CHAPTER V

ELECTION

§ 20. Doctrine of Election.

1. Election may be defined as "the choosing between two rights when there is clear intention that both were not to be enjoyed". Election arises when there is a duality of gifts in the same instrument—two inconsisent alternative donations, the one of which the donor has no power to make without the assent of the donee of the other. The commonest application of the doctrine is where a person (*A*) has by a will or deed *affected* to dispose of the property of another (*B*) to a third person (*C*), and has by the *same* instrument also given some other property belonging to himself to that other (*B*). In such a case, an intention of the donor is implied that the donee (*B*) is entitled to the gift made to him (*by A*), only if he *elects* to permit the gift to the third person (*C*) to take effect.

2. The **principle** upon which this equitable doctrine is based is that "*He who accepts a benefit under an instrument must adopt the whole of it*, conforming to all its provisions and renouncing every right inconsistent with it" [*Codrington* v. *Codrington*, (1875) 7 H.L. 854]. It is also commonly expressed by the dictum, "**A man cannot both approbate and reprobate**." That is to say, the donee (*B*) cannot enjoy both the benefit given by the donor and the right to his own property. He is entitled to the benefit only upon 'conforming to all the provisions of the instrument', i.e., by renouncing the right to his own property attempted to be disposed of by the donor. To accept the benefit and at the same time to decline the burden is to frustrate the intention of the donor. (The doctrine is thus based on the highest principle of equity and justice, and is not peculiar to English conditions). The donee is put to his election to take either *under* or *against* the instrument. He has two courses open to him: (*a*) If he elects to take under the instrument, by accepting the *benefit* given to him by *A*, he must relinquish the *right* to his own property which has been given to *C* by *A;* (*b*) If, on the other hand, he elects to take against the instrument and will not give up his own property which the donor has intended to give away, then equity will interfere, and sequester the *benefit* conferred upon him under the instrument for the purpose of compensating the person (*C*) whom he disappoints by insisting on his proprietary *rights*.

3. It is to be **noted** carefully that when the donee *reprobates* or elects against the instrument he does not lose the whole of the benefit given to

him under the instrument, but only so much of it as will be required to *compensate* the person who has been disappointed by his election against the instrument. It has been settled after a conflict of judicial decisions, that **compensation and not forfeiture is the principle** that is to be applied when the donee elects against the instrument. The result is, that the 'refractory' donee will not only be able to retain his own property, but will also be entitled to claim so much of the benefit given by the donor that remains after compensating the 'disappointed' donee for the loss of the property that the donor designed for him.

X is tenant in fee simple of Blackacre. A testator devises Blackacre to *Y*, and bequeaths to *X* a legacy of £1000 (by the same will). *X* insists on retaining Blackacre. *X* will then have to abandon (not all claim to the legacy, but) so much of the legacy of £1,000 as will serve to compensate *Y* for the loss of Blackacre. Now suppose, that the value of Blackacre is only £500. *X* will then be able to retain not only Blackacre but also £500,—the surplus of the legacy that remains after compensating *Y*. (Of course, if the value of Blackacre is greater than or equal to the legacy, it matters little to him whether the rule to be applied is one of compensation or forfeiture, simply because then there will be no surplus of the benefit left for him).

§ 21. Conditions necessary to raise a case of election.

To raise a case of election—

(1) The donor must give the property of the donee to a third person.

(2) The donor must in the same instrument give to the donee some property which is actually his own (otherwise there is nothing out of which compensation may be made to the third party, if the donee elects against it).

(3) The property of the donee attempted to be disposed of must be alienable (by the donee himself), otherwise the donee will not be in a position to comply with the wishes of the donor.

(4) The property given to the donee must be such that it can be used to compensate the third person. No election is to be made where it is inalienable. Thus, if property is given to a married woman subject to a restrain on alienation, and some free property of hers is given away by the instruments, she will not have to elect. She will be able to retain her own property, and also take the gift, for it has been made inalienable.[1]

(5) There must appear on the face of the instrument a clear intention on the part of the donor to dispose of that which is *not his own*, though it is immaterial whether he knew or did not know that he was attempting to give away another's property. That is to say, the doctrine of election is not based on a mistaken belief of the donor that the property attempted to be disposed of was his own. But at the same time, in order that a case of election may be raised, it must clearly appear in the instrument itself that

1. *Re Vardon's Trusts*, (1885) 31 Ch. D. 275.

the donor has attempted to dispose of that which belongs to the donee. External evidence is thus inadmissible to *raise* a case of election. For example, if a testator devises 'All my real estate' to *Y*, it may not be proved by oral evidence that he was in the habit of treating as part of his real estate a field that belonged to *X*. Consequently,—(*a*) Where a testator has a *limited* or partial interest in the property attempted to be disposed of, he is presumed to have given his own property only, and any general words used will be deemed to apply to such interest only as he was capable of disposing of by his will, (*b*) Similarly, if a testator having an estate which is subject to an *incumbrance* (in favour of *X*) gives this estate to *Y*, and gives a legacy to *X*, the incumbrancer, this will not put *X* to his election between the incumbrance and the legacy. In order that such a case of election may be raised, it must appear from the will itself that the testator has given to *Y* the estate freed from the incumbrance. Every testator is *prima facie* taken to have intended to dispose of only what he had power to dispose of.

(6) The doctrine of election cannot be raised in order to cure an illegality, e.g., to override the rule against perpetuities.

§ 22. "Election is a matter of intention."

It is clear from what has been said so far that the "**foundation** of the doctrine is the intention of the author of the instrument and its *characteristic* is the effectuation of a gift made by a donor of property not belonging to him" [*Dillon* v. *Parker*, (1818) 1 Swan. 359]. Being thus founded on the general presumption that the author of an instrument intends that effect shall be given to every part of it, the doctrine may be excluded by evidence of contrary intention,—by evidence (*a*) of an express declaration by the donor that the doctrine of election is not to be used, or (*b*) of words which show a contrary intention. And it has been held[1] that by giving property to a married woman subject to a restraint on alienation one in effect says that as regards that property she is not to be put to her election,—the attempt to render the property inalienable amounts to a declaration that the doctrine is excluded.

But "this general and presumed intention is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument, but in principle it is evident that it may be repelled by a declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention".[1]

§ 22A. Doctrine of Election of India.

1. In India, the doctrine of election has been adopted in Ch. XXII of the Indian Succession Act (as to gifts by will), and s. 35 of the Transfer of Property Act (as to gifts *inter vivos*). But the Indian law *differs* from the English on a vital point. In India, the refractory donee will *forfeit* the benefit

altogether, and the benefit will revert to the representatives of the donor subject to the charge of making good to the disappointed donee the value of the property attempted to be given to him by the instrument. The result is, that the balance after satisfying the disappointed donee will go to the representatives of the donor, and not to the refractory donee as in England. The principle of 'compensation' has not been accepted in India [cf. s. 181, Indian Succession Act; also s. 35, T.P. Act].

This may be explained by an example :

If *A* has by an instrument disposed of the property belonging to *B* to a third person *C*, and has by the same instrument also given some other property belonging to *A* himself to *B*, *B* is required either to elect *under* or *against* the instrument. (*a*) If he elects to take under the instrument, by accepting the benefit given to him by *A*, he must relinquish the right to his own property which has been given to *C* by *A*. (*b*) If, on the other hand, he wants to retain his own property, he is said to elect against the instrument. In such a case, (*i*) in England *B* will not forfeit all his rights to the property given by *A* to him. It will first be applied to compensate *C* for the loss caused by *B*'s election against the instrument; if there is any balance left, the refractory donee (*B*) will get it. (*ii*) But under the Indian law, *B* will forfeit the benefit altogether, and it will revert to the transferor or his representatives as if it had not been disposed of.

Secondly, the Indian law specifies a time within which the election must be made, viz., one year from the date of transfer or from the death of the testator (as the case may be). In England, no such time is fixed by the law. But (*i*) if a time is limited by the instrument itself, the donee must elect within that period, and if he fails, he is deemed to elect *against* the instrument [*Dillon* v. *Parker*, (1818) 1 Swan. 359]; or (*ii*) if the parties interested in the will categorically call upon the donee to elect, the Court might not consider 12 months after the testator's death to be an unreasonable time within which he must elect [*Sopwith* v. *Maugham*, (1861) 30 Beav. 235].

2. The conditions necessary for the application of the rule under these statutory provisions are—

(1) The transferor must give the property of the transferee to a third person.

(2) The transferor must at the same time grant some property of his own to the transferee.

(3) The two transfers must be by the same transaction. No case for election arises if the two gifts are not made in the same transaction.[2]

(4) The transferee must have proprietary interest in the property

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2. On the death of the Nawab of Tonk, Government transferred the chiefship to the eldest son, and transferred a portion of the cash allowance to the second son for whose maintenance the late Nawab had already made a grant of two villages. *Held*, the second son was not put to elect between the cash allowances and the villages, since the two grants came from independent sources (*Afzal* v. *Ghulam*, (1903) 30 Cal. 843 P.C.).

disposed of by the transferor in derogation of the transferor's rights. Thus, a creditor is not put to election, as he has only a personal right to be paid by the debtor.

(5) A person taking no benefit under a transaction directly, but deriving a benefit under it *indirectly*, is not put to election.[3]

(6) No election arises when benefit is given to a person in a different capacity.[4]

The exception to the rule in s. 35 is—

"—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction."

In other words, if a particular benefit is conferred expressly in satisfaction of the property of the transferee which is disposed of, the transferee is not bound to relinquish other benefits conferred by the same instrument, if he elects against it. For example, *A* transfers to *B* property *X in lieu of B*'s property which is given to *C*. *A* also gives to *B* property *Y*. If *B* elects of retain his own property, he must relinquish his claim to *X* but not to *Y*.

3. The application of the doctrine of election, however, is not confined to the above statutory provisions of the Transfer of Property Act and the Succession Act, but is made, wherever circumstances require, as a principle of universal justice.[5-6]

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3. The illustration to s. 184 of the Succession Act illustrates this principle :

The lands of Sultanpur are settled upon *C* for life and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1,000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C* and as administrator elects on behalf of *C*'s estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to *B* for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will.

4. The illustration to s. 185 of the Succession Act explains this principle :

The estate of Sultanpur is settled upon *A* for life, and after his death, upon *B*, *A* leaves the estate of Sultanpur to *D* and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B*'s only child. *B* dies intestate shortly after the testator without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this and yet claim his legacy of 1,000 rupees under the will.

5. *Rungamma* v. *Atchama*, (1850) 4 M.I.A. 1.

6. *Mukhun* v. *Sreekishen*, (1869) 12 M.I.A. 157, *Sadik Husain* v. *Hashim*, (1916) 21 C.W.N. 130 P.C.

CHAPTER VI

MORTGAGES

§ 23. Nature of a Mortgage at Law and in Equity.

1. **At common law** a mortgage was strictly an 'estate upon condition', — the estate being forfeited upon the condition being broken. It was effected by transfer of the legal estate in the land (or other property) for the purpose of securing the repayment of a debt, made by the borrower to the lender, subject to the proviso that if the borrower repaid the money within a certain day with interest, the lender would reconvey the land to the borrower. If the *condition* was not performed, i.e., if the money was not repaid within the stipulated period, the land belonged *absolutely* to the lender, and the borrower lost all his right to recover it. A mortgage, at law, was thus an 'absolute conveyance subject to an agreement or proviso for reconveyance'.

2. **Equity** considered it unfair that the borrower should lose his land entirely if he failed to pay within the date fixed for payment. It looked upon the transaction from the standpoint of the original intention of the parties according to the maxim "Equity looks to the intent rather than to the form." Thus it came to regard it not as an absolute conveyance, but merely as a *security* or pledge for the repayment of the debt, and declared it to be against conscience that the mortgagee (lender) should retain as owner for his own benefit what was intended as a mere security. Hence, even after the day fixed for payment, i.e., after the mortgagor (borrower) had lost his *legal* right to redeem, he was deemed to have an **equitable** right to redeem his estate on payment within a *reasonable* time of the principal, interest and costs. This right of the mortgagee, after the mortgagor has become the absolute owner of land according to the provisions of the mortgage deed[1] itself, is known as the mortgagor's **equity of redemption.** As *Maitland* humorously puts it, owing to the action of equity, the mortgage deed became

1. Since 1926, the form of a legal mortgage in England has changed, for under the L.P.A., 1925, a legal mortgage can only be effected by (1) a demise (or lease) for a term of years absolutely subject to a proviso that such term will cease on repayment of the debt, or (2) or charge by way of legal mortgage which has the same effect. Since 1926, therefore, the mortgagor has the advantage of retaining the *legal* estate in fee simple vested in himself while at the same time the mortgagee gets a *legal* term of years. But the change is merely one of form only, and *at law*, the mortgage is still irredeemable after the expiration of the time specified for repayment. Hence, the rules of *equity* about redemption and other incidents of a mortgage remain practically as effective as before. (In the present Chapter we shall refer to the old form of mortgage unless otherwise specified. The Indian student, too, is more interested about the old form of mortgage in relation to which the doctrines of equity had their origin.)

"one long *suppressio veri* and *suggestio falsi.* It does not in the least explain the rights of the parties; it suggests that they are other than what really they are". In other words, while the deed said that if the mortgagor defaulted in paying off the loan with interest by the date fixed for payment, the mortgagee would at once become the absolute owner of the mortgaged property,—equity said that even after the date fixed, the mortgagor would be entitled to redeem the mortgage on payment, at any time before a sale or foreclosure of the mortgage has taken place.

Thus,

"An equity of redemption is a right not given by the terms of the agreement between the parties to it, but *contrary to them*, to have back securities given by a borrower to a lender on payment of principal and interest at a day after that appointed for payment, when by the terms of the agreement between the parties the securities were to be the absolute property of the creditor" [*Salt* v. *Marquess of Northampton*, (1892) A.C. 1].

3. Once the doctrine of redemption was formulated, it came to receive the most anxious protection of the Court of Equity which held that the equity of redemption could not be barred or fettered in any way, not even by the express stipulation of the parties of the contract. In the province of mortgages, equity thus started with the principle that 'the *first essential characteristic* of a mortgage is the mortgagor's right to redeem'. On the other hand, the mortgagor's equity of redemption, being an equitable right, could not continue for any length of time. It had its origin in the notion of equity that the stipulation as to the time for the payment was a penalty which ought to be relieved against by allowing a *reasonable* time;—but beyond that the Court would not go. The mortgage was, therefore, allowed a corresponding right whereby the mortgagee might ask the Court to set limits to its own benignity and to declare (after allowing the mortagagor a reasonable time for payment) that the mortgagor who had already lost his *legal* right to redeem should be deprived of his *equitable* right also, that is to say, should be for ever 'foreclosed' of his equity of redemption. Here, then, we get another leading rule of equity in the sphere of mortgages, viz., that "the *second essential characteristic* of a mortgage is the right to foreclose". As *Hanbury* puts it—"The right of foreclosure is an equitable right given to the mortgagee to counterbalance the mortgagor's right to redeem."

4. The position of mortgage in law and equity has thus been summarised in *Coote's Law of Mortgages*—

"........a security created by contract for the payment of a debt already due or to become due, or of a present or future advance, effected by means of an actual or executory conveyance of real or personal property charging the mortgaged property with the payment of the money secured, redeemable at law according to the strict legal conditions of the conveyances, but redeemable in equity independently of such conditions, and enforceable, in default of payment, by foreclosure or sale in lieu thereof."

§ 24. "Once a mortgage, always a mortgage."

1. Once the doctrine of redemption was formulated, Courts of Equity strictly adhered to this primary notion that a mortgage was merely a *security* for the payment of a debt, and as such redeemable by discharge of such debt and held that the equity of redemption could not be fettered even by an express agreement of the parties. Thus it established the further doctrine that the maxim *modus et conventio vincunt legem*, or that the agreement of the parties overrides the law, did not apply to mortgages. This doctrine is represented by the maxim *Once a mortgage always a mortgage* which simply means that a transaction could not, at one time be a mortgage, and at another cease to be so, by having any stipulation in the mortgage-deed which is calculated to prevent redemption. It means that "no contract betwen a mortgagor and mortgagee made *at the time of the mortgage* and as part of the mortgage transaction can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage" [*Samuel* v. *Jarrah Timber Corporation*, (1904) A.C. 323].

2. It has a twofold application—(*i*) If a transaction which really intended to be a mortgage, though it was carried out in the form of a sale, equity will not allow the mortgagor to be deprived of his right to redeem the property on payment of the debt with interest within a reasonable time, though the stipulated time has elapsed...... Where a conveyance or assignment of an estate is originally intended as a security for many, whether this intention appears from the deed itself or by any other instrument,[2] it is always considered in equity as a mortgage and redeemable, even though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time or to a particular description of persons" (*Coke on Littleton*). (*ii*) Secondly, equity will not allow any "clog on the equity of redemption."

§ 25. A Clog on the Equity of Redemption.

1. A "clog" means any stipulation or provision in the mortgage-deed which has the effect of fettering the equity of redemption, i.e., any stipulation

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2. In India, however, since the Privy Council decision in *Balkishen Das* v. *Legge* [(1899) 22 All 149], it is *not* open to the Courts to allow any *extraneous* evidence in order to prove that a transaction purporting to be a sale was intended by the parties to be a mortgage by conditional sale. Such intention must be gathered from the document itself which purports to effect the transaction, by reason of s. 92 of the Evidence Act. The English Chancery cases have *no* application to the law of India as laid down in the Acts of the Indian Legislature. Following this decision, cl. (*c*) of s. 58 of the Transfer of Property Act, as amended in 1929, now expressly enacts that "no transaction shall be deemed to be a mortgage by conditional sale unless the condition is embodied *in the document* which effects or purports to effect the sale." [*Chunchun* v. *Ebadat*, A.I.R. 1954 S.C. 345].

which prevents the mortgagor from getting back his property, on payment, free from any obligation. Equity declared such stipulations to be void and unenforceable as being contrary to the nature of a mortgage.

2. The doctrine of 'clogging the equity' thus implied that—

(*a*) Any provision in the mortgage-deed which attempts to deprive the mortgagor of his right to redeem *absolutely* and at any time is void.[3] The right to redeem, thus, cannot be restricted to some only of the representatives of the mortgagor, or to the mortgagor personally. At the time of the mortgage, the mortgagee cannot even reserve for himself an option to purchase the mortgaged property [*Samuel* v. *Jarrah Timber Co.,* (1904) A.C. 323].

(*b*) Not only is an agreement directly barring the equity of redemption void, but stipulations which even *indirectly* tend to have the effect of making

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3. (a) But though the mortgagor cannot be precluded from redeeming altogether, a stipulation *postponing* the right to redeem for a *reasonably* fixed period has been held not to be necessarily void as a clog [*Morgan* v. *Jeffreys,* (1910) 1 Ch. 620; *Knightbridge* v. *Byrne,* (1938) 55 T.L.R. 196].

These English principles have been generally applied in India. The Supreme Court has thus observed, *in Ganga Dhar* v. *Shankar,* A.I.R. 1958 S.C. 770,—

The Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the money on the mortgage. If he was oppressed or imposed upon, he may be entitled to relief. The question whether there is anything unconscionable in the agreement is essentially one of fact and has to be decided on the circumstances of each case.

A mortgage deed provided that the mortgagor will not be entitled to redeem for a period of 85 years and that thereafter he should redeem within 6 months and not thereafter.

Held, that the latter term amounted to a clog and was invalid and must be ignored but that it stood quite apart and that the invalidity of the one did not make the other (viz., prohibiting redemption before the expiry of 85 years) also invalid. *Held also* that the length of the term, viz., 85 years, itself did not lead to the conclusion that it was an oppressive term and that in the circumstances of the case, it was a reasonable one and could not be enforced and that a suit brought for redemption before the expiry of that period was premature and must fail.

Similarly, it has been held that a stipulation in the mortgage deed that if the debt was not paid off within a period of 15 years, on the expiry of that period, the mortgagee would become the absolute owner of the mortgaged property, was a clog on the equity of redemption, which could not extinguish the right of the mortgagor to redeem the property even after the expiry of 15 years. [*Murarilal* v. *Deva Karan,* A.I.R. 1965 S.C. 225 (para. 4)]

(b) On the other hand, though a mortgagor cannot, at the time of the mortgage, enter into any agreement precluding himself from the right to redeem, he can by a *subsequent independent* transaction agree to give up his right to redeem. In other words, there is nothing to prevent the mortgagee from *buying* the equity of redemption [*Reeve* v. *Lisle,* (1902) A.C. 461]. In this case it was observed—"the mortgagee cannot, *at the moment* when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is *subsequent* to and *independent of the original bargain*". This principle has been followed in India in *Shankar Din* v. *Gopal,* (1912) 34 All. 620 P.C., holding that a subsequent and independent contract qualifying the right of redemption is valid. This is also made clear by the Proviso to s. 60 of the Transfer of Property Act which says that the right of redemption may be extinguished by the 'act of parties', which plainly means an act subsequent to the execution of the mortgage.

the mortgage irredeemable have been held to be equally unenforceable in equity. In *Noakes* v. *Rice,*[4] Lord Macnaughten observed,—

"Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity; and equity will not permit any *device or contrivance* designed or calculated to prevent or impede redemption. When the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as *free and unfettered* to all intents and purposes as if the land had never been made the subject of the security... It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that after full payment of principal, interest and costs he should continue to receive for a definite or an indefinite period a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created."

Similarly in, *Carritt* v. *Bradley* [(1903) A.C. 258], where the owner of shares in a tea company mortgaged them to the company's broker, and agreed to secure that *always* thereafter the broker should retain employment with the company, failing which the mortgagor would pay him the commission he would otherwise have made, it was held that no action lay on this agreement after the mortgage was paid off, because it prevented free dealings with the shares, on their redemption;—a mortgagor on redemption is entitled to get back his property free from *all* restrictions.

(*c*) Thus the doctrine of 'clogging the equity' was extended so that a stipulation in a mortgage for *any collateral advantage* to the mortgagee besides the payment of his principal, interest, and costs was regarded by the Court as necessarily bad, in so far as it extended *beyond the period of redemption.* This rule was probably designed to prevent the evasion of the usury laws, and to guard against the oppression of necessitous landowners by moneylenders. But the social conditions which gave birth to this rule have changed, and the trend of recent decisions is towards a relaxation of the older doctrine. A modern authority on the point is *Kreglinger* v. *New Patagonia Meat Co.*[5] [(1914) A.C. 25], which lays down that there is no rule in equity which prevents a mortgagee

4. *Noakes* v. *Rice.*—In a mortgage of a leasehold public house by a licensed victualler to brewers, the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not, during the continuance of the term and 'whether any money should or should not be owing on the security of the mortgage' use or sell in the house any malt liquors except such as should be purchased from the mortgagees. *Held,* that the covenant was a clog on the equity of redemption, and that the mortgagor on payment of all that was due, was entitled to have a reconveyance of the property, free from the tie. The agreement was void as a clog because it prevented the mortgagor from getting back the property unfettered even after he paid off the loan.

