CHAPTER XI

RESULTING AND CONSTRUCTIVE TRUSTS

(I)

§ 59. Resulting Trusts.

A Resulting Trust is a *trust which arises in favour of the person creating it or his representatives*. It is so called, because in it the beneficial interest in the property 'results' or comes back to the person who transferred the property to the trustee, or provided the means of obtaining it. It may also be called an **Implied Trust** (after *Snell*) inasmuch as it is founded on "an unexpressed but *presumed intention of the* party creating it". As *Lewin* points out, Resulting Trusts arise, either (*a*) where a person being himself both legally and equitably entitled makes a *conveyance*, devise or bequest of the legal estate, and there is no ground for the inference that he meant to dispose of the *equitable* interest, or (*b*) 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. Resulting Trusts are thus divisible into two broad classes [cf. ss. **81** and **82** of the Indian Trusts Act]. Let us now examine the chief varieties of Resulting Trusts falling under each class:—

(A) Arising out of gifts: The general rule as to these is that wherever upon a conveyance, devise, or bequest, it appears that the grantee, or legatee was intended to take the legal estate merely, the *equitable* interest (or as much thereof as is left undisposed of) will result to the settlor (*Lewin*). *If the settlor is dead, it will result in favour of his representatives.*[1] Now the

1. That is to say, (*i*) if the trust arises out of a devise, or bequest (i.e., under a will), and there is a residuary devisee or residuary legatee, the trust will result in favour of the residuary devisee or legatee, as the case may be. But (*ii*) if there is no residuary devisee or legatee, or the trust arises out of a conveyance *inter vivos,* it will result in favour of the persons entitled under intestacy. Now in England, prior to 1926, different persons entitled under intestacy under the common law rules as to succession, according as the property was *realty or personalty*. The former went to the *heir*, and the latter to the *next of kin* of the deceased. But the Administration of Estates Act, 1925, has abolished all distinction between realty and personalty as to intestate succession, and has laid down a uniform list or persons entitled under intestacy, irrespective of the nature of the property. Consequently, since 1926, the persons to be benefited by a resulting trust will be the same, whether the property be realty or personalty, viz., those enumerated in the above Act.

It is to be noted that inasmuch as there is no such distinction in INDIA between immovable and movable property for succession, the resulting trust will arise for the benefit of the settlor's 'Legal representative' in all cases where the settlor is dead (cf., s. 81, Indian Trusts Act).

intention of *excluding* the person invested with the legal estate from the enjoyment of the beneficial interest in the property may or may not be expressed.

(1) The intention of excluding the donee is expressed—(*i*) Where the owner conveys property '*upon trust*', but declares no trust.[2] Here the trustee is excluded, by the very fact of being named trustee, from benefiting from the trust property; or (*ii*) where the owner conveys property upon trusts which do not, or for unforeseen events, cannot *exhaust* all the interest in the property[3], the unexhausted residue will result; or (*iii*) where the trust fails[4] by reason of offending against some rule of law, e.g., the rule against perpetuities. In none of these cases can the trustee defeat the resulting trust by extrinsic evidence by parol, showing that the settlor meant him to enjoy the property in case the trusts failed. And even if the settlor has died without any representatives who can take under him, the trustee cannot take any benefit (unless he himself is a representative) and the property will then go to the Crown as *bona vacantia*.

(2) The intention that the donee shall be a trustee may not be expressly declared—Where property is conveyed *inter vivos without consideration*.[5] In such a case there was, prior to 1926, a presumption that he did not intend a gift and, consequently, the donee must hold as trustee for the donor. The doctrine of resulting trust in this case, however, differs from the cases mentioned above where there is a declaration of trust, for in the present case, it is no absolute rule but a mere rule of presumption,—and being a presumption, is rebuttable (*a*) by *extrinsic evidence* to show that the *donor intended the donee to enjoy the property* and (b) by a contrary equitable presumption known as the *Doctrine of 'Advancement'* [*see* below] arising out of relationship of the parties. (It is to be noted that this presumption has been negatived by the Law of Property Act, 1925, by enacting that in a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressly conveyed for the use of benefit of the grantee).

(B) Arising from purchases: The general rule is that where a person purchases something 'in the name of a third person', a trust results for the purchaser (or his representatives). This is, however, not an absolute rule, but a rule of presumption which varies according as the conveyance is to a stranger or to a relation of the purchaser.

(1) If the conveyance is to a stranger, there is a presumption that the purchaser did not intend to benefit the transferee. "The trust of a legal estate, (*a*) whether taken in the name of the purchaser and others jointly, or (*b*) in the name of others without that of the purchaser, results to *the man who advances* the purchase-money" [*Dyer* v. *Dyer*, (1788) 2 Cox 92]. And even if

2. *See* ill (*a*) to s. 83, Indian Trusts Act.
3. *See* ill (*c*) to s. 83, Indian Trusts Act.
4. *See* ill (*d*) to s. 83, Indian Trusts Act.
5. *See* ill. (*a*) to s. 81, Indian Trusts Act.

the advance of the purchase money does not appear on the face of the deed, parol evidence is admissible to prove that the nominal purchaser (i.e., to whom the property has been conveyed) was only an agent of the real purchaser. But the presumption of resulting trust is rebuttable by parol evidence showing that the nominal purchaser was *intended* to take the beneficial interest.

(2) If the conveyance is to the purchaser's wife or child, the presumption is the other way, viz., that the purchaser intended to benefit the wife or child. This presumption is known as the Presumption of Advancement.[6]

The presumption rebuts the presumption of a resulting trust arising from purchases in the names of third persons (or from voluntary gifts). Since the doctrine of resulting trusts is based upon the presumed intention of the purchaser (or donor), it will not arise where the relation existing between the true and the nominal purchaser (or the donor and the donee) is such that it may be presumed that a *gift was intended*; and this presumption of advancement will be raised in all cases where the purchaser (or donor) is under an obligation to support or to make provision for the latter.[7] The presumption is raised in favour of (1) *a legitimate* (but not illegitimate) child of the purchaser, (2) a person to whom the purchaser has placed himself in *loco parentis*, including an illegitimate child, and (3) *wife of* the purchaser (but not a woman with whom he is not lawfully married). This presumption of advancement is again rebuttable by parol evidence to the contrary such as (*a*) the *contemporaneous acts* and declarations of the purchaser which are receivable in evidence both for and against him, or (*b*) the subsequent acts and declarations of the purchaser, which are evidence against him, but not for him. The acts and declarations of the other party are similarly receivable in evidence. Thus, the fact that the son is acting as his father's solicitor would be sufficient to rebut the presumption.

(II)

§ 60. Constructive Trusts.

A Constructive Trust has been defined as a trust 'which is raised by construction of equity, in order to satisfy the demands of justice without reference to any presumable intention of the parties, either express or implied' (*Snell*). (It thus differs from a resulting trust which arises out of a presumed *intention* of the grantor). Similarly, *Strahan* puts it—

"A *constructive* trust arises where a person becomes possessed of property

6. The presumption of advancement does not exist in India (see Ch. IX, *post.*).

7. *Dyer* v. *Dyer,—D* paid the purchase money for certain property and took the conveyance to himself, his wife, and a son *W*, jointly, *D* survived his wife and then died, devising all his interest in the property to the plaintiff (his younger son), who filed this bill against *W*, insisting that as the purchase money was all paid by *D*, *W* (the defendant) was but a trustee. *Held*, that though, if no relationship existed there would be a resulting trust in favour of the person paying the purchase money, yet the circumstance of the nominee, being the child of the purchaser, operated to rebut the resulting trust, and the defendant took the property beneficially as an advancement from his father.

through such an abuse of confidence reposed in himself or another as will induce the court to hold that in conscience he is bound to hold it for the benefit of the person injured by the breach of confidence."

The principle followed here is that a person occupying a *fiduciary* position must not take advantage of his position to make personal profit for himself, where to do so might create a conflict between his duty and interest. If he makes any such profit, he becomes *'a trustee of the advantage* so gained'. But though the primary application of the doctrine is to persons occupying a fiduciary position, it is not confined to that case alone, and even strangers may sometimes be bound by a constructive trust. Let us examine the two cases separately :

(A) Persons occupying fiduciary position when bound.—Firstly, a **trustee** who 'gains any personal advantage by availing himself of his situation as trustee, becomes a constructive trustee of the advantage so gained'. A common illustration of this rule is the *renewal* by a trustee *of a lease* that he holds on trust. It was decided in *Keech* v. *Sandford* [(1726) 2 W. & T. 693] that a trustee, renewing a lease held on trust in his own name, even after refusal of the lessor to grant a lease to the *cestui que trust*, will hold the renewed lease upon trust for the *cestui que trust*. In this case, the lessor refused to renew the lease to the *cestui que trust* because he was an infant, whereupon the trustee got a lease made to himself. *Held*, that the trustee must hold the renewed lease on trust for the infant, and must assign the same to him and account for the profits. It should be noted in this connection that where a person who has renewed the lease is held to be a trustee, he has a lien upon the estate for the costs and expenses of the renewal with interest [*Lacon* v. *Martins*, (1743) 3 Atk. 1].

The rule in *Keech* v. *Sandford* has been extended also to mortgagees, tenants for life, partners, joint tenants and the like persons having only a partial interest in a leasehold. "If trustees, mortgagees and persons interested obtain renewal, the new lease is always subject to the trusts and limitations of the old lease" [*Rowe* v. *Chichester* (1773) Amb. 715 (719)]. But in the case of persons other than trustees, the presumption of constructive trust is not absolute but is rebuttable,—if they can show that they did not in any way abuse their position [*Re Biss*, (1903) 2 Ch. 40].[8]

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8. In INDIA, the case of a TENANT FOR LIFE obtaining renewal is dealt with in s. 90 of the Trusts Act, which makes it clear that it applied only where the renewal is obtained by the life-tenant *"availing* himself of his position as such".

The case of a *mortgagee* is dealt with in s. 64 of the T.P. Act, but this provision is different from the English rule in so far as it makes the presumption statutory and *irrebuttable*—

"Where the mortgaged property is a lease and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, *shall*, in the absence of a contract to the contrary, have the benefit of the new lease."

To the same effect is ill. (*d*) to s. 3 of the Specific Relief Act.

S. 27(*e*) of the Transfer of Property Act embodies the equitable rule that since the mortgagor is entitled to the benefit of the renewal, the mortgagee should be reimbursed the expenses incurred for such renewal. Under s. 72(*e*), the mortgagee is entitled to add the costs of renewal to the principal money, with interest, unless there is a contract to the contrary.

This doctrine of constructive trust applied to the case of renewal of a lease applied equally to *any other advantage* of a valuable kind obtained by the trustee.

(2) Secondly, all persons who stand in a **fiduciary relation** other than trustees proper are also bound by the doctrine. Thus, if an agent acquires any pecuniary advantage to himself from third parties by means of his fiduciary character, he is accountable to his employer as a trustee for the profit he has made. Similar will be the case with executors, administrators, partners, attorneys etc.

(B) Strangers to a trust when bound.—The doctrine is so very wide that sometimes even a stranger to an already constituted trust may become chargeable as a trustee, though he does not stand in a fiducicary position. Thus,—

(*a*) Anyone who receives the trust property (*i*) as the representative of the trustee, or (*ii*) by virtue of a voluntary gift made by the trustee, or (*iii*) with actual or constructive notice of the trust, is a trustee. To put it shortly, anyone who receives the trust property otherwise than by purchase for value without notice is a constructive trustee of the same for the *cestui que trust*.

(*b*) Where a stranger to a trust assumes to act as a trustee, and in that capacity receives trust property, he is called a **trustee *de son tort*,** or a trustee of his own wrong. In other words, when trust property comes into the possession of a stranger to the trust who chooses to take upon himself the business of a trustee with relation to such property, he must account to the *cestui que trust* exactly as a properly appointed trustee would have to do. He cannot sit upon his own wrong, and escape liability, by saying that he had no right to act as a trustee. In this respect, the position of a transferee of the trust property with notice of the trust differs, inasmuch as such a person is a bare trustee and mere notice of the trust does not impose upon him any of the *duties* of a trustee; the only right which the *cestui que trust* can enforce against him is to follow the trust property in his hands [*Underhill*, Law of Trusts].

(*c*) A stranger to the trust may also incur the liabilities of a trustee by assisting, with knowledge, a trustee to commit a fraudulent breach of trust. But an agent of the trustee who assists in a breach, e.g., a solicitor who draws up a document in contemplation of the breach of trust, is not liable as a constructive trustee if he had no reason to suspect that any fraud was contemplated [*Barnes* v. *Addy*, (1874) 9 Ch. App. 244]. In this case it was observed—

"Strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity might disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

§ 61. Other cases of constructive trust—vendor's and purchaser's liens.

1. It is clear that the doctrine of constructive trust has been extended to a very great extent. Numerous other cases in which it arises may be specified. As *Snell* puts it, every case, not being a case of express or implied trust in which the legal owner of property is compelled in equity to hold it for the benefit of some other person, is, strictly speaking, a case of constructive trust.

2. An important species of constructive trust of this class is the **lien on land sold** which constitutes a charge in equity irrespective of possesion. Thus, (*i*) where the *vendor* has conveyed the property (i.e., legal estate) to the purchaser before he has received payment of the purchase money (wholly, or in part) he has, in *equity, a lien* on the property sold for the amount of the unpaid purchase money[9] [*Mackreth* v. *Symmons*, (1808) 15 Ves. 329]. This is known as the Vendor's Lien. It arises independently of any agreement between the parties, express or implied; the purchaser becomes a constructive trustee for the vendor to the extent to which the purchase money has not been paid, for it would be against his conscience to keep the property of another without paying the full consideration. Similarly, (*ii*) the *purchaser*, who has paid the whole, or any instalment, of the purchase money to the vendor before he has obtained a conveyance of the property, has a *lien* upon the property in the hands of the vendor for the amount of the purchase money prematurely paid by him, and to that extent the vendor is a trustee for him. This is known as the Purchaser's Lien [cf. cls. (4) (b) and (6) (b) of s. 55 of the Transfer of Property Act].

3. The vendor's lien is enforceable against (*a*) the purchaser, and his representatives, (*b*) all volunteers taking under him, (*c*) subsequent purchasers of the legal estate with notice, and (*d*) persons subsequently acquiring an equitable interest in the property, with or without notice, provided the vendor is not negligent [*Rice* v. *Rice*, see *ante*]. Like any other equitable interest, it cannot be enforced against anyone who has taken the legal estate for value without notice of the existence of the lien.[10] Again, the vendor

9. *Mackreth* v. *Symmons*.—*A* having agreed to sell land to *B* conveys it to him without receiving the whole of his purchase-money. *B* then gives an equitable mortgage of the property to *C*, who takes without notice of the fact that *A*'s purchase money remains unpaid. *B* then becomes bankrupt, and the trustees in bankruptcy take possession of the property. *C* gives notice of his equitable mortgage, and then *A* also gives notice about his unpaid purchase money. *Held*, that *A* had an equitable vendor's lien for the unpaid purchase money and that *C*'s right being also merely equitable, he could not obtain priority by giving prior notice, for, as between equitable rights and interests, the first in time prevails. (It should be noted that in such a case arising after 1926, the vendor's lien would not be enforceable unless it was registered as a land charge, *see* below).

10. In *England*, the Law of Property Act and the Land Charges Act of 1925 have dispensed with the doctrine of notice by requiring that the vendor's lien and the purchaser's lien on land must be registered as a land charge. Priority depends on registration or non-registration. The registration operates as actual notice to all persons. But if, after 1925, the lien is not registered, it will be void against any purchaser for value, *whether he has notice* of the lien *or not*.

may waive his lien expressly, or by taking another security for the purchase money. But a mere personal security will not be sufficient to discharge the lien (*Mackreth* v. *Symmons*). *The lien is enforceable by a sale of the property in the same way as in a mortgage*. [These incidents are common to the purchaser's lien also.]

§ 62. Trusteeship of the vendor under an agreement for sale.

Here we come across another species of constructive trust. To discuss the matter fully, we should analyse the **effects of an agreement of sale in equity**. We have already seen how an agreement for sale of land (provided it is specifically enforceable) is treated in equity as if the contract has been already completed. From the moment of the agreement the **purchaser** has an *equitable* estate in the land which is good against all who claim under the vendor except a purchaser for value of the legal estate without notice of the agreement. And this equitable estate he can convey to another, subject of course, to the vendor's lien for the unpaid purchase money. Another incident of this equitable ownership naturally follows, viz., that in the absence of an agreement to the contrary, the purchaser must bear the risk of any *accidental* loss to the property.

On the other hand, the **vendor,** though he is still the legal owner in possession and as such enjoys the rents and profits of the land until he is paid the price, is to some extent looked upon as one in possession of another man's property. He must take reasonable care of the property so long as it is in his possession, and must pay for any wilful damage. The property in his hands is looked upon a trust property in other respects also. Thus in *Lysaght* v. *Edwards* [(1876) 2 Ch. D. 499], where a man contracted to sell land, and the title was accepted, but before conveyance he died, having by his will devised his real estate to *X,* and all real estate held by him upon a trust to *Y,* it was held that the legal estate in the land sold passed under the latter devise and not under the former, for he had become a *trustee* of the land he had contracted to sell.

Nevertheless, as *Maitland* contends, this trusteeship of the unpaid vendor is a very peculiar trusteeship; one that stands by itself. He is not bound to convey the legal estate to the purchaser (who corresponds to the beneficiary in a trust) unless he is paid. In fact, in some respects, he is in the position more of a mortgagee than of the trustee. Not only can he refuse to deliver possession until he is paid, but he has also a right resembling that of a foreclosure, if the purchaser *will not pay.* At his instance, the Court will order the purchaser to pay within a reasonable time, and in default of payment the purchaser will lose his right to the land under the contract. After that order the vendor will be in the same position as that in which he was before the contract was made: he will be owner both at law and in equity.

§ 62A. Effects of an agreement for sale in India.

1. The English equitable doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate from the moment of the contract does not apply in India,[11] since s. 54 of the Transfer of Property Act (para. 6) expressly declares that a contract for the sale of immovable property does not create any *interest* in the property. The question of equitable ownership of the buyer or the trusteeship of the vendor, under an agreement of sale, does not accordingly arise.

2. Until the conveyance, the seller remains the owner, even though the buyer has paid the price and has taken possession in pursuance of the agreement. The buyer who has paid the price has, however, a charge on the property for his money under s. 55(6)(b) of the Transfer of Property Act, which resembles the English purchaser's lien (p. 150, *ante*), but it differs from the English equitable right which is liable to be defeated by a person acquiring the legal estate for value without notice of the lien. Since the amendment of s. 55(6)(b) of the Transfer of Property Act in 1929, the Indian charge is enforceable against any person claiming under the seller, irrespective of notice.

3. On the other hand, s. 55(4)(b) of the Transfer of Property Act gives a charge upon the property, to a vendor who has transferred it before payment of the whole of the purchase money, and this charge is enforceable by a sale of the property as in England. But it should be carefully remembered that the Indian charge differs from the English vendor's lien both in its origin and nature, as was pointed out by the Privy Council in *Webb* v. *Macpherson* [(1903) 31 Cal 57 P.C.]:

Firstly, the law in India knows nothing of the distinction between legal and equitable property in the sense in which that was understood by the Court of Chancery in England. A mere agreement to sell does not, in India, operate to transfer any interest in the property (s. 54), and as the whole ownership remains in the vendor, there cannot be any lien before the conveyance. The Indian charge, therefore, begins with the conveyance and not from the agreement for sale.[12]

Secondly, the vendor's lien is derived from an equitable principle (as explained above). It was a creature of equity and could be modified to the circumstances of the case by the Court of Equity. But the Indian charge is a creature of statute and is, therefore, more rigid. The English cases as to vendor's lien are not, therefore, authoritative in the interpretation of s. 55(4)(b) of the Transfer of Property Act.

