LECTURE II.

Johns v. James.

supposed that such a deed as that created an absolute irrevocable trust in favour of everyone of the persons who happened at the time to be a creditor, the result might have been very often monstrous. It would give him no opportunity of paying a creditor who was pressing; no opportunity of settling an action; no opportunity of getting any goods for himself or his family the next day, or redeeming property pledged. So, where there was an actual conveyance on trust, it was held in *Wallwyn* v. *Coutts*,[1] that where it was for all the creditors, it must be assumed from the very nature of the transaction, and from the position of the assignor, that it was a thing for his own benefit, and not for the benefit of numbers of persons whom the trustees would probably have no means of ascertaining, and whose debts the trustees would probably have no means of knowing. If you once assumed that this was an absolute trust in favour of every creditor, every person who had a right to claim to be a creditor, or had some demand against him, everyone of those might have filed a bill, and the unfortunate trustee under those circumstances (who might have acted the part of a friend to the impecunious person) might have been liable to a thousand bills in Chancery, for he could not stop any of them until a decree was made in favour of all the creditors.

Those are some of the reasons that appear to me to have led the Court to say that such a deed as this is to be construed as a mandate, the same sort of mandate that a man gives when he gives his servant money, with directions to pay it in a particular way; it does not create any equitable or legal right in favour of a particular creditor. The right to the direction of the money is the right of the person who has put the money in the hands of his agent or steward, or whoever he may be. *Wallwyn* v. *Coutts*[1] laid that down as the law where the deed was for creditors generally. *Garrard* v. *Lord Lauderdale*[2] only extended it to the case where the names of the creditors were scheduled, and the amounts due were scheduled, and that was held not to make any difference; and from that time to this I believe that has been the doctrine of the Court. The deed itself does not create a trust in favour of all and every or any of the creditors. But circumstances may have occurred, circumstances may have existed, which did make the

[1] 3 Mer., 707. [2] 2 R. and M., 451.

assignment a trust or an obligation in favour of some particular person. If the creditor has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right, just as in the case where a man receives money from a person, on a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person. The person to whom he communicates it of course has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made. It seems to me that on principle you cannot create a right in *A* where the deed has not given him a right, because something has occurred giving *B* a right, who originally was in the same position as *A*. That was in fact the principle of the decision in *Acton* v. *Woodgate*,[1] for in that case there being beyond all question a trust deed in favour of all the creditors, including certain *post obit* creditors, whom the settlor was afterwards minded not to put on the same footing as his other creditors, the settlor directed that they should be excluded from the benefit of the deed; and it was held by the Court that it was perfectly in his power to do so, and the deed remained still as a deed to be executed in favour of all the creditors except the *post obit* creditors, and they were not *cestuis que trustent* by the deed. It has been called a partial revocation. It is not a case of revocation in one sense; you cannot revoke the deed, and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds. It appears to me that this is clearly a case of the same kind as *Wallwyn* v. *Coutts*,[2] and *Garrard* v. *Lord Lauderdale*,[3] *viz.*, the case of a creditor to whom no communication has been made, who has never been induced to act by anything that occurred by reason of the execution of the deed."

Execution of deed by creditors.

If a time be limited for the execution of the deed by the creditors, those who refuse to execute it will be excluded

[1] 2 My. & K., 492. [2] 3 Mer., 707. [3] 2 R. & My., 451.

LECTURE II.

from its benefits.[1] So if they claim adversely to it,[2] or act inconsistently with it.[3] And a creditor cannot be said to have acceded to the provisions of a composition deed unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed.[4]

But mere delay in executing the deed by creditors who nevertheless act under it will not disentitle them to participate in its benefits,[5] if they do eventually execute the deed or show in some way that they accept it.[6]

A creditor having security, who assents to, and executes, the deed, which contains a release by the creditors of the debts due to them, must share rateably with the other creditors and give up his security, unless the deed provides for his retaining it.[7]

Deed not communicated to creditors.

If there has been no communication to creditors, the trust, if not fully executed at the time of the settlor's death, would seem then to be at an end, subject to any special interest of the trustee himself; but not if the deed has been communicated to the creditors and acted upon, as this would constitute them *cestuis que trustent*, and make the deed irrevocable.[8]

Trust by will for payment of debts.

A trust by will for the payment of the debts of a third person in the discretion of trustees applies, it has been held, for the benefit of creditors subsequent to the death of the testator.[9] A debt barred by limitation will not be revived by a direction to pay debts;[10] but if not barred at the date of the deed or time of the death, the trust will prevent the operation of the Statute afterwards.[11]

A trustee of an estate devised for payment of debts, although he is executor, has no right of retainer, but must share rateably with the other creditors.[12]

[1] Johnson *v.* Kershaw, 1 DeG. & Sm., 260.
[2] Watson *v.* Knight, 19 Beav., 369.
[3] Field *v.* Lord Donoughmore, 1 Dr. & War., 227.
[4] Forbes *v.* Limond, 4 D. M. G., 298.
[5] Nicholson *v.* Tutin, 2 K. & J., 18; Raworth *v.* Parker, *ib.*, 163; Whitmore *v.* Turquand, 3 D. F. & J., 107; *Re* Baber's Trust L. R., 10 Eq., 554.
[6] Biron *v.* Mount, 24 Beav., 642.
[7] Buck *v.* Shippam, 1 Ph., 694; Cullingworth *v.* Loyd, 2 Beav., 385. As to the case of a creditor having the security of a surety, who himself holds security of the debtor, see Midland Bank *v.* Chambers, L. R., 4 Ch., 398.
[8] Harland *v.* Binks, 15 Q. B., 713; Cosser *v.* Radfords, 1 D. J. & S., 585; Siggers *v.* Evans, 5 E. & B., 367; Wilding *v.* Richards, 1 Coll., 655.
[9] Joel *v.* Mills, 7 Jur., N. S., 389.
[10] Burke *v.* Jones, 2 V. & B., 275; Joel *v.* Mills, 7 Jur., N. S., 389.
[11] Crallan *v.* Oulton, 3 Beav., 1. [12] Bain *v.* Sadler, L. R., 12 Eq., 570.

LECTURE III.

IMPLIED AND RESULTING TRUSTS.

Implied Trusts — Precatory Trusts — Objects, property, and trust must be described — Words of recommendation and entreaty — Intention to give absolutely — Intermediate class of cases — Maintenance — Agreement to settle property — Vendor trustee for vendee — Resulting Trusts — Undisposed of interest — Excluding heirs — Parol evidence to rebut presumption — Illegal purpose — Trust to sell — Trusts vague — No trust declared — Trust declared of part only of estate — Transfer of stock or money into name of another — Purchase in name of trustees — Purchase in name of stranger — Expression of wish — Delay — Rule applies to joint purchase — To personal as well as real estate — Purchase in fictitious name — Parol evidence admissible on part of person paying purchase-money — Parol evidence on behalf of person to whom conveyance made — To rebut presumption as to part of the property — Statute of Frauds — Conveyance to stranger without consideration — Purchases in the name of a wife or child no resulting trust — Reputed wife — Person *in loco parentis* — Purchase by a mother — Purchase in name of nephew — Fiduciary relationship — Purchases void as against creditors — Rules apply to personal estate — Surrounding circumstances to be considered — Purchase-money unpaid — Joint tenancy when created — Purchase in the name of a child and a stranger — Evidence to rebut presumption of advancement — Subsequent acts and declarations — Possession by father — Dividends received by father — Devise, bequest, or lease — Child fully advanced.

Implied trusts.

HITHERTO we have dealt with express trusts only. A person, however, may show an intention to create a trust, and this will be carried out by the Court by means of an implied trust.

The general rule as to implied trusts is thus laid down by Mr. Lewin,[1]—"Wherever a person having a power of disposition over property, manifests any intention with respect to it in favour of another, the Court, where there is sufficient consideration, or in a will where consideration is implied, will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed."

[1] Lewin on Trusts, 7th Ed., p. 118.

LECTURE III.

Precatory Trusts.

An implied trust may be created in a will or deed[1] by words expressive of recommendation, direction, or entreaty, as where the author of the trust gives property and directs,[2] confides,[3] or trusts and confides,[4] hopes,[5] doubts not,[6] recommends,[7] well knows,[8] entreats,[9] desires,[10] or wills and desires,[11] requests,[12] or wishes and requests,[13] or requires and entreats,[14] wills,[15] wishes and desires,[16] most heartily beseeches,[17] orders and directs,[18] authorizes and empowers,[19] is well assured,[20] has the fullest confidence,[21] trusts,[22] well knows,[23] has full assurance and confident hope,[24] is under the firm conviction,[25] or in the full belief,[26] or expresses his belief, that the legatee will give[27] the property in a particular manner. In such cases the Court will enforce the implied trust in favour of the person named or indicated,[28]

