficiary has the equitable title in him and is a beneficial owner, as the real benefit accrues to him. The question, therefore, as to who is the actual or real owner is still open and unsolved.[8] Against Lewin's definition Maitland remarks that it comes from Lord Coke upon Littleton[9] and he levels the following objections against it:[10]

(*i*) To say that a trust is a confidence is not very useful; for if we go on to ask what is confidence, we shall probably be told that it is a trust. This hardly explains anything.

(*ii*) Moreover, the definition stressed that wherever there is a trust, some reliance or confidence is reposed by one into another, but this is true only in case of a trustor who puts confidence in the trustee; the beneficiary does not place confidence in the trustee. Going further, there may be cases where no reliance is placed in the trustee, *e.g.* where I constitute myself a trustee of this watch for my eldest

6. *Law of Trusts*, 9th Edn., 1968, p. 5.
7. *Lewin on Trusts*, 13th Edn., p.11, cited in Maitland: *Lectures in Equity*, p. 43.
8. See *Snell's Principles of Equity*, p. 88.
9. P. 272(*b*), Maitland: *Lectures in Equity*, citing Coke.
10. Maitland: *Lectures in Equity*, pp. 44-45.

daughter. My daughter knows nothing of the trust and she has not been placing trust in me, yet there is a trust.

Maitland himself tried to present a definition but he was not satisfied with it. We may consequently reiterate that no satisfactory definition of a trust is available and more so when we know that contrary to the general rule, there may be trustees of a trust even though no property is vested in them, as is often the case with Settled Land Act trustees.

2. THE INDIAN TRUSTS ACT, 1882

Section 3 of the Indian Trusts Act, 1882 defines a trust. But one has to note that the Act is confined to private trusts (Section 1). It does not apply to public trusts or private religious or charitable endowments.[11] By this enactment, Indian courts have now not to go in search of English principles and precedents as the Act provides readymade principles. The Act does not affect the rule of Mahomedan law as to waqf, or the mutual relations of the members of an undivided family,[12] as determined by the customary or personal law, or to trusts to distribute prizes taken in war among the captors, and nothing in the second chapter of this Act applies to trusts created before the said day i.e. the first day of March, 1882. It applies to the whole of India except the State of Jammu and Kashmir and the Andaman and Nicobar islands [Section 1]. The Act has repealed the Statute of Frauds (Sections 7, 8, 9, 10 and 11] and the Trustees' and Mortgagees' Powers Act, 1866 (Sections 2 to 5 and 32 to 37) and the Specific Relief Act, 1877 (Section 12, i.e. its first illustration) [Section 2].

3. DEFINITION OF TRUST: SECTION 3

The definition rendered by the Act runs as follows:

(3) A trust is an *obligation annexed to the ownership of property*, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, *for the benefit of another*, or of another and the owner;

The person who reposes or declares the confidence is called the "*author of the trust*"; the person who accepts the confidence is called the "*trustee*"; the person for whose benefit the confidence is accepted is called "*beneficiary*"; the subject-matter of the trust is called "*trust property*" or "*trust money*"; the "*beneficial interest*" or "*interest*" of the beneficiary is his right against the trustee as owner of the trust property: and the instrument, if any, by which the trust is declared is called the "*instrument of trust*";

"a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called "*a breach of trust*".

The above definition is quite good but the question of its comparison with other foregoing well-known definitions is out of place because this definition covers only a specific field in the concept of trusts, private express trusts, and

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11. Section 1. *See also* Bombay Public Trusts Act, 1940 and various Religious Endowments Acts of different States.

12. *Perrazu* v. *Subbarayudu*, 44 Mad 656 (PC) 71 explains the reason as to why this is so.

the section itself clears it. To say, therefore, that the definition is defective is to close one's eyes to the express provisions of the section.

The definition in Section 3 is said to be definition of Lewin with certain improvements thereon. In the beginning, it emphasises upon obligation, laying down that a trust is an obligation annexed to the ownership of property for the benefit of another. There is no trust where such obligation is absent.[13] Secondly, the beneficiary has no interest in the trust property but has only a right against the trustee who is the owner of the property. And lastly, the settlor himself can be a trustee. Besides, as the definition lays down, there must be four certainties in a trust:

(*i*) the *intention* of the settlor to create a trust must be express and clear,
(*ii*) the *purpose* for which the trust is to be created,
(*iii*) the *property* that is to be held in trust, and
(*iv*) the *beneficiaries* who are to benefit from the trust must be certain and definite.

A trust involves a transfer of property from the settlor to the trustee. Where the property is immovable property given under a will or by a non-testamentary instrument, it should be in writing, signed by the settlor and registered. In case of movable property the above method is safe, or else transfer of ownership of the property along with a parol declaration to give it in trust would be sufficient. Moreover, the author must be competent to transfer, the property must be transferable and the trustee must also be capable of holding the property. Where a trust involves use of discretion by the trustee he must be competent to contract. As the definition lays down that a trust arises "out of a confidence reposed in and accepted by the owner", it refers to express trusts only. Implied or constructive trusts, described as "obligations in the nature of trusts" in Chapter IX of the Act are not within the purview of the definition. In other words, resulting and constructive trusts under English law are not within this definition of trust under Section 3.[14]

4. IDEA OF DOUBLE OWNERSHIP AND SECTION 3

As explained before, the idea of double-ownership or double-estate is a peculiar and distinctive feature of an English trust so that a beneficial interest is dissociated from a legal title. The trustee is the nominal owner, or a legal owner who has a direct and absolute dominion over property, while a beneficiary, is the beneficial or equitable owner for whose purpose and benefit the trustee has to hold and manage the trust property. One has to note that the duties of a trustee regarding "using" his rights are *positive*, and not negative. As Maitland[15] puts it: "One is not made a trustee by being bound *not* to use one's rights in some particular manner. On every owner of lands or goods there lies the duty of not using them in various ways. The law of torts largely consists of rules which

13. *Cf. Allahabad Bank* v. *CIT*, 1954 SCR 195: AIR 1953 SC 476.
14. *Tan Bug* v. *Collector of Bombay*, AIR 1946 Bom 216.
15. Maitland: *Lectures in Equity*, p. 44.

limit the general rights of owners. I must not dig a quarry in my land so as to cause the subsidence of my neighbour's land. If I do this I commit a wrong and give my neighbour a cause of action; but of course I am not a trustee of my land for him''. Thus the trustee has rights but they are to be used not for his own purpose but for the accomplishment of a certain purpose and for the benefit of a *cestui que trust*. He is bound to use these rights. One more thing is to be remembered here that a trustee is the legal owner but that does not mean that he should have a legal estate in all cases. In cases where the subject matter of a trust is a mere personal right (e.g. a benefit of a contract or a debt), or where the settlor has only equitable rights (as when a beneficiary of a trust makes a settlement of his interest), the trustee does not have anything more than what the settlor commands. Thus personal or equitable rights become the subject of a trust. A trustee, in the words of Snell, is the 'nominal owner' and in the words of Salmond,[16] his ownership is matter of form rather than substance, and nominal rather than real. The property is rather fictitiously attributed to him for certain purposes. But the specific result of this is, that as between a trustee and the beneficiary, the law recognises the truth of the matter, the property belongs not to the former but to the latter; as between the trustee and third persons the fictitious ownership of the trustee (the fiction of law) prevails. The trustee is clothed with the rights of his beneficiaries and is so enabled to personate or represent him in dealing with the world at large. Thus both the ownerships are to serve a definite but a different purpose and one may be transferred or encumbered without affecting the other.[17]

In India.—As decided in *Tagore* v. *Tagore*[18], the double-ownership idea is unknown in India. Equitable ownership is not recognised in India and the trustee is the owner of the trust property when it is vested in him. The Indian beneficiary is not an equitable owner but he has only ''rights'' against the trustees (Section 3). The beneficial interest or interest of the beneficiary cannot be a subject-matter of trust in India as Section 8 of the Act clearly lays down.

8. *Subject of trust*.—The subject-matter of a trust must be property transferable to the beneficiary.

It must not be merely beneficial interest under a subsisting trust. This is a basic and definite difference between the English and the Indian Law of Trusts.

The rights of the beneficiary as explained by Section 55 onwards in Chapter VI of the Indian Trusts Act, are to call upon the trustees to administer the trust property properly and to transfer the same in suitable cases. Section 58 also lays down that the beneficiary's beneficial interest can be transferred by him when he is competent to do so. He can mortgage his interest[19] and assign[20] the same also.

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16. *Jurisprudence*, p. 256.
17. For distinction between legal and equitable ownership *see* Salmond: *Jurisprudence*, 12th Edn., 1966, pp. 260-262.
18. (1872) BLR 377 (PC).
19. *Hemchandra* v. *Surdhani*, (1940) 54 CWN 253 (PC).
20. *Moolla* v. *A.O.*, (1936) 40 CWN 1253 (PC).

5. TRUST DISTINGUISHED FROM OTHER RELATIONS

Trusts resemble certain other legal conceptions namely, bailments, agency, contracts and powers and administration of the deceased person's estate. As Snell explains, out of these the first three categories were enforceable in Common law courts whereas trust was enforceable in equity courts and the administration of estates fell within the competence of the ecclesiastical courts.[21]

(a) Bailments.—Blackstone's definition of a bailment as "a delivery of goods in trust" is a fruitful source of confusion.[22]

It is a delivery of goods by *A* to *B* for a limited purpose with an express or implied condition that on fulfilment of the purpose, *B* will return the goods to *A* as directed by him. Delivery of the goods for a limited purpose (which implies a definite or suitable period for the accomplishment of the limited purpose) without transferring ownership from *A* to *B* is the important feature of bailment. Bailment resembles a trust, in that in both one person has possession over the other's property for that other's benefit. It may be described as a species of trust therefore. The contrast between the two lies in the fact that:

(*i*) Bailment was recognised at Common law and consequently the rights and obligations of a bailee are legal, whereas a trust is merely equitable, the trustees having equitable rights.

(*ii*) Only personal chattels can be bailed, while any property may be held in trust.

(*iii*) A bailee has only a special property in the bailment, the bailor keeping general property with himself, whereas a trustee has the general property in the trust with himself. In other words, a bailor gives to the bailee only a limited or special property for the time being, while a trustee is the full legal owner, subject to obligations attached to the property in trust with him.

(*iv*) A bailee selling without authority the goods bailed to him can pass no good title as against the bailor but an unauthorised sale by a trustee will confer a good title upon a *bona fide* purchaser for value, acquiring the legal interest without notice of the trust.[23]

(*v*) Only a bailor can enforce the duties of the bailee, an obligation under a trust can be enforced by anyone entitled to its benefits.

(*vi*) A bailor uses his special rights for his own benefit but a trustee is bound to exercise them on behalf of and for the benefit of another.

A trust is therefore fundamentally distinguishable from a bailment[24] and a bailee is not a trustee express or implied within the meaning of the Indian Trusts Act, 1882.[24]

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21. *Snell's Principles of Equity*, 27th Edn., 1973, p. 89
22. Hanbury: *Modern Equity*, p. 86.
23. Maitland: *Lectures in Equity*, 1969 Edn., p. 47.
24. *Ramasami* v. *Kamal Ammal*, (1921) 45 Mad 173.

(b) Agency.—An agent and a trustee both administer property on behalf of another and they cannot become the beneficial owner thereof, i.e., each is subject to fiduciary obligations towards his principal or beneficiaries. As Hanbury[25] puts it, the position of a principal and agent resembles that of a beneficiary and trustee. Agents, like trustees, must act personally in the business of the agency and are accountable to their principals, as are trustees to beneficiaries, for any profit made out of the property or business entrusted to them.[26] The relation in each case is a fiduciary one. But the difference lies in this that:

(*i*) Trusts are governed by equity, agency by Common law.

(*ii*) Agency normally arises by contract between the principal and agent (except in case of agency of necessity) whereas in most trusts no such contractual relationship between trustees and beneficiaries exists.

(*iii*) Property of agency does not vest in the agent whereas a trustee has property vested in him.

(*iv*) While an agent can make his principal liable, a trustee cannot involve his beneficiaries in liability.[27]

(*v*) An agent always acts on behalf of his principal and is subject to his control. A trustee is not subject to such a control either from the settlor or from the beneficiaries.

(*vi*) An agent when he goes beyond his powers and out of his sphere cannot pass a legal title to a *bona fide* purchaser for value without notice of the trust.

(*vii*) An agent derives his authority to act by delegation from his principal, whereas a trustee derives such an authority from the instrument of trust. In short, the principle is that when ownership of property is vested in one for a specific purpose for the benefit of another, there he is a trustee.[28] But where only a power of management is given to one and the ownership is retained by the other, there he is only an agent.[29]

(c) Contracts.—Contract and Trust are quite different concepts, but there are basic similarities in so far as the commonest origin of a trust obligation is a transaction between two persons, and in contract also its obligation is the result of an agreement between two persons. As to the distinction between them, (*i*) a contract, as Hanbury[30] lays down, is a *common law personal obligation* resulting from an agreement, a trust is an *equitable proprietory relation* which can arise independently of an agreement. However, the trust may arise as a result of an agreement for consideration, in which case there may be both—a

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25. *Modern Equity*, p. 87.
26. Hanbury: *Principles of Agency*, 2nd Edn., pp. 3-10; Bowstead: *Agency*, 13th Edn., p. 6.
27. *Snell's Principles of Equity*, pp. 89-90.
28. *Annappa* v. *Krishna*, 1936 Bom 412.
29. *Kalipad* v. *Haridasi*, 1938 Cal 673; *Maloji Rao* v. *Keshav*, 1939 Bom 126.
30. Hanbury: *Modern Equity*, p. 88.

trust and a contract.[31] Where money is lent on agreed terms for payment to specific persons and to return to the lender if not so paid, such money is impressed with a trust for those persons.[32] (*ii*) A contract is enforceable at Common law; it is a bilateral act, it springs from an offer and acceptance, it gives a right *in personam*, a stranger to a contract can have neither the benefit of it nor its liability, and contracts without consideration cannot be enforced. On the other hand, a trust being a matter of confidence, was enforced by equity courts: it may be a purely unilateral act (where the settlor himself is a trustee), there is no offer and the trustee's acceptance is presumed unless he disclaims a trust, it almost gives a right *in rem*, its benefit is claimed not by the trustor (unless he is also a beneficiary) but by the *cestui que trust* who is not a party to the contract, and lastly, the consideration supplied in contract and trust are of different nature, as in equity the issues of a prospective marriage are treated to be within the "marriage consideration". In the sense in which Common law understands the word consideration in a contract, the issues are no party to the consideration.

In the recent English case of *Beswick* v. *Beswick*[33], specific performance for the benefit of a third party was granted by the House of Lords. Thus, as Hanbury[34] notes, a few cases have enabled the third party to obtain the benefits due to him under the contract by finding that one of the contracting parties contracted as trustees for him. Of course, not much encouragement has been given to the development of this doctrine. The House of Lords has recently, as seen above, extended the scope of the remedy of specific performance so as to enable a party to a contract to obtain performance for the benefit of a third party, thus rendering the Common law doctrine of privity of contract (an unfortunate inheritance from the past) "unnecessary", Common law "inadequate", and the trust concept "irrelevant".[35]

Much of the discussion on the question of distinguishing trust from contract has centred on the problem of the introduction of the so-called trust concept as a way of permitting a third party to enforce a contract entered into by others for his benefit. This is a recent development.[36]

Pooley v. *Budd*[37] is a leading case on the point.

(d) Powers.—A power is an authority vested in a person to deal with or dispose of property not his own. The person giving the power is the 'donor' and the person receiving the same is called the donee of the power. Power is neither legal or equitable, imperative or discretionary, general or special. A general

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31. *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.*, (1968) 3 WLR 1097.
32. *Barclays Bank Ltd.*v. *Quistclose Investments Ltd.*, 1970 AC 567.
33. 1968 AC 58; John Tiley: *A Casebook on Equity and Succession*, p. 82. *See also* F.E. Dowrick, (1956) 19 MLR 374.
34. Hanbury: *Modern Equity*, p. 631.
35. Hanbury: *Modern Equity*, p. 635.
36. For detailed discussion *see* Law of Property Act, 1925, S. 56, discussed in *Snell's Principles of Equity*, 1973 Edn., pp. 91, 92, 93.
37. Rolls Court (1851) 14 B 34; John Tiley: *A Casebook on Equity and Succession*, pp. 98-100.

power does not restrict a donee's choice whereas a special power restricts his choice of appointment within a certain class of persons. The substantial distinction between a power and a trust is that a mere power is discretionary, while a trust is imperative. When I hold Rs 50,000 upon trust to divide it among a certain class of persons, I have no choice but I am bound to carry out the trust, and in default the court will compel me to do so. In the event of my failure to act either by design or by accident, the property will pass to the persons in default of appointment.[38] In other words, benefits to be given or claimed under trust do not depend upon a trustee's fancy, whereas execution of power is left to the free will of the donee. Moreover, the beneficiaries can compel the trustee to act and to hand over the benefits to them, but in case of power no such compulsion is possible against the donee of power. Where the donor exhibits an intention that the property in any event must go to the objects of power, the power is a trust power which must be exercised; if it is not so, there is a mere power of appointment.[39] Thus the distinction rests on the intention of the donor as exhibited in the instrument.

(e) **Debts.**—(*i*) A debtor has the duty to pay money to the creditor, a trustee has to hold the trust property in trust for the beneficiary.

(*ii*) A debtor's obligation, like that of an agent, is personal, the trust is proprietory.

(*iii*) A debtor is not a trustee for his creditor, because he has not to 'use' any right for his creditor's benefit (except when a debtor becomes the creditor's personal representative), a trustee is bound to exercise his rights for the benefit of his *cestui que trust.*

(*iv*) A debtor can spend or use the money obtained or do anything he likes with it, but a trustee has no right to deal with the trust property according to his own fancy.

(*v*) On a debtor's (e.g. banker) bankruptcy, money cannot be followed but must be claimed as a creditor in bankruptcy. In case of a trust if the trustee goes bankrupt, the trust property can be followed and recovered so far as it can be traced.[40]

(*vi*) A debtor is bound to repay the money even if it is stolen, whereas a trustee is not liable for accidental loss.

(*vii*) A trust and a debt may coexist, as where a loan to be held by the borrower on trust is repayable if the purpose for which the money was lent is carried out, and may be held in trust for the lender if performance is impossible.[41]

(f) **Conditions and Charges.**—Trusts and Conditions are similar in this respect that in both, the owner of the property is subject to obligation. This obligation could not be enforced by Common law courts but the courts of equity enforced it.

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38. *Mcphail* v. *Doulton*, 1971 AC 424.
39. *Snell's Principle of Equity*, p. 96.
40. *Official Assignee* v. *Bhat*, (1933) 60 IA 203.
41. Hanbury: *Modern Equity*, pp. 88-89.

(*i*) An owner of property can create a trust, but no other person can do so. In condition, the person disposing the property to *A* may attach a condition to it that *A* shall dispose of his own property in a certain manner.

(*ii*) A condition may impose an obligation therefor the value of which may exceed the property received in gift, whereas in a trust a trustee's obligation is always limited to the value of the trust property.

> "If *A* gives property to *B* on condition that he do something in favour of *C*, then if the court construes the gift as a condition, the following is the result: if the condition is subsequent and becomes impossible to perform, the interest given to *B* becomes absolute and *C* has no right, whether the condition is attached to real or personal property; similarly if a condition precedent attached to personal property becomes impossible of performance. Further, if *B* observes the condition the property vests in him absolutely. On the other hand if the court construes the gift as trust, *B* will be bound to give benefit to *C* notwithstanding the impossibility of performing the obligation precisely according to its terms."[42]

It is therefore difficult to find out whether a gift of property is subject to a trust or whether it is conditional upon, or charged with, a duty of making certain payments. The difficulties of construction in cases of this type are well illustrated by *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.*[43]

A charge differs from a trust in the following cases.[44]

(*i*) Once the party subject to the charge has fulfilled the charge he holds the property beneficially,[45] *aliter* (otherwise) as a trustee who may have to hold the property on a resulting trust.[46]

(*ii*) A trustee who occupies trust property must account for rents and profits: *aliter* as a person holding property subject to a charge.[47]

But a charge is similar to a trust in the following respects.[48]

(*i*) Neither a person subject to a charge nor a trustee is under a personal obligation to make up any deficiency caused by insufficiency[49] of assets.

(*ii*) Both a charge and a trust create equitable interest which give way to the *bona fide* purchaser for value of the legal estate without notice.[50]

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42. Nathan and Marshall: *Equity Through the Cases*, 1961 Edn., p. 197, citing Thomas: *Conditions in Favour of Third Parties*, (1952) 11 CLJ; *A.G.* v. *Cordwainer's Co.*, (1833) MR/MY & K 534.
43. (1968) 3 WLR 1097.
44. Nathan and Marshall: *Equity Through the Cases*, p. 211.
45. *Oliver, Re*, 62 LT 633.
46. *Re West, George* v. *Grose*, (1900) 1 Ch 84.
47. *Re Oliver*, 62 LT 633.
48. Nathan and Marshall: *Equity Through the Cases*, p. 201.
49. *Re Cowley*, (1885) 53 LT 494.
50. *Parker* v. *Judkin*, (1931) 1 Ch 475.

(g) **Mortgages.**—A mortgage is the result of a contract whereas a trust is the result of confidence. A mortgagee does not hold the mortgaged property as a trustee for the mortgagor; a trustee has to hold the trust property for the beneficiary's benefit. On the contrary, a mortgagee has an interest quite adverse to the mortgagor, which the trustee cannot have. The former can use or get sold the mortgaged property in suitable cases while the latter cannot use the trust property himself. One has to take note that a mortgagee, when he is paid by the mortgagor, becomes a trustee for the mortgagor because though he has every right to secure repayment of his money, that right cannot go beyond it. He becomes a trustee also for the excess amount with him when the mortgaged property is sold and he has been reimbursed out of the sale proceeds.

(h) **Administration.**—Administration of assets and trusts have certain similarities too Trusts were the invention of the Chancellor, whereas administration of the assets of a deceased person was originally regulated by ecclesiastical courts. As the Chancery Courts had also a supplementary jurisdiction in this respect the position of the administrators became more and more assimilated to that of the trustees. Moreover, like a trustee, an administrator is bound to convey the surplus of assets in his hands after the debts have been paid off. Most of the rules applicable to trustees have been made applicable to administrators also. Like trustees therefore, an administrator cannot have an interest adverse to the property, cannot make a profit out of the property in his charge, is not liable unless he commits any wilful default, and can claim a discharge from his office when the mission is completed.

Apart from these similarities, (*i*) an executor or administrator, merely as such, is not a trustee for the legatee or the next of kin. As Snell[51] puts it, "the function of personal representatives is to wind up, and the function of *a trustee* is to hold".

(*ii*) Personal representatives have usually the whole ownership of the property administered and the beneficiaries have only a right to compel them the due administration. Under a trust, the trustees have only the bare ownership while the beneficiaries have the beneficial interest in them.