5. *Krelinger* v. *New Patagonia Meat Co.*—The mortgagor company had, at the time of making a loan upon the security of a floating charge on its business agreed that they would not for a period of 5 years (during which period the loan would not be called in) sell their sheep-skins to anyone other than the firm of the mortgagees, if the latter were willing to pay the best price obtainable. The mortgagors actually paid off before the expiry of 5 years. *Held,* that the mortgagees could exercise their option of pre-emption *notwithstanding that*

from stipulating for any collateral advantage to endure beyond redemption provided, such advantage is not (*a*) unfair and unconscionable, or (*b*) in the nature of a penalty clogging the equity of redemption, or (*c*) otherwise inconsistent with or repugnant to the right to redeem. In other words, a mortgagee can stipulate for a collateral benefit to endure *beyond redemption,* if it does not prevent free dealings with the property mortgaged.

§ 26. The Mortgagor's Equity of Redemption.

(A) *England.*

1. Originally a mere equitable *right* [p. 73, *ante*] the equity of redemption afterwards came to be regarded as an equitable *estate* in the land. In other words, though the legal estate was transferred to the mortgagee, in *equity* the mortgagor was still looked upon as the owner of the land subject only to the obligation of repaying the debt. Consequently *subject to the mortgagee's rights,* the mortgagor can exercise all rights of ownership over it;—he can settle, devise, (again) mortgage, or otherwise dispose of it in the same way as any other equitable interest in land. [Since 1926, he can exercise these rights by virtue of the *legal estate* which he retains.]

2. The equity of redemption subsists until it is destroyed by foreclosure or sale through Court, or by sale under powers contained in the mortgage, or by the operation of the Statute of Limitation under certain circumstances.

(B) *India.*

1. **In India**, since the passing of the Transfer of Property Act, the distinction between legal and equitable rights and interests does not exist. The Indian mortgagor, however, retains a similar right of redemption or reconveyance of the land, until foreclosure or sale (**s. 60**) and a right to transfer such right by way of sale or second mortgage. But this is not an equitable right but a *legal* right[6] and if the mortgagor transfers such right by way of sale of second mortgage, the transferee gets a *legal* and not an equitable interest. In India, neither of the six forms of mortgage recognised by the Transfer of Property Act transfer the *whole* interest of the mortgagor to the mortgagee and the mortgagor retains a legal interest which may be further transferred, whether before or after the expiry of the date fixed for repayment and the right of redemption of the mortgagor is also a legal right, being conferred by s. 60 of the statute.[7] In short,

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the mortgage was paid off, for the option formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining a loan; nor was it a clog on the equity of redemption. (It is to be noted that while in *Noakes* v. *Rice* or *Carritt* v. *Bradley*, the covenants tied the *property*, in the present case, the stipulation did not affect free dealings with the property.).

6. *Ramchand* v. *Prabhu,* (1942) 47 C.W.N. 1 (6) P.C.

7. *Ramkinkar* v. *Satyacharan,* (1938) 43 C.W.N. 281 P.C.

"the mortgagor in Indian law is the owner who has parted with some rights of ownership and the right to redemption is a right which he exercises in virtue of his residuary ownership (*Mulla*).

A lease contained a convenant for payment of certain sums to the lessors. The lessees granted a sub-lease on the same terms and after several assignments of the sub-lease interest, it was mortgaged. The question was whether the mortgagee was liable to make the payments under the covenant contained in the sub-lease. *Held* by the Judicial Committee, that under the English system of law as it prevailed before the passing of the Law of Property Act, 1925, the whole of the *legal* interest passed to the mortgagee, so that in the case of a mortgagee who would, therefore, be liable for the burden of the covenants in the lease [*Williams* v. *Bosanquet,* (1819) 1 B. & B. 238]. But, in India, the mortgagor retains a *legal* interest both before and after the contractual date of repayment has elapsed (until extinction of the legal right of redemption). Consequently, when in India a mortgagor assigns his interest under a lease to a mortgagee, he does not transfer an absolute interest within the principle established in England by the case of *Williams* v. *Bosanquet* [(1819) 1 B. & B. 238], and, therefore, the mortgagee is not liable by privity of estate for the burdens of the lease, even though it is an English mortgage under s. 58 (*e*) of the Transfer of Property Act.[8].

2. S. 60 of the Transfer of Property Act runs thus :

"At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (*a*) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by the section has not been extinguished by act of the parties or by decree of Court.

The right conferred by the section is called a right to redeem and a suit to enforce it is called a suit for redemption."

3. From the fact that the right of redemption is a statutory right in India, important consequences follow and the following points of **distinction** from the English rules of equity should be noted—

(*a*) The right of redemption is not in India a form of relief to be given

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8. *Ramkinkar* v. *Satyacharan,* (1938) 43 C.W.N. 281 P.C. In the later case of *Jagadamba* v. *Shibaprasad,* (1940) 54 C.W.N. 644 P.C., the Judicial Committee laid down the proposition more clearly—"In India, between the mortgagee of leasehold and the lessor, there is no privity either of estate or of contract such as can make the former liable for the burdens of the lease, even though he may have entered into *possession* of the mortgaged property and even though the contract of the lessor may be with the lessee and his assigns."

upon such terms as the Court may consider equitable, but a right given by s. 60 of the T.P. Act upon terms stated therein.[9]

(*b*) Though the opening words of the last clause of the section "nothing in this section" do not prevent a wider right of redemption being given by agreement, express or implied, the mortgagor in the absence of such a stipulation must redeem upon the terms of the Act. Thus, there is no right of partial redemption and the integrity of the mortgage is not broken, except in the one case mentioned in the last clause of the section.[10]

The doctrine of indivisibility of the mortgage security has also been given a statutory form in India as regards the corresponding rights of the mortgagee. Thus, s. 67 of the Transfer of Property Act provides that when the mortgage-money becomes due, the mortgagee may sue for a decree for foreclourse or sale of the *entire* mortgaged property. The principle is that the whole of the mortgaged property is liable for any and every portion of the mortgage-debt. Even a co-mortgagee cannot bring a suit in respect of his share of the mortgage money. As the Privy Council has laid down,[11] when an undivided property is mortgaged to two mortgagees as tenants-in-common and one of them desires to realise the debt but

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9. *Ramchand* v. *Prabhu*, (1942) 47 C.W.N. 1 P.C.

10. Under s. 60 of the Transfer of Property Act, as if stands amended in 1929, apart from any special contract between the mortgagor and mortgagee, redemption of a share of the mortgaged property is allowed only in *one* case, viz., where a mortgagee (or all the mortgagees, where there are mortgagees more than one) has (or have) acquired in whole or in part, the share of a mortgagor.

The principle of indivisibility of the mortgage security is that in a mortgage transaction the creditor values his security as one and indivisible, and if a co-mortgagor or a purchaser of a part of the equity of redemption is allowed to redeem the property piecemeal, the mortgagee would suffer by reason of the depreciation that may be caused in the consequence.

On this principle,—where the property belongs to, or after the mortgage becomes the property of several persons as owners of different parts, the fact that the mortgagee *releases* a part of the mortgaged estate does not entail a proportionate abatement of the mortgage debt as against the remaining owners of the equity of redemption, nor does it entitle the owners of any other part to redeem by payment of a part of the debt. Similarly, the fact, that the mortgagee has allowed the owner of one part of the mortgaged property to redeem his part, does not entitle any separate owner of a portion of what remains to redeem his part on payment of its portion of the debt.

In the Privy Council case of *Ramchand* v. *Prabhu*, (1942) 47 C.W.N. 1 P.C.—Where a simple mortgage was first given of four properties and then a usufructuary mortgage was given of two of these properties and two others in favour of the same person, the advance for the first mortgage being included in the sum for which the second mortgage was given, but the second mortgage contained a term that two villages might be first redeemed for a specified part of the mortgage money and then the two remaining for the balance; *held* that by such stipulation the integrity of the first mortgage was not broken and the right and obligation to redeem it on its own terms was left untouched.

As has been already stated, the only case where this indivisibility of the mortgage security is broken by operation of law in India is the case of acquisition of a share in the mortgagor's interest by the mortgagee or mortgagees.

The *principle* underlying this exception is not that it is unjust that the full burden of the security should be imposed on other parts of the property, but that their claim to contribution has become a claim against the mortgagee or his interest in the equity of redemption, necessitating a circuity of action if piecemeal redemption is not allowed.

11. *Sunitibala* v. *Dharasundari*, (1922) 47 Cal. 175 (179) P.C.

the consent of his co-mortgagee cannot be obtained for bringing the suit, then the procedure to be adopted is as follows :

The co-mortgagee must sue for the entire mortgage-money against the entire mortgaged property, making his co-mortgagee a party defendant and ask for a proper mortgage decree. The decree will then provide for all the necessary accounts and payments excepting that there could be no judgment for any sum of money entered as between the mortgagee defendant and the mortgagor.

(*c*) The mortgagor's right to redeem being statutory in India, he can be deprived of it only by means and in the manner enacted for the purpose and strictly complied with. It is impossible to say (as may be said under English law) that the dismissal of a redemption suit operates as a foreclosure, since provision to that effect is not to be found in the Act (Transfer of Property Act).[12] It is to be noted that under the provisions of rr. 3(1) and 5(1) of O. 34 of the C.P. Code, the mortgagor's right of redemption on payment subsists until a *final* decree for sale or foreclosure is actually passed.[13]

4. Though the right of redemption is a legal right in India, the doctrine against 'clog on the equity of redemption' has been applied in India, and it has been held that a provision operating as a clog has no validity whether against a mortgagor or against an assignee from him.[14] The Privy Council has acted on the principle that there is nothing in s. 60 of the Transfer of Property Act to exclude the English equitable principle. On the other hand—.

"The terms of s. 60, Transfer of Property Act, are an indication that the rules of English law relating to a mortgagor's right to redeem are applicable to Indian society and circumstances. There is no indication to the contrary. The matter must, therefore, be determined by rules of English law".[14]

In a Province to which the Transfer of Property Act did not extend, the doctrine has been applied as one of justice, equity and good conscience.[15]

(*i*) Under the terms of a mortgage deed, the mortgagees were entitled to possession for 19 years. If the mortgagor failed to pay at the end of the 19 years, the property was to belong to the mortgagees absolutely. If the mortgagor paid off the mortgagee at the end of that period, the mortgagee was still to retain a limited interest in the mortgaged property. *Held,* the term providing for an interest in the mortgaged property to remain in the mortgagee even after repayment was void as a clog on the equity of redemption and was not binding either upon the mortgagor or his assigns.[14]

(*ii*) A mortgage for a term of 5 years provided that if it was not redeemed at the end of that period, the mortgagee would be entitled to take possession and

12. *Raghunath* v. *Hansraj,* (1934) 39 C.W.N. 9 P.C.

13. The period of limitation for a suit for redemption or for foreclosure is *thirty* years (Arts. 61, 63 of the Schedule of the Limitation Act, 1963).

14. *Mehrban* v. *Makhna,* (1930) 34 C.W.N. 529 P.C.

15. *Sher Khan* v. *Swami Dayal,* (1922) 28 C.W.N. 79 P.C.

remain in possession for a period of 12 years during which the right of the mortgagor to redeem would be suspended; *Held*, assuming the mortgage to be an 'anomalous mortgage' the right to redeem arose as soon as the term of 5 years expired and the contract suspending the right to redeem thereafter was void being in defeasance of the statutory right given by s. 60 of the Transfer of Property Act. All the forms of mortgage enumerated in s. 58 are governed by s. 60 and s. 98 should also be read subject to s. 60.[15]

5. It has also been held that the principle evolved in *Kreglinger* v. *New Patagonia Co.*[5] would be applicable in India.[16] The principle, as explained by *our* Supreme Court, is that though the Court will not allow any contract between the mortgagor and mortgagee to take away or to restrict the right of redemption of the mortgagor and the Court would relieve the mortgagor against any term in the nature of a *penalty,* the Court would not interfere with any other bargain unless the mortgagor can establish that that was an unfair or oppressive bargain which the mortgagee had imposed upon him, *taking advantage* of the impecunious position of the mortgagor. Whether the mortgagee had taken an unfair advantage was a question of fact to be determined from the circumstances of each case.

In *Gangadhar's case*[16], the mortgagor stipulated that the mortgage would be redeemable only after the expiry of 85 years; in other words, it could not be redeemed before the expiry of 85 years. The Court *rejected the contention on behalf of the mortgagor* that the aforesaid term was a clog on the equity of redemption, on the following grounds :

(*a*) The mortgagee's right to enforce the mortgage being co-extensive with the mortgagor's right to redeem, the mortgagee could not demand payment of his money before the expiry of the period of eighty-five years. Hence, the clause postponing redemption operated equally on both parties.

(*b*) The circumstances existing at the time of the execution of the mortgagor showed that the bargain had been freely made. By virtue of the mortgage in suit, the mortgagor redeemed a prior mortgage and to recover possession of that property, which he has been in possession of ever since. On the other hand, the money advanced by the instant mortgage was larger than that of the prior mortgage, while the security was a smaller one, nor was the interest stipulated in the instant case excessive. There was nothing to show that the mortgagor was, at the time of the mortgage, in a position of financial embarrassment. Hence, the term postponing the right of redemption beyond 85 years could not be said to be a 'clog on the equity redemption'. Therefore, the right to redemption (under s. 60 of the Transfer of Property Act) would arise only on the expiration of the period stipulated in the deed of mortgage.

16. *Gangadhar* v. *Shankar*, A.I.R. 1958 S.C. 770 (paras. 14-20).

§ 27. Remedies of the Mortgagee.

(1) *Right to sue the mortgagor personally.*

(A) *England.*

In a legal mortgage, the mortgagor covenants in the mortgage that he will repay the money lent with interest, within a certain period; and on the expiry of this period the mortgagee has a common law right to sue on the personal covenant, apart from his real right over the land. In England, a personal covenant to repay is also presumed in law from the every fact of accepting the loan [*Sutton* v. *Sutton*, (1882) 22 Ch. D 511]. As *Maitland* observes—"the mortgagee is not the less a creditor because he is a secured creditor."

(B) *India.*

But, in India, ss. 58 and 68 of the Transfer of Property Act lay down that the right to sue the mortgagor personally is available only in the case of *a simple mortgage*, and *an English mortgage*, but not in the case of a mortgage by conditional sale or a usufructuary mortgage. (Of course, in the last two cases the right may be created by an express personal covenant to pay). As was explained by the Privy Council in *Ram Narayan* v. *Adhindra*[17] "although a loan *prima facie* involves a personal liability, and although such liability is not displaced by the mere fact that security is given for the repayment of the loan, still the nature and terms of such security may *negative* any personal liability on the part of the borrower". Thus, in a *mortgage by conditional sale*, all that the mortgagor says is that if he pays, he will recover his property, but if he does not, the sale shall become absolute; but that does not confer on the mortgagee any right to personal relief. Similarly, in a pure usufructuary mortgage, the mortgagor does not even make this qualified covenant, but the mortgagee simply agrees to pay himself out of the profits of the property.

Besides the above cases, the mortgagee has the right to sue the mortgagor personally in some other cases, on equitable grounds—

"(*a*) Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee (e.g., accident), the mortgaged property is wholly or partially destroyed or the security is rendered insufficient, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(*b*) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(*c*) Where the mortgagee being entitled to possession of the mortgaged

17. *Ram Narayan* v. *Adhindra*, (1917) 38 I.C. 932 P.C.

property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor" (s. 68, Transfer of Property Act).

(2) *Foreclosure.*

(A) *England.*

1. At any time after the mortgagor is in default, the mortgagee may apply to the Court for an 'order of foreclosure', i.e. an order that the mortgagor who has already forfeited his legal right to redeem the land be deprived of his equitable right also [cf. p. 73, *ante*]. 'This right to foreclose is simply then the right to ask the Court to withdraw its relief against a forfeiture which is created by the mortgage' (*Strahan*). (*i*) The Court fixes a time (usually 6 months) within which the mortgagor must pay off the debt and declare that if he fails to pay off the debt with interest and costs within that time, he shall be *for ever* foreclosed of his equity of redemption. This order is called an 'order of foreclosure *nisi*,' (i.e., conditional). (*ii*) If the mortgagor fails to comply with this order within the given date, the order will be made *absolute*, and thereupon the land becomes the absolute property of the mortgagee both at law and equity.

2. **"Opening the foreclosure."** The order of *foreclosure absolute* vests the fee simple in the mortgagee and the equity of redemption is barred. But equity will, in special circumstances, allow the mortgagor to redeem even after the foreclsoure has been made absolute. For example, if the mortgaged property was far more valuable than the mortgage debt, or, if the mortgagor was prevented from redeeming by some accident, the Court will 'reopen the foreclosure' and allow the mortgagor a fresh opportunity to redeem [*Campbell* v. *Holyland*, (1877) 7 Ch. 166]. On the other hand, the mortgagee himself may afford an opportunity of 'opening the foreclosure'. Though as a rule he can pursue all his remedies simultaneously, yet if he first obtains a foreclosure, and then sues the mortgagor on his personal covenant, because the value of the estate has proved insufficient to satisfy the mortgage debt, the mortgagee will by so doing give the mortgagor a renewed right to redeem [*Palmer* v. *Hendrie*, (1859) 27 Beav. 349]. If the mortgagor pays off the debt, the land must be reconveyed to him. It is on this account that in England the right of foreclosure is not much relied upon by the mortgagee and as *Maitland* observes, "One is not very safe in purchasing a foreclosed estate." The right upon which he places his main reliance is that of *sale*.

(B) *India.*

1. In India, the remedy of foreclosure is available to the mortgagee only in cases of a mortgage by conditional sale and an anomalous mortgage which confers a power to foreclose.

2. The mortgagor's right of redemption and the mortgagee's right of foreclosure are co-extensive. This means that when the mortgagor's right to redeem accrues, the mortgagee's right to enforce his security by foreclosure or sale also accrues. Ordinarily, both the mortgagor and mortgagee's rights accrue from the date fixed for payment, commonly known as the date of default.

But sometimes this rule is limited by terms in the mortgage bond and such terms are given effect to if not oppressive or unreasonable. Thus, when a mortgage for a fixed term provided that the mortgagee might sue for sale *before* the expiry of the term *if his security were jeopardised*, it was held that the right of redemption was not thereby accelerated.[18]. Similarly, the mortgage may provide that if a specified contingency happens, e.g., interest remaining unpaid for three months, the mortgage money would become payable even though the date fixed by the mortgage had not yet arrived. Such a clause is *exclusively* for the benefit of the mortgagee and he has the option, on the happening of such contingency, either to enforce the security at once, or if the security is ample, to stand by the investment for the full term of the mortgage.[19]

3. In India, there is no provision for reopening a final decree for foreclosure once it is passed under O. 34, r. 3, C. P. Code.

(3) *Judicial sale.*

(A) *England.*

In England, in every action for foreclosure, the Court has a statutory *discretion* [s. 91 (2) of the Law of Property Act, 1925, replacing s. 25 of the Conveyancing Act, 1881], to order for sale instead of foreclosure, at the request of the mortgagee, if the latter finds it to his advantage.

(B) *India.*

The right of judicial sale is of a different kind in India. The right to cause the property to be sold through Court is an independent right given to the mortgagee in cases of simple mortgage. English mortgage and equitable mortgage [s. 67(a), T.P. Act], and in these cases the mortgagee has no right to foreclose. These mortgagees may bring a suit for sale under O. 34, r. 4, C.P. Code, and the procedure is a preliminary decree followed by a final decree for sale, after the passing of which the mortgagor loses his right of redemption for ever.

(4) *Sale without intervention of Court.*

(A) *England.*

The power of a mortgagee to sell the land and to pay himself the debt out of the proceeds of sale formerly depended on an express power in

18. *Bhawani* v. *Sheodihol*, (1905) 26 All. 497.
19. *Lasa Din* v. *Gulabu*, (1932) 59 I.A. 376 (384).

the mortgage deeds. As regards mortgages executed after 1881, a power of sale is implied in all mortgages made by deed in virtue of the Conveyancing Act, 1881, and this power can be exercised by the mortgagee *without an order of Court*, under conditions laid down by the Statute. This remedy, however, is not so harsh upon the mortgagor as that of foreclosure, for the mortgagor does not lose his whole interest in the land, but entitled to any surplus that remains after the payment of the debt in the hands of the mortgagee who holds it as a trustee [cf. *ante*].

(B) *India.*

In India, the power to sell without intervention of Court is conferred by s. 69 of the Transfer of Property Act only in certain specified cases—(*a*) where the mortgage is an English mortgage and the parties are other than Hindus, Mahommedans etc.; (*b*) where the mortgagee is the Government and the deed confers an express power of sale; (*c*) where the mortgaged property is situated within the specified Presidency and other commercial towns and the deed contains an express power of sale.

Further, the power of sale without intervention under s. 69 can be exercised only—

(*i*) if notice in writing requiring payment of the principal money has been served on the mortgagor, and default has been made in payment of the principal money or part thereof, for three months after such service; or

(*ii*) some interest under the mortgage amounting at least to Rs. 500 is in arrear, and for three months after becoming due.

The power has not been extended to the *moffusil* on the apprehension that it might work mischievously in view of the rural conditions of this country.

(5) *Appointment of Receiver.*

(A) *England.*

A power to appoint a receiver to collect the rents and profits of the land and to apply them in payment of the interest due under the mortgage is also implied by the Statute like the power of sale.

(B) *India.*

In India, under s. 69A of the T.P. Act, a mortgagee, who has a power of sale without intervention of Court under s. 69, may appoint a receiver of the income of the mortgaged property, in certain circusmtances.

(6) *Taking possession.*

(A) *England.*

In England, the power possessed by a mortgagee to take possession of the property is neither statutory nor dependent upon an express authority given by the mortgage deed. It results from the simple fact that upon the execution of a legal mortgage the mortgagee becomes entitled to the

legal estate, and consequently the mortgagee can take possession of the land even by ejecting the mortgage, if required, *at any time* after the execution of the mortgagor, without having to wait for the mortgagor making default, as in the case of the other remedies. It follows, therefore, that the right to take possession is available only to a legal mortgagee.