Thus, being a statutory right, the Indian charge cannot be waived on equitable considerations which would have applied to the equitable lien

11. *Pir Bux* v. *Tahar*, (1934) 39 C.W.N. 34 (*39*) P.C.
12. *Radha Kishan* v. *Shridhar*, A.I.R. 1960 S.C. 1368.

in England. As the section provides, the charge can be excluded by contract, but each contract must be either an express contract to the contrary or an implied contract, i.e., some conduct inconsistent with the continuance of the charge. It is not excluded by a mere personal contract to defer payment of a portion of the purchase-money or to take the purchase-money by instalments.

But like the English lien, the Indian charge is also not available against a transferee for value without notice.

4. But though a contract for sale does not, in India, create an interest in land, it creates a personal obligation of a fiduciary character which is enforceable by a suit for specific performance against the vendor and any person subsequently acquiring any title from the vendor except a *bona fide* transferee for value without notice of the contract [s. 19(b), Specific Relief Act, 1963; illustration to s. 40 of the Transfer of Property Act]. S. 91 of the Trusts Act (see p. 165, *post*) shows that the obligation created by the contract is of a fiduciary nature and is available against a subsequent transferee with notice of the earlier contract and that the subsequent transferee would hold as a constructive trustee for the purchaser by the earlier contract. Hence, under **s. 91** of the Trusts Act, such a person may enforce his right against the subsequent transferee even without having recourse to a suit for specific performance.[13]

5. As against the vendor and persons claiming under him with notice of the contract, the buyer under a contract for sale has not only a right to sue for specific performance, he has also the right to defend his possession (if he had obtained it in pursuance of the agreement) under s. 53A of the Transfer of Property Act if the vendor or the person claiming under him with notice of the contract seeks to oust the buyer. But s. 53A has a limited scope, and where it does not apply, "an averment of the existence of a contract for sale, whether with or without possession following upon the contract is not a defence to an action for ejectment in India".[11] The remedy of the buyer in such a case is to obtain a stay of the ejectment suit and then to bring a suit for specific performance of his agreement, if that relief is not yet barred by limitation.

§ 62B. Resulting and constructive trusts under the Indian Trusts Act.

Though the terms 'Resulting' and 'Constructive' Trusts are not used in the Indian Trusts Act, 'Certain obligations in the nature of trusts' are dealt with in Chapter IX (ss. 80-94), and these sections virtually collect instances of Resulting (ss. 81-85) and Constructive Trusts (ss. 86-94). It would be convenient to notice the provisions of these sections under two groups.

13. *Moolla* v. *Official Assignee*, (1936) 40 C.W.N. 1253 (*1263*) P.C.

A. RESULTING TRUSTS

I. *Transfer without intending to dispose of the beneficial interest.*

Section 81 says—

"Where the owner of property transfers or bequeaths it, and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

This section includes the principles discussed under group (A), at pp. 149-50, *ante*. The intention of the owner of the property, as to whether he intended to dispose of the beneficial interest or not, is to be determined with reference to the circumstances that existed at the time of the transfer or bequest and not as they exist at any subsequent time thereafter.[14]

II. *Transfer to one for consideration paid by another.*

Section 82 says—

"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

This section deals with the common case of purchase by one in the name of another [p. 149, *ante*]. See also p. 167, *post*, on Benami Transactions.

III. *Trust incapable of execution, or executed without exhausting trust property.*

Section 83 says—

"Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative."[15]

IV. *Transfer for illegal purpose.*

Section 84 says—

"Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

This section adopts the principle laid down in *Cottington* v. *Fletcher* (2 Atk. 155)—"Where a trust is created for an unlawful purpose, the Court will neither enforce the trust in favour of the parties intended to be

14. *Raj Rani* v. *Dwarkanath*, A.I.R. 1953 S.C. 205 (210).
15. *Fazalbhoy* v. *Official Trustee*, A.I.R. 1979 S.C. 687.

benefited, nor will assist the settlor to recover the estate unless the illegal purpose fails to take effect."

The transferor loses the aid of equity once the fraudulent purpose is carried into effect.[16]

But the case would be outside s. 84 where both the transferor and transferee were in equal fraud in carrying out the transfer to defraud the creditors of the transferor and though the fraud has been carried out, the possession is still with the transferor. In such a case, in a suit by the transferee, for possession, it is open to the transferor to plead fraud and the absence of consideration.[17]

V. *Bequest for illegal purpose, or bequest of which revocation is prevented by coercion.*

Section 85 says—

"Where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Where property is bequeathed, and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative."

This section is to be read with the provisions of s. 4 [p. 125, *ante*] which lays down that a trust, in order to be valid, must be for a lawful purpose.

B. CONSTRUCTIVE TRUSTS.

I. *Transfer pursuant to rescindable contract.*

Section 86 says—

"Where property is transferred in pursuance of contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid."

When property is obtained by fraud, a Court of Equity construes a trust in favour of the transferor, because the transferee has not the equitable estate, though he has the legal one [*Re Rochefocauld*, (1897) 1 Ch. 196]. The same principle applies in the case of mistake or coercion, which makes a contract voidable under s. 19 of the Indian Contract Act and hence is liable to rescission under s. 35 of the Specific Relief Act.

In neither of these cases does the transferor intend that the transferee should have the beneficial interest.

16. *Petherperumal* v. *Muniandy*, (1908) 35 Cal. 551 P.C.
17. *Immani Appa Rao* v. *Ramalingamurthi*, A. 1962 S.C. 370.

II. *Debtor becoming creditor's representative.*

Section 87 says—

"Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein."

This section codifies the rule laid down in *Ingle* v. *Richards* [(1860) 28 Beav. 366] that a debt which an executor himself owes to the estate will be treated as assets in his hands not only for payment of debts, but also for the benefit of the beneficiaries, for, though at law the appointment of a debtor to be executor extinguished the debt, this is not so in equity, unless, of course, the testator himself forgave the debt [*Strong* v. *Bird*, (1874) 18 Eq. 315].

III. *Advantage gained by fiduciary.*

Section 88 says—

"Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

This is a codification of the principle discussed at p. 152, *ante*. Under this section would come all cases where a person standing in a fiduciary relationship with another benefits himself in respect of that position. The following are some instances of fiduciary relationship. [*see* also s. 90, p. 162, *post*] :

Agent.—An agent would come within this section only when he is bound in fiduciary relationship.[18] Every agent is not a fiduciary. The fiduciary relationship arises when property is handed over to an agent for investment, sale, safe custody, etc., but not if he merely collects rent or debts on commission [*Padoch* v. *Burt*, (1894) 1 Ch. 343].

An agent, who was authorised to invest money in other firms, unauthorisedly invested it in his own business and thereafter became insolvent. *Held*, that the money in the hands of the agent was trust money and that, accordingly, the principal could claim in respect of it priority as against the other creditors of the insolvent and that even the knowledge of the principal as regards the unauthorised dealing could not affect the fiduciary position.[19]

An agent cannot buy the property which is entrusted to him unless there is the most entire good faith and a full disclosure [*DeBusche* v. *Alt*. (1878) 8 Ch. D. 286]. (*See* also *post*.)

18. *Ganga Buksh* v. *Rudar Singh* , 22 All. 434 P.C.
19. *Murugappa* v. *Official Assignee*, A.I.R. 1937 P.C. 296.

Section 216 of the Indian Contract Act is also based on the same principle :

"If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it."

Partners.—The principle underlying the present section also underlies the provisions of s. 16 of the Indian Partnership Act (replacing s. 258 of the Indian Contract Act),[20] which are:—

"Subject to contract between the partners,—(*a*) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

(*b*) If a partner carries on any business of the same nature as and competing with that of the firm, he shall account and pay to the firm all profits made by him in the business."

Hence arises the presumption that a renewal of a lease by one partner enures to the benefit of all partners. But the presumption is one of fact and is, therefore, rebuttable.[21]

Co-decree-holder.—When one of several co-decree-holders executes the joint decree and purchases property of the judgment-debtor in execution, the purchase enures to the benefit of all the decree-holders and the other decree-holders are entitled to recover proportionate shares in the property purchased, on payment to the executing decree-holder, their shares of the costs incurred by the latter.[22]

Co-mortgagee.—Where one of several co-mortgagees institutes a suit to enforce the mortgage, impleading his co-mortgagees as *pro forma* defendants and obtains a decree and purchases the mortgaged properties in execution thereof, the defendant mortgagees are entitled to a share in the property purchased subject to their paying to the plaintiff a proportionate share of the costs incurred by him.[22]

Purchase with joint funds.—When a property is purchased by a person with funds belonging to himself and other persons, the purchase enures to the benefit of all the persons interested in the funds, in proportion to their shares in the joint funds.[20]

Solicitor.—1. A solicitor, as a general rule, should not, in any way whatever, either personally or through his wife or through his son in respect

20. *Annamalai* v. *Chettiar*, (1930) 35 C.W.N. 145 (*147*) P.C.
21. *Govararaju* v. *Sitaramamurthy*, A. 1959 S.C. 190.
22. *Ganga Sahai* v. *Kesri*, A.I.R. 1915 P.C. 81.

of any transaction in the relations between him and his client, make any gain himself, at the expense of the client, beyond the amount of his fair professional remuneration [*Tyrell* v. *Bank of London*, (1862) 10 H.L.C. 26].

2. In respect of a gift made by a client to his solicitor, there must be a complete absence of fraud, misrepresentation, or even suspicion, and there must also be a cessation of the confidential relation [*Wright* v. *Carter*, (1903) 1 Ch. 27]. He cannot obtain a gift from his client so long as the relationship subsists [*Tomson* v. *Judge*, (1855) 3 Drew 306].

3. A solicitor is absolutely incapacitated from purchasing the interest of his client in the subject-matter of a pending action, though the purchase would be good if effected before the purchaser became the vendor's solicitor [*Simpson* v. *Lamb*, (1857) 7 E. & B. 84]. In other cases, there is no absolute bar, but if the purchase is impugned, it is for the solicitor to prove that he gave full value for it, and that there was full disclosure [*Demerara Co.* v. *Hubbard* (1923) A.C. 673]. Even where the solicitor is otherwise entitled to purchase, if, instead of openly purchasing, he purchases in the name of his trustee or agent, without disclosing that fact to his client, such purchase cannot stand [*Lewis* v. *Hillman*, (1852) 3 H.L.C. 607]. Where a purchase is made by an attorney from his client, he must, to be on the safe side, insist on the intervention of another professional adviser [*Pisane* v. *Att. Gen. for Gibraltar*, L.R. 5 P.C. 516].

IV. *Advantage gained by exercise of undue influence.*

Section 89 says—

"Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced."

Illustration (b) to s. 3 of the Specific Relief Act, 1877 was also founded on the same principle—

"*A* is the legal medical or spiritual adviser of *B*. By availing himself of his situation as such adviser, *A* gains some pecuniary advantage which might otherwise have accrued to *B*. *A* is a trustee for *B*. within the meaning of this Act, of such advantage."

See also *Huguenin* v. *Baseley*, (1807) 15 Ves. 180; *Allcard* v. *Skinner*, (1887) 36 Ch. D. 145, in Ch. XV, *post*.

V. *Advantage gained by a qualified owner.*

Section 90 says—

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where

any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage."

Tenant for life.—Already discussed at p. 152, *ante.*

Co-onwer.

(A) *England.*—There is ordinarily no fiduciary relation between tenants-in-common so as to impose an obligation on one co-owner to protect the interests of other co-owners [*Kennedy* v. *De Trafford,* (1897) A.C. 180].

(*B*) *India,*—1. This principle is applicable also *in India.* Section 90 of the Trusts Act applies only where one co-owner is placed in such a relation to another by the *act* or *consent* of another, that he becomes interested for him and with him in any subject of property or business, and being in the position he, acting for himself or as representing another, gains an advantage in derogation of another's rights.[23]

2. This section, however, does not exclude the application of the general principles relating to fraud. Thus, where one co-sharer *deliberately* defaults in payment of his share of the revenue,[23] or rent,[24] "with a view to ousting his co-sharers and appropriating to himself their common property", and purchases the property put up for sale for the arrears, he holds the property so purchased, for the benefit of all the co-sharers and the latter would be entitled to obtain a reconveyance to the extent of their shares on payment of the proportionate expenses together with interest thereon.[25]

A minor had taken mortgage of a 3-anna share of a property but his agents made intentional default in payment of the revenue for which the minor was responsible as mortgagee, with a view to have the property brought to sale and purchased on behalf of the minor. The co-sharers, who knew nothing of the default or the sale, brought a suit against the minor for a declaration that the auction sale at which the minor had been purchaser, should be set aside on the ground of fraud. *Held,* that not only was there a fiduciary relationship between a mor'gagor and mortgagee but also between the mortgage of a certain share and the owners of the other shares in the property. Even though there was no actual fraud on the part of the minor, the deliberate default with a view to take advantage of the result of such default, which was committed by his agents, amounted to a breach of trust, and the minor could not retain such advantage.

However free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor, therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents were responsible.

Nor can he be permitted to hold for himself this advantage to the prejudice of

23. *Sorabjee* v *Dwarkadas,* A.I.R. 1932 P.C. 199.
24. *Satdeo* v. *Kamal,* A.I.R. 1953 Pat. 27.
25. *Deonandan* v. *Janki,* A.I.R. 1916 P.C. 227.

the co-owners. For this purpose the mortgagor and mortgagee may be identified; they together represented the 3-anna share and theirs was the obligation to pay their quota of the revenue. Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are *not shown to have been aware of the default or sale, or disentitled themselves to this equitable relief.*'[26]

3. But the other co-sharers would be disentitled to this relief where they themselves are in arrears.[27]

Mortgagee.—Under this section, a mortgagor is entitled to the acquisition made by the mortgagee only on establishing that the acquisition was made by the mortgagee '*availing himself* of his position *as mortgagee*', and on payment to the mortgagee of the cost of his acquisition.[28]

Where an obligation is cast on the mortgagee and in breach of the obligation he purchases the property for himself, he stands in fiduciary relationship in respect of the property so purchased for the benefit of the mortgagor, for no one can be allowed to benefit from his own wrongful act.[29]

1. *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale, and he becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred as mortagee, *B* holds the land for the benefit of *A*.[30]

2. A usufructuary mortgagee of a tenant's interest was bound under the terms of the mortgage to pay the rent due to the landlord. He did not pay the rent with the result that the property was brought to sale for arrears of rent and the mortgagee purchased the property. The mortgagor sued for redemption and the mortgagee contended that the relationship of mortgagor and mortgagee ceased and that the suit for redemption was not maintainable.

Held, the right to redeem was not extinguished, for the case attracted the provisions of s. 90 and in the eye of law the purchase in the rent sale must be deemed to have been made in trust for the mortgagor and therefore the suit for redemption was maintainable.[29]

S. 90 will not, however, be attracted where the mortgagee does not gain any advantage availing himself of his position as such or of a situation brought about by his own default.[31] The position will be different if both the mortgagor and mortgagee were in default in paying rent for the mortgaged property, but at the execution sale the mortgagee purchased the property,[32] because in such a case not only does the mortgagee acquire an advantage, but such gain is also in derogation of the mortgagor,—the other person interested in the property.[29]

26. *Deonandan* v. *Janki*, A.I.R. 1916 P.C. 227.
27. *Anath* v. *Dwarka*, (1939) 43 C.W.N. 529 P.C.
28. *Sorabjee* v. *Dwarkadas*, (1932) 36 C.W.N. 947 P.C.
29. *Mrutunjoy* v. *Narmada*, A.I.R. 1961 S.C. 1353.
30. Ill. (c) to s. 90, Trusts Act, see also *Deonandan* v. *Janki*, A.I.R. 1916 P.C. 227, *ante*.
31. *Sachidanand* v. *Sheo Prasad*, (1965) 2 S.C.J. 458.
32. *Basmati* v. *Chamru*, A.I.R. 1964 S.C. 1707.

Section 63 of the Transfer of Property Act deals with only one kind of acquisition by a mortgagee, viz., an accession, but it must be read subject to sec. 90 of the Trusts Act; that is to say, s. 63 of the Transfer of Property Act does not entitle the mortgagor to recover acquisitions made by the mortgagee for his own benefit, in circumstances which do not bring him within s. 90 of the Trusts Act.

The mortgagee of share of a village also became a co-owner by the purchase of a half share in the equity of redemption and the purchase of two fields. He purchased the tenancy right in the fields during the continuance of the mortgage, as he required them for the purposes of a ginning factory. On redemption, the mortgagor claimed the *tenancy right,* as an accession under s. 63 of the T.P. Act. *Held,* the acquisition was made by the mortgagee for his own benefit, and that, accordingly, the mortgagor was not entitled to recover the acquisition unless he could show, in terms of s. 90 of the Trusts Act, that the mortgagee acquired it by availing himself of his *position as mortgagee.*[28]

VI. *Property acquired with notice of existing contract.*

Section 91 says—

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

This section adopts the maxim that whenever persons agree concerning any particular subject, that in a Court of Equity, as against the party himself, and anybody claiming under him, *voluntarily or with notice,* raises a trust

[*Legard* v. *Hodges* (1792) 1 Ves. 477]. This is an instance of a contract raising a trust.

VII. *Purchase by person contracting to buy property to be held on trust.*

Section 92 says—

"Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract."

This section is founded on the doctrine of Performance, which has been already noted at p. 38, *ante*.

VIII. *Advantage secretly gained by one of several compounding creditors.*

Section 93 says—

"Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors, the advantage so gained."

This section is somewhat analogous in principle to the preceding one.

IX. *Constructive trust in cases not expressly provided for.*

Section 94 says—

"In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."[33]

33. *Mathalone* v. *Bombay L.A. Co.*, (1954) S.C.R. 117.

CHAPTER XII

BENAMI TRANSACTIONS IN INDIA

§ 63. Nature of Benami Transactions.

1. Purchases in the name of others are known in India as benami transactions. The custom of purchasing properties *benami* in the name of third persons is very frequent in India among the Hindus and Mahommedans, and has been recognised by the Courts for a long time. He who pays the purchase money is the real owner and not the person in whose name the purchase is made. The knowledge or assent of the person in whose name the transfer is made is immaterial.

2. *Benami* literally means 'without name', i.e., a transaction effected by a person without his own name. The person in whose name the transaction is effected is called *benamdar.* Benami transactions are not confined solely to purchases but extend also to leases, mortgages and gifts,—the object being to conceal the real owner,—sometimes to avoid creditors and sometimes merely from habit or superstition. The legal characteristic of these transactions is that there is no intention to benefit the person in whose name the transaction is made.

"A *benami* conveyance is not intended to be an operative instrument ...... where a transaction is once made out to be a mere *benami* it is evident that the *benamdar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested."[1]

§ 64. Benami and Resulting Trust.

1. A benami transaction resembles a resulting trust inasmuch as the beneficial ownership under both systems is to be determined by the *source* from which the money came with which the transaction was made.[2-3] Further, as between the real owner and the *benamdar,* the latter is in a position of a trustee, inasmuch as he holds the property for the benefit of the real owner and also represents the real owner to the world and any proceeding by or against the *benamdar* binds the real owner.

2. But a *benamdar* is not a trustee in the strict sense of the term. He has the *ostensible* title to the property standing in his name, but the property

1. *Petherperumal* v. *Muniandy,* (1908) 35 Cal. 551 (558) P.C.; *Meenakshi Mills* v. *C.I.T.*, A.I.R. 1957 S.C. 49.