(*iii*) For the breach of trust and for a claim to the personal estate, the time-limits are also different except in case of fraud to which neither limit applies. Moreover, a trustee cannot plead limitation statutes where he himself is guilty of fraud or conversion.

(*iv*) A personal representative can pay his own debt or debt of others in preference to other creditors, but a trustee cannot do so.

(*v*) One of the several personal representatives can pass a good title to the purchase of the pure personality whereas the trustees must act jointly.

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51. *Snell's Principles of Equity*, p. 96.

Chapter XII

Classification of Trusts

"There is one good, general and infallible rule that goes to both these kinds of trusts; it is a rule that never deceives and to which there is no exception, and that is: THE LAW NEVER IMPLIES, THE COURT NEVER PRESUMES A TRUST, BUT IN CASE OF ABSOLUTE NECESSITY."

—Nottingham, L.C.
in *Cook* v. *Fountain*, (1676) 3 Swans 585

"The names given to various types of trusts are not terms of art, but they are commonly assumed to be so. The categories are not exclusive."

—Hanbury: *Modern Equity*

"A constructive trust is the formula through which the conscience of equity finds expression."

—Cardozo

SYNOPSIS

1. GENERAL

There is a divergence of opinion[1] on the question of classification of trusts and rightly enough, it is possible, because classification involves an angle from which, and a reason or purpose for which, a situation is surveyed.

Following Lewin, Maitland[2] classifies trusts according to the mode of their creation. Trusts are created either (*i*) by the act of a party, or (*ii*) by operation of

1. Nottingham, L.C. expresses in *Cook* v. *Fountain*, (1676) 3 Swans 585, that trusts are either express, implied or presumptive. Lord Esher, M.R., Bowen, L.J. and Kay, L.J. in *Solar* v. *Ashwell*, (1893) 2 QBD 390, say that they are either express or constructive and in *Re I. Lanover, S.E.*,. 1926 Ch 626, Ashbury, J. expresses that trusts are either express, by act of parties, or implied i.e. constructive, which is either resulting or non-resulting. *See* Nathan & Marshall: *Equity Through the Cases*, Chap. 5, pp. 210-213.
2. Maitland: *Lectures on Equity*, 1969 Edn., p. 53.

law. Express and implied trusts come under the first classification and resulting or constructive trusts in the second.

As Hanbury[3] notes, the names given to various types of trusts are not terms of art, but they are commonly (even in statutes) assumed to be so. The categories are not exclusive; some trusts could appear in more than one category. According to him trusts are either (*a*) express, (*b*) implied, (*c*) resulting, or (*d*) constructive. Express trusts may be (*i*) executed, or (*ii*) executory and, (*i*) completely constituted, or (*ii*) incompletely constituted. Snell practically accepts this classification adding (*i*) private and public, (*ii*) simple and special, and (*iii*) perfect and imperfect trusts to the list.[4]

(1) Viewed at from the *mode of their creation* we have express or declared trusts, implied or presumed trusts and constructive trusts. Resulting trusts, precatory trusts and secret trusts are also a species of any of the above-mentioned three main classes, which we shall consider.

(2) According to the *nature and duties of the trustees*, trusts may be classified into two categories: simple trusts and special trusts.

(3) Considering the trusts *with reference to their objects*, there are two divisions of trusts: private trusts and public trusts or charitable trusts.

(4) Lastly, *from the viewpoint of supplying consideration*, trusts are divided into: trusts for value, voluntary trusts and trusts of imperfect obligations or illusory trusts.

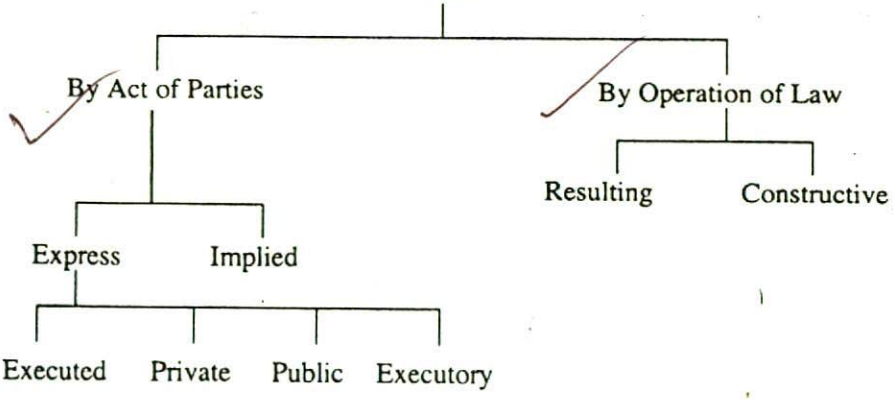
(5) All the varieties of trust fall into two broad divisions: trusts created by the act of parties and those created by the operation of law.

It will be fruitful, therefore, to cast the above broad divisions into a tabular form to facilitate understanding.

2. TABLES OF CLASSIFICATION

Table I

Trusts



3. Hanbury: *Modern Equity*, p. 98.
4. *Snell's Principles of Equity*, pp. 98-100

Table II

Classification according to nature of duties, objects, mode of creation and consideration.

TRUSTS

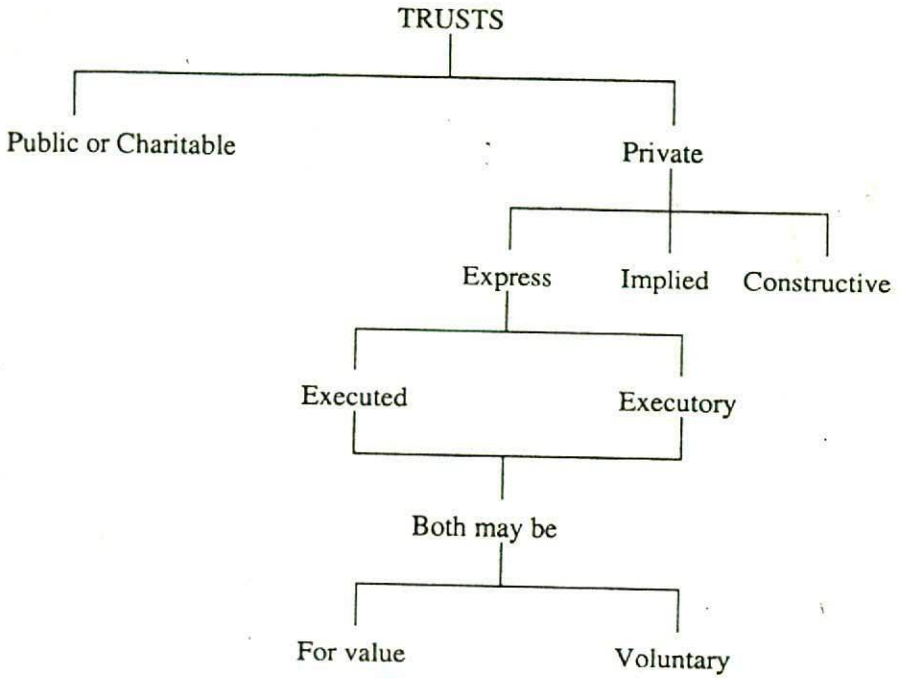
(*a*) According to nature of duties of trustees
  (*i*) Simple
  (*ii*) Special
(*b*) According to objects
  (*i*) Private
  (*ii*) Public or Charitable
(*c*) According to the mode of creation
  (*i*) Express or declared trust
  (A) Executed
  (B) Executory
  (*ii*) Implied or presumed
  (*iii*) Constructive
  (*iv*) Resulting
  (*v*) Precatory
  (*vi*) Secret

  } These may fall in any one of the above categories (*i*), (*ii*) or (*iii*)

(*d*) According to consideration
  (*i*) Trust for value
  (*ii*) Voluntary trust
  (*iii*) Trust of imperfect obligations or illusory trust
(*e*) Rest
  (*i*) Completely and incompletely constituted trust
  (*ii*) Trusts of perfect and imperfect obligations
  (*iii*) Protective and discretionary trusts which may fall in any one or more of the above divisions

Note.—The categories are not exclusive and they may overlap.

Table III



3. EXPRESS TRUSTS

In the words of Lord Brougham in *Fitzgerald* v. *Steward*[5], an express trust is one "created, not by facts and circumstances, but by express words". As per Lord Esher, M.R., " . . . If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust . . . such a trust is in equity called an express trust".[6] In short, a trust created by an express declaration of the person in whom the property is vested is an express trust.[7] For example, *A* declares himself a trustee of 'Blackacre' for *B*. Similarly where *A* conveys the land to *C* in trust for *B*, the same result follows. Express trusts are termed declared trusts also.

4. IMPLIED TRUSTS

Such trusts are raised or created by act of construction of law. It arises from the presumed intention of the owner of the property. As expressed by Nottingham, L.C. in *Cook* v. *Fountain*[8], "express trusts are declared either by word or in writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. The last are commonly called

5. (1831) 2 Russ & M 457, 460.
6. *Solar* v. *Ashwell*, (1893) 2 QBD 390.
7. *Snell's Principles of Equity*, p. 98.
8. Nathan & Marshall: *A Casebook on Equity and Succession*, No. 46; (1676) 3 Swans 585.

presumptive trusts . . . so the trust, if there be any, must either be implied by the law or presumed by the court. There is one good, general and infallible rule that goes to both these kinds of trusts; it is a rule that never deceives and to which there is no exception, and that is: the law never implies, the court never presumes a trust, but in case of absolute necessity".

Where *A* purchases land and conveys it to *X*, there is *prima facie* an implied trust and *X* holds it as a trustee for *A*.

Thus the distinction between an express and an implied trust is thin insofar as in the former, the words creating a trust are clear, while in the latter they are less clear.

5. CONSTRUCTIVE TRUSTS[9]

Constructive trusts arise by operation of law. In certain circumstances the legal owner of property must hold it on trust for another according to principles of equity. It is not possible in such circumstances to observe formalities. When it would be an abuse of confidence for the owner of property to hold the same for his own benefit, a trust is imposed upon him irrespective of his intention. Such a trust is called a constructive trust, e.g., a trustee getting renewal of a lease of land held by him as a trustee is bound by this trust. As Cardozo said, a constructive trust is the formula through which the conscience of equity finds expression.

The most accurate and lucid distinctions have been brought out by *Lewin on Trusts*[10]. "An *implied trust* is one declared by a party not directly, but only by implication; as where a testator devises an estate to *A* and his heirs, 'not doubting' that he will thereout pay an annuity of £ 20 per annum to *B* for his life, in which case *A* is the trustee for *B* to the extent of the annuity. Trusts by operation of law are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity and are either (1) *resulting trusts*, as where an estate is devised to *A* and his heirs upon a trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or (2) *constructive trusts*, which the court elicits by a construction put upon certain acts of parties, as when a tenant for life of leasehold renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease".

The term has been used in different senses. It is applied to fiduciary and quasi-fiduciary relationships other than that subsisting between trustee and beneficiary.[11] The obligation incumbent on a trustee who has made a profit however innocently, through his office, is of this nature and the trustee is to hold

9. Hanbury: *Modern Equity*, p. 101; *Snell's Principles of Equity*, p. 99.
10. 12th Edn.,p. 124; 15th Edn., p. 16, cited in Re *Llanover Settled Trusts*, Nathan & Marshall: *A Casebook on Equity and Succession*, No. 47, 1961 Edn.
11. Maitland: *Lectures on Equity*, p. 80.

such profit for the benefit of the beneficiaries.[12] The position of a stranger to the trust who meddles with the trust property in such a way that equity will regard him *a trustee de son tort*[13] is also of this nature wherein a constructive trust is created. In *Eves* v. *Eves*[14] Lord Denning has therefore rightly said that . . . "a few years ago even equity would not have helped. But things have altered now. Equity is not past the age of child-bearing. One of her latest progeny is a constructive trust of a new model".

Principle of unjust enrichment.—Such trusts are enforced on one principle and that is, to prevent unjust enrichment of one person at the expense of another. In America, this has become one of the weapons in the form of an equitable remedy of a proprietary nature, available to prevent unjust enrichment, whenever the quasi-contractual remedy is inadequate.[15]

Before coming to the provisions of the Indian Trusts Act, 1882, it is necessary that the concept of the divisions (*a*) and (*e*) under Table II are made clear first, the express trust and its subdivisions to be discussed in the course of discussion of the statutory provisions of the Indian Trusts Act.

6. PRIVATE AND PUBLIC TRUSTS

A private trust primarily confers the benefit of the trust on certain persons or a class of them. It is possible that in doing so it may incidentally confer some benefit on the public at large, e.g., there may be a trust for the benefit of *X* individually or for his sons or descendants.

A public trust, as the very name connotes, confers a benefit on the public at large. Trusts to promote public welfare or education are public trusts and they may incidentally confer a benefit on an individual, or a class of them. The division of trusts into private and public are related to the end or purpose or object which they are supposed to serve. A public trust may be a charitable trust or a purpose trust or a religious trust, but it must, to justify its existence, serve some considerable portion of the public answering a definite description[16], because it is for the benefit of the community or of an appreciably important section of the community.[17] A trust which has no such element is not a public trust.[18]

A private trust may be enforced by any of the beneficiaries while a public trust only by the Attorney-General.

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12. *Boardman* v. *Phipps*, (1967) 2 AC 46; Nathan and Marshall: *A Casebook on Equity and Succession*, No. 78.
13. *Carl-Zeiss Stiflung*, (1969) 2 WLR 427.
14. (1975) 3 All ER 768, 771.
15. Hanbury: *Modern Equity*, pp. 101-2.
16. *Nabi Shirazi* v. *Province of Bengal*, ILR 1942 Cal 211.
17. *Verge* v. *Somerville*, 1924 AC 496; *Keren* v. *Inland Rev. Commr.*, 1932 AC 650.
18. *Cambay Municipality* v. *Ratilal Ambalal Reshamwala*, 1995 Supp (2) SCC 591.

7. SIMPLE AND SPECIAL TRUSTS

Where *A* vests his property in *B* for the benefit of *C* and *A* has not laid down the nature of the trust, what results is a simple trust. The beneficiary in such a trust has a right to be put in possession of the trust property and consequently call upon the trustee to execute a conveyance of the legal estate. The simple reason is that here a trustee has no duties to perform. The trust is also termed a bare trust[19] and it is for the law to construe its nature.

A special trust imposes duties on trustees for the execution of the purpose pointed out by the settlor. Thus where there is a trust for sale, the trustee is not a mere depository of the trust but he has to take pains and perform his duties. Where these duties are ordinary and of a mechanical character involving routine intelligence, the trust is called a *ministerial trust*. But where the duties involve special intelligence and a greater element of judgment and discretion, it is called a Discretionary trust. The beneficiary in such a trust cannot order a particular part of the income from the trustees as he can do in a simple trust, because it all depends upon the discretion of the trustees.[20]

8. TRUSTS OF PERFECT AND IMPERFECT OBLIGATION

Such a trust is also called an Honorary trust. The distinguishing feature of this type of trust is that it cannot be enforced by or on behalf of the *cestui que trust*. A trust for the preservation of the independence and integrity of newspapers[21], or for the maintenance of good understanding between nations[22], or for pursuing inquiries into a new alphabet[23] (made by George Bernard Shaw) are void because the purpose involved therein is abstract and impersonal. [24]. As Snell notes, acceptance of certain other trusts for the purpose of maintenance of a tomb or individual animals by courts, branding them as "exceptional or anomalous" trusts, shows unfortunate "concessions to human weakness or sentiment". He also observes that "an individual trust cannot be tortured into a valid power"[25] even though the settlor's wishes or purpose could be achieved thereby. Thus a trust, the object of which is "certain" and which can be "enforced", is not a trust of imperfect obligation but a valid trust.

9. RESULTING TRUST

(a) When comes into existence.—What Homman, J. expressed in the *Gillingham Bus Disaster case*[26] in regard to a resulting trust appears to be the

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19. *Tomlinson* v. *Glyns Executor and Trustee Co.*, 1970 Ch 112.
20. *Re Gulbenkian's Settlements* (No. 2), 1970 Ch. 408.
21. *Re Astor's S.T.*, 1952 Ch 534; Nathan and Marshall: *A Casebook on Equity and Succession*, No. 27.
22. *Ibid.*
23. *Re Shaw*, (1957) 1 WLR 729: (1958) 1 All ER 245; Nathan and Marshall: *A Casebook on Equity and Succession* No. 29.
24. *Re Denley's Trust*, (1969) 1 Ch 373.
25. *Snell's Principles of Equity*, p. 100.
26. *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor*, 1959 Ch 62: (1958) 3 WLR 325; Nathan and Marshall: *A Casebook on Equity and Succession*, No. 92.

best description thereof. Such a trust arises, according to him, where the expectation of the settlor "is for some unforeseen reason cheated of fruition and" (*ii*) "is an inference of law based on an after-knowledge of the event". As expressed by Hanbury[27], "resulting trusts occur where equity regards property which is held by *T* (a trustee) as belonging in equity to the person who has transferred it to, or caused it to be vested in *T*. . . . There is no doctrinal unity to resulting trusts." Creation of such a trust is not dependent on compliance with formalities and is also not subject to all rules regarding express trusts. In such a trust the beneficial interest in the property results or reverts to the creator.

(*b*) *Types.*—According to Maitland[28], resulting trusts are of two kinds: (*i*) where there is a gift and the question is whether the donee takes beneficially or merely as a trustee, and (*ii*) where a person buys something but the conveyance of it is at his instance made not to him but to someone else, i.e., cases of 'purchases in the name of third parties'. In expressing this Maitland followed Lewin[29], who said that resulting trusts may be subdivided thus:

(*i*) where a person being himself both legally and equitably entitled makes a conveyance or bequest of the legal estate and there is no ground for the inference that he meant to dispose of the equitable interest.

(*ii*) where a purchaser of property takes a conveyance of the legal estate in the name of a third person, but there is nothing to indicate an intention of not appropriating to himself the beneficial interest.

(*c*) *Important features.*—The important thing here is that in a resulting trust there is a disposition of the legal interest but not of the equitable interest. The consequence of this will be that the equitable interest, or so much thereof as is left undisposed of, will result, if arising out of the settlor's reality, to himself or his personal representatives. The second important feature of such a trust is that the intention of excluding the person invested with the legal estate from the enjoyment of the property may be expressed or may not be expressed. Such trust is also called an implied trust because it is founded on an unexpressed but presumed intention of the party creating it. Where the rule of perpetuities is defeated such a trust comes into being.

(*d*) *Distinction from Constructive Trust.*—Coming to the distinctions between a resulting and a constructive trust, it may be said that the former arises because of incomplete disposition by the settlor, and it arises in case of a gift or from purchases in the name of third parties; the latter arises out of fiduciary relationship between the parties and in such cases even a stranger is bound by the trust.

(*e*) *Varieties of Resulting Trusts.*—As has been said, such a trust is the result of an incomplete disposition or a result of unclear intention as to the

27. *Modern Equity*, 1969 Edn., Chap. 12, p. 204.
28. *Lectures on Equity*, 1969 Edn., pp. 75, 78.
29. *Lewin on Trusts*, 13th Edn., Chap. VI.

disposition (which is very difficult to find[30]), whereby legal estate is vested in the donee but as to the enjoyment of the beneficial interest there is insufficient clarity and the donee is thereby excluded from it. Thus in cases (*i*) where property is conveyed upon trust but a trust is not declared[31], (*ii*) where trust-property conveyed to the trustee is not completely exhausted[32], (*iii*) where a trust fails as it offends some rule of law[33], a trustee cannot set up a plea that he should get the benefit of the trust as there is nobody else who should get its benefit. The trust-property in such cases, or so much of it as remains unspent and unexhausted, must return to the settlor or to his legal representatives if he is dead. This is so because there is an intention expressed to exclude the donee. (*iv*) In the same way, when property is given upon trust but the beneficiaries are not specified at all, or (*v*) where property is purchased by *A* and transferred to *B* without consideration[34], *B* should hold it in trust for *A* as a trust results from the circumstances of the case. It must be noted that in the above case, the intention that *B* is to be a trustee is not expressed but still *B* has to hold it as a trustee. But this rule is liable to be rebutted either by extrinsic evidence of a donor's intention in this regard in favour of the donee, or by the doctrine of advancement. In England the Law of Property Act, 1925 does not allow a resulting trust to arise under the circumstance. (*vi*) Moreover, where a trust is created for *X*'s maintenance and *X* dies without spending anything, a resulting trust for the settlor will ensue. (*vii*) Even in cases of conveyance to a stranger or in the name of the purchaser and others jointly or in other's name without the purchaser's name, a trust results to the purchaser[35], which presumption, if rebutted by evidence, the nominal purchaser will take the estate fully. (*viii*) On the contrary, a conveyance to the purchaser's wife or child stands on a different footing because here the presumption is that the purchaser wanted to benefit them. Thus the relation between the nominal purchaser and the person who advanced money for the purchase is a circumstance of great and vital importance, which raises a presumption of advancement which will rebut a presumption of the resulting trust. *Dyer case*[36] is a leading one on this point. But again the presumption of advancement is also liable to be rebutted and defeated by proper evidence as to contemporaneous and subsequent acts and declarations of the purchaser himself.

(*f*) *Modern position.*—As Hanbury exposes[37], *the principle of these cases is not that any new equity arises to create a resulting trust, but that the beneficial interest has never left the settlor.* But many difficulties may be involved. What would be the position if property were settled on a widow determinable on her remarriage, and the "remarriage" were annulled? Could she claim once more—

30. *Sanderson's Trust*, 3 K & J 497; *Re Andrew's Trust, Caester* v. *Andrew*, (1905) 2 Ch 49.
31. Section 83 of Indian Trusts Act, Illustration (*a*).
32. *Ibid.*, Illustration (*c*).
33. *Ibid.*, Illustration (*d*).
34. Section 83 of Indian Trusts Act, Illustration (*a*)
35. *Ibid.*
36. *Dyer* v.*Dyer*, (1788) 2 Cox 92. Other equally important cases are *Sanderson case*, 3 K & J 497; *Andrew case*, (1905) 2 Ch 49 and *King* v. *Denison*, (1889) 1 V & B 260.
37. *Modern Equity*, Chap. 12, pp. 204-217.

rather reclaim the property from the settlor's estate? Logic should not here be pushed further than the occasion demanded. Different branches of law rely on different policy considerations and there is no one clear ruling on the effect of a void marriage and the annulment of a voidable one.