[1] Liddard *v.* Liddard, 28 Beav., 266. [2] White *v.* Briggs, 2 Ph., 583.
[3] Griffiths *v.* Evans, 5 Beav., 241; Shepherd *v.* Nottige, 2 J. & H., 766.
[4] Wood *v.* Cox, 1 Ke., 317; Palmer *v.* Simmonds, 2 Drew., 224; Macnab *v.* Whitbread, 17 Beav., 299; Pilkington *v.* Boughey, 12 Sim., 414.
[5] Harland *v.* Trigg, 1 Bro. C. C., 142.
[6] Paul *v.* Compton, 8 Ves., 380; Parsons *v.* Baker, 18 Ves., 476; Taylor *v.* George, 2 V. & B., 378; Sale *v.* Moore, 1 Sim., 534.
[7] Horwood *v.* West, 1 S. & S., 387; Paul *v.* Compton, 8 Ves., 380; Tibbits *v.* Tibbits, 19 Ves., 656; Malim *v.* Keighley, 2 Ves. J., 335; Hart *v.* Tribe, 18 Beav., 215; Meggison *v.* Moore, 2 Ves. J., 630; Meredith *v.* Heneage, 1 Sim., 553.
[8] Briggs *v.* Penny, 3 Mac. & G., 546.
[9] Prevost *v.* Clarke, 2 Mad., 458; Meredith *v.* Heneage, 1 Sim., 553; Taylor *v.* George, 2 V. & B., 378.
[10] Harding *v.* Glyn, 1 Atk., 469; Bonser *v.* Kinnear, 2 Giff., 195; Cary *v.* Cary, 2 Sch. and Lef., 189.
[11] Eeles *v.* England, 2 Vern., 466; Birch *v.* Wade, 3 V. & B., 198; Forbes *v.* Ball, 3 Mer., 437.
[12] Pierson *v.* Garnett, 2 Bro. C. C., 38, 226; Bernard *v.* Minshull, Johns, 276.
[13] Foley *v.* Parry, 2 M. & K., 138; Bernard *v.* Minshull, Johns, 276.
[14] Taylor *v.* George, 2 V. & B., 378.
[15] Eales *v.* England, Pr. Ch., 200; Clowdsley *v.* Pelham, 1 Vern., 411.
[16] Liddard *v.* Liddard, 28 Beav., 266.
[17] Meredith *v.* Heneage, 1 Sim., 553.
[18] Cary *v.* Cary, 2 Sch. & Lef., 189; White *v.* Briggs, 2 Ph., 583.
[19] Brown *v.* Higgs, 4 Ves., 708; affd., 13 Ves., 192.
[20] Macey *v.* Shumer, 1 Atk., 389; Ray *v.* Adams, 3 M. and K., 237.
[21] Shovelton *v.* Shovelton, 32 Beav., 143; Curnick *v.* Tucker, L. R., 17 Eq., 320; Le Marchant *v.* Le Marchant, L. R., 18 Eq., 414.
[22] Irvine *v.* Sullivan, L. R., 8 Eq., 673.
[23] Briggs *v.* Penny, 3 Mac. and G., 546.
[24] Macnab *v.* Whitbread, 17 Beav., 299.
[25] Barnes *v.* Grant, 2 Jur., N. S., 1127.
[26] Fordham *v.* Spreight, 23 W. R. (Eng.), 782.
[27] Robinson *v.* Smith, 6 Madd., 194; Clifton *v.* Lombe, Amb., 519; but see Lechmere *v.* Lavie, 2 M. & K., 198.
[28] Knight *v.* Knight, 3 Beav., 148, 172.

and compel the person in whom the confidence is reposed to give effect thereto.

Objects, property, and trust must be described.

The property must be described with certainty.[1] For the objects, property, and way in which it shall go must be pointed out.[2]

For instance, a bequest of property to a certain person "hoping that he will continue it in the family," does not create a trust, as the beneficiary is not indicated with reasonable certainty.[3] So, for the same reason, a bequest to *A* requesting him to distribute it amongst such members of *B's* family as *B* shall think most deserving, does not create a trust.[4] Again, a bequest to *A* desiring him to divide the bulk of it among *B's* children, does not create a trust, for the trust property is not indicated with sufficient certainty;[5] and a bequest of a shop and stock-in-trade to *A* on condition that he pays the testator's debts and a legacy to *B*, is a condition and not a trust for the testator's creditors and *B*.[6] So also a direction to remember certain persons without specifying any sum or property,[7] or to make ample provision for them,[8] to give what shall remain at the legatee's death,[9] or to divide and dispose of the savings,[10] to consider certain persons,[11] or to be kind to them,[12] will not create a trust.

Words of recommendation and entreaty.

Such words and expressions, however, as have been mentioned, particularly where they indicate recommendation or entreaty, are of a flexible character, and will not create a trust, if that is inconsistent with other positive provisions in the will.[13] And words of expectation do not amount to a recommendation, and do not create a trust.[14]

[1] Lechmere *v.* Lavie, 2 M. & K., 197; Russell *v.* Jackson, 10 Hare, 213; Palmer *v.* Simmonds, 2 Drew, 221.

[2] Malin *v.* Keighley, 2 Ves. J., 335; Briggs *v.* Penny, 3 Mac. & G., 546; Bernard *v.* Minshull, Johns, 276.

[3] Harland *v.* Trigg, 1 Bro. C. C., 142.

[4] Green *v.* Marsden, 1 Drew, 646; White *v.* Briggs, 2 Ph., 583.

[5] Palmer *v.* Simmonds, 2 Drew, 221.

[6] Messenger *v.* Andrews, 4 Russ., 478.

[7] Bardswell *v.* Bardswell, 9 Sim., 319.

[8] Winch *v.* Brutton, 14 Sim., 379; Fox *v.* Fox, 27 Beav., 301.

[9] Lechmere *v.* Lavie, 2 M. & K., 197.

[10] Cowman *v.* Harrison, 10 Hare, 234.

[11] Sale *v.* Moore, 1 Sim., 534; Hoy *v.* Master, 6 Sim., 568.

[12] Buggins *v.* Yates, 9 Mod., 122.

[13] Knott *v.* Cottee, 2 Ph., 192; Young *v.* Martin, 2 Y. & C. C. C., 582; Hood *v.* Oglander, 34 Beav., 513; Scott *v.* Key, 35 Beav., 291; Eaton *v.* Watts, L. R., 2 Eq., 51.

[14] Lechmere *v.* Lavie, 2 M. & K., 197.

LECTURE III.

Intention to give absolutely.

If it is clear that the author of the trust intended that the devisee should take absolutely, precatory words will not cut down the absolute gift, and create a trust; they are then regarded merely as the expression of a wish.[1] Thus where property is given to *A* for his own use, benefit, and disposal absolutely, the author of the trust nevertheless conjuring,[2] desiring,[3] or recommending[4] him to make a particular disposition, no trust will be created.[5]

If a testator has, by his will, recommended or desired that a particular person shall be employed as an agent or manager of an estate, or the like, this will not in general impose a trust or obligation upon the devisee of the estate.[6]

Intermediate class of cases.

There would seem to be an intermediate class of cases between those in which the Court holds that a trust has been created and those in which it holds that it has not been created. Thus there may be an absolute gift subject only to the performance of a particular trust, and the Court may look *dehors* the will to see what the trust is. In *Irvine* v. *Sullivan*[7] the testator bequeathed his property to *A* absolutely, trusting that she would carry out his wishes, but there was no further reference to them in the will. *A* had written down what the testator desired to give to various persons; but the paper had not been seen by the testator. It was held that *A* took beneficially subject to the performance of the testator's wishes.[8]

Maintenance.

Occasionally the trusts of a will with reference to the maintenance of children are so ambiguous that it is doubtful whether the testator meant to create a trust, or merely to indicate the motive of the gift. Thus, if a legacy be given to a father that he may support himself and his children,[9] or better to enable him to provide for his children,[10] or to assist his children or the like,[11] or if a legacy be given

[1] Meredith *v.* Heneage, 1 Sim., 542; Wood *v.* Cox, 2 My. & Cr., 684.
[2] Winch *v.* Bruton, 14 Sim., 379.
[3] McCulloch *v.* McCulloch, 11 W. R. (Eng.), 504.
[4] Johnston *v.* Rowlands, 2 DeG. and Sm., 356.
[5] See also Webb *v.* Wools, 2 Sim., N. S., 267; Abraham *v.* Alman, 1 Russ., 509; Reeves *v.* Baker, 18 Beav., 373.
[6] Lawless *v.* Shaw, 5 C. & F., 129; Finden *v.* Stephens, 2 Ph., 142; Williams *v.* Corbet, 8 Sim., 349.
[7] L. R., 8 Eq., 673.
[8] See also Wood *v.* Cox, 2 M. & C., 684; Bernard *v.* Minshull, Johns, 276; McCormick *v.* Grogan, L. R., 4 H. L., 82.
[9] Thorp *v.* Owen, 2 Hare, 607.
[10] Brown *v.* Casamajor, 4 Ves., 498; Wetherell *v.* Wilson, 1 Keen, 80.
[11] Benson *v.* Whittam, 5 Sim., 22.

to *A* to maintain and bring up *B*,[1] the gift is absolute without any trust or obligation being imposed on the legatee. So no trust is created when there is an absolute gift, having full confidence that the legatee will make sufficient and judicious provision for the children,[2] or will husband the means left for the children.[3] But a bequest of the income of property that the legatee may use or dispose of it for the benefit of himself and the maintenance and education of his children, in general, creates a trust, not exclusively, however, for the children, but for the parent and children.[4] The trust is imperative to this extent, that the parent must perform the obligation. Provided he does this, he may retain any surplus beyond what is required for this purpose, for himself, and is not bound to account for the application of the fund.[5] But failing in the performance of the trust he will not be allowed to receive the income.[6] Where there is a bequest of a fund to *A* for the maintenance of her children, and there are none, she will herself be entitled to the income.[7] So also if they have since died.[8] The obligation to maintain the children, if there are any, will not be at an end when they attain twenty-one or marry. Whether it would, if they ceased to reside under the parent's roof, is doubtful.[9] The cases on this point are conflicting.[10]

In *Scott* v. *Key*,[11] under a bequest to the testator's widow to be at her sole and entire disposal for the benefit of herself and children, it was held, that the trust for maintenance did not cease absolutely on a daughter, an only child, attaining twenty-one and marrying; but that on her becoming a widow and requiring maintenance, she would be entitled to it.