2. *Gopeekristo* v. *Gangaprosad,* (1854) 6 M.I.A. 53.

3. *Bilas* v. *Desraj,* (1915) 37 All. 557 P.C.

does *not vest* in him, but is vested in the real owner.[4] The real owner, unlike the *cestui que trust,* has got the legal title, and can bring suits to enforce his rights in respect of the property even without reference to the latter.[5] The *benamdar* has some of the liabilities of a trustee but not all the rights of him. When it is said that the *benamdar* holds the property as a trustee for the real owner, we must not suppose that he holds the office of a trustee and is charged with the administration of a trust. Thus, a *benamdar* incurs no liability if he does not protect the property standing in his name.

3. The Indian law of *benami* also differs from the English doctrine of resulting trusts in that the **presumption of 'Advancement'** (pp. 150-51, *ante*) has not been applied in India on the ground that it is a rule of English positive law, and not founded on natural justice.[6] Owing to the widespread practice prevailing in India, for owners of property to make grants and transfers of it *benami,* without the slightest intention of vesting in the donee any beneficial interest in the property, no exception has ever been engrafted on the general law, negativing the presumption of resulting in favour of the person providing the purchase money.[7]

In *Guran* v. *Ram,*[8] the Privy Council observed—

"The general principle of equity, applicable both in England and in India, is that in the case of voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor unless it can be proved that an actual gift was intended. An exception has, however, been made in English law, and a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in the name of a wife, or where a deposit is made, in the joint names of both husband and wife. This exception has not been admitted in Indian law under the different conditions which attach to family life, and where the social relationships are of an essentially different character."

Raghoram purchased Taluk Gherity *in the name* of his minor son Gangaprosad. Afterwards another son Gopeekristo was born to him. Raghoram died leaving a will whereby he bequeathed all his property to his two sons in equal shares. Gopeekristo brought this suit claiming that the taluk really belonged to his father and that he was entitled to half of it. Gangaprosad's contention was that it was an advancement to him, so that the entire property belonged to him. *Held,* that the presumption was that it was a *benami* purchase. The English equitable doctrine of advancement not being founded on natural justice, was not applicable to India, because "in India there is what would make it particularly objectionable, namely, the *impropriety* or *immorality* of making an *unequal* division of property among children." Gangaprosad, therefore, held as trustee for his father from whom the purchase money came; so Gopeekristo would be entitled to a half.[6]

4. *Gur Narayan* v. *Sheolal,* (1918) 23 C.W.N. 521 P.C.
5. *Controller* v. *Aloke,* A.I.R. 1981 S.C. 102 (paras. 30-32).
6. *Gopeekristo* v. *Gangaprosad,* (1854) 6 M.I.A. 53.
7. *Kerwick* v. *Kerwick,* (1920) 32 C.L.J. 490 P.C. (In this case, however, the English rule was applied in a transaction between two persons born of *British* parents in India, on the ground that the Indian usages did not apply in the case of such persons.)
8. *Guran* v. *Ram,* (1928) 48 C.L.R. 119 P.C.

4. Hence, the deposit by a Hindu of his money in a Bank in the joint names of himself and his wife and on terms that it is payable to either as survivor does not on his death constitute a gift by him to his wife.[9]

It is, however, open to establish by *evidence* that the husband *actually* intended to advance to the joint-holders in which case, the wife would take as the survivor.[10]

5. The rule is not confined to assets in the joint names of the deceased and his wife. It is of universal application whatever the relationship. Proof of contrary intention necessary to prevent a resulting trust in such cases is upon the person who wants to rely on such intention of the person who paid the money.[10]

(i) When it is alleged that a purchase by an Indian husband out of his money, but in the name of his wife, was made in pursuance of an ante-nuptial agreement, and that, consequently, it is not a benami transaction, the alleged ante-nuptial agreement must be proved by the clearest and most satisfactory evidence.[11]

On the other hand—

(*ii*) In a case of joint deposit in a bank in the names of the deceased and different relatives other than wife or children), an intention of advancement was held to have been established by the following circumstances: (*a*) So long as the depositor's wife was alive, he made the deposits in the names of himself and his wife; on the death of his wife, he transferred those investments in the names of different relatives jointly with himself, and when some of these relatives died, he transferred those investments in the names of other relatives. (*b*) Some of these relatives were destitute widows and some were *purdanashin* ladies who were unable and unfit to deal direct with banks.[10]

6. But though the presumption of advancement does not apply in India, very little evidence of intention would be sufficient to turn the scale, particularly when the alleged *benamdar* is a *child* of the real owner.[12-13]

Illustrations.

1. Where certain property was purchased by a Mahommedan father in the name of his minor daughter by a favourite wife, and the deed was produced, at the time of the daughter's marriage, for the inspection of her father-in-law, and it was represented to him that the property belonged to the girl, *held*, there was sufficient evidence of intention on the part of the father to make a gift of the property to her daughter.[12-13]

2. Where the plaintiff, who was about 45 years old, married the defendant, a young girl of the age of 8 as his fourth wife, and about 7 or 8 years after the marriage, purchased certain documents in the defendant's name and it appeared that it was his intention to exclude his senior wife and her sons from participation

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9. *Guran* v. *Ram*, (1928) 32 C.W.N. 817 P.C.
10. *Shambhu* v. *Pushkar*, (1944) 49 C.W.N. 27 P.C.: A.I.R. 1945 P.C. 10.
11. *Sura Lakshmiah* v. *Kothandarama*, (1925) 42 C.L.J. 8 P.C.
12-13. *Sidiq* v. *Fakhr Jahan*, (1931) 36 C.W.N. 137 (146) P.C.

in the property and to make a provision for the defendant, *held,* it was a case of gift to the defendant for her provision.[14-15]

§ 65. Gifts in favour of near relations.

1. But though presumption of advancement is not applicable in India; there is no resulting trust in the case of gifts in favour of a near relation like the wife, for, in such cases, it can be inferred from the relationship that the gift was intended for the wife's benefit (*see* s. 81, Trusts Act, *ante*). Hence there would in such cases be no resulting trust in favour of the husband and the wife would take the property beneficially. This is made clear by *ill.* (*d*) to s. 81, which says—

"*A* makes a gift of certain land to his wife *B.* She takes the beneficial interest in the land free from any trust in favour of *A.*"

2. In Mahommedan law, a gift is completed by delivery of possession, but as between a husband and wife, strict delivery of possession is not possible and other acts showing the intention of the donor suffice. Thus, where mutation of the wife's name in the public records is proved, the subsequent acts of the husband with reference to the property are presumed to be done by the husband on his wife's behalf and not on his own.[16] Even mutation is not necessary, if the deed of gift *declares* that the husband delivered possession to the wife, the deed is handed over to her and retained by her.[17]

§ 66. Burden of proof.

1. The burden of proof is no doubt upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things.[18] But as *benami* transactions are very familar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose.[19] Still the person who impugns its apparent character must show something definite to establish that it was a sham transaction. The decision of the Court should rest *not upon suspicion*[20] but upon legal grounds established by legal testimony[21] and beyond reasonable doubt.[22] The Court must look at the substance of the transaction as evidence by the deeds of the parties, not permitting the real question to be obscured by form of expression used or by recitals of obviously untrue statements.[23]

14. *Thulasi* v. *Official Receiver,* A.I.R. 1934 Mad. 671.
15. See also *Ismail* v. *Hafiz Boo,* (1906) 33 Cal. 773 P.C.
16. *Ma Mi* v. *Kallandar,* (1927) 31 C.W.N. 625 P.C.
17. *Sidiq* v. *Fakhr Jahan,* (1931) 36 C.W.N. 137 P.C.
18. *Matilal* v. *Kundan,* (1917) 21 C.W.N. 929 P.C.
19. *Mahabub* v. *Bharat,* (1918) 23 C.W.N. 321 P.C.
20. *Minakumari* v. *Bijoy,* (1916) 21 C.W.N. 585 P.C.
21. *Maniklal* v. *Bijoy,* (1920) 25 C.W.N. 469 P.C.
22. *Po Kin* v. *Po Shein,* (1926) 31 C.W.N. 252 P.C.
23. *Hanoomanpersaud* v. *Babooee,* (1866) 6 M.I.A. 393.

2. But direct evidence to prove a transaction to be *benami* cannot be expected since the whole object to such a transaction is to suppress evidence of the real facts. It can be proved only by circumstantial evidence, and several circumstances have been laid down by judicial decisions to be the principal tests for determining the real nature of such a transaction.

§ 67. Tests of a Benami Transaction.

I. *Source of consideration.*—The most important test for determining a *benami* transaction is the source[24] from which the consideration came.[25] But this is not the only criterion.[26]

Where from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming as to the payment of consideration or the evidence on neither side is conclusive, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts, having regard to the surrounding circumstances, the position of the parties, their relation to one another, the motives which could govern their actions and subsequent conduct, including their dealings with or enjoyment of the disputed property.[27] These latter considerations are all the more important, when there is no question of the source of consideration money, e.g., where a deed of gift is impeached as *benami* and *colourable.*[28]

II. *Position of the parties.*—The position of the parties and their relation to each other are to be taken into consideration in applying the tests that would govern the case. Thus, where the conveyance stands in the name of the wife, the fact of possession of the property and of the title-deeds would afford no criterion on the question of *benami*. The fact that the rent receipts were issued in the name of the wife or that she figured as plaintiff in rent suits against the tenants or that her name was entered in the record-of-rights would not also be of much importance, for these circumstances would be in accordance with *benami* usage by which the apparent state of things would ordinarily be kept up. The material points for consideration would be as to who paid the price, and the conduct of the parties.[29] Similarly, the mutation of the name of the son in the landlord's registers or the granting of receipts in his name and acts of this nature, are not inconsistent with the transaction being a *benami* one.[30]

III. *Motive.*—Motive is one of the circumstances usually to be taken into consideration.

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24. This is the principle underlying s. 82 of the Trusts Act which has already been reproduced, *ante*.
25. *Nrityamani* v. *Lakhan*, (1916) 20 C.W.N. 522 P.C.
26. *Ramnarain* v. *Hadi*, (1898) 26 Cal. 227 P.C.
27. *Dilip* v. *Nawal*, (1908) 30 All. 258 P.C.
28. *Monmohan* v. *Ramdei*, (1931) 35 C.W.N. 925 P.C.
29. *Joychand* v. *Dolegobinda*, (1943) 48 C.W.N. 454 (457).
30. *Sahdeo* v. *Usman*, A.I.R. 1939 Pat. 462.

But *benami* transactions are so frequently entered into without any apparent motive that where other circumstances clearly point to the *benami* character of a particular transaction, the mere fact that there is no apparent motive for the property being purchased in another person's name may not be sufficient to outweigh the cumulative effect of the other circumstances.[31]

In considering the question of motive, it should be determined whether it was to the advantage of the donor or grantor if the transaction was a real one or if it was ficititious.[32] Where the motive alleged for a *benami* transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a mere *benami* transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest.[32]

Illustration.

A mortgage was alleged to have been executed as a *benami* transaction, to avoid creditors. But the mortgage was for a considerably *less* sum that the *value* of the property and would not thus afford any present protection against the creditors. It is only a remote speculation to say that by accumulation of interest at a penal rate, the deed might in time be a protection. On the other hand, if regarded as a genuine transaction, it appeared that the advantages to the mortgagor were obvious. "He secured a diminution of the rate of interest which he had to pay, he obtained the benefit of one consolidated liability in place of a number, and he secured a friendly creditor."

Held, it was a genuine mortgage.[32]

IV. *Possession and enjoyment of profits.*—It has been already pointed out, in cases of allegation of gift, that the question of payment of the price of the property, obviously, is not of much importance. In such cases, actual possession is the most important criterion.[32-33] In the case of Mahommedans, however, the peculiarity of their law of gift should be kept in view.

Illustration.

Plaintiff purchased the property in the name of his agent and steward who had rendered valuable services to the plaintiff and his father for a long time. Defendant contended that the plaintiff's purchase in the defendant's name was intended to be a gift in return for the defendant's services. It was found that the defendant has been in possession on receipt of the rents for about 10 years without any demand from the plaintiff for accounts. *Held,* the payment of the purchase money was consistent with the defendant's case of gift. In such a case a much more important fact is the actual possession of the property. It was, in the present case, a gift and not a *benami* purchase.[34]

Hence, receipt of rents,[32-33] registration of name in revenue records[35] are relevant evidence to prove the real nature of the transaction.

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31. *Zinda Ram* v. *Ramrup*, A.I.R. 1935 Pat. 231.
32. *Dalip* v. *Nawal*, (1908) 30 All. 258 P.C.
33. *Imambandi* v. *Kamleswari*, (1886) 14 Cal. 109 P.C.
34. *Ramnarain* v. *Hadi*, (1898) 26 Cal. 425 P.C.
35. *Thakro* v. *Ganga*, 10 All. 197 P.C.

V. *Custody of title-deeds.*—Custody of the title-deeds, unexplained by any other circumstances, e.g., relationship between the parties, supports the title of the person in whose name the property stands.[36]

VI. *Subsequent conduct.*—Apart from possession, subsequent conduct of the parties in other matters may throw much light as to the real nature of the transaction. Thus, where a mortgage, alleged to be *benami,* was subsequently acknowledged, in collateral transactions, to be a genuine transaction by the mortgagor's heirs, though with the statement that it has been satisfied, *held,* that it was a circumstance, along with others, to determine that the mortgage was a real one.[37]

§ 67A. Limitations to the Doctrine of Benami.

Statutory Restrictions.

There has been a sea-change after the introduction and enforcement of the Benami Transactions (Prohibition) Act, 1988. This Act has been promulgated to prohibit *benami* transactions and the right to recover property held *benami* or matters connected therewith or incidental thereto. According to s. 6, nothing in this Act shall affect the provisions of s. 5 of the Transfer of Property Act, 1882 or any law relating to transfer for an illegal purpose.

Section 2(a) defines *benami* transaction as a transaction in which property is transferred to one person for a consideration paid or provided by another person. Under s. 2(c), 'property' means property of any kind, whether movable or immovable, tangible or intangible and includes any right or interest in such property. S. 3(1) prohibits *benami* transactions but under s. 3(2) nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for their benefit. According to s. 3(3), whoever enters into any *benami* transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

S. 4(1) prohibits the right to recover property held *benami.* No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. But nothing in s. 4 shall apply (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the

36. *Suleiman* v.*Mehndi,* 25 Cal. 373 P.C.
37. *Dalip* v. *Nawal,* (1908) 30 All. 258 P.C.

property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity. There is a total prohibition under s. 4 of the Benami Transactions (Prohibition) Act, 1988, against maintainability of any suit, claims or action for recovery of *benami* property. In *Om Prakash* v. *Jai Prakash*[37a] s. 4 was applied to dismiss a suit where the plaintiff claimed to be the real owner of the property purchased in the name of the defendants.

Under s. 5(1) all properties held *benami* shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed. S. 7 repeals the provisions of ss. 81, 82 and 94 of the Indian Trusts Act, 1882 and certain other Acts.

This Act of 1988, thus, supersedes the English equitable doctrine of constructive trusts in India, as regards *benami* purchases.

37a. *Om Prakash* v. *Jai Prakash*, A.I.R. 1992 SC 884 (para. 9).

CHAPTER XIII

TRUSTEES

(I)
APPOINTMENT AND REMOVAL

§ 68. Appointment of trustees—"A trust never fails for want of a trustee."

(A) *England.*

The *original* trustees are ordinarily appointed by the settlor himself by the trust instrument. But there may be cases, where a trust exists but there is no trustee to execute it, e.g., when no trustee has been appointed by the settlor though he has shown an intention to create a trust, or all the trustees have died or disclaimed, or are incapable to acting.

In such cases, the principle applied by a Court of Equity is that once a trust exists, "*Equity never wants a trustee*". Equity will follow the legal estate and declare the person in whom it is vested to be a trustee, and in no case will the lapse of the legal estate be allowed to affect the beneficial interest. Thus, (*i*) If a testator shows an intention to create a trust, but does not appoint a trustee, his personal representative is deemed a trustee. (*ii*). Similarly, if a sole trustee appointed by the settlor disclaims the trust, the property reverts to the settlor, or if he is dead, to his personal representative, who must hold upon the trusts specified. (*iii*) Again, when a sole or surviving trustee dies, the legal estate vests in his personal representatives, still subject to the trust; and they may execute the trust until new trustees are appointed, provided the trust instrument contains no contrary direction. [*See* also §71, *post.*]

(B) *India.*

S. 59 of the *Indian Trusts Act* is based on the same principle :

"Where no trustees are appointed, or all the trustees die, disclaim, or are discharged, c· where, for any other reason, the execution of a trust by the trustee is or becomes in practicable, the beneficiary may institute a suit for the execution of the trust and ·h trust shall, so far as may be possible, be executed by the Court until the appointment . trustee or a new trustee."

·. Disclaimer of trust.

·. No person is bound to accept a trust, and provided he has not done

anything from which acceptance of the trust may be inferred, he may disclaim, but the disclaimer must extend to the whole of the trust. Once he assumes any of the rights conferred on the trustee, he assumes all the duties of the trust also. Thus, taking of probate by an executor-trustee is an acceptance of the entire trust. At any rate, unless a trustee disclaims by deed, or word of mouth, or by conduct, his assent may easily be presumed. The disclaimer must be made within a reasonable period from the date of knowledge that he has been appointed trustee.

2. **S. 10** of the *Indian Trusts Act* codifies the above principles—

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

Instead of accepting a trust, the intended trusts 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 trusts property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust."

3. Disclaimer should be distinguished from renunciation subsequent to acceptance. **S. 46** of the Indian Trusts Act says—

"A trustee who has accepted the trust cannot afterwards renounce it except (*a*) with the permission of a principal Civil Court of original jurisdiction, or (*b*) if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of special power in the instrument of trust.[1]

§ 70. How a Trustee ceases to be a Trustee.

(A) *England.*

1. Once a trustee has accepted a trust, he can *lawfully* cease to be trustee only in one of the following ways :

(1) By death. (2) By duly winding up the trust by conveying the trust property to the beneficiaries who have become lawfully entitled to receive it and to give him a valid receipt for it. (3) By consent of all the beneficiaries being *sui juris* and competent to contract. Not only so,—if the beneficiaries, being of full age and under no disability, direct the trustee to do something with the property thereby putting an end to the trust, the trustee is *bound* to obey such direction, even if that act may constitute a breach of trust. (4) By virtue of a power given in the trust instrument to resign his office. (5) By retirement of a new trustee under provisions of the statute. (6) By order of discharge by the Court. (7) By *removal* against his will by the Court under provisions in the trust instrument, or under statutory powers.

2. Apart from these, the Court has an *inherent* power to remove trustees and to appoint new ones in their place whenever, in the opinion of the Court, the interests of the beneficiaries require it. Thus, the Court will remove a trustee

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1. *Abdul* v. *Mulla*, A.I.R. 1963 S.C. 309.

who has shown himself to be an unfit person for the office, e.g., when he becomes bankrupt or commits a breach of trust—on proceedings being taken against him by the beneficiaries. In *Letterstedt* v. *Broers*,[2] Lord Blackburn observed—

"The jurisdiction of the Court to remove trustees is merely ancillary to its principal duty, to see that the trusts are properly executed .... in exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle—that their main guide must be the welfare of the beneficiaries".[3]

3. These modes of vacating the office of the trustee are distinguished by *Maitland* from another mode which is *unlawful,* viz., the wrongful alienation of the trust property to a third person by the trustee in breach of trust.