But, at the same time, equity will refuse to lend its aid to cases wherein illegality is a part of the evidence on which a resulting trust will or will not be found to exist.[38]

The resulting trust may be invoked as a device of equitable surgery, to provide a solution in cases where unskilful draftsmanship leaves the beneficial interest wholly or partially undisposed of.[39] The principle of *unjust enrichment* is also one of the reasons why such trusts are enforced in modern times.[40]

10. PRECATORY TRUSTS

(a) Meaning and origin.—The word precatory is obtained from the Latin root *precarius* meaning entreaty and the archaic English meaning is—that which depends on the will or pleasure of another. The meaning of the word is characterised by a lack of security or stability that threatens with danger.[41]

A trust must have three certainties:[42] certainty of intention, of subject-matter and of objects, so that a trustee must be under an imperative obligation. That obligation can be inferred from the nature and manner of the [illegible] considered as a whole. No technical words are required to create a trust and the question in each case would depend upon whether on the proper construction of the words used, the settlor or testator has manifested an intention to create a trust. However, no expressions or terms which are insufficient to express a definite intention can create a trust. For example, I desire, will, request, entreat, beseech, recommend, hope, do not doubt etc. are ineffectual.

But, as Hanbury notes, the courts have not been consistent on such questions of construction. In the past the court of chancery seems to have been eager to catch at any phrase which could possibly be twisted into an expression of trust.[43] This created a dissatisfaction and an adverse reaction and the court had to discard that tendency (but not completely even up to this time) to discover a trust.[44]

The reason for such an inclination of the chancery court was very clear. According to the rules of ecclesiastical courts, an executor who administered an estate was entitled to keep for himself any surplus that was undisposed of. In 1830 however the Executors Act provided that the same should be held in trust for the next of kin.

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38. *Re Emery's Investment Trusts*, 1959 Ch 410; *Chettiar* v. *Chettiar*, 1962 AC 294; *Ayerst* v. *Jenkins*, 1873 LR 16 Eq 275.
39. *Modern Equity*, Chap. 12, pp. 204-217.
40. *Ibid.*, pp. 101-2.
41. A Merrium Webster: *Webster's Seventh New Collegiate Dictionary*, p. 668
42. Lord Langdale in *Knight* v. *Knight*, (1840) 3 Bear 148.
43. Maitland: *Lectures on Equity*, p. 65.
44. See *Re Williams*, (1897) 2 Ch 12; *Comiskey*, 1905 AC 84.

(*b*) *A turning point.*—In the middle of the 19th century stricter construction was placed upon expressions of this type of precatory words. *Lambe* v. *Eames*[45] marks the "turning of the tide" but the process was gradual and slow.

Such a trust is considered to be a species of an express trust, as noted by Hanbury[46] and Underhill[47], because they are expressed, though in ambiguous and uncertain language.

It was after hearing many old cases being cited that James, L.J. in *Lambe case* remarked: "I could not help feeling that it was the officious kindness of the court of chancery in interpreting trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed". *Re Adams*[48] is a leading case on the point where a trust was held to exist by the chancery court (where it was not so intended).

(*c*) *Ratio of modern decisions.*— In view of the modern decisions[49], it is not enough in such cases where precatory words are used, to say *that they do not create a trust*, because if according to reported decisons[50], a particular expression is held to create a trust, the use of that identical expression today will also create a trust. So one has to read his will or trust twice to understand what it means.[51]

11. SECRET TRUST

(a) Meaning.—In a secret trust the settlor's intention to create a trust is either expressed in disregard of the formal requirements of the statute, or if expressed with due regard to the formalities, it becomes ineffectual ultimately at law. A trust may be created by act *inter vivos*, or it may be created, declared and tranferred by a will. In both the cases you cannot create a trust without observing certain formalities and more so when a trust is created by any instrument of a testamentary character that is not a valid will. In other words, in such cases one makes a testamentary disposition without observing those formalities which the law requires him to observe in case of all such dispositions. Maitland[52] has given fine examples in this connection.

(*b*) *Illustrations.*—(*i*) If I make a devise to *T*, *saying nothing of any trust*, and I then make a declaration that *T* is to hold it in trust for *X*, but this declaration is not made with the formalities required by the Wills Act, and is not communicated to and assented to by *T* during my lifetime; then on my death *T* will take the land benefically, unburdened by any trust. (*ii*) If on the other hand, *I devise to T "upon trust", but do not mention what trust*, and then by some paper which is not a valid will declare that the trust is for *X*, then on my death

45. (1871) LR 6 Ch App 597.
46. *Modern Equity*, p. 124.
47. *Underhill on Trusts and Trustees*, 6th Edn., p. 9.
48. *Re Adams and the Kensington Vestry*, (1884) 27 Ch D 394.
49. *Re Steel's Will Trusts*, 1948 Ch 603.
50. *Shelley* v. *Shelley*, 1868 LR 6 Esq 540.
51. See *Snell*, Chap. 2, p.111.
52. *Lectures on Equity*, p. 61.

my heir-at-law, or my residuary devisee, if I have one, will be equitably entitled to the land that *I* devised to *T*. *T* cannot establish a trust and *T* cannot retain the beneficial interest for himself, for I have made clear on the face my will that I did not intend him to have it. (*iii*) *If during my lifetime I communicate to T* my intention that he should hold merely as a trustee for *X* and *T* assents to hold in that character, he is bound[53] to execute the testator's intention.[54] (*iv*) If the direction has not been communicated in my lifetime to *T* there is no trust in favour of *X*.[55]

(*c*) *Types*.—Secret trusts are of two kinds (*i*) fully secret trust (*ii*) half secret turst.

(*d*) *Definitions*.—A fully secret trust is one where *neither the existence* of a trust *nor its terms are disclosed* by the will or other instrument.[56]

A half secret trust is one where the existence of the trust is disclosed by the will or other instrument but the terms are not.[57]

(*e*) *Explanation*.—Example (*i*) illustrates a fully secret trust, while (*ii*) illustrates a half secret trust. Examples (*iii*) and (*iv*) connote a further development in the situation and its result.

It will be noticed that in both the types of trusts the property is transferred to a person and the transfers are not clothed with due formalities. This situation provides an allurement and a handle to the devisee to keep the property for himself either as an absolute owner or a beneficiary[58] on the pretext that the legal formalities for creation of a will or disposition of property as provided by the Statute of Frauds have not been observed. But equity in such cases will not allow this to happen on the principle that no man can be allowed to profit from his own fraud and the Statute of Frauds cannot be allowed to be used as a shield for covering dishonest and fraudulent intentions.

Varieties of such trusts could be seen in the case of transfer *inter vivos*, testamentary dispositions and a transfer obtained upon a fraudulent representation to the owner, secretly giving him an assurance to hold the property in trust. Such holding of property rightly binds the conscience of the holder from the point of view of equity and therefore he is converted into a trustee who can be compelled to execute the disappointed intention.[59]

Some writers consider a secret trust as a species of constructive trust[60], others consider it as a species of express trust, but Snell[61] points out that it is still unsettled whether it is a species of a constructive or a species of an express trust.

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53. *Drakeford* v. *Wilks*, (1747) 3 Alk 539.
54. Cf. *Kalicharan* v. *Ramchandra*, (1903) 30 Cal 783. See also *Tee* v. *Ferris*, 69 Eng Rep 819.
55. *In Re Boyes case*, (1884) 26 Ch D 531.
56. Nathan & Marshall: *A Casebook on Equity and Succession*, Chap. 10.
57. *Ibid*.
58. *Rochefoucauld* v. *Boustead*, (1897) 1 Ch 196.
59. *Scott* v. *Tyler*, (1787) 2 Dick 725; *McCormick* v. *Grogan*, (1869) 4 HL 82.
60. Nathan & Marshall: *A Casebook on Equity and Succession*, Chap. 10, p. 431.
61. *Snell's Principles of Equity*, 1969 Edn., Chap. 2, p.110.

In either view, he says, there are difficulties. A fully secret trust, however, appears to be a clear example of a constructive trust and a half secret trust within certain limits can be said to be an example of an express trust. But *Blackwell* v. *Blackwell*[62] equates the half secret with the secret trust (i.e, constructive).

(*f*) *Basis of the secret trust.*—The title of a beneficiary under a fully secret trust as well as under a half secret trust arises outside the will and is not testamentary. If that is so, Section 9 of the Wills Act, 1837 is irrelevant. The section says that "No will shall be valid unless it shall be in writing and . . . signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary".

12. TRUSTS FOR VALUE

Where consideration has been paid by the beneficiaries to the settlor in order to bring a trust in existence, the resultant trust is one for value. For example, *A* creates a trust in favour of *P* if she marries *A*, marriage being a valuable consideration. Similarly, in a debtor creating a trust in favour of his creditors for payment of their dues if they reduce these debts by 5 per cent the transaction results in a trust for value. As Maitland expresses, in such cases formalities are of minor importance, since if the transaction cannot take place by way of "trust executed" it can be enforced as a contract by a court of equity.[63]

13. VOLUNTARY TRUSTS

The law as to voluntary trusts has been laid down in *Milroy* v. *Lord*[64]:

> "In order to render a voluntary settlement valid and effectual, the settlor must have done everything, which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the proviso will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. But in order to render the settlement binding, one or other of these modes must be resorted to, for there is no equity to perfect an imperfect gift."

In a voluntary trust one must note that no consideration is moving from the beneficiary to the settlor or no detriment is suffered by the beneficiary. If the trust is executed it comes into force at once and the beneficiaries can enforce the same at once. If it is executory, it cannot be enforced at once, on the principle

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62. (1929) AC 318. *See* Nathan, p. 451.
63. Citing *Lewin on Trusts*, 13th Edn., pp. 61, 66.
64. (1862) 4 De GF & J 264; Nathan & Marshall: *A Casebook on Equity and Succession*, No. 67.

that "Equity will not aid a volunteer". In such a case the settlor must do what is necessary for him to do to bring into operation.

But even here if the agreement to create a trust was for consideration, the same can be enforced but in that case it will be trust for value. The word "consideration" includes marriage consideration, and consideration other than marriage. Even the trustees of the above parties who paid consideration can enforce such trusts.

14. ILLUSORY TRUSTS

(a) Nature.—Trusts require certainties, that of words, that of subject-matter and that of objects, so that there will be ascertainable persons who can insist upon its enforcement. If there are no beneficiaries, as is the case with purpose trusts and in "monument" and "animal cases"[65], the trustees so called will have arbitrary powers and nobody can compel them to act according to the purpose of the trust. Likewise, a trust for an abstract purpose or for purposes where the benefit to individuals is "indirect or intangible" which does not give the *cestui que trust* any *locus standi* to enforce the trust is void, being not a trust in favour of ascertainable beneficiaries. The ultimate object of such trusts is the settlor's own convenience and benefit rather than that of the beneficiaries. That is why such trusts are called illusory trusts or trusts of imperfect obligation.

(b) Benefits enjoyed by a purpose trust.—A trust is obligatory, it is not a matter of choice or discretion in the trustees; moreover, it must have a human beneficiary who can enforce it. This dictum of Sir William Grant[66] may be confusing but it is authoritative. In general, therefore, trusts for purposes are valid if they are charitable. If not, they would be a burden on society in so far as the power they concentrate and wield and the freedom enjoyed by them not only from the rules of certainty, enforceability by beneficiaries and perpetual duration, but also freedom from taxation are all a matter of envy for others. One has to note that so far as taxation is concerned there is not a halfway house with these privileges: either a purpose trust is charitable and enjoys all these privileges, or it is private and enjoys none.[67]

(c) Where such trusts arise.—There are three situations wherein such a trust arises: (*i*) trusts for advancement of purposes not charitable, (*ii*) trusts for payment of creditors, and (*iii*) trust of money voted by Parliament, for execution whereof the officers in charge are responsible to the Government and to none else. About (*i*) we have discussed before. For (*iii*) it may be said that it stands on quite a different footing from (*i*) and (*ii*), and is quite distinctive from the general principle of trust.

A trust of this nature, wherein money or property is transferred by the debtor to a trustee, upon trust for his creditors, can be enforced by the beneficiaries and is irrevocable. This proposition is backed by the general rule

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65. For detailed discussion *see* Hanbury: *Modern Equity*, pp. 195-203 and 242-251.
66. *Morris* v. *Bishop of Durham*, (1804) 9 Ves Jr 399, cited in Hanbury: *Modern Equity*, p. 196.
67. *Ibid.*

that in the absence of a power of revocation is settlor cannot revoke even a voluntary settlement once it is completely constituted. But to this there is an important exception that such a trust might be revoked by the debtor and in that case the beneficiaries will not always have the right to compel the enforcement of the trust. It is for this reason that such trusts are called illusory. As Leach, M.R. said[68], such a deed creating a trust in favour of creditors had the same effect as if the debtor had delivered money to an agent to pay his creditors, and, before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered. Lord Brougham said in *Garrard case*[69] that it was "an arrangement (rather than a conveyance vesting a trust in A) by the debtor for his own personal convenience and accommodation". The creditors are not a party to it and they have not waived any right of action, they are not injured by it and therefore the debtor has complete control over it. This situation points to one plain and undisputable fact that the implementation and execution of this type of trusts depends solely upon the goodwill, honesty and integrity of the debtor where he of his own accord has created a trust. But in spite of this, the following are the circumstances wherefrom an inference of a binding and irrevocable trust in favour of creditors could be drawn.

(*d*) *When it becomes irrevocable.*—(*i*) *As against executing creditor*: Where the creditor himself is a party to execution of the deed the same will be irrevocable as against him and he will be able to enforce it.[70]

(*ii*) *As against assenting creditor.*—When a deed is made known to the creditors and they assent to it or acquiesce therein and thereby delay pressing their claims, the same is irrevocable as to them.[71] Of course, mere communication short of assent or action on it by creditors is of no consequence.

(*iii*) *After debtor's death.*—The right to revoke the trust being personal, becomes irrevocable after a debtor dies.[72]

(*iv*) *Intention to create a trust.*—If the intention of the maker is firm and final so as to make good previous lapses and breaches by him[73] in paying his debts, the trust is final and irrevocable. Here, its maker's intention is to escape the consequences of his previous breaches. In short, where due to debtor's firm intention the relationship of a trustee and *cestui que trust* is established, the trust is irrevocable.

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68. *Acton* v. *Woodgate*, (1833) 2 My & K 492.
69. (1831) 2 Russ & M 491.
70. *Mackinnon* v. *Stewart*, (1850) 1 Sim (NS) 76.
71. *Acton case*, (1833) 2 My & K 492.
72. *Synnot* v. *Simpson*, (1854) 5 HLC 121.
73. *New Prance & G. Trustee*, (1897) 2 KB 19.

Chapter XIII

Creation of Trusts

"The doctrine of precatory trusts is a creature of Equity, by whose aid the intention of testators . . . have too frequently been defeated."

—Lopes, L.J. in *Hill* v. *H*, (1897) 1 QB 483, cited in C: K. Allen: *Law in the Making*, p. 417

"The legal meaning and the popular meaning of the word 'charitable' are so far apart that it is necessary almost to dismiss the popular meaning from the mind as misleading before setting out to determine whether a gift is charitable within the legal meaning of the word . . . The legal significance is clearly narrower than the popular."

—*Lewin on Trusts*, 15th Edn., p. 15

"The whole law relating to charitable trusts has been well described as a 'wilderness'[1]*, and it provides one of the worst examples in our law of endless technical distinctions which have no relation to reality or common sense, and which again and again succeed only in frustrating the intentions, to the prejudice of the public interest, of benevolent minded testators. Faith and Hope are highly necessary virtues in all courts of law, but in the Chancery Division charity is the least, and not the greatest, of these."*

—C. K. Allen: *Law in the Making*, p. 419

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A. EXPRESS PRIVATE TRUST

1. GENERAL[2]

The Statute of Uses, 1535, in England, abolished uses but it failed to put a stop to a "use upon use"—an idea which in the course of time found momentum in practice, consequently resulting into a trust whereunder legal and beneficial interests in a property were dissociated. Later on, the statute itself was repealed and replaced by the Law of Property Act, 1925, and today, private trusts in England find expression in one of these forms: (*a*) bare trust, (*b*) trust for sale, and (*c*) a trust under the Settled Land Act, 1925 by means of a vesting deed and a trust instrument. In case of a settlement made by a will, the will is the trust instrument and the vesting assent is the assent of the testator's personal representatives.

A trust may be by act of parties or by operation of law. Trusts by act of parties are either express or implied and an express trust may be private or public.

2. TEXT

Interpretations-clause—"*trust*": "*author of the trust*": "*trustee*": "*beneficiary*": "*trust-property*": "*beneficial interest*": "*instrument of trust*".—A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner;

the person who reposes or declares the confidence is called the "author of the trust"; the person who accepts the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"; the subject-matter of the trust is called "trust-property" or "trust-money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the "instrument of trust";

a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust";

and in this Act, unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force; a person is said to have "notice" of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the facts is given to or obtained by his agent, under the circumstances

2. *See* Chap. 10, *supra*.

mentioned in the Indian Contract Act, 1872, Section 229; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

4. *Lawful purpose.*—A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (*a*) forbidden by law, or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation.—In this section the expression "law" includes, where the trust-property is immovable and situate in a foreign country, the law of such country.

Illustrations

(*a*) *A* conveys property to *B* in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(*b*) *A* bequeaths property to *B* in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support *A*'s children. The trust is void.

(*c*) *A*, while in insolvent circumstances, transfers property to *B* in trust for *A* during his life, and after his death for *B*. *A* is declared an insolvent. The trust for *A* is invalid as against his creditors.

5. *Trust of immovable property.*—No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of movable property.—No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

6. *Creation of trust.*—Subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

Illustrations

(*a*) *A* bequeaths certain property to *B*, "having the fullest confidence that he will dispose of it for the benefit of" *C*. This creates a trust so far as regards *A* and *C*.

(*b*) *A* bequeaths certain property to *B* "hoping he will continue it in the family". This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(*c*) *A* bequeaths certain property to *B*, requesting him to distribute it among such members of *C*'s family as *B* should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(*d*) *A* bequeaths certain property to *B*, desiring him to divide the bulk of it among *C*'s children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(*e*) *A* bequeaths a shop and stock-in-trade to *B*, on condition that he pays *A*'s debts and a legacy to *C*. This is a condition, not a trust for *A*'s creditors and *C*.

7. *Who may create trusts.*—A trust may be created—

(*a*) by every person competent to contract, and

(*b*) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

8. *Subject of trust.*—The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

9. *Who may be beneficiary.*—Every person capable of holding property may be a beneficiary.

Disclaimer by beneficiary.—A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

10. *Who may be trustee.*—Every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

No one bound to accept trust.—No one is bound to accept a trust.

Acceptance of trust.—A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

Disclaimer of trust.—Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust.

Illustrations

(*a*) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A*'s will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*.

(*b*) *A* transfers certain property to *B* in trust to sell it and to pay out of the proceeds *A*'s debts. *B* accepts the trust and sells the property. So far as regards *B*, a trust of the proceeds is created for *A*'s creditors.

(*c*) *A* bequeaths a lakh of rupees to *B* upon certain trusts and appoints him his executor. *B* severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

3. PARTIES TO A TRUST[3] (SECTION 3)

An express trust is the creation of the acts and declarations of the party.

The equitable ownership in property recognised by Equity in England is translated into Indian law as "an obligation annexed to the ownership of property, not amounting to an interest in the property", but an obligation which may be enforced against a transferee with notice or a gratuitous transferee.[4]

The Indian Trusts Act, 1882, Section 3, defines a trust as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. This we have seen in Chapter XI. The section further states that the person who reposes or declares the confidence is called the "*author of the trust*"; the person so accepting the confidence is called the "*trustee*"; and the person for whose benefit the confidence is accepted is the "*beneficiary*".

For the constitution of an express private trust, there must be three parties: (*i*) the author of the trust, called a settlor, (*ii*) the trustee, and (*iii*) the *cestui que trust* or the beneficiary.

4. WHO MAY CREATE TRUST (SECTION 7)

The capacity to create a trust is, generally speaking, co-extensive with the ability to hold and dispose of a legal or equitable interest in property. As laid down by the Trusts Act, Section 7:

"A trust may be created—

(*a*) by every person competent to contract, and

(*b*) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor, but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property."

As to competency, every person *sui juris*, i.e., of full age and legal capacity and of sound mind, is competent to contract. This is laid down by Section 7(*a*). As per clause (*b*) of the section even a minor, or any person on behalf of the minor, can create a trust. Under this clause creation of a trust is subject to approval and permission of the High Court or a District Court.

5. WHO MAY BE BENEFICIARY (SECTION 9)

Every person capable of holding property may be a beneficiary (Section 9). This means that even a minor, or a child in its mother's womb (*en ventre sa mere*), may be a beneficiary. Of course, in giving property to such an unborn person, the rule as to perpetuities (Section 14 of the Transfer of Property Act) should not be broken.

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3. Chap. 2 of the Indian Trusts Act, 1882.

4. *Bai Dosabai* v. *Mathuradas* and *Mathuradas* v. *Bai Dosabai*, (1980) 3 SCC 545.

6. WHO MAY BE TRUSTEE (SECTIONS 10 AND 60)

As laid down by Section 10,

> "Every person capable of holding property may be a trustee; but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract."

Thus a minor can be a trustee but where the question of using discretion arises he is considered not competent to become a trustee. Besides, as per Section 60 of the Act, "the beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons, and by a proper number of such persons". The following are not proper persons within the meaning of this section:

(*a*) a person domiciled abroad;

(*b*) an alien enemy;

(*c*) a person having an interest inconsistent with that of the beneficiary;

(*d*) a person in insolvent circumstances; and

(*e*) unless the personal law of the beneficiary allows otherwise, a woman and a minor. (Section 60)

Reading Section 10 with Section 60 it is clear that though a minor can be a trustee, if the beneficiaries object to his being such and the court does not consider him to be a proper person, he cannot be one. A married woman's position is also the same. If the personal law of the beneficiary allows a minor or a woman to be a trustee, the section has no application, e.g., under Hindu and Muslim laws a minor can be a trustee. That a married woman is not a proper person as a trustee is now no longer acceptable. Keeping this in view the Law Commission of India in its seventeenth report dated 6th January, 1961, has recommended the deletion of these words.

7. WHEN IS A TRUST CREATED (SECTION 6)

Subject to the provisions of Section 5, a trust is created when the author of the trust *indicates with reasonable certainty* by any words or acts,

(*a*) an *intention* on his part to create thereby a trust,

(*b*) the *purpose* of the trust,

(*c*) the *beneficiary*, and

(*d*) the *trust-property*, and

(*e*) unless the trust is declared by will or the author of the trust is himself to be a trustee transfers the trust-property to the trustee. As laid down by the section, the following are necessary for creation of a trust:

(*i*) intention

(*ii*) trust-property

(*iii*) beneficiaries

(iv) purpose of the trust, and

(v) transfer of trust-property to trustees[5] which may be a transfer *inter vivos* or under a will.

8. RULE OF THREE CERTAINTIES

In *Knight* v. *Knight*[6], Lord Langdale, M.R., has laid down that three things are necessary for the creation of a trust:

(i) certainty of words,

(ii) certainty of subject-matter, and

(iii) certainty of object.

