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of possession. In law, therefore, the person to whom a gift of lands was made and seisin delivered, was considered thenceforth to be the true owner of the lands,[1] and his estate was known as the legal estate. We have now to consider how another class of estates, known to English law as equitable estates, arose.

Gifts to religious houses.

After the power of alienation had been acquired, it became a common thing for the grantees of estates to convey them to religious houses. The members of these houses were unable, by reason of their profession, to perform the military services required by the feudal law; they obtained great quantities of land, and an undue proportion of wealth and power. As religious houses fell under the legal description of corporations, who possess the character of perpetuity, the lord was deprived of the benefits he derived from escheats. Lands belonging to such bodies were consequently said to be in *mortuâ manu*, or in mortmain, because they produced none of the advantages to the feudal lords, which lands held by individuals did. In order to check conveyances to religious houses and corporations, various Statutes, called the Statutes of Mortmain, were passed, prohibiting corporations from purchasing land, unless a license in mortmain was procured from the lord. In order to evade these Statutes, the following device was resorted to by the ecclesiastical bodies. The grant, instead of being made direct to the religious house, was made to some person to the use of the religious house. A gift of this kind conferred no estate or interest whatever in contemplation of law on those whose benefit was designed, for the principle of feudal tenure was, to look no further than to the actual and ostensible tenant, and to consider him alone as the proprietor.[2] The use, therefore, declared upon such a gift, being in the view of the ordinary Courts of Justice a nonentity, escaped the operation of the Statutes of Mortmain.[3] "The laity were not long behind in resorting to this contrivance as regards both land and chattels, to enable them to defeat creditors of their executions and for other fraudulent purposes, frequently, it seems, selecting some person as their feoffee, who from his station and power might aid them in setting the law at defiance. Subsequently, conveyances to uses were put in practice by the laity for less objectionable purposes. During the civil

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Uses.

[1] Williams on Real Property, 151. [2] 1 Cru. Dig., 402. [3] 1 Bl. Com., 357.

wars occasioned by the claims of the rival Houses of York and Lancaster, every person who could be accused of having sided with the defeated party, was liable to attainder, and by consequence, to the confiscation of his estates. To avoid this hazard, secret conveyances to uses, or upon special trusts, appear to have been resorted to by persons of every rank and condition. In the reign of Edward IV, at which time this mode of conveyance had become fully established, the Judges expressly held, that a use was not forfeitable by attainder; this would of course confirm the practice."[1] When a feoffment was made to uses in this way, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law writers the *cestui que use*, had the beneficial property in the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him and to defend it against strangers. This right at first depended upon the conscience of the feoffee; if he withheld the profits from the *cestui que use*, or refused to convey the estate as he directed, the *cestui qui use* was without remedy. To redress this grievance, the writ of subpœna was devised, or rather adopted from the Common Law Courts, by the clerical Chancellors, to oblige the feoffee to attend in Court and disclose his trust; and then the Court compelled him to execute it. This writ is said to have been first issued by John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second. "No sooner was this protection extended than half the lands in the kingdom became vested in feoffees to uses. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse."[2] "The power assumed by the clerical Chancellors in controlling the maxims and principles of the Common Law, cannot be considered as short of legislative; for not only, in virtue of a law created for private convenience and independent of the Common Law, was the person legally entitled deprived of all the beneficial incidents of property; but a distinct title to the enjoyment was introduced, not only unknown to, but at first repudiated by, the law: the legal title indeed was not directly affected, yet the legal owner was compelled to exercise his legal rights, so as only to be subservient to

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[1] 1 Spence's Eq. Jur., 440. [2] Lewin's Introduction, 2.

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the protection and enjoyment of this equitable interest: although by this means, as regarded the real owner of the estate, the legal rights of third persons, including the Crown, were defeated, which indeed was one of the palpable objects for which trusts were introduced."[1] Uses were not considered as issuing out of or annexed to the land, as a rent, a condition or a right of common, but as a trust reposed in the feoffee, that he should dispose of the lands at the discretion of the *cestui que use*, permit him to receive the rents, and in all other respects have the beneficial property of the lands. Thus, between the feoffee and *cestui qui use*, there was a confidence in the person and privity in estate.[2] But this was only as between the feoffee and the *cestui que use*. To all other persons the feoffee was as much the real owner of the fee as if he did not hold it to the use of another. He performed the feudal duties, his wife was entitled to dower, his infant heir was in wardship to the lord, and upon attainder the estate was forfeited.[3] The doctrine of uses, as regulated and settled by the Court of Chancery, was so applied that it became productive of serious grievances. Persons who had a claim to the lands could not find out the legal tenant against whom it was necessary to proceed. Husbands were deprived of their curtesy, and widows of their dower, creditors were defrauded, purchasers for valuable consideration were frequently defeated, and the king and other feudal lords were deprived of their tenures, and other inconveniences attended the secrecy observed in making conveyances to uses, by which the beneficial interest belonged to one person and the legal estate to another.[4]

Statute of Uses.

To remedy these inconveniences, the Statute of Uses[5] was passed by which the possession was divested out of the persons seised to the use, and transferred to the *cestui que use*. By this Statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that have any such use, confidence, or trust (by which was meant the persons beneficially entitled) shall be deemed in lawful seisin and posses-

[1] Spence's Eq. Jur., 436.
[2] Chudleigh's case, 1 Rep., 120; Burgess *v.* Wheate, 1 W. Bl., 123.
[3] Co. Lit., 271.
[4] See Watkins on Conveyancing, 287; Sandars on Uses, 1—62.
[5] 27 Hen. VIII, c. 10.

sion of the same lands and hereditaments for such estates as they have in the use, trust, or confidence. LECTURE I.

The modern doctrine of uses, as distinguished from trusts, was introduced by this Statute. Uses, therefore, in the modern acceptation of the word, are such limitations of lands and other hereditaments as are executed by the Statute and confer on the beneficial owner the legal estate; and trusts are similar to what uses were at Common Law before the passing of the Statute. Uses, under the Statute, were subject to the jurisdiction of the Courts of Common Law, and trusts to that of the Courts of Chancery or Equity.[1]

The object of this Statute was to abolish the jurisdiction of the Court of Chancery over landed estates by giving actual possession at law to every person beneficially entitled in equity. But the Court of Chancery recovered its power in the following manner. Soon after the passing of the Statute of Uses, a doctrine was laid down, that there could not be a use upon a use. For instance, suppose a feoffment had been made to *A* and his heirs, to the use of *B* and his heirs, to the use of *C* and his heirs, the doctrine was, that the use to *C* and his heirs was a use upon a use, and was, therefore, not affected by the Statute of Uses, which could only execute or operate on the use to *A* and his heirs. So that *B*, and not *C*, became entitled under such a feoffment to an estate in fee-simple in the lands comprised in the feoffment. This gave the Court of Chancery an opportunity for interfering. It was manifestly inequitable that *C*, the party to whom the use was last declared, should be deprived of the estate which was intended solely for his benefit; the Courts of Chancery, therefore, interposed on his behalf, and constrained the party to whom the law had given the estate, to hold in trust for him to whom the use was last declared. So that whenever it is wished to vest a freehold estate in one person as trustee for another, the conveyance is made unto the trustee or some other person and his heirs, to the use of the trustee and his heirs, in trust for the party intended to be benefited (called *cestui que trust*) and his heirs. An estate in fee-simple is thus vested in the trustee by force of the Statute of Uses, and the entire beneficial interest is given over to the *cestui que trust* by the Court of Chancery. The estate in fee-simple which is vested in the trustee is called the legal estate,

Object of Statute.

[1] Watkins on Conveyancing, 288.

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Legal and equitable estates.

being an estate to which the trustee is entitled only in the contemplation of a Court of Law, as distinguished from equity. The interest of the *cestui que trust* is called an equitable estate, being an estate to which he is entitled only in the contemplation of the Court of Chancery which administers equity.[1] The *cestui que trust* is the beneficial owner of the property. The trustee, by virtue of his legal estate, has the right and power to receive the rents and profits; but the *cestui que trust* is able, by virtue of his estate, in equity, at any time, to oblige his trustee to come to an account and hand over the whole of the proceeds.[1] The general idea of a use or trust answered more to the *fidei commissum* than the *usus fructus* of the civil law, which latter was the temporary right of using a thing without having the ultimate property or full dominion of the substance; but the *fidei commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence, that he should convey it, or dispose of the profits, at the will of another. The right of the latter was originally considered in the Roman law as *jus precarium*, —that is, one for which the remedy was only by entreaty or request; but by subsequent institution, it acquired a different character,—it became *jus fiduciarium*, and entitled to a remedy from a Court of Justice, and it was the business of a particular magistrate, the *praetor fidei commissarius*, to enforce the observance of these confidences.

We see, therefore, that, according to the English law, there may be two persons holding different estates in the same property. Both are entitled to convey their estates, both are entitled to the rents and profits: one, the legal owner, to receive them; the other, the equitable owner, to enjoy them. This concurrent existence of two systems of jurisprudence is known, I believe, only to the English law, and led to doubts as to whether trusts could be created by Hindus. "The Hindu law," said Peacock, C. J.,[2] "so far as I am acquainted with it, makes no provision for trusts. There is nothing in the Hindu law at all analogous either to trusts of the English law or to the *fidei commissa* of the Roman law, which were probably the origin of trusts in the English law." In *S. M. Krishnaramini Dasi* v. *Ananda Krishna*

Trusts among Hindus.

Krishnaramini Dasi's case.

[1] Williams on Real Property, 157.

[2] Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 36.

Bose,[1] Markby, J., quoting the above case, decided, that trusts could not be created by Hindus. His Lordship said, that there was not the least ground for supposing that anything like the English law of trusts existed in Hindu law,—that is to say, a system according to which property subject to a trust has to be viewed under a double aspect,—that of the trustee on the one hand, who is declared by law to be the absolute and uncontrolled owner; and the *cestui que trust* on the other, who has a right in equity to interfere in the ownership and compel the trustee to abandon all or nearly all his rights in his (the *cestui que trust's*) favour. "There is not," continued his Lordship, "a trace of it in any passage of any work on Hindu law that I have seen. There is not an indication of it in the habits of the people, and so far from the English system of trusts resting on principles of jurisprudence, which, though dormant, may be considered as universally present, it is undoubtedly one of the most anomalous institutions in the whole history of law—one that could never have possibly been conceived *à priori*, or worked out from any general principle, and is distinctly the product of our own time." On appeal, however,[2] Peacock, C. J., explained the passage from his judgment cited above, saying, "I did not say, nor did I intend to say, that a devise upon trust for a purpose which might be legally carried into effect without the intervention of trustees would necessarily be void. There are many cases in which trusts have been enforced against Hindus both by the Courts in this country and by Her Majesty in Council upon appeal." Macpherson, J., said in p. 284:—"I think that, for various reasons,—because there is nothing in Hindu law which is repugnant to, or inconsistent with, the idea of trusts,—because trusts are not unknown to the Hindu law,—and because trusts, as among Hindus, have been recognized and administered for the last century almost, by this Court and the late Supreme Court,—we are bound so to recognize trusts and to give effect to them. I think that, both by Hindu law, and the practice which has always prevailed in our Courts, a Hindu may legally deal with his property so as to create a trust—a relation in many respects similar to, although not necessarily identical with, that known in English law as the relation of trustee and *cestui que trust*. I concede that

[1] 4 B. L. R., O. C., 231. [2] *Ibid*, 278.

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trusts, in the strict sense in which an English lawyer uses the term,—that is to say, trusts, to the existence of which a 'legal' estate and an 'equitable' estate, wholly separate from and independent of each other, are necessary, were unknown to the old Hindu law. There being no distinction in Hindu law between legal and equitable estates, it was, of course, impossible that there should be anything corresponding to the two estates which are so well known to the English law; nevertheless, trusts, in the wider sense of the term, were by no means unknown in the tenets of Hindu law. I do not speak of the various personal ordinary trusts, such as deposits and bailments, which are expressly recognized and dealt with by all the writers on Hindu law. The existence of such trusts does not affect the present question, which relates solely to special trusts, where the person to whom property is given is bound to use it for the benefit of another, or to apply it in a particular manner indicated, and not necessarily for his own advantage. But in the case of endowments for religious and charitable purposes, and gifts to idols, there is no doubt that trusts have always been known. It is said, that in a gift to an idol there is no trust, and that there is an actual gift to the idol. It may be so in words; but, by whatever name it is called, it is a mere setting apart of property which is to be held and used by the manager for the time being, whether he be a priest or whoever he may be, for the purpose, in the first instance, of providing for the worship of the idol, or of carrying out the religious or charitable objects of the original donor. Practically, if a trust were not recognized in such cases by Hindu law, no endowment or gift to an idol, or for religious or charitable purposes, could have any permanent effect; while, as a matter of fact, we see such endowments are very carefully preserved and are continued from generation to generation. But granting, for the sake of argument, that trusts are not expressly recognized by the old Hindu law, that is not, in my opinion, any reason why we should now conclude that they are invalid. There is nothing in Hindu law which forbids trusts, or is in any way repugnant to them or inconsistent with their existence. The Hindu law system is not, and does not profess to be, exhaustive; on the contrary, it is a system in which new customs and new propositions, not repugnant to the old law, may be engrafted upon it from time to time,

according to circumstances and the progress of society. Fiduciary relations extend as the transactions and intercourse between men extend. In all probability, trusts had, by degrees, sprung into existence before we find any record of them in our reports, just as I believe the custom of making wills, although it may be of no very ancient origin, prevailed among Hindus quite independently of any decisions in the Courts, or any intervention of English lawyers. The Supreme Court was called on to grant, and did grant, probate of the will of a Hindu within a few months after the Court was instituted; and we find the earliest legislation recognizing the wills of Hindus. There is not necessarily anything anomalous or unnatural in the constitution of trusts. The general position of trusts in English law with these two absolutely separate estates, the legal and the equitable, may be somewhat anomalous. But this is the result of the peculiar procedure in England, where the Court of Chancery has always been distinct from the Courts of Common Law, and equitable rights are kept wholly apart from legal. The peculiarity of the English law of trusts arises out of specialities of procedure. But questions of procedure cannot affect the question, whether trusts are to exist, or whether Courts are to give effect to them. I cannot see that the fact that this Court is a Court of Equity as well as of law, and that our procedure differs from that of the old Supreme Court, creates any difficulty in giving effect to, or administering, trusts, or in any way affects the question of substantive law as to whether trusts can or cannot be created." In *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore*,[1] Phear, J., said:—"I confess, the broad assertion that trusts are unknown to Hindu law took me somewhat by surprise. There is, probably, no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and possession of dominion over property, coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor is, I imagine, familiar to every Hindu. I need only point to the cases of the mother acting as guardian of her infant child, the *karta* of a joint family managing on behalf of minor or absent members, and the gomasta buying, selling, and trading in his own name for the bene-

Tagore case.

[1] 4 B. L. R., O. C., 134.

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fit of an unseen principal. If it be said that in these instances and others which might be mentioned, the guardian, manager or gomasta is only an agent, and differs from a trustee, in the strictest sense of the word, in this, namely, that his powers are referable to the authority of the person for whose benefit he acts, and not to any sort of ownership in himself, I would add that, in my opinion, this circumstance does not materially affect the essence of the trust. No doubt, in this country, where Courts of Justice are not distinguished by their functions into Courts of Law and Courts of Equity, and where law and equity are administered by the same tribunal, there is no occasion for the creation and maintenance of an equitable estate in property as separate from the legal estate. There is, consequently, no such thing here as a bare legal estate in one man descendible to heirs, side by side, with a beneficial estate of inheritance, or a succession of beneficial estates in the same property passing down another series of persons. And this, I understand, is all that the Chief Justice and Mr. Justice Markby intended to lay down in the two judgments to which I have been referred.[1] But I think, that whether a man accepts property on the terms of giving another person a specified benefit out of it, or whether he undertakes to manage property on behalf of another, our Courts will, in both cases alike, know how to make him discharge the obligation under which he comes; and I do not hesitate to believe that it is in entire accordance with the genius of the Hindu law that they should do so.

"Although our Courts know nothing of a legal title as distinguished from an equitable title, they can, I apprehend, easily understand the predicament of property placed under the dominion and control of one person, in order that he may deal with and manage it for special purposes involving the benefit of others. In few words, the non-existence of the English equitable estate does not necessitate the non-recognition of a trust. Except, perhaps, in the very rudest state of civilization, trust-ownerships will, most certainly, spring into being, and the interests of society require that, within certain limits at least, effect should be given to those by Courts of Justice." On appeal,

[1] Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 11; and Srimati Krishnaramini Dasi *v.* Ananda Krishna Bose, 4 B. L. R., O. C., 231.

Peacock, C. J., referring to his judgment in *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*,[1] said:—"Although the Hindu law contains no express provision upon the subject of uses or trusts, I see nothing contrary to the spirit and principles of the Hindu law in a devise to trustees, giving a beneficial interest to a person to whom it might have been given by a simple devise without the intervention of trustees . . . It is too late to contend that all gifts or alienations upon trust are void, because the ancient Hindu law makes no express mention of them. All that I laid down in the case of *Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*[2] was, that a devise for a purpose which would be void as a condition, would be void in the shape of a trust." Finally, on appeal to the Privy Council, it was argued that an estate to be held in trust can have no existence by the Hindu law. Their Lordships, however, said:—"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 moveable or immoveable, 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. Implied trusts were recognized and established here in the case of a *benami* purchase in *Gopee Krist Gosain* v. *Gunga Persaud Gosain*;[3] and in the cases of a provision for charity or other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary. If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that, under the guise of an unnecessary trust of inheritance, the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt the argument upon the ground that a man cannot be allowed to do by

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[1] 2 B. L. R., O. C., 36. [2] 2 B. L. R., O. C., 11. [3] 6 Moo. I. A., 53.

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indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, after the determination of those interests, the beneficial interest in the residue of the property remains in the person who, but for the will, would be lawfully entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails."

Trusts for creditors.

Trusts for the benefits of creditors are recognized here as divesting the owner of the property conveyed of any interest therein which can be the subject of execution until the trusts have been carried out,[1] and there are many instances of family religious trusts[2] such as trusts for the support of a family idol and for the erection of temples and bathing ghats.[3] And a trustee who misappropriates trust funds may be compelled to compensate the *cestui que trust*.[4]

Family religious trusts.

These cases show clearly that there is such a law as the law of trusts existing in this country, and it is difficult to imagine a state of civilization in which some system of trusts should not exist. Without such a system it would be impossible to provide for persons under disability, such as infants and lunatics. It would be impossible to provide for religious or charitable purposes, and for the many instances in which one person obtains control over the property of another, without, perhaps, actual force or fraud, but under circumstances which make it inequitable that he should retain such control. In this course of lectures, I shall confine myself to those principles of the law of trusts which must be applied equally to all cases in which a person, whether governed by English, Hindu, or Muhammadan law, is bound to apply property over which he has control for the benefit of some other. With those portions of the law of trusts which are founded upon the distinction between legal and equitable estates, or upon English Statutes, I shall not attempt to deal, such, for

[1] Bamanji Manikji *v.* Naoroji Palanji, 1 Bom. H. C., 233; Bapaji Auditram *v.* Umedbhai Hathesing, 8 Bom. H. C., A. C., 245; and *In re* Dhanjibhai *v.* Kharsetji Ratnagar, 10 Bom. H. C., 327.

[2] Juggutmoheenee Dosee *v.* Sokheemonee Dosee, 10 B. L. R., 19.

[3] Norton, Part II, p. 456; Purappa Vanalingam Chetti *v.* Nullasivan Chetti, 1 Mad., 415; and Venkatesa Nayudu *v.* Shrivan Shatgagopa Swami, 7 Mad., 77.

[4] Moonshee Buzzul Ruhim *v.* Shumsheroonnissa Begum, Suth., F. B., 60.

instance, as questions relating to the legal estate taken by the trustee, the devise of trust estates, and escheat. Nor shall I attempt to deal with the class of cases relating to powers under settlements, the duties of trustees for renewal of leases, and other similar branches of the law which are seldom applied in this country.

Legislation in India.

Although trusts are fully recognized in this country, there has been very little legislation with regard to them. The Penal Code[1] contains[2] provisions for the punishment of criminal breach of trust; the Specific Relief Act[3] defines[4] 'trust' and 'trustee,' and provides[5] that a trustee may sue for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled; the Civil Procedure Code[6] contains provisions[7] for the conduct of suits by and against trustees, executors, and administrators, and provisions[8] as to suits relating to public charities; the Limitation Act[9] provides[10] that no suit against an express trustee or his legal representatives or assigns shall be barred by any length of time, and contains provisions[11] for the limitation of suits to make good loss caused by the breach of trust of a person deceased, for contribution against the estate of a person deceased, against the purchaser of moveable property from a trustee, and against the purchaser of land from a trustee. With these exceptions the Indian Statute-Book is silent on the subject so far as regards the bulk of the population; for the Statute of Frauds, ss. 7 to 11, relating to declarations of trust, resulting trusts, transfer of trusts, and to judgments of *cestui que trust*, is in force only in the Presidency-Towns. The provisions of Acts XXVII and XXVIII of 1866, the Trustee Relief Acts, have always, up to a very recent date, been applied only in cases where the parties are European British subjects, as the Acts themselves state that they shall only be extended to cases to which English law is applicable. But it has been recently decided in Bombay, by West, J., in the case of *In re Kahandas Narrandas*,[12] that these provisions are applicable between Hindus. The object of the proceedings was to obtain the

[1] Act XLV of 1860.
[2] Ss. 405—49.
[3] I of 1877.
[4] S. 3.
[5] S. 10, Expl. 1.
[6] Act X of 1877.
[7] Ss. 437, 439.
[8] S. 539.
[9] XV of 1877.
[10] S. 10.
[11] Sched. ii, arts. 98, 100, 133, 134.
[12] I. L. R., 5 Bomb., 154.

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appointment of a new trustee to a charity under s. 35 of Act XXVII of 1866. It was admitted that this could be done by the more expensive process of a regular suit, and it was contended that the expression "cases to which English law is applicable" applies to all cases in which the principles of English law have to be referred to, and that as the administration of trusts in this country is governed by the rules of the English Courts of Chancery, the Act applied to the law to be followed, not merely to cases where the parties are English. West, J., granted the application, considering that English law was applicable if the principles recognized by the English Equity Courts were applicable.

Arrangement of subject.

You are aware, no doubt, that, in the year 1879, a bill codifying the law of Private Trusts was laid before the Indian Law Commission. The object of that bill was to codify the law relating to trusts in the wider sense which I have described. It saved the rules of Mahomedan law as to *wuqf*, and it left untouched religious and charitable endowments established by Hindus and Buddhists as being matters in which the Legislature could not usefully interfere further or otherwise than has been done by Act XX of 1863. This bill has not yet become law. I think, however, that my best course in arranging the subject of these Lectures is to follow the plan upon which the bill is framed. I shall, therefore, commence by defining a trust. I shall then consider the different kinds of trusts; the creation of trusts; the duties and liabilities of trustees; their rights and powers; their disabilities; the rights and liabilities of the *cestui que trust*; vacating the office of trustee; and the extinction of trusts. I shall also consider the subject of religious and charitable trusts among European British subjects, which is not dealt with by the Act. And I shall also consider the law of trusts as applicable to religious and charitable endowments established by Hindus and Buddhists, and the rules of Muhammadan law as to *wuqf*.

Definition of trust.

A trust may be defined as an obligation imposed upon some person or persons having the ownership of property, whether moveable or immoveable, to deal with such property for the benefit of some other person or persons, or for charitable purposes. Mr. Lewin adopts Lord Coke's definition of a *use*, the term by which, before the Statute of Uses, a trust of lands was designated, and defines a trust to be

"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 *cestui que trust* has no remedy but by *subpœna* in Chancery." But this definition is limited to trusts of lands only, whereas trusts may be declared of almost every kind of property. In the Specific Relief Act, I of 1877, the word 'trust' is defined "to include every species of express, implied, or constructive ownership." LECTURE I.

There must be a confidence reposed in the trustee. It is not necessary that the confidence should be expressly reposed by the author of the trust in the trustee, for it may be raised by implication of law, as in the case of a constructive trust which is raised by a Court of Equity "whenever a person clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee; for, as it is impossible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his *cestui que trust*:"[1] as for example, when a trustee or executor renews a lease in his own name,—or where a factor, agent, partner or other person in whom confidence is reposed, takes advantage of such confidence to acquire a pecuniary benefit for himself, —in such cases he will be made to account to the person in whose interest he was bound to act, and will have to refund any profits he may have made, or make good any loss caused by his acts. These cases I shall deal with at greater length hereafter. Must be confidence.

"Further, the trustee of the estate need not be actually capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a legal property nor a legal right to property.

"A trust is a confidence reposed in some other; not in some other than the author of the trust, for a man may convert himself into a trustee, but in some other than the *cestui que trust*; for, as a man cannot sue a *subpœna*

[1] Lewin, 7th Ed., 160.

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against himself, he cannot be said to hold upon trust for himself; and if the trustee acquires the beneficial interest in the trust property, the trust is extinguished;"[1] or, in other words, where the legal and equitable interests are co-extensive and vested in the same person, the equitable merges in the legal interest.[2]

Merger.

Definition of terms.

The person who reposes 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 reposed and accepted is called the *cestui que trust*, or beneficiary; the subject-matter of the trust is called trust-property or trust-money; and the instrument, if any, by which the trust is declared, is called the instrument of trust. These definitions I have taken from the draft code.

Kinds of trust.

Having ascertained what is meant by a trust generally, I now propose to consider the different kinds of trusts. The most important division of trusts is into 'simple' and 'special' trusts.

Simple trust.

"The simple trust," says Mr. Lewin,[3] "is where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs."

Special trust.

"The special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention; as where a conveyance is to trustees upon trust to sell for payment of debts."

Ministerial and discretionary trust.

"Special trusts have again been subdivided into ministerial (or instrumental) and discretionary. The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment."

[1] Lewin, 14.
[2] Wade *v.* Paget, 1 Bro. C. C., 363; Phillips *v.* Brydges, 3 Ves., 126.
[3] 7th Ed., p. 18.

"A trust to convey an estate must be regarded as ministerial; for, provided the estate be vested in the *cestui que trust*, it is perfectly immaterial to him by whom the conveyance is executed."

"A fund vested in trustees upon trust to distribute among such charitable objects as the trustees shall think fit,[1] is clearly a discretionary trust, for the selection of the most deserving objects is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the candidates, and all the particular circumstances of the case."

Mixture of trust and power.

"There is frequent mention in the books of a mixture of trust and power,[2] by which is meant, a trust of which the outline only is sketched by the settlor, while the details are to be filled up by the good sense of the trustees. The exercise of such a power is imperative, while the mode and its execution is matter of judgment and discretion."

Lawful and unlawful trusts.

Trusts may also be divided into lawful and unlawful. What trusts are unlawful I shall consider more fully when dealing with the creation of trusts. It is sufficient to state now that all lawful trusts may be enforced by a Court of Equity; and, as a rule, it may be laid down that a trust is lawful until the contrary is shown. Where a trust is unlawful and fraudulent, a Court of Equity will remain neutral, and will neither enforce the trust, nor relieve the person creating it,[3] unless the illegal purpose fails to take effect.[4]

Public and private trusts.

Again, trusts may be divided into public and private. Trusts for public purposes are such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. All charitable trusts come under the description of public trusts. "Public purposes," said Lord Romilly, M. R.,[5] "are such as mending or repairing the roads of a parish, supplying water for the inhabitants of a parish, making or repairing bridges over any stream or culvert that may be

[1] Attorney-General *v.* Gleg, 1 Atk., 356; Hibbard *v.* Lamb, Amb., 309; Cole *v.* Wade, 16 Ves., 27; and Gower *v.* Mainwaring, 2 Ves., s. 87.
[2] Cole *v.* Wade, 16 Ves., 27; Gower *v.* Mainwaring, 2 Ves., 89.
[3] Brackenbury *v.* Brackenbury, 2 J. and W., 391; Childers *v.* Childers, 1 DeG. and J., 482.
[4] Symes *v.* Hughes, L. R., 9 Eq., 475.
[5] Dolan *v.* Macdermot, L. R., 5 Eq., 62; affirmed on appeal, L. R., 3 Ch., 676.

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required in a parish: all these are 'public purposes' in the ordinary sense of the term, and are distinguished from 'charities' in the shape of alms-giving, building alms-houses, founding hospitals, and the like, and which are more properly termed 'charities.' It is true that, in a legal sense, they are all charities." A private trust, on the other hand, is a trust created only for the benefit of certain individuals who must be ascertained within a limited time.

Executed and executory trusts.

Finally, trusts may be divided into executed and executory. Where the trust is complete in itself,—that is to say, when the author of the trust has formally and finally declared what interest in the trust-property is to be taken by the *cestui que trust*, leaving nothing to the discretion of the trustee, the trust is said to be an executed trust. But where directions are given for the execution of some future conveyance or settlement of trust-property, and the particular limitations are not fully or accurately specified, and the trust is, therefore, not complete in itself, but merely contains heads or minutes for the disposition of property which are to be carried into effect in a more formal manner according to the intention to be collected from the instrument, the trust is said to be executory.[1] The distinction between trusts executed and executory was questioned by Lord Hardwicke in *Bagshaw* v. *Spencer*;[2] but it has long been firmly established as one of the settled rules of the Court of Chancery. It was thus stated in *Austen* v. *Taylor*[3] by Lord Northington: "The words 'executory trust' seem to me to have no fixed signification. Lord King, in the case of *Papillon* v. *Voice*,[4] describes an executory trust to be, where the party must come to the Court (the Court of Chancery) to have the benefit of the will. But that is the case of every trust, and I am very clear that this Court cannot make a different construction on the limitation of trust than Courts of Law could make on a limitation in a will, for in both cases the intention shall take place. . . . The true criterion is this; whenever the assistance of the trustees, which is ultimately the assistance of this Court, is necessary to complete a limitation, in that case, the limit-

Austen v. Taylor.

[1] Egerton *v.* Earl Brownlow, 4 H. L. C., 210; Tatham *v.* Vernon, 29 Beav., 604.

[2] 2 Atk., 577; S. C., 1 Ves., 142, 152.

[3] 1 Eden, 366, 368.

[4] 2 P. Wms., 471.

ation in the will not being complete, that is sufficient evidence of the testator's intention, that the Court should model the limitation. But where the trusts and limitations are already expressly declared, the Court has no authority to interfere and make them different from what they would be at law." And in *Jervoise* v. *The Duke of Northumberland*,[1] Lord Eldon said: "Where there is an executory trust,—that is to say, where the testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, completed the devise in question, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection, the Court inquires what it is itself to do, and it will mould what remains to be done so as to carry that intention into execution."[2] In *Coape* v. *Arnold*,[3] Lord Cranworth, L. C., said: "In a certain sense, and to some extent, all trusts are executory, *i.e.*, in all trusts the legal interest is in some person who is bound in conscience, and so is compellable by this Court, to employ that legal interest for the benefit of others. To this extent his duties are executory. Where the subject-matter of the trust is a real estate held by a trustee for the benefit of others, and the trustee has no active duties to perform, such as paying debts, raising portions, or the like, the same rules which would have decided the rights of parties, if the beneficial interest had been legal, will, in general, prevail in deciding for whose benefit the trustee is to hold the estate. The rule is, equity follows the law—a rule essential to the convenient enjoyment of property in this country, where the artificial distinction of legal and equitable estates so extensively prevails."

Jervoise v. The Duke of Northumberland.

Coape v. Arnold.

The cases in which executory trusts usually arise are where articles are entered into previous to a marriage, the parties intending that a more formal document shall be drawn up afterwards to carry out the provisions which are indicated in the articles; or where a testator intends that his property shall be settled in a particular way upon certain persons, but does not in his will state precisely the nature of the estate which he wishes to devise. In these cases the Court is obliged to construe the instrument and to declare

Executory trusts in marriage articles and wills.

[1] 1 J. and W., 570.
[2] See also Stanley v. Lennard, 1 Eden, 95; Wright v. Pearson, *ib.*, 125.
[3] 4 DeG. M. and G., 585.

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such trusts as seem most accurately to carry out the intention of the author.

Distinction between them. Marriage articles.

A material distinction has been recognized in equity between an executory trust founded on marriage articles, and one voluntarily created, as by will. In the former case, the object of the settlement is usually to provide for the issue of the marriage. Therefore, unless the contrary clearly appear, equity presumes that it could not have been the intention of the parties to put it in the power of the parent to defeat the object of the settlement by appropriating the whole estate; and on this presumption the articles will usually be decreed to be executed by limitations in strict settlement. In *Blackburn* v. *Stables*,[1] Sir W. Grant, M. R., said:—"I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest rather than another; an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is to be clearly ascertained from anything in the will, that the testator did not mean to use the expressions which he has employed in their strict, proper, technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense; and have never said that merely because the direction was for an entail, they would execute that by decreeing a strict settle-

Blackburn v. Stables.

[1] 2 V. & B., 369.

ment." And in *Jervoise* v. *The Duke of Northumberland*,[1] Lord Eldon said:—"In marriage articles, the object of such settlement, the issue to be provided for, the intention to provide for such issue, and in short, all the considerations that belong peculiarly to them, afford *primâ facie* evidence of intent, which does not belong to executory trusts under wills. But I take it according to all the decisions, allowing for that an executory trust in a will is to be executed in the same way."[2] In the case of a will, the Court endeavours to carry out the intentions of the testator as apparent on the will, and is not necessarily bound to give technical words their strict signification; and if, therefore, the directions of the testator as to the disposition of the trust-estate show that he could not have intended the expressions to have their strict technical operation, the Court, in decreeing a settlement, will depart from the words in order to execute the intent.[3] Where a testator directs his trustees to settle or convey an estate without more, the Court is obliged to interfere and to point out the estate to be taken by the *cestui que trust*. But if a testator merely directs the purchase of an estate by his trustees, and himself declares the uses of the estate when purchased, the Court has no power to alter or modify his words;[4] it is only when something is left incomplete and executory by the author of the trust, that a Court of Equity will mould or modify the words in order to give effect to the intentions of the party. For, if the limitations of the trust-estate are definitely and finally declared by the instrument itself, that will be an executed trust, and it must be carried into execution as strictly and literally as if it were a limitation of the legal interest.[5]

Jervoise v. The Duke of Northumberland.

Will.

If the executory trust, which the testator has attempted to create, is one which is void for illegality, as where it violates the rule against perpetuities, the Court will carry out the testator's intention *cy prés*, that is, as nearly as possible, and will direct the property to be strictly settled.[6]

Cy prés.

[1] 1 Jac. & W., 574.
[2] See Sackville West *v.* Viscount Holmesdale, L. R., 4 E. & I., App., 543.
[3] 2 Jarm. Pow. Dev., 442; see Sackville West *v.* Viscount Holmesdale, L. R., 4 E. & I., App., 543.
[4] Austen *v.* Taylor, 1 Eden, 361; S. C., Amb., 376.
[5] Jervoise *v.* The Duke of Northumberland, 1 Jac. and W., 570; Bale *v.* Coleman, 1 P. Wms., 142; S. C., 2 Vern., 670; Papillon *v.* Voice, 2 P. Wms., 477; Douglas *v.* Congreve, 1 Beav., 59.
[6] Humberston *v.* Humberston, 2 Veru., 737; S. C, 1 P. Wms., 332.

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Intention.

We have seen that the Court will endeavour to carry out the intentions of the author of the trust, and in so doing is not bound to give their strict meaning to technical expressions which may be used in the instrument creating the trust. Upon this principle of carrying the intentions of the testator into effect, the Court will endeavour to construe expressions which have no strict technical operation, and this whether the instrument of trust be a deed or will.[1]

But the expressions used must be directory and certain; mere precatory expressions, or words of recommendation, will not be enforced.[2]

General rules.

In conclusion of this subject, it may be stated generally for the guidance of trustees, that where an executory trust arises on marriage articles, whose object is to provide for the husband and wife, and their issue, the trustees will be justified in executing the trust by limiting the estate in strict settlement, although it would certainly be the more prudent course for them to obtain a declaration of the Court for their guidance even in these cases.

But where the trust is created by will, and the testator has not himself distinctly and accurately specified the limitations which are to be inserted, trustees could seldom or ever be advised to take upon themselves the responsibility of putting a construction on the direction of the testator by the execution of any particular settlement; this can be done with safety only under the sanction of the Court. And the same remark applies to executory trusts created by any voluntary deed or instrument operating *inter vivos*.

If a husband have entered into articles on his marriage, binding himself to make a particular provision for his wife and children, it will not be competent for the trustees of their own authority to accept any other provision in lieu of that contemplated by the articles; although they will be justified in instituting a suit for the purpose of bringing the propriety of such a substitution before the Court.[3]

[1] Woolmore *v.* Burrows, 1 Sim., 512; Lord Dorchester *v.* The Earl of Effingham, 3 Beav., 180; Bankes *v.* Le Despencer, 10 Sim., 576; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves., 218; Lord Deerhurst *v.* Duke of St. Albans, 5 Mad., 232; Jervoise *v.* The Duke of Northumberland, 1 J. and W., 559; Blackburn *v.* Stables, 2 V. and B., 367.

[2] As to the limitations which will be directed, see Lewin on Trusts, 7th edn., pp. 102—118; Knight *v.* Knight, 3 Beav., 148, 177.

[3] *See* Hill on Trustees, 329, citing Cooke *v.* Fryer, V. C. Wigram, 19th Nov., 1844.

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Subject-matter of trust.

The next point to consider after defining the different kinds of trusts, is, the property which may be made the subject of a trust. As a general rule it may be laid down, that every kind of property, whether moveable or immoveable, which may be legally transferred or disposed of, may be the subject of a trust. It is not necessary that the person creating the trust should have the legal estate,—that is to say, should be the absolute owner, for the equitable owner of property, or the person having the beneficial interest, may create a trust of such beneficial interest:[1] and a trust may be created of property which is not in the actual possession of the author of the trust, such as property to which he will become entitled on the death of a third person.[2]

In *Green* v. *Folgham*,[3] the sole possessor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees, upon trust for her and her husband for their lives; and directed that, after their decease, it should be sold for the benefit of their children. The mother destroyed the recipe, and verbally communicated the contents to her eldest son for the benefit of his brothers and sisters. In a suit brought against him by some of the younger children, he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits made by him by the sale of the medicine after his mother's death: and as a sale was impracticable, an issue was directed to ascertain the value of the secret. In *Jenks* v. *Holford*,[4] Lord Northington, on an attempt being made to make a child bring some chemical recipes given to her by her father into hotchpot, said, he would not countenance these sorts of recipes, which he thought in most cases savoured of quackery, so as to put a value on them in Chancery; as for aught he knew a recipe to make mince pies or catch rats might be as valuable. If, however, the recipe is valuable, even though it is for a trivial matter, there does not seem to be any good reason why it should not be made the subject of a trust.

Trusts against policy of law.

If the policy of the law, as in the case of trusts for immoral purposes, or any Statutory enactment such as the provisions of the Indian Succession Act, X of 1865,

[1] Knight *v.* Bowyer, 23 Beav., 635; affirmed on appeal, 2 DeG. and J., 421.
[2] Hobson *v.* Trevor, 2 P. Wms., 191; Wright *v.* Wright, 1 Ves., 411.
[3] 1 S. & S., 398. [4] 1 Vern., 62.

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s. 101, against perpetuities prevent the author of the trust from parting with the beneficial interest in favor of the intended *cestui que trust*, no valid trust can be created. I shall deal with the subject of trusts against the policy of the law more fully hereafter.

Title of honor.

No trust can be declared of a title of honor or of a peerage. These are from their very nature personal possessions, and belong only to the person to whom they are granted or on whom they descend, and cannot be held by one person upon trust for another.[1]

Trusts of immoveable property without the jurisdiction of a Court.

As a general rule, a Court of Justice has no control over immoveable property situate without the local limits of its jurisdiction. But a Court administering equity, as the Courts in this country are bound to do, may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or any equity subsisting between the parties respecting property situated out of the jurisdiction. The leading case on this point is that of *Penn* v. *Lord Baltimore*,[2] where specific performance was decreed of an agreement respecting lands in America.

Penn v. Lord Baltimore.

Act X of 1877, ss. 15, 16.

The Code of Civil Procedure, Act X of 1877, ss. 15, 16, provides, that—

"Every suit shall be instituted in the Court of the lowest grade competent to try it.

Subject to the pecuniary or other limitations provided by any law, suits

(*a*) for the recovery of immoveable property,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure or redemption of a mortgage of immoveable property,

(*d*) for the determination of any other right to, or interest in, immoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of immoveable property under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought *can be entirely obtained through his personal obedience*, be instituted either in the Court

[1] The Buckhurst Peerage, L. R., 2 App. Ca., 1. [2] 1 Ves., 444.

within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides or carries on business, or personally works for gain.

Explanation.—In this section 'property' means property situate in British India.

This section does not apply to the High Courts in the exercise of their ordinary or extraordinary civil jurisdiction.[1] The jurisdiction of the High Courts of Calcutta, Bombay, and Madras, with regard to land without the limits of their ordinary original civil jurisdiction, is provided for by the Charter Act[2] and the Letters Patent granted under it. Section 9 of the Charter Act provides, that each of the High Courts to be established under the Act shall have such jurisdiction as Her Majesty may, by Letters Patent, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency-Towns as may be prescribed thereby. Section 12 of the Letters Patent provides that the High Court, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the High Court, or if the defendant, at the time of the commencement of the suit, shall dwell or carry on business, or personally work for gain within such limits. The High Courts have jurisdiction, under this clause, to entertain suits for land, whether the land is situated wholly, or in part only, within the local limits of their ordinary original jurisdiction, leave of the Court having been first obtained in the latter case.[3] But if leave has not been obtained they have no jurisdiction, even though the parties are personally subject to the jurisdiction.[4] Thus the Courts

High Courts' Charter.

Letters Patent.

Suits for land.

[1] See Act X of 1877, s. 638. [2] 24 and 25 Vict., c. 104.

[3] Prasannamayi Dasi *v.* Kadambini Dasi, 3 B. L. R., O. C., 85; S. M. Jagadamba Dasi *v.* S. M. Padamani Dasi, 6 B. L. R., 686; Sreenath Roy *v.* Cally Doss Ghose, I. L. R., 5 Calc., 82.

[4] The East Indian Railway Co. *v.* The Bengal Coal Co., I. L. R., 1 Calc., 95; The Delhi and London Bank *v.* Wordie, *ib.*, 249.

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have jurisdiction to decree foreclosure of lands partly within and partly without the limits of their Original Civil Jurisdiction, where leave has been obtained;[1] but not if no leave has been granted,[2] suits for foreclosure being suits 'for land.'[3] So also suits for redemption of mortgages,[4] and for sale of mortgaged property in satisfaction of the mortgage debt,[5] are suits for land.[6]

But every suit having reference to land is not necessarily a suit 'for land,' and the Courts have jurisdiction if the object of the suit is not to recover possession of the land or to deal with the land itself;[7] and it has been held, that a suit to declare that a person resident in Calcutta holds lands in the mofussil subject to certain trusts, is not 'a suit for land.'[8] A suit *in personam* can be entertained if the defendant resides within the jurisdiction, as for example, a suit to restrain a nuisance.[9]

Foundation of jurisdiction.

In order to found the jurisdiction of the Court some one of three circumstances must exist; either the defendant must be within the jurisdiction of the Court, or the subject-matter in dispute must be situated within the jurisdiction of the Court, or the contract must have been entered into within the jurisdiction of the Court.[10] The fact that the defendant may be served with the summons, although he is residing abroad,[11] does not extend the jurisdiction of the Court.[12] In *Edwards* v. *Warden*,[13] a suit was instituted against four trustees in India of a fund in India, and one formal defendant in England, to recover

[1] The Bank of Hindustan, China, and Japan *v.* Nundolall Sen, 11 B. L. R., 301.
[2] Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R., 318, 328.
[3] Bebee Jaun *v.* Meerza Mahomed Hadee, 1 Ind. Jur., 40.
[4] Lalmoney Dossee *v.* Judoonath Shaw, 1 Ind. Jur., 319.
[5] Leslie *v.* The Land Mortgage Bank, 18 W. R., 269.
[6] But see Yenkoba *v.* Rambhaji, 9 Bom. H. C. Rep., 12.
[7] Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R., 318; East Indian Railway Co. *v.* The Bengal Coal Co., I. L. R., 1 Calc., 95; The Delhi and London Bank *v.* Wordie, I. L. R., 1 Calc., 249; Kellie *v.* Fraser, I. L. R., 2 Calc., 445; Juggernauth Doss *v.* Brijnath Doss, I. L. R., 4 Calc., 322.
[8] Bagram *v.* Moses, 1 Hyde, 284; see also Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R., 318; Broughton *v.* Mercer, 14 B. L. R., 442; Treepcora Soondery Dossee *v.* Debendronath Tagore, I. L. R., 2 Calc., 52.
[9] Rajmohun Bose *v.* The East Indian Railway Co., 10 B. L. R., 241.
[10] Cookney *v.* Anderson, 31 Beav., 452, 642.
[11] Act X of 1877, s. 89.
[12] *Ibid*, and see Maunder *v.* Lloyd, 2 J. and H., 718.
[13] L. R., 9 Ch., 495.

money payable in England. The trustees were served out of the jurisdiction, appeared and answered, and entered into evidence; and it was held, that as they had not demurred, or pleaded, or moved to discharge the order for service, the Court of Chancery had jurisdiction to determine the questions between the parties.

Court of equity acts *in personam* and not *in rem*.

The Court, in enforcing equitable rights over, or titles to land situated without the limits of its jurisdiction, operates upon the conscience of the defendant or *in personam*,[1] not upon the property or *in rem*, and the decree, therefore, does not directly affect the property;[2] but a trust of such land is supported against a trustee resident within the jurisdiction by a decree operating *in personam*.[3] It is immaterial whether the lands are situated within the limits of the British empire or are in a foreign country. The Court of Equity will exercise its authority if the defendant is within its jurisdiction.[4] In *Angus* v. *Angus*,[5] a bill was brought for possession of lands in Scotland, and for a discovery of the rents and profits, deeds and writings, and fraud in obtaining the deeds was charged. The defendant pleaded the 19th article of the Treaty of Union, and that the lands in question, and the matter prayed by the bill, were out of the jurisdiction of the Court. Lord Hardwicke said:—"This Court acts upon the person as to the fraud and discovery, therefore the plea must be overruled. To have made this a good plea, there ought to have been a further averment, that the defendant was resident in Scotland. This had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here; for the jurisdiction of the Court as to frauds is upon the conscience of the party."[6] Of course the Court of one country has no jurisdiction over the Court of another. In *Lord Cranstown* v. *Johnston*,[7] the plaintiff sued to set aside a sale made in pursuance of a decree fraudulently obtained in the absence of the debtor by the creditor, who himself purchased the property at the execution-sale. The property was situated

Land may be in a foreign country.

Angus v. Angus.

Lord Cranstown v. Johnston.

[1] Toller *v.* Carteret, 2 Vern., 494.
[2] Earl of Kildare *v.* Eustace, 1 Vern., 421; Roberdeau *v.* Rous, 1 Atk., 543; Carteret *v.* Petty, 2 Sw., 323*n*.
[3] Penn *v.* Lord Baltimore, 1 Ves., 454.
[4] Earl of Kildare *v.* Eustace, 1 Vern., 421.
[5] 1 West, 23.
[6] *See* Scott *v.* Nesbitt, 14 Ves., 438.
[7] 3 Ves., 170.

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in the Island of St. Christopher in the West Indies. Sir R. P. Arden, M. R., said:—"Upon the whole it comes to this,—that, by a proceeding in the Island, an absentee's estate may be brought to sale, and for whatever interest he has, without any particular upon which they are to bid; the question is, whether the Court will permit the transaction to avail to that extent. It is said, this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly that it is strange for this Court to say, it is void by the laws of the Island, or for want of notice. I admit I am bound to say that, according to those laws, a creditor may do this. To that law he has had recourse, and wishes to avail himself of it: the question is, whether an English Court will permit such an use to be made of the law of that Island or of any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt for which the suit was commenced, and for which only the sale could be holden. It was not much litigated that the Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here.[1] Those cases clearly show that, with regard to any contract made, or equity, between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England. Lord Hardwicke lays down the same doctrine.[2] Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings as in a Court of Law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws, to proceed behind the back of the

[1] Archer *v.* Preston, Lord Ardglasse *v.* Muschamp, Lord Kildare *v.* Eustace, 1 Eq. Abr., 1; 1 Vern., 75, 135, 419.

[2] 3 Atk., 589.

debtor upon a constructive notice which could not operate to the only point to which a constructive notice ought, that there might be actual notice without wilful default: that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice."

Acting upon these principles, the Court of Chancery in England has decided questions relating to trusts of lands in Ireland,[1] in the Island of Sark,[2] in South America,[3] and in the West Indies.[4] It has ordered a sale of lands abroad,[5] and has given relief against a fraudulent conveyance.[6] In *Paget* v. *Ede*,[7] it was held, that a foreclosure decree being a decree *in personam* depriving the mortgagor of his personal right to redeem, the Court had jurisdiction to make such a decree in respect of a mortgage between an English mortgagor and mortgagee of land in one of the colonies.

Privity.

There must be a privity between the plaintiff and defendant, and it must appear that some contract or personal obligation has been incurred moving directly from the one to the other.[8]

Injunction restraining proceeding by other Courts.

The jurisdiction of the Court is founded like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom the order is made being within the power of the Court. And, acting upon the foregoing principles, it can restrain the party within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court.[9]

And therefore the Court of Chancery in England has restrained persons within the jurisdiction from suing in

[1] Earl of Kildare *v.* Eustace, 1 Vern., 421: Cartwright *v.* Pettus, 2 Ch. Ca., 214; Earl of Ardglasse *v.* Muschamp, 1 Vern., 75.
[2] Toller *v.* Carteret, 2 Vern., 495.
[3] Cood *v.* Cood, 33 Beav., 314.
[4] Lord Cranstown *v.* Johnston, 3 Ves., 182.
[5] Roberdeau *v.* Rous, 1 Atk., 543.
[6] Earl of Ardglasse *v.* Muschamp, 1 Vern., 75.
[7] L. R., 18 Eq., 118.
[8] Norris *v.* Chambres, 29 Beav., 246—254.
[9] Lord Portarlington *v.* Soulby, 3 M. & K., 108.

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the Ecclesiastical Court,[1] the Admiralty Court,[2] in the Courts in Ireland,[3] Scotland,[4] and the Colonies,[5] and has restrained a defendant from taking possession.[6]

If, however, a contract relating to land situated out of the jurisdiction be one which the *lex loci rei sitae* renders incapable of fulfilment, the Court will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound by the same equities as affected the party to the contract under whom they claim.[7]

The decree of the Court does not, as we have seen, affect the property directly. It is a personal decree ordering the defendant to do certain things. If he neglects or refuses to obey these orders, he can be imprisoned for an indefinite period for contempt of Court, and his property within the jurisdiction can be seized, and thus "his conscience is operated upon." If, however, he is able to evade the process of the Court for arrest and has no property in the country which can be seized, the decree is of course practically useless.[8]

Trusts of moveable property abroad.

Moveable property has no locality, but is subject to the law which governs the person of the owner. Accordingly, moveable property abroad belonging to a British subject may become the object of a trust, which will be recognized in this country.[9]

Object must be lawful.

I shall now deal with the object for which the trust is created. We have seen already, *ante*, p. 19, that trusts may be divided into lawful and unlawful, and that all lawful trusts may be enforced by a Court of Equity, and that, as a rule it may be laid down, that a trust is lawful until the contrary is shown; and that where a trust is unlawful and fraudulent, a Court of Equity will remain neutral, and

[1] Hill *v.* Turner, 1 Atk., 516; Sheffield *v.* The Duchess of Buckinghamshire, 3 M. and K., 628.
[2] Blad *v.* Bamfield, 3 Swanst., 604; Jarvis *v.* Chandler, 1 T. & R., 319.
[3] Lord Portarlington *v.* Soulby, 3 M. & K., 104; Booth *v.* Leycester, 1 Keen, 519.
[4] Kennedy *v.* Earl of Cassilis, 2 Swanst., 313; Innes *v.* Mitchell, 4 Drewry, 57.
[5] Bunbury *v.* Bunbury, 1 Beav., 318.
[6] Cranstown *v.* Johnston, 5 Ves., 278; Hope *v.* Carnegie, L. R., 1 Ch., 320.
[7] Waterhouse *v.* Standfield, 9 Hare, 234; 10 Hare, 254; Norris *v.* bres, 29 Beav., 246.
[8] *See* Norris *v.* Chambres, 29 Beav., 246, 253.
[9] Hill on Trustees, 3; Hill *v.* Reardon, 2 Russ., 608.

will neither enforce the trust nor relieve the person creating it, unless the illegal purpose fails to take effect. In considering whether the object of the trust is one permitted by the law, the general rule to be followed is, that the intention of the author of the trust is to be carried into effect, where it is not against good policy;[1] "it is the intention of the party that creates and governs uses and trusts,"[2] "a trust is created by the contract of the party, and he may direct it as he pleaseth."[3] "What the Court looks at in all charities" (and the rule applies equally to all other trusts) said Romilly, M. R.,[4] "is the original intention of the founder, and apart from any question of illegality and various other questions, this Court carries into effect the wishes and intentions of the founder of the charity: and where it sees that those intentions have not been carried into effect, it rectifies the existing administration of the charity for that purpose. If it cannot carry them into effect specifically, it carries them into effect as nearly as may be, and with as close a resemblance to them as it can." This rule has been applied to trusts created by Hindus.[5]

General rule for ascertaining whether trust lawful.

In considering whether the object of a trust is legal or not, it will be useful to bear in mind the provisions of s. 23 of the Indian Contract Act:—

Indian Contract Act, s. 23.

"The consideration or object of an agreement is lawful, unless—

it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations.

(*a.*) *A* agrees to sell his house to *B* for 10,000 rupees. Here, *B's* promise to pay the sum of 10,000 rupees is the consideration for

[1] Burgess *v.* Wheate, 1 Eden, 195.
[2] The Attorney-General *v.* Sands, Hardres, 494, *per* Lord Hale.
[3] Pawlett *v.* The Attorney-General, Hardres, 469, *per* Lord Hale.
[4] Attorney-General *v.* Dedham School, 23 Beav., 355.
[5] Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377.

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A's promise to sell the house, and *A's* promise to sell the house is the consideration for *B's* promise to pay the 10,000 rupees. These are lawful considerations.

(*b.*) *A* promises to pay *B* 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(*c.*) *A* promises for a certain sum paid to him by *B* to make good to *B* the value of his ship, if it is wrecked on a certain voyage. Here, *A's* promise is the consideration for *B's* payment, and *B's* payment is the consideration for *A's* promise, and these are lawful considerations.

(*d.*) *A* promises to maintain *B's* child, and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(*e.*) *A*, *B*, and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(*f.*) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 10,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(*g.*) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A* on his principal.

(*h.*) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(*i.*) *A's* estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction in effect a purchase by the defaulter, and would so defeat the object of the law.

(*j.*) *A*, who is *B's* mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(*k.*) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code."

It appears, therefore, that if the object of the trust is contrary to the policy of the law, or if it is founded upon an illegal or immoral contract, it will be void.[1] For example, if the trust is based upon a transaction forbidden by the law,[2] or is intended as a fraud upon an act of the Legislature,[3] such for instance, as a fictitious and fraudulent conveyance for the purpose of obtaining a property qualification to enable the grantee to vote at elections,[4] it will be void. In *May* v. *May*,[5] a conveyance of property by a father to his son, to give him a qualification to vote, was held not invalid, but a bounty. In *Groves* v. *Groves*,[6] property was purchased by one person and conveyed to another in order to give the latter a vote at Parliamentary elections, and the Court refused to assist the purchaser, and a suit by him, seeking to make the grantee a trustee, was dismissed.[7] So an assignment of the half pay of an officer in the army is bad. For half pay is intended by the State to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may always be ready to return into actual service. It materially differs, therefore, from the general case of expectancies, which may be assigned; for in the latter case, no public interest is thwarted. Thus a pension is equally uncertain as half pay; but as no future benefit is meant to arise to the State from granting it, a material difference arises between them.[8] So also an attempt by a Hindu to create any estate,—such for instance, as an estate tail,—which is unknown and repugnant to the Hindu law, is void.[9]

Trusts contrary to policy of law or founded upon illegal contract void.

Assignment of half pay.

Among trusts which, according to English law, are void as being contrary to public policy, may be mentioned those to provide for future illegitimate children. Such trusts are held to be void, because they tend to encourage immorality. The law on this point, so far as regards per-

Trusts for future illegitimate children.

[1] *See* Attorney-General *v.* Pearson, 3 Mer., 399; Hamilton *v.* Waring, 2 Bligh., 209; Earl of Kingston *v.* Lady Pierepont, 1 Vern., 5.
[2] *Ex parte* Dyster, 1 Mer., 172. [3] Curtis *v.* Perry, 6 Ves., 739.
[4] Childers *v.* Childers, 3 K. and J., 310; 1 De G. and J., 482; Ashworth *v.* Hopper, L. R., 1 C. P. D., 178.
[5] 33 Beav., 81. [6] 3 Y. & J., 163.
[7] *See* Rex *v.* Portington, 1 Salk., 162; Adlington *v.* Cann, 3 Atk., 154.
[8] Stone *v.* Lidderdale, 2 Anst., 533.
[9] Soorjeemoney Dossee *v.* Denobundoo Mullick, 6 Moo. I. A., 526; Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377.

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sons subject to English law, will be found in the case of *Occleston* v. *Fullalove*.[1]

There a testator, who had gone through the ceremony of marriage with Margaret Lewis, his deceased wife's sister, who had two daughters, Catherine and Edith, by him, and who was *enceinte* with a third at the date of the will, gave a moiety of his property to trustees in trust for Margaret Lewis for life, and after death, for his reputed children Catherine and Edith, and all other children which he might have or be reputed to have by Margaret Lewis, then born or thereafter to be born. The third child, Margaret, was born before the testator's death, and was acknowledged by him as his child. Wickens, V. C., considering that the case was governed by the decision in *Pratt* v. *Mathew*,[2] held that Margaret was not entitled to share in the testator's property. On appeal, Lord Selborne, L. C., differing from James and Mellish, L. JJ., agreed with the decision of Wickens, V. C., thinking that he was bound by the authorities. The Lord Justices, however, held, that there was nothing in the authorities to prevent a child coming into existence between the date of execution of the will and the death of the testator from taking under the will, and that Margaret was entitled to share.

The principle of the decision is, that a gift by a testator or testatrix to one of his or her children by a particular person, is perfectly good, if the child has acquired the reputation of being such a child as described in the will before the death of the testator or testatrix.[3]

Trust for illegitimate children in being, or *en ventre sa mère*.

But a trust for an illegitimate child in being, or *en ventre sa mère*, at the time of the creation of the trust, is good if the child is clearly designated as the object of the gift.[4] "In order," said Stuart, V. C.,[5] "that any legatee—whether the legacy be to a class or to an individual—may take, it is necessary that the person or the class should be clearly described. Where a gift is made to a child or to children as a class, the natural and proper meaning of the word 'child' or 'children' is legitimate child or legitimate children; but if the object of the gift is clearly described and clearly ascertainable from the words of the will, it matters nothing

[1] L. R., 9 Ch., 147. [2] 22 Beav, 328.
[3] *In re* Goodwin's Trust, L. R., 17 Eq., 346. See also Ellis *v.* Houston, L. R., 10 C. D., 236; Megson *v.* Hindle, L. R., 15 C. D., 198.
[4] Medworth *v.* Pope, 27 Beav., 71.
[5] Holt *v.* Sindrey, L. R., 7 Eq., 173.

whether the object of the gift be legitimate or illegitimate, because an illegitimate child, or a number of illegitimate children as a class, if properly described, may be a legatee or legatees just as well as legitimate children."[1] It is merely a question of designation.[2] The principle which may fairly be extracted from the cases upon the subject is this, the term 'children' in a will *primâ facie* means legitimate children; and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *primâ facie* interpretation is departed from. One class of cases is, where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. The other class of cases is, where there is, upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which would apply to, and would include, illegitimate children.[3] In order to interpret the words of the will, it is always not only allowable, but it is the duty of the Court, to obtain the knowledge which the testator had of the state of his family, so as to ascertain whether the testator intended illegitimate children to take under general expressions used in the will.[4]

Trust forbidden by law.

A trust for a purpose which is forbidden by law is unlawful. As an example may be mentioned section 13 of Beng. Regulation of 1793, which forbids Collectors from conferring on their public officers any private trust relating to their personal concerns.[5]

Trusts postponing enjoyment of property or restraining alienation.

Another class of trusts, which are void as being against public policy, are those in which an attempt is made to postpone the enjoyment of property for an indefinite period, or to prevent the alienation of property for ever. Such trusts are considered to be injurious to the good of

[1] See also Clifton *v.* Goodbun, L. R., 6 Eq., 278; Savage *v.* Robertson, L. R., 7 Eq., 176. [2] Lepine *v.* Bean, L. R., 10 Eq., 160.

[3] Hill *v.* Crook, L. R., 6 E. & I., App., 265, *per* Lord Cairns. See also *In re* Brown's Trust, L. R., 16 Eq., 239.

[4] Hill *v.* Crook, L. R., 6 E. & I., App., 265; Dorin *v.* Dorin, L. R., 7 E. & I., App., 568.

[5] See also the Indian Contract Act, IX of 1872, ss. 26—28, which declares agreements in restraint of marriage, trade or legal proceedings to be void.

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the State, and will not be enforced.[1] "A perpetuity," said Lord Guildford,[2] "is a thing odious in law, and destructive to the commonwealth: it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity."[3]

In England the rule is, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person, the latter of such remainders being absolutely void.[4] The effect of this rule is to forbid the tying up of lands for a longer period than can elapse until the unborn child of some living person shall come of age; that is, for the life of a party now in being, and for twenty-one years after, with a further period of a few months during gestation, supposing the child should be of posthumous birth. In analogy, therefore, to the restriction thus imposed on the creation of contingent remainders, the law has fixed the following limits to the creation of executory interests: it will allow any executory estate to commence within the period of any fixed number of now-existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist. This additional term of twenty-one years may be independent or not of the minority of any person to be entitled;[5] and if no lives are fixed on, then the term of twenty-one years only is allowed.[6] By the Statute 39 and 40 Geo. III, c. 98, the accumulation of income is forbidden for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority of any person living, or *en ventre sa mère*, at the death of the grantor, devisor or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so

Accumulation.

[1] See the Duke of Norfolk's case, 3 Ch. Ca., 20, 28, 35, 48.

[2] Duke of Norfolk *v.* Howard, 1 Vern., 164.

[3] For instances of attempt to create perpetuities by the creation of terms, see Floyer *v.* Bankes, L. R., 8 Eq., 115; Sykes *v.* Sykes, L. R., 13 Eq., 56.

[4] Hay *v.* The Earl of Coventry, 3 T. R., 86; Brudenell *v.* Elwes, 1 East, 452; Cole *v.* Sewell, 2 H. L. C., 186; Moneypenny *v.* Dering, 2 D. M. G., 145.

[5] Cadell *v* Palmer, 7 Bligh, N. S., 202.

[6] Williams on Real Property, 9th Ed., 305.

directed to be accumulated. The law was the same as regards trusts created by will in India up to the passing of the Indian Succession Act, X of 1865. By section 101 of that Act it is provided as follows :—

"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(*a.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death, to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B*, who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B*, and the minority of the sons of *B*. The bequest after *B's* death is void.

(*b.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death to such of *B's* sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(*c.*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that, after *B's* death, it shall be divided amongst such of *B's* children as shall attain the age of 18; but that if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(*d.*) 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 daughter whose share it was. All these provisions are valid."

The rule in this section, it will be seen, does away altogether with the absolute term of twenty-one years, and,

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owing to the definition of minority, reduces to eighteen years (or to eighteen and the period of gestation when the person in being is unborn) the twenty-one years which went to make up the period according to the English law.[1] This section of the Succession Act[2] applies to Hindus, Jains, Sikhs, and Buddhists.

Perpetuities among Hindus.

According to Hindu law, a perpetuity, save in the case of religious and charitable endowments, is illegal. Thus trusts to accumulate property for ninety-nine years,[3] to accumulate until the fund reached three lakhs,[4] and to postpone enjoyment until the testator's children reached the age of twenty-one,[5] have been held to be void; and the rule cannot be avoided by means of a colourable dedication to an idol.[6] The law of wills among Hindus is analogous to the law of gifts; a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator, and therefore a gift to an unborn child, except in the case of an infant in the womb, or an adopted son, is void.[7] And what cannot be done by a gift, cannot be done by the intervention of a trust.[8] So a trust for the maintenance of a family for ever is void.[9] But a father may delay the rights of his issue by interposing a valid estate previous to theirs.[10]

Restraint on alienation.

It is against the policy of the law to permit a trust to be created with a condition restraining alienation of the interests of the *cestui que trust* generally. For instance, a devise to trustees upon trust for daughters for their "separate and inalienable use" is too remote and void.[11] And

[1] Stokes's Succession Act, 82. [2] Act XXI of 1870, s. 2.

[3] Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 11.

[4] S. M. Krishnaramani Dasi *v.* Ananda Krishna Bose, 4 B. L. R., O. C., 231.

[5] S. M. Bramamayi Dasi *v.* Jages Chandra Dutt, 8 B. L. R., 400.

[6] Promotho Dossee *v.* Radhika Persaud Dutt, 14 B. L. R., 175.

[7] Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377; Soudaminey Dossee *v.* Jogesh Chunder Dutt, I. L. R., 2 Calc., 262; Bhoobun Mohini Debia *v.* Hurish Chunder Chowdhry, I. L. R., 4 Calc., 27; Kherodemoney Dossee *v.* Doorgamoney Dossee, I. L. R., 4 Calc., 455; Chundramoney Dossee *v.* Motilal Mullick, 5 Calc., 496.

[8] Krishnaramani Dasi *v.* Ananda Krishna Bose, 4 B. L. R., O. C., 231; Rajender Dutt *v.* Sham Chand Mitter, I. L. R., 6 Calc., 106; Kally Prosono Mitter *v.* Gopee Nauth Kur, 7 Calc., 241.

[9] Chundramoney Dossee *v.* Motilal Mullick, 5 Calc., 496.

[10] Hurrosoondery *v.* Cowar Kistonauth, Fult., 393.

[11] Armitage *v.* Coates, 35 Beav., 1; *In re* Cunynghame's Settlement, L. R., 11 Eq., 324; *In re* Teague's Settlement, L. R., 10 Eq., 564.

such a restriction is void by both Hindu and Mahomedan law. Thus, when a father, during his son's minority, gave certain property to him, and on delivery of possession got from him a document stipulating that he would not alienate the property, and that, on his death, the property should return to the father,—it was held, that the condition against alienation was absolutely void.[1] So, trusts prohibiting or restricting the right of partition are void.[2] Alienation to a particular person may be restrained, but alienation generally, being repugnant to the estate, cannot.[3] So a trust may be created in favour of a man, to determine and go over on his bankruptcy,[4] but a trust to continue after bankruptcy would be void.[5] For instance, a proviso in a will that the *cestui que trust* shall not have power to sell, mortgage or anticipate the income of the trust fund, will not prevent the assignee from taking the income on the bankruptcy of the *cestui que trust*.[6] Such a condition is inconsistent with, and repugnant to, the gift. It is one of the incidents of property that it shall vest in the assignees of a bankrupt for the benefit of his creditors, and this incident cannot be taken away by the author of the trust.[7] So the right of alienation is one of the incidents of the absolute ownership of property; and therefore, if an absolute gift without the intervention of trustees is followed by a condition restricting the right of alienation, the condition is wholly void.[8]

Condition restraining alienation after absolute gift.

Where trustees have a discretion as to the manner of the application of the trust-fund for the benefit of the *cestui que trust*, but no power to apply it otherwise than for his benefit during his life, the discretion is a discretion subject to the incidents of property, and is consequently terminable upon the insolvency of the *cestui que*

Insolvency.

[1] Nabob Amiruddaula Muhammad *v.* Nateri Srinivasa Charlu, 6 Mad. H. C. R., 356. See Kumara Asima Krishna Deb *v.* Kumara Kumara Krishna Deb, 2 B. L. R., O. C, 25; Nitai Charan Pyne *v.* S. M. Ganga Dasi, 4 B. L. R., O. C., 26*n*; Promotho Dossee *v.* Radhika Pershaud Dutt, 14 B. L. R., 175.

[2] Mayne, §§ 328, 356, 410.

[3] Co. Litt., ss. 360, 361, 362.

[4] Brandon *v.* Robinson, 18 Ves., 433.

[5] Graves *v.* Dolphin, 1 Sim., 66.

[6] Green *v.* Spicer, 1 R. & M., 395; Snowdon *v.* Dales, 6 Sim., 524.

[7] Brandon *v.* Robinson, 18 Ves., 433; Bird *v.* Johnson, 18 Jur., 976.

[8] Bradley *v.* Peixoto, 3 Ves., 324; Ross *v.* Ross, 1 Jac. & W., 154; Ware *v.* Cann, 10 B. and C., 433; Hood *v.* Oglander, 34 Beav., 513; Hunt-Foulston *v.* Furber, L. R., 3 C. D., 285.

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trust. The life-interest enures for the benefit of the creditors, and any attempt to continue the insolvent in the enjoyment of the property is in fraud of the law.[1]

But where a testatrix bequeathed a share of her residue in trust for her nephew for life, and by a codicil, after reciting that her nephew had become bankrupt and insane, she directed the trustees to apply during his life the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they, in their discretion, should think most expedient,—it was held, that the nephew's assignees were not entitled to any portion of the provision made for him. The cases of *Green* v. *Spicer*,[2] *Snowdon* v. *Dales*,[3] and *Piercy* v. *Roberts*[4] were distinguished, on the ground, that in those cases the gift took effect before the donee became bankrupt, and the income of the fund was either to be paid to the donee or to be applied for his benefit generally. Whereas in the case now under consideration, the trustees were only to apply such sums as they thought fit for maintenance and support, there was a trust created for the mere special purpose of supporting and maintaining the nephew, and under such a trust the assignees could take no interest.[5]

If a trust is created for the benefit of two or more persons, and one becomes bankrupt or insolvent, the assignee will be entitled only to his proportionate part. In *Page* v. *Way*[6] freehold and personal property belonging to the husband was conveyed to trustees upon trust to receive the rents and profits, "and pay and apply the same when received, unto or for the maintenance and support of the husband, his wife, and children, or otherwise if the trustees should think proper, to permit the same to be received by the husband during his life, without power to charge or anticipate." The husband became bankrupt, and in a suit by the assignees claiming the whole income of the trust-property,—it was held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life. Lord Langdale, M. R., said:—"I am of opinion that, so long as the wife and children were main-

[1] Green *v.* Spicer, 1 R. and M., 395; Piercy *v.* Roberts, 1 M. and K., 4; Snowdon *v.* Dales, 6 Sim., 524; Younghusband *v.* Gisborne, 1 Coll., 400.
[2] 1 R. and M., 395. [3] 6 Sim., 524. [4] 1 M. and K., 4.
[5] Twopeny *v.* Peyton, 10 Sim., 487. See *Re* Sanderson's Trust, 3 K. and J., 497. [6] 3 Beav., 20.

tained by the husband, the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were maintained. The assignees take everything subject to what is proper to be allowed for the maintenance of the wife and children." Again, where property was vested in trustees upon trust to pay the rents and profits to a certain person for life, provided that, if he became bankrupt, the trustees should apply the rents and profits in or towards the maintenance, clothing, lodging, and support of the *cestui que trust*, and his then or any future wife and his children, or any of them, as the trustees should, in their discretion, think fit,—it was held, on the bankruptcy of the *cestui que trust*, that his life-estate was forfeited at the time of his discharge,—that, from the date of the vesting order to the time of the discharge, the rents and profits of the estate belonged to the assignee; that, upon the discharge taking place, the discretionary powers given to the trustees by the settlement might be exercised by them in favour of the insolvent, his wife, and children collectively, or in favour of any of those persons to the exclusion of the others,—and that to whatever extent the power might be exercised in favour of the insolvent, the benefit which he would take by the appointment would vest in the assignee.[1]

Again, where a testator bequeathed his residuary estate to trustees, and, after making a provision out of it, for the benefit of his son and for his life, and, after the son's death, for his wife and children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do any act whereby the same, or any part thereof, might, if the absolute property thereof were vested in him, be forfeited to, or become vested in, any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son and of any wife and child or children he might have, as the trustees in their discretion should think fit,—it was held, on the bankruptcy of the son, that the trust for the benefit of the son, his wife, and children was valid, and that the assignees were not entitled to any part of the provision. Shadwell, V. C., said:—"There is nothing in point of law to invalidate such a gift that I am aware

[1] Lord *v.* Burn, 2 Y. and C. C. C., 98. See also Holmes *v.* Penney, 3 K. and J., 90.

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of. It does not follow that anything was of necessity to be paid; but the property was to be applied; and there might have been a maintenance of the son, and of the wife, and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance: and, therefore, my opinion is, that I am not at liberty to take this as a mere gift for the benefit of the son simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children: and if that is the true construction of the gift in question, the result is, that the assignees are not entitled to anything."[1] In *Kearsley* v. *Woodcock*,[2] Wigram, V. C., in a similar state of circumstances said, that it was not of necessity that any part of the trust-funds, under such a gift, must be applicable for the separate benefit of the bankrupt; the whole property might not be more than sufficient for the support and maintenance of the wife and children; and the benefit which the bankrupt derived from the property might not be capable of severance; it might be of such a kind that no definite portion of the principal or income could, in respect thereof, be diverted from its application for the benefit of the other members of the family, *e.g.*, the joint occupation of a house, which was necessary for the habitation of the wife and children, the expense of which was not increased by the circumstance, that it was also the abode of the bankrupt.[3]

A trust for the benefit of a person until his bankruptcy or insolvency, then in the discretion of the trustees for the subsistence of himself and family, was held in *Rippon* v. *Norton*,[4] on the insolvency taking place, to entitle his three children to three-fourths of the fund, and the assignees to the remaining fourth. This case goes further than *Page* v. *Way*[5] and *Kearsley* v. *Woodcock*.[6] In *Wallace* v. *Anderson*,[7] the trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income in such manner, for the maintenance and support, or otherwise for the benefit of the husband and the issue, as they

[1] Godden *v.* Crowhurst, 10 Sim., 642.
[2] 3 Hare, 185.
[3] See also Wallace *v.* Anderson, 16 Beav., 533.
[4] 2 Beav., 63.
[5] 3 Beav., 20.
[6] 3 Hare, 185
[7] 16 Beav., 633.

might think proper. It was held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared to be entitled to the surplus. Romilly, M. R., said:—"I am not satisfied that the point which has arisen in the present case was argued in *Rippon* v. *Norton*.[1] To say that the discretion of the trustees as to the application of the income was gone by the bankruptcy, is to say that it never arose, and the object of the trust would thereby be defeated. I am not sure that the Court would not, in a case like the present, follow the rule laid down in *Kearsley* v. *Woodcock*."[2]

Trust to cease on bankruptcy or insolvency.

Although, as appears from the above authorities, a trust restraining alienation of the interests of the *cestui que trust* generally, or attempting to continue the interest of the *cestui que trust* after his bankruptcy, is void, yet there is no objection to a trust to determine, in case the *cestui que trust* shall become bankrupt or insolvent,[3] or shall attempt to assign or incumber his interest.[4] The interest of the *cestui que trust* in such a case determines as soon as the act forbidden is done, even though the interest is still in expectancy. Thus, where property was settled in the year 1823 on a wife for life, with remainder to the husband, "until he should make any composition with his creditors for the payment of his debts, although a commission of bankruptcy should not issue against him;" and in 1842, the husband's principal creditors agreed to take a composition on their debts secured by bills, and the wife did not die until 1852,—it was held, that the composition, though it was not made with the whole of the husband's creditors, and was made during the wife's life, and did not affect the trust-property, nevertheless operated as a forfeiture of the husband's interest.[5] So the interest will determine upon the execution of a composition deed by the *cestui que*

[1] 2 Beav., 63. [2] 3 Hare, 185.

[3] Lockyer *v.* Savage, 2 Str., 947; *Ex parte* Oxley, 1 B. and B., 257; *Ex parte* Hinton, 14 Ves., 598; Cooper *v.* Wyatt, 5 Mad., 482; Yarnold *v.* Moorehouse, 1 R. and M., 364; Lewes *v.* Lewes, 6 Sim., 304; *In re* Aylwin's Trusts, L. R., 16 Eq., 585.

[4] Stanton *v.* Hall, 2 R. and M., 175; Stephens *v.* James, 4 Sim., 499; Oldham *v.* Oldham, L. R., 3 Eq., 404.

[5] Sharp *v.* Cosserat, 20 Beav., 470.

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trust, even though he does not become bankrupt or insolvent, or execute any assignment of the property for the benefit of his creditors.[1] If a sum of money is left for the purpose of purchasing an annuity for a particular person, with a condition that it shall determine if the annuitant shall at any time sell, assign, incumber, or in anywise dispose of or anticipate the same, the annuitant will not be entitled to the value of the annuity.[2] The rules to be followed in determining questions of this class were thus laid down by Turner, V. C., in *Rochford* v. *Hackman*:[3] First, that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift; and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest or to a life-estate, is void, as being inconsistent with the interest given; and secondly, that although a life-interest may be expressed to be given, it may be well determined by an apt limitation over. And he also expressed an opinion that the life-interest might be well determined by a proviso for cesser, although it be not accompanied by any limitation over, for no greater effect could, he thought, be given to a limitation over than to an express declaration that the life-interest should cease. This latter point was expressly decided by Wood, V. C., in *Joel* v. *Mills*.[4]

Trust to cease on happening of particular event.

A clause providing for the determination of the interest of the *cestui que trust* upon the happening of a particular event within a specified time, whether the time is certain or uncertain, is good, *e.g.*, a clause providing against disposition during the life of a third person,[5] or before attaining a certain age.[6]

When property is settled on *A* for life, and after her death on *B* for life, until he shall become insolvent, and then over, the gift over takes effect on *B's* insolvency in *A's* lifetime.[7]

Clauses of forfeiture construed strictly.

Clauses of forfeiture will be construed strictly, and therefore the very act provided against must have been done. Thus a proviso giving property over, if the *cestui que trust* should alienate, or attempt to alienate, it does not come

[1] Billson *v.* Crofts, L. R., 15 Eq., 314.
[2] Hatton *v.* May, L. R., 3 C. D., 148.
[3] 9 Hare, 480. [4] 3 K. and J., 458.
[5] Kearsley *v.* Woodcock, 3 Hare, 185.
[6] Churchill *v.* Marks, 1 Coll., 441.
[7] *Re* Muggeridge's Trust, Johns., 625.

into effect on his bankruptcy, which is an alienation by operation of law, and not a voluntary act.[1] It would, however, come into effect if he presented a petition in insolvency, see *infra*, note 10; and the penalty of forfeiture on bankruptcy is not incurred by a composition with creditors.[2] The words of the clause, however, may be so wide as to show that the author intended that it should come into effect upon the *cestui que trust* doing any act which would affect the life-estate.[3]

So the giving a warrant of attorney will not work a forfeiture, unless done as a contrivance to evade the prohibition against alienation;[4] nor, even in England, will the marriage of a *feme sole* cause a forfeiture of an annuity which is to determine upon the annuitant's doing any act by which the property "should be vested or become liable to be vested in any other person."[5] So a charge on arrears of an annuity is good,[6] or a charge on the income as it accrues.[7]

A general assignment of property will not include property liable to forfeiture.[8]

Where there is a clause of forfeiture on bankruptcy, and the *cestui que trust* becomes bankrupt, and the bankruptcy is annulled before any beneficial interest in the property has come to the assignee, the clause will not take effect.[9]

The presentation of a petition in insolvency by the insolvent himself is a voluntary act, and as the property of the insolvent vests in the Official Assignee, the presentation of a petition would be an alienation of his property, and would work a forfeiture.[10]

The owner of property, whether moveable or immove-

[1] Lear *v.* Leggett, 2 Sim., 479; Whitfield *v.* Prickett, 2 Keen, 608.

[2] Montefiore *v.* Enthoven, L. R., 5 Eq., 35.

[3] *Ex parte* Eyston L. R., 7 C. D., 145.

[4] Avison *v.* Holmes, 1 J. and H., 530; Barnett *v.* Blake, 2 Dr. and Sm., 117; Montefiore *v.* Beheens, 35 Beav., 95.

[5] Bonfield *v.* Harsell, 32 Beav., 217; see, however, Craven *v.* Bradley, L. R., 4 Ch. App., 296.

[6] *Re* Stretz's Trusts, 4 D. M. G., 404.

[7] Cox *v.* Bockett, 35 Beav., 48.

[8] Fausset *v.* Carpenter, 2 Dow. and Cl., 232.

[9] Ancona *v.* Waddell, L. R., 10 C. D., 157.

[10] See Shee *v.* Hale, 13 Ves., 404; Brandon *v.* Aston, 2 Y. and C. C. C., 24; Churchill *v.* Marks, 1 Coll., 441; Martin *v.* Margham, 14 Sim., 230; Townsend *v.* Early, 34 Beav., 23.

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able, cannot create a trust of it for his own benefit to go over in case of his bankruptcy or insolvency.[1]

Trust for immoral purposes.

Any trust, as well as any contract for immoral purposes, is of course void.[2]

Failure of trust.

If the purpose for which the trust is created fails, because it is unlawful or fraudulent, a Court of Equity will not act. It cannot enforce the trust in favour of the *cestui que trust*, for that would be to declare the trust to be good; and it will not restore the property to the author of the trust, because a man cannot be allowed as plaintiff to plead his own wrong. A right of action cannot arise out of fraud. In such a case, therefore, if the property has got into the hands of the trustee, the author of the trust is without remedy, for where there is an equal wrong, the title of the holder shall prevail.[3] But though the author of an unlawful or fraudulent trust cannot recover the property from the trustees, persons claiming through him may sue for the purpose. "There is a great difference," said Lord Eldon, "between the case of an heir coming to be relieved against the act of his ancestor in fraud of the law, and of a man coming upon his own act under such circumstances."[4] A defendant cannot set up the fraud of his ancestor.[5]

Illegal purpose failing.

There is an exception to the general rule that where a trust has been created for an unlawful or fraudulent purpose, the Court will not interfere; for it will do so where the illegal purpose fails to take effect, and nothing is done under it. The mere intention to effect an illegal object will not deprive the author of the trust of his right to recover the property.[6]

[1] *In re* Murphy, 1 Sch. and Lef., 44; *In re* Meaghan, *ib.*, 179; Higinbotham *v.* Holme, 19 Ves., 88. As to settlements on marriage, see Lewin, 7th edn., 94.

[2] See Contract Act, I of 1872, s. 23, illus. (*k*); Thornton *v.* Howe, 31 Beav., 14. See as to dancing-girls, Chinna Ummayi *v.* Tegarai Chetti, I. L. R., 1 Mad., 168; Mathura Naikin *v.* Esu Naikin, I. L. R., 4 Bomb., 545.

[3] Cottington *v.* Fletcher, 2 Atk., 155; Chaplin *v.* Chaplin, 3 P. Wms., 229; Muckleston *v.* Brown, 6 Ves., 68; Ottley *v.* Browne, 1 B. and B., 360; Groves *v.* Groves, 3 Y. and J., 163; Hamilton *v.* Ball, 2 Ir. Eq., 191; Davies *v.* Otty, 35 Beav., 208; Haigh *v.* Kaye, L. R., 7 Ch., 469.

[4] Muckleston *v.* Brown, 6 Ves., 68; Joy *v.* Campbell, 1 Sch. and Lef., 328; Matthew *v.* Hanbury, 2 Vern., 187; Brackenbury *v.* Brackenbury, 2 Jac. and W., 391; Groves *v.* Groves, 3 Y. and J., 163; Miles *v.* Durnford, 2 D. M. G., 641; Childers *v.* Childers, 3 K. and J., 310; 1 DeG. and J., 482.

[5] *Doe d.* Roberts *v.* Roberts, 2 B. and Ald., 367; Bessey *v.* Windham, 6 Q. B., 166; Phillpotts *v.* Phillpotts, 10 C. B., 85.

[6] Davies *v.* Otty, 35 Beav., 208; Symes *v.* Hughes, L. R., 9 Eq., 475; Manning *v.* Gill, L. R., 13 Eq., 485; Haigh *v.* Kaye, L. R., 7 Ch., 469.

If the defendant wishes to rely on the illegality of the transaction as a defence, he must plead it in distinct terms.[1]

Must be a *cestui que trust.*

In order to a complete trust, there must be a *cestui que trust*, a person to be benefited by the trust, otherwise the trust fails, and the property appropriated for the purpose results to the author of the trust or his representatives. In England, it has been repeatedly held, that a trust, merely for the purpose of keeping up tombs or buildings, which are of no public benefit, but only an individual advantage, is not a charitable use, but a perpetuity, and is void.[2]

Trust partly lawful and partly unlawful.

The object of a trust must, as we have seen, *ante*, p. 33, be lawful. Where the object is clearly unlawful, no difficulty arises, for the Court will not enforce an illegal trust. But the object may be in part lawful and in part unlawful, and the question then arises as to whether the whole trust fails, or whether the lawful part remains good. In England the rule is, that if property be given to trustees, to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then, unless the amount intended to be applied for the unlawful purpose can be ascertained, the whole gift will fail; but the fact that the amount to be applied for the unlawful purpose has not been expressly stated in the gift, will not make the whole gift void; and the Court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose, and hold the gift good as to the residue.[3] The Contract Act[4] provides, that where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under certain specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement; and that, in the case of an alternative promise, one branch of which is legal, and the other illegal, the legal branch alone can be enforced.

Trust of immoveable property in foreign country.

If a trust is created of immoveable property in a foreign country, the better opinion seems to be that the

[1] Haigh *v.* Kaye, L. R., 7 Ch., 469.

[2] Lloyd *v.* Lloyd, 2 Sim., N. S., 255; Thomson *v.* Shakespeare, Johns, 612; 1 De. G. F. and J., 399; Fowler *v.* Fowler, 33 Beav., 616; Fisk *v.* The Attorney-General, L. R., 4 Eq., 521; Hunter *v.* Bullock, L. R., 14 Eq., 45; Dawson *v.* Small, L. R., 18 Eq., 114; Gott *v.* Nairne, L. R., 3 C. D., 278; *Re* Williams, L. R., 5 C. D., 735.

[3] See Lewin on Trusts, 7th Edn., 97.

[4] IX of 1872, ss. 57, 58.

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trusts must conform to the laws of the land where the property is. In *Nelson* v. *Bridport*,[1] an estate in Sicily had been granted to Lord Nelson with power to appoint a successor, and it was held that the incidents to real estate, the right of alienating it, and the course of succession to it, depend entirely upon the law of the country where the estate is situated.

[1] 8 Beav., 547.

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DECLARATION OF TRUST.

Declaration of trust — Intention to create trust must be shown — Valuable consideration — Consideration not necessary — Transmutation of possession — Voluntary settlements — If incomplete, not enforced against settlor — If nothing more to be done by settlor, trust is complete — Assignment by *cestui que trust* — Notice — What amounts to a valid declaration of trust — Ineffectual assignment — *Chose-in-action* — Subsequent disclaimer by trustee — Settlor cannot revoke voluntarily — Setting aside voluntary settlement — Defrauding creditors — To what property Statute applicable — Question of fraud is one of fact — Assignment by way of mortgage — Valuable consideration not support when *mala fides* — Sale to defeat Crown — Assignment in favour of one creditor — Voluntary settlements within Statute — Indebtedness of settlor — Secured debts — Consideration paid to third person — Voluntary settlement only void as against existing creditors — Unless fraud — How far settlement void — Insolvent Act, s. 9 — Section 24 — Defrauding purchaser — Statute does not extend to personal estate — When settlor may defeat settlement — Subsequent purchase must be for value — How far voluntary settlement defeated — Personalty settled — Subsequent will — Conveyances with power of revocation — Effect of Statute — Valuable consideration — Marriage — Extrinsic evidence admissible to show consideration — Settlement not set aside as against grantors — Voluntary settlement in expectation for death — Rectifying settlement — Enforcement — On whom binding — Creditors' deeds how far revocable — Johns *v.* James — Execution of deed by creditors — Deed not communicated to creditors — Trust by will for payment of debts.

Declaration of trust.

I NOW propose to treat of the manner in which a trust may be declared.

As regards moveable property beyond the limits of the ordinary original civil jurisdiction of the High Courts, whether belonging to European British subjects, Hindus or Mahomedans, trusts may be declared by parol, or by an instrument in writing, which may be either testamentary or non-testamentary. The Hindu law, in no transaction, absolutely requires a writing;[1] nor, so far as I am aware, does

[1] Crinivasammal *v.* Vijayammal, 2 Mad. H. C. R., 37; Krishna *v.* Rayappa, 4 Mad. H. C. R., 98; M. S. Rookho *v.* Madho Dass, 1 N. W. P. H. C. R., 63; Jivandas Keshavji *v.* Framji Nanabhai, 7 Bom. H. C., O. J., 51; Hurpurshad *v.* Sheo Dyal, L. R., 3 I. A., 259. See, however, Sirdar Sainey *v.* Piran Singh, I. L. R., 3 All., 466.

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the Mahomedan law. With regard to European British subjects resident without the limits of the jurisdiction of the High Courts, it is doubtful whether they would be governed by the Statute of Frauds or not.[1] If not, they would be governed by the English Common Law as it stood before the Statute, and at Common Law a trust, whether of real or personal property, was averable,—that is, might be declared by parol.[2] So much of the Statute of Frauds as relates to the creation of trusts is still in force within the Presidency-Towns, and trusts of lands created by European British subjects must conform to the provisions of the Statute. The seventh section provides that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing to be signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. Trusts of moveable property are not within the Statute, and may therefore be declared by parol.[3]

Intention to create trust must be shown.

It is only necessary that the person creating the trust shall clearly show his intention to create the trust,[4] and shall point out the subject-matter of the trust and the persons who are to benefit by it. Technical words are not necessary, but if they are used, their technical meaning must be given to them.[5]

Valuable consideration.

Where there is valuable consideration, and a trust is intended to be created, formalities are of minor importance, since, if the transaction cannot take effect by way of trust executed, it may be enforced by a Court of Equity as a contract.[6] Where immoveable property was given into the possession of the defendant under an order of a revenue officer, which directed the defendant to sell the crops, and after payment of the Government dues, to account for the profits to the plaintiff on his claiming it, it was held that the defendant was not a depositary, but a trustee.[7]

[1] See Gardiner *v.* Fell, 1 Moo. I. A., 299; Freeman *v.* Fairlie, *ib.*, 305; Mayor of Lyons *v.* East India Co., *ib.*, 175; Stokes's Older Statutes, i.

[2] See Lewin, 7th Ed., p. 47.

[3] Fordyce *v.* Willis, 3 Bro. C. C., 587; M'Fadden *v.* Jenkyns, 1 Hare, 461; Peckham *v.* Taylor, 31 Beav., 250.

As to the formalities requisite in order to comply with the Statute of Frauds, *see* Lewin, 7th Ed., p. 49; and as to the Statute of Wills, *see* p. 53.

[4] Lewin, 7th Ed., p. 74. [5] *Ibid*, 99. [6] *Ibid*, 62.

[7] Vital Vishva Nath Prabhu *v.* Ram Chandra Sadashiv Kirkire, 7 Bom. H. C., 149.

Consideration not necessary.

Transmutation of possession.

It is not necessary there should be any consideration to support a trust.[1] If a trust has been perfectly created, it is not necessary that there should have been a transmutation of possession, and it cannot afterwards be defeated by any act of the settlor.[2] As a general rule, it may be laid down that, in order to make a voluntary declaration of trust binding upon the author of the trust, he must have completely parted with all his interest in the property to the trustee, or have declared himself to be a trustee of the property for the benefit of the *cestuis que trustent*.[3] It is not necessary, in order that the trust may be binding, that it should be communicated to, or accepted by, the volunteer.[4]

Voluntary settlements

The leading case with reference to settlements and trusts in favour of a volunteer,—that is to say, a person who has not given any consideration, is *Ellison* v. *Ellison*.[5] "I take the distinction to be," said Lord Eldon, "that, if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant and is purely voluntary, this Court will not execute that voluntary covenant. But if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court. . . . If the actual transfer is made, that constitutes the relation between trustee and *cestui que trust*, though voluntary, and without good or meritorious consideration."

If incomplete, not enforced against settlor.

But although a voluntary settlement or grant may be valid as against creditors and purchasers, it may be incomplete; and then will not be enforced against the settlor."[6]

[1] Lewin, 7th Ed., 62; see also Suttaprosunno Ghosal *v.* Rakhalmoney Dossee, Boul., 706.

[2] Jamsetji Jijibhai *v.* Sona Bhai, 2 Bom. H. C. R., 143; and see Lewin, 7th Ed., 62.

[3] Milroy *v.* Lord, 4 D. F. & J., 274; Warriner *v.* Rogers, L. R., 16 Eq., 340; Richards *v.* Delbridge, L. R., 18 Eq., 11; Heartley *v.* Nicholson, L. R., 19 Eq., 233. As to what amounts to a complete transfer, see Parnell *v.* Hingston, 3 Sm. & G., 337; Wheatley *v.* Purr, 1 Keen., 551; Stapleton *v.* Stapleton, 14 Sim., 186; Moore *v.* Darton, 4 DeG. & Sm., 517; Gee *v.* Liddell, 35 Beav., 621.

[4] *Re Way*, 2 D. J. & S., 365; Lambe *v.* Orton, 1 Dr. & Sm., 125; Tate *v.* Leithead, Kay, 658.

[5] 6 Ves., 656; 1 W. & T. L. C., 245, 4th Ed.

[6] Antrobus *v.* Smith, 12 Ves., 46; Ellison *v.* Ellison, 6 Ves., 662; Jeffreys *v.* Jeffreys, Cr. & Ph., 138; *Ex parte* Pye, 18 Ves., 149.

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A volunteer has no equity to enforce a mere voluntary promise to assign against the assets of the person who made the promise.[1] A voluntary covenant to transfer stock is a mere imperfect gift which equity will not assist.[2] So is a voluntary covenant to transfer shares.[3] A voluntary settlement is incomplete unless the interest of the donor has been completely parted with, and therefore a voluntary agreement to declare a trust will not be enforced.[4] Even if the settlor has executed a deed purporting to pass his interest, and he intends to carry out the transaction, yet if, for any reason, he has not in fact parted with his interest, the trust cannot be executed.[5] But when a covenant or other instrument creates such a complete obligation on the part of the covenantor, that damages would be recoverable in case of breach, effect will be given to it, as when a person covenants to pay a sum of money or an annuity.[6] So a settlement or gift by the bond of the settlor may be enforced against the obligor's estate;[7] and a person claiming under such a bond is within the Statute 13 Eliz., c. 5, and is entitled to the protection of the Statute like any other creditor.

In *Hervey* v. *Audland*,[8] it was held that a covenantee under a voluntary covenant for further assurance could not prove under an administration suit against the covenantor's estate. But, in *Cox* v. *Barnard*,[9] this was allowed, upon the ground that though the Court might not specifically execute the covenant as damages were wanted, it could give damages.[10] The delivery of property or securities passing by delivery is valid.[11]

[1] Marler *v.* Tommas, L. R., 17 Eq., 8, 13.
[2] Ellison *v.* Ellison, 6 Ves., 656; Ward *v.* Audland, 8 Sim., 571.
[3] Dillon *v.* Coppin, 4 M. and C., 647; Dillwyn *v.* Llewelyn, 4 D. F. J., 517.
[4] Evelyn *v.* Templar, 2 Bro. C. C., 148; Coleman *v.* Sarrel, 1 Ves., J., 50; Jeffreys *v.* Jeffreys, Cr. and Ph., 138.
[5] Garrard *v.* Lord Lauderdale, 2 R. & M., 452; Meek *v.* Kettlewell, 1 Hare., 469; Richards *v.* Delbridge, L. R., 18 Eq., 11; Heartley *v.* Nicholson, L. R., 19 Eq., 233; Batstone *v.* Salter, L. R., 10 Ch., 431; Bulbeck *v.* Silvester, 45 L. J., Ch., 280.
[6] Fletcher *v.* Fletcher, 4 Hare, 67; Watson *v.* Parker, 6 Beav., 283; Clough *v.* Lambert, 10 Sim., 174; Hales *v.* Cox, 32 Beav., 118; Bonfield *v.* Hassell, *ib.*, 217.
[7] Dening *v.* Ware, 22 Beav., 184; Hall *v.* Palmer, 3 Hare, 532.
[8] 14 Sim., 531. [9] 8 Hare, 310.
[10] See Patch *v.* Shore, 2 Dr & Sm., 589.
[11] Irons *v.* Smallpiece, 2 B. & Al., 551; M'Culloch *v.* Bland, 2 Giff., 428.

If, however, the grantor adopts some other mode of transfer than that which is necessary to effect a complete assignment of the property, the transferee will not be entitled unless the instrument can be construed as a declaration of trust. For instance, an attempt to transfer shares or property of that description by some other mode than that which is effectual by the rules of the company or society in which the shares are held is not an effectual transfer: as, for instance, where the owner of shares endorsed on the certificates the words, "I hereby assign, &c.," to others, but no transfer was executed, he was held to have a *locus pœnitentiæ* so long as the gift was incomplete. So a power-of-attorney given to the trustee to transfer will not be sufficient unless he acts upon it.[1] Again, where the transfer is in other respects imperfect and does not operate on the whole property,[2] and if the assignment or other mode of gift or settlement is incomplete and the gift is intended to take effect by it, the Court will not construe it as a declaration of trust, and upon this ground give effect to it, for then every imperfect instrument would be made effectual by being converted into a perfect trust.[3] Where a cheque was given to one in trust for another, with a verbal direction that the amount was to be in trust instead of a legacy given by will to the proposed *cestui qui trust*, the declaration was held to be inoperative;[4] and where a cheque was given by the owner to his young child with a declaration before witnesses, but was afterwards retained by the owner till his death,[5] no trust was created. But an instrument executed as a present and complete assignment (not being a mere covenant to assign at a future time) is equivalent to a declaration of trust; therefore, such an instrument will pass promissory notes of the grantor, though neither specifically mentioned in the deed, nor indorsed by him.[6] This case, and the observations in *Grant* v. *Grant*,[7] would seem, to a

[1] Milroy *v.* Lord, 4 D. F. J., 264; Antrobus *v.* Smith, 12 Ves., 39; Dillon *v.* Coppin, 4 M. and Cr., 647; Searle *v.* Law, 15 Sim., 95; Cunningham *v.* Plunket, 2 Y. and C.C.C., 245; Weale *v.* Ollive, 17 Beav., 252; Moore *v.* Moore, L. R., 18 Eq., 474.

[2] Woodford *v.* Charnley, 28 Beav., 96.

[3] Milroy *v.* Lord, 8 Jur. N. S., 806; Richards *v.* Delbridge, L. R., 18 Eq., 11; Heartley *v.* Nicholson, L. R., 19 Eq., 233; Bottle *v.* Knocker, 46 L. J., Ch., 159; Baddley *v.* Baddley, L. R., 9 Ch. Div., 113; Fox *v.* Hawkes, L. R., 13 Ch. Div., 822.

[4] Hughes *v.* Stubbs, 1 Hare, 476. [5] Jones *v.* Lock, L. R., 1 Ch., 25.

[6] Richardson *v.* Richardson, L. R., 3 Eq., 686. [7] 34 Beav., 623.

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If nothing more to be done by settlor, trust is complete.

certain extent, to modify the doctrine in *Milroy* v. *Lord*,[1] which, however, was a decision of the Lords Justices. And if nothing more remains to be done or can be done by the grantor or donor,—if, as far as he is concerned, the conveyance or assignment is complete, and he has done all that is necessary to be done, having regard to the nature of the property,—the assignment or other assurance will be valid in equity.[2] Thus, an assignment of a policy of assurance by deed is valid, although the grantor may retain the deed and give no notice of the assignment to the office.[3] And where there was a voluntary assignment of a *chose-in-action*, followed by a power-of-attorney to receive it, this would seem to be sufficient to give a right in equity to have the deed enforced even after the death of the assignor.[4]

After a valid declaration of trust, the fact that the trust-fund is found at the settlor's death mixed up with his own moneys, does not affect the validity of the trust.[5]

Assignment by *cestui que trust*.

Notice.

When property is vested in a trustee, the *cestui que trust* may make a valid assignment of his beneficial interest, and the assignee will have the right to enforce it by proceeding against the trustee.[6] Notice to the trustee is not necessary to perfect the trust, even as against a subsequent volunteer who does give notice. As against the settlor an equitable interest is perfectly transferred without notice.[7] But a voluntary assignment of a mere expectancy in an equitable interest, not communicated to the trustees, does not amount to the creation of a trust.[8] If notice is not given, the trustee will be justified in paying over the fund to the grantor.[9] And if the settlor conveys his equitable interest

[1] 8 Jur., N. S., 803.

[2] Sloane *v.* Cadogan, Sugd. V. and P., 11th Ed., App; Edwards *v.* Jones, 1 M. and C., 238; Milroy *v.* Lord, 8 Jur, N. S., 806.

[3] Fortescue *v.* Barnett, 3 M. and K., 36; Pearson *v.* Amicable Assurance Co., 27 Beav., 229; Pedder *v.* Mosely, 31 Beav., 159; Kekewich *v.* Manning, 1 D. M. G., 187.

[4] Kiddill *v.* Farnell, 3 Sm. and G., 428; Weale *v.* Ollive, 17 Beav., 252; Woodford *v.* Charnley, 28 Beav., 96.

[5] Thorpe *v.* Owen, 5 Beav., 224.

[6] Sloane *v.* Cadogan, Sugd. V. and P., 11th Ed., App; Kekewich *v.* Manning, 1 D. M. G., 176; Donaldson *v.* Donaldson, Kay, 711; Voyle *v.* Hughes, 2 S. and G., 18; Pearson *v.* Amicable Assurance Co., 27 Beav., 229; *Re* Way, 2 D. J. and S., 365; *In re* King L. R., 14 C. D., 179.

[7] Burn *v.* Carvalho, 4 M. and Cr., 690; Donaldson *v.* Donaldson, Kay, 711; Sloper *v.* Cottrell, 6 E. and B., 504; Gilbert *v.* Overton, 2 H. and M., 110.

[8] Meek *v.* Kettlewell, 1 Hare, 464; affd. 1 Phillips, 342; Penfold *v.* Mould, L. R., 4 Eq., 564.

[9] Donaldson *v.* Donaldson, Kay, 711.

to trustees, and directs them to hold it upon trust for another, that will be as effectual as if he had declared himself a trustee.[1] So it will be sufficient if he directs his trustees to stand possessed of the property upon the new trusts,[2] or even if he assigns it to the new *cestui que trust* without the intervention of a trustee.[3]

What amounts to a valid declaration of trust.

A voluntary settlement may be effected by a declaration of trust, by which the owner of property declares either himself, or another person in whom the property is vested, a trustee for the voluntary grantee.[4] A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument.[5] If the settlor shows no intention of keeping a control over the settled property otherwise than as a trustee for the objects of his bounty, the trust will be effectual.[6] The tendency of modern decisions is to construe a voluntary settlement or gift inoperative, as a complete transfer of the property as a declaration of trust, if this can be done consistently with the previous authorities.[7]

A direction by the beneficial owner of property to his trustees to hold it for others than himself acted upon by the trustees is valid as a declaration of trust. Thus, where the *cestui qui trust* of money in the hands of a trustee, by deed without consideration, directed part of the dividends to be paid by him for the maintenance of an infant, or stranger, and covenanted to indemnify him, and agreed to allow the same out of the dividends, and the trustee accepted the new trust and acted upon the deed, it was held that there was a valid executed trust created which could not be revoked.[8]

A receipt in the form "received of *A*, for the use of *B*, £100, to be paid to *B* at *A.*'s death" is a sufficient declaration

[1] Gilbert *v.* Overton, 2 H. and M., 110.

[2] Rycroft *v.* Christy, 3 Beav, 238; M'Fadden *v.* Jenkins, 1 Hare, 458; Lambe *v.* Orton, 1 Dr. and S., 125.

[3] Cotteen *v.* Missing, 1 Mad., 176; Collinson *v.* Pattrick, 2 Keen, 123; Godsal *v.* Webb, *ib.*, 99.

[4] Collinson *v.* Pattrick, 2 Keen, 123.

[5] Kekewich *v.* Manning, 1 D. M. G., 176.

[6] Wheatley *v.* Purr, 1 Keen, 551; Vandenberg *v.* Palmer, 4 K. and J., 204.

[7] See Kekewich *v.* Manning, 1 D. M. G., 176; Richardson *v.* Richardson, L. R., 3 Eq., 686.

[8] Rycroft *v.* Christy, 3 Beav., 238; and see Bentley *v.* Mackay, 15 Beav., 12; M'Fadden *v.* Jenkyns 1 Ph., 153; Meek *v.* Kettlewell, *ib.*, 342; Gilbert *v.* Overton, 2 H. and M., 110.

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of trust.[1] In *Grant* v. *Grant*,[2] Lord Romilly said, that if *A*, having a sum of consols, were to say to *B*, "I give you that sum," or to *C* "I have given that sum to *B*," that would be sufficient to make *A* trustee for *B*. See also *Milroy* v. *Lord*.[3] In *Morgan* v. *Malleson*,[4] the donor made and signed a memorandum, "I hereby give and make over to *A* a bond," specifying it, but retaining it in his own possession; and it was held, that there had been a sufficient declaration of trust in favour of *A*.[5]

A banker, who debits himself in his books with money in favour of another, thereby declares himself a trustee of it.[6] So, where a person deposits securities for money in the hands of a trustee, stating that he intends them as a provision for the voluntary grantee.[7]

Ineffectual assignment.

An assignment, or attempted assignment, by the grantor, of property, in a way which is ineffectual to pass the interest, will be good if the assignment is upon trust for the grantee in such terms that the Court can construe it as a declaration of trust by the grantor.[8]

Chose-in-action.

An assignment of a *chose-in-action*, with a power-of-attorney to enforce payment, coupled with a declaration that the fund shall be held upon certain trusts for the benefit of the assignor, and ultimately of the assignee, is valid.[9] And a declaration of trust will be valid though the settlor may retain a control over the fund[10] or keep the instrument declaring the trust in his possession.[11] A mere expression of intention to be carried into effect by some future act does not amount to a declaration of trust.[12]

Subsequent disclaimer by trustee.

If a settlor conveys his property to a trustee in such a manner as to completely divest himself of it, and the

[1] Moore *v.* Darton, 4 DeG. and Sm., 517; see also Paterson *v.* Murphy, 11 Hare, 88.
[2] 34 Beav., 623. [3] 8 Jur., N. S., 809. [4] L. R., 10 Eq., 475.
[5] *In re* Bellasis' Trusts, L. R., 12 Eq., 218; Warriner *v.* Rogers, L. R., 16 Eq., 349.
[6] Stapleton *v.* Stapleton, 14 Sim., 186.
[7] Watson, 284, citing Arthur *v.* Clarkson, 14 W. R. (Eng.), 754.
[8] Airey *v.* Hall, 3 Sm and G., 315; Parnell *v.* Hingston, *ib.*, 337.
[9] Parnell *v.* Hingston, 3 Sm. and G., 337; see also Lewin, 7th Edn., p. 64, and *In re* King, L. R., 14 C. D., 179.
[10] Wheatley *v.* Purr, 1 Keen, 551; Vandenberg *v.* Palmer, 4 K. and J., 204.
[11] *Re* Way's Trust, 2 DeG. J. S., 365; Fletcher *v.* Fletcher, 4 Hare, 67; Hope *v.* Harman, 11 Jur., 1097.
[12] Bayley *v.* Boulcott, 4 Russ., 345.

trustee subsequently disclaims, the accident of the disclaimer has been held not to vitiate the deed, but the Court will appoint a new trustee.[1]

If the person in whose favour a voluntary gift is made incurs expense in respect of the property, the subject of the gift, with the sanction of the donor, he may call for a conveyance of it.[2]

Settlor cannot revoke voluntarily.

A complete voluntary settlement cannot be revoked by a subsequent voluntary settlement, even if the property becomes re-vested in the settlor, for he will then take it not absolutely, but as a trustee.[3]

According to Shiah law, a man who devotes property to charitable or other uses, and transfers the proprietary right therein to a trustee, cannot, at his pleasure, take it back from the trustee, whom he has constituted the owner, and give it to another person, unless, on the creation of the trust, he has reserved to himself the right to do so in express terms.[4]

But if a person, without the privity of any one, and without receiving consideration, makes a disposition as between himself and trustees for purposes connected with himself, he is merely directing the mode in which his own property shall be applied for his own benefit, and the deed will operate merely as a power to the trustees and will be revocable by the party making it, for the settlor being the only *cestui que trust*, may direct the disposition of his own trust-fund.[5]

Setting aside voluntary settlement.

If a voluntary settlement has been obtained by fraud or undue influence, or has been executed under a mistake, it may be set aside.[6]

Defrauding creditors.

A voluntary settlement made with the intention of defrauding creditors will be void as against them under the Statute 13 Eliz., cap. 5.[7] This Statute is in force in the

[1] Lewin, 7th Ed., 64, citing Jones *v.* Jones, W. N., 1874, p. 190.

[2] Dillwyn *v.* Llewelyn, 4 DeG. F. and J., 517.

[3] Newton *v.* Askew, 11 Beav., 145; Ellison *v.* Ellison, 6 Ves., 656; Smith *v.* Lyne, 2 Y. & C. C. C., 345; Paterson *v.* Murphy, 11 Hare, 88.

[4] Hidait-oon-nissa *v.* Syud Afzul Hossein, 2 N. W. P., 420.

[5] Kanye Dass Byragee *v.* Ramgopal Ghose, 16 S. D. A., 23.

[6] Huguenin *v.* Basley, 14 Ves., 273; Forshaw *v.* Welsby, 30 Beav., 243; Nanney *v.* Williams, 22 Beav., 452; Davies *v.* Otty, 35 Beav., 208; Bindly *v.* Mulloney, L. R., 7 Eq., 343; Manning *v.* Gill, L. R., 13 Eq., 485; Rujabai *v.* Ismail Ahmed, 7 Bom., 35.

[7] Gooche's case, 5 Rep., 60, *a*; and Nunn *v.* Wilson, 8 T. R., 521; *Doe v.* Ball, 11 M. & W., 531.

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Presidency-Towns.[1] In *Sham Kissore Shaw* v *Cowie*[2] it was held to be applicable to persons other than European British subjects; and in *Gnanabhai* v. *Srinivasa Pillai*,[3] the Court say that the principles applied in the English cases may fully be made applicable to voluntary transactions between natives.[4] But in *Azimunnissa Begum* v. *Dale*,[5] Bittleston, J., seemed to think that the Statute did not apply.

The absence of consideration is taken to be comprised in the term 'fraudulent,' though the Act does not specially refer to voluntary conveyances in so many words.[6] But the extent of the value given is not taken into consideration; the question is, whether the transaction was one of bargain or of gift merely, and the fact that some value, *e.g.*, a covenant to indemnify against expenses, was given, may be proved *aliunde*.[7] Volunteers, who are creditors, for instance, under bonds or obligations given without valuable consideration, are as much entitled to the benefit of the Statute as any other creditors.[8]

To what property Statute applicable.

An assignment of property which cannot be taken in execution is not, within the words of the Statute, an assignment of property with the intent to delay creditors, inasmuch as creditors could never have had execution or satisfaction out of such property.[9] An assignment of *choses-in-action* is not within the Statute during the lifetime of the assignor, except as regards such as can be taken in execution.[10]

Question of fraud is one of fact.

The question as to whether the assignment was with the intent to hinder, delay, or defraud creditors, is one of fact; circumstances of suspicion do not amount to proof of fraud,[11] even when the conveyance is absolute and the grantor remains in possession, though this is generally

[1] See Stokes's Older Statute, Introd., iv.
[2] 2 Ind. Jur., 7. [3] 4 Mad. H. C., 84.
[4] And see Soodheekeena Chowdrain *v.* Gopee Mohun Sein, 1 W. R., 41; Judah *v.* Mirza Abdool Kurreem, 22 W. R., 60.
[5] 6 Mad. H. C., 474.
[6] *Doe v.* Manning, 9 East, 59; *Doe* v. Rusham, 17 Q. B., 723; Willats *v.* Busby, 5 Beav., 193.
[7] Pott *v.* Todhunter, 2 Coll., 76; Townend *v.* Toker, L. R., 1 Ch., 446.
[8] Adames *v.* Hallett, L. R., 6 Eq., 468.
[9] Rider *v.* Kidder, 10 Ves., 360; Norcutt *v.* Dodd, Cr. and Ph., 100; Barrack *v.* McCulloch, 3 K. and J., 110; Stokoe *v.* Cowan, 29 Beav., 637.
[10] Norcutt *v.* Dodd, Cr. and Ph., 100.
[11] Martindale *v.* Booth, 3 B. and Ad., 498; Hale *v.* Saloon Omnibus Co., 4 Drew., 492.

considered to be an indication or badge of fraud.[1] But where the conveyance is not absolute, to take effect immediately, as in the case of mortgage, and the mortgagee is not to take possession until a default in the payment of the mortgage-money, then, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud.[2] If it be found as a fact that there was no fraud, the conveyance will, as a rule, be good under the Statute.[3]

Assignment by way of mortgage.

When the assignment is not absolute, but by way of mortgage, as the retention of the possession by the mortgagor until default in payment is in accordance with the deed, the assignment is not fraudulent.[4]

Valuable consideration not support when *mala fides*.

A valuable consideration will not support a conveyance if there be *mala fides*, and an intent to delay or defraud creditors. Even an ante-nuptial marriage settlement may be set aside. Of course, those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have a task of great difficulty to discharge.[5] So, if the object of the conveyance be to place the property beyond the reach of process, or to defraud future creditors, it will be void, though it may be, or may purport to be, for value.[6] An assignment by a prisoner, on the eve of trial for felony, of all his effects upon certain trusts, is within the Statute, and void as against the Crown;[7] but otherwise, if made *bonâ fide* and for value, for instance, to secure an existing debt.[8]

Sale to defeat Crown.

Assignment in favour of one creditor.

A sale of property for good consideration is not fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judment-creditor.[9] And a *bonâ fide* assignment for the benefit of creditors

[1] Twyne's case, 3 Rep., 80; Martindale *v.* Booth, 3 B. & Ad., 498.
[2] 1 Sm. L. C., 15.
[3] Martindale *v.* Booth, 3 B. and Ad., 498; Freeman *v.* Pope, L. R., 5 Ch., 538.
[4] Edwards *v.* Harben, 2 T. R., 587.
[5] Harman *v.* Richard, 10 Hare, 89; Strong *v.* Strong, 18 Beav., 408; Bott *v.* Smith, 21 Beav., 511; Columbine *v.* Penhall, 1 Sm. and G., 228; Acraman *v.* Corbett, 1 J. & H., 410; Bulmer *v.* Hunter, L. R., 8 Eq., 46.
[6] Barling *v.* Bishopp, 29 Beav., 417; Reese River Co. *v.* Attwell, L. R., 7 Eq., 347; Blenkinsopp *v.* Blenkinsopp, 1 D. M. G., 495. See, however, Darvill *v.* Terry, 6 H. and N., 807; Hale *v.* Saloon Omnibus Co., 4 Drew., 492.
[7] Saunders *v.* Watson, 4 Giff., 179.
[8] Chowne *v.* Baylis, 31 Beav., 351.
[9] Wood *v.* Dixie, 7 Q. B., 892.

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generally is not within the Act, though made with the intent to delay an individual creditor.[1] But an absolute assignment, in consideration of a past debt, of property of much greater amount than the debt, by a person in a dying state, is void as against other creditors under the Statute.[2] The Statute only mentions feigned and fraudulent gifts and conveyances. But, however, voluntary conveyances or settlements have been held to be within the Statute if made to hinder or defraud creditors. The mere fact that the settlement is voluntary will not invalidate it. The principle is this: The language of the Act being, that any conveyance of property is void against creditors if made with intent to defeat, hinder, or delay creditors,—the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion, that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors.[3] Nor will the fact that the settlement comprises all the settlor's property be sufficient ground for setting it aside.[4] And extrinsic evidence is admissible to show, that valuable consideration was in fact given for a deed which appears on the face of it to be voluntary,[5] or that the settlement was *bonâ fide*, though the practice of framing deeds so as not to show the real nature of the transaction carried out by them ought to be discouraged.[6] The indebtedness of the settlor at the time of the settlement is usually relied upon as showing the intent to delay and defraud creditors; but it is only one of the circumstances which the Court has to consider.[7] The indebtedness need not be to the extent of insolvency, though this was formerly held to be necessary.[8] But this is not the law now. "With respect to voluntary settlements," said Wood, V. C.,[9] "the result of the

Voluntary settlements within Statute.

Indebtedness of settlor.

[1] Pickstock *v.* Lyster, 3 M. & S., 371; Harland *v.* Binks, 15 Q. B., 713; Evans *v.* Jones, 3 H. & C., 423.

[2] Stokoe *v.* Cowan, 7 Jur., N. S., 901. As to the right of a creditor to follow the assets of a deceased Hindu into the hands of a purchaser for value, see Jamyatram Ramchandra *v.* Parbudhas Hathi, 9 Bom., 116.

[3] Thompson *v.* Webster, 4 Drew, 632; Holloway *v.* Millard, 1 Madd., 414; Holmes *v.* Penney, 3 K. & J., 90.

[4] Alton *v.* Harrison, L. R., 4 Ch., 622; Allen *v.* Bonnett, L. R., 5 Ch., 577; *Ex parte* Games, L. R., 12 C. D., 314.

[5] Gale *v.* Williamson, 8 M. and W., 405.

[6] Thomson *v.* Webster, 4 DeG. and J., 600.

[7] Richardson *v.* Smallwood, Jac., 556.

[8] Lush *v.* Wilkinson, 5 Ves., 384.

[9] Holmes *v.* Penney, 3 K. and J., 99; Crossley *v.* Elsworthy, L. R., 12 Eq., 158; Taylor *v.* Coenen, L. R., 1 Ch. Div., 636.

authorities is, that the mere fact of a settlement being voluntary is not enough to render it void against creditors: but there must be unpaid debts which were existing at the time of making the settlement, and the settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who, at the time of making the settlement, were creditors of the settlor.[1]

On the other hand, although indebtedness to this extent may not exist, and the property of the grantor, not subject to the conveyance, may be enough to pay his debts existing at the time of the conveyance, it will not necessarily be good. "If," said Lord Westbury, C.,[2] "the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent 'to delay, hinder, or defraud creditors,' or that, after the settlement, the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts,—that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the Statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered, or defrauded."

The mere fact that the settlement has in the event prevented a creditor, who was such when it was made, from

[1] See also Skarf *v.* Soulby, 1 Mac. and G., 375; Thompson *v.* Webster, 4 DeG. and J., 600; affd., 7 Jur. (N. S.), 531; Kent *v.* Riley, L. R., 14 Eq., 190; Gnanabhai *v.* Srinivasa Pillai, 4 Mad. H. C., 84.

[2] Spirett *v.* Willows, 3 D. J. and S., 293.

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obtaining payment of his debt, is not of itself sufficient to enable him to set it aside.[1]

Secured debts.

Although the settlor may be indebted, yet if the debts are secured,[2] or if they do not exceed such ordinary debts as every person must incur, as for instance, for ordinary household expenses, and if the settlor has the means of paying them,[3] the settlement will not be void, and *à fortiori* the settlement will be good, if the settlor was solvent at the time he made it.[4]

Consideration paid to third person.

A conveyance, if otherwise within the Statute, will not be taken out of it merely because the consideration for it is not for the benefit of the grantor, but of another person. Thus, where a person in insolvent circumstances sold his business in consideration, in part, of an annuity to his wife, it was held that the wife was not entitled to the annuity as against her husband's creditors.[5]

Voluntary settlement only void as against existing creditors.

A merely voluntary settlement would seem to be void only as against existing creditors,[6] but subsequent creditors may sue to set it aside if any of the antecedent debtors remain unsatisfied.[7] If it can be shown that the settlor, though indebted at the time he made the settlement, has since paid every debt, it is difficult to say that he executed it with an intention to defeat or delay creditors, since his subsequent payment shows that he had not such an intention.[8]

Unless fraud.

A deed, in fact fraudulent, and executed expressly to hinder and delay future creditors, may be impeached by them, though there were no creditors at the date of the deed, or they have subsequently been paid. And it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that it would necessarily have that effect.[9]

[1] Freeman *v.* Pope, L. R., 5 Ch., 538. See also Crossly *v.* Elsworthy, L. R., 12 Eq., 158; Mackay *v.* Douglas, L. R., 14 Eq., 106; Cornish *v.* Clark, L. R., 14 Eq., 184; Azim-un-Nissa Begum *v.* Dale, 6 Mad. H. C., 469.

[2] Stephens *v.* Olive, 2 Bro. C. C., 90; Skarf *v.* Soulby, 1 Mac. & G., 375.

[3] Skarf *v.* Soulby, 1 Mac. & G., 375; Lush *v.* Wilkinson, 5 Ves., 387; Kent *v.* Riley, L. R., 14 Eq., 190.

[4] Kent *v.* Riley, L. R., 14 Eq., 190.

[5] French *v.* French, 6 D. M. G., 95; Neale *v.* Day, 4 Jur., N. S., 1225.

[6] Kidney *v.* Coussmaker, 12 Ves., 136; Townsend *v.* Westacott, 4 Beav., 58; Spirett *v.* Willows, 3 DeG. J. and S., 293.

[7] Richardson *v.* Smallwood, Jac., 558; Ede *v.* Knowles, 2 Y. and C. C. C., 172; Jenkyn *v.* Vaughan, 3 Drew., 419; Freeman *v.* Pope, L. R., 5 Ch., 538.

[8] Jenkyn *v.* Vaughan, 3 Drew., 425.

[9] Barling *v.* Bishopp, 29 Beav., 417; Reese River Company *v.* Atwell, L. R., 7 Eq., 347; Ware *v.* Gardner, L. R., 7 Eq., 317; Freeman *v.* Pope, L. R., 5 Ch., 538.

It is not necessary that a creditor should have obtained a judgment, lien, decree or charging order; without any of these he may sue to impeach the validity of a fraudulent conveyance. But he must have obtained such a judgment, &c., before he can have execution against the property comprised in the deed.[1]

How far settlement void.

The settlement is only void to the extent necessary to deal with the estate for the satisfaction of the creditors, the creditors of the settlor,[2] and is good as against the grantor and his assignees,[3] parties who assent to, and concur in, it;[4] such as volunteers claiming under him, for instance, devisees[5] and strangers.[6]

In all other respects it is good, and will not be set aside merely because it is voluntary.[7]

If the conveyance or settlement be voidable, the voluntary grantee may, before it is avoided, make a valid transfer to a purchaser for value.[8]

Insolvent Act, s. 9.

The Insolvent Act 11 and 12 Vict., cap. 21, provides, section 9, that if any person who would be deemed a trader liable to become bankrupt, with intent to defeat or delay his creditors, shall make any fraudulent gift, grant, conveyance, delivery, or transfer of any of his lands, tenements, money, goods, or chattels, such an act may be deemed an act of insolvency on which his creditors may petition.

Section 24.

Section 24 of the Insolvent Act provides, "that if any insolvent who shall file his petition for his discharge under the Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever to any creditor, or to any other person, in trust, for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in in-

[1] Reese River Company *v.* Atwell, L. R., 7 Eq., 347; Colman *v.* Croker, 1 Ves., J., 161; Goldsmith *v.* Russell, 5 D. M. G., 547; Collins *v.* Burton, 4 D. and J., 612.

[2] Curtis *v.* Price, 12 Ves., 89.

[3] Robinson *v.* M'Donnell, 2 B. and Ald., 134.

[4] Olliver *v.* King, 2 Jur., N. S., 312.

[5] Villiers *v.* Beaumont, 1 Vern., 100.

[6] Bessey *v.* Windham, 6 Q. B., 166.

[7] Bill *v.* Cureton, 2 M. and K., 503; De Hoghton *v.* Money, L. R., 1 Eq., 154.

[8] Morewood *v.* South Yorkshire Railway Company, 3 H. and N., 798; Daubeny *v.* Cockburn, 1 Mer., 626.

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solvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed, and is hereby declared to be, fraudulent and void as against the assignees of such insolvent."

To constitute a fraudulent preference, two things must concur—1*st*, the act of preference must be voluntary on the part of the debtor; 2*ndly*, it must have been done by him when in such a state of insolvency, as that, it may or must be inferred, that bankruptcy was then in his consideration. And therefore when an assignment or conveyance is made by a debtor to a creditor upon the demand of the latter for payment or security, it will not be fraudulent.[1]

Defrauding purchaser.

The Statute 13 Eliz., cap. 5, with which we have been dealing, relates to creditors. Another Statute of the same reign, which applies in India to the same extent as 13 Eliz., cap. 5[2] (27 Eliz., cap. 4), made perpetual by 30 Eliz., cap. 18, section 3, relates to purchasers. This Statute, in substance, enacts, that all conveyances, grants, charges, leases, estates, incumbrances, and limitations of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, made for the intent to defraud and deceive such person or persons, bodies politic or corporate, as had purchased, or should purchase, in fee-simple, fee-tail, for life, lives or years, the same lands, tenements, or hereditaments, or any part thereof, or to defraud and deceive such as had or should purchase any rent or commodity in or out of the same or any part thereof, shall be deemed or taken only as against that person and persons, bodies politic and corporate, his and their representatives, and persons claiming under them for good consideration, utterly void, frustrate, and of none effect, any pretence, colour, feigned consideration, to the contrary notwithstanding.

The Statute (s. 4) does not extend to defeat any con-

[1] *Ex parte* Tempest, L. R., 10 Eq., 648; affd., L. R., 6 Ch., 70. As to a loan made on the eve of insolvency, see *In re* Bungseedhur Khettry, I. L. R., 2 Calc., 359; and as to a pledge of goods by an insolvent and re-delivered to him on commission sale, see *In re* Murray, I. L. R., 3 Calc., 58.

[2] See *ante*, p. 59.

veyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use, of, on, or out of any lands, &c., for good consideration and *bonâ fide*.

Statute does not extend to personal estate.

The Statute does not extend to settlements of personal estate,[1] being in this respect unlike the 13 Eliz., cap. 5; and therefore a voluntary settlement of chattels, personal, will not be defeated by a subsequent sale.[2] Mortgagees[3] and lessees[4] are purchasers *pro tanto;* but a judgment-creditor is not, and has, therefore, no title on that ground to set aside a prior voluntary settlement.[5]

When settlor may defeat settlement.

The settlor himself cannot defeat the settlement by an admission of the receipt of money,[6] and if he has contracted to sell, the contract may be specifically enforced against him;[7] but a Court of Equity will not, as against an unwilling purchaser, assist a vendor to defeat a prior voluntary settlement made by himself, though it will if the purchaser is willing to complete on having a good title,[8] or if there has been part performance by the purchaser receiving possession and payment of part of the purchase-money;[9] and notice to the purchaser of the settlement is immaterial.[10] But the purchaser may sue the vendor and trustees and *cestuis que trustent* to enforce specific performance,[11] though he cannot require the voluntary deed to be delivered up to him to be cancelled.[12] The voluntary grantee has no equity to the purchase-money as against the vendor.[13]

Subsequent purchase must be for value.

To avoid a prior conveyance, however, to a volunteer, the subsequent purchase must be for value, and the consideration must not be grossly inadequate, or a presumption

[1] Jones *v.* Croucher, 1 S. and S., 315.
[2] Bill *v.* Cureton, 2 M. and K., 503; M'Donnell *v.* Hesilrige, 16 Beav., 346; Meek *v.* Kettlewell, 1 Hare, 473.
[3] *Doe v.* Webber, 1 A. and E., 733; Dolphin *v.* Aylward, L. R., 4 H. L., 486; Ede *v.* Knowles, 2 Y. and C. C. C., 173.
[4] Goodright *v.* Moses, 2 W. Bl., 1019.
[5] Beavan *v.* Lord Oxford, 6 D. M. G., 507.
[6] *Doe v.* Webber, 1 A. and E., 733.
[7] Buckle *v.* Mitchell, 18 Ves., 100; Dakin *v.* Whimper, 26 Beav., 568. See Azimunnissa Begum *v.* Dale, 6 Mad. H. C., 474.
[8] Smith *v.* Garland, 2 Mer., 123; Clarke *v.* Willott, L. R., 7 Ex., 313; Peter *v.* Nicholls, L. R., 11 Eq., 391.
[9] Peter *v.* Nicholls, L. R., 11 Eq., 391.
[10] Buckle *v.* Mitchell, 18 Ves., 100; *Doe v.* Manning, 9 East, 59.
[11] Daking *v.* Whimper, 26 Beav., 568; Townend *v.* Toker, L. R., 1 Ch., 447.
[12] De Hoghton *v.* Money, L. R., 1 Eq., 154.
[13] Dakin *v.* Whimper, 26 Beav., 568.

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of fraud and collusion will arise.[1] When the subsequent conveyance is a mortgage, the voluntary grantees will be entitled, subject to the mortgage.[2] There is an exception to the rule in the case of charities, for a voluntary endowment of a charity will not be defeated by a subsequent conveyance for value.[3]

How far voluntary settlement defeated.

The operation of the Statute is to destroy the estates created by the voluntary conveyance as against the purchaser, who cannot, therefore, be affected by the trusts of those estates.[4] But the voluntary settlement will be defeated so far only as may be necessary to give effect to the subsequent conveyance.[5] A purchaser from the heir or devisee of a person who has made a voluntary settlement is not entitled to set aside the settlement.[6]

Personalty settled.

If personalty be settled on certain specified trusts in favour of volunteers, and the trusts are acted upon, the settlement cannot be altered by any subsequent settlement.[7]

Subsequent will.

As a person claiming under a will is a volunteer, a voluntary settlement will not be revoked by a subsequent will disposing of the settled property, even if the object is the payment of the settlor's debts;[8] And a purchase in the name of a wife or child is not within this Statute.[9]

Conveyances with power of revocation.

The 5th section of the Statute 27 Eliz., cap. 4, in substance declares, that if any person shall make any conveyance, gift, grant, devise, charge, limitation of use or assurance of, in or out of any lands, tenements, or hereditaments, with any clause of revocation, determination, or alteration at his will or pleasure, and after such conveyance, gift, &c., shall convey or charge lands, &c., for money or other good consideration—the said first conveyance or grant not being revoked—the said former conveyance, grant, &c., shall, as against those claiming under the latter conveyance, &c., be deemed void.

[1] *Doe v.* Routledge, Cowp., 705; Metcalfe *v.* Pulvertoft, 1 V. & B., 184.
[2] Hales *v.* Cox, 32 Beav., 118.
[3] Corporation of Newcastle *v.* The Attorney-General, 12 C. and F., 402.
[4] Currie *v.* Nind, 1 M. and Cr., 17.
[5] Croker *v.* Martin, 1 Bligh., N. S., 573; Dolphin *v.* Aylward, L. R., 4 H. L., 486.
[6] *Doe v.* Rusham, 17 Q. B., 723; Lewis *v.* Rees, 3 K. and J., 138.
[7] Newton *v.* Askew, 11 Beav., 145; Rycroft *v.* Christy, 3 Beav., 238.
[8] Bale *v.* Newton, 1 Vern., 464; Jeffreys *v.* Jeffreys, Cr. and Ph., 138.
[9] Christy *v.* Courtenay, 13 Beav., 96; Barrack *v.* M'Culloch, 3 K. & J., 110; Drew *v.* Martin, 2 H. and M., 130.

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The Act does not apply to mortgages made *bonâ fide* and for value (s. 6). It avoids the first conveyance, though to a purchaser for value,[1] and cannot be evaded by making the exercise of the power apparently conditional, as that the consent of a third person appointed by the grantor shall be obtained.[2] Effect of Statute.

The reservation of an unlimited power of leasing is in effect a general power of revocation.[3] So, a power to mortgage, unless it be limited to a specified sum upon an estate of much greater value.[4]

A settlement with power of revocation is void as against a subsequent purchaser, although the settlor has released or extinguished the power previously to the sale;[5] unless the release was for value, the settlement containing the power being also for value.[6]

Conveyances or settlements will not be void as against purchasers or creditors if supported by a valuable consideration, except in cases where a power of revocation is reserved to the settlor, the mere *quantum* of consideration is in general not material.[7] Valuable consideration.

Marriage, according to English law, is a valuable consideration, and will support a settlement.[8] Though, as a general rule, a settlement after marriage even upon a wife or children is voluntary, there being merely a moral consideration which will not support a promise or settlement.[9] But an additional portion received by the wife after the marriage will support a post-nuptial settlement on her and her children.[10] Marriage.

A release by a wife of the past income of property settled to her separate use, or her concurrence in a particular settlement,[11] or the release of her jointure,[12] or right

[1] Hungerford *v.* Earle, 2 Vern., 261.
[2] Standen *v.* Bullock, 3 Rep., 82, *b*; Lavender *v.* Blackston, 3 Keb., 527.
[3] Lavender *v.* Blackston, 3 Keb., 527.
[4] Jenkins *v.* Keymis, 1 Lev., 150.
[5] Bullock *v.* Thorne, cited in Sug. V. & P., 722.
[6] Sug. V. and P., 722.
[7] Townend *v.* Toker, L. R., 1 Ch., 446; Bayspoole *v.* Collins, L. R., 6 Ch., 228.
[8] Ford *v.* Stuart, 15 Beav., 499; Fraser *v.* Thompson, 4 D. and J., 661.
[9] Jeffrey *v.* Jeffrey, 1 Cr. and Ph., 138; Moore *v.* Crofton, 3 J. and Lat., 438.
[10] Ward *v.* Shallett, 2 Ves., 18; Ramsden *v.* Hylton, *ibid*, 308.
[11] Harman *v.* Richards, 10 Hare, 81.
[12] Ball *v.* Burnford, Prec. Ch., 113.

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of dower,[1] or a charge by her upon her own estate,[2] will support a settlement by her husband. So the payment of the settlor's debts by a third person is a good consideration for a settlement upon his wife and children,[3] and a loan to him will be a good consideration for a settlement upon himself for life with remainder to his children.[4]

So if a person incur expenses on the faith of a settlement, and in addition enters into a covenant to indemnify the settlor against certain incumbrances, there will be a good consideration for a settlement.[5]

The release or surrender of a voluntary bond is a good consideration to support a substituted bond, unless with a fraudulent design, as by an insolvent to substitute an available security for one that could not avail against creditors.[6]

Settlements founded upon immoral considerations are of course void. See *ante*, p. 48.

Extrinsic evidence admissible to show consideration.

A settlement in form voluntary may be shown from extrinsic evidence to have been made for valuable consideration.[7] And, if necessary, an inquiry may be directed as to whether the settlement was founded on any and what valuable consideration, for the consideration need not actually appear.[8]

In Bayspoole v. *Collins*,[9] the owner of property, which was worth, beyond an incumbrance to which it was subject, about £1,300, was persuaded by *A*, a relative of his wife, to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, *A* lent him £150 on his promissory note. The settlement was executed, but no mention was made in it of the advance of £150. It was held, that the loan was a sufficient valuable consideration to support the settlement against a subsequent mortgagee of the settlor.

A conveyance to a trustee in trust to pay the debts of the grantor, although it may be void as regards them, will,

[1] Jones *v.* Boulter, 1 Cox, 288.
[2] Lady Arundel *v.* Phipps, 10 Ves., 139.
[3] Holmes *v.* Penny, 3 K. and J., 90 ; Scott *v.* Scott, 4 H. L. Cas., 1065.
[4] Thompson *v.* Webster, 7 Jur., N. S., 531.
[5] Townend *v.* Toker, L. R., 1 Ch., 446.
[6] *Ex parte* Berry, 19 Ves., 218.
[7] Pott *v.* Todhunter, 2 Coll., 76.
[8] Kelson *v.* Kelson, 10 Hare, 385 ; Gully *v.* The Bishop of Exeter, 2 Moo. and P., 266 ; Mildmay's case, 1 Rep., 176 ; Leifchild's case, L. R., 1 Eq., 231 ; Tull *v.* Parlett, M. and M., 472.
[9] L. R., 6 Ch., 228.

nevertheless, entitle the assignee to take proceedings against persons in possession of the property which is assigned.[1]

Settlement not set aside as against grantors.

Where a settlement or conveyance, whether by transfer of property or declaration of trust respecting it, is effectual, and not open to objection upon any of the foregoing grounds, the grantor cannot avoid it, nor will the Court set it aside. Although the Court will not assist the completion of voluntary deeds, it does not lay down, as a rule, that they are always void; the mere alteration of intention is not sufficient to induce the Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor.[2]

And a settlement will not be revoked though the trustees of the property re-convey it to the grantor,[3] in which case they will be guilty of a breach of trust.[4]

So the settlement will remain in force, though the settled property may come back into the hands of the settlor.[5]

Voluntary settlement in expectation for death.

In *Forshaw* v. *Welsby*[6] it was held, that a voluntary settlement containing no power of revocation, made by a person in expectation of death, ought to be set aside at his instance, as it was not intended to be operative in the event of his recovery. Each case, however, must depend upon its own circumstances. The absence of a power of revocation in voluntary settlements is an important circumstance in considering them. When they are not intended to be irrevocable, such a power should be inserted. Where it is wanting, the argument is usually urged that the non-insertion is contrary to the intention of the settlor, particularly where the settlement is for the benefit of persons to be ascertained at a future time.[7]

The party taking a benefit under a voluntary settlement or gift containing no power of revocation has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irre-

[1] Glegg *v.* Rees, L. R., 7 Ch., 71.

[2] Bill *v.* Cureton, 2 M. and K, 503; Toker *v.* Toker, 31 Beav., 629; affd., 3 DeG. J. and S., 487; Shafto *v.* Adams, 4 Giff., 492.

[3] Ellison *v.* Ellison, 6 Ves., 656; Smith *v.* Lyne, 2 Y. and C. C. C., 345; Paterson *v.* Murphy, 11 Hare, 88.

[4] M'Donnell *v.* Hesilrig, 16 Beav., 346.

[5] Smith *v.* Lyne, 2 Y. and C. C. C., 345; Gilbert *v.* Overton, 2 H. and M., 110.

[6] 30 Beav., 243; and see Phillips *v.* Mullings, L. R., 7 Ch., 244.

[7] Forshaw *v.* Welsby, 30 Beav., 243: and see Nanney *v.* Williams, 22 Beav., 452; Hall *v.* Hall, L. R., 8 Ch., 430.

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vocable: and where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such a power, and the want of it will, in general, be fatal to the deed.[1]

Rectifying settlement.

The Court will not rectify a voluntary settlement at the instance either of the grantor or of the grantee, unless there has been a mistake common to all parties:[2] and where it does not express the intention of the parties, and is impeached, it cannot be reformed except with the consent of the donor.[3]

The mere retention of the instrument of settlement or gift by the settlor is immaterial, if there is nothing to show that the settlor did not intend it to operate immediately.[4]

Enforcement.

So is its destruction and the non-communication of its contents to the trustees or *cestui que trust*,[5] and if found cancelled among the papers of the grantor after his death, it will be enforced against his representatives upon the presumption that it was improperly cancelled.[6]

An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease, for the benefit of other persons, with a power of revocation, is valid, and is not testamentary.[7]

On whom binding.

A settlement complete and valid, having regard to the abovementioned rule, is binding on the settlor or grantor, and on his heirs and legal representatives and devisees,[8] and persons claiming under them though for value.[9]

A person who takes by title paramount to the settlement, who does no act to repudiate it, will, in general, be considered to have acquiesced in it.[10]

All who claim under the instrument or trust are entitled to the benefit of it, and a settlement in favour of

[1] Coutts *v.* Ackworth, L. R., 8 Eq., 558. See Prideaux *v.* Lonsdale, 1 D. J. and S., 433 ; Woollaston *v.* Tribe, L. R., 9 Eq., 44.

[2] Bentley *v.* Mackay, 31 Beav., 143 ; Broun *v.* Kennedy, 33 Beav., 133 ; Thompson *v.* Whitmore, 1 J. and H., 268 ; Lister *v.* Hodgson, L. R., 4 Eq., 30.

[3] Phillipson *v.* Kerry, 32 Beav., 628.

[4] *Doe v.* Knight, 5 B. and C., 671.

[5] Fletcher *v.* Fletcher, 4 Hare, 67 ; *Re* Way, 2 D. J. and S., 365.

[6] Sluysken *v.* Hunter, 1 Mer., 40.

[7] Tompson *v.* Brown, 3 M. and K., 32.

[8] Jeffreys *v.* Jeffreys, Cr. and Ph., 138 ; Hales *v.* Cox, 32 Beav., 118 ; Gilbert *v.* Overton, 2 H. and M., 110.

[9] Lewis *v.* Rees, 3 K. and J., 132 ; *Doe v.* Rusham, 17 Q. B., 723.

[10] Thompson *v.* Finch, 22 Beav., 316.

unborn children is, according to English law, binding and irrevocable unless a power of revocation be reserved.[1]

Creditors' deeds how far revocable.

A question frequently arises how far deeds for the payment of creditors are revocable. As to this it has been held, that a conveyance for the benefit of creditors is revocable if it has not been communicated to them,[2] but not if communicated to them, or some of them, and they assent to it.[3] A conveyance even to one creditor in trust for himself and others cannot be revoked after it has been communicated to him unless he has dissented.[4]

Johns v. James.

The principles applicable to creditors' deeds were fully discussed by the Lords Justices in the recent case of *Johns* v. *James*.[5] There a debtor conveyed all his property to the defendants upon trust to pay thereout a sum of £5,000, which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the plaintiff. The defendants realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The plaintiff brought an action against the defendants, asking for an account of the property, and that the debts of the plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the plaintiff. It was held, that the defendants were not trustees for the plaintiff. James, L. J., said :—"It appears to me to be too late now to question the principle of *Garrard* v. *Lord Lauderdale*.[6] That case seems to me to have proceeded upon the plainest notion of common sense. It is quite obvious that a man in pecuniary difficulties having a great number of debts which he could not meet, might put his property in the hands of certain persons to realize and pay the creditors in the best way they could. It was held by the Vice-Chancellor, and it has been affirmed, that really after all that is only making those particular persons who are called trustees his agents or attorneys. There might be a power-of-attorney from him to realize all his property, and relieve him from the difficulties he was in. If it were

[1] Petre *v.* Espinasse, 2 M. and K., 496 ; Bill *v.* Cureton, *ib.*, 503.

[2] Acton *v.* Woodgate, 2 M. and K., 492 ; Walwyn *v.* Coutts, 3 Mer., 707 ; Browne *v.* Cavendish, 1 J. and L., 606.

[3] Griffith *v.* Ricketts, 7 Hare, 307 ; Nicholson *v.* Tutin, 2 K. and J., 18 ; Bamonji Manikiji *v.* Maroj Palanji, 1 Bom. H. C., 233.

[4] Siggers *v.* Evans, 5 E. and B., 367 ; Montefiore *v.* Brown, 7 H. L. C., 241.

[5] L. R., 8 Ch. Div., 744. [6] 2 R. and M., 451.