(B) *India.*

Under **ss. 70-72** of the *Indian Trusts Act,* the office of a trustee may be vacated in one of the following ways: (1) By death or (2) by discharge. Discharge takes place—

(*a*) by the extinction of the trust,—(*i*) when its purpose is completely fulfilled, or (*ii*) when the fulfilment of its purpose becomes unlawful, or (*iii*) when the fulfilment of its purpose becomes impossible, or (*iv*) when the trust being revocable, is expressly revoked; or

(*b*) by the completion of the trustee's duties under the trust; or

(*c*) by such means as may be prescribed by the instrument of trust; or

2. *Letterstedt* v. *Broers,* (1884) 9 A.C. 371 (386), quoted in *Bilasrai* v. *Shivnarayan,* (1943) 48 C.W.N. 448 P.C.

3. The same principles have been applied in INDIA.

(*i*) *In Pearymohan* v. *Manohar* [(1921) 26 C.W.N. 133 (P.C.)], the Privy Council observed that it is a sufficient ground for removal of a trustee that he has in the exercise of his duties put himself in a position that his duty and interest conflict. In this case a *Sevait* was removed from office on the ground that he had purchased the debottar property *benami* and without disclosing that he was the real purchaser.

(*ii*) Similarly, in *Hussain* v. *Nur Hussain,* (1929) 32 C.W.N. 769 P.C., *Sajjadanasin* or trustee of a Wakf was removed on the ground that she not only set up her own title to the trust property in defiance of the trust, but also alienated portions thereof upon such assertion (See, in this connection, s. 14, Religious Endowments Act, 1863).

(*iii*) In *Mahomedally* v. *Akberally,* (1934) 38 C.W.N. 452 P.C., where a founder dedicated certain buildings for public charitable purposes, viz., to be used as a sanatorium and, also, as a rest-house for pilgrims and poor people, but after the death of the founder, the *mutwallis* became insolvent and were excommunicated, and were found occupying portions of the buildings with their own families and did not keep accounts, *held,* the removal of the *mutwallis* was justified.

(*iv*) In *Satish* v. *Dharani* [(1940) 1 Cal. 266 P.C.], a Mohunt was removed on grounds of immorality, a continuous course of misappropriation and breach of trust and the assertion of persistent unfounded claim to the trust properties as his personal properties. The true rule for removal of the heads of public endowments is that "if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal from his office".

(*d*) by consent of himself or if there are more beneficiaries than one, all the beneficiaries being competent to contract; or

(*e*) by the Court to which a petition for discharge is presented under this Act.[4]

S. 78 lays down how a trust may be *revoked* :

(1) A trust created by a will may be revoked at the pleasure of the testator.

(2) A trust otherwise created can be revoked only—

(*a*) where all the beneficiaries are competent to contract—by their instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust; or (*c*) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

§ 71. Appointment of a new trustee.

When the office of the trustee is vacated, a *new* trustee may be appointed.

Under the *Indian Trusts Act* (**ss. 73-74**), the principal Civil Court of original jurisdiction may appoint a new trustee, on the petition of the beneficiary, (*i*) in case—(*a*) any person appointed a trustee disclaims, or (*b*) any trustee, original or substituted, dies, or (*c*) is for a continuous period of 6 months absent from India, or (*d*) leaves India for the purpose of residing abroad, or (*e*) is declared an insolvent, or (*f*) desires to be discharged from the trust, or (*g*) refuses or becomes, in the opinion of the Court, unfit or personally incapable to act in the trust, or (*h*) accepts an inconsistent trust; and

(*ii*) it is found impracticable to appoint a new trustee by the author of the trust or his legal representative or any person nominated by the instrument of trust.

In appointing new trustees, the Court shall have regard (*a*) to the wishes of the author of the trust as expressed in or to be inferred from, the instrument of trust, (*b*) to the wishes of the person (if any) empowered to appoint new trustees, (*c*) to the question whether the appointment will promote or impede the execution of the trust, and (*d*) where there are more beneficiaries than one, to the interest of all beneficiaries.

(II)
RIGHTS AND DISABILITIES OF TRUSTEE

§ 72. The Rights and Disabilities of a Trustee.

A. *Rights*.

1. In the eye of law the trustee is the owner of the trust estate. Consequently, as we have seen, he can give a valid title to a *bona fide* purchaser from him without notice, even though the alienation itself may be

4. *Temple* v. *Induru*, A.I.R. 1967 S.C. 781.

an act of breach of trust on the part of the trustee. But apart from this extraordinary right conferred by law, a trustee has got only those rights which are conferred by the trust instrument or recognised by equity,—to be exercised by him for the benefit of the *cestui que trust* on whose behalf he holds the trust estate.

2. The Indian Trusts Act specifies the following rights of trustees:—

(*i*) *Right to title-deed.*—A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust property (**s. 31**).

(*ii*) *Right to reimbursement of expenses.*—Every trustee may reimburse himself, or pay or discharge out of the trustproperty, all expenses properly incurred or about the execution of the trust, or the realization, preservation or benefit of trustproperty, or the protection or support of the beneficiary **(s. 32).** [*See* below under (B).]

(*iii*) *Right to indemnity from gainer by breach of trust.*—A person other than a trustee who has gained an advantage from a breach of trust must indemnify by the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary, the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified, who has, in committing the breach of trust, been guilty of fraud (**s. 33**).

(*iv*) *Right to apply to Court for opinion in management of trust property,* by petition to a principal Civil Court of original jurisdiction (**s. 34**).

(*v*) *Right to settlement of accounts.*—When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trustproperty examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect **(s. 35).**

B. *Disabilities.*

The position of a trustee being of personal confidence *par excellence*, equity has laid down general rules, subject to which only he can exercise his rights, e.g., (1) A trustee cannot delegate his office; (2) A trustee cannot profit by the trust. The disabilities flowing from these two rules are sometimes called 'negative' duties (as distinguished from the 'positive' duties enumerated in §55). Another rule to be noted in this connection is that "in the case of private trusts, a majority of trustees have no power to bind a minority" and they must all act together.

(i) A trustee cannot delegate his office (*Delegatus non potest delegare*).

(A) *England.*

1. The office of the trustee being one of personal confidence, he cannot,

as a rule, delegate the performance of his duties to others, unless the trust instrument specifically authorises delegation for any purpose. And if he shifts his duties on to a stranger or even to a non-trustee, he remains liable for any consequent loss to the trust estate. It is a breach of trust for which the trustee becomes liable; the act done by the delegate becomes void [*Alexander* v. *Alexander*, 2 Ves. 643], and the agent, who is thus a party to a breach of trust, also becomes liable, as a constructive trustee, to the *cestui que trust* [*Mara* v. *Browne*, (1896) 1 Ch. 199 (C.A.)].

2. But since a trustee cannot possibly do everything for himself in the administration of the trust, *a limited* power of delegation must necessarily be admitted, e.g., the obtaining of professional assistance in the execution of the trust business. In other words, though the trustee cannot delegate the exercise of his discretion under the trust, he may carry out the *ministerial* functions through an agent or proxy. But even such partial delegation may be justified only if there is 'moral or legal necessity' for such action. In other words, he can delegate his duties in those cases where a man of ordinary prudence managing his own affairs would do so in the *'ordinary course of business'*. [*Ex parte Belchier*, Amb. 219]. Thus, it was held in *Speight* v. *Gaunt*[5] [(1883) 9 A.C. 1] that a trustee may obtain professional help in the ordinary course of business 'provided he runs no needless risk in doing so'. It is to be noted, however, that this right does not protect a trustee if he delegates to an agent not reasonably fitted by character or calling to perform it. He must act as a man of ordinary prudence in the selection of an agent and must not allow the delegation to continue longer than is necessary.

The rule was summarised in these words by Kekewich, J., in *Re Weall* [(1889) 42 Ch. D. 674]—

> "A trustee is bound to exercise discretion in the selection of agents, but so long as he selected persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can entrust his agents with any duties which they are willing to undertake, or pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the court would be disposed to support any conclusion at which he arrives, however erroneous, provided it is the outcome of such consideration as might reasonably be expected to

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5. *Speight* v. *Gaunt*.—A trustee employed a broker of good standing to purchase corporation bonds as an investment of the trust funds, the same being a proper investment. The stockbroker misappropriated the purchase money and became insolvent. *Held*, that the trustee was not bound to make good the loss of the trust fund. For, if a man has to purchase stock, he must almost of necessity employ a stockbroker and pay the price to him,—a trustee in doing this was thus following the ordinary course of business, and running no needless risk. Bowen, L.J., observed.—"A trustee cannot delegate his trust. If confidence has been reposed in him by a dead man, he cannot throw upon the shoulder of somebody else that which has been placed on his own shoulders. On the other hand, in the administration of a trust a trustee cannot do everything for himself, he must to a certain extent make use of the arms, legs, eyes, and hands of other persons and the limit within which he is confined is, that a trustee may follow the ordinary course of business provided that he runs no needless risk in doing so."

be given to a like matter by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs."

(*B*) *India.*

The law in India is similar.

Thus, **s. 47** of the INDIAN TRUSTS ACT provides—

"A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (*a*) the instrument of trust so provides, or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary, or (*d*) the beneficiary, being competent to contract, consents to the delegation.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial, and involving no independent discretion is not a delegation within the meaning of this section."

Thus, a lease executed by a person under a power of attorney from a trustee, the latter not knowing anything of the lease until after it was executed, is void.[6]

Even where a delegation to a co-trustee is justified by the conditions specified by s. 47, such delegation, in order to be valid, must be express, specific and in the clearest of terms.[7] Thus, the authorisation of a co-trustee for negotiation for sale will not validate his entering into the contract of sale, without the concurrence of the absent trustee or trustees. Such a sale shall be void.[7]

(*ii*) **Co-trustees must act jointly.**

(A) *England.*

1. This is corollary of the principle forbidding delegation of the trustee's office. Since trustee cannot delegate their duties, they cannot appoint one of themselves to act in the execution of the trust. The principle is that the settlor has trusted all the trustees where there is more than one; it is, therefore, the duty of every one of them to exercise his individual judgment and discretion in respect of all matters concerning the trust. In other words, when the administration of a trust is vested in co-trustees, they all form one collective trustee, and must act jointly.

"It is not uncommon to hear one of several trustees spoken of as the 'acting' trustee, but the Court knows no such distinction; all who accept the office are in the eyes of the law acting trustees .... If any one refuses or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved."[8]

6. *Bonnerjee* v. *Sitanath*, (1921) 49 Cal. 325 P.C.; *Abdul* v. *Mulla*, A.I.R. 1963 S.C. 309.
7. *In re Nizam's Jewellery Trust*, A.I.R. 1980 S.C. 17 (paras. 36-37).
8. *Lake* v. *S. Kensington Hotel Co.*, (1879) 11 Ch. D. 121 (C.A.); *Lewin*, 14th Ed., 196.

2. For the same reason, as *Maitland* observes, "In the case of private trusts our law and our equity do not recognise any power in the majority of a body of trustees to bind a minority. In the case of a private trust, as distinguished from a public or charitable trust, where there are several trustees and all have accepted office and are exercising the office, their power, interest and authority are equal and undivided, they cannot act separately, but must act as a unit, except where authority to act is given to a majority of the trustees by the instrument creating the trust. The office, in such a case, is a joint one and they have only a joint interest, power and authority, and must all join in conveyances and receipts. Thus, in a trust for sale, all the trustees must join in the conveyance—a majority of them cannot pass the estate that is vested in them all. A trustee cannot shelter himself by saying that he was outvoted; if there is a breach of trust, no one will be able to say that he was bound by a resolution of the majority."

3. The trust property should be under the control of all trustees. Any trustee who unnecessarily allows a co-trustee to obtain sole control of the property, is liable for the co-trustee's misapplication of it. Similarly, moneys should be deposited in the names of all the trustees so that any one of them is unable to withdraw the amount without knowledge of the others.

4. All trustees must join in the receipt of money, the object being to guard against any of them from misappropriating the same. In paying money to trustees, therefore, one must be careful to obtain a joint receipt of all. For these reasons, *Maitland* observes, "the case of co-trustees is different from the case of co-executors". Each co-executor, taken singly, has a very large power of administering the *personal* estate of his testator, collecting debts, giving valid receipts, selling and assigning portions of the estate. But unless the settlor has so provided, one of several co-trustees has no such powers.

5. From the rule that each co-executor has the power to give a valid discharge while a co-trustee has not, another point of difference follows: Since all the trustees must join in the receipt, it often happens that, while one of them has received money, the others have formally joined in the receipt *for the sake of conformity*. The question then arises, how far would these non-receiving trustees be liable for the misappropriation or misapplication of the money by the recipient co-trustee. The general rule is that, it being necessary for all to join in the receipt, there is no presumption of receipt from the mere fact of joining in the receipt and those who have so joined for the sake of conformity only will not be liable for a breach of trust by the recipient trustee; the co-trustees will be liable only if they allow the money to remain in the hands of the recipient trustee alone, longer than that circumstances reasonably require.[9] The case of co-executors is different. Their power is joint and also several, and each has the power of

9. *Townley* v. *Sherborne*, (1634) B.R. 35; *Brice* v. *Stokes*, (1805) 11 Ves. 319.

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giving a valid discharge, and, consequently, there is no necessity for the others to join in the receipt. If therefore, an executor joins his co-executor in signing a receipt, he does an unnecessary act, and is *prima facie* liable for the receipt on the presumption that those who joined in the receipt have actually received the money.

6. Public trusts offer an exception to the general rule that co-trustees must act jointly.

In a *public trust*, the act of the majority of trustees is deemed to be the act of the whole number.

"Where there are several trustees, and the trust is of a public character, the act of the majority is held to be the act of the whole number; as where there are seven trustees and they met for the purpose of electing a schoolmaster, and at the meeting, five of the trustees concurred in the appointment, but two dissented, the act of the majority was considered to bind the minority. But the act of the majority does not bind the minority, so far as the act is beyond the proper sphere of the trustees" (*Lewin*).

(B) *India.*

1. The same principle[10] is embodied in **s. 48** of the Trusts Act which says—

"When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides."

2. The principle has also been applied to religious endowments.[10] Hence,

(*a*) The act of a majority of *sevaits* does not bind the dissenting *sevaits* nor the *Debottar itself.*[11]

(*b*) A *co-sevait* cannot alienate a share of the *debottar* estate to the extent that he is interested in the *sevaitship.*[12]

(*c*) In any suit relating to the endowment, all the *sevaits* must be represented as co-plaintiffs or party defendants (in case they do not or cannot possibly join as plaintiffs).[13]

(*iii*) **A Trustee cannot profit by the Trust.**

We have already seen [at p. 177, *ante*] that a trustee is not allowed to put himself in a position where his duty and interest may conflict, and that, consequently, a trustee cannot gain any advantage of the trust [*cf.* s. 51 of the Indian Trusts Act[14]]. This is an absolute rule, and all the profits made by a trustee in virtue of his office belong to the beneficiaries. For example, if a trustee employs trust moneys in his own business, the *cestui que trust* will be entitled to all the gains (but the losses will have

10. *Manmohan* v. *Janki Prasad*, A.I.R. 1945 P.C. 23.
11. Mukherjea, *Hindu Law of Religious and Charitable Trusts*, p. 253.
12. *Kali Durga* v. *Surendra*, (1940) 45 C.W.N. 655.
13. *Barboni Coal Co.* v. *Gokulanand*, 61 I.A. 35; *Rajendra* v. *Mohammad*, 8 Cal. 42 P.C.
14. *Jessa* v. *Om Narain*, A.I.R. 1967 S.C. 1162.

to be borne by the trustee). This rule is not confined to express trustees only, but extends to all persons clothed with fiduciary character [*cf.* p. 178, *ante*]. From this general rule, two other rules follow, viz., that (*a*) a trustee cannot purchase the trust property and (*b*) a trustee is not entitled to any remuneration. They require separate treatment.

(a) A trustee cannot purchase the trust property.

1. A trustee cannot in his private capacity purchase the trust property or take a lease or mortgage of it, **from himself or his co-trustee,** even at a public auction (i.e., at a sale held in execution of a decree made against himself as trustee). It was pointed out in *Fox* v. *Mackreth*[15] [(1788) 2 R.R. 55] that this is an **absolute** rule, such a purchase being liable to be set aside on application by the *cestui que trust* even *without any* evidence of *fraud or unfairness.* And not only is the trustee absolutely disqualified from buying it himself, but he cannot also buy it even as the agent of another person.[16] This incapacity even continues after he has ceased to be a trustee with a view to qualify himself for the purchase. The foundation of this absolute rule is "that although you may see in a particular case that the trustee has not made any advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the Court whether he has made an advantage or not" (*Ex parte Lacey*). Consequently, such purchases will in no case be upheld unless made (*i*) with the sanction of the Court, or (*ii*) under a power in the trust instrument [*Fox* v. *Mackreth*, (1788) 2 R.R. 55].

2. In *Kanhaya Lal* v. *National Bank*[17] the Privy Council explained that the reason why any one in a fiduciary position cannot sell to himself is that there is a merging thereby of two positions, the interest of the seller to get the highest price and of the buyer to get the lowest price, and that where there is no such conflict, there can be no objection for his purchase.

In another case,[18] their Lordships observed—

> "A trustee for sale cannot purchase; he cannot purchase because the same person cannot be both vendor and purchaser, and he who acts for another cannot also act for himself."

3. But though absolutely disqualified from purchasing the trust property *from himself*, a trustee may sometimes buy the trust property **from the *cestui que trust*.** There is no absolute rule against this; but such purchases are closely watched and the trustee may be called upon to show the utmost

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15. *Fox* v. *Mackreth.*—*F* made *M* a trustee for sale of his estate for the payment of his debts. *M* purchased the property himself, without having communicated to *F* the value of the estate acquired by him, and before completion of the contract sold it at a higher price to *P*. *Held*, that *M* having purchased the property by taking an undue advantage of the confidence reposed in him by *F*, *M* was a constructive trustee as to the profits made by him by the sale to *P*.

16. *Dhonender* v. *Muttylall*, (1874) 14 B.L.R. 276 P.C.

17. *Kanhaya Lal* v. *National Bank of India*, (1923) 28 C.W.N. 689 P.C.

18. *Pearymohan* v. *Manohar*, (1921) 34 C.L.J. 86 (92) P.C.

good faith, because the trustee has an opportunity of knowing all the circumstances affecting the value of the trust property. To put it in another way, *a trustee (who is not a trustee for sale) may purchase the beneficial interest provided* (*i*) he makes a full disclosure of all that he knows about the value of the property, and (*ii*) the *cestui que trust*, being *sui juris*, fully understands that he is selling to the trustee. Thus, in *Thomson* v. *Eastwood* [(1877) 2 A.C. 215], it was observed—

> "There is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust* but is a well-known principle of equity that if a transaction of that kind is challenged in proper time, a Court of Equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the *onus* of proving that he gave full value, and that information was laid before the *cestui que trust*, when it was sold."

Thus, such a purchase will be unheld if,—(*a*) the trustee gives a fancy price; or (*b*) the offer to sale proceeds from the *cestui que trust* and the trustee gives market price, keeping him at arm's length; or (*c*) the sale is by public auction, and the trustee has leave of the Court; or (*d*) the trustee is only a bare trustee, or has retired from the trust for a considerable time (*Ex Parte Lacey*).

4. In the Indian Trusts Act, the rules relating to purchase by a trustee are contained in **ss. 52-53:**

> "52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.
>
> 53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.
>
> And no trustee, whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself."