(*a*) *Certainty of intention.*—Certainty being an essential requirement for the constitution of a trust, the words expressing a trust must be so used that on the whole they ought to be construed as imperative. Moreover, if on the whole it can be gathered that a trust was intended, no particular form of expression is necessary. As Snell puts it, "a trust may well be created, although there may be an absence of any expression in terms importing confidence".[7] The word 'trust' may not be used and yet a trust may exist because the court looks to the intent rather than the form.

Law on this point and other certainties is the same in England and in India[8], and Section 6 lays down this fact. If the intention to create a trust, the purpose of it, the beneficiaries to it, and the trust-property are indicated by the settlor (or trustor) along with a transfer of the trust-property to the trustee, all with reasonable certainty, there is nothing that can stop a trust from taking form. But if the "intention" in the declaration of trust is lacking[9], no trust can arise and the transferee takes the property beneficially for himself.

As Nathan[10] notes, "on the assumption that there is certainty of subject-matter[11] and of objects,[12] the court will hold a precatory trust to have been created if it considers that the precatory expressions used, studied in relation to the will as a whole, impose an obligation". In other words, where precatory words are used in a gift from which it is not easy to find out whether the donor wanted to give an absolute gift to the donee or not, or whether he intended that the donee should hold the gift in trust and dispose of it in accordance with the instructions contained in the will, the court will find out an answer to this from an examination of the whole of the instrument.[13]

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5. *Kumari Chandan* v. *Longa Bai*, AIR 1998 MP 1.
6. (1840) 3 Bear 148.
7. *Page* v. *Cox*, (1852) 10 Here 163.
8. *Mussorie Bank* v. *Raynor*, 4 All 500 (PC): 9 IA 70.
9. *Chambers* v. *Chambers*, (1944) 48 CWN 621 (PC): AIR 1944 PC 78.
10. *Nathan's Equity through the Cases*, Chap. 6, p. 219.
11. *Wynne* v. *Hawkins*, (1782) 1 Bro CC 179; *Fox* v. *Fox*, (1859) 27 Bear 301, *per* Romilly, M.R.
12. *Morice* v. *Bishop of Durham*, (1805) 10 Ves 522; *Nathan's Equity Through the Cases*, No. 52.
13. For further details and modern trend *see* Chap. 12, topic 10, *supra*.

(*b*) *Certainty of subject-matter* (*Section 8*).—The subject-matter of a trust must be property transferable to the beneficiary.

Property of any kind, movable or immovable, that is legally transferable can be the subject of trust. But a mere beneficial interest under a subsisting trust (which can be settled in trust in England) cannot be a subject-matter of trust in India. This is a departure from English law as in India equitable interest is not recognsied. It therefore follows that a trust of "mere expectancy" which is not transferable according to Section 6 of the Transfer of Property Act, is not possible in India. Similarly, a chance of being an heir apparent to succeed a contingent interest of a reversioner, a public office, pay of a public office, pension of a government servant or any other interest restricted to enjoyment personally, cannot be a subject of trust.

In England, 'any' property which is alienable may be a subject-matter of trust unless public policy or the statute prohibits its transfer. By 'any' is meant, all property which is legal, equitable, real, personal, at home or abroad, in possession or action, whether a remainder, a reversion or an expectancy.[14]

For creation of trust the owner of the property must fully divest himself of the property. In a recent case[15] the owner of the property executed a trust expressing a desire to construct a Dharmshala in order to perpetuate the memories of himself and his family members. The executant however, did not divest herself of rights of the property and transferred the same to the trustees. The court decided that the document cannot be said to have created a trust in present.

The subject-matter of a trust must be certain or the "bulk"[16] of property bound by the trust must be definite; if not, the trust cannot arise. The subject-matter falls under two heads: (*a*) the trust-property, and (*b*) the beneficial interest. Thus if the settlor leaves all his houses to trustees but keeps it uncertain as to which of the houses or how many each beneficiary is to have, the trust fails and there will be a resulting trust for the settlor.[17] Similarly, if some part of the interest for the beneficiaries is certain while some other part is uncertain, that uncertain part fails and the principal beneficiary takes the whole.[18] Out of the three kinds of uncertainties in this regard, as noted by Snell[19], the first may be cured by applying the maxim "equality is equity", the second kind of uncertainty where the settlor gives the trustee a discretion to apply the trust fund among a certain class of persons is no uncertainty, while the third kind of uncertainty arises where one beneficiary is given the whole of the beneficial interest and others an uncertain part of it; the direction for the uncertain part

14. Underhill: *Law of Trusts and Trustees.*
15. *Kumari Chandan* v. *Longa Bai*, AIR 1998 MP 1.
16. *Palmer* v. *Simmonds*, (1854) 2 Drew 221.
17. *Doyle* v. *A.G.*, (1735) 2 Eq Ca Abr 194.
18. *Curtis* v. *Rippon*, (1820) 21 RR 327.
19. *Snell's Principles of Equity*, 27th Edn., p. 113.

fails and the principal beneficiary takes the whole.[20] In *Sprange case*[20], the wife bewilled her husband, Thomas Sprange to £ 300 lying in joint stock annuities, for his sole use and at his death "the *remaining part of what is left, that he does not want for his own wants and use*", to be divided between 3 other beneficiaries. In the result Thomas was entitled to £ 300 absolutely.

(*c*) *Certainty of object.*—Certainty of object or the beneficiaries is also necessary for the validity of a trust, except where the trust is for the benefit of "charity". A non-charitable trust, as laid down by Grant, M.R., in *Morice case*[21], therefore fails if the object is uncertain. In that case Grant, M.R. said that "there can be no trust over the exercise of which this court will not assume a control: *for an uncontrollable power of disposition would be ownership and no trust.*) If there be a clear trust but for uncertain objects, the property that is the subject of the trust is undisposed of and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. *Every other trust must have a definite object*".

Where a trust fails for uncertainty of object, the donee does not and cannot take for his own benefit, but holds for the settlor or his legal representatives as a trustee, *i.e.*, a resulting trust arises here.[22]

Summarising the situation regarding the three certainties, Lord Eldon has said that the trust must be of such a nature that it can be under the control and review of the court if there is maladministration. And unless the subject and objects can be ascertained upon principles familiar in other cases, the court can neither reform maladministration nor direct due administration.[23]

(*d*) *Illustrations.*—(1) In *Bhaidas* v. *Bai Gulam*[24], a Hindu testator bequeathed estate to his wife as a sole executrix, constituting her the owner and directed that *whatever remained* of the property after her death should go to the testator's two daughters in such a manner *as she*, the executrix, *may like*. The trust for daughters failed for uncertainty of the subject-matter as "whatever may remain" was uncertain. This case is similar to *Sprange case*[25].

(2) In *Allahabad Bank* v. *CIT*[26], the appellant-bank purported to create a trust for payment of pensions to its staff members. By a deed it transferred a fund to three persons, named as "present trustees". The deed provided for applying the trust fund income to the payment of such pensions and in such manner as the bank or its authorised officer shall direct. The bank retained the sole discretion of granting, withdrawing, modifying or determining the pension.

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20. *Curtis* v. *Rippon*, (1820) 21 ER 327; *Parnall* v. *Parnall*, (1878) 9 Ch D 96; *Sprange* v. *Bernard*, (1789) 2 Bro CC 585; *Nathan's Equity Through the Cases*, No. 51.
21. *Morice* v. *Bishop of Durham*, (1805) 10 Ves 522.
22. See also *Re Boyes*, (1884) 26 Ch D 531.
23. *Morice* v. *Bishop of Durham*, (1805) 10 Ves 522; *Chhotabhai* v. *Gnanchandra*, AIR 1935 PC 97.
24. (1921) 46 Bom 153 (PC): AIR 1922 PC 193.
25. *Sprange* v. *Bernard*, (1789) 2 Bro CC 585.
26. 1954 SCR 195: AIR 1954 SC 476.

It was held that since it was not at all obligatory upon the bank to grant any pensions or to continue them, the deed of trust did not constitute a trust. This was so because a trust is obligatory. Moreover, the beneficiaries were not and could not be indicated with reasonable certainty, and hence the deed was void for uncertainty.

(3) Where *X* bequeaths certain property upon *Y*, "having the fullest confidence that he will dispose it of, for *Z*'s benefit", a valid trust is created.

(4) Where *X* bequeaths to *Y* certain property requesting him to hold and distribute it among such members of *Z*'s family as *Y* should think most deserving, no valid trust arises as the beneficiaries are not created with reasonable certainty.

(5) A shop and its stock-in-trade are conveyed to *P* on condition that *P* is to pay *A*'s debts and to grant a legacy to *Q*. This is not a trust but a condition.

(6) *Ogden*[27], In *Re*, a testator bequeathed a portion of his residuary estate to *P*, to be distributed by him among such political federations or bodies in the United Kingdom, having as their objects or one of their objects the promotion of liberal principles in politics, as he (*P*) shall in his absolute discretion select and in such shares and proportions as he shall in the like discretion think fit. As evidence was given that *P* could enlist all such institutions which qualified, the gift was upheld.[28] The onus is on those who allege the validity of the trust to show that its objects are certain.

(*e*) *Lawful purpose and transfer of trust-property.*—Section 6 of the Trusts Act, 1882 adds two further essentials to the abovesaid three certainties. They are:

(*iv*) the purpose of the trust, and

(*v*) the transfer of the trust-property to the trustee.[29]

If the trust is to be operative the purpose of the trust, the ultimate intention of creating the trust, must be lawful. If it is otherwise, the trust cannot operate though it exists. This is laid down by Section 4.

Lawful purpose.—A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is

(*a*) forbidden by law, or

(*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or

(*c*) is fraudulent, or

(*d*) involves or implies injury to the person or property of another, or

(*e*) the court regards it as immoral or opposed to public policy.

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27. 1933 Ch 678; *Kirloy* v. *Parker*, 1966 IR 309.
28. *Ogden, Re*, was followed in *I.R.C.* v. *Broadway Cottage Trust*, 1955 Ch 20.
29. See *Kumari Chandan* v. *Longa Bai*, AIR 1998 MP 1, *supra*.

The above two essentials are by way of abundant caution, as their absence does not stop a trust from coming into existence, or does not make the trust uncertain. It is for those who want to avoid a trust to prove its unlawfulness. Moreover, the transfer of property is a necessary element but not so in all cases because where the author himself is a trustee, the question of transfer need not arise; it is a question of change of status, i.e., from an absolute owner to a trustee. Similarly, where a trust is incorporated into an instrument of will it takes effect after the death of the settlor. The trust-property in such a case is automatically vested in the trustee on a settlor's death and the settlor is quite unable (because he is already dead) here to transfer the property to the trustee. It is by operation of law that property is transferred in such a case. A mere agreement to create a trust or an expression of intention to create a trust, as when I put a cheque of Rs 10,000 into my son's hand saying that I give it to him and then take it back from him I express an intention to give it to him after my death, does not create a valid trust.[30]

Suppose the property is not transferred. Should a trust fail in such a case? The answer is that in case of a voluntary trust, it fails because there is no transfer but in case of a trust for value it will not fail because consideration has been provided for creating a trust and the settlor in such cases will be compelled to do so. If the trustees are not named they shall have to be named. On the principle that "equity will not allow a trust to fail for want of a trustee", the settlor will be compelled.

So far as the purpose is concerned, a trust which postpones the enjoyment of the property for an indefinite period or prevents its alienation forever, being in breach of the rule against perpetuities, is void. A trust seeking to alter the ordinary law of descent or succession or violating the rules for valid disposition of property (Section 14, Transfer of Property Act; Section 114, Indian Succession Act) is void. A trust to defraud creditors, a trust in restraint of marriage or for future illegitimate children are in the same way void being against public policy. But a trust for an illegitimate child in existence is valid.[31] If a trust is directed to more than one purpose, all of which are unlawful, the trust is void, but if some of them only are unlawful, and the unlawful can be severed from the lawful, the lawful purpose will take effect.

Chambers v. *Chambers*[32] must be considered to be a representative decision as it deals with most of the certainties. Here *C*, a businessman (i.e., company), transferred a certain amount by book entries to his wife. His wife was informed that the amount so transferred constituted a gift and she could not draw more that 10 per cent of the capital in any one year. On *C* transferring a certain amount from his wife's gift account subsequently, it was held that there was no trust for three reasons:

(*i*) there was no declaration of trust by *C*;

30. *Jones* v. *Lock*, (1865) 1 Ch App 25.
31. *Blodwell* v. *Edwards*, (1596) 78 ER 758.
32. (1944) 48 CWN 621 (PC): AIR 1944 PC 78.

(*ii*) there was no parting with the property by *C*; and

(*iii*) there were no ascertained funds for the trust.

9. NECESSARY FORMALITIES FOR CREATION OF A TRUST (SECTION 5)

In England, as Maitland expresses, a trust may be created without deed, without writing, without formalities of any kind, by a mere word of mouth; and no particular words are necessary. But this was the position before the Statute of Frauds, 1677. After the enactment of this statute, a trust must be 'manifested and proved' by some writing and signed by the author; or else they shall be utterly void. A trust may be *inter vivos*, which takes effect immediately, or it may be ambulatory (which can be revoked) as it is expressed in a will, a testamentary instrument validly executed.

In India, Section 5 lays down the formalities as under:

> "5. *Trust of Immovable Property.*—No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee."

Trust of Movable Property.—No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee. These rules do not apply where they would operate so as to effectuate a fraud.

As laid down by the section, the immovable property must be transferred; mere vesting is not enough. Movables must actually be transferred. Registration of a will as contemplated by the first part of Section 5 is compulsory. A trust when declared in a will must comply with the provisions of the Indian Succession Act, 1925, except where the testator is a Mahomedan. An uncertain trust and a trust void for want of registration may be made prefect by 12 years' adverse possession by the trustees and action against them for remedy is barred thereafter.[33]

A mere beneficial interest cannot be a subject-matter of trust. Here the Indian law departs from the English law whereunder a beneficial interest may also be subjected to a trust. The trust-property may be in actual possession of the settlor or it may be vested in him which he will obtain on the death of a third person, but in no case can an expectancy be made a subject-matter of trust.

As provided by the last para of Section 5, "these rules do not apply where they would operate so as to effectuate a fraud", property obtained by fraudulent representation will be held in trust. In one Bombay case, a father executed a gift deed in his daughters' favour, who by an unregistered writing stipulated with the father that they would be bound to restore the property at any time the father liked to revoke the gift. Held, that the daughters held as trustees the gift of the father and the writing though unregistered was admissible in evidence to show that a fraud was effectuated and Section 5 would not apply to effectuate a fraud.

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33. *Hemchand* v. *Pyarelal*, (1942) 47 CWN 46(PC): AIR 1942 PC 64.

10. EXECUTED AND EXECUTORY TRUST

An express trust may be (*i*) executed, or (*ii*) executory. Plainly speaking, no technical words are necessary to create a trust. But words have their own meaning and technical words have technical meanings. When in a trust technical words are used, they will be understood in their technical sense. This brings us to the distinction between executed and executory trusts.

An executed trust, as the very word and its tense connote, is a trust wherein everything that was required to be done for bringing the trust into existence has been done and completed by the settlor. He has fully and finally declared a trust by the instrument laying down with reasonable certainty all that was necessary. In such cases he can be said *to be his own conveyancer.*

But a trust is executory where something remains to be done by the settlor to complete it. Where, therefore, a declaration of trust takes the form of an agreement or direction for the subsequent execution of a proper trust instrument, the trust so declared is an executory trust (Strahan). It arises mainly in marriage articles and in wills.

Where *A* conveys property to *X* to hold in trust for *B* and declares a trust, transferring the property to *X*, laying down *B*'s interest, the trust is a fully operative, express and executed trust taking effect immediately. For such trusts, when an occasion for interpretation arises, the words therein are strictly and technically construed on the principle "equity follows the law". When executory trusts are interpreted, the language of the will is subordinated to the intent of the settlor and will be construed favourably so as to strengthen the intention of the settlor on the ground that "the sketch being a sketch, equity will not catch at technical phrases and defeat what is believed to be his (settlor's) intention". (Maitland)

The difference between the two may be expressed thus:

(*a*) A trust is executed when nothing is left to be done, whereas something remains to be done in an executory trust.

(*b*) The former arises where the settlor has been his own conveyancer, the latter arises chiefly in marriage articles and in wills.

(*c*) In the former, while interpreting it the language will be strictly construed, because 'equity follows the law'; in the latter, the language will be subordinated to the intent of the settlor on the principle that "equity looks to the intent rather than to the form".[34]

11. COMPLETELY AND INCOMPLETELY CONSTITUTED TRUST

A trust if incomplete cannot be termed a trust. The expression therefore connotes not a category of trusts but rather a rule for distinguishing what is a trust from something that is not so. The nomenclature is therefore misleading.

To be valid as a trust, the settlor must vest the property in the trustee, and a mere declaration without vesting is of no consequence. Where land is to be

34. In *Glenorchy* v. *Bosville* (1733) Cas Talb 3, this distinction is brought out

given in trust there must be a written declaration to that effect. So, where property is vested in a trustee, it will be a completely constituted trust, otherwise it will be an incompletely constituted trust. If a declaration of vesting is backed by valuable consideration it will be enforced by equity as contrary to convey property because, "equity looks on that as done which ought to be done".[35] Such promises are construed by equity (if backed by valuable consideration) as a declaration of trust. If not backed by consideration such a promise amounts to a voluntary promise which cannot be enforced, because equity will not assist a volunteer. If the subject-matter of a trust is a legal estate the settlor must do all that the law requires him to transfer it to the trustee to effectuate a trust. In other words, if the subject-matter is freehold property it should be conveyed by a deed of grant, if it is leasehold there should be a deed of assignment, if it is movable property there must be a deed of a delivery thereof and if it is registered shares a proper form of transfer must be used. This boils down to the fact that an imperfect gift is no declaration of trust.[36] As was stated by Lord Eldon, L.C., in *Ellison case*[37], if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have the assistance because there is no equity to perfect an imperfect gift[38], but if there is a complete transfer of property, though it is voluntary, yet the legal conveyance being effectually made the equitable interest will be enforced by the court.

12. DISCRETIONARY TRUST

It is a trust wherein trustees are invested with a discretion as to how much benefit is to be given to a beneficiary. The discretion vested in trustees must be exercised by them so that as and when the income from the trust is available they will exercise the discretionary powers of distribution of the benefit, and the beneficiary has therefore no more than a hope that the discretion will be exercised in his favour. Before 1969, in England such trusts were used as tools for mitigating the burden of estate duty but now the Finance Act, 1969 has minimised such advantages by taxing the actual benefits received. In such a trust, since all possible *sui juris* beneficiaries as a whole are between them entitled to the whole of the income, they by joining together can dispose of the whole of the income.[39]

13. PROTECTIVE TRUST

A protective trust combines in itself the advantages of determinable interests with those of discretionary interests. Where an interest of a principal beneficiary has been determined on bankruptcy, etc., a discretionary trust of his part of the income (benefit) arises in his favour or in favour of any other person entitled to the same on his death. During the period such a trust subsists he will not receive the income or any part of it, and the disbursement thereof will be

35. *Ellison* v. *Ellision*, (1802) 6 Ves 656.
36. *Richards* v. *Delbridge*, (1874) LR 18 Eq 11.
37. *Ellison* v. *Ellison*, (1802) 6 Ves 656.
38. *Milroy* v. *Lord*, (1862) 31 Ch 798.
39. *Re Smith, Public Trustee* v. *Aspinall*, 1928 Ch 915.

within the absolute discretion of the trustees (*see* Section 33 of the Trustees Act, 1925 in England). On the extinguishment of the principal beneficiary's right, the discretionary trust comes to an end and the determinable interest also comes to an end.

A protective trust, as explained by Nathan[40], contains three parts as per Section 33:

(*a*) a life or lesser interest determinable on certain events;

(*b*) a forfeiture clause specifying the determining events;

(*c*) a discretionary trust which arises after forfeiture.

As to when a forfeiture occurs is a matter of construction[41] of the instrument by the court, but the effect of the forfeiture clause is to determine the principal beneficiary's life interest and to bring a discretionary trust into operation. In *Gourju case*[42], "trading with enemy" brought forfeiture, but a discretionary trust may arise independently[43] of Section 33 of the Trustees Act, 1925.

14. PURPOSE TRUST

In the previous chapter we have come across such trusts under the caption "trusts of perfect and imperfect obligations". According to Maitland, private trusts fall into two categories:[44]

(*a*) wherein a trustee is to exercise his rights on behalf of some other person, and

(*b*) wherein a trustee is to exercise his rights for the accomplishment of a particular purpose.

This second class of trust is known as a purpose trust. Since there is no *cestui que trust* here who can enforce the trust, it is sometimes called a trust of imperfect obligation. But then, such a trust is valid if the purpose be legal. Such a trust is enforced not by any person but by the Attorney-General. As Maitland says, if there be any *cestui que trust*, it is the public. But one has to note that charitable trusts are not trusts of imperfect obligation, and moreover they differ from a purpose trust. A purpose trust is the genus and a charitable trust is its species. We may also say that a purpose trust is for some definite and lawful purpose other than a charitable purpose.

(*a*) *Distinction from a Charitable Trust.*—A purpose trust can be distinguished from a charitable[45] trust in following respects:

(*i*) The former though valid cannot be enforced by anyone[46], whereas the latter can be enforced in the Attorney-General's name.

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40. Nathan's *Equity Through the Cases*, pp. 310-319.
41. *Re Hall, Public Trustee* v. *Montgomery*, 1944 Ch 46.
42. 1943 Ch 24.
43. *Re Smith, Public Trustee* v. *Aspinall*, 1928 Ch 915.
44. Maitland: *Lectures on Equity*, pp. 50-53.
45. Cf. Hanbury: *Modern Equity*, pp. 195-203, 252; *Snell's Principles of Equity*, p. 142.
46. *Dean, Re*, (1889) 41 Ch D 552 (a trust for hounds and horses).

(*ii*) The former is bound to fail for uncertainty of object, while the latter will not so fail and the cy pres doctrine will come to its help.

(*iii*) The former if violates the rule against perpetuity will fail, the latter is not so affected.

(*iv*) A charitable trust is a purpose trust, but a purpose trust is not a charitable trust.

(*v*) A charitable trust enjoys complete tax concession, whereas a non-charitable purpose trust does not.[47]

Compared to a purpose trust, the position of a charitable trust is far more favourable.

(*b*) *A Purpose Trust or a 'Power Trust'*[48].—Power without accountability is the second name of tyranny. And in this brief resume we shall see ways to curb it because it results into a surreptitiously looming danger eroding the economic, social and political life of a country.

A purpose trust is non-charitable and breaks the rule of three certainties. One does not know who the beneficiaries are and the trust cannot be enforced. As has been said, "a purpose trust, even of the limited kind now allowed, cannot be upheld for an indefinite or perpetual period".[49] As Snell has noted, this is an unfortunate 'concession to human weakness or sentiment' and 'an invalid trust cannot be tortured into a valid power'.[50] The reasons for this are more than clear. Such trusts arise under a guise of unincorporated associations, which are not persons and therefore cannot be beneficiaries. In *Macaulay* v. *O'Donnel*[51], its validity was attempted to be established, but with no sufficient satisfaction on all points. Though in that very year, in *Re Price case*[52], a trust the purpose whereof was specific and non-charitable and did not hurt the rule of perpetuities, was held to be a valid one, in 1959, in *Leaby case*[53], it was ruled that such a trust was invalid as it lacked human beneficiaries, and the fact that the 'property is spent' does not provide an answer to the basic uncertainty of beneficiaries.