[1] Biddles *v.* Biddles, 16 Sim., 1; Jones *v.* Greatwood, 16 Beav., 527; Wheeler *v.* Smith, 1 Giff., 300.

[2] Fox *v.* Fox, 27 Beav., 301.

[3] Scott *v.* Key, 35 Beav., 291.

[4] Woods *v.* Woods, 1 My. & Cr., 401; Byne *v.* Blackburn, 26 Beav., 41; Carr *v.* Living, 28 Beav., 644; Berry *v.* Briant, 2 Dr. & Sm., 1; Bird *v.* Maybury, 33 Beav., 351.

[5] Hora *v.* Hora, 33 Beav., 88.

[6] Castle *v.* Castle, 1 DeG. & J., 352.

[7] Hammond *v.* Neame, 1 Swanst., 35.

[8] Bushnell *v.* Parsons, Prec. Ch., 219.

[9] Longmore *v.* Elcum 2 Y. & C. C. C., 363; Staniland *v.* Staniland, 34 Beav., 536.

[10] See also Bowden *v.* Laing, 14 Sim., 113; Carr *v.* Living, 28 Beav., 644; Thorp *v.* Owen, 2 Hare, 612.

[11] 11 Jur., N. S., 819.

LECTURE III.

A direction that *A* shall reside with and be maintained by *B*, will not be enforced as a trust in the event of *A* not choosing to reside with *B*, and although *A* may reside with *B*, the trust will terminate at the death of the latter.[1] Where an annuity was given to the testator's widow (in addition to another provision for her) as long as she and her son should live together, but if they ceased to live together it should cease, it was held that the annuity did not terminate upon the son's death in the widow's lifetime.[2] There are cases, however, somewhat varying in terms from those just noticed in which the Court has come to the conclusion that the trustee or parent was not intended to take any interest. As if there is a gift to *A* to dispose of among his children,[3] or the better to enable him to maintain his children until their shares should become payable.[4]

Again, the terms of the bequest may show that the parent or trustee was intended to take jointly, or in common, with the other objects of the trust, as where a fund is given to a parent with her children for their joint maintenance.[5] And where the bequest was to the testator's wife for the use and benefit of herself and all his children by her, or by a former wife, it was held that the widow and children took as joint tenants.[6] In some cases it has been held, that where there is a gift to a parent to be disposed of for the benefit of himself or herself and children, the parent takes an estate for life with a power of disposition in favour of the children.[7] But this cannot be relied upon as a general rule. Where a testator gave a house and all his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," and the widow gave part to an illegitimate son of one of the testator's children, the gift was held valid. The Lords Justices without absolutely

[1] Wilson *v.* Bell, L. R., 4 Ch., 581.
[2] Sutcliffe *v.* Richardson, L. R., 13 Eq., 606.
[3] Blakeney *v.* Blakeney, 6 Sim., 52.
[4] Wetherell *v.* Wilson, 1 Keen, 80; Brown *v.* Casamajor, 4 Ves., 498.
[5] Wilson *v.* Maddison, 2 Y. and C. C. C., 372; Bibby *v.* Thompson, 32 Beav., 646.
[6] Newill *v.* Newill, 7 W. N., 25; Bellasis' Trusts, L. R., 12 Eq., 218.
[7] See Crockett *v.* Crockett, 2 Ph., 553; Costabidie *v.* Costabidie, 6 Hare, 410; Gully *v.* Cregoe, 24 Beav., 185; Jeffrey *v.* DeVitre, *ib.*, 296; Shovelton *v.* Shovelton, 32 Beav., 143; Armstrong *v.* Armstrong, L. R., 7 Eq., 518.

deciding the question, seem to have had little or no doubt that no trust at all was created by the testator's will.[1]

Agreement to settle property.

An implied trust will arise when a person agrees for valuable consideration to settle certain property, whether moveable or immoveable,[2] and the property may be followed into the hands of a third person.[3]

Vendor trustee for vendee.

So if a person enters into a valid contract for the sale of property, he is from that time a trustee of the property for the purchaser, and must account for the rents and profits, and will be liable in damages if he neglects the property, for being a trustee he is bound to take care of the trust estate, and commits a breach of trust if he does not do so.[4]

Resulting Trusts.

The next class of trusts to consider are those created by operation of law. These again may be subdivided into resulting trusts and constructive trusts. I will first deal with the rules of English law as to resulting trusts, and then with benami transactions. When the instrument creating the trust, whether a deed or will, does not direct how the whole of the property, made subject to the trust, is to be disposed of, the undisposed of interest results to the settlor or his heirs or representatives.[5] If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, the undisposed of interest devolves upon the person or persons on whom the law, in the absence of disposition, casts that species of property. So on the same principle, where lands are devised upon particular purposes, as for payment of debts, or with a direction to pay to *A* for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir. This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can be raised respecting its application; but the difficulty in these cases generally is to determine whether it is intended that the interest

Undisposed of interest.

[1] Lambe *v.* Eames, L. R., 6 Ch., 597. See also Mackett *v.* Mackett, L. R., 14 Eq., 49.

[2] Kennedy *v.* Daly, 1 Sch. and Lef., 355; Wellesley *v.* Wellesley, 4 M. & Cr., 561; Lyster *v.* Burroughs, 1 Dr. and Wal., 149.

[3] Lewis *v.* Madocks, 8 Ves., 150.

[4] Acland *v.* Gaisford, 2 Madd., 32; Wilson *v.* Clapham, 1 J. and W., 38; Ferguson *v.* Tadman, 1 Sim., 530; Foster *v.* Deacon, 3 Madd., 394. See further Lewin, 7th Ed., 128, 129.

[5] Culpepper *v.* Aston, 2 Ch. Cas., 116; Cook *v.* Gwavas, cited in Roper *v.* Radcliffe, 9 Mod., 187; Lloyd *v.* Spillett, 2 Atk., 150; Cottington *v.* Fletcher, *ib.*, 156; Northen *v.* Carnegie, 4 Drew, 587; Mapp *v.* Elcock, 3 H. L. C., 492.

LECTURE III.

in the land beyond the purpose to which it is devoted shall belong to the devisees in a fiduciary character, or for their own benefit.[1]

Where the whole legal interest of a grantor is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted results to the grantor or to his heir or legal personal representatives. But where the whole legal interest is given for a particular purpose, with an intention to give to the grantee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the grantee, and there is no resulting trust. Thus, a devise to *A* and his heirs charged with the testator's debts is a beneficial devise, subject to a particular purpose, and there will be no resulting trust; but if the devise is upon trust to pay debts, that being a devise for a particular purpose only, a trust will result for the heir.[2]

In *Lallubhai Bapubhai* v. *Mankuvarbai*,[3] Westropp, C.J., said: "Where there is a devise upon trusts which do not exhaust the property devised, the mere conferring of a legacy, or other benefit, upon the heir does not prevent there being a resulting trust of the residue for him, unless there be other circumstances sufficiently strong to turn the scale in favour of the devisee. On the same principle the mere gift, by a testator, of an annuity to his wife has been held not to be sufficient without other circumstances demonstrative of his intention that she should not have both it and dower, to induce the Courts in England to put her to her election between the annuity and dower. Even where there is an expressed intention to exclude the next-of-kin from the residue of personalty, or the heir from the residue of realty, there must be a distinct devise away from them, otherwise there will be a resulting trust in their favour."

Excluding heirs.

In order to exclude the heir, the intention of the grantor to exclude them must be apparent; mere conjecture[4] or the fact that legacies have been given[5] will not be

[1] 1 Jarm., 529, 3rd Ed.

[2] King *v.* Denison, 1 V. and B., 272, *per* Lord Eldon; and see Wood *v.* Cox, 2 M. and C., 684; Rogers *v.* Rogers, 3 P. Wms., 193.

[3] I. L. R., 2 Bom., 410.

[4] Halliday *v.* Hudson, 3 Ves., 211; Phillips *v.* Phillips, 1 M. and K., 661.

[5] Salter *v.* Cavanagh, 1 Dr. and Wal., 668.

sufficient.[1] The trust results, not on the ground of intention, but because the ancestor has declared no intention.[2]

Even where there is an expressed intention to exclude the next-of-kin or heir, there must be a distinct devise away from them, otherwise there will be a resulting trust in their favour.[3]

Parol evidence to rebut presumption.

Parol evidence is admissible to rebut the presumption of law in the case of an instrument made *inter vivos*, and to show the settlor's intention to give the surplus interest beneficially.[4]

Illegal purpose.

If property is assigned for an illegal purpose which is not carried into effect, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed, does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it.[5]

Trust to sell.

Where estates are devised to executors upon trust, to sell and to invest part of the proceeds of the sale for a particular purpose, but no trust is declared of the sum so reserved after the purpose is satisfied, there will be a resulting trust for the heir.[6]

Under a devise of all the residue of the testator's estate and effects whatsoever, and wheresoever, of what nature or kind soever, to trustees upon trusts applicable only to personal property, the real estate will pass with a resulting trust for the heir.[7] But if the trusts may be applicable to real estate, then the real estate will pass.[8]

If the trusts declared are so vague that they cannot be

[1] King *v.* Denison, 1 V. and B., 274; Amphlett *v.* Parke, 2 R. and M., 230.