(B) *India.*

In India, a mortgagee is entitled to possession, as of right only in case of usufructuary and English mortgages.

§ 28. Liabilities of a mortgagee in possession.

(A) *England.*

When a mortgagee enters into possession, he is entitled to receive the rents and profits, and to apply them to the payment of interest and then of his principal. But equity discourages the mortgagee from entering into possession, and due to its interference, the remedy of taking possession is not a pieasant thing for the mortgagee. In fact—

"The situation of a mortgagee in possession is far from an eligible one" (*Davidson,* quoted in *Maitland*). According to some writers, the mortgagee in possession is a *constructive trustee* for the mortgagor. (*Maitland,* however, does not use the term 'trustee', for, strictly speaking, he does not hold *on behalf of the mortgagor*, cf. p. 83, *ante*). At any rate, certain *liabilities* have been imposed by equity on the mortgagee in possession on the principle that the mortgagee must not take any advantage out of his mortgage beyond the payment of his principal, interest and cost. These liabilities are enumerated below.

(B) *India.*

In India, the liabilities of a mortgagee in possession are enumerated in s. 76 of the Transfer of Property Act, which broadly follows the English principles on the subject. The liabilities of a mortgagee who takes possession of the mortgaged property during the continuance of the mortgage are—

(*a*) He is bound to account for the rents and profits upon terms of great strictness.[20] He must account not only (*i*) for sums actually received by him, but also (*ii*) for sums which he might have received but for his 'wilful default'. (And if he assigns the mortgage, he remains still accountable, unless the assignment is by order of Court).

(*b*) If he himself occupies any part of the property, he is chargeable with an occupation rent in respect of it on the highest possible rental value.[21]

(*c*) If he recovers rents and profits in excess of the sum due for interest, the surplus will go to reduce the principal money.[21]

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20. Cl. (*g*), s. 76 of the Transfer of Property Act. [*Manik* v. *Clins*, AI.R. 1969 S.C. 751].
21. Cl. (*h*), s. 76 of the Transfer of Property Act.

(*d*) He is liable for voluntary waste, e.g., pulling down houses, opening mines.[22]

(*e*) He cannot charge any allowance or commission for the trouble of collecting rents (excepting actual expenses).[23]

(*f*) He must keep the mortgaged property in necessary repairs (so far as the surplus rents allow).[24]

(g) He must manage the property as a person of ordinary prudence would manage if it were his own.[25]

§ 29. Consolidation.

(A) *England.*

Consolidation is the right of a mortgagee, having two or more securities on *different* properties from the same mortgagor, to refuse to allow the mortgagor or any person claiming under him to redeem one of them without redeeming the other or others. The doctrine of consolidation is that where distinct estates are separately mortgaged as securities for distinct debts by the same mortgagor to the *same mortgagee*, the mortgagee is placed in the same favourable position as if the whole of lands had been mortgaged to him for the sum total of the moneys advanced. It had its origin in the maxim: **"He who seeks equity must do equity."** Redemption being an equitable right, the redeeming party must on his part do equity towards the mortgagee by allowing him to exhaust one security in paying the defiiciency, if the other turns insufficient to provide the sum charged on it. The doctrine has been extended even to the case where the same person makes two mortgages of different estates to two *different* mortgagees, if by assignment these two mortgages have become *vested* in one person. But in *Jennings* v. *Jordan* [(1881) 6 A.C. 698], it was pointed out that 'the Court does not favour the extension of the doctrine of consolidation of mortgages'. Thus, the right will not attach where the mortgage of one of the properties is created (or the vesting of the two properties in the same person takes place) *subsequently* to the assignment of the equity of redemption of the other property to the person seeking to redeem.

22. Cl. (*e*), s. 76 of the Transfer of Property Act.

23. Cl. (*h*), *ibid.*

24. Cl. (*d*), *ibid.* [*Anandram* v. *Premraj*, A.I.R. 1968 S.C. 250].

25. Cl. (*a*), *ibid.* From this obligation, it follows that the mortgagee would be liable for damage due to the property not only due to waste or wilful default but also due to negligence. Thus, he would not be liable for the natural decay caused to houses and buildings but would be liable if the deterioration is due to want of ordinary repairs. (*Wragg* v. *Denham*, (1936) 2 Y. & C. 117).

It also gives the mortgagee a corresponding right to do what an owner of ordinary prudence would have done. Hence, he can leasse out the property and the mortgagor, on redemption, would not be entitled to oust the lessee, provided the lease is of such a character that a prudent owner would have entered into it in the usual course of management [*Asa Ram* v. *Ram*, A.I.R. 1958 S.C. 183], but it cannot exceed beyond the term for which it had been granted by the mortgagee [*Harihar* v. *Deonarain*, A.I.R. 1956 S.C. 305].

Prior to 1882, the doctrine of consolidation applied as a general rule to all mortgages. But the Conveyancing Act, 1881 (now replaced by the L.P.A., 1925) enacted that as regards mortgages created after 1881, the mortgagor cannot be subjected to consolidation unless a *contrary intention* appears in the mortgage deeds or one of them. But as the mortgagee may still stipulate for the benefit in the mortgage deed expressly, and often does so, the old doctrine is still worth considering.

(B) *India.*

1. In India, s. 61 of the Transfer of Property Act similarly abolishes the equity of consolidation but saves contracts to the contrary—"A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together."

2. It should be noted in this connection that (in the absence of a contract to the contrary) the mortgagee cannot compel the mortgagor to redeem all the mortgages in respect of which the mortgage-money has become due. This is provided by s. 67A of the Transfer of Property Act[26] which runs thus :

"A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due."

The reason for this apparent anomaly has been explained by the Special Committee for amendment of the Transfer of Property Act thus :

"While dealing with section 61 we pointed out that it is inequitbale to enforce the principle of the consolidation of securities to the prejudice of a mortgagor. When, however, a mortgagee holds several mortgages in respect of the same or different properties, it will be prejudicial to the mortgagor if the mortgagee is allowed to enforce one mortgage and keep the other mortgages alive. In the case of a number of mortgages in which the only remedy open is foreclosure, the disadvantage of the mortgagor will be very marked as he may lose the whole property in satisfaction of one debt, which may be less than the real value of the property and will be liable to have a personal decree passed against him in satisfaction of debts under the other mortgages. In the case of mortgages too where the only remedy is sale, the property will never realize its fair and proper value if it be sold subject to another mortgage."

§ 30. Marshalling of securities.

Though consolidation relates to the rights of a mortgagee against the mortgagor where the latter mortgages several properties to the same

26. *Rajagopala* v. *Bank*, (1970) 2 S.C.W.R. 601.

person, marshalling governs the equities as between two or more mortgagees from the same mortgagor.

(A) *England.*

The rule of marshalling of securities as between mortgagees has been stated thus :

Where there are two creditors of the *same debtor*, and one creditor has a right to resort to two funds of the debtor for payment of his debts, and the other creditor has the right to resort only to one fund, then (*a*) the Court will order the first creditor to be paid out of the fund against which the second creditor has no claim, *so far as* that fund will extend, so as to leave as much as possible of the second fund for payment of the second creditor, and (*b*) if the first creditor has already paid himself out of the second fund, the Court will allow the second creditor to stand in his shoes and resort to the first fund to the extent to which the second fund has been exhausted by the first creditor. Marshalling is thus the right of the second creditor to *throw* the person who has right to both the funds on that fund to which the second creditor has no claim.

The principle of the rule is "that a person having two funds to satisfy his demands shall not by election disappoint a party who has only one fund" [*Aldrich* v. *Cooper*, (1803) 8 Ves. 382]. Thus, if *A* mortgages both of his estates *X* and *Y* to *B*, and afterwards mortgages *Y* only to *C*, the Court will at the instance of *C*, direct *B* to realise his debt first out of *X*, and to take the balance only out of *Y*, so as to leave as much as possible to *Y* to satisfy *C*. "It is the constant equity of this Court, that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien" [*Lanoy* v. *Athol*, (1742) 2 Atk. 446].

(B) *India.*

The Transfer of Property Act deals with the right of marshalling by a *subsequent purchaser* in s. 56 and by a *subsequent mortgagor* in s. 81.

(*i*) S. 56 requires that a mortgagee who has the means of satisfying his debt out of several properties shall exercise his right so as not to prejudice the purchaser of one of them. The section runs thus—

> "If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or any other person who has for consideration acquired an interest in any of the properties."

The rule of marshalling being a rule of equity, it will not be enforced so as to prejudice[27] the holder of the larger number of securities. Thus,

27. *Braham* v. *Manbir*, A.I.R. 1963 S.C. 1607.

the mortgagee cannot be compelled to proceed against a security which may be insufficient or doubtful and marshalling does not absolutely relieve the property sold from the mortgage-debt.

Suppose, *A*, the owner of two properties *X* and *Y*, mortgages them to *C* and then sells *X* to *B*. Now in this case, *B* will be entitled to insist that the mortgage-debt should be satisfied, in the first instance, out of the property *Y*, as far as possible; if after *Y* is exhausted, there still remains any balance of the debt unsatisfied, then and then only the property *X* will be drawn upon. But the doctrine does not absolutely relieve the property *X*.

(*ii*) S.81 protects a subsequent mortgagee from the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties as well, the principle being "that it shall not depend upon the will of one creditor to disappoint another". The section runs thus—

"If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties."

(*a*) But the rule of marshalling will never be applied in favour of a subsequent incumbrancer when that will prejudice the right of the prior mortgagee (as in s. 56). Nor will it be applied to prejudice the right of third parties or transferees for value. "It is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal representatives claiming as volunteers under him" [*Flint* v. *Howard*, (1893) 2 Ch. 54 (73)].

(*b*) Again, "neither in England nor in this country has the doctrine been extended to a case where *only* portion of the property already mortgaged is subsequently sold or mortgaged. If the prior mortgagee is forced to have recourse to a portion of the mortgaged property for his money, it may be that both he and the mortgagor will be prejudiced, and the sale of the property in portions will not realise an adequate price."[28]

§ 31. "Redeem up and foreclose down".

(A) *England*.

It has already been explained that not only the mortgagor himself, but also all persons entitled to any interest in the equity of redemption are entitled to come to the Court to redeem the land. Consequently, when there are successive mortgages, any subsequent mortgagee may redeem

28. Report of the Special Committee on the Transfer of Property Amendment Bill.

a prior mortgagee, and every redeeming mortgagee is liable to be redeemed in his turn by those below him, while all are liable to be redeemed by the mortgagor himself. But if a redemption action has to be brought, there is a special rule which prevents a puisne (i.e., subsequent) mortagagee, or the mortgagor, from redeeming one mortgage without also redeeming another. This rule of procedure, which has its counterpart in foreclosure also, is expressed by the maxim *"Redeem up and foreclose down."* It means that in an action of redemption or foreclosure, all persons who will be affected by the accounts taken in the action must be made parties. Thus, (*i*) In an action of **redemption**—a puisne mortgagee must redeem the prior mortgagees in the order in which they precede his mortgage (and must also foreclose the right of redemption possessed by all mortgagees subsequent to him as well as the mortgagor). For example, if a 4th mortgagee wishes to redeem a 2nd mortgagee, he must join as party to the action not only the 2nd, but also the 3rd mortgagee, and offer to redeem him also, because the 3rd mortgagee is affected by the account of what is due to the 2nd mortgagee (but the 1st mortgagee need not be joined because he is not affected). And for the same reason all incumbrancers subsequent to the plaintiff as well as the mortgagor are necessary parties, and the plaintiff must ask to have them foreclosed. (*ii*) Similarly, in an action of **foreclosure,** a puisne mortgagee can foreclose the mortgagor's equity of redemption only upon foreclosing all mortgages subsequent to him in their successive order. But mortgages prior to the plaintiff need not be joined, because they will not be affected by the accounts taken in the action. [The result is that a puisne mortgagee may foreclose without redeeming, though in redeeming he must also foreclose].

(B) *India.*

In India, the corresponding rule is embodied in ss. 91 (*a*) and 94 of the Transfer of Property Act. S. 91 (*a*) gives a puisne mortgagee the right to redeem a prior mortgagee until he reaches the first mortgagee. S. 94, on the other hand, gives a prior mortgagee the right to foreclose any subsequent mortgagee and also the mortgagor himself.

O. 34, r. 1 of the Civil Procedure Code also requires that in any suit on a mortgage, all the parties affected by the accounts should be made parties in the suit. So all prior and subsequent mortgagees must be impleaded in any suit for foreclosure or redemption.

Nevertheless, the doctrine of 'redeem up and foreclose down' does not, in the English sense, apply in India. For, in *England*, if a person mortgages his property by three successive mortgages, the third mortgagee cannot redeem the first mortgagee without first redeeming the second mortgagee, and without foreclosing the mortgagor who is just below him.

But, in *India*, the third mortgagee may redeem the first mortgagee without redeeming the second mortgagee; the third mortgagee may also redeem the second mortgagee without foreclosing the mortgagor.[29] The only thing necessary is that all these people must be made parties in any of such suits.

§ 32. Nature of an Equitable Mortgage in England.

1. So far we have been discussing, broadly, the principles relating to a legal mortgage of land. A legal mortgage, we have seen, is a transfer of the legal estate in land (or other property) for the purpose of securing the repayment of debt. But a mortgage may also be effected on the security of land (or other property) without conveying the legal estate to the lender. Where the creditor gets only an *equitable* estate, the mortgage is called an *equitable mortgage*. An equitable mortgage may thus be **defined** as a debt secured on land or other property which passes only an equitable interest in the property.

2. From this follow important **points of difference** between a legal and an equitable mortgage:

(*a*) In a legal mortgage (apart from the L.P.A.[30]), the entire legal interest in the property goes to the mortgagee, and the mortgagor has only an equity of redemption left in him, whereas an equitable mortgage does not give the lender any rights against the land at law,—he has a mere charge on the land in the equity, which he can enforce by the aid of the Court. (*b*) An equitable mortgagee, because he does not possess the legal estate, cannot take possession and has got to rely on his right to apply to the Court for an order of sale or foreclosure. (*c*) Since a legal estate can be transferred only by deed, a legal mortgage must be created by *deed*, but an equitable mortgage may be created by mere *writing*, and in the case of the usual form of equitable mortgage, viz., by deposit of title-deeds, it may be created even without writing [cf. § 84]. (*d*) Lastly, it is obvious that since a legal mortgage passes the entire legal interest, there can be but one legal mortgage of a legal estate (apart from the L.P.A. 1925[30]), and once a mortgagor has created a legal mortgage upon his land, any subsequent mortgage on the same property must be equitable. But there can be successive equitable mortgages not only of the same legal interest, but also of the same equitable interest, and consequently equitable mortgages raise a new problem, viz., that of priority between successive incumbrances on the same property,—between a legal and another equitable mortgage, or between two or more equitable mortgages on the same property.

29. *Mulla's Transfer of Property Act,* 2nd Ed., p. 532.

30. The law as to priority of mortgages has been vitally affected by the L.P.A., 1925. Excepting a mortgage by deposit of title-deeds all other mortgages or charges, *whether legal or equitable*, now rank according to the date of their registration as 'land charges'. The *legal estate* has thus lost much of its importance as affecting the priority of mortgages.

The application of the maxim 'Where there is equal equity, the law prevails,' must now be read subject to this change.

3. And the very operation of the rules of **priority** (the ordinary rules of priority discussed at pp. 56-58, being applicable to mortgagee until 1926)[30] expose an equitable mortgage to certain risk peculiar to itself. As *Maitland* observes, **"Equitable mortgages are not very safe things"**. Thus, an equitable mortgage will be postponed not only to a prior equitable mortgage, but to any *legal* mortgage, whether *prior or subsequent*, except where the legal mortgagee, being subsequent, is affected with *notice* of the prior equitable mortgage. Now, the doctrine of **tacking**[31] extends this principle further,—and an equitable mortgage may be postponed, even to a subsequent *equitable* mortgage or charge, if the latter happens to get hold of the legal estate in addition.

4. Another danger to which an equitable mortgage is exposed is created by the doctrine of **consolidation**. An equitable mortgage created after the right of consolidation has already arisen, takes subject to it, and is, therefore, liable to *lose* in case of deficiency.

§ 33. Equitable mortgages—how created in England.

In *England*, an equitable mortgage may generally be created in two ways—

(A) **Second and subsequent mortgages.** Where the mortgagor has only an equitable interest, and is unable to convey the legal estate, an equitable mortgage is created. Thus, where a person has made a legal mortgage, and then during the subsistence of that mortgage, wants to create another mortgage on the same property by a deed, the subsequent mortgage would (*prior to* 1926) operate as an equitable mortgage only, for after the first mortgage the mortgagor has only an equity of redemption left to him.[32]

(B) **Informal mortgages.** The mortgagor, though he has the legal estate, may use a form of conveyance ineffectual to transfer the legal estate, or may deliberately abstain from any attempt at conveying the legal interest, and then an equitable mortgage is created. Thus, (1) a mere **agreement** to execute a proper (legal) mortgage, if in *writing*, already creates an equitable

31. It is to be carefully remembered that though tacking by a third or subsequent mortgagee has been abolished by the L.P.A. 1925, tacking by a first (legal) mortgagee as to further advances *still exists*. The second (equitable) mortgagee can avoid this risk only by giving *notice* of his mortgage to the first mortgagee, thereby preventing the latter from tacking any subsequent advances that they may make after he has received that notice. The doctrine of tacking as to further advances has even been extended by the new legislation, for in cases where the first mortgagee is under an *obligation* to make further advances under the terms of his mortgage, he can tack even though he has notice of the subsequent mortgage. The INDIAN LAW contained in ss. 79 and 93 of the Transfer of Property Act is in conformity with the law contained in the English Law of Property Act, 1925.

32. Since 1926, this form of equitable mortgage has ceased to exist, for in the first legal mortgage (under the L.P.A.), the mortgagor only grants a legal term of years and himself retains the fee simple, so that he may subsequently create further *legal* mortgages on the same property by way of sub-demise. But the other forms of equitable mortgage still subsist, e.g., informal mortgage, mortgage by deposit of title-deeds, or where a *cestui que trust* mortgages his interest under the trust.

mortgage, for it constitutes an agreement of which specific performance may be compelled in equity.[33] (2) Apart from the agreement to create a proper mortgage, an equitable mortgage may be created by a signed writing merely *declaring* that the land is **charged** with the repayment of the loan. Such a charge will give an equitable interest in the land. Signed writing (to comply with s. 4 of the Statute of Frauds which requires that agreements regarding land must be *evidenced* by a written memorandum) is all that is required to create an equitable mortgage. (3) An equitable mortgage may be created even without writing,—it can be made by a mere *deposit* of title-deeds 'with the intent that the land which they concern shall be security for the payment of a debt'. The principle on which a **mortgage by deposit of title-deeds** is upheld is that the deposit is taken as the evidence of an implied agreement to give a proper mortgage which has been *partly performed by such deposit.* As *Maitland* puts it, **"mortgage by deposit is an outcome of the equitable doctrine of part performance"**. Thus, the fact that *A* has handed over the title-deeds of his estate to *B* is cogent evidence of an agreement for mortgage, just as the fact that *A* has let *B* to take possession of this land is cogent evidence of an agreement as required by s. 4 of the Statute of Frauds exists. It would be unconscientious on the part of either party to disregard the rights of the other [*Russel* v. *Russel*, (1783) 1 Bro. C.C. 269].

§ 33A. Mortgage by deposit of title-deeds in India.

1. In India, there is no distinction between legal and equitable estates and hence none between legal and equitable mortgages. All mortgages are subject to the formalities required by law, and operate as 'legal' mortgages.[34] While in England, (before 1926) a legal mortgage would always prevail against the equitable unless the holder of the legal mortgage has done or omitted to do something which prevents him in equity from asserting his paramount rights—in India, all mortgages rank *in order of the time of creation*, according to s. 48 of the Transfer of Property Act, subject only to ss. 78 and 79 [see pp. 56-58, *ante*].

2. A mortgage by mere 'deposit of title-deeds with intent to create security thereon' may, however, be created under s. 58(f) of the Transfer of Property Act. Such mortgage resembles the English equitable mortgage by deposit in that it does not require *registration* or any other formality [s. 59, T.P. Act]. It may be effected by mere (*i*) *delivery* by a debtor of his documents of title to immovable property to his creditor or his agent, (*ii*) with *intent* to create a security thereon. The debt may, however, be an existing as well as a future debt.

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33. In INDIAN LAW, no such mortgage is recognised. An agreement to mortgage merely gives rise to a personal obligation which does not constitute either a mortgage or a charge. Again, this personal obligation is not capable of specific performance, for a contract for loan of money is not specifically enforceable. And the only remedy is damages for a breach of contract.

34. *Imperial Bank of India* v. *U. Rai Gyaw*, (1923) 1 Rang. 637 P.C.

3. Notwithstanding the above similarities, the Indian mortgage by deposit of title-deeds differs from an English equitable mortgage in important respects.

(*i*) In *England*, such a mortgage, being purely equitable, is not a complete security, and will, therefore, be postponed to a subsequent legal mortgage unless the latter has done or omitted something which prevents him from asserting his rights in equity (i.e., so as to be affected with constructive notice of the equitable mortgage). In *India*, it is a *completed transfer* and it is immaterial whether the subsequent mortgagee has got notice of the prior mortgage by deposit of title-deeds or not. The Proviso added to s. 48 of the Indian Registration Act in 1929 expressly declares that a mortgage by deposit shall take effect as against any mortgage-deed subsequently executed and registered. A mortgage by deposit in India thus virtually operates as a mortgage by deed.

(*ii*) In *India*, a mortgage by deposit is valid only if created within the three Presidency-towns and certain other commercial towns specified in s. 58(f), Transfer of Property Act. But if the mortgage is created within any of these specified towns, the mortgage by deposit of title-deeds would be valid, even though the property is situated outside such town, provided there is no special prohibition against this equitable mortgage by the law applicable to the place where the property is situate.[35]

§ 34. Deposit accompanied by memorandum.

1. Though a deposit of title-deeds, without more, creates a mortgage, it is not unusual, in England as well as India, for the deposit to be accompanied by a memorandum in writing. The nature and scope of such memorandum are to be considered in such cases.