Such trusts are therefore closer to power, and they must be construed as such. If done so, many or most of the problems would disappear, because 'no one enforces a power'.

Whether a purpose trust should be upheld is a teasing question requiring urgent solution.

In view of the arguments in favour of and against the problem, it is submitted that though such a trust is not qualified as a chartiable trust, it serves

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47. Cf. Hanbury, *Modern Equity*, p. 200.
48. *Ibid*, p. 197.
49. *Ibid*
50. *Snell's Principles of Equity*, p. 100.
51. 1943 Ch 435.
52. 1943 Ch 422
53. *Leaby* v. *A.G.*, 1959 AC 457.

society and the community. To such trusts are granted certain tax concessions in western countries. As this position is unwillingly tolerated its result would be 'out of harmony with the principles of our law'. Though the trust breaks certain rules as to private trust, it serves the community and therefore the issue of fiscal privileges enjoyed by it cannot be joined with arguments not upholding it.

If the above arguments in favour of upholding the purpose, non-charitable, rule-breaker trusts are accepted, the immediate consequence would be to create a new category of trust. But this cannot be allowed and if allowed it would be a premium to useless and capricious trust. In *Brown case*[54], the purpose of a trust was "to block up almost all the rooms of the house and coach-house for 20 years and subject thereto, to a devisee in fee". This was held to be void and the 'sealing' of the rooms was "unsealed".

A safer way between the two extremes would be to impose certain limitations upon them so that they would not be termed and accepted as trust, but as power. Friedmann has tried to show that such trusts are like "legal cloaks of corporated power"[55], wielding enormous and uncontrollable power without the courts having power to reform or review their administration[56] or maladministration. They spell and exercise by their enormous wealth and specialised knowledge sometimes a disastrous influence on the economic, social and political life of the community and slip into a disservice to society, a purpose never intended by the trust. Such trusts may not spend money and nobody can force them to do so, and when they spend money nobody can check them as to how and to what end they are to do so. For these reasons, they should not be upheld.

Hanbury[57] has shown that there should be two limitations on such power trusts (they cannot be accepted as purpose trusts). One is the limitation as to time within which they have to achieve the purpose, and the second the limitation as to spending the amount completely at the end of the time-limit. If any sum remains unspent it should revert to the settlor or his successors. Such limitations have been imposed in Canada and other countries should not lag behind in following suit.

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54. *Brown* v. *Burdett*, (1882) 21 Ch D 667.

55. *Law in a Changing Society*, Chap. 9, p. 231.

56. As the cover story of *India Today*, a fortnightly, of October 1981, pages 16 to 28 goes, the recent Rs 30 crores (original plan for Rs 125 crores) A.R. Antulay's "trading in trusts" scandal is a fitting illustration of acquisition of "power without accountability" through trust It is the biggest political scandal which dwarfed the souvenir scandal of 1977 and which is qualitatively different from the comparatively minor scandals of two union ministers, T.T Krishnamachari and K.D. Malaviya. "Will a splash of perfume remove the stench emanating from a rotten political system where power has been conditioned to grow not out of the people but out of filthy lucre? This has not only shook the foundations of the social, political and economic life of the country but has also brought down to the dust the established moral values of the Indian society, by shouting from the rooftops shamelessly that "if you are technically correct, you are morally correct too". (Also see *Jana Satta*, *Gujarat Samachar*, *Times of India*, dailies, dated 2-9-1981); see *R.S. Nayak* v. *A.R. Antulay*, (1986) 2 SCC 716 1986 SCC (Cri) 256.

57. *Modern Equity*, pp. 202-203.

For secret trust, precatory trust and trust in favour of creditors (all of them being variations of a private express trust), *see* Chapter 12, *supra.*

B. EXPRESS PUBLIC (OR CHARITABLE) TRUST

1. GENERAL

Charitable trusts are purpose trusts and their assets are vested in trustees or a corporation. To obtain the status of a charitable trust what is important is the nature of purpose only. Moreover, it is the way in which the finite number of ascertainable persons, i.e., the beneficiaries, are benefited that makes such a trust charitable.[58]

The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment.[59]

In *Cambay Municipality case*[60], a dharmashala was constructed on municipal land with funds provided by a private citizen. This cannot be said to be a public trust since it lacks the ingredients of a public trust. The case lays down test of a public trust.

Since charitable trusts are immune from the validity of the general rule regarding trusts, their definition becomes far more vital and important. Their object is never capable of complete achievement and they are immune from the rule of perpetuities and from taxation. A gift, if it is so worded that it does not commence within the perpetuity period, is caught by the rule of perpetuity unless saved by the "wait and see" provisions of the Act[61] in England. Similarly when a gift to charity is shifted from a charity to an individual, it is caught by the rule but a gift from one charity to another is outside it. A charitable trust will not fail for uncertainty and the reason is that when the donor "has confined himself to charity", the absence of selection of a particular charitable object will not render a trust uncertain because the scheme of the donor will be carried out even by applying the cy pres doctrine. At one time equity leaned in favour of such a trust but since times have changed, it has not remained now a matter of pride. As the idea of such a trust was abused in 1601, a Statute of Charitable Uses was passed, the preamble whereof gave instances of charitable objects and since then it has remained a guiding factor till it was struck off from the statute-book by the Charities Act, 1960. Before that, in *CIT* v. *Pemsel*[62], Lord Macnaughten laid down a classification of objects which has

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58. *Sarisbrick, Re*, 1951 Ch 622.
59. *Deokinandan* v. *Murlidhar*, AIR 1957 SC 133 quoted in *Dolagovinda Sethi* v. *Kanika Museum*, AIR 1989 Ori 60; *also see* (1963) 49 ITR (Ed) 105; *State of Madras* v. *Subramaniaswami*, (1961) 74 Mad LW 388; *Sri Ram* v. *Prabhu Dayal*, AIR 1972 Raj 180.
60. *Cambay Municipality* v. *Ratilal Ambalal Reshamwala*, 1995 Supp (2) SCC 591.
61. Perpetuities and Accumulations Act, 1964, in England.
62. Known as *Pemsel case*, 1891 AC 531.

won wide acceptance.[63] Still, however, no satisfactory and comprehensive definition of charity has been laid down either by the Legislature or by judicial utterance.[64] But it must be said that a charitable trust is charitable as well as public.

Since public charitable trusts receive a favoured treatment a question came for decision in *M.P. Shanti Verma Jain case*[65], whether assessee trust was a public trust or a private trust. The trust deed narrated philosophy of Jain Dharma. The object of the trust was to propagate Jain Dharma and help its followers. Medical aid was also to be rendered to persons devoted to Jain Dharma. Non-Jains were to be given medical aid only if families managing the trust showed sympathy. The trust in question was thus set up to propagate Jain religion and serve its followers. Consequently its income was not exempted. The trust was not a public charitable trust.

2. DEFINITION

No satisfactory and comprehensive definition of charity has been possible so far,[66] for, a rigid definition would be too restrictive and would not include in itself a number of desirable objects. The courts are oscillating between two extreme types of cases wherein either a liberal interpretation of "charity" is made, so that such trusts may not become void, or it is strictly construed, so that no tax relief would be available to trusts which are not really charitable. Its popular meaning differs from its legal meaning. An object which is charitable in a popular sense but which benefits individuals only is not therefore charitable in the legal sense. It is therefore necessary to describe it rather than to definite it. For this purpose recourse may be made to the House of Lords' decision in *Commissioner of Income Tax* v. *Pemsel*[67].

Land was conveyed in 1813 to trustees on trust to apply a proportion of the rents and profits for missionary establishments commonly known as the Moravian Church of which Pemsel was the treasurer. It was claimed that the gift was for "charitable purposes" under the Income Tax Act, 1842 and hence exempt from income tax. Held, since the trust contemplated purposes which had no relation to the relief of poverty, the purposes were not charitable within the meaning of the 1842 Act and thus income tax was payable. (This case is noteworthy chiefly because of the definition of charity given by Lord Macnaghten. "How far then, it may be does the popular meaning of the word 'charity' correspond with its legal meaning? 'Charity' in the legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.")

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63. Hanbury: *Modern Equity*, Chap. 15, pp. 252-255.
64. *Snell's Principles of Equity*, Chap. 3, p. 142.
65. *State of Kerala* v. *M.P. Shanti Verma Jain*, (1998) 5 SCC 63: AIR 1998 SC 2208.
66. Lord Evershed in *Re Cole*, 1958 Ch 877.
67. Known as *Pemsel case*, 1891 AC 531.

3. REQUIREMENTS OF A CHARITABLE TRUST

A trust to be charitable must satisfy the following three requirements:

(*a*) charitable nature,

(*b*) public benefit,

(*c*) exclusively charitable.

Moreover, as laid down in a *Bombay case*[68], there must be in such a trust the following certainties:

(*a*) a declaration of trust binding the settlor,

(*b*) the settlor must set apart certain properties and must deprive himself of the ownership thereof, and

(*c*) there must be a statement of objects for which property is to be held.[69]

4. CHARITABLE OBJECTS CLASSIFIED

The best classification of charitable objects is found in *Pemsel case*[70], given by Lord Macnaghten, which comprises four principal divisons:

(*i*) trusts for the relief of *poverty*;

(*ii*) trusts for the advancement of *education*;

(*iii*) trusts for the advancement of *religion*; and

(*iv*) trusts for other purposes *beneficial to the community* not falling under any of the preceding heads.

5. WHAT IS A CHARITABLE OBJECT

A charitable object, according to Mukhopadhyaya[71], must have the following three peculiarities, that is,

(*i*) indefiniteness,

(*ii*) meritoriousness, and

(*iii*) perpetuity.

A charity must benefit an indefinite number of individuals; it must refer to a definite class or community or a section of the public, but they must be well-defined[72] and not private individuals or a fluctuating body. This element distinguishes a charity from a private trust. The next element is that of altruism and altruism is always meritorious. The word charity implies an instilled virtue as its motivating power. Charity, whether in bountiful generosity to the poor or in that of kindness and indulgence in one's opinion of others, still retains a hint

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68. *Hanmantram Ramnath* v. *CIT*, AIR 1947 Bom 115: 48 BLR 532.
69. See *Dolagovinda Sethi* v. *Kanika Museum*, AIR 1989 Ori 60 at 66 wherein requirements of a public trust are enumerated.
70. *CIT* v. *Pemsel*, 1891 AC 531.
71. *Mukhopadhyaya on Perpetuities*.
72. *Ahmedabad Rana Caste Association* v. *CIT*, (1971) 3 SCC 475: AIR 1972 SC 273 *following* AIR 1965 SC 1281.

of its early meaning of brotherly love and compassion. Altruism is devotion to the interests of others, and suggests not only an ethical principle as one's guiding motive but also the absence of any selfishness or self-interest.[73] Here the beneficiaries must not be able to claim the benefit personally but they regard the pursuance of such an object as a mark of respect and reverence due to the pursuer. Lastly, the object is of a perpetual nature, that is, it is never capable of complete accomplishment and consequently it is permanent in duration. Thus the aim of charity is general public utility, but this does not mean that something should be given free of charge or at a price less than the cost price. A charitable object does not depend upon the donor's opinion about it and at the same time every object of public general utility is not necessarily charitable. According to English law, therefore, that purpose is charitable which is contained or enlisted in the Statute of Elizabeth[74] or which by analogies is deemed or decided to be within the spirit and intendment of the statute.[75]

6. EXAMPLES

(a) Poverty.—The word is not capable of being subjected to a definition. It is a comparative idea with reference to worldly needs. Thus poverty is the condition of one who does not have enough to live on; it is most comprehensive, denoting either a total lack of material possessions or a state in which one must forego many of the necessities and all of the luxuries of life; as the monk took the threefold vow of poverty, chastity and obedience, and during the last years of his life Mozart lived in the uttermost poverty. Destitution connotes a state of extreme poverty, in which one lacks the bare means of subsistence, and suggests dependence on charity to provide food and shelter.[76] Poverty therefore does not mean destitution.

Encouragement of poor emigrants[77], or provision of flats at economic rents for the benefit of aged persons of small means,[78] are included in charity but to provide dwellings for the working classes or a mutual benefit fund with no test of poverty are not charitable.[79] Similarly, a trust to provide comfortable circumstances for those who are used to them is doubtful of being enlisted as charitable because "needy" is not the same thing as "used to comfort". Gifts to the 'working classes' or for the benefit of the employees of a company are now unlikely to be held charitable unless the qualification of poverty is clearly stated.[80] As Hanbury notes, the requirement of *public* benefit has been reduced in the field of poverty almost to a vanishing-point. It is still true to say that a gift to a group of individuals *chosen* because they are poor is not charitable,

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73. Funk & Wagnall: *Standard Handbook of Synonyms and Antonyms.*
74. 43 Eliz 1, C 4, 1601.
75. See *Chaturbhuj Vallabhdas* v. *CIT*, AIR 1946 Bom 337: 48 BLR 83; *C.T.I* v. *Breach Candy Swimming Bath Trust*, AIR 1955 Bom 250: ILR 1955 Bom 268.
76. Funk & Wagnall: *Standard Handbook of Synonyms and Antonyms*, p. 326.
77. *Davies* v. *Perpetual Trustee Co. Ltd.*, 1959 AC 439.
78. *Paylings W.T., Re*, (1969) 1 WLR 1595.
79. *Snell's Principles of Equity*, p. 146.
80. Hanbury: *Modern Equity*, p. 264.

provided the object of the gift is not to relieve their poverty.[81] That is why Justice Harman has pointed out that "to amuse the poor would not be to relieve them".[82] The rule has to be stated so widely due to the "poor relations"[83] cases, holding gifts to one's poor relations as a class to be charitable. He expects that poor relations cases will be treated as exceptions rather than the rule, and the exceptions will not be extended.[84]

Thus if a trust be brought under any of the other three heads then there should be no objection that it may incidentally benefit the rich as well as the poor;[85] but if it cannot be brought under any head save that of the relief of poverty, then the benefits contemplated by the trust must be directed to that end.

(*b*) *Education.*—As has been said, education is the systematic development and cultivation of the mind and other natural powers. "It begins in the nursery," as said by John Lubbock, "and goes on at school, but does not end there. It continues through life, whether we will or not,"[86] Moral development is included in education in its fullest and noblest sense. Any full education must be the result in great part of instruction, training and personal association.[87] It has therefore rightly been noted by Snell[88], that its meaning is not confined to education given by a master or a mistress in class in a formal institution. But some element of instruction and improvement there must be; the mere increase of public knowledge or acquisition of experience is not enough. Education can take many forms. Schools and universities are its obvious examples. But education of a less academic sort is not excluded. The following may be cited as its examples:

(*i*) foundation of a lectureship in a university,

(*ii*) for cultivation of the skills of self-control, elocution, oratory, department and the arts of personal contact;

(*iii*) for the production of a dictionary, the publication of law reports, finding the Bacon—Shakespeare manuscripts;

(*iv*) for teaching business management, or education in the art of government.

Thus there are in fact very few aspects of the education of the young that would be regarded as education. It is natural therefore that it excludes research. As Wilberforce, J., said in *Hopkins, Re* [89]:

> "In order to be charitable, research must either be of *educational value* to the researcher, or must be so directed as to lead to something which will

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81. *I.R.C.* v. *Baddeley*, (1953) 1 WLR 84.
82. *Ibid.*
83. See *Scarisbrick, Re*, 1951 Ch 622: Nathan & Marshall: *Equity Through the Cases*, No. 77.
84. Hanbury: *Modern Equity*, pp. 264-265.
85. *Verge* v. *Somerville*, 1924 AC 496.
86. Funk and Wagnall: *Standard Handbook of Synonyms and Antonyms*, p. 170, citing *Use of Life.*
87. *Ibid.*
88. *Snell's Principles of Equity*, p. 146; Hanbury: *Modern Equity*, pp. 258-261.
89. 1965 Ch 669.

pass into the *store of educational material*, or so as to improve *the sum of communicable knowledge in* the area which education may cover."

Research of a purely private character is thus excluded.

But the following purposes have been held not to be charitable:

(*i*) founding a college for training spiritualistic mediums;

(*ii*) preserving a useless collection of pictures and furniture as museum;

(*iii*) political propaganda masquerading;

(*iv*) education of pickpockets in a thieves' kitchen to make them fit for their profession; or

(*v*) a public library devoted entirely to works of pornography.[90]

The concept of education must mix with public benefit or else it has no relevance to charity. As has been observed by Hanbury[91] a trust to educate one's own children is not charitable; it is educational but it is not sufficiently public. The same is true of a trust to educate one's relations.[92] It was remarked in that case that the "founder's kin" provisions belonged "more to history than to doctrine". Relations are neither the whole community nor a sufficient section of it. In this connection a sect a locality, or a sect in a locality is a sufficient section but under the heading community, e.g., "Welsh people" will be a sufficient section only if it is identifiable as a section. There is a distinction between a group of people identified by virtue of their character as individuals (e.g., children or employees of a particular person; their common quality is personal), and a group of people identified by virtue of membership of a class (e.g., inhabitants of a parish; the common quality which identifies them is impersonal). On the other end of the scale, a trust will be held not charitable if it is for a "fluctuating body of private individuals". A section of the community must have some coherence. If all this is not taken into account and the beneficiaries are defined too capriciously, the gift must fail for uncertainty because there is some limit to the rule that a charitable trust will not fail for uncertainty. The task of the draftsman in steering clear of these various obstacles is surely a formidable one, because it is not easy to be sure in advance of what constitutes a 'section' of the community.[93]

(*c*) ***Religion***[94].—The word *religion* applies to any system of religious belief and worship and the conscientious devotion to it. Religion is a genus and denomination, sect, faith, creed, communion, church and cult are but its species. A denomination refers to a body of people having a name and set of beliefs that distinguish them from the larger body of which they are a part, as the Baptist denomination. A sect is a group of people who follow a particular leader or teacher

90. *Snell's Principles of Equity*, p. 147.
91. Habury: *Modern Equity*, pp. 259-61.
92. *Caffoor Trustees* v. *CIT*, 1961 AC 584
93. Hanbury: *Modern Equity*, p. 261.
94. *Snell's Principles of Equity*, pp. 147-148; Hanbury: *Modern Equity*, pp. 261-263.

and also the doctrines of the group. A communion is a religious group, perhaps comprising several bodies or churches, having a common essential faith.[1] In one sentence, in the words of Dr Hanbury, within the pale of religion shades of doctrines are immaterial. Thus a trust for the advancement of religion is naturally not confined to the Chiristian religion only but the idea extends and attracts within its sweep the furtherance of any religion provided it is not subversive of all religion and morality. Consequently, (*i*) trusts for the religious order or for community[2] (e.g. a monastery or a convent), (*ii*) trusts for saying of masses for the dead, (*iii*) a gift simply for God's work, (*iv*) a trust for the repair of the whole churchyard, are all held to be charitable. But (*i*) a trust for establishing "a catholic daily newspaper" and (*ii*) the upkeep of a particular vault or tomb in a churchyard are held not to be charitable.

As Hanbury notes, "in religious toleration equity lagged behind the criminal law. For some decades after it ceased to be a criminal offence to hold and propagate certain religious beliefs or to deny all beliefs, equity would prevent a trust for such purposes from being carried out at all." *Bowman* v. *Secular Society*[3] and *Bourne* v. *Keane*[4], are the two leading cases which mark the purposes in this field. It was in *Thornton* v. *Howe case*[5], that Romilly, M.R. remarked that the privilege of charity is not, of course, confined to Christianity. As Cross, J., once remarked, "as between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none".[6] But as with education, so with religion, there are limits. Nor is every moral philosophy a religion. The constitutional possession of religious doctrine by a society is not sufficient in itself to make that society charitable; there must be the *intention to advance* religion in some positive manner. On this ground both Masonry and Theosophy have failed to qualify.[7] Again, doctrines adverse to the very foundations of all religion, and a gift to propagate arguments calculated to disprove all religious beliefs could not be upheld as a trust for the advancement of religion. Of course, looking from another angle of rationalism and moral philosophy, it may be educational under certain circumstances.[8] Finally, as laid down in *Glimour* v. *Coats*[9] by the House of Lords, proof of public benefits was necessary to constitute a charity; and that benefit to the public was not proved by doctrine alone. Neither religious doctrine, nor edification by example, nor the eligibility of all Roman Catholic women to enter the convent were sufficient to satisfy it. In that case, therefore, the community of cloistered nuns was held to be non-charitable. Still, however, it must be noted that many 'satellite' purposes[10] have been freely admitted into the realm of religious charity in the United Kingdom.

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1. Funk and Wagnall: *Standard Handbook of Synonyms and Antonyms*, p. 360.
2. *Banfield, Re*, (1968) 1 WLR 846.
3. 1917 AC 406.
4. 1919 AC 815.
5. (1862) 31 Beav 14.
6. *Noville Estates* v. *Madden*, 1962 Ch 832.
7. *United Grand Lodge of AFAM, England* v. *Holborn B. C.*, (1957) 1 WLR 1080.
8. Hanbury: *Modern Equity*, pp. 262-263. cf. *Stemson's W.T., Re*, (1969) 3 WLR 21.
9. 1949 AC 426.
10. Hanbury: *Modern Equity*, pp. 262-263, cf. *Stemson's W.T., Re*, (1969) 3 WLR 21.

(*d*) *Beneficial to the community.*—This expression is of very wide import but it should not be taken to include every object of general public utility. "Beneficial" means "beneficial in a way that the law regards as charitable". Though the inspirations of the donors are "infinitely variegated" this becomes a test of the legal status of charity and has to be approached objectively from two main points.

What the donor thought or what other people think is not the issue here; "beneficial to the community" is something that has to be decided by the courts in the light of all relevant evidence available. The second point is that the legal test of charity is governed by the spirit and intendment of the preamble of the statute and valuable analogies created therefrom. Thus, under this fourth head an element of "public" as well as "benefit" is required.

Provision of a fire brigade, or crematorium, or of hospitals, whether voluntary or from paying patients, publication of law reports, provision for a library, provision for prizes for sports are instances of this fourth division, but a political purpose would stand outside the equity of the statute. A trust for the protection and benefit of animals generally is charitable provided it involves a benefit to the community[11], but, surprisingly enough, a gift for total suppression of vivisection which was once held charitable on the ground that it promoted humanitarian views, is now established as not being charitable as it leads to disadvantage of mankind.[12]

Social and recreational activities may be considered under this head. Under the Recreational Charities Act, 1958, which extends the definition of charity without restricting the purposes, activities and facilities in the interests of social welfare are includible under this head.[13] It must be mentioned that most of the inclusions under this head are for earning exemption from taxation. As to political trusts, there can be no such class of trusts but if a trust is purely for a political purpose it is non-charitable. A trust whose ultimate and predominant purpose is benefit to society must not fail simply because politics may be involved in its fulfilment. The *National Anti-Vivisection Society case*[14] is an example of this kind.