[2] Tregonwell *v.* Sydenham, 3 Dow., 211; Lloyd *v.* Spillett, 2 Atk., 151; Habergham *v.* Vincent, 2 Ves. J., 225.

[3] Fitch *v.* Weber, 6 Hare, 145; Johnson *v.* Johnson, 4 Beav., 318; Lallubhai Bapubhai *v.* Mankuvarbai, I. L. R., 2 Bom., 410.

[4] Fowkes *v.* Pascoe, L. R., 10 Ch., 343. As to admission of parol evidence in case of wills, see Lewin, 7th Ed., 56, 134.

[5] Symes *v.* Hughes, L. R., 9 Eq., 475; Manning *v.* Gill, L. R., 13 Eq., 485; Haigh *v.* Kaye, L. R., 7 Ch., 469; Dawson *v.* Small, L. R., 18 Eq., 114.

[6] Stonehouse *v.* Evelyn, 3 P. Wms., 252; Watson *v.* Hayes, 5 M. and C., 125; Page *v.* Leapingwell, 18 Ves., 463; Mariott *v.* Turner, 20 Beav., 557.

[7] Dunnage *v.* White, 1 Jac. and W., 583; Lloyd *v.* Lloyd, L. R., 7 Eq., 458; Longley *v.* Longley, L. R., 13 Eq., 133.

[8] D'Almaine *v.* Moseley, 1 Drew., 629; Coard *v.* Holderness, 20 Beav., 147.

LECTURE III.

executed,[1] or if they lapse,[2] or are void because of unlawfulness,[3] or if property is devised on trusts to be thereafter declared, and no declaration is made,[4] a trust will result.

Trusts vague.

No trust declared.

So also a trust will result when the instrument creating the trust shows that it was not intended that the grantee should take beneficially, as where the conveyance, devise, or bequest is to *A* "upon trust," and no trust is declared.[5]

Trust declared of part only of estate.

If a trust is declared of a part only of an estate, whether by conveyance, *inter vivos*, or by will, the undisposed of interest results to the grantee or testator, or his heirs or representatives.[6] According to English law, the undisposed of residue, in the case of personalty, vests in the executors beneficially. But that rule does not apply to Hindus.[7]

Transfer of stock or money into name of another.

A trust will result where stock or money is transferred to another, unless it can be inferred from the surrounding circumstances that a gift was intended;[8] and where the transfer is into the joint names of the grantor and grantee, the grantee will have a beneficial interest for life.[9]

Purchase in name of trustees.

No trust will result where a person invests money in the names of the trustees of his marriage settlement, the presumption being in such cases that he intended to benefit the persons interested under the settlement.[10]

Though *cestuis que trustent* may claim the whole of an estate which is wholly purchased out of trust monies, they can, if the estate be only partially purchased with trust money, claim only a charge for the amount of the trust monies employed in the trust.[11]

[1] Stubbs *v.* Sargon, 2 Keen., 255; 3 M. and C., 507; Williams *v.* Kershaw, 5 C. and F., 111.

[2] Ackroyd *v.* Smithson, 1 Bro. C. C., 503; Williams *v.* Coade, 10 Ves., 500.

[3] Gibbs *v.* Rumsey, 2 V. and B., 234; Page *v.* Leapingwell, 18 Ves., 463; Tregonwell *v.* Sydenham, 3 Dow., 194.

[4] Fitch *v.* Weber, 6 Hare, 145; Barrs *v.* Fewkes, 2 H. and M., 60; Biddulph *v.* Williams, L. R., 1 C. D., 203.

[5] Dawson *v.* Clarke, 18 Ves., 254; Penfold *v.* Bouch, 4 Hare, 271; Attorney-General *v.* Dean and Canons of Windsor, 24 Beav., 679; 8 H. L. C., 369; Aston *v.* Wood, L. R., 6 Eq., 419; Barrs *v.* Fewkes, 2 H. & M., 60.

[6] Northen *v.* Carnegie, 4 Drew., 587; Nash *v.* Smith, 17 Ves., 29; Mapp *v.* Elcock, 2 Phill., 793; 3 H. L. C., 492; Bird *v.* Harris, L. R., 9 Eq., 204; Williams *v.* Arkle, L. R., 7 H. L., 606.

[7] Lallubhai Bapubhai *v.* Mankuvarbai, I. L. R., 2 Bom., 406.

[8] Custance *v.* Cunningham, 13 Beav., 363; Fowkes *v.* Pascoe, L. R., 10 Ch., 340; Batstone *v.* Salter, L. R., 10 Ch., 431.

[9] Fowkes *v.* Pascoe, L. R., 10 Ch., 343.

[10] *Re* Curteis's Trust, L. R., 14 Eq., 217.

[11] Lane *v.* Dighton, Amb., 409; Ryal *v.* Ryal, Amb., 411; Nogender Chunder Ghose *v.* Greender Chunder Ghose, Boul., 389.

Purchase in name of stranger.

Where property is bought by one person in the name of a stranger, to whom the conveyance is made, there will be a resulting trust for the person who paid the purchase-money. "The clear result of all the cases," said Eyre, C. B.,[1] "without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers or others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successivé*, results to the man who advanced the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor."[2]

The person who advances the money must do so in the character of purchaser.[3]

Expression of wish.

No resulting trust will be created by the mere expression of a wish on the part of the grantor, that the purchase-money may be applied in a certain way.[4]

Delay.

The rights of a purchaser may be barred by negligence or delay.[5]

Rule applies to joint purchase.

The rule that a trust results for the person who pays the purchase-money applies to the case of a joint purchase in the name of one. In *Crop* v. *Norton*,[6] Lord Hardwicke seemed to think that the application of the rule was confined to an advance by one individual. In *Wray* v. *Steele*,[7] however, Sir T. Plumer decided that a resulting trust arose upon a joint advance, the purchase being taken in the name of one. "Lord Hardwicke," said his Honour, "could not have used the language attributed to him. What is there applicable to an advance by a single individual, that

[1] Dyer *v.* Dyer, 2 Cox, 93.

[2] As to conveyances taken jointly, see *ex parte* Houghton, 17 Ves., 253; Rider *v.* Kidder, 10 Ves., 367. And as to several *successivé*, see Howe *v.* Howe, 1 Vern., 415; Withers *v.* Withers, Amb., 151; Smith *v.* Baker, 1 Atk., 386; Prankard *v.* Prankard, 1 S. and S., 1.

[3] Bartlett *v.* Pickersgill, 1 Eden, 516; Crop *v.* Norton, 9 Mod., 235; Aveling *v.* Knipe, 19 Ves., 441.

[4] Wheeler *v.* Smith, 1 Giff., 300.

[5] Delane *v.* Delane, 7 Bro. P. C., 279; Groves *v.* Groves, 3 Y. and J., 172; Clegg *v.* Edmonson, 8 D. M. G., 787; Peddamuthulaty *v.* Timma Reddy, 2 Mad. H. C., 270.

[6] 2 Atk., 74; 9 Mod., 233; Barn., 184.

[7] 2 V. and B., 388.

LECTURE III.

defendant to prevent an execution of the agreement; but as it is, I think that it is a case within the Statute, and that the bill must be dismissed with costs."[1]

Conveyance to stranger without consideration.

In some cases it has been held, that where a conveyance is made to a stranger without any valuable consideration being expressed, that a resulting trust arises for the grantor.[2] In *Young* v. *Peachy*,[3] Lord Hardwicke said: "If a trust by implication was to arise in the present case, it would be to contradict the Statute of Frauds; for it might be said in every case where a voluntary conveyance is made, that a trust shall arise by implication; but that is by no means the rule of the Court.[4] Trusts by implication, or operation of law, arise in such cases, where one person pays the purchase-money, and the conveyance is taken in the name of another, or in some other cases of that kind; but the rule is by no means so large as to extend to every voluntary conveyance."[5]

Where a son conveyed an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money on it by way of mortgage for the use of the son, and the father died shortly afterwards, and before any money was raised, having by a will subsequent to the conveyance made a general devise of all his real estates, it was held, that the case was within the Statute, and that parol evidence was not admissible to prove the trust; but that the son had a lien on the estate as vendor for the apparent consideration, no part of which was paid.[6]

Purchases in the name of a wife or child no resulting trust.

No resulting trust arises upon a purchase in the name of a wife alone.[7] Nor upon a joint purchase in the names of husband and wife,[8] nor upon a purchase in the name of a child.[9]

[1] See also Heard *v.* Pilley, L. R., 4 Ch., 548.

[2] Duke of Norfolk *v.* Brown, Prec. Ch., 80; Warman *v.* Seaman, Freem., 308; Sculthorp *v.* Burgess, 1 Ves. J., 93; Davies *v.* Otty (No. 2), 35 Beav., 208.

[3] 2 Atk., 256. [4] See Fordyce *v.* Willis, 3 Bro. C. C., 577.

[5] And see 1 Sand. Uses, 5th Ed., 365; Wms. R. P., 10th Ed., 159; Lloyd *v.* Spillett, 2 Atk., 150.

[6] Leman *v.* Whitley, 4 Russ., 423. This case was doubted by Lord St. Leonards, Sug. V. and P., 14th Ed., 702.

[7] Kingdom *v.* Bridges, 2 Vern., 67; Back *v.* Andrews, 2 Vern., 120; Christ's Hospital *v.* Budgin, 2 Vern., 683; Rider *v.* Kidder, 10 Ves., 360; Gosling *v.* Gosling, 3 Drew., 335; Lloyd *v.* Pughe, L. R., 8 Ch., 88.

[8] Drew *v.* Martin, 2 H. and M., 130.

[9] Dyer *v.* Dyer, 2 Cox, 92; Finch *v.* Finch, 15 Ves., 50; Murless *v.* Franklin, 1 Swanst., 13; Grey *v.* Grey, 2 Swanst., 597; Finch, 340.

If a mortgage is made in the joint names of a husband and wife, this will be considered as being in the nature of a joint purchase, and the wife will, if the husband dies, be entitled to the mortgage money by survivorship.[1]

Reputed wife.

A purchase in the name of the purchaser and of a woman with whom he has gone through the ceremony of marriage, but who could never become his lawful wife, does not come within the rule, and therefore such a purchase will not raise a presumption that it was intended as an advancement or provision for her.[2]

Person *in loco parentis*.

The presumption of advancement may arise in the case of a purchase by a person who has placed himself *in loco parentis* to the person in whose name the purchase is made. Thus the presumption has been held to apply in the case of an illegitimate son.[3]

But the presumption of advancement will not arise in the case of a purchase in the name of an illegitimate grandchild, although the grandfather has placed himself *in loco parentis* to the child.[4]

Purchase by a mother.

In the case of *Re De Visme*,[5] it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. In *Sayre* v. *Hughes*,[6] a mother, after making her will in favour of her two daughters, transferred stock, which had stood in her own name, into the names of herself and one of the daughters, and died. It was held, that there was a presumption of intended benefit to the daughter which was unrebutted, and that the stock belonged absolutely to her. *Re De Visme*[7] was cited as an authority for the proposition, that there could be no presumption of advancement as between a mother and child; but Stuart, V. C., pointed out that the word 'father' does not occur in Lord Chief Baron Eyre's judgment in *Dyer* v. *Dyer*,[8] and said that it was not easy to understand why a mother should be presumed to be less disposed to

[1] Christ's Hospital *v.* Budgin, 2 Vern., 683.
[2] Soar *v.* Foster, 4 K. and J., 152.
[3] Beckford *v.* Beckford, Lofft., 490; Kilpin *v.* Kilpin, 1 M. and K., 520; Soar *v.* Foster, 4 K. and J., 152; Tucker *v.* Burrow, 2 H. and M., 515.
[4] Tucker *v.* Burrow, 2 H. and M., 515; Forrest *v.* Forrest, 11 Jur., N. S., 317. See, however, Powys *v.* Mansfield, 3 My. and Cr., 359, as to double portions.
[5] 2 DeG. J. and S., 17.
[6] L. R., 5 Eq., 377; see also Hepworth *v.* Hepworth, L. R., 11 Eq., 10.
[7] 2 DeG. J. and S., 17.
[8] 2 Cox, 92.

LECTURE III.

benefit her child in a transaction of this kind than a father. Where stock was transferred by a mother into the names of herself, her daughter, and the daughter's husband, and the dividends on the stock were received by the son-in-law and paid over to the transferror during her life, and the mother died leaving the son-in-law only surviving, it was held, that there was no resulting trust, and that the son-in-law was entitled to the stock, the Court being of opinion that the evidence showed that the mother intended to create a beneficial interest in each of the three persons into whose name the stock was transferred.[1]

Purchase in name of nephew.

Where one of two brothers purchased an estate in the name of his nephew, and paid the whole of the purchase-money, and enjoyed the rents and profits, it was held, in a suit by the purchaser to recover possession, that he must be presumed to have purchased on his own account.[2]

Fiduciary relationship.

Where a fiduciary relationship, such as that of solicitor and client, subsists between a parent and child, and the parent's money is advanced by the child in her own name, the ordinary presumption in favour of the transaction being a gift, is excluded, and the *onus* is thrown upon the child of proving that a gift was in fact intended.[3]

Purchases void as against creditors.

Purchases in the name of a wife or child by way of gift, or advancement, are, it appears, within the 13 Eliz., c. 5, and may be avoided as against creditors.[4]

Rules apply to personal estate.

The rules of English Courts of Equity as to resulting trusts apply also to personal estate, and therefore, where a husband transfers stock into the names of himself and his wife, no resulting trust will arise for the husband, but the wife will be entitled to the whole of the fund by survivorship;[5] so also in the case of a transfer of stock into the names of a parent and child, the stock will belong to the child surviving.[6]

[1] Batstone *v.* Salter, L. R., 19 Eq., 250; affd., L. R., 10 Ch., 431. And see Fowkes *v.* Pascoe, L. R., 10 Ch., 343.

[2] Sheeoram Ghose *v.* Dataram Ghose, 2 Sel., 53.

[3] Garrett *v.* Wilkinson, 2 DeG. and Sm., 244; see also Hepworth *v.* Hepworth, L. R., 11 Eq., 14.

[4] Glaister *v.* Hewer, 8 Ves., 195; Townsend *v.* Westacott, 2 Beav., 340; 4 Beav., 58; Christy *v.* Courtenay, 13 Beav., 96; Barrack *v.* M'Culloch, 3 K. and J., 110; Drew *v.* Martin, 2 H. and M., 130.

[5] Dummer *v.* Pitcher, 2 M. and K., 262; Low *v.* Carter, 1 Beav., 426; Vance *v.* Vance, *ib.*, 605; Poole *v.* Odling, 31 L. J., Ch., 439.

[6] Sayre *v.* Hughes, L. R., 5 Eq., 376; *Re* De Visme, 2 DeG. J. and S., 17.

Surrounding circumstances to be considered.

The mere circumstance that the name of a wife or child is inserted on the occasion of a purchase of stock is not sufficient to rebut the presumption of a resulting trust in favour of the purchaser, if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet the surrounding circumstances may be taken into consideration so as to say that it is a trust, and not a gift. Thus in *Marshall* v. *Crutwell*,[1] the husband of the plaintiff, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife, and he afterwards paid in considerable sums to their account. All cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer), the plaintiff claimed to be entitled to the balance. It was held, that the transfer of the account was not intended to be a provision for the plaintiff, but merely a convenient mode of managing her husband's affairs, and consequently that she was not entitled. Jessel, M. R., said: "In all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift. In transferring a sum of stock, there is no obvious motive why a man should put a sum of stock into the name of himself and his wife. She cannot receive the dividends, he can and must, and it is difficult to see any motive of convenience or otherwise which should induce a man to buy a sum of stock or transfer a sum of stock (if there is any difference between the two) in or into the names of himself and his wife, except the motive of benefiting

[1] L. R., 20 Eq., 329; and see Fowkes *v.* Pascoe, L. R., 10 Ch., 343.

LECTURE III.

her in case she survives. But here we have the actual fact, that the man was in such a state of health that he could not draw cheques, and the wife drew them. Looking at the fact that subsequent sums are paid in from time to time, and taking into view all the circumstances (as I understand I am bound to do) as a juryman, I think that the circumstances show that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account."

Purchase-money unpaid.

Where a purchase, either of moveable or immoveable property, is made in the name of a wife or child, and the purchaser dies before the whole of the purchase-money is paid, the purchase will enure for the benefit of the wife or child, and the unpaid purchase-money is payable out of the purchaser's personal estate.[1]

Joint tenancy when created.

A purchase in the joint names of a father and son creates a joint tenancy.[2] In one case, where the father had no other estate to which a judgment-creditor could resort, the creditor was relieved in equity against the survivorship at law.[3]

Purchase in the name of a child and a stranger.

If a purchase is made by a parent in the name of a child and of a stranger, whether of real or personal estate, it will be considered as an advancement; the stranger will be treated as a trustee for the child, and there will not be any resulting trust to the father.[4]

Evidence to rebut presumption of advancement.

In certain cases where a purchase is made in the name of a child, the presumption of advancement may be rebutted.[5] The antecedent and contemporaneous acts and declarations of the parent are admissible in evidence to rebut the presumption of advancement, but his subsequent acts and declarations are inadmissible for that purpose.[6]

[1] Redington *v.* Redington, 3 Ridg., P. C., 177; Vance *v.* Vance, 1 Beav., 605; Drew *v.* Martin, 2 H. and M., 130; Skidmore v. Bradford, L. R., 8 Eq., 134.

[2] Scroope *v.* Scroope, Freem., 171; 1 Ch. Cas., 27; Back *v.* Andrew 2 Vern., 120; Grey *v.* Grey, 2 Swanst., 599; Dummer *v.* Pitcher, 2 M. and K., 272.

[3] Stileman *v.* Ashdown, 2 Atk., 477; see Pole *v.* Pole, 1 Ves., 76.

[4] Lamplugh *v.* Lamplugh, 1 P. Wms., 111; Mumma *v.* Mumma, 2 Vern., 19; Finch *v.* Finch, 15 Ves., 43; Crabb *v.* Crabb, 1 M. and K., 511; Collinson *v.* Collinson, 3 D. M. G., 403.

[5] Keats *v.* Hewer, 10 Jur., N. S., 1040.

[6] Redington *v.* Redington, 3 Ridg., 177; Lloyd *v.* Read, 1 P. Wms., 607; Murless *v.* Frankin, 1 Swanst., 13; Sidmouth *v.* Sidmouth, 2 Beav., 447; Collinson *v.* Collinson, 3 D. M. G., 409; Dumper *v.* Dumper, 3 Giff., 583; Williams *v.* Williams, 32 Beav., 370; Tucker *v.* Burrow, 2 H. and M., 515.

In *Devoy* v. *Devoy*,[1] the presumption that the transfer by a father of stock into the joint names of himself, his wife, and child, was intended to be an advancement, was allowed to be rebutted by the evidence of the transferror that no trust was intended, but that the transfer was made under a misapprehension of its legal effect.[2]

Subsequent acts and declarations.

Although subsequent acts and declarations of the parent are not evidence to the support of the trust, subsequent acts and declarations of the child may be so.[3]

Possession by father.

The presumption of advancement will not be rebutted by the fact of the father having continued in possession of the estate during his life,[4] nor by the fact that he has expended money in repairs on the estate.[5]

Dividends received by father.

Where a father purchases stock or shares in the name of a child, and receives the dividends during his life under a power from the son, this alone will not rebut the presumption of advancement.[6] In *Smith* v. *Warde*,[7] a father directed stock to be purchased in the names of himself and his wife in trust for his infant son. The purchase was made in the joint names without any trust being declared, and the father received the dividends down to his decease. It was held, that neither his son nor his wife (who survived him) were entitled to the stock, but that it formed part of his assets.[8]

Devise, bequest, or lease.

If, after a purchase of property by a parent or by a husband in the name of a child or wife, the purchaser devises or bequeaths it,[9] or leases it,[10] the *primâ facie* presumption of advancement will not be rebutted.

Where a testator by his will settled £1,000, reduced annuities, on each of his grand-daughters, the children of his only son, and two years afterwards he transferred a

[1] 3 Sm. and G., 403.
[2] See also Stone *v.* Stone, 3 Jur. (N. S.), 708.
[3] Sidmouth *v.* Sidmouth, 2 Beav., 447.
[4] Grey *v.* Grey, 2 Swanst., 600; Lamplugh *v.* Lamplugh, 1 P. Wms., 111; Taylor *v.* Taylor, 1 Atk., 386; Christy *v.* Courtenay, 13 Beav., 96.
[5] Shales *v.* Shales, 2 Freem., 252; Elliot *v.* Elliot, 2 Ch. Cas., 231; Scawin *v.* Scawin, 1 Y. and C. C. C., 65.
[6] Sidmouth *v.* Sidmouth, 2 Beav., 447; Scawin *v.* Scawin, 1 Y. & C. C. C., 65.
[7] 15 Sim., 56.
[8] See also Hoyes *v.* Kindersley, 2 Sm. and G., 195; Bone *v.* Pollard, 24 Beav., 283.
[9] Crabb *v.* Crabb, 1 M. and K., 511; Dummer *v.* Pitcher, 2 M. and K., 262; Jeans *v.* Cooke, 24 Beav., 513.
[10] Murless *v.* Franklin, 1 Swanst., 13.

LECTURE III.

sum of £3,200, reduced annuities, which was all the property he possessed, into the name of his son, and died at the age of ninety-four, having resided the last ten years of his life with his son, who was a man of considerable property, it was held that the transfer to the son operated as an absolute gift to him free from any trusts.[1]

Child fully advanced.

If a purchase is made in the name of a child who is already fully advanced by the parent, there will be a resulting trust for the father;[2] but if the child be not at all, or only in part, advanced, the presumption of advancement will not be turned into a trust.[3]

Where lands are purchased in a certain place in the name of a child by a father, but it appears that the father is bound to settle lands so purchased in a particular manner, there will not be any advancement, but the child will be a trustee merely.[4]

[1] Hepworth *v.* Hepworth, L. R., 11 Eq., 10.
[2] Lloyd *v.* Read, 1 P. Wms., 608; Pole *v.* Pole, 1 Ves. S., 76.
[3] Grey *v.* Grey, 2 Swanst., 600; Elliot *v.* Elliot, 2 Ch. Cas., 231.
[4] Blake *v.* Blake, 7 Bro. P. C., 241.

LECTURE IV.

BENAMI TRANSACTIONS AND CONSTRUCTIVE TRUSTS.

Benami transactions — Purchase in name of child — Burden of proof — Strangers — Benami transactions among Mahomedans — Assent of benamidar unnecessary — Disputing landlord's title — Suit by landlord against beneficial lessees — Strict proof required — Oral evidence — Proof of payment of purchase-money — Pleading benami transaction against purchaser under s. 317, Civil Procedure Code — Purchase at sale for arrears of revenue — Sale by benamidar — Standing by — Purchaser with notice — Real owner may sue benamidar — Equitable owner — Suit by creditors against benamidar — Transaction avowedly fraudulent — Constructive trusts — Renewal of leases by trustee — Principle of rule — Instances — Remedy — Agent of trustee — Legal adviser gaining advantage by ignorance — Gifts to persons in fiduciary capacity — Voluntary gift where no fiduciary relation when set aside — Onus of proof where fiduciary relation exists — Where it does not — Spiritual influence — Parent and child — Persons *in loco parentis* — Guardian and ward — Gift to legal adviser — Extent of rule — Gift in expectation of death — Strangers — Principles on which Court acts — Badges of fraud — Independent advice — At whose instance set aside — Aquiescence — Confirmation and acquiescence — Laches.

Benami transactions.

It will be convenient in this place to consider what is known as a *benami* transaction,—that is to say, the practice of putting property into a false name. However objectionable the system may be, it is legal and in common use.[1]

"The Law of Benami," says Mr. Mayne,[2] "is in no sense a branch of Hindu law. It is merely a deduction from the well-known principle of equity, that where there is a purchase by *A* in the name of *B*, there is a resulting trust of the whole to *A*; and where there is a voluntary conveyance by *A* to *B*, and no trust is declared, or only a trust as to part, that there is a similar trust in favour of the grantor as to the whole or as to the residue, unless it can be made out that an actual gift was intended.

Purchase in name of child.

"In the English Courts an exception is made to this rule, where the person in whose name the conveyance is taken or made is a child of the real owner, when the transaction

[1] M. S. Beebee Nyamut *v.* Fuzl Hossein, S. D. A. of 1859, p. 139.
[2] Hindu Law, s. 367.

LECTURE IV.

is presumed to have been made by way of advancement to him. But this exception has not been admitted in India. There the rule is well established that in all cases of asserted benami the true criterion is to ascertain from whose funds the purchase-money proceeded. Whether the nominal owner be a child or a stranger, a purchase made with the money of another is *primâ facie* assumed to be made for the benefit of that other,"[1] whether a daughter or a son.

"The wives and mothers of the members of a joint undivided Hindu family, so long as they continue to live in the family, and are supported out of its income, are just as much members of that family as their husbands and sons; and as unity of possession is one of the essential characteristics of a joint undivided Hindu family, no difference in the nature of the interests possessed by the different members thereof can affect the presumption with which we have to deal in this case. So far as the ordinary and usual course of things is concerned, the practice of making benami purchases in the names of female members of joint undivided Hindu families is just as much rife in this country as that of making such purchases in the names of male members and . . . the presumption against such acquisition is no less strong in the former case than in the latter."[2]

Burden of proof.

The burden of proof lies on the party in whose name the property was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.[3] But although the habit of holding land benami is inveterate in India, that does not justify the Courts in making every presumption against apparent ownership.[4]

Strangers.

If the person in whose name the purchase is effected, is a stranger in blood or only a distant relative, he will be undoubtedly *primâ facie* a trustee; and if he desires

[1] Dhurm Das Pandey *v.* M. S. Shama Soondri Dibiah, 3 Moo. I. A., 229, 240; Gopeekrist Gosain *v.* Gungapersaud Gosain, 6 Moo. I. A., 53, 74; Moulvie Syud *v.* M. S. Bibee, 13 Moo. I. A., 232; Rukunadawla Nowab Ahmed Ali Khan v. Hurdwari Mull, 5 B. L. R., 578.

[2] Chunder Nath Moitro *v.* Kristo Komul Singh, 15 W. R., 357, *per* Dwarkanath Mitter, J. See, however, Obhoy Churn Mookerjee *v.* Puchanun Bose, Marsh., 564.

[3] Gopeekrist Gosain *v.* Gungapersaud Gosain, 6 Moo. I. A., 53.

[4] Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum, 8 W. R., P. C. Rul., 11.

to contend that the *primâ facie* character of the transaction was not its real character, the burthen is on him. In *Gopeekrist Gosain* v. *Gungapersaud Gosain*,[1] the purchase was made in the name of an only son, and it was argued that this circumstance changed the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son; that the presumption is advancement, and that, therefore, the burden of proof was shifted. But the Judicial Committee held, that there was no authority in Indian law, no distinct case or dictum establishing or recognizing such a principle or such a rule. "It is clear," said Knight Bruce, L. J.,[2] "that in the case of a stranger the presumption is in favour of its being a *benami* transaction, that is a trust; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognizing a purchase by one man in the name of another to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of

[1] 6 Moo. I. A., 53. [2] P. 75.

LECTURE IV.

making an unequal division of property among children. . . . . Their Lordships are, therefore, satisfied that, according to the law by which this case must be governed, the presumption in favour of its being a benami transaction is different from that which would have existed by the law of England."

Benami transactions among Mahomedans.

In so far as the practice of holding and buying lands in the name of another exists, that practice exists in India as much among Mahomedans as among Hindus; and the judgment in *Gopeekrist Gosain* v. *Gungapersaud Gosain*[1] and the cases therein referred to are, at all events, authority for the propositions that the criterion of these cases in India is to consider from what source the purchase-money comes; that the presumption is, that a purchase made with the money of *A*, in the name of *B*, is for the benefit of *A*; and that, from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that son.[2] Although a purchase by a Mahomedan with his own money of an estate in the name of his son, raises a presumption of the son's name being used benami for his father, proof that the father's object was to affect the ordinary rule of succession as from him to that property is sufficient to give, as respects strangers, a title to the son independent of, and adverse to, the father.[3]

Assent of benamidar unnecessary.

The knowledge and assent of the person in whose name the purchase is made is immaterial; in the greater number of instances of benami purchases they are made in the names of persons ignorant at the time of their being so made.[4]

Disputing landlord's title.

As a general rule, a tenant cannot dispute his landlord's title.[5] The rule is founded upon the doctrine of estoppel, which is, as Lord Coke says, "a curious and excellent sort of learning." But it has been decided that the doctrine of estoppel does not apply to benami transactions, and that in this country a lessee may deny that the person in whose favour he has executed a lease was the real lessor,

[1] 6 Moo. I. A., 53.
[2] Moulvie Sayyud Uzhur Ali *v.* Mussummat Bebee Ultaf Fatima, 13 Moo. I. A., 232, 246: see 2 Mad. H. C. Rep., 27 (*n*).
[3] Ruknadawla Nowab Ahmed Ali Khan *v.* Hurdwari Mull, 5 B. L. R., 578.
[4] Gopeekrist Gosain *v.* Gungapersaud Gosain, 6 Moo. I. A., 74.
[5] See Evidence Act, I of 1872, s. 116.

and beneficially entitled to the rent, and that he may prove by parol evidence that the person who granted the lease was only a benamidar for a third party. In *Donzelle* v. *Kedarnath Chuckerbutty*,[1] Paul, J., said: "In England, where the usage denoted by benami transactions is wholly unknown, it is supposed, and therefore assumed, that all deeds and conveyances truly represent the titles of parties set forth in them. Deeds are called solemn instruments; they are executed after considerable deliberation, and under the guidance, and with the advice, of able legal advisers. In England, and in fact wherever the English law prevails, and English institutions exist, it is right to suppose that what is stated in deeds and other similar documents represents the true state of things, and consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country, it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statements wholly regardless of the truth for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents, and to apply the technical doctrine of estoppel in the manner in which that doctrine is applied in cases governed by English law."

Suit by landlord against beneficial lessees.

Where a lease was taken benami in the names of three ladies, who for some time paid rent to the lessor, and who were sued for rent by him on several occasions when he obtained decrees, which he executed against their property, the lessor was nevertheless allowed, when the ladies were unable to pay any rent, to sue their husbands, who were the beneficial lessees.[2]

Strict proof required.

The Courts look with jealousy on benami transactions, and a person who claims under such a title must prove his case strictly, and he can only recover on the strength of the case he asserts; mere inferences will not be sufficient to induce the Court to take away property from the person in whose name it is held.[3]

Where *bonâ fide* creditors of the ostensible owner of property are claimants on that property, the Court will

[1] 7 B. L. R., 720.

[2] Debnath Roy Chowdhry *v.* Gudadhur Dey, 18 W. R., 132.

[3] Sreemanchunder Dey *v.* Gopaul Chunder Chuckerbutty, 11 Moo. I. A, 28; Nowab Azimut Ali Khan *v.* Hurdwaree Mull, 13 Moo. I. A., 395.

LECTURE IV.

require strict proof on the part of any one seeking to have it declared that he held it only benami.[1] Though there may be in the evidence circumstances which may excite suspicion, and doubt may be entertained with regard to the truth of the case made, it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds, established by legal testimony.[2] If it is once established that a transaction is benami, the fact that the deeds and proceedings bear the benamidar's name, is perfectly consistent with the benami case, and is of no essential weight on the one side or the other in considering who is the principal.[3] It is not necessary that the nature of the transaction should be proved by writing, but oral evidence is admissible.[4] The persons who seek to prove that a transaction was benami, must prove the payment of the purchase-money; and if they do so, any subsequent acts done in the name of the nominal owner, will be explained by reference to the original transaction; whereas if they cannot prove that payment, their case must necessarily fail.[5]

Oral evidence.

Proof of payment of purchase-money.

Pleading benami transaction against purchaser under s. 317, Civil Procedure Code.

The real owner of property, who is actually in possession, may plead in answer to a suit for redemption by a certified purchaser under s. 317 of the Civil Procedure Code, that the purchase was made benami by the plaintiff on his behalf. This section corresponds with s. 260 of Act VIII of 1859, and it was decided by the Privy Council that that section should be construed strictly and literally; that it was applicable only to a suit brought against the certified purchaser to assert the benami title against him; that the Statute did not make benami purchases illegal; and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate, and show that he was the apparent owner only and a mere trustee.[6]

[1] Ruknadawla Nowab Ahmed Ali Khan *v.* Hurdwari Mull, 5 B. L. R., 578.

[2] Sreemanchunder Dey *v.* Gopal Chunder Chuckerbutty, 11 Moo. I. A., 28, 44; Faez Buksh Chowdry *v.* Fukeeroodeen Mahomed Ahassun Chowdry, 14 Moo. I. A., 234.

[3] Rohee Lall *v.* Dindyal Lall, 21 W. R., 257.

[4] Palaniyappa Chetti *v.* Arumugam Chetti, 2 Mad. H. C. R., 26; Tara Monee Debia *v.* Shibnath Tulapatur, 6 W. R., 191.

[5] M. S. Beebee Nyamut *v.* Fuzl Hossein, S. D. A. of 1859, p. 139.

[6] M. S. Buhuns Kowur *v.* Lalla Buhoree Lall, 14 Moo. I. A., 496; Lokhee Narain Roy Chowdhry *v.* Kalypuddo Bandopadhya, L. R., 2 I. A., 154.

The provisions of s. 260 of Act VIII of 1859 apply to ordinary benami purchases at execution-sales, but do not affect purchases of property by one member of a Hindu family in his own name, but with the joint funds. Those provisions, say the Privy Council, "were designed to check the practice of making what are known as benami purchases at execution-sales, *i.e.*, transactions in which *A* secretly purchases on his own account in the name of *B*. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition howsoever made by a member of a family in his sole name, if made by the use of the family funds."[1]

Purchase at sale for arrears of revenue.

A purchase at a sale for arrears of revenue made by a managing member of a joint Hindu family in his own name, is not affected by the 21st section of Act I of 1845, which provides that "any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs;" and notwithstanding anything contained in that section, the members of the joint family may sue to enforce rights acquired by them under such a purchase as against the managing member, though he is the sole certified purchaser.[2]

Sale by benamidar.

If property is purchased in the name of a benamidar, and all the indicia of ownership are placed in his hands, and the benamidar sells to a purchaser for valuable consideration, the true owner can only get rid of the effect of the alienation by showing that it was made without his own acquiescence, and that the purchaser took with notice of that fact. If the purchaser bought in good faith, and without notice, he acquires a good title as against the true owner and his heirs, or any subsequent purchaser from them.[3]

Standing by.

Parties who stand by, and permit another to hold himself out to the world as the real proprietor of an estate

[1] Bodh Singh Doodhooria *v.* Gunesh Chunder Sen, 12 B. L. R., 317, 330.
[2] Toondun Singh *v.* Pokh Narain Singh, 13 W. R., 347.
[3] Bhugwan Doss *v.* Upooch Singh, 10 W. R., 185; Rackhaldoss Moduck *v.* Bindoo Bashinee Debia, Marsh., 293; Kally Doss Mitter *v.* Gobind Chunder Paul, Marsh., 569; Rennie *v.* Gunga Narain Chowdhry, 3 W. R., 10.

LECTURE IV.

when in reality he is not so, and thus induce parties, innocent of the fraud, to lend their money upon such faith, are not entitled to any consideration from a Court of equity and good conscience.[1]

Purchaser with notice.

If a purchaser of an estate at its full value takes with notice of a trust, he is bound to the same extent and in the same manner as the person of whom he purchased, for, knowing another's right to the property, he throws away his money voluntarily and of his own free will.[2] Notice is either actual or constructive. What is sufficient to put a purchaser upon inquiry is good notice,—that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it. It is sufficient to charge a man with knowledge that he had that before him, which, if he had used due diligence, would have afforded the knowledge he desires.[3] And where there is a person in possession of the estate other than the nominal owner, the person in whose name the title-deed is, the purchaser is bound to enquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession.[4]

Real owner may sue benamidar.

The real owner of property may sue the benamidar, either to declare his title to the property, or to recover possession of it, and may prove the benami nature of the transaction.[5] Thus where a portion of a taluq, which was confiscated by Government, really belonged to an innocent person who had allowed her property to remain in the name of the taluqdar, she was allowed to sue the Government and the taluqdar to recover the confiscated property, the Privy Council saying "the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."[6]

Equitable owner.

The equitable owner of property which is in the name

[1] Nundun Lal *v.* Tayler, 5 W. R., 37; Brojonath Ghose *v.* Koylash Chunder Banerjee, 9 W. R., 593; Nidhee Singh *v.* Bissonath Dass, 24 W. R., 79.

[2] Mancharji Sorabji Chulla *v.* Kongseo, 6 Bom. H. C. R., O. C., 59; Hakeem Meah *v.* Beejoy Patnee, 22 W. R., 8.

[3] Mancharji Sorabji Chulla *v.* Kongseo, 6 Bom. H. C. R., O. C., 59.

[4] Hakeem Meah *v.* Beejoy Patnee, 22 W. R., 8.

[5] Tara Soondaree Debee *v.* Oojul Monee Dossee, 14 W. R., 111.

[6] M. S. Thukrain Sookraj Koowar *v.* The Government, 14 Moo. I. A., 112.

of a trustee may prove the benami nature of the transaction in a suit by the trustee to obtain possession of the property.[1]

Suit by creditors against benamidar.

Creditors may enforce their claims against the property of their debtor held for him benami.[2] Thus it has been held, that a conveyance to female members of a Hindu family, the father continuing in absolute and uncontrolled possession during his life, and his son entering into possession after his death, could not exclude the claim of the son's creditors.[3]

Transaction avowedly fraudulent.

In many cases the object of the benami transaction is avowedly to defraud creditors, and against them it is, as we have seen,[4] void.[5] But as between the true owner and the benamidar the question arises, whether the owner can sue for the restitution of the property, alleging that the sale was fraudulent, or can set up the defence of his own fraud in an action by the benamidar. Formerly it was considered that no title could be founded upon fraud, and that if a man chose to convey his property to another admittedly for the purpose of deceiving the public, defrauding his creditors, and avoiding the ends of justice, he disentitled himself to any relief,[6] even though no person had been defrauded.[7] And the Courts refused to recognize any distinction in favour of an ignorant female.[8]

"Courts of Justice," said Jackson, J., "are designed for the protection of honest suitors, and the enforcement of just claims. They are not available as machinery to aid in the carrying out of schemes of fraud. It is right that parties should know, in making secret arrangements in regard to

[1] Ramanugra Narain *v.* Mahasundar Kunwar, 12 B. L. R., 433.

[2] Musadee Mahomed Cazum Sherazee *v.* Meerza Ally Mahomed Shoostry, 6 Moo. I. A., 27.

[3] Hemanginee Dossee *v.* Jogendro Narain Roy, 12 W. R., 236.

[4] *Ante*, p

[5] See also Gnanabhai *v.* Srinivasa, 4 Mad. H. C., 84; Sankarappa *v.* Kamayya, 3 Mad. H. C., 231; Pullen *v.* Ramalinga, 5 Mad. H. C., 368; Tillak Chund *v.* Jitamal, 10 Bom., 206.

[6] Roushan Khatoon Chowdrain *v.* The Collector of Mymensingh, S. D. A. of 1846, p. 120; Brimho Mye Dibeea *v.* Ram Dolub Hor, S. D. A. of 1849, p. 276; Rajah Rajnarain Roy *v.* Juggunnath Pershad Mullick, S. D. A. of 1851, p. 774; Ram Soonder Sandial *v.* Rajah Anundnath Roy, S. D. A. of 1856, p. 542; Koonjee Singh *v.* Jankee Singh, S. D. A. of 1852, p. 838; Keshub Chunder Sein *v.* Vyasmonee Dossia, 7 W. R., 118; S. M. Sukhimani Dasi *v.* Mahendranath Dutt, 4 B. L. R. (P. C.), 16.

[7] Hurry Sunker Mookerjee *v.* Kali Coomar Mookerjee, W. R., 1864, p. 265.

[8] Bhowany Sunkur Pandey *v.* Purem Bebee, S. D. A. of 1853, p. 639.

LECTURE IV.

their property for fraudulent purposes, such as defeating their creditors, that they are entering on a dangerous course, and that they must not expect the assistance of the Courts to extricate themselves from the difficulties in which their own improbity has placed them."[1]

So the Courts refused to allow a defendant to plead, that a deed which was admittedly executed by him, was executed for the purpose of defrauding his creditors, on the ground that, though a deed may be avoided on the ground of fraud, the objection must come from a person neither party nor privy to it, and that no man can allege his own fraud to invalidate his own deed.[2] And the principle was applied equally to persons claiming through the author of the fraud.[3]

But in the later cases these principles have not been followed, and the original owner of property has been allowed to plead that the transaction was fraudulent, the reason being, that the real rights of the parties are to be ascertained, and if the plea were disallowed, the Courts would assist the benamidar to obtain property by means of fraud. Thus, in a suit brought by the plaintiff for registration of her name in the place of a person from whom she said she had purchased the property, one of the defendants contended that the plaintiff's vendors had purchased the property benami for her (the defendant), and that she had been in possession of it from the date of her purchase. It appeared that there had been no consideration for the sale to the plaintiff, and that it had been executed by the defendant's husband for the purpose of defrauding his creditors. In a previous suit the defendant had stated that the plaintiff's vendors were really the purchasers of the property. It was held that she was not estopped by this statement from now showing the real truth of the transaction. "In many of these cases," said Couch, C.J., "the object of a benami transaction is to obtain what may be called a shield against a creditor; but notwithstanding this, the parties are not precluded from showing that it was not intended that the

[1] Alokscondry Goopto *v.* Horo Lal Roy, 6 W. R., 287.

[2] Obhoy Churn Gluttuck *v.* Treelochun Chatterjee, S. D. A. of 1859, p. 1639; Ram Lall Dut *v.* Kishen Chunder Banerjee, S. D. A. of 1860, pp. 1, 436.

[3] Luckhee Narain Chuckerbutty *v.* Tara Monee Dossee, 3 W. R., 92; Purikheet Sahoo *v.* Radha Kishen Sahoo, 3 W. R., 221; Kalee Nath Kur *v.* Doyal Kristo Deb, 13 W. R., 87.

property should pass by the instrument creating the benami, and that in truth it still remained in the person who professed to part with it. . . . . Although, no doubt, it is improper that transactions of this kind should be entered into for the purpose of defeating creditors, yet the real nature of the transaction is what is to be discovered, the real rights of the parties. If the Courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving an estate to a person when it was never intended that he should have it."[1]

A suit will lie in which the plaintiff does not sue to render void an act done by him in fraud, or in other terms, to be relieved from the effect of his own fraudulent act, but simply sues to have an act legal in itself enforced, though done with the motive of keeping property out of the reach of his creditors.[2]

Constructive trusts.

The last kind of trust with which we have to deal is that known as a constructive trust. A constructive trust is one which the Court elicits by a construction put upon certain acts of parties. Such a trust is raised wherever a person clothed with a fiduciary character, as for instance, a factor,[3] agent,[4] or partner,[5] 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 will be decreed to hold for the benefit of his *cestui que trust*.[6]

Renewal of lease by trustee.

A common instance of a constructive trust is, where a trustee of leasehold property renews the lease in his

[1] S. M. Debia Chowdhrain *v.* Bimola Soondaree Debia, 21 W. R., 422. And see Gopeenath Naik *v.* Jadoo Ghose, 23 W. R., 42; Bykunt Nath Sen *v.* Goboollah Sikdar, 24 W. R., 391; Param Singh *v.* Lalji Mal, I. L. R., 1 All., 403. As to the principles upon which English Courts proceed where an attempt is made to create a trust for a fraudulent purpose, see *ante*, p. 48.

[2] Suboodra Beebee *v.* Bikromadit Singh, S. D. A. of 1858, pp. 543, 548.

[3] East India Co. *v.* Henchman, 1 Ves. J., 287.

[4] Fawcett *v.* Whitehouse, 1 R. & M., 132; Hichens *v.* Congreve, *ib.*, 150, *n*; Brookman *v.* Rothschild, 3 Sim., 153; Gillett *v.* Peppercorn, 3 Beav., 78; Edwards *v.* Lewis, 3 Atk., 538; Griffin *v.* Griffin, 1 Sch. and Lef., 352; Mulvany *v.* Dillon, 1 B. and B., 417; Mulhallen *v.* Marum, 3 De and Wal., 317.

[5] Bentley *v.* Craven, 18 Beav., 75; Burton *v.* Wookey, 6 Madd., 367.

[6] Lewin, 7th Ed., 98, 165.

LECTURE IV.

own name. The leading case on this point is *Keech* v. *Sandford*.[1] There the lessor refused to renew the lease for an infant, and the trustee then got a lease made to himself. Lord King, however, declared that the trustee must hold the renewed lease for the infant, though no fraud was alleged, saying: "This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed."

An executor *de son tort* cannot renew a lease in his own name.[2] Where the renewed lease comprises lands not included in the former lease, the trust will not attach to such lands.[3]

Principle of rule.

The principle upon which trustees and executors are not allowed to take renewals of leases of trust-property to themselves is, that it is for the public good that persons in fiduciary positions shall not be allowed to reap any benefit from the positions which they hold.[4]

Instances.

If a person who has a limited interest in a lease renews it in his own name, he can only hold it as a trustee for the other persons interested;[5] and if a settlor creates a trust of a leasehold interest, he cannot renew the lease for his own benefit.[6]

If a trustee, upon his representations, acquires an absolute interest in the trust-property by virtue of an Act of the Legislature, he will be a trustee of the interest he has acquired.[7] Where several persons are jointly interested in a lease, one of them cannot obtain a renewal to himself,[8] as for instance, in the case of one of several partners obtaining a renewal of the lease of the partnership premises.[9]

[1] Sel. Cas., Ch., 61.

[2] Mulvany *v.* Dillon, 1 B. & B., 417; Griffin *v.* Griffin, 1 Sch. & Lef., 352.

[3] Acheson *v.* