TAGORE LAW LECTURES—1881.

Tagore Law Lectures—1881.

THE LAW OF TRUSTS

IN

BRITISH INDIA.

WITH AN

APPENDIX,

CONTAINING

THE REGISTRATION OF SOCIETIES ACT (XXI OF 1860), RELIGIOUS ENDOWMENTS ACT (XX OF 1863), OFFICIAL TRUSTEES ACT (XVII OF 1864), INDIAN TRUSTEE ACT (XXVII OF 1866), THE TRUSTEES' AND MORTGAGEES' POWERS ACT (XXVIII OF 1866), THE RELIGIOUS SOCIETIES ACT (I OF 1880), AND THE INDIAN TRUSTS ACT (II OF 1882).

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LECTURE I.

ORIGIN OF TRUSTS IN ENGLAND.

Origin of Trusts in England — Tenures — Feudal system — Sub-infeudation — Estates of freehold — Alienation of estates — Gifts to religious houses — Mortmain — Uses — Statute of Uses — Object of Statute — Legal and equitable estates — Trusts among Hindus — Krishnaramini Dasi's case — Tagore case — Trusts for creditors — Family religious trusts — Legislation in India — Arrangement of subject — Definition of trust — Must be confidence — Merger — Definition of terms — Kinds of trust — Simple trust — Special trust — Ministerial and discretionary trust — Mixture of trust and power — Lawful and unlawful trusts — Public and private trusts — Executed and executory trusts — Austen *v.* Taylor — Jervoise *v.* The Duke of Northumberland — Coape *v.* Arnold — Executory trusts in marriage articles and wills — Distinction between them — Marriage articles — Blackburn *v.* Stables — Jervoise *v.* Duke of Northumberland — Will — *Cy près* — Intention — General Rules — Subject-matter of trust — Trusts against policy of law — Title of honor — Trusts of immoveable property without the jurisdiction of a Court — Penn *v.* Lord Baltimore — Act X of 1877, ss. 16, 16 — High Courts' Charter — Letters Patent — Suits for land — Foundation of jurisdiction — Court of Equity acts *in personam* and not *in rem* — Land may be in a foreign country — Angus *v.* Angus — Lord Cranstown *v.* Johnston — Privity — Foundation of jurisdiction — Injunction restraining proceeding by other Courts — Trusts of moveable property abroad — Object must be lawful — General rule for ascertaining whether trust lawful — Indian Contract Act, s. 23 — Trusts contrary to policy of law or founded upon illegal contract void — Assignment of half pay — Trusts for future illegitimate children — Trust for illegitimate children in being, or *en ventre sa mère* — Trust forbidden by law — Trusts postponing enjoyment of property or restraining alienation — Accumulation — Perpetuities among Hindus — Restraint on alienation — Condition restraining alienation after absolute gift — Insolvency — Trust to cease on bankruptcy or insolvency — Trust to cease on happening of particular event — Clauses of forfeiture construed strictly — Trust for immoral purposes — Failure of trust — Illegal purpose failing — Must be a *cestui que trust* — Trust partly lawful and partly unlawful — Trust of immoveable property in foreign country.

Origin of Trusts in England.

THE Law of Trusts as administered in India closely resembles the English law in the general principles applied, although the system upon which it is administered is different; I propose, therefore, in the first place, to describe the origin and growth of trusts in England. In order to do this, it is necessary to go back to the time of the Norman conquest, and to consider shortly the tenures by

Tenures.

LECTURE I.

which lands in England are held. At the time of the conquest, the greater part of the land was confiscated, and was granted by the conqueror to his followers according to what is known as the feudal system. The lands were held by the grantees from the sovereign, upon condition that they should, when called upon, perform certain military duties. The sovereign was considered to be the owner of the granted lands, and was called the lord paramount, while the services to be rendered were regarded as incident, or annexed to the ownership of the land; in fact, the rent to be paid for it.[1] At first the interest of the grantee in the lands granted did not extend beyond his own life. In course of time it gradually improved in stability and acquired an hereditary character, so much so, that the grantee, considering himself as substantially the owner, began to imitate the example of his sovereign by carving out portions of his land, to be held of himself by some other person, on terms and conditions similar to those of the original grant. This method of creating estates in the granted land was termed sub-infeudation. A continued chain of successive dependencies was thus established, connecting each stipendiary or vassal with his immediate superior or lord.[2] The grant, as we have seen, did not originally extend beyond the life of the first vassal; but, in process of time, grants were made to a man and his sons, and then to a man and his heirs. This method of holding lands gave rise to the fundamental maxim, which still prevails as regards land in England, that all land belonging to any subject in the realm is holden of some superior, and either mediately or immediately of the sovereign. And as all lands were holden, they were called tenements; the possessors, tenants; and the manner of their possession, a tenure.[3] There is no such thing, according to the English law, as the absolute ownership of land. All that a subject can have, is an estate in the land.

Feudal system.

Sub-infeudation.

Estates of freehold.

The only estates with which we need concern ourselves, are those which are called freehold estates, because they were the only estates which a free man would hold,—namely, estates for life, in tail, and in fee-simple. If land was granted to a man simply without more, that gave him an estate for his life only, and on his death the land escheated to the grantor. If land was granted to a man

[1] Williams on Real Property, 2. [2] 1 Bl. Com., 175. [3] *Ibid*, 186.

and the heirs of his body, he was said to have an estate tail, which descended on his death to his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endured. If the first owner, or any descendant who had succeeded to the estate, died without children, the estate escheated to the grantor or his heir. If land was granted to a man and his heirs, he had an estate in fee-simple. This estate descended on his death to his heirs. If he died without children, the estate went to his collateral relations, and only escheated on the failure of all persons who could possibly claim through him.[1] All these estates were originally inalienable either during the lifetime of the holder, unless with the consent of the lord, or by will. It would be foreign to the purpose of these Lectures to trace the steps by which the right of alienation was acquired, but I will endeavour shortly to explain the means used for the transfer of an estate from one person to another.

Alienation of estates.

The most ancient form of conveyance, was a feoffment with livery of seisin. The feudal doctrine that all estates in land are holden of some lord, necessarily implies that all lands must always have some feudal holder or tenant. This feudal tenant is the freeholder, or holder of the freehold. He has the feudal possession, called the seisin; and so long as he is seised, nobody else can be. The freehold is said to be in him, and until it is taken out of him and given to some other, the land itself is regarded as in his custody or possession. A feoffment with livery of seisin, was the gift of an estate in the land, accompanied with livery,—that is, delivery of the seisin or feudal possession. At the time of the gift, the nature of the estate to be taken by the person to whom it was given, or feoffee, was marked out or limited.[2] Before the reign of Henry VIII, a simple gift of lands to a man and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee-simple in the lands. The Courts of Law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable, just as a gift of money or goods, made without any consideration, is, and has ever been, quite beyond the power of the giver to retract, if accompanied by delivery

[1] See Williams on Real Property, Chaps. I, II, III.
[2] *Ibid*, 136.