7. INCIDENTS OF A CHARITABLE TRUST

An express private trust and an express public or charitable trust though governed mostly by the same rules, due to a striking peculiarity of its nature, a charitable trust receives a different treatment at the hands of the court so far as the questions of interpretation and concessions are concerned. A private trust benefits an individual or individuals but a charitable one benefits the public or a definite section of the public. It is because of this reason that a charitable trust receives a favoured treatment. The points of comparison in this regard are

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11. *Wedgwood, Re*, (1915) 1 Ch 113.
12. *National Anti-Vivisection Society* v. *I.R.C.*, 1948 AC 31.
13. For details see *Snell's Principles of Equity*, pp. 149-156; Hanbury: *Modern Equity*, pp. 266-271.
14. *National Anti-Vivisection Society* v. *I.R.C.*, 1948 AC 31.

uncertainty of object, failing of the object and the permanent duration of the trust conflicting with the rule against perpetuity and the rule against inalienability.

(*a*) *When is a charity favoured*

(1) A private trust fails for uncertainty of the object unless a power of selection and apportionment among a definitely prescribed class of beneficiaries is given by the trustor to the trustee[15]; but a charitable trust does not fail for uncertainty. Once the intention of the donor confining himself to charity is clear the absence of selection of a particular charitable object will not render a trust uncertain. There are no compulsions for the donor as to how to express his intention. Interpretation by the court, therefore, in such cases will make it possible for a trust to exist. Where the intention is not clear (apart from the mode in which it is expressed) or is not exclusively charitable,[16] or is mixed up with other purposes of shadowy and indefinite nature, or where a discretion is vested in a trustee, or the description includes purposes which may or may not be charitable and where the purpose is not obligatory, the gift will fail for uncertainty because there is a limit beyond which a court cannot go and uphold the trust.[17] Thus, where a private trust fails at the very first instance for uncertainty, a charitable trust will not easily yield because of the favourable treatment accorded to it by the court.

(2) Where the object selected by the settlor fails but the general charitable intention is clear a cypres doctrine will be applied by the courts and the trust will survive; but in case of private trusts the doctrine does not apply.

(3) As seen before, a charitable trust is of a permanent duration. This being so it is not affected by the rule against perpetuity. In charity, property is devoted forever and this prevents its alienation but the trust does not fail. A private trust has not won such concessions.

(4) Moreover, a charitable trust is exempted from taxation and this is the greatest favour in present times when taxation is at its highest; a private trust is not so exempted. A gift from one charity to another is outside the rule of perpetuities, while a private trust doing this would be caught by the rule against perpetuity.[18]

(5) Where the donor has capacity and disposable estate, defects in conveyancing in a charitable trust are supplied, i.e., an imperfect conveyance which will not be executed in case of a private individual will be perfected and executed in case of a charity.[19]

(6) In a charitable trust a majority of trustees will bind the minority, whereas in a private trust, trustees must act unanimously.

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15. *A.G.* v. *New Zealand Insurance Co.*, (1936) 41 CWN 321 (PC).
16. *Hunter* v. *A.G.*, 1899 AC 309; *Mills* v. *Farmer*, (1815) 1 Meriv 55.
17. See *Osmund, Re*, (1944) 1 All ER 262 (CA).
18. *Royal College of Surgeons* v. *N.P. Bank*, (1952) 1 All ER 984 (HL). See also *State of Kerala* v. *M.P. Shanti Verma Jain*, AIR 1998 SC 2208: (1998) 5 SCC 63.
19. *Alt* v. *Strathden*, (1894) 3 Ch 265.

A charitable trust is thus more favoured than a private trust.

(*b*) *When less favoured*

It is not that public trusts are everywhere favoured in comparison to private trusts. There are circumstances wherein they are less favoured and even treated on a par with private individuals.

A trust must have a lawful purpose. But this rule is applied more strictly to charities and, consequently, charities for superstitious purposes[20] are void. Where the purpose is against the political and moral sense of the country,[21] the trusts are void. The *Anti-Vivisection Society case*[22] is a noteworthy example for this. In case of private trusts no such questions as to the nature and character of the beneficiaries can arise.

In the following circumstances charities are treated on a par with private individuals. Where a testator fails to name a trustee or if one named by him dies, equity would supply the want of a trustee.[23] Where purposes of a trust are legal as well as illegal and the legal purposes can be separated from the illegal ones, the trust will be exempted *pro tanto*. Section 10 of the Indian Limitation Act applies equally to a public as well as a private trust. If there is a gift to an individual as well as a charity, and both are left indefinite, the gift is bound to fail, but if the individual is definite and the charity is indefinite, the gift is not to fail. Where a gift given is construed in words ambiguous having both legal and illegal sense, the legal interpretation will prevail on the principle that it is better for a thing to have effect than to be made void.

8. THE CY PRES DOCTRINE

The Latin word cypres means—for a purpose resembling "as nearly as possible" the purpose originally proposed. It means approximation. Cypres (from *ici-pres* or, probably) is a doctrine evolved in English in relation to charitable trusts whereby, if a gift is clearly for charitable purposes only, it will not be allowed to fail because the precise object to be benefited, or the mode of application of the fund is uncertain. It must be evident that the truster had a general charitable intent, but the precise purpose is impossible, or has never existed, or has ceased to exist before the testator's death, or the purpose or institution has ceased to exist after the gift has taken effect, or in certain other cases where the question of general charitable intent is less material. If the conditions are satisfied the court will settle a scheme for the application of the funds to another purpose as near as possible to that prescribed by the truster.[24]

According to Hanbury[25] the word has several connotations. In connection with charities, the cypres application of a fund means the application of that

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20. *Bourne* v. *Keane*, 1919 AC 815.
21. *Heath* v. *Chapman*, 2 Drew 417.
22. 1948 AC 31, overruling *Cross* v. *London Anti-Vivisection Board*, (1895) 2 Ch 501.
23. *Ibid.*
24. Walker, *The Oxford Companion to Law*, 1980, p. 329, from L. Sheridan and V. Delany, *The Cy pres Doctrine*.
25. *Modern Equity*, pp. 279-87.

fund to objects or purposes which are not precisely those the donor provided for, but which as nearly as possible fit his intentions. It is obvious that such a power of altering the terms of such a trust will only be used where it is impossible or impracticable to give literal effect to them as laid down in the trust.[26] At the same time there must be present in the gift the necessary wider or paramount intention for this purpose.[27] Thus a gift may be saved from initial failure by the presence of a wider or paramount charitable intention to which it is possible to give effect.

Once there is an effective devotion of funds to charity, those funds will remain devoted forever unless there is in the gift an effective provision for devolution. Save in the special case, the possibility of a lapse or a resulting trust is excluded. Cy pres is available without there being width of charitable intent. Its jurisdiction depends upon the Charities Act, 1960, Section 13. In such cases the court will frame a scheme and it will be carried out.[28]

Where there is a surplus of funds after the specified charitable object has been carried out, the same will be applied cypres, provided a paramount intention of charity appears.[29] A court has no authority to sanction any deviation from the donor's expressed intention so far as it can be given effect. Similarly, because the court considers the application of the trust property or its income to another purpose which would be more expedient or beneficial, it has no authority to do so.[30]

The principle underlying this doctrine has also been summarised in *Mayor of Lyons* v. *A.G.*[31], an Indian case.

Hanbury[32] has therefore rightly pointed out that "such a power of altering purposes must be hedged around with safeguards, but in recent years, especially in connection with trusts with long outmoded purposes, it has been found necessary to relax them. Application of cypres is justified in varying circumstances". He from this point of view, divides such cases into two parts: "first, where the problems arise at the commencement of a charitable trust, to which the width of a charitable intent provides the answer; secondly, problems that only arise subsequently, to which perpetual dedication to charity provides the answer".

9. POSITION IN INDIA

(*a*) *What trusts are charitable.*—Looking to the provisions of the various Acts[33] in this connection one must come to the conclusion that the meaning and

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26. *A.G.* v. *Ironmonger's*, (1840) 10 Cl & F 908.
27. *Ibid.*
28. *Ratilal* v. *State of Bombay*, AIR 1954 SC 388.
29. *Campden Charities, Re*, (1881) 18 Ch D 310; 52 Cal 508; 88 IC 890; 1925 Cal 797; *Shankarnarayan* v. *H.R.E. Board, Madras*, (1948) 74 IA 230: ILR 1948 Mad 585.
30. *Ratilal* v. *State of Bombay*, AIR 1954 SC 388.
31. (1876) 1 Cal 303 (PC): 3 IA 32: 1 MIA 272. See also *Strahan's Digest of Equity*, p. 209.
32. *Modern Equity*, p. 280. For details of the doctrine see *Snell's Principles of Equity*, pp. 160-165, Hanbury: *Modern Equity*, pp. 279-287 and leading case Nos. 85 to 89 in Nathan & Marshall: *Equity Through the Cases*.
33. Section 9, Bombay Public Trusts Act, 1950; Section 2, Charitable Endowments Act, 1890;

scope of the words public or charitable are very much the same in India they are in England. Moreover, it is generally acknowledged that in order to be charitable a trust must be either for the relief of poverty, or for the advancement of education or religion, or for any other purpose beneficial to the community as in England.

In *Section 18 of the Transfer of Property Act, 1882, charity* has been classified under the following four principal divisions:

(*i*) advancement of *religion*;

(*ii*) advancement of *knowledge*;

(*iii*) advancement of *commerce, health and safety of the public*; and

(*iv*) advancement of *any other object beneficial to mankind.*

Illustrations of *Section 118 of the Indian Succession Act* indicate and explain the nature of charitable objects and purposes. A *charitable purpose* under Section 9 of the *Bombay Public Trusts Act*, 1950, includes:

(*i*) relief of poverty or distress;

(*ii*) education;

(*iii*) medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates (*A*) exclusively to sports, or (*B*) exclusively to religious teaching or worship.

As for example, the following have been held to be charitable or religious purposes:

(*i*) gift of property to temple or to idol[34];

(*ii*) gift for the maintenance of priests[35];

(*iii*) gift to a dignitary of a church[36];

(*iv*) gift for building wells, haudas (troughs)[37], sarais[38], sadavrata[39], hospitals[40], schools and universities[41], for feeding the poor and to supply buttermilk to the poor[42];

(*v*) gift for keeping a choultry in repair[43].

Religious Endowments Act, 1863; Charitable and Religious Trusts Act, 1920; Section 118, Indian Succession Act, 1925; Section 18, Transfer of Property Act, 1882; and Section 4, Indian Income Tax Act, 1922.

34. *Thakersy Devraj* v. *Harbhan Narsy*, 8 Bom 432; *Bhugavati P. Sen* v. *Guru Prasanna Sen*, 25 Cal 112.
35. *Ibid.*
36. *Ibid.*
37. *Jamnabai* v. *Khimji*, 14 Bom 1.
38. *Jugal Kishore* v. *Laxman*, 23 Bom 659; *Ramkrishna Mission* v. *Dogar Singh*, 1984 All 72.
39. *Jamnabai* v. *Khimji*, 14 Bom 1.
40. *Fanindra Kumar*, 6 CWN 321.
41. *Manorama* v. *Kalicharan*, 31 Cal 166: 8 CWN 273.
42. *Draivia Sundram* v. *Subramania*, ILR 1945 Mad 854: AIR 1945 Mad 217; *Municipality of Taloda* v. *Charity Commissioner*, AIR 1968 SC 418: (1968) 1 SCR 652: (1968) 2 SCA 48.
43. *Gulam* v. *Ajia*, 4 Mad HC 44.

In this connection one is to note what Sections 10 and 11 of the Bombay Public Trusts Act, 1950 provide. As per Section 10: "Notwithstanding any law, custom or usage, a public trust shall not be void only on the ground that the persons or objects for the benefit of whom or which it is created are unascertained or unascertainable." Thus a charity created for such objects as "dharma, dharmada, punyadan, punyakarya" is not void only on the ground that the objects for which it is created are unascertained or unascertainable.

As Section 11 goes: "A public trust created for purposes some of which are charitable or religious and some of which are not, shall not be deemed to be void in respect to the charitable or religious purpose only on the ground that it is void with respect to the non-charitable or non-religious purpose." Thus a gift for saying mass, as it advances religion, is validly charitable.

(*b*) *General Public Utility.*—The test of an object of general public utility or an object beneficial to the community, is not whether the testator believed it to be so, but *whether the court considers it to be beneficial to the public having regard to the nature and character of the trust and at the same time in so deciding the court would be guided by Indian ideas and particularly the common opinion amongst the community to which the interested parties belong.*[44]

(*c*) *Charity.*—The word charity without any further qualification has a recognised meaning in law. It amounts to a general charitable intention for objects well recognised as charitable in law. It is not an indefinite word so as to include a public or private charity or benevolent or philanthrophic objects. The words '*charity*', '*charitable objects*' or '*charitable purpose*' are defined in various sections of different Acts of the Indian Legislature and in all of them the idea of *public benefit* is clearly involved.[45] One of the tests to be applied is whether the gift in question is valid in law. If the gift to charity is valid in law it is a relevant factor to be considered in deciding if it is a charitable purpose within the meaning of the Income Tax Act.[46] Charity defined under the Indian Income Tax Act, it must be noted, is of much wider application than charity as understood in English law under Statute of Elizabeth. Similarly, the expression "*any other object of general public utility*" in the definition of "charitable purposes" in the Act is of the widest connotation. It is sufficient if a well-defined section of the public benefit by the object.[47]

Thus (*i*) the establishment of a dispensary[48] or a hospital, (*ii*) of school or college for spread of education,[49] (*iii*) provisions for scholarships and similar

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44. *Trustees of Tribune Press* v. *CIT*, (1939) 66 IA 231: AIR 1939 PC 208: (1939) 43 CWN 1065 (PC).
45. *Chamber of Commerce* v. *CIT*, 1936 ALJ 1085: AIR 1936 All 764.
46. *Chaturbhuj Vallabhdas* v. *CIT*, AIR 1946 Bom 337: 48 BLR 63.
47. *CIT* v. *Breach Candy Swimming Bath Trust*, ILR 1955 Bom 268: AIR 1955 Bom 250.
48. *Haridasi* v. *Secretary of State*, 7 Cal 304 (PC): 8 IA 46.
49. *Ibid.*, *CIT* v. *Sreeram -Surajmall Charity Trust*, (1971) 79 ITR 649 (Cal); *Bhupti* v. *Ramlal*, 37 Cal 128: 14 CWN 18; *Vedapatshala* v. *State of Tamil Nadu*, (1981) 94 LW 137; *Rajammal* v. *Authorised Officer Land Reforms*, 1984 (1) MLJ 270 (red parayanam in a temple).

objects of education,[50] (*iv*) for feeding of poor Brahmins, (*v*) help to poor widows and orphans, (*vi*) providing accommodation for persons visiting Benaras and other places, (*vii*) providing food to pilgrims, (*viii*) help to sick and distressed, (*ix*) *seva* and worship of deities,[51] (*x*) provision for sadhus and saints[52], (*xi*) maintenance of a newspaper for supplying the province with an organ of educated public opinion,[53] (*xii*) organisation for the development of handspinning and khaddar,[54] (*xiii*) performance of *shraddhas*, reading of sacred books to masses, establishment of sarai or a resting place, construction of tanks and ponds,[55] *goshalas* can all be the objects of charity. In short, all the purposes coming within the sweep of charitable or charitable and religious[56] purposes are qualified to get exemptions under the Income Tax Act.

The dominant purpose of the trust must be charitable,[57] matter of control and management thereof being immaterial.[58] But if the object is the promotion and development of motor trade and industry carried on for profit[59] or if the object is to protect the business interest of the association[60] members, the trust is not charitable because the income of the property or its benefit does not enure to benefit the public[61], i.e., a well-defined section of the public,[62] but it benefits only certain individuals connected with it who can claim its benefit. For a trust to be charitable there must be altruism.[63] But that does not mean that the benefit must reach mankind at large; if the benefit is obtained by a section of a community sufficiently defined and identifiable by some common quality of a public or impersonal nature, it is enough.[64]

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50. *Ibid.*, *CIT* v. *Sreeram -Surajmall Charity Trust*, (1971) 79 ITR 649 (Cal); *Bhupti* v. *Ramlal*, 37 Cal 128: 14 CWN 18; *Vedapatshala* v. *State of Tamil Nadu*, (1981) 94 LW 137; *Rajammal* v. *Authorised Officer Land Reforms*, 1984 (1) MLJ 270 (red parayanam in a temple).
51. *Ibid.*, *CIT* v. *Sreeram -Surajmall Charity Trust*, (1971) 79 ITR 649 (Cal); *Bhupti* v. *Ramlal*, 37 Cal 128: 14 CWN 18; *Vedapatshala* v. *State of Tamil Nadu*, (1981) 94 LW 137; *Rajammal* v. *Authorised Officer Land Reforms*, 1984 (1) MLJ 270 (parayanam in a temple)
52. *Purmanundass* v. *Venayekrao*, 7 Bom 19 (PC): 9 IA 86.
53. *Trustees of Tribune Press* v. *CIT*, AIR 1939 PC 208.
54. *All-India Spinners' Association* v. *CIT*, (1944) 49 CWN 1 (PC): AIR 1944 PC 88.
55. *Venkata Krishna Rao* v. *Sub-Collector, Ongole*, AIR 1969 SC 563.
56. See *Mayor of Lyons* v. *A.G.*, 1 MIA 175: (1876) 1 Cal 303 (PC).
57. *CIT* v. *D.D. Deshpandey*, (1976) 102 ITR 390 (DB)(Bom); *Trustees of the Charity Fund* v. *CIT*, AIR 1959 SC 1060
58. *Ganeshi Devi Rami Devi Charity Trust* v. *CIT*, (1969) 71 ITR 696 (Cal); *CIT* v. *Ahmedabad Rana Caste Association*, (1968) 70 ITR 503 (Guj).
59. *CIT* v. *Calcutta Motor Dealers' Association*, (1977) TLR 604 (Cal).
60. *Madras Hotels Association* v. *CIT*, (1977) TLR 1375 (Mad); *Chamber of Commerce* v. *CIT*, 1936 ALJ 1085.
61. *Ganeshi Devi Rami Devi Charity Trust* v. *CIT*, (1969) 71 ITR 696 (Cal).
62. *Ahmedabad Rana Caste Assocn.* v. *CIT*, (1971) 3 SCC 475: AIR 1972 SC 273: ILR (1973) Bom 545.
63. *Chamber of Commerce* v. *CIT*, AIR 1936 All 764.
64. *Laxmi Narain Lath Trust* v. *CIT*, (1971) 1 ITJ 562: AIR 1966 Raj 154; *CIT* v. *Walchand Diamond Jubilee Trust*, AIR 1959 Bom 148.

In deciding whether a Hindu endowment is for a religious purpose or for a charitable one, Hindu law and Hindu notions are very valuable and they would be followed.[65]

The concept of 'charity' under the Muslim law is even more wider than under the English and the Hindu laws.

(*d*) *Cases.*—It would be sufficient for this topic to cite the substance of two Indian cases, *Mayor of Lyons* **v.** *A.G.*[66] and *Trustee of the Tribune Press* v. *CIT*[67].

The ratio of the first decision is that if the charity in the abstract is the substance of the gift and the particular disposition is merely the mode thereof which may not be capable of execution, the gift does not fail. Thus if the gift is confined to charity but the method of application shown in the deed is not possible of execution, it cannot fail. This is the doctrine. But this doctrine will not be applied (*i*) where the donor's desires are highly undesirable, impracticable or impossible of literal execution. In such a case the court cannot substitute the same. (*ii*) Moreover, where a donor's paramount intention of charity is clear and manifest and yet that cannot be carried into effect, the gift will fail, creating a resulting trust in favour of the donor.[68] In short, if there is a general intention, the failure of the particular form in which the charity is to be executed shall not destroy the whole. In applying this doctrine, regard must be had to the other objects of the testator's bounty, but primary attention must be paid to the objects akin or near to the original one.[69]

Thus the doctrine should receive an extended application to give effect to the true intent and aim of the donor in spite of his lapses, his ignorance and his failure to understand the situation.[70] Where a charitable gift is made upon a condition precedent it fails if the condition is not satisfied and the doctrine does not apply. To attract the application of the doctrine an absolute declaration of intention to give to charity must be established.[71]

One has to remember here that it is the court's duty to give effect to the donor's intention if it is not against public policy. In *Sir Currimbhoy, Ebrahim Re*, [72] it was rightly held that the court would not consider whether the directions of the donor were wise or whether a more beneficial application of the donor's property might not be found.

In the second case, Sardar Dayal Singh created a trust "to maintain the Tribune Press and newspaper in an efficient condition, keeping up the liberal

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65. For details see *Mayne's Hindu Law*, 11th Edn., p. 192; *Saraswati Ammal* v. *Rajgopal Ammal*, AIR 1953 SC 491. See also *Mayne's Hindu Law*, 13th Edn., 1991, pp. 1158, 1160
66. (1876) 1 Cal 303 (PC): 3 IA 32: 1 MIA 272.
67. AIR 1939 PC 208.
68. *Commr.* v. *Dy. Commr.*, (1937) 41 CWN 1072 (PC): AIR 1937 PC 240.
69. *A.G.* v. *Fardoonji*, 13 BLR 341.
70. 65 IC 820: 37 MLJ 489; 47 IC 611.
71. *Santona Roy* v. *A.G., Bengal*, (1920) 25 CWN 343; *Kuruppannan (R.K.)* v. *Tirumalai*, AIR 1962 Mad 500; *Ratilal Panachand* v. *State of Bombay*, AIR 1954 SC 388: 1954 SCR 1055.
72. 12 BLR 1040.

policy of the newspaper and placing it on a footing of permanency. On applying for exemption of income tax under Section 4(3)(*i*) of the Indian Income Tax Act, it was held (by the Judicial Committee) that the appellants were entitled to exemption as the dominant purpose of the trust was "supplying the province with an organ of educated public opinion", which was an object of "public utility", and hence "charitable" within the meaning of the provisions of the Income Tax Act. *The test of an object of general public utility is not whether the testator considered it to be so, but whether the court considers it to be beneficial to the public, having regard to the nature and character of the trust.* In the present case this must be determined with reference to the policy and character of the newspaper as it existed at the time when the testator created the trust, and it is not necessary to enquire as to the manner in which the trust has been or is being carried out since the date of the testator's death. The English decisions establish that political propaganda is not an object of general public utility, but in the present case, *the dominant object of the testator was to benefit the public* of upper India by providing them with an English newspaper—the dissemination of news and ventilation of opinion upon all matters of public interest. Though politics and legislation were discussed in the paper, that was not its dominant purpose. *The object of supplying the province with the organ of educated public opinion should therefore be held to be an object of general public utility.*

Chapter XIV

Trustees—Their duties and liabilities

Between a paid trustee and an unpaid trustee "there is no difference as to the standard of diligence expected; indeed it would be a brave amateur trustee who attempted to excuse himself for lack of diligence on the ground that he was not being paid".