2. The English rule has been expressed as follows:

> "Although it is a well-established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

3. In India, the following rules have been laid down, following the English law—

(*i*) Where titles are handed over accompanied by a bargain, that bargain must rule. When that bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security.[36] Thus, though title-deeds relating to several properties may be handed over to the creditor,

35. *Papiah* v. *Naganatha*, (1931) 35 C.W.N. 1061 P.C.
36. *Pranjivan* v. *Chan Ma*, (1916) 20 C.W.N. 925 P.C.

the mortgage may be restricted to some of those properties if the memorandum mentions only some of them.

The mortgagor deposited title-deeds relating to three items of property of which one was a house in Rangoon. A promissory note was also executed and at the back of it, there was a memorandum saying,—"As security—grant of a house in Rangoon." *Held*, the security was restricted to the Rangoon house, though the title-deeds of other properties as well had been delivered to the mortgagee.

(*ii*) If such memorandum constitutes the mortgage, it must be registered under s. 17 of the Registration Act, and oral evidence to contradict is not admissible.[37]

(*iii*) But registration is not necessary if the mortgage is complete without the writing and the memorandum is merely a statement that the mortgage has been effected.

"No such memorandum can be within the section (s. 17, Registration Act) unless *on the face of it* it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties."[37]

Hence, where the parties professing to create a mortgage by deposit of title-deeds, *contemporaneously* enter into a contractual agreement in writing, which is made an *integral part* of the transaction and is itself an operative instrument and not merely evidential, such a document must be registered.[38] In such cases, the question to be determined is—

"Did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?"[39]

1. The plaintiff (*H*) brought this suit to enforce a mortgage effected by the defendant (*K*) by deposit of title-deeds. But besides the deposit, the plaintiff had obtained from the defendant "a memorandum of agreement evidencing the said deposit and embodying the terms of the loan and conditions. The plaintiff founded upon this memorandum in their plaint, and the defendant contended that the memorandum constituted the bargain between the parties and was, therefore, unenforceable for want of registration under s. 17(I)(*b*) of the Registration Act. The plaintiff's case was that the memorandum did not effect or constitute any transaction between the parties, as referred to in s. 17(1), but merely recorded a completed transaction. *Held*, that where parties professing to create a mortgage in Calcutta by deposit of title-deeds, contemporaneously enter into a contractual agreement in writing, which is made an *integral* part of the transaction and is itself an operative instrument and not merely *evidential*, the transaction is not an equitable mortgage within the Transfer of Property Act and the document must, in order to create a valid mortgage, be registered.

37. *Obla* v. *Narayana*, (1930) 35 C.W.N. 494 (502) P.C.
38. *Harisankar* v. *Kedar*, (1939) 43 C.W.N. 806 P.C.
39. *Subramaniam.* v. *Lutchman*, (1922) 28 C.W.N. 1 P.C.

In the present case, the memorandum set out all the details of the transaction and specially confers a power of sale on the mortgagees. It is an instrument effective to create an interest in the property in favour of the mortgagees. Having purported to create a mortgage by delivery of title-deeds, the parties proceeded to create it over again in writing. The memorandum does not merely evidence a transaction already completed; its language is operative. It is contractual in form and embodies an agreement that the title-deeds in question are to be held as security for the advances made and it speaks of the moneys 'hereby secured'.

2. The accounts relating to the appellant's dealings with the respondents were examined on the 23rd October, 1936, and a large sum was found due to the respondents who demanded payment. The appellant thereupon brought and gave certain documents, being title-deeds relating to immovable properties belonging to his family, for the purpose of being held as security for the amounts then due and to become due on further dealings. A draft of the memorandum was thereafter prepared which the appellant took with him to be shown to his lawyer and be returned in the afternoon, and signed and delivered it to the respondents. All this took place in Calcutta. The memorandum was in the form of a letter addressed to the respondents' firm and was in the following terms:—

"We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title-deeds in Calcutta at your place of business ... with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions....."

Held: The memorandum delivered by the appellant along with the title-deeds deposited with the respondents did not require registration as the parties did not intend thereby to create the charge. Accordingly, it is admissible in evidence to prove the creation of the charge.

"The document purports only to record a transaction which had been concluded and under which the rights and liabilities had been agreed upon."[40]

40. *Rachpal* v. *Bhagwandas*, A.I.R. 1950 S.C. 79.

CHAPTER VII

LIENS

§ 35. Classes and Varieites of Liens.

1. A lien is the right of a person to have a claim satisfied out of property belonging to another. It differs from a mortgage or pledge in that it gives a mere *passive* right of possession without any *active* right.

2. Liens exist at law as well as in equity. A *common law lien* is simply the right to *retain* another person's property until he pays a claim against him, and such lien is lost the moment the person having it parts with the possession of the property subject to it. Any right to sell to satisfy the lien must be given expressly by statute. It is, however, good against the whole world. In *equity*, on the other hand, the owner of an equitable lien has a right to a judicial sale of the property to satisfy the lien. It does not depend for its continuance on the retention of possession of the property, and affects everybody taking the property with notice of it. But like other equitable interests, it is invalid against purchasers for value having the legal estate without notice.[1]

3. Liens are either (a) *particulars,* i.e., confined to a particular charge, or (b) general, i.e., extending to the general balance due.

4. Liens are of diverse kinds. The more important liens may be enumerated as follows :

(1) *Solicitor's Lien.*—(*a*) At common law the solicitor has a particular lien on the property recovered for his costs of the suit. This has been recognised and enlarged by the Solicitors Act, 1860. (*b*) The solicitor has a general lien on all deeds and documents other than a will, in the solicitor's hands and with reference to which he has expended skill and labour. The solicitor has the equitable right to withhold these from his client until his bill has been paid. It is a general lien and extends to all costs due from the client, and not merely to the costs incurred in connection with the documents over which the lien is claimed.

(2) *Banker's Lien.*—The banker has a general lien on the securities deposited, extending to the general balance of account.

(3) *Agent's Lien.*—Section 221 of the Indian Contract Act codifies the law as to agent's lien in India, comprising, within the term 'agent', a large class of persons: "In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or

1. The above distinction between a legal and an equitable lien is maintained also in Indian law [*Nippon Kaisha* v. *Ramjiban,* (1938) 42 C.W.N. 677 P.C.].

immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same have been paid or accounted for to him."

(4) *Vendor's and purchaser's Lien.*—See Ch. XI, **post.**

(5) *Bailee's Lien.*—See s. 170 of the Indian Contract Act.

TRUSTS

CHAPTER VIII

HISTORY OF THE TRUST

§ 36. Origin and Importance of the Trust.

The trust is the most distinctive achievement of English equity jurisprudence. *"Of all the exploits of Equity the largest and the most important is the invention and development of the Trust"* (*Maitland*). The importance of this institution lies in its elasticity and generality; but there is nothing quite like it in any system of foreign law. Most of its functions have been done in other countries by other branches of law. The English trust involves the conception both of an obligation and of ownership. Though in the ultimate analysis the trust gives rise to a right *in personam*,—a right enforceable against the trustee, yet from very early times it is treated almost like a right *in rem*,—a right of ownership, so to say, in equity, which is good almost against all (see p. 43, *ante*).This is the distinctive characteristic of the trust, and, according to *Maitland*, its origin was due to the peculiar conditions of the English legal system.

§ 37. Development of Trusts from Uses.

"The modern trust", thus, "developed from the ancient (English) *use"* (*Maitland*). The history of its growth falls into two natural divisions—(*a*) before, and (*b*) after, the Statute of Uses, 1535.

(A) Before the Statute of Uses.

(*i*) The first occasion on which we find land being permanently held by one man to the *use* of another man is in the 13th Century when land was conveyed to the borough community to the use of the Fransiscan friars. The rule of their order was that they were not to have any wealth at all. But some sort of property was obviously indispensable, and hence the device was adopted of having land conveyed to the borough community *to the use of the* friars. Again, land could not be conveyed at common law to religious houses and monasteries by reason of the Statutes of Mortmain. The provisions of these statutes were now evaded by granting lands to third persons to the use of these houses.

(*ii*) Originally, thus, a device was for conveying land for religious purposes, the use was soon resorted to in the 14th Century for secular purposes, to effectuate conveyances which were impossible at common law,

e.g., (*a*) to make a will (in effect), or (*b*) to convey land by a man to himself or to his wife. These were impossible at common law, for land could be conveyed only by feoffment with 'livery of seisin'. Gradually, it was found that the device might be profitably used for other purposes as well, e.g., (*a*) for avoiding the feudal services such as reliefs, wardships, marriages, and for evading the feudal law of forfeiture for treason and escheat for felony, (*b*) for avoiding creditors, (*c*) for escaping dower. All this was effected by feoffing the land to one or more persons by the owner of the land whereby the feoffees served as a cloak to the real owner. The feoffees became the legal owners, but there was an understanding between the feoffor and the feoffee that the former was to have the profits and the enjoyment of the land.

(*iii*) By the 15th Century the use became so popular that it came to be the usual mode of transfer of land for all purposes.

But this device of escaping the harships of the feudal law by feoffing the land upon a use might well be rendered futile, if common law recognised the *use*, and compelled the feoffees to fulfil the understanding by virtue of which they had acquired the land. But the use was not, and could not, be enforced by the law of contract, inasmuch as the agreement was too *vague*, and did not fulfil the formal requirements of a contract. The use, therefore, naturally fell into the province of the Chancellor who could enforce it by a procedure far more efficient and flexible than that of the Courts of Common Law.

The Chancellor began to enforce the use as between the *cestui que use* (originally the feoffor) and the feoffee, but without marrying the effectiveness of the device. He did not say that the feoffor was the owner of the land, but said that the feoffee must hold it for the *cestui que use*, for to do otherwise would be an act of dishonesty. Acting on the *conscience* of the feoffee, equity began to enforce the agreement, but quite in a different way than the law of contract would have done. Equity enforced it not as a contract but as a 'confidence', and the remedy was given not to the feoffor (or trustor) as such but to the *cestui que use* (or the person to be benefitted). And the right of the *cestui que use* to enforce the 'use' was made by the Chancellor to look like an estate in the land,—an equitable ownership, as distinguished from the legal ownership that remained in the feoffee to use (or trustee).

Let us see how the "use" operated. If *A* conveyed land by feoffment to *B* to the use of *C* (i.e. with the intention that *B* should not hold it for his own benefit, but for the benefit of *C*), or of *A* himself, then *B* was said to hold the land "to the use" of *C* or *A*. At common law the feoffee to use (*B*) was the owner of the land, the seisin of legal estate being in him. In the Court of Chancery, on the other hand, he was merely the nominal owner; he was bound to allow the *cestui que use* (*C*) to have the profits and benefit of the land. The "use" or beneficial ownership was

treated like an estate, that is to say, the *cestui que use* was said to have an equitable interest or estate in the land, which in course of time came to be available against all save a *bona fide* purchaser for value of the legal estate without notice of his equitable interest.

The use was disliked by the King and the feudal lords because it enabled services and other feudal dues to be defeated. They, therefore, had the Statute of Uses (1536) passed to abolish uses by providing that "where any person was seized of an estate of freehold to the use of another, the use should be converted into the legal estate, and the *cestui que use* should become the legal owner" (see *Maitland*). The object of this legislation was, obviously, to annihilate the uses with all their advantages, for its effect was that the person who had the use or the beneficial interest became the *legal owner* as well, and consequently all the incidents of the legal estate fell upon him. The feoffee to use could no longer serve as a cloak to the real owner. 'The use', as *Snell* puts it, 'became the land.'

(B) After the Statute of Uses.

The immediate effect of the Statute was to make it impossible for one person to have the legal estate, and for another to have the equitable interest. In cases to which the Statute applied, a conveyance to *B* to the use of *C* did not create a trust, for the Statute deprived *B* of any interest in the property, and converted *C*'s equitable interest into the legal estate.

But the Statute **failed to put an end to the use or trust** for three reasons—(*i*) In the first place, the Statute only applied where one person was seised of *land* to the use of another, and, therefore, did not affect personal chattels, leaseholds, or copyholds. It was confined to freehold lands.

(*ii*) Secondly, it did not apply to *active uses*, i.e., where the persons to whom freeholds were conveyed had some active duty to perform,—e.g., where land was conveyed to *B* to the use that *B* should collect the rents and pay them over to *C*, the legal estate was in *B* (and not in *C*), in order that he might carry out the duty imposed upon him. Moreover, it did not apply where a person stood seised to himself; the Statute required one person to be seised to another.

(*iii*) In the third place, it did not execute a *use upon use*. It was held in *Tyrrel's case* [(1557) Dyer's Rep. 155(a)] that there could not be a use upon use, so that if freehold land was conveyed to *B* to the use of *C* to the use of *D*, the only use that would be recognised at law would be the use in favour of *C*; *C* would be legal owner by virtue of the Statute, and *D* would take nothing. This gave the Court of Chancery the opportunity of interfering once more, and eventually the use in favour of *D* was enforced in equity just in the same way as the first use (in favour of *C*) had been enforced

before the passing of the Statute. Thus it was held that if there was a use following on a use, the Statute executed the first use, and was then exhausted, so that the *legal* estate vested in the first *cestui que-use*, who held on behalf of the *second* who still had an *equitable* estate. The second use came to be known as the *trust*.

Thus, equitable interests again came into existence,—this time by means of *two uses* or trusts. Henceforth, if it was desired to grant land to *T* as trustee for *A*, it was granted to *B to the use' of T 'to the use'* of (or in trust for) *A*. "Later, it became usual to omit the feoffees to uses, and to grant the land into and *'to the use'* of *T 'to the use'* of (or in trust for) *A*."

The net result of the Statute of Uses, then, was that after the Statute, to create a trust, a second use had to be resorted to. Lord Hardwicke critically summed up the position by observing [in *Hopkins* v. *Hopkins*, (1938)1 Atk. 581] that "a Statute made upon great consideration, introduced into a solemn and pompous manner, by this strict construction, had no other effect than to add at most *three words* (viz., 'to the use') to a conveyance".

The Statute of Uses has been **repealed** by the Law of Property Act, 1925, so that from 1st January, 1926, a trust of any property can be created by any instrument coming into operation after that date, *without a use*, i.e., by simply conveying land "to *T* in trust for *A*". The usual mode of creating trusts in England, at the present time, however, is by way of *settlements*, under which the beneficial interest is to be enjoyed by a number of persons in succession.

CHAPTER IX

GENERAL VIEW OF TRUSTS

§ 38. The nature and definition of a trust.

(A) *England.*

1. To comprehend the juristic nature of the modern trust, we should start with a definition. But a logical definition of a trust is hard to find out, and, as *Maitland* shows, the best *description* of the characteristics of a trust would be by distinguishing it from analogous juristic relations.

2. The classical definition of a trust is that given by *Lewin,* according to whom it is—

"A *confidence* reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which the *cestui que trust* has no remedy but by *subpoena* in the Chancery."

But *Maitland* criticises this definition on the grounds—(*a*) that to say that a trust is a confidence hardly explains anything, and (*b*) that there may be cases where no reliance or confidence is reposed by one person in another, e.g., where the owner creates a trust by declaring himself a trustee of his property for his child. Hence a trust is constituted from the moment of the declaration though the child may not even know anything about it.

3. *Maitland* gives his own definition thus,"When a person has rights which he is bound to exercise (*i*) on behalf of another, or (*ii*) for the accomplishment of some particular purpose, he is said to have those rights in trust for that *other* or for that *purpose,* and he is called a trustee. But this definition too, as *Maitland* himself points out, is wide and vague, for it may to some extent apply to the case of some other analogous relations, such as that between the legatee and the executor.

(B) *India*

1. **S. 3** of the Indian Trusts Act, 1882, defines a trust as follows :

"A trust is an obligation annexed to the ownership of property, and arising out of a confidence (a) reposed in and accepted by the owner, or (b) declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; ....

2. It is clear that the above definition follows that of Lewin with the following differences :

(*a*) It is an improvement in so far as it includes the case where the *settlor* himself is the trustee.

(*b*) It emphasises upon the *obligation* which is created by the trust. There is no trust where there is no obligation upon the so-called trustees to hold or apply the trust property for the purposes of the trust.[1]

(*c*) It also points out that under the Indian law, the beneficiary has no interest in the property but has only a *right* against the trustee who is the owner of the property (of this, see, further, under the next caption).

3. The words 'confidence reposed in and accepted by the owner' also *make* it clear that the definition of 'trust' in s. 3 refers to *express* trusts only. Implied or constructive trusts are separately dealt with by the Indian Trusts Act in Ch. IX and described as *Obligation in the nature of trusts.* The relationships included in Ch. IX which go by the name of Resulting and Constructive Trusts in English equity are thus excluded from the definition of 'trust' in s. 3 of this Act.[2-3]

§ 39. Nature of the rights of trustee and beneficiary in the trust property.

(A) *England.*

1. From the foregoing analysis, it is clear that the conception of a trust involves that of a **double ownership,**—viz, that one person in whom property is vested is compelled in equity to hold it for the benefit of another or for some purpose other than his own. As *Snell* points out, "the trustee is the nominal, while the *cestui que trust* is the *beneficial* owner of the property". *Story* similarly defines a trust to be "an equitable right, title or interest in property distinct from the legal ownership thereof". The legal owner holds the direct or absolute dominion over the property in the view of law; but the income, profits. This conception when analysed leads us to the following characteristics of a trust:—

(*i*) The trustee is bound to *use* his rights in a certain way, for the benefit of another, or for the accomplishment of a certain purpose. One is not made a trustee by being *not* to use one's rights in a particular manner. Thus, the negative duty imposed upon the owner of a land not to use his land in such a manner as to cause detriment to his neighbour's land does not constitute the former a trustee for the latter.

(*ii*) The trustee is bound to exercise his rights on behalf of some other person, or sometimes for the accomplishment of some *purpose.* The outstanding peculiarity of a trust for a purpose is that in it there is no definite *cestui que trust.*

1. *Cf. Allahabad Bank* v. *Commr. of I.T.*, (1954) S.C.R. 195 (202).

2. *Tan Bug* v. *Collector of Bombay,* A.I.R. 1946 Bom. 216 (242).

3. It may be noted in this connection that the definition of 'trust' in s. 3 of the Specific Relief Act comprises all the three classes of *'express, implied* and *constructive* fiduciary ownership'.

(*iii*) It is often said that the trustee is the legal owner, while the *cestui que trust is the equitable* owner. But it is not essential that a trustee should have the 'legal estate'. (*a*) Firstly, the subject-matter may be a mere personal right, e.g., the benefit of a contract of debt, and not a true proprietary right or 'estate'. (*b*) Secondly, there may be land, yet the trustee may not have the legal estate in it, e.g., where the settlor has only equitable rights. Thus, if the *cestui que trust* of an already created trust, or a mortgagor, puts his equitable interest in a settlement, he having merely equitable rights can convey none but equitable rights to the trustees. "It is better, therefore, to say that the trustee is the *nominal*, while the *cestui que trust* is the beneficial, owner of the property" (*Snell*).

2. *Salmond* explains the double ownership thus :

The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of someone else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner. As between the trustee and the beneficiary, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large.

Trust-ownership and beneficial ownership are independent of each other in their destination and disposition. Either of them may be transferred, while the other remains unaffected. In like manner, either kind of ownership may be independently encumbered.

(B) *India*.

1. It has already been pointed out (p. 9, *ante*), that, in India, there is no such thing as equitable ownership, and that when property is vested in a trustee, the owner is the trustee.[4-5]

The Indian beneficiary cannot, therefore, have any *equitable ownership* in the land. He can only have *rights* against the trustee, which are laid down by the Trusts Act.

S. 3 of the Trusts Act expressly says—

"'The beneficial interest' or 'interest' of the beneficiary is his right against the trustee as the owner of the trust property."

4. *Chhatra Kumari* v. *Mohan Bikram*, (1931) 35 C.W.N. 953 P.C.

5. This was the state of affairs even before the enactment of the Indian Trusts Act. Thus, in *Tagore* v. *Tagore* (1872) 9 B.L.R. 377 P.C., it was observed—"*No doubt*, the anomalous law, which has grown up in England, of a legal estate which is paramount in one set of Courts and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu law. But it is obvious that property, whether movable or immovable, must for many purposes be vested, more or less absolutely, in some person or persons, for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases."

This has been clearly explained by the Supreme Court in these words[6]:

"The definitions in s. 3 emphasize that the trustee is the owner of the trust property and the beneficiary only has a right against the trustee as owner of the trust property. The trustee is thus the legal owner of the trust property and the property vests in him as such. He no doubt, holds the trust property 'for the benefit of the beneficiaries but he does not hold 'on their behalf'.[6]

S. 8 of the Act also specifically lays down that the 'beneficial interest' of a beneficiary under a trust cannot be the subject-matter of a further trust. The Indian law thus patently differs from the English law on this point, as explained at p. 108, *ante.*

2. The right of the beneficiary is the right to call upon the trustee to administer the property so as to give the beneficiary his dues according to the provisions of the trust [s. **55**, Trusts Act], or, in a proper case to convey the property to the beneficiary [s. **56**, Trusts Act]. The beneficiary is not even entitled to bring a suit for possession against a trespasser, since the ownership is not vested in him.

3. But though the Indian law does not recognise the dual conception of legal and equitable ownership, it nevertheless declares that the beneficiary has a *beneficial* interest in the property, which he may transfer, if competent to contract. Thus s. **58** of the Trusts Act says—

"The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and to which he may dispose of such interest: Provided that, when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of the beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage."

Hence, an Indian beneficiary may deal with his interest by way of mortgage, even though such interest may not be regarded as an 'equitable interest'. And though a mortgagee from an Indian beneficiary does not acquire an equitable interest in the land as in England, the mortgagee can enforce his mortgage against the beneficial interest of the mortgagor in the property.[7]

4. In other words, though the beneficiary has no equitable estate or interest in the immovable property which is the subject of the trust, it cannot be said that he has no 'interest' in it. Thus, a right to receive rents and profits, under a deed of settlement, from the hands of a trustee is interest in immovable property under these Acts, and an assignment of such right would require registration under s. 54 of the Transfer of Property Act or s. 17 of the Registration Act.[8]

§ 40. Trusts distinguished from analogous relations.

(A) Debt.

1. A debtor is **not a trustee for** his creditor. Though the debtor cannot

6. *Holdsworth* v. *State of U.P.*, **A.I.R. 1957 S.C. 887.**
7. *Hemchandra* v. *Suradhani*, **(1940) 54 C.W.N. 253 (258) P.C.**
8. *Moolla* v. *Official Assignee*, **(1936) 40 C.W.N. 1253 P.C.**

so deal with his property as to prevent the creditors from obtaining payment of what is due to them, yet he is in no sense a *trustee* for his creditors, for he is not *bound to use* any particular thing or right belonging to him for the *benefit* of his creditors.[9] A secured creditor like the mortgagee has a right *in rem* against the mortgaged property, but even then, the mortgagor is not bound to hold that property 'on behalf of' the mortgagee.

2. The distinction between a trustee and a debtor may be illustrated with reference to the position of a banker who is a debtor in relation to the depositor (*Maitland*).

(*i*) When a person deposits money with a banker, the money thereupon ceases to be the property of the depositor and becomes the property of the banker; the banker can deal with it as he wishes, he can mix it with his own, he can use it to make a profit for himself, he can lose it in a hazardous speculation, and the depositor will have no ground to object; the only right of the depositor is the legal right of a creditor to have the debt which arose on the deposit to be repaid.

In *Att. Gen. of Canada* v. *Att. Gen. of Quebec.*,[10] the Privy Council has explained the position in these words :

> "Money deposited with a Bank is not trust money which the trustee must preserve and not use; on the contrary it is lent for use. .... The only obligation under which the banker lies is to repay a like sum in the like currency."

If the banker goes bankrupt, the depositor has no claim to follow his money but must claim as a creditor in the bankruptcy.

(*ii*) On the other hand, the property in the hands of the trustee remains in equity the property of the *cestui que trust* and the trustee must not use it to make a profit for himself and he must not mix it with his own. If the trustee goes bankrupt, the beneficiary can follow his property,[11] and, so far as it can be traced, recover it as against all other creditors.

But where a person *accepts a trust* in relation to a specific sum of money and agrees to invest it in his firm and agrees to conform to the terms of the instrument creating the trust, the defence that he held the money merely as a deposit in the capacity of a debtor is not open to him. In other words, even if a trustee is allowed to invest a trust fund as he liked and pay interest on it, he does not cease to be a trustee with respect to that fund.[12]

The father of a minor left Rs.10,000 in the hands of a firm for investment in their business at a fixed rate of interest in the name of the minor to whom the amount was to be paid on his attaining the age of 21 years. Subsequently, the

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9. Except when the debtor becomes a person representative of the creditor, (see s. 87 of the Trusts Act, *post*).

10. *Att. Gen. of Canada* v. *Att. Gen. of Quebec*, (1946) 51 C.W.N. 427 P.C.

11. *Official Assignee* v. *Bhat*, (1933) 60 I.A. 203.

12. *Krishnadas* v. *Ratanbai*, (1940) 52 Bom. L.R. 1044 (1050, 1055).

members of the firm became insolvent, and the minor, who had become a major by this time, claimed priority with respect of the sum of Rs. 10,000 deposited in his name with the firm. *Held,* that even though there was an agreement between the minor's father and the firm that interest was to be paid on the money invested in the firm, the agreement did not affect the fiduciary relation created between the firm and the minor and that it was not open to contend on behalf of the insolvents or the Official Assignee that the transaction was only a deposit and did not create a trust.[11]

(B) Bailment.

1. Bailment is a trust according to *Blackstone* who defines bailment as "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee". *Maitland,* however, points out that apart from the fact that while the rights of a bailor against his bailee are common law rights, those of a *cestui que trust* against the trustee were never common law rights,—a trust is **fundamentally distinguishable** from a bailment.[13]

2. The *general* property in the case of a trust is in the trustee, whereas a bailee has only a *special* property, the general property remaining in the bailor. In other words, the trustee is the full owner, though he is bound to exercise his rights for the benefit of the *cestui que trust.* But when goods are delivered to the bailee for some purpose, he does not become the owner of the goods, but only receives certain special rights over them (e.g., right of possession, right of action). These special rights, again, the bailee uses for his own benefit and is not bound to exercise them on behalf of any other.

3. Again, from the fact that the bailee is not the full owner, while the trustee is, other consequences follow. Thus—

If a trustee sells a trust property in breach of trust, a *bona fide* purchaser for value without notice of the trust takes a good title from the trustee (see p. 44, *ante*). But if the bailee makes an unauthorised sale of the goods, a *bona fide* purchaser for value without notice of the bailor's rights gets no title to the goods, for the bailee from whom he has purchased was not the owner of the goods. In such a case, the transferee from the bailor or any other person, however innocent, who in any way deals with the property in the chatttel, is also guilty of conversion and liable to the bailor [*Halsbury*].

(C) Executorship.

1. *Maitland* admits that his definition of a trust is wide enough to include the case of executors or administrators. In fact, the position of an executor resembles that of the trustee in so far as the executor (after the debts have been paid off) is the full owner of the goods, but is at the same time bound

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13. The same view has been taken in INDIA. Though a bailee may be in some respects in a fiduciary position as regards his bailor, he is not a trustee (either express or constructive) within the meaning of the Trusts Act, *Ramaswami* v. *Kamalammal,* (1921) 45 Mad. 173.

to use his rights in a particular way, e.g., to convey the surplus of assets to those entitled to the deceased's property.

2. There are other similarities between the position of a trustee and a personal representative. Most of the ordinary rules applicable to a trustee are applicable to personal representatives, e.g.,—

(1) They are chargeable only with assets which they have actually received or which they might have received but for their own wilful default.

(2) The right to consult the court and to claim a discharge on completion of their duties are available equally to personal representatives.

(3) The rules that the trustee cannot make a profit from the trust and that the *cestui que trust* can follow the trust property apply equally to personal representatives.

3. Nevertheless, *Maitland* contends, "*an executor or administrator merely as such is not a trustee* for the legatee or next of kin", though he may under certain circumstances *become* a trustee for them, and in a given case it may be hard to decide whether a man has been merely an executor or administrator or has also been a trustee. The question is of much practical importance because the Statutes of Limitation draw a **distinction** between an action by a legatee against an executor and an action by a *cestui que trust* against his trustee.

4. Other important points of distinction between trustees and personal representatives are :

(1) One of several personal representatives can sell and give the purchaser a good title to personalty, whereas no one trustee can dispose of the trust property without the concurrence of the others.

(2) A personal representative can pay his own debts or the debts due to any other creditor, in preference to the debts due to other creditors (*Maitland*).

5. The distinction made between a trustee and an executor is, according to *Maitland*, due to historical reasons. The tendency of modern statutes, however, is to equilibrate executors and administrators with trustees. Thus, the Judicial Trustees Act, 1896, which enabled the Court to relieve honest trustees from liability for a breach of trust, also declared that for the purposes of that Act executors and administrators were to be regarded as trustees. By the Administration of Estates Act, 1925, the administrator of an intestate and the executor in case of partial intestacy are expressly made trustees for the persons beneficially entitled on the intestacy.

6. Again decisions like *Re Swain* [(1891) 3 Ch. 233], *Re Timmis* [(1902) 1 Ch. 176], *Re Mackay* [(1906) 1 Ch. 25], show that the executor may be held to have constituted himself a trustee on very slight grounds. In these cases, actions brought by legatee against executor for recovery of legacy were regarded as actions by *cestui que trust* against trustee, in the following circumstances :

(*i*) When a testator, by his will, gives property to his executors to be

held upon a trust, the rule is that the property vests in them as executors and they continue to be executors until they assent to the gift; after they have assented, they become trustees. Whether they have assented is a question of fact to be determined from the circumstances of the case. As *Williams* (On Executors, 12th Ed.) puts it—

"If there is a specific bequest to the executor himself on trust, and he assents to it, the thing bequeathed thereupon ceases to be part of the testator's assets, and the executor becomes a trustee of it for those who are beneficially interested. He is thereupon precluded from dealing with it or making title as executor."

(*ii*) Even if there is no trust created by the will, a personal representative may constitute himself a trustee, if instead of paying over the property to the beneficiaries, he continues to administer it for them. In such cases, however, there must be some conduct which amounts to a declaration of trust.

(D) Contract.

1. A contract, as we know, is 'an *agreement* between two persons by which an obligation is created'. In so far as a trust also originates in 'an agreement, express or implied, creating an obligation upon the promisor, it has got a resemblance to a contract. Now, "*the commonest origin of a trust,*" as *Maitland* points out, "is a *transaction between two persons*". Thus, when *A* conveys property to *T* upon a trust (say, for *B*), and *T* consents, expressly or by conduct, that he will execute the trust, a trust is created. What, in effect, we get is but an agreement between *A* and *T* which is enforceable in *equity* (as distinguished from a contract which falls within the province of law). Historically, too, the law of trusts begins with the rule that he who has undertaken a trust is bound by it [*see* p. 40, *ante*]. We have already discussed how the trust estate primarily gives rise to a right *in personam* [pp. 40-41], and how *Pollock* observes that 'the true way to understand the nature and incidents of equitable ownership is to start with the notion of a contract with the legal owner'.

2. But notwithstanding all this analogy, a trust is **distinguishable** from a contract on fundamental grounds :

(*a*) Historically, contracts were enforceable in common law, while trusts fell under the exclusive jurisdiction of the Court of Chancery, for Courts of Law refused to recognise them. Again, equity did not, and could not, enforce the trust as an agreement, but enforced it as a matter of confidence.

(*b*) Though the commonest origin of a trust is an agreement between two persons, a trust may be, and is sometimes, created by a perfectly *unilateral* act,—when a man becomes bound by a trust by his own declaration or conduct, while the beneficiary knows nothing.

(*c*) Even when the trust is created by a bilateral act, there is required no formal offer or acceptance between the parties as in a contract. The rule is that though nobody can be compelled to undertake a trust, the trustee's

acceptance is *presumed* unless he disclaims either by conduct, or by deed, or otherwise.

(*d*) The rule that a stranger to a contract acquires neither rights nor liabilities under it has no application to trusts. In a trust the equitable remedy is given not to the trustor as such, but to the destinatory (*cestui que trust*) who is no party to the contract.

(*e*) Again, though equity refuses to enforce an agreement to create a trust at the instance of a person who has given no consideration just as common law refuses to enforce an agreement without consideration, yet the consideration required in the two cases is not the same, for the issue of a prospective marriage is treated in equity as within the marriage consideration although in the common law sense, they are no party to the consideration.

(*f*) While a contract creates a mere right *in personam*, available against the promisor, the right of a *cestui que trust* resembles a right *in rem*, inasmuch as it is enforceable against all whose conscience is not clean.

(*g*) As *Salmond* points out,—"A trust is more than an obligation to deal with one's property for the benefit of another; it is an obligation to use it for the benefit of another in whom it is concurrently vested. The beneficiary has more than a mere personal right against his trustee for the performance of the obligations of the trust. He is himself an owner of the trust property."[14]

(E) Agency.

1. Trust resembles agency in that both a trustee and an agent administer property on behalf of another and neither is the *beneficial* owner of such property. But there are essential differences :[15]

(*a*) At law the trustee is the owner of the property he administers, but the agent is in no way the owner of the property which belongs to the principal. As a result, the agent cannot, outside the sphere of his authority, pass a legal title to a third person, even if he be a *bona fide* purchaser for value without notice, to any greater extent that any other wrongdoer could do. On the other hand, a *bona fide* purchaser of the legal estate for value without notice of the trust, from a trustee, obtains a valid title against all the world.

(*b*) The trustee, being the legal owner, is personally liable on all contracts entered into by him in reference to the trust. But if the agent enters into a contract as agent, the contract is with the principal, and the agent is not personally liable.

(*c*) The authority of the agent to deal with the property is purely a matter of delegation from the person whose agent he is and for whose benefit he acts. But the authority of the trustee is derived from the instrument or other transaction giving rise to the trust, and the wishes of the beneficiary may have nothing to do with it.

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14. This observation must be qualified with reference to India. See p. 109, *ante*.
15. See Ashburner, *Equity*, 1933, p. 86.

(*d*) Again, though there is an analogy of the *cestui que trust's* right to follow the trust property in the hands of the trustee with the right of the principal to follow the property in the hands of the agent in case of an unauthorised use of it, still the right of the principal is not based in any way upon the existence of the trust relation. In such cases, equity gives relief only because the law recognised such a right,—equity merely 'follows the law'.

(*e*) A trust arises when a person receives or holds *property* in such circumstances that by the rules of equity he ought to employ it for the benefit of some other person or object other than his own benefit. Agency arises from an express or implied contract to *act* for some other person, and property need not be involved at all.

2. But though there is a marked distinction between the relation of agency and trust, property in the hands of an agent may sometimes be impressed with a trust for the benefit of the principal and, in such cases, the agent cannot set up the bar of limitation to a suit for accounts by the principal.[16]

(F) Mortgage.

1. Though the relation of a mortgagor and mortgagee is purely contractual, it has some analogy to the fiduciary relation, in so far as the mortgagor has in *equity* a beneficial interest in the property (viz., the equity of redemption) though at *law* the mortgagee has an absolute estate after the time fixed for redemption has passed [see p. 73, *ante*]. The mortgagee, however, is not a trustee for the mortgagor. He does not hold the legal estate for the benefit of the mortgagor as the trustee does for the *cestui que trust*. And the mortgagee has not only the legal interest in the property mortgaged, but also a beneficial interest in it adverse to the mortagagor's which he can enforce by suit against the mortgagor.

2. Thus, the mortgagee, who has a power of sale without intervention of the Court, in England (or in India under s. 69 of the Transfer of the Property Act, see *ante*), is not a trustee for the mortgagor of the power of sale. The power is given to him for his own benefit, and if he exercises the power *bona fide*, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as to be evidence of fraud in itself [*Haddington Island* v. *Hudson*, (1911) A.C. 722]. But he must give reasonable publicity to the sale and must not impose depreciatory conditions that are to deter intending purchasers.

3. As *Ashburner* points out, the mortgagee becomes a trustee only after he has been paid. In equity, his right in the property does not go beyond what is necessary to secure repayment of the money due to him. Thus, (*a*) if the mortgagor or some person entitled to redeem has paid the

16. See Ch. XI, *post*, on Constructive Trusts.

mortgagee his principal, interest, and costs, the mortgagee (if he still holds the property) becomes a trustee of the mortgaged property for the person making the payment; and (*b*) if he has sold the mortgaged property and reimbursed himself his money out of the proceeds of sale, he becomes a trustee of the surplus proceeds (if any) for the persons entitled to the equity of redemption [*Re Bill*, (1886) 34 Ch. D. 462].

4. The position of a mortgagee in possession is, however, different. [*See* pp. 87-88, *ante*].

(G) Charge.

The definition of 'trust', in s. 3 of the Trusts Act has already been noted. A 'charge' is defined in s. 100 of the Transfer of Property Act as follows :

> "Where immovable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to mortgage, the latter person is said to have a charge on the property.........."

There are certain similarities between the concepts of a trust and a charge, e.g., that a *bona fide* transferee from the trustee (s. 96, Trusts Act) or the owner of the property, without notice of the trust or charge (as the case may be), acquires a good title free of the trust or charge.

But the distinction between the two lies in this,—that in trust, a *fiduciary* relation is created between the trustee and the beneficiary, but there is no such relation between the owner of a property and the charge-holder and the owner simply has a *collateral* duty or burden. The charge-holder has no beneficial interest in the property, whereas the *cestui que trust* has a beneficial interest in the property. The only remedy of the charge-holder, under s.100 of the Transfer of Property Act, is to have the charged property to be sold for the realisation of the amount secured by the charge, provided the property has not, in the meantime, passed to a *bona fide* transferee without notice; but in the case of a trust, the beneficiary has various remedies under the Trusts Act in case the trustee commits a breach of trust by non-payment of the moneys settled in his favour, e.g., the right to follow the trust property in the hands of any person other than a *bona fide* purchaser without notice and in whatever shape it may be found in his hands (s. 63, Trusts Act). In the case of a charge, the owner of the property enjoys the property freely once the charged amount is paid.

The distinction between the two concepts is thin, and, as the Supreme Court has pointed out,[17] since no technical words are needed to create a trust, it is only the circumstances which can answer whether the settlor intended to create a trust, i.e., a fiduciary obligation or a charge. In the case before the Supreme Court, *P* died, leaving a will, directing payment

17. *Abinash* v. *Uttarpara Hitakari Sabha*, (1962) 2 S.C.R. 28 (*35-36*).

of certain amounts regularly out of the income of the property of the respondent Sabha, along with other bequests. It was found that the bequest to the Sabha was for charitable purposes. Hence, the question arose whether the Official Trustee would be appointed to ensure payment of the amounts payable to the Sabha. This could be done only if the will had created a trust in favour of the Sabha.

Considering the circumstances in which the will had been created and its various terms, the Supreme Court held that a trust had been created in favour of the Sabha, for the following reasons :

(*a*) The testator had a charitable intention at the time when the will had been executed, and that is why he provided that a specific sum would be payable to the Sabha or any other institution which might take its place, for the execution of specified charitable purposes after the other donees (his family members) had died. This direction was couched in an elastic form to prevent it being defeated.

(*b*) The charity in favour of the Sabha was a *permanent* one and the testator intended that after the happening of the specified contingency, his legal heirs should regularly pay half of the income to the Sabha, so that the specified charities might be carried out perpetually. That object could not be achieved if the Sabha was placed in the position of a creditor with a charge on the property with the off-chance of the charge being defeated by a *bona fide* purchaser for value without notice.[17]

(H) Power of Appointment.

1. A power of appointment confers the right of *alienation* as opposed to that of enjoyment. By a power of appointment a settlor or donor may empower another person to declare in whom and in what manner a certain property is to vest in future, but the power gives the latter no right of ownership over the property. In short, where a person is invested with the power to determine the disposition of a property of which he is not the owner, he is said to have a power of appointment over such property.[18] Thus, *A* may grant land to such person as *B* shall appoint by deed or by his will. Here *B* has a power of appointment over the property. Powers are either (*i*) *general*, or (*ii*) *special*. The donee of a general power can exercise it in favour of any person including himself. The donee of a general power is, therefore, treated as owner for most purposes. But the donee of a special power can exercise it only subject to the limitations imposed by the settlor.

2. A trust differs from a mere power of appointment in that the former is imperative, while the latter is *discretionary*. In other words, equity will not execute an unexecuted power; in the absence of fraud, the person having the power cannot be compelled to exercise it. But a trust being always

18. This is the definition given in the *Expl.* to s. 69 of the Indian Succession Act. In *Bai Motivahu* v. *Mamubai*, (21 Bom 789 P.C.), it was decided that a power of appointment conferred under a Hindu will was valid.

imperative, the trustee is bound to carry out the trust, and the court will compel him to execute it.

"Thus, if a fund is given to *A* upon trust to divide among a certain class of persons. *A* has no option in the matter, but is bound to carry out the trust, and, if he fails to do so, the Court will see that the property is duly divided. If, on the other hand, *A* is given a mere power to appoint the fund among the members of the class, he cannot be compelled to exercise the power, and, if he fails to do so, whether from accident or design, the members have, in the absence of fraud, no claim to the money which will pass to the persons entitled in default of appointment" (*Snell*).

3. But there are certain powers which are in the nature of trusts; these combine the qualities of the two in such a manner that equity will enforce their execution (i.e., the Court will take upon itself the duties of the donee of the power). But there must be a true *trust-power*, or equity will not interfere. If the donor has shown an intention that *in any event* the property *shall* go to the objects of the power (i.e., the persons in whose favour the appointment is to be made), it is a trust-power; otherwise it is a mere power of appointment. For example, 'where there is a *general* intention in favour of a class, and a *particular* intention in favour of individuals of that class, who are to be selected by the donee, and the particular intention fails owing to that selection not being made, the Court will carry into effect the general intention in favour of the class' [*Burrough* v. *Philcox*, (1840) 5 My. 72].

4. A mixture of trust and power is not to be confounded with a common trust to which a power is annexed; for, in the former case, as in a trust 'to distribute at the discretion of the trustees', they are bound at all events to distribute, and the manner only is left open; but in the latter case the trust itself is complete, and the power, being but an accessory, may be exercised or not, as the trustee may deem it expedient (*Lewin*).

§ 41. Classification of Trusts.

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

(A) Trusts created by the act of parties.

These may be Express or Implied.[19]

(I) · An **Express Trust** is a trust which is clearly expressed or declared by the author thereof, verbally or in writing, e.g., where *A* conveys Whiteacre to *C* 'upon trust' for *B*.

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19. The expressions 'express', 'implied' or 'constructive' trust are not used in the INDIAN TRUSTS ACT. The defintion of trusts in s. 3 refers to *express* trusts only, and these are dealt with in ss. 4-79, while *constructive* or *implied* trusts are dealt with as 'obligation in the nature of trusts' in ss. 80-96. The Indian Trusts Act is thus divided into two parts, one dealing with express trusts and the other with implied or constructive trusts of English equity.

(II) An **Implied Trust** is a trust which is not so clearly expressed as an Express Trust, but is founded on such words as 'I desire', 'I request', 'I hope', e.g., where *A* conveys Whiteacre to *C* 'hoping' that he will hold the same for *B* [cf. *ill* (*a*) to s. 3 of the Specific Relief Act]. The distinction between an Express and an Implied Trust is thus one between clear and less clear words, and it is difficult to draw the line between them, because no formal words are necessary for the creation of a trust [*see* Ch. X, *post*].

(B) Trusts created by operation of law.

These are (1) Resulting and (2) Constructive. In a **Resulting Trust,** a trust arises or *results* in favour of the person who provided the property, while in a **Constructive Trust** a person is deemed to be a trustee by equity, in order to meet the demands of justice. For example, (1) where a person conveys property to another to be held on certain trusts which fail, a trust *results* in favour of the giver; and (2) where a trustee obtains a renewal in his own name of a lease held by him as a trustee, he holds the renewed lease as a *constructive* trustee for the beneficiary.

The classification of trusts into those created by act of party and those created by operation of law is accepted by writers, but the significance given by *Maitland* to the term Implied Trust is not generally accepted. *Maitland*, in fact, confines the term to the class of trusts otherwise known as Precatory Trust. But there is a class of writers (e.g., *Story*) who group all trusts created by act of parties under Express Trusts, while the term 'Implied Trust' is used by them to designate all others, i.e., those arising by operation of law,—resulting and constructive trusts. In this sense, Implied Trusts are those which either (*a*) flow from the presumed intention of the parties (i.e., Resulting Trust), or (*b*) are implied by the construction of law (meaning equity), without any reference to any intention of the parties, either express or implied (e.g., Constructive Trusts). In *Snell's* nomenclature the term 'Implied Trust' has a narrower significance, being identified with Resulting Trusts only.

Snell classifies trust into (1) Express (or Declared)—or those arising from an express declaration of the person in whom the property is vested; (2) Implied (or Presumptive)—or those arising from the presumed intention of the owner of the property; and (3) Constructive—or those arising by construction of equity, independently of the intention of the owner of the property.

Express Trusts are again divided into Private and Public. A trust is (*a*) **Private** if it is for the benefit of an individual or class of individuals, without reference to the effect of such personal benefit on the public welfare; and (*b*) **Public** if the object is to promote the *public welfare*, though incidentally it may confer a benefit on an individual or class. "By Public must be understood such as are constituted for the benefit either of the public at large or some considerable portion of it answering a

particular description" (*Lewin*). In short, in a private trust, the beneficiaries are an ascertained body of persons, while in a public trust, the beneficiaries are the people in general or some section of the people.[20]

Trusts in favour of charities or **Charitable Trusts** are public trusts, (*Maitland* does not use the term 'Public Trust.' According to him, from the standpoint of their end, Express Trusts are divisible into two groups—those held for the benefit of some individual or class, and those held for the accomplishment of some purpose, private or public. Of these latter, viz., **Purpose Trusts,** the most important species is the Charitable Trust, that is, where the purpose is 'charitable').

§ 41A. The Indian Law of Trusts.

1. The law of *private* trusts has been codified in India in the Indian Trusts Act (II of 1882). It now extends to the whole of India except—

(*i*) the State of Jammu and Kashmir; and

(*ii*) the Andaman and Nicobar Islands; but the Central Government may by notification in the Official Gazette, extend it to the Andaman and Nicobar Islands or any part thereof.

But the Act does not—

(*i*) affect the rules of Mahommedan law as to *wakfs*; or

(*ii*) affect the mutual relations of the members of an undivided family as determined by any customary or personal law; or

(*iii*) apply to *public or private religious or charitable endowments*; or

(*iv*) apply to trusts to distribute prizes taken in war among the captors.

2. Religious and charitable trusts, whether private or public, are wholly excepted out of the scope of the Trusts Act. Till now, there is no consolidated statute relating to such trusts, and the position can hardly be said to be satisfactory since the subject is governed partly by the uncodified personal law of the different communities and partly by a number of Central and Provincial enactments which do not deal with the matter systematically or comprehensively.

I. As will be shown in Ch. X, *post,* the *substantive* law relating to religious and charitable trusts amongst the Hindus and Mahommedans is to be found in the personal laws of the Hindus and Mahommedans, as interpreted by the Courts. In a recent case, the Supreme Court has observed—

> "What are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu law and Hindu notions."[21]

II. Legislation on the subject has confined itself to the *procedural* aspect, i.e., the control of the administration of such trusts, e.g.:

(*a*) The Religious Endowments Act (XX of 1863) transferred the religious

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20. *Mahant* v. *Suryanarayan*, A.I.R. 1967 S.C. 256.
21. *Saraswati* v. *Rajagopal*, (1954) S.C.R. 277 (285).

endowments which were under the direct management of Government to certain Committees constituted under the Act.

(*b*) The Charitable Endowments Act (VI of 1890) relates to charitable trusts which are *not religious* in nature. It provides for the vesting of the property of such trusts in the Treasurer of Charitable Endowments and provides for their administration according to a scheme settled by the appropriate Government.

(*c*) The Charitable and Religious Trusts Act (XIV of 1920) relates to both religious and charitable trusts, provided they are for *public purposes*. The object of this enactment is simply to provide a procedure for obtaining information regarding such trusts and also to enable the trustees to obtain directions of a Court on certain matters.

(*d*) S. 92 of the Civil Procedure Code, 1908 provides for the institution of a suit by the Advocate-General or *with his consent*, to obtain certain reliefs in connection with a *public* religious or charitable trust.

(*e*) S. 118 of the Indian Succession Act, 1925 constitutes a restriction upon the power to make a religious or charitable use if the person is other than a Hindu, Mahommedan, Buddhist, Sikh or Jain.

CHAPTER X

EXPRESS TRUSTS

(I) Express Private Trusts.

§ 42. Parties necessary to the formation of a Trust.

To the constitution of an express or declared private trust (other than one for the advancement of a purpose), three parties are necessary: (*i*) The party who owns the property which is directed to be held for the benefit of a certain person called *the settlor*; (*ii*) the party who undertakes to hold the property for this purpose called the *trustee*; (*iii*) the party for whose benefit the property is to be held called the *cestui que trust*, or *beneficiary*. [*See* s. 3, Indian Trusts Act; p. 107, *ante*.].

§ 43. Who may create Trusts.

S.7 of the Indian Trusts Act lays down:—

"A trust may be created—

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

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

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

As to who is competent to contract, we must refer to s.11 of the Contract Act. Hence, any person, who is *sui juris* and not of unsound mind [cf. s. 12, Contract Act], may create a trust. A minor may also create a trust with the permission of the principal Civil Court of original jurisdiction (i.e., of the District Judge or of the High Court within the Presidency-towns).

§ 44. Who may be a beneficiary.

S. 9 of the Indian Trusts Act says—

"Every person capable of holding property may be a beneficiary."

Thus, a minor or a child *en ventre sa mere* may be a beneficiary. But a trust may be created in favour of an unborn person only if it does not offend the rule against perpetuities, which is applicable to private trusts.

Section 9 is an enabling and not a disabling provision.

It recognises the possibility of a beneficiary to renounce his interest under the trust and suggests two modes, namely, by (1) disclaimer and (2) by setting up with a notice by trust a claim inconsistent therewith.

§ 45. Who may be appointed Trustee.

S.10 of the Indian Trusts Act says—

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

This section has to be read along with s. 60 which provides—

"The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons, and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section:

A person domiciled abroad; an alien enemy; a person having an interest inconsistent with that of the beneficiary; a person in insolvent circumstances; and, unless the personal law of the beneficiary allows otherwise, a woman and a minor."

The result is that though a minor is *competent* to be a trustee, he is not a *proper* person, and if the beneficiary objects to a minor being the trustee, the Court may remove him. Such is the position also as regards a married woman. But s. 60 does not apply where the personal law of the beneficiary allows the appointment of a minor or married woman as a trustee. Thus, in Hindu and Mahommedan families, a minor son often succeeds to property, burthened with a trust for dependent relations of his father, and a married woman is sometimes made by her father trustee for herself and her son and daughter. In such cases, the minor or married woman is also a proper person to be a trustee.

Again, a minor trustee cannot exercise any act which involves a discretion on the part of the trustee.

§ 46. Subject-matter of Trust.

(A) *England.*

In England, any property which is alienable, may be the subject-matter of a trust.

"All property, real or personal, legal or equitable, at home or abroad, and whether in possession or action, remainder or reversion, or expectancy, may be made the subject of a trust, unless—(*a*) the policy of the law or any statutory enactment prohibits the settlor from parting with the beneficial interest in it; or, (*b*) being real estate, the tenure, under which it is holding, is inconsistent with the trust sought to be created" (*Underhill*).

(B) *India.*

1. The principle enacted in **s. 8** of the Indian Trusts Act is the same, except that it lays down that "a merely beneficial interest under a subsisting trust" (which can be settled in trust in England, see *above*) cannot be the subject-matter of a trust in India. This exception was introduced in order to avoid complications arising out of a trust upon trust.

Secondly, the property must be "transferable to the beneficiary", and for a list of properties which are transferable, we must refer to s. 6 of the Transfer of Property Act, so that there cannot be any trust in India of a mere expectancy, such as the chance of an heir-apparent to succeed or the contingent interest of a reversioner. Similarly, there cannot be a trust in respect of a public office, pay and pensions allowed by the Government, or of any interest in property restricted in its enjoyment to the owner personally.

2. Subject to the above, any property which is transferable may be the subject-matter of a trust (s. 8).

§ 47. The purpose must be lawful.

(A) *England.*

1. A trust must be created only for a lawful purpose. "The Court will not permit the system of trusts to be directed to any object that contravenes the policy of the law" (*Att. Gen.* v. *Pearson*, 3 Mer. 399).

2. For determining whether the object of a trust is lawful or not, it is the intention of the settlor which is to be looked into.[1]

3. Every trust of which the purpose is unlawful is void. Where a trust is created for an unlawful purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settlor to recover the estate except where the illegal purpose failed to take effect, in which case a trust resulted (*Cottington* v. *Fletcher*, 4 Atk. 155).

(B) *India.*

1. **S. 4** of the Trusts Act says that a trust may be created only for an object which is lawful. The purpose is lawful unless it is—(*a*) forbidden by law; or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is fraudulent, or (*d*) involves or implies injury to the person or property of another, or (*e*) the Court regards it as immoral or opposed to public policy.

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

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

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1. Agnew, *Law of Trusts in Br. India*, p. 31.

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

On the other hand,

A trust created for discharging the debts of the settlor is lawful, because it does not *ex facie* constitute any fraud nor defeat any provision of law.[2]

2. Where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void (s. 4, Indian Trusts Act). But if one of the several objects of a trust is perfectly lawful and the expenditure hereon is fixed and it is *separable* from the other objects, the trust is valid to the extent of that object although the other objects may not be lawful or valid.[3]

3. A private trust must not violate the rules relating to valid disposition of property, e.g., the rule against perpetuities enacted in s. 14 of the Transfer of Property Act, 1882 and s. 114 of the Indian Succession Act, 1925; the rule contained in s. 13 of the Transfer of Property Act or s. 113 of the Indian Succession Act as regards gifts in favour of unborn person, or the rule against accumulation in s. 17 of the Transfer of Property Act and s. 117 of the Succession Act.

(*i*) *A* transfers property, of which he is the owner, to *B*, in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.[4]

(*ii*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.[5]

So far as Hindus are concerned, trusts in favour of unborn persons have been made possible by the Hindu Disposition of Property Act, 1916, which says—

"No disposition of property by a Hindu, whether by transfer *inter vivos* or by will shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

4. Any trust which seeks to alter the ordinary law of descent or succession is void.[6] Thus, a Hindu cannot create an estate tail by means of a trust[7].

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2. *Chogmal* v. *Deputy C.T.O.*, A.I.R. 1976 S.C. 656 (para. 5).
3. *Kayastha Pathsala* v. *Bhagwati*, (1936) 41 C.W.N. 276 P.C.
4. Ill. to s. 13 of the Transfer of Property Act.
5. Ill. (*iv*) to s. 114 of the Indian Succession Act.
6. *Kristoromoney* v. *Narendra*, 16 Cal. 383 P.C.; *Gnanasambandha* v. *Velu*, 23 Mad. 271 P.C.
7. *Tagore* v. *Tagore*, (1872) 9 B.L.R. 377.

§ 48. Formalities necessary for the creation of a Trust.

(A) *England.*

1. In England, as *Maitland* puts it, "subject to a certain section of the Statute of Frauds, and to the Wills Act, a trust can be created without deed, without writing, *without formality of any kind* by mere word of mouth; and subject to certain rules of construction no particular words are necessary".

2. Before the Statute of Frauds (1967) trusts of all kinds, might be created by word of mouth, but s. 7 of the Statute of Frauds required that—"All declarations of or creations of trusts or confidences of any *lands, tenements, or hereditaments* shall be 'manifested and proved' (*i*) by some writing signed by the party who is by law enabled to declare such trust, or (*ii*) by his last will in writing,—or else they shall be utterly void and of no effect."[7]

3. It is to be noted, however, that (*a*) the Statute only applies to trusts relating to land or interests in land, and does not affect trusts of personalty. (*b*) Secondly, it merely provides a rule of *evidence*. So the writing may be *posterior* to the creation of the trust. "The Statute will be satisfied if the trust can be manifested and proved" by any subsequent acknowledgment by the trustee, as (*i*) by an express declaration by him, or (*ii*) by a memorandum to that effect, or (*iii*) by a letter under his hand, or (*iv*) by a recital in a deed executed by him; and the trust, however late, the proof operates retrospectively from the time of its creation (*Lewin*). (*c*) Thirdly, s. 8 of the Statute protects from the operation of s. 7 trusts (1) *resulting* from any conveyance of land, or (2) arising by the *construction* of law. The Statute is thus confined to express trusts only.

4. We may now **sum up** the formalities for the creation of a trust: A trust may be created to take effect at once (i.e., *inter vivos*), or may be intended to take effect only on the death of the owner of the property and to be revocable until then (i.e., *to be ambulatory*). (*a*) *Inter Vivos*—(*i*) If the subject-matter be *real property*, the trust must be evidenced by some writing (deed is not essential) signed by the settlor. (*ii*) If it is personalty, it may be created by mere word of mouth. (b) *To be ambulatory*:—It must be made by a testamentary instrument validly executed under the Wills Act, 1837, whether the subject-matter be *realty or personalty*.

5. These statutory requirements, however, are subject to one rule of equity that **'the Statute of Frauds is not to be made a cover or cloak for fraud'.** Thus though there is no writing, parol evidence may be admitted to enforce a trust where the strict application of the statutory rule would effectuate *fraud*. It is on this ground that equity enforces what are known as Secret Trusts.

(B) *India.*

1. **S. 5** of the **Indian Trusts Act** requires that (1) a trust of an *immovable* property must be declared by a registered instrument (mere writing will not do)

signed by, a will of, the author of the trust or the trustee; (*ii*) if the property be *movable*, it may be declared as above, or the ownership of the trust property must be transferred to the trustee[8] (mere word of mouth will not do).

2. In other words, mere vesting of the property is not enough in the case of immovable property, as it is in the case of movable property. But even in the case of immovable property, the property must be transferred[9-10] to the trustee in order to create a valid trust, unless—(*a*) the trust is declared by will or (*b*) the author of the trust is himself to be the trustee (s. 6). So an owner of property may create a trust by simply declaring by a registered instrument that he is holding the property for the benefit of another person.

3. The requirement of registration in s. 5 of the Trusts Act prevails against anything to the contrary in the Registration Act. Thus, a composition deed declaring a trust is compulsorily registrable, notwithstanding s. 17(2)(*i*) of the Indian Registration Act.[11]

4. Where the trust is made by a will, it must comply with the law of testamentary disposition, e.g., the Indian Succession Act, 1925.[12]

5. But the absence of the formalities cannot be pleaded as a cloak for *fraud*. (Proviso to s. 5) [On this point, *see* § 49 on 'Secret Trusts'.]

6. The ordinary law of acquisition of title by adverse possession is also not affected by the requirements of the Trusts Act. Thus, a trust which is *ab initio* void for want of registration, uncertainty, or the like, may be perfected by 12 years' adverse possession by the trustee *qua* trustees and an action by the settlor or the heirs of the settlor to repudiate the trust as void and to recover possession from the trustees would then be barred.[13]

7. If the foregoing formalities have been complied with, no other formality is required to make a valid trust. Thus, there need not be any

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8. The mode of transfer to the trustee may be such as is prescribed by the law for transfer of the particular kind of movable property which is involved. Thus, a trust of interest is provident fund money after retirement was held validly constituted by an unregistered instrument by which the interest was transferred to trustees, including the settlor himself, for under s. 130, the transfer of an actionable claim can be made by an unregistered instrument (*Official Trustee* v. *Chippendale*, A.I.R. 1944 Cal. 335).

9. *B* executed an agreement by which he appointed *N* manager and receiver of all his properties for 10 years and put *N* in possession under that agreement, which required *N* to keep accounts and explain them to *D* in July of each year and *N* was entitled to receive certain remuneration for his work. *Held*, this agreement did not constitute *N* a trustee within the meaning of the Indian Trusts Act [*Rai* v. *Bhayalal*, (1920) 24 C.W.N. 769 P.C.].

10. Since the creation of a valid trust, the settlor loses to have any interest in the trust property; it does not accordingly vest in the Receiver on his subsequent insolvency. If the Receiver nevertheless takes possession of such property, he must be deemed to hold it and its profits as trustee of the trustees appointed under the trust deed; the Receiver himself has no right to administer the trust property in accordance with the provisions of the trust deed [*Hunter* v. *Rani Kaniz*, (1935) 40 C.W.N. 35 P.C.].

11. *Govind* v. *Madan*, (1944) 49 C.W.N. 219 P.C.

12. Except where the testator is a Mahommedan (cf. s. 58, Indian Succession Act, 1925).

13. *Hem Chand* v. *Pearylal*, (1942) 47 C.W.N. 46 P.C.

consideration[14] or acceptance by the trustee,[15] or physical delivery of possession to the trustee where the trust is created by a registered deed[16] or a will.[17]

§ 49. Secret Trusts.

(A) *England.*

1. A secret trust is created where property has been given to a person either absolutely or upon an indefinite trust, but there has been an understanding between him and the donor, not clothed with the formalities for the creation of a trust. "Where a person has obtained possession of property by undertaking to hold it upon trust, he will not be permitted subsequently to repudiate the trust and hold the property for his own benefit on the ground that the terms of the trust were not reduced into writing or that no will declaring the terms of the trust was made" (*Strahan*). Thus, if the trust is—

I. *Inter Vivos*: Equity will not allow a person to whom land has been conveyed as a trustee and who knows it, to raise the Statute of Frauds as a bar. Thus, it is competent for a person claiming land conveyed to another to prove by *parol* evidence that it was conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the Statute in order to keep the land himself [*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196]. It was observed in this case that "the Statute of Frauds does not prevent the *proof of fraud;* and it is a fraud of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself".

II. *By Will:* Similarly, the provisions of the Wills Act will not be allowed by equity to be used as means to protect fraud, and the rule of equity is that 'a man must not profit by his own fraud'. Thus,

> If a testator devises real estate or bequeaths personal estate to *A*, the beneficial owner upon the face of the will, but upon the *understanding* between the testator and *A*, that the devisee or legatee will, as to a part or even the entirety of the beneficial interest, hold upon any trust which is lawful in itself in favour of *B*, the Court, at the instance of *B*, will *affect the conscience* of *A*, and decree him to execute the testator's intention" (*Lewin*).

But it has been laid down in *Re Boyes* [(1884) 26 Ch.D. 531] that when a bequest has been made to a person with an understanding that he is to hold upon trusts to be thereafter declared, and a subsequent declaration of the trust, not clothed with the formalities of a will is made, the secret trust will be enforced only on two conditions—(*a*) that the

14. Agnew, *Law of Trusts in British India* (As to voluntary trusts, however, see *post.*).
15. As to disclaimer by trustee, see Chapter on 'Trustees', *post.*
16. *Hashim Ali* v. *Sadiq Hasan*, 13 I.C. 882.
17. *Bai Mohakore* v. *Bai Mangla*, 35 Bom. 403.

subsequent direction to hold in trust has been communicated to the devisee in the testator's lifetime, and (*b*) that the devisee has accepted that particular trust (either expressly or impliedly).[18]

2. The same principle applies not only where a person obtains property upon a secret understanding to hold it on trust for another, but also where he obtains it by a fraudulent representation to the owner that he will hold it for those to whom the owner intended to convey the property. Thus, if, an heir or devisee or legatee or next of kin contrive to secure to himself the succession of the property through fraud, the Court affects the conscience of the legal holder and converts him into a trustee, and compels him to execute the disappointed intention [*Scott* v. *Tyler*, (1787) 2 Dick. 725]. Similarly, "if *A* induces either to make, or to abstain from revoking, a will leaving his property, by expressly promising or even tacitly consenting to carry out *B*'s wishes concerning it, the Court will hold this to be a trust, and will compel *A* to execute it. But such a trust will be construed only in cases in which the Court has been persuaded that there has been a fraudulent inducement, held out on the part of the apparent beneficiary, in order to lead the testator to confide to him the duty which he so undertook to perform" [*McCormick* v. *Grogan*, (1869) 4 H.L. 82].

(B) *India.*

The Proviso to s. 5 of the *Indian Trusts Act*, embodies this principle—

"These rules will not apply where they would operate so as to effectuate fraud."

Thus, where a father executed a deed of gift in favour of his daughters who, at the same time, gave an unregistered writing to their father stipulating that they would be bound to restore the property to him at any time he liked to revoke the gift. *Held*, that the unregistered writing by the daughters was admissible in evidence to show that the daughters held as trustees and that s. 5 of the Trusts Act would not apply so as to effectuate a fraud.[19]

§ 50. The rule of three certainties.

(A) *England.*

1. Certainty is an essential requirement for the constitution of a trust. Subject to the statutory requirements referred to above, no particular form of expression is necessary to declare a trust. But whatever be the language used, 'three certainties are essential to the creation of every trust', viz., (1) Certainty of Words, (2) Certainty of Subject-matter and (3) Certainty of Objects.

(1) The *words* in question must be so used that on the whole they ought to be construed as *imperative* and not as merely discretionary. The language must make it certain that the settlor *intended* to constitute a trust binding

18. *Blackwell* v. *Blackwell*, (1929) A.C. 318.

19. *Ramchandra* v. *Anandibai*, A.I.R. 1932 Bom. 188.

on the person to whom the property was given. But if on the whole it can be gathered that a trust was intended, equity may construe a trust from the use of mere *precatory* words [*see* Precatory Trusts below].

(2) The *subject-matter* of the trust must be certain, i.e., the property which is to be bound by the trust must be definite. The subject-matter is never certain when the first taker has a discretion to withdraw any *indefinite* part of it. Thus, in *Curtis* v. *Rippon* [(1820) 21 R. R. 327], where the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would make such use of it as should be for her own and their spiritual and temporal good remembering always, according to circumstances, the Church of God and the poor", it was held, that no trust was created and that the wife was absolutely entitled to the property, there being no ascertained part of it provided for the children or for the Church or for the poor. For the same reason, where there is an absolute gift to one person coupled with a recommendation that the donee shall give to a certain other person 'so much of it as may not be required by him',[20] or 'what shall be left at his death' [*Parnall* v. *Parnall*, (1878) 9 Ch. D. 96], the donee will take *absolutely*, unfettered by any trust.

(3) *The object or persons to be benefited* by the trust must be certain.

2. It is, however, to be noted that though in the absence of any of those three certainties the trust will fail,—in the absence of the first two the donee takes beneficially, but where a trust fails for uncertainty of objects, the donee cannot take for his own benefit, but must hold as a trustee for the settlor or his representatives;—to anticipate an expression,—there will be a *resulting trust* in favour of the settlor. The reason is, that in this last case, a trust of definite property was in fact intended by the settlor, which has failed only for uncertainty of the persons to be benefited. The rule is that "Once establish that a trust was intended, and the legatee cannot take beneficially" (cf. *Re Boyes*, p. 100n.).