(*a*) **S. 52** and the second paragraph of **s. 53** deal with trustees for sale and purchase respectively; the bar against them is absolute. (*b*) The first paragraph of **s. 53** refers to trustees other than for sale. They can purchase with the permission of the Court, but not otherwise. The Indian law thus differs from that in Engalnd, where the purchase in this latter case may be valid even without previous permission of the Court, provided it is fair and beneficial to the *cestui que trust*.

5. The rule as to purchases by trustees has been extended to other fiduciary relations, e.g., (*i*) Receiver appointed by Court [*Nugent* v. *Nugent*, (1908) 1 Ch. 546]; (*ii*) Attorney or agent and so on. Purchases by them are

voidable on proof of non-disclosure or other means of taking undue advantage. Thus, in *Lewis* v. *Hilman* [(1852) 3 H.L.C. 607] it was laid down that even if a person in fiduciary position is otherwise entitled to purchase, yet if he effects the purchase secretly in another person's name such purchase cannot stand, on the ground that concealment is the best evidence of taking advantage. (*iii*) Similarly, an officer appointed to conduct a sale for creditors cannot himself be the purchaser.[19]

6. In India, this principle has been followed by the Privy Council in setting aside *benami* purchases by (*i*) a *Sevait* of the Debottar property[20]; (*ii*) a Pleader of the client's property [*Nagendrabala* v. *Dinonath*][21]; (iii) an executor of the testator's property.[22]

In one of these cases, the Privy Council observed,—

"Trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove."

(b) A trustee is not entitled to any remuneration.

1. The office of the trustee being essentially gratuitous, he is, as a general rule, not entitled to any allowance for his care, and trouble [*Robinson* v. *Pett*,[23] (1734) 3 P.W. 132]. In this case, Lord Chancellor Talbot said,—

"It is an established rule that a *trustee, executor or administrator* shall have

19. *Kanhayalal* v. *National Bank*, (1923) 28 C.W.N. 689 (702) P.C. *(See* also O. 21, r. 73, C.P. Code and s. 136 of the Transfer of Property Act, which are founded on the same principle.)

20. *Pearymohan* v. *Manohar*, (1921) 26 C.W.N. 133 P.C.—*P* was the *sevait* of a debottar estate. In execution of a decree against him as *sevait*, a part of the estate was sold at a Court sale and it was purchased by *P* in the name of his son. In a suit brought by *M* (a successor to the sevaitship) for (1) an order to set aside the *benami* purchase, and (2) the removal of *P* from the office of *sevait, held*, (i) A purchase of debottar property by the *sevait benami* and without disclosing that he is the real purchaser is invalid, even when the sale is in execution proceedings, and the *sevait* has paid the full market value. (ii) It is a sufficient ground for removing a *sevait* from office that he has placed himself in a position in which he can no longer faithfully discharge the obligation of his office.

21. *Nagendrabala* v. *Dinonath*, (1923) 51 I.A. 24.—A pleader had purchased in the *benami* of his wife *N* the decree obtained against his client *D* in a mortgage suit, without the client's knowledge. Afterwards *N* brought part of the property to sale under the decree, and having obtained the leave of the Court to bid, bought it at the auction sale *concealing* the fact that the pleader was the real purchaser. In a suit by the client to set aside the sale, the pleader contended that when he had purchased, the relationship of pleader and client had ceased. *Held*, that the purchase must be set aside,—the mere fact of concealment being sufficient to vitiate both the transactions. It was observed, "The disability attaching to him as pleader cannot exist indefinitely; and if the purchase had been open, matter might have been otherwise. But here the pleader took advantage of his position as is evidenced by *benami* purchase in the name of his wife. There is no more certain way of taking advantage than the way of concealment."

22. *Achi Tahayar* v. *Balkis*, A.I.R. 1931 P.C. 68.—In this case, the Privy Council observed—"In the case of a sale by an executor to his wife, the Court will seek to be certain, by vigilant scrutiny, of the true nature of such a transaction, because the close relationship between the husband and wife may, unless the nature of the transaction is explained, give rise to the not unnatural inference that the husband was truly the party intervening in the case and that not without benefit to himself."

23. S. 50 of the Indian Trusts Act is to the same effect.

no allowance for his care and trouble, the reason of which seems to be, for that, on these pretences, if allowed, the trust estate might be loaded and rendered of little value; besides the great difficulty there might be in setting and adjusting the quantum of such allowance, specially as one man's time may be more valuable than that of another; and there can be no hardship in this respect on any trustee who may choose whether he will accept the trust or not."

Even if the trustee be a solicitor, he will not be allowed to charge anything except for his costs out of pocket only. This rule follows from the absolute duty of a trustee not to deal with the trust property in such a way as to make for himself a personal profit out of it or out of his dealings with it [*Vipont* v. *Butler*, (1893) W.N. 64].

2.. But there are exceptional circumstances in which a trustee may receive remuneration, e.g., (*a*) where the trust instrument expressly authorises him to receive compensation for his care and trouble; (*b*) where he has made an express contract to this effect with the *cestui que trust* being *sui juris* (such a bargain, however, will be closely scrutinised by the Court); (*c*) where it is expressly sanctioned by the Court in case the execution of the trust is unusually burdensome; (*d*) where the trustee, being a solicitor, is appointed by his co-trustees to defend legal proceedings.

3. On the other hand, although not entitled to remuneration, a trustee has **right to reimbursement and indemnity** for all expenses properly incurred in, or about, the execution of the trust, or the realisation, preservation[24] or benefit of the trust-property or the protection or support of the beneficiary. Thus, he may charge his travelling expenses if properly incurred. Again, he is generally entitled to employ a solicitor for any legal business such as that which solicitors usually perform, and to pay him his proper charges. Such expenses reasonably incurred, as well as costs out of pocket, become, as against the *cestui que trust, a first charge* on the trust property. [*cf.* **s. 32** of the Indian Trusts Act, *ante*].

(*iv*) **A trustee cannot set up adverse title.**

1. A person who enters into possession of trust property as a trustee cannot subsequently deny his position. He is estopped from urging that the trust is void or from asserting a title adverse to the trust, "until he has obtained a proper discharge from the trust with which he has clothed himself"[25]. The principle underlying the rule is also otherwise expressed:

24. 'Preservation of the estate' includes not only moneys paid in respect of the Government revenue and the like for preservation of the estate, but also costs of litigation incurred for defence of the title of the trustee (s. 13, Indian Trusts Act). Thus, a *sevait* was held to be entitled to be reimbursed out of the debottar estate, the costs of defending his position as *sevait* which was unsuccessfully challenged by the Receiver of the debottar estate [*Pearymohan* v. *Narendra*, (1909) 37 Cal. 229 P.C.].

25. *Srinivasa* v. *Venkatavarada*, (1911) 34 Mad. 257 P.C.—*S*, the only son of the deceased, was one of the executors and trustees named in his will and sole residuary legatee. He obtained probate, took upon himself the management of the estate and for some years acted in execution of the trusts of the will. Called upon to account, he asserted that the will was wholly inoperative and that the property belonged to him in his individual capacity by right of survivorship. *Held*, he could not assert any title adverse to the trust or to question its validity until obtaining proper discharge from the trust.

The legal title of the trustee and the beneficial interest of the *cestui que trust* together constitute but one title, and the possession of the one is the possession of the other. The trustee's possession, even when he does not perform the trust, is not adverse, because it is *according to his title (Lewin)*. Hence, parties, who are originally trustees, cannot acquire a beneficial interest by holding adversely to their trust.[26]

2. The same rule is contained in **s. 14** of the Indian Trusts Act which says—

"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."

3. (*a*) The above rule applies not only in cases of express trusts but also in cases of resulting trusts which arise for *failure* of an express trust to exhaust the whole of the settlor's estate. In these cases, the trustee holds *under* the trust deed and the possession of the trustee is said to be the possession of the trustee [*Churcher* v. *Martin*, (1889) 42 Ch. D. 312]. (*b*) But where a resulting trust arises by reason of the *invalidity* of an express trust and the heir or legal representative of the settlor claims the beneficial interest, their claim is *against* the instrument of trust, for had it been valid, no resulting trust in favour of the claimant would have arisen. In such a case, the possession of the trustee cannot be said to be under the trust deed but against the disposition made by it; hence, no estopel arises against the trustee and he is entitled to plead adverse possession from the point of time when the resulting trust arose.[27]

(III)

DUTIES AND DISCRETIONS

§ 73. The Duties and Discretions of a Trustee.

1. A distinction is made between the duties imposed upon and the discretions vested in a trustee for the purpose of determining his liability.

2. Briefly speaking, a **duty** of a trustee is an obligation, the *failure* to fulfil which will expose the trustee to legal liability for breach of trust. On the other hand, the trustee is said to have a **discretion**, if he is under an obligation to sue his judgment in deciding to do or to refrain from doing anything. In this case, the failure to act honestly or to exercise reasonable care and skill in deciding whether to do or to refrain from doing the thing, constitutes a breach of trust. *Strahan* thus observes :

"What are usually called duties and what are usually called powers or discretions are both in their essence absolute duties. The difference between them does not lie in the nature of the obligation on the trustee, but in the nature of the act he

26. *Bitto Kunwar* v. *Kesopersad*, (1897) 19 All. 277 (289) P.C.
27. *Khaw Sim* v. *Chooah Hui*, (1921) 26 C.W.N. P.C.

is obliged to do. In the case of duties he is bound to do the thing prescribed, whether in his judgment it is wise to do it or not. In the case of powers or discretions he is bound to exercise his judgment as to whether it is wise to do a thing or not, and act accordingly."

3. In other words, where absolute discretion has been given to trustees to do a particular act, the Court cannot compel them to exercise the power; but if they do exercise it, the Court will see that they do exercise it properly and reasonably [*Tempest* v. *Camoys*, (1882) 21 Ch. D. 571][28]

4. (*a*) As to duties, *Maitland* lays down these general rules: (*i*) A trustee is bound to do anything that he is expressly *bidden* to do by the instrument creating the trust. (*ii*) A trustee is bound to refrain from doing anything that is expressly *forbidden* by that instrument. The primary and absolute duty of a trustee is, thus, to carry out the directions of the settlor (of course, so far as they can be lawfully carried out, and so far as they are not modified by the directions of all the beneficiaries being competent to contract) [*cf.* s.11 of the Indian Trusts Act]. As regards *duties, utmost diligence* is the only protection of a trustee against liability for any loss. For example, if the settlor has directed the trustee to invest in a particular security, he must invest in that security. He is bound to do the thing prescribed and has no discretion. If he fails to comply with the direction, he commits a 'breach of trust'. (We should note here the third rule given by *Maitland* that "a trustee may 'safely' do anything that he is expressly *authorised* to do by the trust instrument").

(*b*) Within the limits set by the directions a trustee may do what would be done by a prudent man of business as to his own affairs. As regards his *discretions*, therefore, the *conduct of a man of ordinary prudence* is the standard by which a trustee would be judged; and if he fails in this, he will be held liable. For example, even if the settlement makes no express direction for investment, it is a general rule that if a trustee, who has in his hands money which he is not bound at once to apply in some other way, ought to invest it, and so make it profitable; if he retains it uninvested for a longer time than is reasonable, he will be liable for a 'breach of trust'.

(*c*) A discretion is sometimes *coupled* with a duty. Thus, a trustee having a duty to invest trust funds, may have a discretion regarding the selection of the investment. He must then use as much diligence as a prudent man of business would exercise in selecting the investment [*see* below]. But if in exercising his *discretionary* authority, a trustee has taken this much of care, he will not be liable,—for any *accidental* loss, or for any depreciation in the value of the securities upon which the trust funds may have been rightfully invested.

5. The above principles are codified in s. 15 of the Indian Trusts Act which says—

"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

28. This is the principle underlying s. 49 of the Indian Trusts Act.

absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction, deterioration of the trust-property."

Thus, if a trustee for sale, sells the property without advertising the sale, he is liable to make good the loss which is caused to the beneficiary owing to want of competition amongst the bidders.

It is to be noted that there is no provision in the Indian Trusts Act, corresponding to that given in England by the Judicial Trustee Act, 1896 (replaced by the Trustee Act, 1925) which gives the Court a discretionary power of relieving from personal liability for breach of trust a trustee who has acted *honestly* and *reasonably*.

§ 74. Principal duties of a Trustee.

(*i*) Reduction into possession and preservation of the trust property.

1. As soon as possible after his appointment, the trustee must (*a*) acquaint himself with the nature and circumstances of the trust property, and (*b*) to obtain, where necessary, a transfer of the trust property to himself and (*c*) to get in trust moneys invested on insufficient or hazardous security [**s. 12,** Indian Trusts Act].

Thus, if the trust fund be a debt or chose in action which may be reduced into possession, it is the trustee's duty to get it in, and if he neglects to do so for so long that the debt becomes statute-barred or otherwise irrecoverable, unless he can show a well-founded belief that an action would have been fruitless [*Billing* v. *Brogden*, (1888) 38 Ch. D. 546].

2. Where there are two or more trustees, the trust property must be reduced into the joint control of all the trustees and it is a breach of trust for a trustee to leave the sole control of the trust property to his co-trustee or co-trustees [*cf.* **s. 26(b),** Indian Trusts Act; see also *ill.* (*b*) to **s. 12**].

3. The trustee must maintain and defend such suits and take such other steps as may be necessary for the preservation of the trust-property and the assertion or protection of the title thereto [**s. 13,** Indian Trusts Act]. Thus, if 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.

4. 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 a contrary intention may be inferred from the trust instrument, to convert the property into property of a permanent and immediately profitable character [**s. 16,** Indian Trusts Act].

This rule is based on the English Rule in *Howe* v. *Dartmouth* [(1802)7 Ves. 137] :

"Where personal estate is given in terms amounting to a general residuary

bequest, to be enjoyed by persons in succession, the interpretation the Court puts upon the bequest is that the persons indicated are to enjoy the same thing in succession; and in order to effectuate that intention, the Court, as a general rule, converts into permanent investments so much of the personalty as is not so invested, and also reversionary interests."

Snell points out the limitations of the rule,—"wasting and hazardous securities are to be converted in the interest of the remainderman, reversionary interests for the benefit of the tenant for life. But this duty to convert does not arise (*i*) where the property is settled by deed, nor (*ii*) where the bequest is not residuary but specific, nor does it apply to realty."

Underhill explains the rule thus—

> Where residuary personal estate is settled by will for the benefit of persons in succession, all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorised securities, must be converted into property of a permanent and immediately income-bearing character, unless (*i*) the will contains a direction or implication to the contrary; or (*ii*) the will confers on the trustee a discretion to postpone such conversion, which he *bona fide* and impartially exercises.

It must, however, be borne in mind that the rule is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him. Courts of Equity have consequently always declined to apply this rule, in cases where the settlor has indicated an intention that the property should be enjoyed *in specie*, though he may not, in a technical sense, have specifically said so.

5. On the same principle, when 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 [**s. 18,** Indian Trusts Act].

(*ii*) **Investment of trust property.**

Subject to the duty of carrying out the directions of the settlor, a primary duty of the trustee as a man of ordinary prudence is to **preserve the trust property.** Consequently, when the trust property consists of money which cannot be applied immediately to the purpose of the trust, the trustee should (in the absence of any direction to the contrary) invest the trust fund in a state of security and make it profitable [*cf.* **s. 20,** Indian Trusts Act]. Now as to the *mode* of investment, (*i*) if there is an specific direction in the trust instrument, that must be followed; (*ii*) in the absence of any such direction, a trustee must (unless expressly forbidden by the instrument) invest in one of the 'authorised' securities enumerated, in England in the Trustee Act, 1925, and in India in s. 20 of the Indian Trusts Act, e.g., Parliamentary stocks, Government securities, etc. But note that within the limits of what is *authorised*, the trustee must make

his selection with *reasonable prudence*; that is to say, he must ascertain whether a particular security, though authorised by the Statute, would be a proper investment under the given circumstances.

This is best illustrated in the case of an **investment upon real securities.** The Statute empowers a trustee to invest in '*real securities*'. Yet a trustee is not justified in lending money on any property simply because it answers to the description of 'real security'. He must exercise ordinary prudence,—the standard of which has been laid down by the Court in a group of rules. These ensure that a trustee must take all reasonable precaution before he lends money upon a mortgage: (*a*) He should not, generally, advance more than $^2/_3$rds of the actual value of the property[29] (T.A., 1925). This limit as to the amount that may be advanced points out that he must leave sufficient margin for depreciation. (*b*) He should ascertain the actual value of the property by valuation made by a properly qualified independent valuer.[30] (*c*) He may lend on first mortgages, but not generally, on second mortgages because they are not safe. At any rate, he must not lend on contributory mortgages, since by doing so he parts with his exclusive control over the trust property. It is to be noted that investment in real securities does not comprise *purchase* of land, because that is an alienation out and out of the trust property.

(*iii*) **Sale of land.**

A trustee has often a duty to sell land under the trust instrument. He may then sell it according to his discretion, and subject to such conditions of sale as he thinks fit. But the sale must be beneficial to the *cestui que trust*,—and so the trustee's position becomes difficult in determining the conditions under which the sale should be made. If he makes the conditions extremely stringent, the land may only fetch a lower value; on the other hand, if they are not stringent enough, the trust estate may be put to great cost in having to render a strict proof of title, and so on. Hence, the rule of equity is that a trustee must insert all reasonable but no unreasonable condition,—he must not sell under *depreciatory condition.*

Ss. 37-38 of the Indian Trusts Act illustrate the discretionary powers of a trustee empowered to sell :

"37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charge or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

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29. The corresponding rule contained in s. 20 (*e*) of the INDIAN TRUSTS ACT is—

"(*e*) On a first mortgage of immovable property situate in India; 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."

30. The absence of an independent valuation at the time of the loan would not, *per se*, make such an investment a breach of trust. It would be a breach of trust only if at the time of the loan the security was an insufficient security and, therefore, an improper security for the trustee to select out of the investments authorised (*Khoo Tek* v. *Ching Joo*, A.I.R. 1934 P.C. 243).

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale as he thinks fit; and may also buy in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and resell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Where a trustee is directed to sell trustproperty or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase."

(*iv*) Duty to render accounts.

S. 19 of the Indian Trusts Act[31] says that the trustee is bound to keep clear accounts of the trust-property and to render them to the beneficiary, at his request, at all reasonable times.

"A trustee is bound to give his *cestui que trust* proper informaiton as to the investment of the trust estate; and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, "I have invested the trust money on mortgage", but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee's statement is correct and that the trust estate is so invested" . (*Lee* v. *Wilson*, 3 Ch. 88).

The principle is,—"He who undertakes to give information, but gives half information, in the doctrine of the Court of Equity, conceals" [*Walker* v. *Symmonds*, (1818) 19 R.R. 155]. Similarly, in rendering accounts, the trustee must explain questioned items and must be ready to support each and every item with proper vouchers [*Concha* v. *Murietta*, (1889) 40 Ch. D. 543].

§ 75. The positive and negative duties of a trustee: A summary.

Strahan classifies the duties of a trustee into *positive* and *negative*, according as they impose an obligation on the trustee to do something or to *refrain from* doing something.

It is an *absolute duty* of a trustee to carry out the directions of the settlor expressed in the trust instrument as to the trust property so far as such directions can be lawfully carried out. [*Cf.* s. 11, Indian Trusts Act.]

(A) Subject to this absolute duty, the trustee's **positive duties** are—

(1) To preserve the trust property. [*Cf.* ss. 12, 13, 16, 18, 20, Indian Trusts Act.]

(2) To transfer the income and corpus to the persons entitled thereto. [*Cf.* ss. 55-56, Indian Trusts Act.]

(3) To render accounts and to give information to the *cestui que trust* as to the trust property. [*Cf.* s. 57, Indian Trusts Act.]