—Hanbury: *Modern Equity*, p. 294

"The office of trustee is... an office of honorary service and not an office of profit—so much so, indeed, that if a trustee makes a profit out of his trusteeship he gets into serious trouble."

—Evershed, M.R., in *Dale* v. *I.R.C.*, 1954 AC 11 (1953 HL)

" ... . In other words, the receipt of a profit for the performance of the duties of a trustee is repugnant to the nature of trusteeship... .The fiduciary duty may arise, not only from trust but also ex lege and ex conventione. The duty was... acknowledged in the jurisprudence of all civilised communities... . It applies to all judicial factors appointed by the courts... and to partners and to agents under a contract of agency and, of course, to trustees under a settlement or under a will... . Some who are entitled to the duty are never entitled to remuneration; some are ex lege entitled to payment for their services; some are entitled to payment ex conventione; and some are entitled to payment if the settlor or testator so directs. The rule is the same for all: it is not that reward for the services is repugnant to fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by his contract, or by the trust-deed under which he acts, as the case may be."

—Lord Normand in *Dale* v. *I.R.C.*, 1954 AC 11 (1953 HL)

SYNOPSIS

A. DUTIES

1. TEXT OF SECTIONS 11 TO 22

11. *Trustee to execute trust.*—The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Where the beneficiary is incompetent to contract his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (*a*) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (*b*) in the case of debts not bearing interest, to make such payment without interest.

Illustrations

(*a*) *A*, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(*b*) *A*, a trustee of certain land for *X*, *Y* and *Z*, is authorized to sell the land to *B* for a specified sum. *X*, *Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a less sum. *A* may sell the land accordingly.

(*c*) *A*, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B*'s request, trust-property to *B*'s husband, *C*, on the security of his bond. *C* becomes insolvent and *B* requests *A* to make the loan. *A* may refuse to make it.

12. *Trustee to inform himself of state of trust-property.*—A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Illustrations

(*a*) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(*b*) The trust-property is money in the hands of one or two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than circumstances of the case required.

13. *Trustee to protect title to trust-property.*—A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or

value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration

The trust-property is immovable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

14. *Trustee not to set up title adverse to beneficiary.*—The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

15. *Care required from trustee.*—A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Illustrations

(*a*) *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust-funds to *B* by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. *A* is not bound to make good the loss.

(*b*) *A*, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker *B*, then in credit. The rents are accordingly paid to *B*, and *A* leaves the money with *B*, only till wanted. Before the money is drawn out, *B* becomes insolvent. *A*, having had no reason to believe that *B* was in insolvent circumstances, is not bound to make good the loss.

(*c*) *A*, a trustee to two debts for *B*, releases one and compounds the other, in good faith, and reasonably believing that it is for *B*'s interest to do so. *A* is not bound to make good any loss caused thereby to *B*.

(*d*) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. *A* is bound to make good the loss caused thereby to the beneficiary.

(*e*) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but for want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*.

(*f*) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums. *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*.

(*g*) *A* bequeaths certain moneys to *B* and *C* as trustees, and authorizes them to continue trust-moneys upon the personal security of a certain firm in which *A* had himself invested them. *A* dies, and a change takes place in the firm. *B* and *C* must not permit the moneys to remain upon the personal security of the new firm.

(*h*) *A*, a trustee for *B*, allows the trust to be executed solely by his co-trustee, *C*. *C* misapplies the trust-property. *A* is personally answerable for the loss resulting to *B*.

16. *Conversion of perishable property.*—Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to

convert the property into property of a permanent and immediately profitable character.

Illustrations

(*a*) *A* bequeaths to *B* all his property in trust for *C* during his life, and on this death for *D*, and on *D*'s death for *E*. *A*'s property consists of three leasehold houses, and there is nothing in *A*'s will to show that he intended the houses to be enjoyed in specie. *B* should sell the houses, and invest the proceeds in accordance with Section 20.

(*b*) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and *B* should not sell them.

17. *Trustee to be impartial.*—Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

Illustration

A, a trustee for *B*, *C* and *D*, is empowered to choose between several specified modes of investing the trust-property. *A* in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative right to *B*, *C* and *D*.

18. *Trustee to prevent waste.*—Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

19. *Accounts and information.*—A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

20. *Investment of trust-money.*—Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others—

(*a*) in promissory notes, debentures, stock or other securities of any State Government or of the Central Government or of the United Kingdom of Great Britain and Ireland:

Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government shall be deemed, for the purposes of this clause, to be securities of such Government;

(*b*) in bonds, debentures and annuities charged or secured by the Parliament of the United Kingdom before the fifteenth day of August,

1947 on the revenues of India or of the Governor-General-in-Council or of any Province:

Provided that, after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid;

(*bb*) in India three-and-a-half per cent stock, India three per cent stock, India two-and-a-half per cent stock or any other capital stock, which before the 15th day of August, 1947, was issued by the Secretary of State for India-in-Council under the authority of an Act of Parliament of the United Kingdom and charged on the revenues of India or which was issued by the Secretary of State on behalf of the Governor-General-in-Council under the provisions of Part XIII of the Government of India Act, 1935;

(*c*) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India-in-Council or by the Central Government or in debentures of the Bombay Provincial Co-operative Bank, Limited, the interest whereon shall have been guaranteed, by the Secretary of State for India-in-Council or the State Government of Bombay;

(*d*) in debentures or other securities for money issued, under the authority of any Central Act or Provincial Act or State Act, by or on behalf of any municipal body, port trust or city improvement trust in any Presidency Town, or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi:

Provided that after the 31st day of March, 1948, no money shall be invested in any securities issued by or on behalf of a municipal body, port trust or city improvement trust in Rangoon town, or by or on behalf of the trustees of the port of Karachi.

(*e*) on a first mortgage of immovable property situate in any part of territories to which this Act extends: Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage money;

(*ee*) in units issued by the Unit Trust of India under any unit scheme made under Scheme 21 of the Unit Trust of India Act, 1963 (52 of 1963); or

(*f*) on any other security expressly authorized by the instrument of trust, or by the Central Government by notification in the Official Gazette or by any rule which the High Court may from time to time prescribe in this behalf:

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for

his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

20-A. *Power to purchase redeemable stock at a premium.*—(1) A trustee may invest in any of the securities mentioned or referred to in Section 20, notwithstanding that the same may be redeemable and that the price exceeds the redemption value:

Provided that a trustee may not purchase at a price exceeding its redemption value any security mentioned or referred to in clauses (*c*) and (*d*) of Section 20 which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such security as is mentioned or referred to in the said clauses which is liable to be redeemed at par or at some other fixed rate at a price exceeding fifteen per centum above par or such other fixed rate.

(2) A trustee may retain until redemption any redeemable stock, fund or security which may have been purchased in accordance with this section.

21. *Mortagage of land pledged to Government under Act 26 of 1871. Deposit in Government Savings Bank.*—Nothing in Section 20 shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immovable property already pledged as security for an advance under the Land Improvement Act, 1871 (26 of 1871), or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

22. *Sale by trustee directed to sell within specified time.*—Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorised by a principal Civil Court of original jurisdiction.

Illustration

A bequeaths property to *B*, directing him with all convenient speed and within five years to sell it, and apply the proceeds for the benefit of *C*. In the exercise of reasonable discretion, *B* postpones the sale for six years. The sale is not thereby rendered invalid, but *C*, alleging that he has been injured by the postponement, institutes a suit against *B* to obtain compensation. In such suit the burden of proving that *C* has not been injured lies on *B*.

2. ONEROUS NATURE OF OFFICE

According to Professor Issac, a noted author on Trusts, Trusteeship has become a readily available tool for every purpose of organsiation, financing, risk-shifting, credit operations, settling disputes and liquidation of business affairs. Maitland the other renowned writer on equity, observed that one of the exploits of Equity, the largest and the most important, is the innovation and the development of the trust. The trust has been and is being applied for all purposes mentioned by Professor Issac, and many others as a device to accomplish different purposes. Trusteeship is an institution of elasticity and generality. The broad base of the concept of property or its management rested in one person

and obligation imposed for its enjoyment by others is accepted in Hindu Jurisprudence.[1]

The office of a trustee is an onerous one. So much so that Hanbury has remarked that " ... there is little to be said as to his rights". Hardwicke, L.C., was so much moved by the "cares of office" of a trustee and his position that in *Knight* v. *Earl of Plymouth*[2], it made him remark as under:

> "A trust is an office necessary in the concerns between man and man, and... if faithfully discharged, attended with no small degree of trouble and anxiety" so that "it is an act of great kindness in anyone to accept".[3]

A trustee must act exclusively in the interest of the trust. *He stands to gain nothing* from his work unless the trust instrument so provides. He is required to observe the highest standard of integrity, and a *reasonable standard of business efficiency* in the management of the affairs of the trust; and he is subjected to *onerous personal liability* if he fails to reach the standards set. Nor may he compete in business with the trust; or be in a position in which his personal interests conflict with those of the trust. He may thus be forced to forego opportunities which would be available to him if he were not a trustee.[4]

A question may be asked, that if this were so why do people consent to become trustees? Hanbury[5] in this regard divides the class into two types: professionals and non-professionals. The professionals (e.g., solicitors and banks) charge for what they do, while the non-professionals do not, because they act out of feelings of duty to the settlor. Trusts involve administration and it comprises collection, investment, distribution, accounting, tax payment, etc., and these too depend upon the size of the trust. According to Hanbury, even non-professional trustees, when they have to act efficiently, take the help of professional agents like solicitors, stockbrokers and accountants or taxation experts. It is therefore advisable to appoint professionals or experts as trustees so that technical matters will not be overlooked. At the same time there is some disadvantage in such appointments because such professional trustees are too "official" and never take the slightest of risk in respect of a breach of trust however beneficial such a course may be in the interests of the family. One has also to note that there are certain other persons (e.g., agents, partners, etc.) who though not trustees are under special duties because of their fiduciary position.[6]

We have to keep before us these general principles when we embark upon a discussion of the duties of trustees because they apply in England as well as in India with equal force.

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1. Quoted in *Mahesh Chandra* v. *Regional Manager, U.P. Financial Corpn.*, (1993) 2 SCC 279: AIR 1993 SC 935: (1993) 78 Comp Cas 1: (1993) 2 GLH 337.
2. 1747 Dick 120.
3. *Snell's Principles of Equity*, p. 204.
4. *Phipps* v. *Boardman*, (1967) 2 AC 46. See also *Snell's Principles of Equity*, pp. 204-205.
5. Hanbury: *Modern Equity*, p. 292.
6. *Ibid.*

3. STANDARDS APPLICABLE TO TRUSTEES

At this juncture a distinction must be made between duties of trustees and their power or discretions.

A duty is an obligation which must be carried out; there is no option, it is imperative and must be performed with the utmost diligence,[7] or *exacta diligentia.*

But a power is discretionary. It may be exercised or it may not. As Salmond observes, it is that which I can do effectively. I am vested with a discretion here to do or not to do a particular thing, and in this field the law actively assists me in making my will effective. A power, as defined by Salmond, is an ability conferred upon a person by law to alter, by his own will, directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of others. A power or discretion given by statute to trustees is in no way different from that which is given by the instrument of trust. A trustee while exercising his power must do so honestly and while managing trust affairs mast take "all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own".[8] As to judicial control of the discretionary powers of trustees, as decided in *Tempest* v. *Lord Camoys*[9] Jessel, M.R., said that in case of pure discretion to trustees the court does not enforce the exercise of a power against the wish of the trustees, but it does prevent them from exercising it improperly.

And now comes the most interesting and subtle distinction between an ordinary prudent man's behaviour and the scope of the exercise of a trustee's discretion. As Lord Watson pointed out in *Learoyd* v. *Whiteley*[10] a trustee is under a duty to invest; he has a discretion in the selection of investments, but in the exercise of this discretion he is less free than a prudent man would be in investing his own money; for "businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and likewise to avoid all investments of that class which are attended with hazard". If he properly performs his duties, powers and discretions, he is not liable for loss to or depreciation of the trust-property arising from factors beyond his control.[11]

In the last hundred years England has seen that due to the appointment of professionals as persons doing the administrative work of a trust, the duties of trustees in their strict application have been mitigated. The courts and statute have helped in this pacification process so that the requirement of a trustee to act personally has been relaxed, and the exculpating clauses excluding trustees' personal liability have become statutory. Section 61 of the Trustees Act, 1925,

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7. Hanbury: *Modern Equity*, p. 293; *Snell's Principles of Equity*, p. 204.
8. *Per* Lord Blackburn in *Speight* v. *Gaunt*, (1883) 9 App Cas 1.
9. (1882) 21 Ch D 571. See also *Gisborne* v. *Gisborne*, (1877) 2 App Cas 300.
10. (1887) 12 App Cas 727. Cited in Hanbury: *Modern Equity*, p. 293.
11. *Lucking's W.T., Re*, (1968) 1 WLR 866.

in England, therefore, gives the court a discretion to excuse a trustee who has acted honestly and reasonably and ought fairly to be excused. But it must be remembered that the standard of diligence expected of an unpaid trustee is no less (but equal) than that expected of a paid trustee; the only difference between these two types of trustees being that while an unpaid trustee has an opportunity of taking shelter behind Section 61 of the Trustees Act, a paid trustee will not have such a shelter or to such an extent.[12]

The relationship between trustee and beneficiary is not that of a debtor and creditor.[13] No relationship of trustee and beneficiary exists between the State Electricity Board and its consumers on security deposits made by consumers with the Board for supply of electricity by the Board. The Board is also not a constructive trustee. The object of security deposit is to secure the payment of consumption charges.[14]

Duties of a trustee.—As seen, a duty is an obligation of an imperative nature exacting the utmost diligence. Duties are of two types: positive and negative: positive duties oblige one to do something, negative ones oblige to abstain from doing something. Negative duties are considered to be disabilities. The failure to perform a duty is a breach of trust. The Indian Trusts Act, 1882 lays down the duties of a trustee under Sections 11 to 22 and his liabilities under Sections 23 to 30.

4. TO EXECUTE TRUST (SECTION 11)

As laid down by the section, a trustee—

(*a*) is bound to fulfil the purpose of the trust; and

(*b*) to obey the author's directions contained in the instrument.

Where the directions of the author are illegal, impracticable or manifestly injurious to the beneficiaries, they need not be obeyed. Besides, where all the beneficiaries are competent to contract and they collectively consent to modify the directions or where a court allows a departure from them, the original directions need not be followed. A trust is obligatory and the fulfilment of its purpose in the directed manner is the fundamental duty of a trustee. This finds expression in an adage giving homely truth in a condensed manner, that "he who pays the piper, calls the tune", or "one who pays, dictates". Where such directions are given after a trust has been created they are ineffective and of no consequence, because on creation of a trust its property is tranferred to the trustee and the owner loses all control over it. This is clearly laid down by the section itself by the expression "directions... given at the time of its creation".

The Explanation appended to Section 11 explains the duty of a trustee where the purpose of the trust is for the payment of a debt. There his duty will be to—

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12. *Learoyd* v. *Whiteley*, (1887) 12 App Cas 727. Cited in Hanbury: *Modern Equity*, p. 293.
13. *Nawab Mir Barkat Ali* v. *C.E.D.*, (1996) 10 SCC 685: (1996) 222 ITR 612.
14. *Ferro Alloys Corpn. Ltd.* v. *A.P. State Electricity Board*, 1993 Supp (4) SCC 136: AIR 1993 SC 2005.

(*i*) pay only those debts of the author of the trust which exist and are recoverable at the date of the instrument;

(*ii*) where such instrument creating a trust is a will, the trustee is to pay those debts which exist and are recoverable at the date of the author's death. The reason for this is very clear in that a will speaks from the death of a person and is effective only thereafter; and

(*iii*) in case of debts not bearing interest, a trustee is to make payments without interest.

The gist of Section 11 which lays down a general principle can be stated this way, that a trustee is to execute the trust as far as it is practicable, legally and beneficially, for the *cestui que trust*; the beneficiaries, if all of them are *sui juris* and of one mind, can control the trust and the principal Civil Court of original jurisdiction can permit a departure from the author's original directions in the following cases, as explained and accepted in *New case, Re*,[15] by Romer, L. J.:

(*i*) where circumstances exist which are not foreseen by the author (and therefore not provided for);

(*ii*) where the trustees are embarrassed by emergency; and

(*iii*) where consent of all the beneficiaries cannot be obtained as all of them are not *sui juris* or not in existence.[16]

This was incorporated in the statute-book in England in Section 57 of the Trustees Act, 1925, but with a warning that such a recasted arrangement which is shown to be "beneficial to the estate or to beneficiaries" will not be the sole criterion on which the court's jurisdiction is founded.[17] Every case has its own special circumstances and it will be decided accordingly.

Section 11 of the Indian Trusts Act, 1882 incorporates within its sweep only a part of Chapman's decision[18] in para 2 thereof, which explains that "where the benificiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction".

Maitland[19] has very ably summed up the general rules regarding the duties of a trustee thus:

(*a*) A trustee is *bound to do* anything that he is expressly bidden to do by the instrument creating the trust.

(*b*) A trustee may *safely do* anything that he is expressly authorised to do by that instrument.

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15. (1901) 2 Ch 534.
16. See *Nathan's Equity Through the Cases*, S. 4, p. 546.
17. *Chapman* v. *Chapman*, 1954 AC 429.
18. *Ibid.*
19. *Lectures on Equity*, p. 93.

(*c*) A trustee is *bound to refrain* from doing anything that is expressly forbidden by that instrument (supposing that the provisions of the instrument in question are in no way invalid or unlawful).

(*d*) Within these limits a trustee must play the part of a prudent owner and a prudent man of business.

That is the standard by which his conduct will be judged.

5. ACQUAINTANCE WITH TRUST-PROPERTY (SECTION 12)

The second duty of a trustee is (*i*) to acquaint himself with the nature and circumstances of the trust-property as soon as possible after his appointment. (*ii*) He must also obtain a transfer of such property to himself, and (*iii*) get in trust-moneys invested on insufficient or hazardous securities. For example, if the trust-money is a debt or a chose-in-action, a trustee should take immediate steps to recover it or to reduce it into possession immediately unless he can show a well-founded justification for his delay or default. If there are two or more trustees, it is not advisable for one trustee to allow the property to remain under the sole control of one trustee but it should be reduced into the joint control of all.[20]

6. TO PROTECT TITLE TO TRUST-PROPERTY (SECTION 13)

It is the most fundamental duty of a trustee to secure and place the trust-property in a state of security. He has to maintain and defend suits for the assertion and protection of its title and for this purpose must take all reasonable and possible steps suitable to the occasion. A trust-property if it is given to the author of the trust by an unregistered deed, it is his duty to get such instrument registered. This situation of a trustee requires the utmost diligence, *exacta diligentia*, and fidelity on his part. And in doing so he cannot deviate from the letter of the trust.

7. NOT TO SET UP ADVERSE TITLE (SECTION 14)

Fidelity is the very foundation of a trust. Consequently a trustee cannot and must not, for himself or for another, set up or aid any title to the trust-property adverse to the interest of the beneficiary. His interest should not conflict with that of the beneficiary and if it is so, he cannot be allowed to do so unless he obtains a proper discharge from trust with which he has clothed himself.[21] In other words, he cannot impeach the trust,[22] others may. But in that case he cannot join them or aid them; he has to defend the trust-property and assert his title thereto. If the trust is invalid it is for the beneficiaries to set up their claim against it, but it does not befit a trustee to do so.[23] A trustee consequently cannot mix his own property with that of the trust. If he does so, a burden lies heavily

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20. Cf. Section 26(*b*), Indian Trusts Act and *see* illustration (*b*) to Section 12.
21. *Shrinivas* v. *V. Ayangar*, 13 BLR 520; *Venkatraman* v. *Jayamal*, AIR 1963 Mad 353.
22. *Asharam* v. *Ludheshvar*, AIR 1931 Nag 335 (FB).
23. *Ardeshar* v. *Shirinbai*, 1 BLR 721.

upon him to prove that any particular property belongs to him as distinct from the trust-property.[24]

8. TO EXERCISE REASONABLE CARE (SECTION 15)

Section 15 informs about the care required of a trustee in dealing with trust-property. We have in this chapter explained the standards required of a trustee. He is to observe the highest standard of integrity and a reasonable standard of business efficiency in the management of the affairs of the trust, and if he fails to reach the standards set, he will be subjected to onerous personal liability[25] as the section and its Illustrations (*d*) to (*h*) explain. As has been ably observed by Maitland, a trustee should do that which he is bidden to do and should refrain from doing that which he is forbidden to do.[26] In using his discretion the conduct of a prudent and reasonable man is the standard by which he will be judged; if he fails to reach that, he is held liable. As to what a reasonable man or a person of ordinary prudence would do under the circumstances is a question of fact to be answered by the court on evidence; it is not for the trustee to decide. If he can prove his diligence and the care exercised, he will not be liable. A trustee's discretion is subject, in India, to control by the principal Civil Court of original jursidiction as provided in Sections 15, 36 and 49 of the Act.[27] Whether a trust is gratuitous or for remuneration, the liability is the same.[28] One has to note that in England, equity courts distinguish between duties and discretions. Duties are *imposed upon* while the discretions are *invested in*, the trustee. Thus, as regards duties, utmost diligence is the only formidable protection and 'mere hardship' is no defence;[29] but as regards discretion, the standard is the *amount of* diligence one would bestow on one's own property.[30] Still, however, in both the cases failure to reach the expected standard amounts to a breach of duty.

Strahan in his digest of equity[31] has rightly pointed out that it is a question of fact whether in a particular case reasonable care has been exercised or not, and it can be proved only by evidence. But it is a dangerous practice to decide a question of fact by help of precedents as to what amounts to reasonable care. If this is allowed it would go to establish a "doctrine of constructive want of care" similar to the venerable but exploded doctrine of constructive fraud.

A financial corporation granting loan on hypothecation of property of the loanee is a trustee of the property hypothecated and should act as a prudent owner, bona fide and in good faith while resorting to coercive method such as

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24. *Narayan B. Gosavi* v. *G.V. Gosavi*, AIR 1960 SC 100.
25. *Phipps* v. *Boardman*, (1967) 2 AC 46.
26. Maitland: *Lectures on Equity*, p. 93.
27. *Nilam Tirupati Rayudu* v. *V.L. Narsama*, 38 Mad 71.
28. *Jobson* v. *Palmer*, (1893) 1 Ch 71.
29. *Caffrey*, 6 Ves G 488.
30. *Webb* v. *Jones* 39 Ch D 660. See also *Speight* v. *Gount*, 9 App Cas 1.
31. Strahan & Kenrick: *Digest of Equity*, 3rd Edn., p. 111, cited in Maitland: *Lectures on Equity*, p. 94.

sale of the property hypothecated in case of default in repayment.[32] Trusteeship has nowadays become a readily available tool for every purpose of organisation and trusteeship is an institution of elasticity and generality.