3. The reason behind the principle of certainty was explained by Lord Eldon thus :

> "As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a *nature* that it can be under that control, so that the administration of it can be reviewed by the Court; or if the trustee died, the Court itself can execute the trust; a trust therefore which in case of maladministration could be reformed and a due administration directed; and then unless the *subject and objects* can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration."[21–22]

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20. *Mussorie Bank* v. *Raynor*, (1882) 4 All. 500 P.C.
21. *Morice* v. *Bishop of Durham*, (1804) 10 Ves. 522 (539).
22. *Chhotabhai* v. *Jnan Chandra*, A.I.R. 1935 P.C. 97.

(B) *India.*

The rule as to certainties is contained in s. 6 of the **Indian Trusts Act** which says that no trust is created unless—

"the author of the trust indicates with reasonable certainty by any words or acts—(*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust property."

The law on this point is the same as in England and the English authorities are applicable in the interpretation of this section.[23]

1. In this case, the facts were as follows: *C*, who was the sole owner of a business and conducted it himself, called it a Company. He first used certain entries to be made in the books of the Company, transferring from his own account to the credit of his wife certain sums of money and made subsequent additions. The Company later informed Mrs. *C* that the total sum placed to her credit was in the nature of 'personal gift and that she could not withdraw in any year more than 10 per cent of the capital'; subsequently *C* transferred certain amounts to his credit. *Held*, there was no trust in favour of Mrs. *C*, for grounds, *inter alia*, that (*i*) there was no ascertained and appropriated trust fund; (*ii*) there was no absolute parting by the owner with the alleged subject-matter of the trust; (*iii*) there was no valid declaration of trust as required by law.[23]

2. The appellant Bank executed a deed by which it purported to create a trust for the payment of pensions to the members of its staff. It transferred a fund to three persons referred to as the 'present trustees' and then provided that the income of the fund should be applied to the 'payment of *such pensions and in such manner* as the Bank or its authorised officers shall direct to be paid out of the fund' and the Bank had the sole discretion of granting, withdrawing, modifying or determining the pension. *Held*, that the deed of trust did not constitute a trust inasmuch as it was *not at all obligatory* on the Bank to grant any pension at all or to continue them for any period whatever. Further, the deed was void for uncertainty since the beneficiaries could not be indicated with reasonable certainty.[24]

3. A Hindu testator bequeathed his estate to his wife and appointed her the sole executrix in these words—"I constitute her the owner. And as to *whatever property there may remain* after her death my wife shall leave the said property to my two daughters in such manner *as she may like." Held*, the widow took an absolute estate and there was no trust in favour of the daughters as the subject-matter, viz., 'whatever may remain', was uncertain.[25]

§ 51. Precatory Trusts.

1. Since technical words are not necessary for the creation of a trust, equity will infer a trust from the use of mere *precatory* words, e.g., where a person gives property to another with words of 'wish,' 'hope,' 'desire,' or 'entreaty,' that the donee will dispose of the property in some particular way. Such cases arise chiefly in wills. Whether the testator intended an absolute

23. *Chambers* v. *Chambers*, (1944) 48 C.W.N. 621 P.C.
24. *Allahabad Bank* v. *Commr. of I.T.*, (1954) S.C.R. 195.
25. *Bhaidas* v. *Bhai Gulam*, (1921) 46 Bom 153 P.C.

gift or a trust will be determined in such cases by an examination of the whole instrument, and if the intention is clear, equity will construe the words as a declaration of trust.

2. Formerly, Courts were much inclined towards construing recommendatory words as imperative, so as to create precatory trusts, but the recent tendency of equity is strongly against this doctrine. It is now settled, as the Privy Council pointed out in *Mussorie Bank* v. *Raynor*[26] [(1882) 4 All. 500 P.C.] that the three certainties are essential even in Precatory Trusts. In other words, the Court will not construe a trust from recommendatory words, unless (*a*) the *intention* to create a trust be certain and clear (that is to say, the words, though in the form of entreaty, *must in the substance be imperative*); (*b*) the *subject-matter* of the trust be certain; and (*c*) the *persons intended* to be benefited be certain.[27]

§ 52. Executed and Executory Trusts.

1. The statement that no technical words are necessary to constitute a trust is to be qualified by an important rule of construction that **"technical words will be understood in their technical meaning"** (*Maitland*). The significance of this rule of construction is illustrated in the distinction made between Executed and Executory Trusts—a distinction which becomes specially important in the construction of wills (for in wills the trust may be either executed or executory).

2. A trust is said to be *executed* when there is nothing left to be done in order to constitute it, the trust being finally declared by the instrument creating it. A trust is *executory* when something remains to be done in order to complete it; it arises when there is a stipulation or direction to make a settlement upon trusts which are indicated in, but do not appear to be finally declared by, the instrument containing such stipulation or direction. In other words,

"Where the declaration (of the settlor) itself sets out fully and formally the trust on which the trust property is to be held, the trust declared by it is called an

26. *Mussorie Bank* v. *Raynor*.—The testator gave by his will to his widow the whole of his property "feeling confident that she will act justly to our children in dividing the same when no longer required by her." *Held*, these words were in the nature of an appeal to the conscience of the wife; hence she took absolutely and there was no trust. Even in a precatory trust, there must exist the three certainties.

27. The later decision of the House of Lords in *Comiskey* v. *Bowring Hanbury*, (1905) A.C. 84 is not, however, reconcilable with the Privy Council decision in the *Mussorie Bank case*, the facts being somewhat similar.

In the *Comiskey case*, the testator gave to his wife "the whole of my estate in *full confidence* that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will shall at her death by equally divided among the surviving said nieces. *Held* that there was an absolute gift to the testator's wife, *subject to an executory gift* of the same at her death to such of his nieces as should survive her, so far as his wife should not dispose by will in favour of such surviving nieces, or any one or more of them

executed trust. Where the declaration takes the form of an agreement or direction for the subsequent execution of a proper trust instrument, the trust declared by it is called an *executory trust." (Strahan)*

Executory trusts arise chiefly (1) in marriage articles, and (2) in wills.

3. The importance of the distinction between Executed and Executory Trusts, as we have seen above, lies chiefly in the fact that they are differently *construed* in a Court of Equity.

(*i*) In the case of an **executed trust,** where the settlor has been his own conveyancer, there is an *executed* document complete in its terms, expressed in the language of legal limitations. Therefore, the maxim "Equity follows the law" is strictly applied; that is to say, the words of limitation and other technical expressions will be 'technically construed',—in the same way as a Court of Law would have done.

(*ii*) But in construing the words creating an *executory trust,* a Court of Equity exercises a large authority in *subordinating the language to the intent.* Thus, in the construction of a will where the testator has merely *sketched* out a settlement that is to be made after his death, the intention of the testator will be more favourably considered on the ground that 'the *sketch being a sketch, equity will not catch at technical phrases and defeat what is believed to be his intention' (Maitland).*

(*iii*) If an executed trust seeks to create something which is void for illegality, e.g., where it violates the rule against perpetuities, the Court will carry out the testator's intention *cy pres* and direct the property to be settled as nearly as possible according to the testator's intention.[28]

§ 53. Completely and incompletely constituted Trusts—the constitution of Voluntary Trusts.

(A) A trust is said to be completely constituted when the trust property is *vested in trustees* for the benefit of the *cestui que trust;* until then it is only **incompletely constituted** (though it may have been declared according to the requirements of the Statute of Frauds) [§48, *ante*]. But where there is valuable consideration for its creation, it is not of much importance to distinguish an incompletely constituted trust from one completely constituted—a mere *promise* to create a trust from the constitution of a trust *(Maitland).* For,—

(I) An imperfectly constituted trust,—that is, where there has been a mere promise to constitute a trust, but no conveyance of the property,—if backed by valuable consideration, will be enforced by equity (*i*) **as a contract to convey,** by specific performance, for "Equity looks on that as done which has been agreed to be done." *Lewin* puts it thus, "Where there is valuable consideration and a trust is intended to be created, formalities are of minor importance, since if the transaction cannot take

28. Agnew, *Law of Trusts*, p. 21.

place by way of a 'trust executed', it can be enforced by a Court of Equity as a contract." Such a promise will also be construed (*ii*) **as a declaration of trust,** on the ground that "a trust shall never fail for want of a trustee". (Thus, when there is valuable consideration, a mere declaration to create a trust is almost as effective as a formal settlement, the only point of difference being that until and unless there is a conveyance of the legal estate to the trustee, the *cestui que trust's* rights may be defeated by a *bona fide* purchaser from the settlor without notice of the trust.)

(II) But if there is no valuable consideration, the case would be otherwise. **Equity will not assist a volunteer to perfect an imperfect gift.** A voluntary promise will not be enforced in equity, even if the promise be under seal. It should be noted, that at *law* a promise under seal is valid though made without valuable consideration, but *equity* will not grant specific performance of a voluntary promise, though under seal, for it follows the general maxim that "Equity will not assist volunteers." If, however, the trust has been *completed by a conveyance* of the property to the trustee, a voluntary promise will be upheld on the ground that *conveyance passes* title, whether for consideration or not. True, equity will not assist a volunteer to perfect his title, but if his title is *already perfect*, equity will enforce it. The law on this point was thus summed by Lord Eldon in *Ellison* v. *Ellison* [(1802) 6 Ves. 656],—

> "If you want the assistance of the Court to constitute you a *cestui que trust* and the instrument is voluntary, you shall not have that assistance; but if there has been a complete transfer of the property, although it is voluntary, yet the *legal conveyance* being validly made, the *equitable interest* will be enforced by the Court of Equity."

This leads to the conclusion that a voluntary trust if *perfectly* created is valid and enforceable (subject, of course, to the Bankruptcy law and the Statutes in favour of creditors and subsequent purchasers which invalidate voluntary transactions as fraudulent). It is, therefore, necessary to consider how a trust may be perfectly constituted. It is to be noted that all trusts created by wills are completely constituted, for a trust to operate after the death of the settlor can only be created by vesting the property in trustees. So the present discussion relates only to trusts *inter vivos*.

(B) A trust may be **perfectly constituted** by a settlor (*a*) by vesting the trust property in trustees, or (*b*) by declaring himself a trustee,—to retain the property in question but to hold it henceforth upon the designated trusts.

(*a*) When a settlor intends to constitute the trust by conveying the property to trustees the test whether or not the trust has been completely constituted is whether or not the settlor has *divested* himself of the ownership of the property. (*i*) If the subject-matter is *legal* estate, the settlor must do all that the *law* requires in order that the conveyance

be effectual to pass the legal interest; and the trust will fail if anything remains to be done by the settlor to divest himself of the legal interest (*see* below). Thus, freehold property must be conveyed by deed of grant, leaseholds by deed of assignment, movables by deed or by delivery, and registered shares by the proper form of transfer. (*ii*) If the subject-matter is *equitable*, it is not necessary that he should procure a conveyance of the legal interest. Where, for example, *T* holds stocks in trust for *S*, and the equitable owner *(S)*, wants to settle his equitable interest, he may do it simply (1) by directing the old trustee to hold the legal estate upon the new trust or (2) by executing an assignment of his equitable interest to some new trustee upon the new trust.

(*b*) When the settlor intends to constitute the trust by declaring *himself* a trustee for the *cestui que trust,* he may do this by any words which express his intention, whether his interest is legal or equitable. But the declaration must be evidenced by *writing* when the property is *land* or hereditament. In other cases word of mouth will be enough.

§ 54. An imperfect gift is no declaration of Trust.

1. We have seen that a voluntary trust may be perfectly constituted by the settlor, either by transferring property to the trustees, or by declaring himself the trustee (without making a conveyance of the property to trustees). In this connection, however, it must be carefully borne in mind that if the settlor has attempted to constitute a trust by transferring the property to trustees, or to make a direct gift to the donee, and the transfer is ineffectual, the Court will not construe the attempted transfer as a declaration of trust, because the two things are very different. By attempting to transfer the property the settlor or donor has shown an intention to *divest* himself of it, not to *hold* it himself as a trustee. Thus, a letter to the donee, saying that the donor gives him his chattels, will not pass the ownership in the goods nor will a delivery of the lease be a valid transfer of the leasehold. And in all these cases, the gift having failed, neither the letter nor the delivery of the deed of lease will be regarded as a declaration of trust for the donee. **"An imperfect gift will not be constituted as a declaration of trust"** [*Richards* v. *Delbridge*,[29] (1874) L.R. 18 Eq. 11]. For, as we have seen, there is no equity in favour of a volunteer.

2. An exception to the above rule is due to the curious doctrine of equity that the issue of a marraige is a party to the marriage consideration.

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29. *Richards* v. *Delbridge.*—*A* is possessed of a mill and of plant, machinery, and stock-in-trade belonging to it. Shortly before his death, *A* endorses on the lease the following memorandum: "This deed and all thereto belonging I give to *R*, now an infant, from this time forth, with all the stock-in-trade," and signs it, and delivers the lease to *R*'s mother on his behalf. *Held*, that the intent of *A* was to create a gift. But the gift was imperfect, since a lease may be conveyed only by a deed of assignment. The gift having failed, the Court will not treat the attempted transfer as a declaration of trust, for there is no equity in favour of a volunteer.

Thus, an agreement in consideration of marriage to convey land to be held in trust for the children of the marraige is enforceable at the suit of a child, though no conveyance has been made to the child. Here is an imperfect gift, but the Court will say that *the issues of a marriage are not volunteers.* That being so, it is immaterial whether the gift is perfect or not, for equity will perfect (by specific performance) an imperfect conveyance, when there is valuable consideration for it.

3. The whole law as to voluntary trusts has been **summarised in** *Milroy* v. *Lord* [(1862) 4 De G.F. & J. 264]:

"In order to render a voluntary settlement valid and effectual, the settlor must have done everything, which, according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. But in order to render the settlement binding, one or other of these modes must be resorted to, for there is no equity to perfect an imperfect gift."[30]

§ 54A. Purpose Trusts.

1. *Maitland's* classification of trusts, we have seen, is into Express and Implied. As to Express Trusts, he distinguishes two classes,—(*a*) where the trustee is bound to exercise his rights on behalf of some other *person;* and (*b*) where he is to exercise his rights for the accomplishment of some *purpose.* So far we have dealt with the former class, viz., where the trustee holds for a definite *cestui que trust.*

2. A trust of the latter class is called a Purpose Trust. The most peculiar characteristic of such trusts as distinguished from other Express Trusts is that they cannot be enforced by any *cestui que trust* against the settlor or the trustee, for there is no definite *cestui que trust* at all. Yet they are to a certain extent valid, if the purposes be legal. Such trusts are also called **Trusts of Imperfect Obligation** (e.g., by *Strahan*). Another important illustration of Trusts of Imperfect Obligation is provided by trusts in favour of creditors, which will be separately dealt with [§ 55].

3. The most important class of 'trusts for a purpose' is, however, the Charitable Trusts or trusts where the purpose is 'charitable'. But Charitable Trusts have certain peculiarities of their own, and they are properly known as Express Public Trusts; hence they form the subject of a separate

30. The INDIAN LAW is *similar.* S. 6 of the Trusts Act lays down (see p. 132, *ante*) that 'unless the trust is declared by will, or the author is himself to be the trustee', the author of the trust must transfer the trust property to the trustee, in order to constitute a trust. If the settlor does neither, the Court will not perfect an imperfect gift by holding it to operate as a declaration of trust [*Amarendra* v. *Monimunjari,* (1921) 48 Cal. 986 (993)].

treatment. The term 'purpose trust' should better be confined to trusts for some definite and lawful purpose, other than a 'charitable' purpose, strictly so-called, e.g., for the purpose of erecting a monument to the settlor [*Mitford* v. *Reynolds*, (1848) 16 Sim. 105], for the promotion of yachting [*Re Nottage*, (1895) 2 Ch. D. 649], for the maintenance of the settlor's tomb in a churchyard [*Pirbright* v. *Selvey*, (1896) W.N. 86].

4. The points of **distinction between Charitable and Purpose Trusts** may, however, be noted :—

(1) Charitable trusts are enforceable by means of an action in the name of the Attorney-General.[31] A 'purpose' trust is not enforceable at all, and yet it is valid. Thus, in *Re Dean* [(1889) 41 Ch. D. 552], where the testator gave to trustees property, charged with an annuity for the maintenance of horses and hounds, it was held that a trust was created in favour of the horses and hounds although no one could enforce it; and neither the trustees could claim the beneficial interest, nor would there be a resulting trust in favour of the heirs of the next of kin of the testator. Such a trust is valid in the sense that the person, who would take the property on failure of the trust, cannot complain if the trustees do what their settlor had requested them. (2) A charitable trust does not fail if the object is uncertain, but a purpose trust, like all other express trusts, will fail for uncertainty of object. (3) A charitable trust is not affected by the rule against perpetuities, but a purpose trust that violates the rule is void. Thus, a bequest for the *perpetual* maintenance of private monuments or tombs, except in churches is bad [*Hoare* v. *Osborne*, (1866) 1 Eq. 585].

§ 55. Trusts in favour of Creditors.

1. Trusts created by a debtor for the payment of his creditors form an exception to the general principles of trust, viz., (*a*) that the *cestui que trust* can enforce the trust, and (*b*) that a trust, after it is completely constituted, is irrevocable by the settlor. Such trusts are, therefore, sometimes called **'illusory'**. It has been observed that "a trust-deed by which property is conveyed for the benefit of creditors *does not of itself* create a trust for any of the creditors". The deed has the same effect as if the debtor had delivered money to an agent to pay to his creditors, and before any payment was made by the agent, the debtor had recalled the money so delivered. The transaction is considered merely as an arrangement made by the debtor for his personal convenience and not so much for the benefit of his creditors [*Acton* v. *Woodgate*, (1833) 2 My. & K. 492]. As a rule, therefore, the debtor may *revoke* the trust at his pleasure.

2. But such a trust may, nevertheless, become irrevocable in certain

31. IN INDIA, suit for the enforcement of a public charitable or religious trust may be brought either by the Advocate-General or by two or more persons having an interest in the trust, with the consent in writing of the Advocate-General (s. 92, Civil Procedure Code).

circumstances, and then the creditors may enforce it as a trust in their favour. Thus, (*i*) the right of revocation being strictly personal, it becomes irrevocable *after the debtor's death,* and the beneficiaries must take subject to it; (*ii*) if any creditor is a party to the deed and has executed it, as to him the deed is irrevocable; (*iii*) if it is communicated to any creditors, it becomes irrevocable as to them, provided they have thereby been induced to a forbearance in respect of their claims, or have acted under its provisions[32]; (*iv*) if the debtor's intention clearly appears to have been to create a trust, and the relationship of trustee and *cestui que trust* has been actually constituted, it is irrevocable.

(II) Express Public or Charitable Trusts.

§ 56. What Trusts are charitable.

(A) *England.*

1. A Charitable Trust may shortly be described as a trust for the accomplishment of some purpose, which is 'charitable' and at the same time beneficial to the 'public'. The legal significance of the term 'charity' is, however, different from its popular meaning. What, then, are **'charitable purposes'**? These were attempted to be defined by Statute (43 Eliz. c4), but the list given there was held by the Courts as not to be exhaustive. A judicial summary of charitable purposes can be found in *Commissioners of Income-tax* v. *Pemsel*[33] [1891) A.C. 531],—'Charitable trusts comprise trusts

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32. Under s. 78(*c*) of the INDIAN TRUSTS ACT, *mere communication* of the trust to the creditors deprives the trustee of his power of revocation. Both in England and India (cf. s. 6(*a*) of the Prov. Insolvency Act and s. 9(*a*), Presidency Towns Insolvency Act), the transfer of a substantial portion of the property to a third person for the benefit of creditors, generally, constitutes an act of insolvency on the part of the transferor. The result is, that a creditor who is not a party to the trust deed and to whom the trust has not yet been communicated can, therefore, avail himself of this act of insolvency and get the payment of his debts out of the transferred (i.e., trust) property. Hence, in this case, the revocability of a trust for creditors has lost its importance since the enactment of the bankruptcy statutes.

A debtor conveying property in trust by a 'composition deed' for the benefit of creditors ceases to have ownership thereof. He is only interested in the surplus proceeds, if any, that result [*Govind* v. *Madan*, (1944) 49 C.W.N. 219 P.C.].

33. *Commissioners of Income Tax* v. *Pemsel.*—A trust was created in favour of the Moravian Church for (1) the support of missionary establishments among heathen nations and (2) the maintenance of children of the poor missionaries of that Church. The question arose whether the first object was a 'charitable purpose'. (The second object was conceded as charitable). *Held,* that it was a charitable purpose. The expression 'charitable purpose' is not defined in the statute. But it is not confined to relief of poverty. That is the *restricted* popular meaning of the word 'charity'. But in a *broader* sense, it means relief of any form of human necessity which excites the compassion of men and appeals to their benevolence. All human necessities do not result from poverty. Shipwrecked mariners drowning in the sea, or children cruelly treated at home do not suffer from lack of money. But no one would hesitate to call an institution for their rescue or relief a charitable one. Nor is the popular conception of a charity confined to the relief of material wants. It does not exclude the idea of *religious need.* Many people consider spiritual want as no less imperatively calling for

for (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion and (4) other purposes beneficial to the community. It may be observed that the fourth head is very vague, but it must not be taken to include every object of public utility,—it must come within the spirit of the Statute.

2. But an elemosynary element is not essential for a charitable trust [*Commissioners v. University College,* 5 T.C. 408(414)]. In other words, it is not a necessary element of a purpose of general public utility that something should be provided free or less than its costs or for less than the ordinary price. If there is an object which in itself is one of general public utility, then the circumstance that the testator's bounty was only in respect of the initial capital assets or had only to meet a working loss temporarily and not permanently will not necessarily alter the character of the object.

3. The law recognises no purpose as charitable unless it is of a **public** character [*Re Compton,* (1945) 1 All E.R. 198 (C.A.)]. "To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first enquiry must be made whether it is public—whether it is for the benefit of the *community or of an appreciably important class of the community.* The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a *fluctuating* body of private individuals cannot" [*Verge* v. *Somerville,* (1924) A.C. 496]. If the gift is to a class, it must be defined with sufficient certainty [*Keren* v. *Inland Revenue Commrs.,* (1932) A.C. 650].[34]

4. A trust for the attainment of political objects is bad, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether the proposed change in the law will or will not be for the *public benefit,* and, therefore, cannot say that the gift to secure the change is a charitable gift [*Bowman* v. *Secular Society Ltd.,* (1917) A.C. 406 (442)].[35] But if the dominant intention of a trust is education or mental improvement,

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relief. The trust for the support of missionary establishments among heathen nations is thus a 'charitable trust' not liable to income-tax. Lord Macnaughten observed, "Charity in its legal sense comprises four principal divisions, trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for *other purposes beneficial to the community* not falling under any of the preceding heads."

34. Thus, while a fund for the benefit of soldiers of one of the States of Australia from the War [*Verge* v. *Somerville,* (1924) A.C. 496] has been held to be a valid public charity,—a holiday fund for the benefit of the employees of a particular factory [*In re Drummond,* (1914) 2 Ch. 90], or a fund raised by the employees of a company for the relief of the air-raid distress of the ex-employees of that company, have been held not to be valid charitable trusts [*Re Air-Raid Distress Fund Trusts,* (1946) 1 All E.R. 501 (C.A.)]. Similarly, a trust for the furtherance of 'psychological healing in accordance with the teaching of Jesus Christ' is a valid charitable one [*Re Osmund,* (1944) 1 All E.R. 262 (C.A.)], but not a corporation formed for the protection of the 'interests of foreign bond-holders,'—which means the protection of the *private* interests of a particular class of the community [*Foreign Bond-holders* v. *I.R.C.,* (1944) All E.R. 420 (C.A.)].

35. *Laxman* v. *Charity Commr.,* A.I.R. 1962 S.C. 1589.

the fact that the education is entrusted to or associated with a particular political party would not make it any the less a charitable trust; on the other hand, if the dominant purpose of a trust is the furtherance of the political propaganda of a particular party, and the education is subsidiary to that, the trust would not be one for charitable purposes [*Bonar Law Memorial Trust* v. *Commissioners,* (1933) 17 T.C. 508].[36]

5. But every object of public general utility is not necessarily a 'charity'. A trust is charitable only if its *dominant object* is beneficial to the community in a way *which the law regards as charitable,*[37] that is to say, only if it comes within one of the four objects mentioned in *Pemsel's case,* (*see* p. 139, *ante*). Thus, a trust having for its object the activities of an ordinary social club,[12] e.g., the promotion of recreation or sports and pastimes,[13] of its members, is not a charitable trust.

6. On the other hand, the following have been held to be charitable purposes within the meaning of the fourth category mentioned in *Pemsel's case* (i.e., other purposes beneficial to the community) :

(*a*) Promotion of the efficiency of the police or armed forces,[37-38]
(*b*) Preservation of places of historical interest.[39]
(c) Benefits for the 'sick and wounded'.[40]
(*d*) Promotion and encouragement of the study and *practice* of the art and science of surgery,[41] although incidentally individuals carrying on the profession were also to be benefited.

7. To be valid a charitable bequest must be for the public benefit, and the trust must be *capable of being administered* by the court. The opinion of the donor of a gift or the creator of a trust that the gift or trust is for the public benefit does not make it so, the matter is one to be *determined by the court* on the evidence before it.[42]

(B) *India.*

1. It has been generally acknowledged that in order to be a charitable trust, the purpose of the trust must be—(*i*) the relief of poverty, (*ii*) the advancement of education, (*iii*) the advancement of religion, or (*iv*) other purposes beneficial to the community as in England (p. 140, *ante*).[43]

36. Also *Tribune Press* v. *Commr. of I.T.*, (1939) 43 C.W.N. 1065 (1073) P.C., *below.*
37. *William's Trustees* v. *Inland Rev. Commrs.*, (1947) 1 All E.R. 518 (H.L.).
38. *Inland Rev. Commrs.* v. *City of Glasgow Assocn.*, (1963) 1 All E.R. 747 (H.L.).
39. *Re Verrall,* (1916) 1 Ch. 100.
40. *Re Hillier,* (1944) 1 All E.R. 480.
41. *Royal College of Surgeons* v. *National Prov. Bank,* (1952) 1 All E.R. 984 (H.L.).
42. *Beauty* v. *London Spiritualistic Alliance,* (1923) All E.R. 49.
43. *Trustees of the Tribune Press* v. *The Commissioner of Income Tax,* (1939) 43 C.W.N. 1065 P.C.—Sardar Dayal Singh created a trust "to maintain the Tribune Press and Newspaper in an efficient condition, keeping up the liberal policy of the said newspaper and .... placing it on a footing of permanency". The trustees of the Press applied for exemption from income-tax under s. 4(3) (i) of the Indian Income-tax Act, 1922, which runs thus—

"This Act shall not apply to the following classes of income—

(1) Any income derived from property held under trust or other obligation wholly for religious or charitable purpose ....

2. In determining whether an object is beneficial to the community or one of general public utility, the Court would, of course, be guided by Indian ideas and, particularly, the common opinion amongst the community to which the parties interested belong.[43]

Thus, the following purposes, *inter alia,* have been held to be charitable purposes:

(*a*) Establishment of School or College, provision for scholarships and similar objects of education.[44]

(*b*) Provision for the lodging of *sadhus* and saints.[45]

(*c*) Maintenance of a newspaper for supplying the Province with an organ of educated public opinion.[43]

(*d*) Organisation for the development of hand-spinning and *khaddar,* without participation in trading projects, and in political propaganda.[46]

(*e*) Establishment of a dispensary[44] or hospital.

3. As regards 'religious purposes', however, the Indian law must

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In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief, advancement of any other object of general public utility".

The Judicial Committee *held* that the Appellants were entitled to exemption as the dominant purpose of the trust was 'supplying the Province with an organ of educated public opinion', which was an object of 'public utility' and hence 'charitable' within the meaning of the provisions of the Income-tax Act, in question.

The question whether the trust is for the advancement of an object of general public utility is a question of law to be determined by the Court. The test is not whether the testator considered it to be so, but *whether the Court considers it to be beneficial to the public, having regard to the nature and character of the trust.* In the present case, this must be determined with reference to the policy and character of the newspaper as it existed *at the time when the testator created the trust* and it is not necessary to enquire as to the manner in which the trust has been or is being carried out since the date of the testator's death. The English decisions establish that *political propaganda is not an object of general public utility,* but, in the present case, the *dominant object* of the testator was to benefit the people of Upper India by providing them with an English newspaper—the dissemination of news and ventilation of opinion upon all matters of public interest. Though politics and legislation were discussed in the paper, that was not its dominant purpose. The object of supplying the Province with an organ of educated public opinion should, therefore, be held to be an object of general public utility.

44. *Haridasi* v. *Secy. of State,* 7 Cal. 304 P.C.; *Kayastha Pathsala* v. *Bhagwati,* (1937) All. 3 P.C.

45. *Parmanandas* v. *Vinayek,* 7 Bom. 19 P.C.

46. *All-India Spinners Association* v. *Commisioner of Income-tax,* (1944) 49 C.W.N. 1 P.C.—In this case, their Lordships, construing the constitution of the All-India Spinners Association, and, following the earlier case of *Trustees of the Tribune Press* (above), *held* that the object to the association was the development of hand-spinning and *khaddar,* without any participation of the members in profits, or in political propaganda, and that this was an object of general public utility; and that the provision of wages for the poor agriculturists in the villages, specially at the time of the year when they were not engaged in agricultural operations, was another charitable object. It was further observed that the question whether the purpose of the association was charitable or not was to be ascertained from the written constitution of the association and not from the current practice, because any departure by the organisation or its members from the constitution would be a breach of trust which the Court could restrain. "The Court might in proper cases refuse to admit, as charitable schemes, purposes eccentirc or impracticable. But though economists might differ about the wisdom of some aspects at least of the Association's purpose, the court could not hold that it was beyond the pale of legitimate charitable trusts."

necessarily differ from the English notions.[47] Thus, as the Supreme Court[48] has laid down—

"What are purely religious purposes and what religious purposes will be charitable must be entirely decided according to Hindu law and Hindu notion."[49]

According to the Hindu *Sastras*, religious or charitable purposes are not confined to purposes which are productive of actual or assumed *public benefit*. The justification for an endowment or perpetual dedication of property, according to *our Sastras*, is religious merit which consists of acts of *ista* (religion) or *purtta* (charity). What acts are acts of *ista* or *purtta* are laid down by the *Sastras*[50] and these heads of religious pruposes "cannot be allowed to be widely enlarged consistently with public policy and needs of modern society".[48]

Hence, arises the distinction between English charitable trusts and HIndu or Muslim religious endowments, which has been clearly explained by the Supreme Court as follows :

"A trust in the sense, in which the expression is used in English law, is unknown to the Hindu system, pure and simple Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system, to Brahmins, *Goswamis, Sanyasis*, etc. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager or custodian of the idol or the istitution. In no case is the property conveyed to or vested in him, nor is he a trustee in the English sense of the term although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration."[50]

As regards Muslim endowments—

"As a result of the creation of a *wakf*, the right of *wakif* is extinguished and the ownership is transferred to the Almighty. The manager of the *wakf* is the *mutawalli*, the Governor, Superintendent or Curator. But in that capacity, he has no right in the property belonging to the *wakf;* the property is not vested in him and he is not a trustee in the legal sense.

Usually, followers of Islam would naturally prefer to dedicate their property to the Almighty and create a *wakf* in the conventional Mahommedan sense. **But that is not to say that a follower of Islam is precluded from creating a public, religious or charitable trust which does not conform to the conventional notion of a** *wakf* and which purports to create a public religious charity in a non-religious secular sense."[50]

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47. Thus, the law against 'superstitious' uses does not apply in India, [*Saraswati* v. *Rajagopal*, (1954) S.C.R. 277].
48. *Saraswati* v. *Rajagopal*, (1954) S.C.R. 277.
49. Or the Muslim law or any other personal law by which the donor may be governed.
50. *Nawab* v. *Director of Endowments*, A. 1963 S.C. 985.

Thus,—

1. The following have been held to be valid religious and charitable purposes :

(*i*) Maintenance and worship of family idols,[51] whether permanent images are kept or not.[52]

(*ii*) Performance of annual *sradhs* (oblations for the propitiation of their souls) of the settlor or his ancestors.[53]

(*iii*) Reading of sacred books of the Hindus[53], giving presents to Brahmins and Pandits[53] or feeding[54] them on sacred occasions, or even feeding 'poor indigent Hindus'[55] or '*fakirs* and mendicants'.[56]

(*iv*) Establishment of a '*Dharamsala*'[57] or a rest-house for travellers;[58] '*Sadabrata*'[59] or '*Annachatra*',[60] i.e., an institution for distribution of food to mendicants or needy people.[61]

(*v*) Provision for construction of a tank or any other reservoir of water for men or animals[59]; planting of trees and groves[62], maintaining a *goshala.*[63]

2. On the other hand, it has been held that the following purposes are *not* religious or charitable purposes according to Hindu law and would not, accordingly, constitute a valid trust or endowment :

The worship at the *samadhi* (tomb) of a person,[48] except in a community in which there is a widespread practice of raising tombs and worshipping thereat.[64]

§ 57. Incidents of a charitable Trust.

(A) *England.*

Charitable trusts are for the most part governed by the same rules as express private trusts, but due to their peculiar nature (being gifts to charity), they sometimes receive a more favourable construction than trusts for the benefit of private individuals, while on grounds of public policy they are treated with a certain illiberality in some respects. A charitable trust is **more favourably treated** than a private trust in the following respects :—

(*i*) Where the objects of a private trust are indefinite, the trust fails. In

51. *Bhupati* v. *Ram Lall,* 37 Cal. 128 F.B.
52. *Prafulla* v. *Jogendra,* 9 C.W.N 528.
53. *Dwarkanath* v. *Burroda,* 4 Cal. 443.
54. *Lakshmisankar* v. *Baijnath,* 6 Bom. 24; *Kedar* v. *Atul,* 12 C.W.N. 1083.
55. *Rajendra* v. *Rajcoomari,* 34 Cal. 5.
56. *Sheosankar* v. *Ramsewak,* 24 Cal. 77
57. *Purmanandas* v. *Vinayekrao,* 9 I.A. 86.
58. *Rama Rao* v. *Venkataraman,* A.I.R. 1947 P.C. 88.
59. *Jamnabai* v. *Khimji,* 14 Bom. 1.
60. *Advocate-General* v. *Strangman,* 6 Bom. L.R. 56.
61. *Vaidyanath* v. *Swaminatha,* A.I.R. 1924 P.C. 221.
62. *Chandramohan* v. *Jnanendra,* 27 C.W.N. 1033.
63. *Lalta Prasad* v. *Brahmanand,* A.I.R. 1953 All. 449.
64. This is a valid religious and charitable purpose amongst Muslims (*Muthu Kana* v. *Vada Levvai,* 34 Mad. 12).

the case of a private trust, a testator is not permitted to delegate to his trustees the position of his property, and he can only confer on his trustees the limited power of selection and apportionment among a *definitely prescribed* class of beneficiaries [*A.G., New Zealand* v. *N.Z. Ins. Co.*, (1936) 41 C.W.N. 321 P.C.].

But a charitable trust will never fail for uncertainty, provided the intention to devote the property to charity is clear on the face of the instrument. If the intention be distinctly charitable, it is immaterial that the particular mode in which the intention is to be carried into effect is left uncertain. A testator may simply direct the property to be applied for charitable purposes or 'for such charitable purposes as his executors or trustees may select' [*Mills* v. *Farmer*, (1815) 1 Meriv. 55]. But in such a case, if the intention is not *exclusively* charitable, the gift will fail for uncertainty, being a mere *purpose* trust. Thus it was observed in *Hunter* v. *Attorney-General* [(1899) A.C. 309] that "where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (e.g. 'charitable or benevolent',[65] 'charitable or philanthropic'), or where the description includes purposes which may or may not be charitable and a discretion is vested in the trustees, the whole gift fails for uncertainty."

For the same reason, where the language of a gift, upon its true construction, makes it possible for the subject-matter of the gift to be applied for non-charitable purposes, that gift is not a charitable gift, though the *greater* part of the purposes may be truly charitable. It is sufficient to destroy the charitable nature of a gift if on its true construction it is *possible* for those administering the property to go outside the scope of charity [*Re Osmund*, (1944) 1 All E.R. 262 (C.A.)]. In other words—

> "To constitute a good charitable gift the application of the funds for charitable purposes must be *obligatory*. If the trustees are allowed, an alternative as to whether the purposes to which the subject-matter of the gift relates are to be charitable or something else, the trust cannot be maintained" (*Halsbury*).

(*ii*) Secondly, if the particular objects selected by the settlor fail, the trust will be carried out *cy pres*, provided a general charitable intention appears [*see* below]. This doctrine is not applicable to private trusts.

(*iii*) Thirdly, gifts to charity are exempted from the rule against per-

65. It is curious to note that a gift for 'charitable *and* benevolent' purposes is valid, but a gift for 'charitable *or* benevolent' purposes is void for uncertainty. This has been definitely laid down by the House of Lords in *Chichester Fund* v. *Simpson*, (1944) 2 All E.R. 60 (H.L.). The reason is that the word 'benevolent' is of vague import and is capable of including objects which may not be charitable. When, however, it is used conjunctively with the word 'charitable' (i.e., with 'and'), it is possible to read it in favour of such benevolent objects as are charitable or such charitable objects as are benevolent,—charity in either way predominating. But the disjunctive 'or' indicates an alternative purpose, i.e., other than charitable, and, accordingly, such a gift is void for uncertainty.

petuities. That is to say, property may be devoted to charity *for ever*, although the effect may be to prevent the free alienation of property provided only that the gift *commences* within the period allowed by the rule. Again, there is nothing to prevent property being 'given over' from one charity to another at *any* distance of time. (But in that case, the gift-over will not be valid unless the first gift is also charitable). In short, where there is a valid immediate gift to charity, a gift-over to another charity is not subject to the rule against perpetuities [*Royal College of Surgeons* v. *National Prov. Bank*, (1952) 1 All E.R. 984 (991) H.L.].

(B) *India*.

1. The rule of certainty as to charitable intention has been applied to hold that a charitable trust will fail unless the settlor expressed an intention to devote the funds to *exclusively* charitable purposes.[66]

On this principle, the Privy Council has held that a gift for *Dharma* without specifying the objects of charity is void for uncertainty inasmuch as the dictionary meaning of *Dharma* was 'law, virtue, legal or moral duty' and the use of the word did not, accordingly, oblige the trustee to use the trust funds for exclusively charitable purposes. The decision has, however, been criticised in respectable quarters[67] on the ground that in the Hindu *Sastras*, the word *Dharma* has as definite and well-settled a meaning as the English word 'charity' (p. 139, *ante*), and connotes *ishta* (religious) and *purtta* (charitable) gifts. It is not unreasonable to anticipate that the Supreme Court would depart from the Privy Council view in some future decision.

2. But if there are definite and *substantial* charitable gifts which are *separable* from other non-charitable gifts, the invalidity of the non-charitable gifts, or the fact that the charitable gifts may not involve a substantial part of the settled property, does not affect the charitable gifts.[68]

3. As in *England*, it has been held that where a trust is created for several objects or purposes, some of which are 'charitable' while others are not, the question whether a charitable trust has been created thereby will be determined by the *dominant* object of that trust deed.[69] One test which is applied for the purpose is whether expenditure on account of the said purpose was obligatory or only discretionary with the trustees.

A trust deed directed the trustees to accumulate the income for defraying the expenses of certain religious ceremonies and *after* meeting such expenses, "to expend such sum as they (the trustees) might deem proper to maintain and educate the male descendants" of the settlor, it was held that the dominant object of the

66. *Ranchordas* v. *Parvatibai*, (1899) 23 Bom. 725 P.C.

67. Mukherjea, *Hindu Law of Religious & Charitable Trusts*, pp. 117-8; Golap Sastri, *Hindu Law*, 4th Ed., p. 759.

68. *Kayastha Pathsala* v. *Bhagwati*, (1936) 41 C.W.N. 262 P.C.

69. *Rajabathar* v. *Vadivelu*, A.I.R. 1970 S.C. 1039 (para. 5).

trust was the charity and the property was dedicated to charity, subject only to a charge for the maintenance and education of the members of the settlor's family. It could not be contended that the dominant object was the maintenance and education of the family members which was a non-charitable purpose, for the trustees had the *discretion* to stop the maintenance and education expenses. The Court observed—

"The dominant object is never allowed by the settlor to be repelled by a discretion conferred on the trustees to stop such expenses. This power to stop is consistent with the intention of the settlor to treat the education and maintenance expenses as secondary objects only after the primary purpose of the trust, namely, charities are fulfilled. The tenor of the document points to the inescapable conclusion that the predominant and overwhelming intention of the settlor was to benefit the charities and provide for the same not only by making the expenses for the charities as the first and foremost direction but also by providing for accumulation of income and purchase of properties out of the said accumulated income only for the purpose of charities."[69]

§ 58. Cy pres.

1. *Cy pres* means 'as nearly as possible'. The doctrine of *cy pres* is that if the wishes of a settlor cannot be carried out literally, they will be carried out as nearly as possible in the way desired by the settlor. This doctrine is applied to charitable trusts when the literal execution of the trust becomes impossible or highly inexpedient, *provided, a general intention of charity appears* [*Att. Gen.* v. *Ironmonger's Co.*, (1840) 10 Cl. & F. 908]. In such cases, the Court can frame a scheme and give suitable directions regarding the objects, upon which the trust money can be spent.[70]

2. Thus, if the settlor has specified an object which is, or afterwards becomes impossible, the gift will not fail,[71] but the property will be used for some similar purpose, resembling as much as possible, the specified object. Similarly, if the property either is originally, or afterwards becomes, more than sufficient to carry out the donor's selected object, the surplus will be applied *cy pres* [*Re Campden Charities,*[72] (1881) 18 Ch.D. 310] provided there appears, in both cases, a *paramount intention* of charity.

3. The principle underlying this doctrine was thus summarised by the Privy Council in *Mayor of Lyons* v. *Advocate-General of Bengal*[73] [(1876) 1

70. *Ratilal* v. *State of Bombay,* A.I.R. 1954 S.C. 388 (394).

71. Gifts to charity, thus, form an exception to the doctrine of resulting trusts.

72. *Re Campden Charities.*—*T* gave money to buy land of the annual value of £10 for the benefit of the parish of Kensington; of this sum, £5 was for the apprenticing of one "poor body or more being of the said parish". After sometime, the annual income for the land was more than £ 2,000. On the ground that there was an enormous increase in the population of Kensington and that apprenticeship had been superseded by education, the Charity Commissioners proposed to apply a considerable portion of the income towards educational purposes. *Held,* that considering the increase of population and change of habits, the Charity Commissioners were justified in sanctioning the alteration proposed.

73. *Mayor of Lyons* v. *Advocate-General of Bengal.*—*T* gave by his will certain funds to be applied annually for the relief of poor debtors detained in prison in Calcutta, and the

Cal. 303 (P.C.)]: It rests on the view that charity in the abstract is the substance of the gift and the particular disposition is merely the mode, so that though the particular disposition may not be capable of execution, the gift does not fail. But the doctrine is not applicable unless *two conditions* are satisfied, viz., (*a*) that it is impossible, or at least highly undesirable to carry out the directions of the donor literally, (so that the Court has no right to set aside the wishes of the testator to substitute another charity simply because the bequest might be more beneficially applied to the charity substituted by the Court); and (*b*) that the donor has manifested a paramount intention of charity; (hence, if the donor has only a *particular* charitable object in his mind, e.g., to build a church or found a school at a particular place, and that cannot be carried into effect, the gift will fail and the trust will result in favour of the donor).[74] Then, in applying the *cy pres* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it.

4. Where, however, the donor's intention can be given effect to, the Court has no authority to sanction any deviation from the intentions expressed by the donor and the Court cannot apply the trust property or its income to other purposes simply because it considers them to be *more expedient* or more beneficial than what the donor had directed.[70,75]

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residue of his property to be applied to the charitable establishments he had founded in Calcutta, Lucknow and in France. The bequest to poor prisoners in Calcutta having failed by reason of the abolition of imprisonment for debt, the question arose whether the bequests to the prisoners should be dealt with *cy pres*, or should fall into the residue so as to increase the endowments of the establishments referred to. *Held*, that it should be applied *cy pres*.

74. Thus, where there is no general charitable intent, but subscriptions have been paid to a Committee for the purpose of fulfilling a specific and well-defined charitable object and that only, and that object becomes impracticable, the subscribers are entitled to return of their subscriptions, *pro rata*, subject only to the rights of the trustees to proper costs, charges and expenses, [*Commissioner, Lucknow* v. *Deputy Commissioner*, (1937) 41 C.W.N. 1072 P.C.].

75. *Halsbury*, Hailsham Ed., Vol. IV, p. 228.