(B) The trustee's **negative duties** are—

(1) Not to make profit out of the trust property. [*Cf.* ss. 50-51, Indian Trusts Act.]

31. *Temple* v. *Induru*, A.I.R. 1967 S.C. 781.

(2) Not, as a general rule, to purchase the trust property from himself or his co-trustees, [*Cf.* ss. 52-53, Indian Trusts Act.]

(3) Not, as a general rule, to delegate his duties. [*Cf.* s. 47, Indian Trusts Act.]

(IV)

BREACH OF TRUST

§ 76. The extent and measure of a trustee's liability for breach of trust

1. "A breach of trust consists in some improper act, neglect, default or omission of a trustee in respect of the trust property or of a beneficiary's interest in it" (*Keeton*). A breach of trust may be active or passive. Thus to buy the trust property on his own account or to mix the trust property with the trustee's own money are instances of *active* breach. An honest and ordinarily careful trustee will rarely commit an active breach of trust. *Passive* breaches, on the other hand, result from omissions and are more likely to be committed by unwary trustees. Non-conversion of the trust-property directed to be converted or non-accumulation of the income for the benefit of the person ultimately entitled are instances of passive breach.

2. A trustee is liable for a breach of trust, whether he has derived any benefit from the breach or not. But a *cestui que trust* can hold a trustee chargeable for a breach of trust only in respect of trust property which the trustee himself has actually received or which he might have received but for his wilful default. To be made liable a trustee must have been guilty of some improper act, neglect or default.

3. A trustee is liable for a breach of trust whether it is due to an act or omission of the trustee himself, or of a co-trustee rendered possible by the trustee's breach of trust, or of an agent to whom the trustee has improperly delegated (a) if the agent is not reasonably fitted to perform it by reason of his character or calling; (b) if the delegation is continued longer than is necessary for its proper performance; (c) if the trustee does not ascertain within a reasonable time by personal inquiry whether the duty has been properly performed.

4. The general measure of the trustee's liability for a breach of trust is the loss caused thereby to the trust estate.[32] Thus, if 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.

32. 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. (*Ill.* (*h*) to s. 23 of the Indian Trusts Act). Where the Trusts Act is applicable, the beneficiary may obtain the relief in an action for breach of trust, and is not obliged to sue for specific performance of an implied obligation.

But he is liable to pay interest in certain cases, which are thus enumerated in **s. 23** of the *Indian Trusts Act.*[33]

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;

(*e*) where the breach consists in failure to invest trust money, and to accumulate interest or dividends thereon;

(*f*) where the breach consists in the employment of trust property or the proceeds thereof in trade or business. In this case, the beneficiary has the option to claim either interest or the net profits made by such employment.

5. A trustee is not however, liable for a breach of trust if--(*i*) the beneficiary has by *fraud* induced the trustee to commit the breach; or (*ii*) the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, (*a*) *concurred* in the breach or (*b*) subsequently *acquiesced* therein (**s. 23**, Indian Trusts Act). The principle underlying this exception is—

"If the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of a breach of trust. Further, either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the Court must enquire into the circumstances which induced concurrence or acquiescence, recollecting in the conduct of that enquiry, how important it is, on the one hand, to secure the property of the *cestui que trust*, and, on the other, not to deter men from undertaking trusts from the performance of which they seldom obtain either satisfaction or gratitude [*Walter* v. *Symonds*, (1818) 19 R.R. 155].

§ 76A. Liability of trustee for breach of trust by co-trustee.

It has already been explained that a trustee will be liable for a breach of trust if he fails to exercise the utmost diligence as regards his duties, or to exercise ordinary prudence as regards his directions. Now, the office of co-trustees being a joint one, the question arises whether one trustee may be liable for the acts of his co-trustee.

1. The general rule is that a trustee is not liable for breach of trust unless he is *personally* guilty of default. To make a trustee liable for a breach of trust committed by his co-trustee, it must, therefore, be proved that he has allowed some 'fraud or evil dealing prejudicial to the trust' [*Townley* v. *Sherborne*, (1634) Cro. Car. 312].

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33. *Vithaldas* v. *Rupchand*, A.I.R. 1967 S.C. 188.

2. But a trustee will be liable for a breach of trust by his co-trustee, where he is himself guilty of some neglect of duty, e.g., (*a*) where he has delivered trust property to his co-trustee without seeing to its proper application, or where he allows his co-trustee to have sole control over it; or (*b*) where he allows his co-trustee to receive trust property and then fails to make due enquiry as to the co-trustee's dealings with it or allows him to retain it longer than the circumstances of the case reasonably require (for it is the duty of trustees, not to allow the trust property to go into the hands of any one of them, and to have it placed, as soon as possible, under their *joint* control) [*Brice* v. *Strokes*, (1805) 11 Ves. 319]; or (*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 beneficial interest [**s. 26,** Indian Trusts Act].

§ 77. Contribution as between co-trustees.

1. 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 *cestui que trust* for the whole of the loss occasioned by such breach; and, consequently, each is entitled to call on the others to contribute *equally* towards such loss, even though the moral reponsibility of all for the breach is not equal.

2. Provided that—

(*i*) Where the breach is fraudulent and all the co-trustees are parties to the fraud, there may be no right of contribution, on the analogy of the common law rule that there is no contribution between joint tortfeasors. [*In England*, this rule has been abrogated by the Law Reform Act, 1935, s. 6].

(*ii*) Where one of the trustees is, or subsequently to the breach of trust becomes, himself a *cestui que trust* and receives an exclusives benefit from the breach, his interest in the trust property is, as between the trustees, primarily liable for the loss.

(*iii*) Where one of the trustees caused the loss either (*i*) by his personal fraud, or (*ii*) by his improper advice, he being a person (e.g., a solicitor) on whose advice the other trustees were entitled to rely, he may be held liable to indemnify his co-trustees.

3. S. 27 of the Indian Trusts Act is to the same effect—

"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 had 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 suit to compel contribution."

(V)

RIGHTS AND LIABILITIES OF BENEFICIARY

§ 78. Rights of beneficiaries.

1. The primary right of a beneficiary is the **right to specific execution of** the trust, i.e., the right to compel the trustee to execute the intention of the author of the trust specifically, to the extent of the beneficiary's interest [s. 56, Indian Trusts Act, para. 1].

2. In certain cases, the trustee is bound to comply with the directions of the beneficiary himself, even though it is contrary to those of the author of the trust. As *Snell* observes, the trustee is, in a sense, a servant and in another, the controller of his *cestui que trust*. He is a servant of the *cestui que trust* in the sense that he is bound to comply with the directions of his *cestui que trust* if he is *sui juris* (i.e., competent to contract) and entitled to the *whole* of the beneficial interest. Where there are more beneficiaries than one, the **directions** of the aggregate body being *sui juris*, must be complied with. Thus, where a trustee is directed by the trust instrument to apply at his discretion the whole or any part of a fund for benefit of *A*, and to apply for the benefit of *B*, any part not so applied for *A*'s benefit,—*A* and *B*, if *sui juris*, can compel the trustee to apply the whole fund for their joint benefit.

This right of the beneficiaries is derived from the more general power, as enunciated in *Saunders* v. *Vautier* [(1841) 4 Beav. 115], of a beneficiary, not being under an incapacity, to put an end to a trust which is exclusively for his own benefit; for a man, who is *sui juris*, may do what he likes with his own property [*Cf.* **s. 78(a)** of the Indian Trusts Act]. In *Saunders* v. *Vautier*, *A* bequeathed stock to trustees upon trust to accumulate the dividends until *X* attained 25, and then to transfer both the stock and the accumulated dividends to *X* absolutely. *Held*, that on attaining 21, *X* was entitled to have the stock and the income transferred to him.[34]—

S. 56 of the Trusts Act embodies this principle :

> "Where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trustproperty to him or them, or to such person as he or they may direct.
>
> (a) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority and is otherwise competent to contract. *B* may claim the Rs. 10,000.
>
> (b) *A* transfers certain property to *B* and directs him to sell or invest it for the benefit of *C*, who is competent to contract. *C* may elect to take the property in its original character."

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34. Ill. (*a*) to s. 56 is to this effect.

The right is called the **right to call for conveyance** and is enforceable by suit if the trustee refuses to comply.

3. But the trustee is a controller of the *cestui que trust*, if the latter has only a *partial* interest in the trust fund. Thus, one of several beneficiaries, even if *sui juris*, cannot direct the trustee to do anything in disregard of the terms of the trust instrument or the rules of equity.

4. Any *cestui que trust*, however, may **transfer his beneficial interest** without the consent of the trustee (**s. 58,** Indian Trusts Act); or compel the trustee to execute any particular duty and if he has reason to believe that the trustee is about to do an act not authorised by the trust, he may have an injunction to restrain him (s. 61, *ibid*).

5. So long as the trust is not validly terminated, the beneficiary is, subject to the provisions of the trust instrument, entitled to the **rents and profits of the trust property** (s. 55, Indian Trusts Act) and, in case of breach of trust, the trustee has to account strictly (see under s. 62, *below*).

6. Another right, which follows from the maxim 'a trust never fails for want of a trustee', has already been noticed. Whenever the execution of the trust becomes impracticable owing to the death, disclaimer, or discharge of the trustee or for any other reason, the beneficiary may **sue for execution of the trust** and in such a case, the Court executes the trust until a new trustee is appointed (s. 59, Indian Trusts Act). The beneficiary is entitled to have **'proper' trustee** (s. 60, *ibid.*). So, when the trustee is not a proper person owing to some disability, e.g., permanent residence abroad, or commits a breach of trust, the beneficiary may sue for removal of the trustee and for the appointment of a proper trustee.

The rights and remedies of the beneficiary in case of a breach of trust by the trustee deserve separate treatment.

§ 79. Remedies of *cestui que trust* for breach of trust.

For every breach of trust the beneficiary has a twofold remedy—(*a*) Against the trustee himself personally, and (*b*) against the trust property or the property into which it has been converted. He can follow any of these remedies, and as *Maitland* puts it—"It is not for the trustee to dictate to the *cestui que trust* in what shape he will make his claim."

(A) Right of action against the trustee personally.

The *cestui que trust* can proceed personally against the guilty trustee and recover from him the amount of loss to the trust property caused by the breach of trust. And the Court is severe in taking accounts,—the trustee is liable not only (*i*) for what he has received, but also (*ii*) for what he might receive but for his *wilful* default, and (*iii*) for interest [*Cf.* **s. 23** of the Indian Trusts Act, *ante*].

The personal liability of trustees is both *joint and several.* Thus, where co-trustees jointly commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned thereby. This rule holds good also where one trustee is held liable for a breach of trust committed by his co-trustee.

(B) Right against the trust property :

(I) Right to recover from the trustee.—This right arises (*a*) where the trustee has wrongfully purchased the trustproperty, subsequently acquires the property himself. In these two cases, the property is traceable in its original character and in the hands of the trustee himself. These are dealt with in ss. 62 and 65 of the Trusts Act, respectively.

(*a*) **S. 62** provides—

"Where a trustee has wrongfully bought trust property, the beneficiary has right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold. But in such cases the beneficiary must repay the purchase money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (*a*) account for the net profits of the property, (*b*) be charged with an occupation rent, if he has been in actual possession of the property, and (*c*) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser............."

(*b*) **S. 65** says—

"Where a trustee wrongfully sells or otherwise transfers trustproperty and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration."

(II) Right to recover from alienee.—If the trustee has wrongfully alienated the trustproperty, a remedy against the trustee is apt to be of little value. The *cestui que trust* has in this case also, a right to recover it from any alienee except a *bona fide* purchaser for value of the property without notice of the trust [*Cf.* **ss. 62-64,** Indian Trusts Act].

In fact, the right is available not only against a transferee from the trustee but against *any third party* into whose hands the trustproperty happens to come 'inconsistently with the trust', except where he can show that he is a *bona fide* transferee for consideration without notice of the trust **(s. 63)**.

The rights of *bona fide* transferees without notice of the trust are safeguarded by **s. 64,** as follows:

"Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

(*a*) a transferee in good faith for consideration without having notice of the

trust, either when the purchase-money wa paid, or when the conveyance was executed, or

(*b*) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trustproperty is not a transferee for consideration within the meaning of this section.

Nothing in section 63 applies to money, currency notes and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred."

The reason who equity favours the *bona fide* transferee for value without notice has already been explained (p. 44, *ante*).

"From a purchaser for value without notice, the Court takes away nothing which that purchaser has honestly acquired (*Heath* v. *Crealock*, 10 Ch. 33).

Not only is a transferee without notice protected, as cl. (*b*) of s. 64 says, a purchaser *with notice* from a purchaser without notice is also protected, on the principle that there would otherwise be a stagnation of property [*Martins* v. *Joliffe*, Ambl. 313], except where the subsequent transferee from the transferee without notice is the trustee himself. This exception is embodied in s. 65 of the Indian Trusts Act, which we have already noticed. The exception is founded on the principle that a person should not be allowed to get advantage of his own fraud [*Barrow's case*, 14 Ch. D. 445 (C.A.)].

(III) Right of 'following the trust fund'.—1. Not only can the *cestui que trust* follow the trust property in the hands of third parties, he has even a more valuable remedy. He can follow the trust fund in *whatever shape* it may be found in the hands of the trustee himself or of any person other than a *bona fide* transferee from the trustee without notice,—so long as the origin of the fund of property is traceable [**s. 63,** Indian Trusts Act, para. 2].

2. This extraordinary right, as *Maitland* observes, is due to the fact that *"Equity has always been striving to prevent the cestui que trust from falling to the level of an unsecured creditor"*. And this result has been obtained under cover of a metaphor—'the idea of a *trust fund as an incorporeal thing which* preserves its identity during any change of investment.' This may be illustrated as follows: (*i*) *Y* lends £100 to *X; X* buys a property with it and then goes bankrupt. *Y* (the unsecured creditor) cannot claim the property but must take dividend with the other creditors of the debtor. But suppose (*ii*) *X* is a trustee for *Y* for the £ 100. *Y* will then not only have a *charge* on the property into which the trust fund has been converted but shall be entitled to claim the *property itself*, and that as against the ordinary creditors, if any, of the trustee. (The fact bankruptcy does not affect the preference of the *cestui que trust* to the ordinary creditors, 'for the *cestiu que trust* is no mere creditor of the trustee who has committed a breach of trust'. His preference is due to the existence of the fiduciary relation).

"It makes no difference in reason or law into what other form, different from the original, the change may have been made.....for the product of or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such" [*Taylor* v. *Plumer*, (1815) 3 M. & S. 562 (575)].

It is also to be noted that there is no distinction between a rightful and wrongful disposition of the property, so far as regards the rights of the beneficial owner to follow the proceeds is concerned [In re *Hallet's Estate*, (1880) 2 Ch. D. 696 (709)].[35]

3. The various **implications** of the right of 'following the trust fund' may be more fully considered: (*a*) the *cestui que trust* has the right to follow the property into which it has been *converted* so long as it can be traced. And if the property in the converted form is alienated by the trustee, the *cestui que trust* can recover it from the person who holds it, unless he be a *bona fide* purchaser for value of the legal estate without notice of the trust [*cf.* 2nd paragraph of s. 63, Indian Trusts Act]. (*b*) The *cestui que trust* has also the right to follow money into *investments* or into the hands of the trustee's banker. For example, if *T* a trustee for *A* of a plot of land, wrongfully sells the land for £ 1000, and then buys with that money a number of shares in a Railway Company in his own name, and afterwards sells them again and buys debentures in another Company, and so on, the *cestui que trust* may claim the shares or debentures which now represent the trust estate, notwithstanding the changes in its shape through investments. (*c*) And this right to follow extends even to the case where the trustee has **mixed trust-moneys** with hiw own [*Cf.* **s. 66,** Indian Trusts Act].

4. The law on this point has been fully discussed in the judgment of Jessel M.R. in *Re Hallet's Estate* as follows: A trustee may mix up the trust funds with his own in two ways—

(*i*) When he purchases an estate partly with the trust money (say, £ 1000) and partly with his own (say, £1000), the *cestui que trust* is entitled as against the trustee and his creditors, to a first *charge* on the property for the amount of the trust money (£1000). It is to be noted, however, that in this case he cannot claim the property itself as he could do if it were bought *wholly* with trust moneys.

(*ii*) When he pays the trust funds into his own banking account and then after paying in other money to the same account, draws out sums of money from the account for his own purpose, the question arises, 'whose

35. When money is given to a party to be invested in his business on terms which constitute a trust, then even though the fund may be properly applied in accordance with the terms of the trust,—on the insolvency of the trustee and in the absence of proof that the fund was lost or ceased to exist before the insolvency, the *cestui que trust* has still a charge on the whole of the insolvent's assets as he had before the insolvency and consequently he has a preferential claim to be paid out first out of the assets in the hands of the Official Assignee when such assets are all assets. Proof of investment in the general assets is, again, sufficient to found a charge and it is not necessary to trace the fund into the present assets [*Official Assignee* v. *Krishanji*, (1933) 37 C.W.N. 713 P.C.].

money is it that he has drawn out,—the *cestui que trust's* or his own?' Now, the rule that is ordinarily applicable for appropriation of payments in a banking account is the *rule in Clayton's Case*, which says that 'when a debtor, owing several debts to the same creditor makes a payment to him, the law will, by presumption, appropriate the payment to the debt earliest in point of date.' In other words, in a banking account the items drawn out will be attributed to the earliest items paid in, in the chronological order. But in *Re Hallet's Estate*[36] [(1879) 13 Ch. D. 696], it was held that the rule in *Clayton's Case*—that 'a person will be presumed to draw out first the money he first paid in' shall not apply **as between a cestui que trust and his trustee.** If a person who holds money as a trustee pays it to his own account at his banker's and mixes it with his own money, and then draws out sums by cheques in the ordinary manner, the drawer *must be taken to have drawn out his own money*, and **the cestui que trust will have the first claim to any balance** that the account may show.[37] "Neither the trustee, nor his *creditors* who stand in his place, can be heard to say that he drew out and spent upon his own purposes the trust moneys standing to his account. When a man does an act, which he must perform rightfully, he cannot say that he did it wrongfully."

5. But the *rule in Clayton's Case* has been held to apply **as between different cestui que trusts of the same trustee.** This may be illustrated as follows: *A* is trustee of 2 different funds of *X* and *Y*. He puts £ 1000 of the trust *X*, and £1000 of trust *Y* on two dates in his own bank and subsequently puts in £ 1000 of his own into the same account. On three successive dates, he withdraws three sums of £500 each, appropriates the money to his own use and becomes insolvent. Now here, *A* is deemed first to exhaust all the £1000 that is his own according to the rule in *Hallet's Case*. But then as between *X* and *Y*, the rule in *Clayton's Case* applies and *he* begins first to exhaust *X*'s. Consequently, out of the balance of £ 1500 left after exhausting *A*'s own money, *X* may claim only £500, while *Y* will be entitled to the rest, i.e., £1000.

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36. Re *Hallet's Estate*.—H, a solicitor, who was a trustee, for some bonds, mixed up trust money (sale proceeds of the bonds) with his own money, by paying them into his own bank account. To put in figures,—he had a balance of £1800 in his bank account when he paid in £ 2500 of the trust money. He then continued paying his own money up to £ 1300, and also drawing out for his own purposes from that account up to £ 2600. At his death, there was thus more money to the credit of the account than the sum of trust money paid into it, but if the rule in *Clayton's Case* applied, i.e., if the amounts drawn out after the mixing of the funds were set against the earlier terms paid in, in order of date, a large portion of the trust money would have gone. *Held*, that the trustee must be taken to have drawn out (£2600) entirely from his own private money (£ 1800 *plus* £ 1300), and not as under *Clayton's Case* first from the 1800, and secondly from the 2500 belonging to the beneficiary. Accordingly, the beneficiary will have a charge on the whole balance of £ 3000 for the whole of £ 2500 of the trust money.