Thus where the property of the debtor stands transferred to a Financial Corporation for management or possession thereof which includes right to sell or further mortgage, etc., the Corporation or its officers or employees stand in the shoes of the debtor as trustee and the property cesti que trust.[33] The very idea is reiterated in N. Surya Narayan Iyer's book[34] as under:

> "Where the trustee is empowered to sell any trust-property... by public auction or private contract and either at one time or at several times... ." The duty of trustee is to obtain the best price. He should therefore use reasonable diligence in inviting competition to that end. Contracts entered into by trustees bona fide would not be invalidated or cancelled by a court, but a trustee should not act in haste unmindful of the consequences.

Where in a trust for sale and payment of creditors the trustee sold at a gross undervaluation showing a preference to one of the creditors, he was held guilty of breach of trust. If the purchaser is privy to fraud the property itself can be recovered from him.[35]

In short, for the trustee, "as is the job, so is the care" to be exercised.[36]

9. TO CONVERT PERISHABLE PROPERTY (SECTION 16)

Section 16 of the Indian Trusts Act embodies the well-known rule in *Howe* v. *Earl of Dartmouth*[37]. It lays down that unless there is a specific intention in the instrument of trust that the property should be enjoyed in specie, it is the duty of a trustee to convert perishable property into that of a permanent and profitable character.

Hanbury[38] has explained the reasons for the rule thus:

> "The rules governing investment by trustees are an attempt to strike a balance between the provision of income for the life tenant and the preservation of the capital for the remainderman.[39] So long as those rules are observed, a trustee is usually under no duty to rearrange the investments so as to balance equally the interests of the life tenant and remainderman. Nor if there are unauthorised investments in the fund, are the trustees under

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32. *Mahesh Chandra* v. *Regional Manager, U.P Financial Corpn.*, (1993) 2 SCC 279: AIR 1993 SC 935: (1993) 78 Comp Cas 1: (1993) 2 GLH 337.
33. *Ibid.*
34. N. Surya Narayan Iyer: *Indian Trusts Act*, 3rd Edn., 1987, p. 275 quoted in the case of *Mahesh Chandra*, supra.
35. (1993) 2 SCC 279, *supra.*
36. See *Official Trustee of T.N.* v. *Udavum Karankal*, 1993 Supp SCC 509, 517, 518, *infra*. See also *John D'Souza* v. *Edward Ani*, (1994) 2 SCC 64: AIR 1994 SC 975: (1994) DLT 229 (Care required of his client's will by an advocate he being a trustee thereof).
37. 1 W&T: (1802) 7 Ves 137; Nathan: *Equity Through the Cases*, No. 131.
38. *Modern Equity*, pp. 328-330.
39. For details see "*The Economics of Investment*" in Hanbury: *Modern Equity*, pp. 314-316.

any duty to covert them into authorised investments. However, the fund if invested, the normal rule is that the tenant for life takes all the income; the remainderman's interest is in the capital. The capital is not of course available until the life tenant's death; but he may if he wishes, deal with or dispose of his reversionary interest in the fund... . A duty to convert and reinvest in authorised investments may arise by reason of the existence of an express trust to sell or to convert, or by statute, or in the case of a bequest of residuary personalty, under the rule in *Howe* v. *Earl of Dartmouth*... . The rule establishes that independently of any provision in the will, there is a duty to convert where residuary personalty is settled by will in favour of persons who are to enjoy it in succession. The trustees should convert all such parts of it as are of a wasting or future or reversionary nature or consist of unauthorised securities, into property of a permanent or income-bearing character."[40]

It must be noted that this rule has but limited application and it does not apply to property settled *inter vivos*, nor to specific as opposed to residuary bequests. Nor does it apply to freehold lands nor to leaseholds held for a term exceeding sixty years.

This rule in thus a part of the *economics of investment* and the Illustrations to Section 16 explain it. The section and the Illustrations thus lay down an equitable principle so that the benefit of the trust-property may not be exhausted by [in Illustration (*a*) to the section] *B* or *C*, but may be left available to all the beneficiaries equally and equitably. The burden of proof always rests on the person who asserts that the principle is not applicable.

10. TO BE IMPARTIAL (SECTION 17)

Where there are more beneficiaries than one, he cannot execute the trust in favour of one at the expense of another. He has to be impartial. He has not to pick and choose between beneficiaries; that is not given to him. He should not favour a tenant for life by investing in more productive but less secure property. He has to hold the scales evenly between the beneficiaries. The rule in *Howe case* is applicable here too, for it is a trustee's duty to hold an even hand between all their beneficiaries.[41]

11. TO PREVENT WASTE (SECTION 18)

Where out of several beneficiaries in succession, one in possession of the property commits or threatens to commit waste, the trustee must prevent it, as it is his duty. The meaning is very plain that a life tenant cannot behave in a manner prejudicial to the interests of the remainderman. Such acts either of destruction or of depreciation of the value of the trust-property are known as waste, which a trustee is bound to prevent unless they are permissive in their character.[42]

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40. Hanbury: *Modern Equity*, pp. 328-330.
41. Fry, L.J., in *Lepine, Re*, (1892) 1 Ch 210.
42. See *Lalit Mohan* v. *Kishan Mohan Laxmichand*, (1904) 6 Bom LR 907.

12. ACCOUNTS AND INFORMATION (SECTION 19)

A trustee is bound to maintain clear, accurate and proper accounts of trust-property and must be prepared to produce it on demand by the beneficiaries. He should not 'conceal' anything.[43] He is also bound to render such accounts in respect of the state of the trust-property. He is at the same time entitled under Section 35 to get his accounts settled and examined on completion of his office and to an acknowledgement from the beneficiaries that there is nothing due by him to the trust. He cannot advance his illiteracy or incapability as a defence for his fault. Consequently, as decided in *Lakhmichand* v. *Jaykuvarbai*[44], he becomes *prima facie* liable for the loss that thereby occurs.

A trustee should not mix trust-property with any private property. If he does so it lies heavily upon him to prove that a particular property is his.[45]

Besides this, a trustee is not only liable for moneys received in his possession but also liable for moneys which might have come into his possession had he acted with suitable alertness and diligence.[46]

13. INVESTMENT OF TRUST-MONEY (SECTIONS 20, 20-A, 21 AND 22)

Sections 20, 20-A and 21 of the Act cast a duty upon the trustee to invest[47] the trust-property, if it is money not immediately needed, into the securities mentioned therein and in no others. Where a trustee is directed to sell within[48] a specified time he should do so unless he has valid and justifiable reasons to act otherwise. Section 22 in this respect is more a power to a trustee than a duty; it is a power to sell within a specified time conferred upon him by a direction contained in the deed, but it is his duty to sell.

As we have seen, the duties of trustees are many. Those who are asked to become trustees "are bound to inquire of what the property consists that is proposed to be handed over to them and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust".[49] In carrying out the trusts they must take due care of the trust-property by investing it prudently and in the manner directed; they must give information to the beneficiaries when required and in some cases submit to their directions; they must comply with any directions of the court and when in difficulty seek its aid; and finally they must make no profit out of the trust unless authorised.[50] In other words, on appointment trustees must make themselves acquainted with the state and details of the trust-property, check that the trust fund is invested in accordance with the

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43. *Walker* v. *Symmonds*, (1818) 19 AA 155.
44. 6 BLR 907.
45. *Narayanan* v. *Gopal*, AIR 1960 SC 100, 114.
46. *Vasudevan* v. *Bhavadasan*, AIR 1934 Mad 115.
47. *Littlehale*, (1970) 3 Bro CC 73.
48. *Fry* v. *Fry*, (1859) 27 Beav 144.
49. *Hallows* v. *Lloyd*, (1888) 39 Ch D 686, *per* Kekewich, J., cited in *Snell's Principles of Equity*, p. 205.
50. *Snell's Principles of Equity*, p. 205.

provisions of the trust deed and that the securities are in proper custody. They should not wait until the trust-property is formally vested in them. The discharge of their duties will obviously depend upon circumstances but the duty to protect the trust assets is a stringent one is also a continuous one. It is enforced very stringently too.[51] As would be seen from the sections, the most important or basic duties of trustees are duties of collecting, of investing and of distributing the assets according to claims, and to provide accounts and information with due regard to the principle of equality. A trustee should not keep unnecessary cash with him which is not required for immediate expenses. This should be avoided.[52]

14. POSITIVE AND NEGATIVE DUTIES

As said before, duties are either positive or negative. Positive duties impose an obligation to do something, negative duties ask a trustee to refrain from doing something. Looking from this point of view, and as Strahan has pointed out, subject to the *absolute duty* of a trustee to carry out the directions of the settlor as contained in the instrument of trust (Section 11 of the Indian Trusts Act), the following are the positive duties—

(*i*) to preserve the trust-property, this being a stringent and a continuous duty (cf. Sections 12, 13, 16, 18 and 20, Indian Trusts Act),

(*ii*) to transfer the income and the corpus to the persons entitle thereto (cf. Sections 55 and 56, Indian Trusts Act), and

(*iii*) to render accounts and supply information (cf. Section 57, Indian Trusts Act).

The negative duties are as follows—

(*i*) not to make a profit out of the trust-property (cf. Sections 50 and 51, Indian Trusts Act),

(*ii*) as a general rule not to purchase trust-property from himself or from his co-trustees (cf. Sections 52 and 53, Indian Trusts Act), and

(*iii*) as a general rule, not to delegate his duties (cf. Section 47, Indian Trusts Act).

B. LIABILITIES

1. TEXT OF SECTIONS 23 TO 30

23. *Liability for breach of trust.*—Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on

51. Hanbury: *Modern Equity*, pp. 310-312.
52. *Ratilal* v. *State of Bombay*, AIR 1954 SC 388.

him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

(B) A trustee committing a breach of trust is not liable to pay interest except in the following cases:—

(*a*) where he has actually received interest;

(*b*) where the breach consists in unreasonable delay in paying trust-money to the beneficiary;

(*c*) where the trustee ought to have received interest, but has not done so;

(*d*) where he may be fairly presumed to have received interest.

He is liable in case (*a*), to account for the interest actually received, and, in cases (*b*), (*c*) and (*d*), to account for simple interest at the rate of six per cent per annum, unless the Court otherwise directs.

(*e*) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate;

(*f*) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the net profits made by such employment.

Illustrations

(*a*) *A* trustee improperly leaves trust-property outstanding, and it is consequently lost: he is liable to make good the property lost, but he is not liable to pay interest thereon.

(*b*) *A* bequeaths a house to *B* in trust to sell it and pay the proceeds to *C*. *B* neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. *B* is answerable to *C* for the loss.

(*c*) *A* trustee is guilty of unreasonable delay in investing trust-money in accordance with Section 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(*d*) The duty of the trustee is to invest trust-money in any of the securities mentioned in Section 20, clause (*a*), (*b*), (*c*) or (*d*). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(*e*) The instrument of trust directs the trustee to invest trust-money either in any of such securities or on mortgage of immovable property. The trustee does neither. He is liable for the principal money and interest.

(*f*) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(*g*) Trust-property is invested in one of the securities mentioned in Section 20, clause (*a*), (*b*), (*c*) or (*d*). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(*h*) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

24. *No set-off allowed to trustee.*—A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

25. *Non-liability for predecessor's default.*—Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

26. *Non-liability for co-trustee's default.*—Subject to the provisions of Sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(*a*) where he has delivered trust-property to his co-trustee without seeing to its proper application;

(*b*) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require;

(*c*) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

Joining in receipt for conformity.—A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Illustration

bequeaths certain property to *B* and *C*, and directs them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* accordingly sell the property, and the purchase-money is received by *B* and retained in his hands. *C* pays no attention to the matter for two years and then calls on *B* to make the investment. *B* is unable to do so, becomes insolvent, and the purchase-money is lost. *C* may be compelled to make good the amount.

27. *Several liabilities of co-trustees.*—Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Contribution as between co-trustees.—But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the

former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

28. *Non-liability of trustee paying without notice of transfer by beneficiary.*—When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

29. *Liability of trustee where beneficiary's interest is forfeited to the Government.*—When the beneficiary's interest is forfeited or awarded by legal adjudication to the Government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the State Government may direct in this behalf.

30. *Indemnity of trustees.*—Subject to the provisions of the instrument of trust and of Sections 23 and 26, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

2. BREACH OF TRUST[53]

(*a*) *Meaning and definition.*—Simply stated, a breach of trust is failing to do what a trust requires a trustee to do. But it is not only by commission of an act that a breach ensues, but also by an omission to do so. As has been aptly said, "Breaches of trust are almost infinitely various. They range from the fraudulent conversion of trust funds to purely technical failures of duty which harm nobody, and transactions (such as some investments in unauthorised securities) which result in a substantial profit for the trust."[54] It is better therefore to say that a trustee may commit 'judicious' breaches of trust.[55]

A breach of trust, as defined by Keeton, consists in (*i*) some improper act, (*ii*) neglect, (*iii*) default, or (*iv*) omission of a trustee in respect of trust-property or beneficiary's interest therein. It may be active or passive. Active breach results from action; passive, from omission. In other words, any act by a trustee in reference to the trust-property in contravention of the duties imposed on him by the trust, or in excess of those duties, and any neglect or omission on his part to fulfil those duties and the concurrence or acquiescence by one of the several trustees in a similar act, neglect or omission on the part of a co-trustee

53. *Townley* v. *Sherborne*, (1634) Bridg J 35.
54. *Snell's Principles of Equity*, p. 272.
55. *Perrins* v. *Bellamy*, (1899) 1 Ch 797, Lord Lindley quoting Selwyn, L.J.

constitutes a breach of trust. But when (*i*) the provisions of the trust deed relieve a trustee, or (*ii*) the statute so relieves him, or (*iii*) where it is occasioned by necessity, or (*iv*) authorised, and (*v*) condoned by beneficiaries, and where (*vi*) it is due to an innocent mistake, a trustee is relieved from the liability ensuing therefrom.[56] In one sentence a trustee is liable for a breach of trust if there was in him an intention to prejudice, or an act or default which prejudiced, the trust.[57]

(*b*) *Section 23.*—As laid down by the section, a trustee is liable for breach of trust. Liability presupposes existence of duty and a trustee is under an imperative duty to execute the trust. As has been said, it has been the constant habit of courts of equity to charge trustees for breach of trust and to charge their representatives also, whether they derive benefit therefrom or not. The section clearly states that such a trustee is liable to make good the loss occasioned to the trust-property or to the interest of beneficiaries. But a trustee will not incur liability if (*i*) he was induced by fraud of the beneficiaries[58], or (*ii*) the beneficiaries have concurred therein, or (*iii*) have subsequently acquiesced therein with full knowledge of their rights and the facts.

The liability of a trustee for breach of trust does not depend upon benefit received by him, but upon an act or omission. Remaining passive is equally a breach of trust where a trustee is required to act. Equity will not tolerate this passivism or set a premium upon inactivity of a trustee. Breach of any of the duties as detailed in Sections 11 to 20 will result in breach of trust.[59] Section 23, Illustrations, (*a*) to (*g*) explain that (*i*) where a trustee improperly leaves the trust-property outstanding, which is consequently lost, (*ii*) where on account of his neglect, sale of a trust-property is unduly delayed and a consequent loss in the form of fall of price ensues, (*iii*) where unreasonable delay in investing trust funds invites a loss of interest to trust-property or to the beneficiary, (*iv*) where a loss results from retaining trust money in trustee's hands, while they could have been invested in government securities as explained in Section 20, and (*v*) where a loss results from his selling of the trust land which he should not have done; in all such cases he is liable for breach of trust.

(*c*) *Measure of liability.*—The measure of liability for breach is the loss caused to the estate which will have to be paid with interest as explained in Section 23. A point to be noted here is that the loss caused to the trust-property must be attributable to, or must be capable of being connected with, the breach of trust by the trustee, i.e., a causal connection must be established between the act or omission of a trustee and the loss resulted.

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56. *Halsbury's Laws of England*, Vol. 26, pp. 184-185.
57. *Townley* v. *Sherborne*, (1634) Bridg J 35. See *Mahesh Chandra* v. *Regional Manager, U.P. Financial Corpn.*, (1993) 2 SCC 279: AIR 1993 SC 935: (1993) 78 Comp Cas 1: (1993) 2 Guj LH 337.
58. *Overton* v. *Banister*, 1884 Herr 503.
59. *Tirupatiraidu*, ILR 38 Mad 71.

In *Official Trustee of T.N.* v. *Udavum Karankal*[60], a question was raised whether the Official Trustee had acted in undue haste and in an irresponsible manner in proceeding to demolish the building without obtaining specific orders of the court, to the detriment of the trust. As the facts go predecessor of Official Trustee obtained sanction from the High Court for conversion of tiled roof of marriage hall belonging to the trust into RCC roof and for providing other amenities at a cost of Rs 6 lacs, to augment trust income. Official Trustee, however, after obtaining opinion of architect, decided to demolish the entire structure and re-erect the same at a cost of Rs 10 lacs. He accordingly demolished the structure and applied to the High Court for sanction of the revised plan. High Court rejected the application and directed that expenditure in excess of Rs 6 lacs involved be borne by the Official Trustee himself. The case therefore came in appeal before the Supreme Court. The Supreme Court held that to the extent that the Official Trustee did not take the permission of the High Court before proceeding to demolish the existing structure, he did not commit a breach of trust. Nevertheless, he could not, in the circumstances of the case, be made personally liable for the breach. His intention in promoting the revised proposal was in the interest of the trust and his bona fides could not be impeached. He had acted on professional advice that the building had become old and dilapidated and that from the point of view of augmenting the income of the trust a new structure was desirable. The additional expenditure involved was also within reasonable bounds. Hence the High Court was not justified in fastening personal liability on the Official Trustee for the additional expenditure involved. Order of the High Court was therefore set aside.

(*d*) *No set-off: Section 24.*—In case there are more than one transactions and a loss results in one and a gain in another, a trustee cannot be allowed to set-off the loss against the gain obtained and thus cover his neglect or default and get out of the liability. But if gain and loss both are in one and the same transaction it can be adjusted.[61] In other words, the measure of a trustee's liability is the whole loss or the whole gain, e.g., if he wrongfully sells stock and applies the proceeds for his purpose, he is liable for the amount necessary to replace the whole stock.[62] There can be no adjustment between two distinct breaches of trust. Not only this, but he is also liable to pay interest thereon as laid down by the section.

(*e*) *Liability for Interest: Section 23.*—No interest is payable by a trustee except in the following cases—

(*i*) where he has actually received it;[63]

(*ii*) where he has delayed payments to the beneficiary;

(*iii*) where he ought to have received interest, but has not done so;

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60. 1993 Supp SCC 509, 517, 518: AIR 1993 SC 1472.
61. *Fletcher* v. *Green*, 33 Beav 426.
62. *Sadler* v. *Lea*, 6 Beav 824.
63. *Emmet*, 17 Ch D 142.

(*iv*) where he may be fairly presumed to have received it, e.g., if he has employed trust-property in private trade;[64]

(*v*) where he fails to invest trust money[65] (a gross misconduct amounting to a direct breach of trust); and

(*vi*) where he employs the trust-property in trade or business.

In all such cases a trustee is liable to make good the loss to the trust-property along with the interest at the rate of six per cent. It must be noted that the rate of 6% interest is very low and it must be raised substantially as the occasion demands. The old rate of 6% therefore requires a suitable amendment by the Parliament.

For following the trust-property or its proceeds into the hands of a trustee or his legal representatives, there is no bar of the Limitation Act.[66]

(*f*) *Co-Trustees*: *Liability and non-liability* (*Sections 25, 26, 27, 28, 29, 30*).—As provided by Section 26, one trustee is not liable as such for a breach of trust committed by his co-trustee; but this non-liability is there only when he behaves in accordance with the provisions of Sections 13 and 15.

If there is no express declaration about such liability in the instrument of trust, a trustee is so liable for his co-trustee's default in the following cases—

(*i*) where he delivers property to co-trustee without seeing to its proper application;

(*ii*) where he allows his co-trustee to receive the trust-property, but fails to inquire into the dealings made by the co-trustee; or

(*iii*) where he allows him to retain it for a period longer than required; or

(*iv*) where he actively conceals or does not take proper steps to protect the property from his co-trustee's breach of trust, either committed or intended.[67]

The gist of the section may be expressed thus that a trustee must properly delegate, he must employ fit and proper persons, the delegation should not last for a period longer than necessary, and he must look into the acts of the agent and check whether he properly performs them or not. Thus a trustee is liable for his co-trustee's acts if he has allowed things to take place knowingly, the result whereof is fraud; and he actively involves himself therein. But where he is not so involved, there is no liability.

A trustee succeeding another is not liable for the acts or defaults of his predecessor (Section 25). And he is not even liable for default of his co-trustees. The law as to liability of a trustee for the default of his co-trustee is discussed in the leading cases of *Townley* v. *Sherborne* and *Brice* v. *Stokes* in England.[68]

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64. *See* Section 10, Indian Limitation Act.
65. See *Hukum Chand* v. *Fulchand*, AIR 1955 SC 1692.
66. *Ibid.*
67. Based on the decision of *Wilkins* v. *Hogg*, 3 Gift 116.
68. (1634) Bridg J 35 and (1805) 11 Ves 319.

Co-trustees jointly committing a breach of trust, or enabling one to commit such a breach, make each one liable to the beneficiary for the whole of the loss so occasioned. Each is therefore liable to contribute equally towards the loss.[69] On the analogy that there is no contribution between joint tort feasors,[70] a trustee who has committed a fraud is not entitled to contribution from his co-trustee (Section 27). When one of the co-trustees committing a breach of trust becomes a beneficiary thereafter, he will be liable for the loss occasioned by his breach to the extent of his interest in the trust-property.[71] Where a loss is occasioned due to wrong advice of a trustee on whom others are entitled to rely, the trustee so advising will have to indemnify his co-trustees. Section 27 explains this.

Section 28 lays down the non-liability of a trustee paying without notice of transfer by a beneficiary. Section 29 provides one more liability of a trustee to hold the trust-property for the benefit of persons directed by the State Government, in case of forfeiture of the beneficiary's interest. Section 30 limits the liabilities of trustees to such moneys, stocks, funds and securities as they actually receive and they shall not be answerable for the acts of a banker, broker or any person in whose hands trust-property may be placed, nor for insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses. This section therefore provides an indemnity for trustees.

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69. *Jackson* v. *Dickinson*, (1903) 1 Ch 947.
70. *Merryweather* v. *Nixon*, (1799) 8 TR 186.
71. Such a trustee's beneficial interest will be impounded in accordance with the rule in *Dacre case, Re*, (1916) 1 Ch 344.