37. In this repsect the Indian Law differs. While under the English rule the *cestui que trust* can claim every portion of the mixed fund which the trustee cannot prove to be his own, under s. 66 of the Indian Trusts Act, the beneficiary is entitled to a *charge* or lien on the fund to the extent of the amount due to him.

§ 80. Liability of a beneficiary joining a breach of trust to have his interest impounded.

The beneficiary's interest in the trust property is liable to be impounded in two cases: (a) for the benefit of other beneficiaries; and (*b*) for the benefit of the trustee.

(*a*) The first of these is dealt with in **s. 68** of the Indian Trusts Act. Where *one of several* beneficiaries—

(*i*) joins in committing breach of trust, or

(*ii*) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(*iii*) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not, within a reasonable time take proper steps to protect the interest of the other beneficiaries, or

(*iv*) has deceived the trustee, and thereby induced him to commit a breach of trust,—the *other* beneficiaries are entitled to have ali his beneficial interest *impounded* as against him and all who claim under him otherwise than as transferees for consideration without notice of the breach, until the loss caused by the breach has been compensated.

(*b*) A beneficiary cannot make a trustee liable for losses occasioned to him by a breach of trust which he has himself authorised or assented to. Thus, if a beneficiary has gained an advantage from a breach of trust, the beneficiary, must indemnify the trustee to the extent of the amount received by him, and the trustee has a charge on the beneficiary's interest for such amount. Provided that, if the trustee is guilty of *fraud* in committing the breach of trust, he is not entitled to be indemnified [**s. 33,** Indian Trusts Act].

§ 81. Bar of Remedy for Breach of Trust.

1. The remedies of the *cestui que trust* may be barred in one of the following ways: (*i*) By *lapse of time,* i.e., by the operation of the *Statutes of Limitation:* (*ii*) By the *acquiescence* or *concurrence* of the *cestui que trust* in the breach, being *sui juris* and with full knowledge of facts (see p. 195, *ante*); (*iii*) By subsequent *confirmation or release* by the *cestui que trust* being *sui juris* and with full knowledge of facts [*Cf.* s. 23, Indian Trusts Act].[38]

§ 82. Trustee and Statutes of Limitation.

(A) *England.*

1. In England, the law is a little complicated owing to the different

38. In England, another mode of the trustee's liability was introduced by the Trustee Act, 1896 (replaced by the Trustee Act, 1925). It gave the Court a discretionary power to *relieve* the trustee from *personal* liability when he 'has acted honestly and reasonably, and ought fairly to be excused for the breach'. In the Indian Trusts Act, no such provision has been introduced by amendment.

operation of several statutes, and the distinction sought to be made between Express and Constructive Trusts. The material statutes at present are the Judicature Act, 1873, the Real Property Limitation Act, 1874 and the Trustee Act, 1888 :

(I) Express Trust.—(*a*) The old rule, which was recognised and declared by the Judicature Act, 1873, s. 25 (2), was that as between a *cestui que trust* and his trustee who holds on an express trust, lapse of time was no bar;—"No claim of a *cestui que trust* against his trustee for any property held on an *express* trust,[39] or in respect of any breach of such trust, shall be barred by any Statute of Limitation." (*b*) But the Trustee Act, 1888, effected to turn the law in the other direction. It gave to the trustee (and persons claiming through him) the full benefit of pleading the Statutes of Limitation in defence, *except when the trustee (i) has been guilty of fraud, or (ii) still retains the trust property or the proceeds thereof, or (iii) has converted it to his own use.*

The present position, therefore, is that (*a*) If the *cestui que trust* wants to recover the trust *property*, or the proceeds thereof (as distinguished from income), no Statute of Limitation bars his action, irrespective of the fraud, or innocence of the trustee. To put it simply, a trustee's possession can never be 'adverse' to his *cestui que trust* (see p. 187, *ante*). (*b*) But unless there has been fraud, the *cestui que trust* cannot recover from his trustee *income* which he has misapplied unless the *cestui que trust* sues within 6 years.

(II) Constructive Trusts.—1. The rule laid down by the Judicature Act is confined to express trustees. So against persons who are trustees only constructively, the ordinary statutory rules as to limitation are to apply. For example, when the *cestui que trust* wants to recover the trust property from a *purchaser* of the trust property with notice of the trust, he must sue within the ordinary period of limitation provided by the Real Property Limitation Act, 1874, viz., 12 years from the date of conveyance to the purchaser.

2. But as *Maitland* points out, for the purpose of the application of the law of *limitation*, the distinction between *express* and other trusts has not been very clearly maintained. Ordinarily, the term Express Trust denotes trusts arising by act of parties, as distinguished from Implied Trusts or trusts arising by operation of law. But the term 'express trustee' as referred to in s. 25(2) of the Judicature Act has been judicially applied in a wider sense (beyond the ordinary case where a trustee holds under a trust expressly declared by the owner of the property) to include persons occupying a *fiduciary* relation a privy to a fraudulent breach of trust and the like. Thus,

39. As to what is an express trust, see p. 119, *ante*. "If there is created *in expressed terms*, whether written or verbal, a trust, and a person is in terms nominated to be a trustee of that trust, a Court of Equity will not allow him to vouch a statute of Limitation against a breach of that trust. Such a trust is in equity called an express trust" [*Soar* v. *Ashwell*, (1893) 2 Q.B. 390 (393)].

in *Burdick* v. *Garrick* [(1870 L.R. 5 Ch. 233], where an agent was appointed under a power of attorney by which he was authorised to receive and invest, to buy real estate and otherwise to deal with the estate, but under no circumstances had he the authority to apply the money to his own use, or to keep it otherwise than to a distinct and separate account, it was *held* that he was not entitled to set up the Statutes of Limitation in bar to a suit for accounts by the principal. The principle was thus explained by *Hatherley, L.C.*—

"In the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal but for the purpose of being employed in a particular manner, in the purchase of land or stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstance differs from one in an ordinary fiduciary person I am unable to see. That being so, the Statute of Limitations appears to me to have no application in the case."[40]

3. The following classes of persons, though not 'express trustees' in the strict sense of the term, have been debarred from pleading the Statutes of Limitation—(*a*) Fiduciary agent, e.g., solicitor entrusted by power of attorney with powers of dealing with the property belonging to his client. Similarly, directors of a company, managing the property as agents of the company, cannot plead limitation against the company. (*b*) Trustees *de son tort*, who without being appointed a trustee, get possession of trust property and assume the position of a trustee. In this case the conduct of the trustee has been held to be equivalent to a declaration of trust [*Soar* v. *Ashwell*, (1893) 2 Q.B. 396]. (*c*) A stranger to the trust who is a privy to and participates in a fraudulent breach of the trust by the trustee [*Barnes* v. *Addy*, (1874) 9 Ch. 244]. (*d*) A stranger to the trust who receives the trust moneys knowing them to be such and deals with them in manner inconsistent with the trust [*Lee* v. *Sankey*, (1872) 15 Eq. 204].

(B) *India*.

1. In *India*, the law of limitation applicable to suits by *cestui que trusts* to recover trust property from trustee or their representatives is contained in s. 10 of the Limitation Act, 1963. It runs thus:

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable cosideration) for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time".[41]

From the words 'express trustees' in the marginal note to this section, it might appear that the law in this section is just the same as enacted

40. See also *Soar* v. *Ashwell*, (1893) 2 Q.B. 390.

41. As to the second paragraph, introduced in 1929, see *post*.

in England by s. 25(2) of the Judicature Act, 1873. But the words 'express trustees' do not appear in the section itself, and, according to the rules of construing a section, the marginal note is no guide for the construction of the section.[42] An analysis of the section with reference to judicial decisions will show that the words "vested in trust for any specific purpose" do not refer exactly to same thing as an express trust in English law, and are narrower in scope.[43]

2. In order to attract the operation of the section, two conditions must combine—(*i*) the trust must have been created for some specific purpose, and (*ii*) the property must have been vested in the trustee with the object of carrying that purpose into effect.

(*i*) A 'specific purpose' means a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can certainly be affirmed.[43-44] Accordingly, this section has **no application** to persons such as an executor, agent and other fiduciary relations, to whom the expression 'express trustee' has been extended in England. Again, as to resulting trusts, a distinction has been made between (*a*) cases where an express trust does not exhaust the whole property, and (*b*) cases where the trusts expressed are void for uncertainty or some other reason. In the former case, the terms of the deed make it clear that in such a case the balance should result to the settlor, but in the latter case, the trust results in defeasance of the instrument and not under it. Hence, a suit to enforce the resulting trust in the former case would come within s. 10 as a suit against an express trustee, but not a suit to enforce a resulting trust in the latter case.[45]

(*ii*) The word 'vest' implies that the property becomes, in law, the property of the trustee.[46] Hence, the section has no application to constructive trusts.[47] Thus, the section has no application to a document induced by undue influence, since even if the person taking the deed be regarded as a trustee under s. 95 of the Trusts Act, there is no trust for a 'specific purpose' as required by this section.[48] It may be noted that s. 2(11) of the Limitation Act specifically excludes a *'benamdar'*, a mortgagee in

42. *Balraj* v. *Jagatpal*, (1904) 26 All. 393 P.C.

43. *Chettiar* v. *Chettiar*, (1930) 35 C.W.N. 145 (174) P.C.

44. *Khaw Sim* v. *Chuah Hooi*, (1921) 26 C.W.N. 495 P.C.; *Chhatrakumari* v. *Mohan Bikram*, (1931) 35 C.W.N. 953 (962) P.C.

45. *Khaw Sim* v. *Chua Hui*, A.I.R. 1922 P.C. 212.

46. *Vidyavaruthi* v. *Balusami*, (1922) 44 Mad. 831 P.C. (It is to be noted that though the actual decision in this Privy Council case, viz., that the heads of Hindu or Mahommedan religious institutions are not trustees within the meaning of s. 10 of the Limitation Act, has been superseded by the amendment of the section in 1929 (see next Chapter), there is no reason why the principles laid down in this case in respect of other trust relations shall not hold good still).

47. *Chettiar* v. *Chettiar*, (1930) 35 C.W.N. 145 (151) P.C., *Chatrakumari* v. *Mohan Bikram*, (1931) 35 C.W.N. 953 (962) P.C.

48. *Ramchandra* v. *Laxman*, (1944) 49 C.W.N. 303 P.C.

possession after the mortgage has been satisfied, and a wrongdoer in possession without title, from the definition of a trustee within the meaning of the Limitation Act. Similarly, agents or factors who sometimes come within the scope of the term 'express trustee' in England (see *ante*), are specifically provided for in Arts. 87-89 of the Indian Limitation Act, and accordingly do not come within s. 10.

3. The present section has no application where the trust is void *ab initio*, e.g., on account of some direction which is inoperative at law. In such a case, it cannot be said that the property in the hands of the trustee under the void trust has been 'vested in trust for a specific purpose.' Hence, after the lapse of 12 years' possession of such person, the right of the rightful owner to recover the property would be barred.[49]

4. The section applies only to suits brought "for the purpose of following in the hands of the trustee or his assigns the trust property or the proceeds thereof". This expression means recovering the property *for* the trust (i.e., for the benefit of the trust) in respect of which it had been given.[50] In other words, when the property is used for some purpose other than the proper purpose of the trust in question, it may be recovered without any bar of time from the hands of the persons indicated in the section. So, where the trustee is not applying the property to purposes other than those of the trust and admits that he is a trustee, and the plaintiff merely sues for his personal right to manage or to control the management, this section has no application. Again, this section has no application where the *cestui que trust* seeks any relief other than those specified in the section, e.g., damages for breach of trust.

5. The only exception to s. 10 is in favour of assigns for valuable consideration. It is to be noticed that there is no reference to the assign being also '*bona fide*' or 'without notice'. Hence, if the transfers be for valuable consideration, knowledge of the trust on the part of the transferee is immaterial for the purpose of this section, and he may plead adverse possession.[51] On the other hand, a volunteer from the trustee, even though without notice, comes within this section, and cannot plead limitation.

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49. *Hemchand* v. *Pearylal*, (1942) 47 C.W.N. 46 P.C.

50. *Balwant* v. *Puranmall*, (1893) 6 All. 1 P.C.; *Arunachellam* v. *Vankatachalapathi*, (1919) 24 C.W.N. 249 P.C.

51. *Subbaiya* v. *Mustapha*, (1923) 28 C.W.N. 493 (497) P.C. (see Art. 134, Indian Limitation Act.).

CHAPTER XIV

RELIGIOUS AND CHARITABLE TRUSTS IN INDIA

§ 83. Religious and Charitable Endowments excluded from operation of the Indian Trusts Act.

1. It has been already pointed out that **s. 1** of the Indian Trusts Act has expressly excluded "public or private religious or charitable endowments" from the scope of the Act. Such endowments are governed by general Acts such as the Religous Endowments Act, 1863, Charitable Endowments Act, 1890, Charitable and Religous Trusts Act, 1920, Mussalman Wakf Validating Act, 1913; local Acts relating to Hindu religious endowments and Mahommedan wakfs; and the general rules of Hindu and Mahommedan laws.

2. The reason why the Indian Trusts Act excluded these endowments from its scope is that they are not 'trusts' in the English sense of the term. As the Privy Council explained in *Vidyavaruthi* v. *Balusamy*[1]—

> "It was in view of the fundamental difference between judicial conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Mahommedan systems that the Indian Legislature in enacting the Indian Trusts Act deliberately exempted from its scope, the rules of law applicable to *Wakf* and the Hindu Religious Endowments."

3. Nevertheless, an enquiry into their nature finds place in this book inasmuch as they resemble trusts in some respects and in so far as the general principles of equity have been applied by the Courts, as well as by the Legislature (in amending s. 10 of the Limitation Act), which will be noticed shortly.

§ 84. How created under Hindu Law.

1. The creation of such endowment is governed by rules of the Hindu and Mahommedan laws.

2. Hindu religious endowments usually go by the name *debottar* or *devasthanam,*—where property is dedicated to the worship of a deity. Hindu law encourages pious gifts. Hence, a religious endowment can be created without a deed or any writing at all.[2] Of course, if created by will, the will must comply with the requirements of s. 57 of the Indian Succession Act, if the case is governed by that Act.[3]

1. *Vidyavaruthi* v. *Balusamy*, (1921) 44 Mad. 831 (840) P.C.
2. *Hemchand* v. *Pearylal*, (1942) 47 C.W.N. 46 P.C.; *Gangi Reddi* v. *Tami Reddi*, 54 I.A. 136.
3. Mulla's *Hindu Law*, 9th Ed., p. 475.

3. Apart from the *debottar*, there are other religious endowments recognised by Hindu law such as *Mutts* which are, briefly speaking, institutions for the promotion and imparting of religious learning according to the tenets of particular schools of philosophy. Hindus may also create endowments for charitable purposes, e.g., for feeding Brahmanas and the poor and the like (p. 144, *ante*).

4. The mode of creation of any of the above endowments is the same, viz., a valid **dedication** of the property by the founder, to the purposes of the endowment. What is essential is that the owner should effectively divest himself of the property for the benefit of the deity, who is the owner of the endowed property in the case of a *debottar* (*debottar* means belonging to the deity) and appropriation of the profits for the purposes of the endowment. Hence, it can be created without any deed or without vesting the property in any trustee or appointing any trustee,[4] and may be created by such acts as the opening of a deposit account in the name of a deity.[4] On the other hand, mere execution of a document conveying property to a family God is not dedication in the absence of any act following it, to show that the executant divested himself of the property,[5] e.g., where there is no change in the management or accounts[5-6] or mutation of the name of the owner in the revenue registers.[6-7]

Similarly, mere purchase of a property in the name of an idol, from funds not appropriated to the use of the idol, is not a dedication of the property to an idol; it may be a *benami* or fictitious transaction.[8] In the absence of a formal and express endowment evidenced by a deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs.[9]

Plaintiff built a *dharma chatram* (free choultry) for the use of sojourners. In a suit by the plaintiff himself to declare that the property was his absolute property, the only evidence in support of the contention that there was a charitable trust was a letter of invitation issued by the plaintiff at the *pratistha* ceremony of the choultry. There was no further evidence to prove what actually took place at the ceremony and whether there was any formal dedication. On the other hand, the property still stood in the name of the plaintiff, the plaintiff never divested himself of the property nor declared himself a trustee of it for a charitable purpose nor acted as such trustee.

Again, though the letter said that the choultry was to be used by 'sojourners', it did not define whether it was to be confined to any particular class of travellers or not and whether any charge was to be made for the use.

4. *Sooniram* v. *Alagu*, (1938) 42 C.W.N. 1125 P.C.
5. *Watson* v. *Ram*, (1890) 18 Cal. 10 P.C.
6. *Thakurjee* v. *Sukhdeo*, 42 All. 395 F.B.
7. *Rama Rao* v. *Venkataraman*, A.I.R. 1947 P.C. 88.
8. *Brojosoondery* v. *Luchmee*, (1873) 20 W.R. 94 P.C.
9. *Hemantakumari* v. *Gourishankar*, (1940) 45 C.W.N. 637 (641) P.C.

Held, that though the letter showed that the plaintiff contemplated that the property would be used as a rest-house, which was a charitable purpose, the evidence on record did not show that he ever carried out this intention to dedicate the property or decided upon the nature of the proposed trust. Hence, there was no charitable trust with regard to the property in suit.[10]

5. The dedication may, however, be complete or partial. A *complete* dedication involves a complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. It is *partial* if it is either in the form that a mere charge is created in favour of an idol or other religious object or that the owner retains the property in himself but grants the community or part of the community an 'easement' over it for certain specified purposes, e.g., dedication of land on the bank of the Ganges for the purpose of a bathing ghat.[11] The distinction between a complete and a partial dedication is that in the former case, no beneficial interest having been reserved for the founder, it is not heritable or partial amongst his heirs. It is also not alienable except in the manner and for the purposes recognised by Hindu law (to be shortly referred to). In the case of a partial dedication, on the other hand, the property is alienable and partible in the ordinary way, but subject to the charge in favour of the idol or other endowment.[12] In the case of a partial dedication, the owner of the property is not the idol or religious institution but the settlor or his heir who holds subject to the *obligation* to apply a portion of the income for the purposes of the endowment, e.g., where a testator bequeaths his property to his grandson, providing that out of the income of a specified property, he should perform the worship of certain family idols.[13]

But a dedication does not lose its absolute or complete character simply because the members of the settlor's family are nominated as *sevaits* or managers[14] and given reasonable remuneration out of the income of the endowment as also other rights like residence[14-15] in the dedicated property.

The question whether a dedication is complete or partial may not, however, be easy to decide in particular cases and has got to be decided according to the circumstances of each case.

"The question whether the idol itself shall be considered beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will."[16]

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10. *Rama Rao* v. *Venkataraman*, A.I.R. 1947 P.C. 88.
11. *Hemantakumari* v. *Gourishankar*, (1940) 45 C.W.N. 637 P.C.
12. *Jagadindra* v. *Hemantakumari*, (1905) 32 Cal. 129 P.C.
13. *Gopal* v. *Purna*, 49 I.A. 100.
14. *Pillayan* v. *Commrs., H.R.E. Board*, A.I.R. 1948 P.C. 25.
15. *Jaounath* v. *Sitaram*, 44 I.A. 187.
16. *Harnarayan* v. *Surya Kunwari*, 48 I.A. 143.

Sometimes it may happen that the same deed may constitute an absolute dedication to the idol with respect to certain properties and only a partial dedication as regards other properties.[17]

The distinction between complete and partial dedication is important not only from the standpoint of succession and alienability but also in other respects. Thus, where there is an absolute dedication so that the deity is the owner of the property and the income is earmarked for the services specified by the endowment,—if there is a surplus of income which cannot be spent on those services, it would be a case for the application of the doctrine of *cy pres* in respect of the surplus.[18]

6. But though no formalities are required for the creation of a Hindu religious or charitable endowment, it must satisfy the following conditions,[19] in order to be valid—,

(*a*) The object or purpose of the trust must be a valid religious or charitable purpose according to the rules of Hindu law [see p. 141, *ante*].

(*b*) The founder should be capable under Hindu law of creating a trust in respect of the particular property which is the subject-matter of the trust.

(*c*) The founder should indicate with sufficient precision the purpose of the trust and the property in respect of which it is made.

(*d*) The trust must not be opposed to the provisions of law for the time being in force.

7. Instead of dedication by conduct, the founder may create the endowment by a formal instrument.

(*a*) It may be by a formal deed conveying property to the idol itself even though the idol has not yet come into existence.[20] In such a case, the better view is that the deed must be registered and stamped as a deed of gift.[21]

(*b*) He may also convey the property to trustees to hold the property for the purposes of the religious or charitable trust. In such a case the deed must comply with the provisions of the Transfer of Property and Registration Acts.

(*c*) In either of the above cases, if the vesting is made by will, the will must comply with the requirements of s. 57 of the Indian Succession Act.

§ 85. Public and private 'debottar'.

1. We have seen (p. 140 *ante*) that a 'charitable' trust postulates that it is a 'public' trust. But in Hindu law, a religious endowment or trust may be public as well as private. Though it may seem anomalous, the distinction

17. *Bhubaneswari* v. *Brojonath*, 64 I.A. 203.

18. *Pillayan* v. *Commrs., H.R.E. Board*, A.I.R. 1948 P.C. 25.

19. Mukherjea, *Hindu Law of Religious and Charitable Trusts*, p. 52.

20. *Bhupati* v. *Ramlal*, 37 Cal. 128.

21. *Bhoopati* v. *Basanta*, 40 C.W.N. 1320; Mukherjea, *Hindu Law of Religious and Charitable Trusts*, p. 102 [*contra*, *Narasimham* v. *Venkatalingam*, 50 Mad. 687 (F.B.)].

does not affect the religious character of the endowment, for, in either case the property is dedicated to a deity or religious worship; but while in the case of a 'public' *debottar* the right of worship is thrown open to the public at large,[22] in a *'private' debottar,* the right of worship is confined to the members of a particular family (usually that of the founder) or the members of a definite group of persons, and the public at large are not entitled as of right to have access to the temple or participate in the worship.

Apart from the above, it has been held by the Privy Council[23] that in the case of a 'private' *debottar,* the members of the family who are interested in the *debottar* may (with the consensus of all the members) divest the property of its *debottar* character and make it an ordinary secular property.[24]

Moreover, unless the *debottar* is 'public', the special laws relating to religious endowments, such as the Religious Endowments Act, 1863; Charitable and Religious Trusts Act, 1920; s. 92 of the Civil Procedure Code and the like will not apply.

2. But the question whether a particular *debottar* is 'private' or 'public' may not be very easy to decide.

(*i*) Where there is an express dedication by deed, it becomes a question of legal construction of the deed.

(*ii*) Where, however, there is no deed, the inference is to be made from all the circumstances of each case, whether there was a dedication to the public.

Thus,

(*a*) Long user by the public in an open and unconcealed manner would be strong evidence of dedication to the public.[25]

A dedication to the public should not be readily inferred from evidence of user where it is known that the temple property was acquired by grant to an individual or family,[26] though it is possible for a temple which was originally a private one to become a public temple by user *as of right* for a considerable period of time.[26]

1. A person squatting upon a land, which did not belong to him, built a mud hut thereon with an idol in it, and therafter a grant of the land was made to him personally and his heirs 'generation after generation'. Subsequently, the temple attained fame and devotees came in large numbers with offerings which were

22. *Venkataramana* v. *State of Mysore,* A.I.R. 1958 S.C. 255.

23. *Doorga Nath* v. *Ramchandra,* 4 I.A. 52.

24. This view follows the rule of English equity that the beneficiaries of a private trust, being *sui juris,* may put an end to the trust, by common consent. But the application of this principle to the case of Hindu religious endowments has been criticised both by Judges and jurists (see pp. 193-194, Mukherjea, *Hindu Law of Religious and Charitable Trusts*).

25. *Lakshmana* v *Subramaniya,* A.I.R. 1924 P.C. 44.

26. *Bhagwan Din* v. *Gir Har,* A.I.R. 1940 P.C. 7.

taken by the family and portions of the land were let out by the family and also used for family purposes, such as cremation, without any interference by the public.

Held, no public trust could be inferred in the circumstances even though no Hindu worshipper was ever turned away or prevented from worshipping the deity.[26]

2. A person installed an idol at his house in pursuance of a dream and allowed Hindus of all castes to worship the idol as if it was a public idol. He himself acted as the *pujari* and, with the income received from the offerings, managed the temple and discharged all the expenses of the temple as if it was a public temple.

Held, the circumstances led to the inference that the founder had dedicated the temple to the public.[27]

(*b*) The fact that repairs and additions to the temple buildings are made or festivals are performed with public subscriptions raises a presumption of dedication to the public.[27]

(*c*) The fact that the performance of worship of the idol is made in accordance with the rites of a particular sect is evidence of dedication to that sect.[28]

§ 86. How created under Mahommedan law.

1. In Mahommedan law, a gift for religious or charitable purposes is called a *Wakf.* Its statutory definition is: " 'Wakf' means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable" (Mussalman Wakf Validating Act, 1913). But the word 'charity' has a much wider meaning under the Mahommedan law than under the English law, and includes provisions for one's children and descendants, provided an *ultimate* benefit is served for the poor or other religious, pious or charitable purposes recognised by the Mahommedan law.

2. A wakf may be created by word of mouth, and no particular form of grant is necessary, provided only the intention to dedicate the purposes of the wakf is clearly expressed.[29] Nor is it necessary that the word 'wakf' itself should be used, if from the general nature of the grant itself the dedication may be inferred. In such a case, the act or statements of the grantee or his successor may be relevantly taken into account as to the interpretation of the original grant, while the method in which the property has been treated in the administrative records may also throw light on the same problem, though they are not conclusive.[30]

3. A wakf may also be created by will or by a deed *inter vivos.* It may be noted that a Mahommedan will is not governed by the Indian Succession Act and may be made in any form. As to a wakf by a deed *inter vivos,* neither the Indian Trusts Act nor the Transfer of Property Act applies, but

27. *Lakshmana* v. *Subramaniya,* A.I.R. 1924 P.C. 44.
28. *Mohan* v. *Gordhan,* 40 I.A. 97.
29. *Hamid* v. *Mohomed,* A.I.R. 1822 P.C. 384.
30. *Raza* v. *Yadagar,* (1923) 28 C.W.N. 937 P.C.

it has been held[31] that a *wakfnama* by which property of the value of Rs. 100 or upwards is dedicated requires to be registered under s. 17(1)(b) of the Indian Registration Act.

§ 87. Hindu and Mahommedan Endowments, how far trusts.

1. It has been already pointed out that, in *Vidyavaruthi* v. *Balusamy,*[32] the Privy Council observed that foundations of the Hindu and Mahommedan systems differ fundamentally from the juridical conception of a trust under the English law. Under the English trust, the property is conveyed to trustees and the legal ownership is vested in them, while the trustees have no beneficial interests in themselves and they hold for the benefit of the *cestui que trusts.* But neither under the Hindu[32] nor under the Mahommedan system[33] is the property conveyed to the *sevait* or the *mutwalli* (head or manager of the endowment). "Nor is any property vested in him; whatever property he holds for the idol or the institution, he holds as manager with certain beneficial interests regulated by customs and usage."[32]

2. Thus, a Hindu religious endowment such as a private idol or a public temple is recognised by the law as a juridical person[34] and the property is vested in such person, and though the deity can act only through persons such as a *sevait* or manager, they can act for it only within the scope of their authority.[35]

3. Similarly, a wakf in Mahommedan law means the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings. When once it is declared that a particular property is wakf, the right of the *wakif* is extinguished and the ownership transferred to the Almightly.[36] The property in respect of which a wakf is created is not merely charged with such several trusts as he may declare, while retaining his property in his hands. It is in the very deed 'God's acre' and this is the basis of the settled rule that such property as is held in wakf is inalienable except for the purposes of the wakf.[37] The manager of the wakf is the *mutwalli,* the governor, superintendent or curator. In the case of *khankas* the head is called *sajjadanashin.* But neither the *sajjadanashin* nor the *mutwalli* has any right in the property belonging to the wakf,[36] and cannot, therefore, be said to be a 'trustee' in the English sense.[33]

4. Certain statutes have, however, treated these endowments as trusts. Thus, a suit for the proper administration of a Hindu or Mahommedan *public* charitable or religious endowment lies under s. 92 of the Civil Procedure

31. *Rustom* v. *Mushtaq,* (1920) 42 All. 609 P.C.
32. *Vidyavaruthi* v. *Balusamy,* (1921) 44 Mad. 831 P.C.
33. *Alla Rakhi* v. *Abdur Rahim,* A.I.R. 1934 P.C. 77.
34. *Pramatha* v. *Pradyumna,* (1925) 30 C.W.N. 25 P.C.
35. *Nainipillai* v. *Rammathan,* (1923) 47 Mad. 337 P.C.
36. *Vidyavaruthi* v. *Balusamy,* (1921) 44 Mad. 831 (840) P.C.
37. *Abdur Rahim* v. *Narayan,* (1922) 28 C.W.N. 121 P.C.

Code.[38] Section 14 of the Religious Endowments Act, 1863, provides a remedy for breach of trust by the trustees of a Hindu or Mahommedan religious establishment of public nature.

5. The most important of the statutory provisions relating to the present topic is s. 10 of the Limitation Act. In *Vidyavaruthi* v. *Balusamy*,[39] the Privy Council held that the head of a Hindu or Mahommedan religious endowment was not a trustee in the English sense of the term and it could not be said that the endowed property was 'vested' in the *sevait, mohunt, mutwalli* and the like; accordingly, these persons were entitled to plead limitation in a suit to recover endowed property from their head.

The Legislature *superseded* the above Privy Council decision on the point, by inserting the following provision as the second paragraph to s. 10 of the Indian Limitation Act, in 1929:

> "For the purposes of this section any property comprised in a Hindu or Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

The above provision has been retained as an *Explanation* to s. 10 in the Limitation Act of 1863. The result of this provision is to put Hindu and Mahommedan religious and charitable endowments on the same footing as other trust funds which definitely vest in a trustee. Since this amendment, *sevaits, mutwallis,* etc., are **'express trustees' for the purpose of limitation** and they cannot plead a bar of time in a suit contemplated by this section. Thus, no question of limitation arises in a suit for declaration that the property in the possession of the defendant is a *wakf* property of which the defendant is the *mutwalli* and not his private property, when the property is found to be a *wakf* property.[40]

§ 88. Status and powers of Sevaits, Mutwallis etc.

I. *Sevait.*

1. As regards the property of the *debottar*, the *sevait* is in the position of a trustee[41] since he has to manage and administer it for the purposes of the foundation, and is strictly accountable for its management as a trustee.[39]

2. On the other hand, the *sevait* is not a trustee in the English sense of the term inasmuch as the property is not vested in the *sevait* but is vested in the deity and the *sevait* is merely a manager[39] and a transferee from a

38. *Abdur Rahim* v. *Barkat*, (1928) 55 Cal. 519; *Mahomedally* v. *Akbarally*, (1934) 38 C.W.N. 425 P.C.

39. *Vidyavaruthi* v. *Balusamy*, (1921) 44 Mad. 831 P.C.

40. *Mohammed Shah* v. *Fasihuddin*, A.I.R. 1956 S.C. 713.

41. *Ramanathan* v. *Murugappa*, (1906) 29 Mad. 283 P.C.

sevait does not get any protection, unless the transfer is justified by necessity, as explained below.

3. But a *sevait* has a power of alienating the endowed property for purposes of legal necessity as well as for the benefit of the estate[42] and a transferee from the *sevait* gets a good title either on proof of the actual existence of such necessity or on proof of *bona fide* enquiry by him as to the existence of such necessity.[43] The necessity that justifies the alienation is the necessity existing at the time of the alienation and a *bona fide* creditor or transferee is not affected by the fact that the necessity had been brought about by the past misdeeds of the *sevait* himself.[44]

4. On the other hand, it is now settled[45-46] that a transfer by a *sevait* without legal necessity is not void *ab initio,* but is only voidable. It is accordingly valid during the grantor's lifetime, though not against his successors. For the same reason, the alienee can claim title by adverse possession against the endowment from the time of the death or cessation of office of the transferor *sevait.*[47]

5. The *sevait* also represents the idol or the endowment in legal actions,[48] and has a right of property in this office which is heritable.[49] In almost all such endowments the *sevait* has a share in the usufruct of the *debottar* property. But even where no emoluments are attached to the office of a *sevait*, he enjoys some interest in the endowed property which has the character of a proprietary right.[50]

In short, the position of a *sevait* is a peculiar one—

> "Both the elements of office and property, of duties and personal interest are mixed up and blended together in the conception of *sevaitship.*"[49]

II. *Mohunt.*

1. A *Mutt* is a religious institution of the nature of a monastery, the object of which is to impart spiritual instruction to the disciples and followers of the *Mutt* and to maintain a line of religious teachers competent to impart such instruction according to the tenets of the school to which the *Mutt* belongs. The head of the *Mutt* is the spiritual teacher or *Acharya* for the time being, known as the *Mohunt*. The *Mohunt* has a secular and a religious

42. *Prasannakumari* v. *Gulab*, (1875) 23 W.R. 253 P.C.
43. *Hanooman Pershad* v. *Babooee*, (1856) 6 M.I.A. 393.
44. *Niladri* v. *Chaturbhuj*, (1926) 31 C.W.N. 221 P.C.
45. *Subbaya* v. *Mustapha*, (1923) 28 C.W.N. 493 P.C.
46. *Nainipillai* v. *Ramnathan*, (1923) 28 C.W.N. 809 P.C.
47. *Ramcharan* v. *Naurangi*, (1932) 37 C.W.N. 541 P.C. (This decision of the Privy Council removes the impression created by some earlier authorities that an alienation by a *sevait* without necessity is altogether void. In this respect, the powers of the manager of a Hindu endowment are clearly larger than those the manager of a Mahommedan endowment).
48. *Jagadindra* v. *Hemantakumari*, (1904) 8 C.W.N. 809 P.C.
49. *Bhabatarini* v. *Ashalata*, (1943) 47 C.W.N. 599 P.C.; *Kalipada* v. *Palani*, A.I.R. 1953 S.C. 125.
50. *Angurbala* v. *Debabrata*, (1951) S.C.R. 1125.

capacity which are interdependent and inseparably blended. He is the head of the institution. He sits upon the *gadi*; he initiates candidates into the mysteries of the cult; he superintends the worship or the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs and the whole assets are vested in him as the owner thereof in trust for the institution itself.[51]

2. Like the idol in a temple or *devasthanam*, the *Mutt* has also been recognised as a juridical person,[52] but in the case of a *Mutt*, the ideal person is not the idol, if there be any, but the head of the institution or *Mohunt*, who has been described as a corporation sole. Thus, while in the case of a *debottar*, the property is not vested in the *sevait* but in the idol, in the case of a *Mutt*, the property is vested in the reigning *Mohunt*, unless there be any usage to the contrary.[53]

3. But although large administrative powers are vested in the reigning *Mohunt*, his position is that of a trustee like that of a *sevait* [p. 216, *ante*], in the sense that he has to hold the property for the purposes of the *Mutt* and is answerable for its administration as a trustee.[52] Hence, the *Mohunt* is not only a spiritual preceptor but also a trustee in respect of the *Mutt* over which he presides.[53] His powers of alienation, therefore, are no greater than those of a *sevait* and can be justified only by proof of legal necessity or preservation of the institution.[54] Being a trustee, his possession or dealings with the trust property can never be adverse to the *math* or the deity,[55] as the case may be.

On the other hand, as the Supreme Court has observed in the *Shirur Mutt case*,[56] it would not be correct to say that a *Mohunt* is a mere manager or a trustee in the strict English sense, having no beneficial interest in the endowed property.

"Mohantship is not a mere office. A superior of a Mutt has not only duties to discharge in connection with the endowment but he has a *personal* interest of a beneficial character which is sanctioned by custom and is much *larger than that of a Sevait in the debottar property*......Thus in the conception of Mohantship as in *Sevaitship*, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal interest of the Mohant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties..... It is true that Mohantship is not heritable like ordinary property, but that is because of its peculiar

51. *Ram Prakash* v. *Anand*, A.I.R. 1916 P.C. 256.

52. *Manohar* v. *Lakshmiram*, (1888) 12 Bom. 247, affirmed by *Chotalal* v. *Manohar*, (1900) 24 Bom. 50 P.C.

53. *Arunachellam* v. *Venkatachalapathi*, (1919) 43 Mad. 253 P.C.

54. *Daivasikhamoni* v. *Periyanan*, (1936) 59 Mad. 809 P.C.; *Nainipillai* v. *Ramanatham*, (1924) 28 C.W.N. 809 P.C.

55. *Ishwar Sridhar Jew* v. *Sushila*, A.I.R. 1954 S.C. 69: (1954) S.C.R. 407.

56. *Commr., H.R.E.* v. *Lakshmindra*, (1954) S.C.A. 415 (427).

nature and the fact that the office is generally held by·an ascetic, whose connection with his natural family being completely cut off, the ordinary rules of succession do not apply".[56]

III. *Mutwalli.*

1. A *Mutwalli*, like a *Sevait*, is the manager of the wakf, but the property does not vest in him as in the case of an English trustee.[57] It is vested in the Almighty as soon the the wakf is created.[58] Accordingly, a *Mutwalli* has no power to alienate the wakf property in any form or for any purpose, unless expressly empowered by the deed of wakf or with the permission of the Court.[58-59] In this respect, the powers of a *Mutwalli* are more restricted than those of a *Sevait*.[60]

2. But the *Mutwalli*, like a *Sevait*, is liable for maladministration as a trustee,[61] and is liable to be removed in similar circumstances.[62] And, for the same reason, s. 92 of the Civil Procedure Code is applicable to the case of a public wakf.[63]

IV. *Sajjadanashin.*

1. A *Sajjadanashin* is the head of *Khankah* which is an institution analogous in many respects to a *Mutt*. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administration of its charities, and has in most cases a larger interest in the usufruct than an ordinary *Mutwalli*.[47]

2. But the property is not vested in the *Sajjadanashin*[61] just as in the case of a *Mutwalli*, and his powers of alienation are similarly restricted.

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57. *Rustom* v. *Mustaq*, (1920) 42 All. 609 P.C.
58. *Abdur Rahim* v. *Narayan*, (1922) 28 C.W.N. 121 P.C.
59. *Masjid Sahidganj* v. *Gurudwara*, (1940) 44 C.W.N. 957 (965) P.C.
60. *Sailendra* v. *Hade Kaza*, (1931) 36 C.W.N. 193.
61. *Vidyavaruthi* v. *Balusamy*, (1921) 44 Mad. 831 P.C.
62. *Husain* v. *Nur Husain*, (1928) 32 C.W.N. 769 P.C.
63. *Vidyavaruthi* v. *Balusamy*, (1921) 44 Mad. 831 P.C.

SPECIFIC RELIEF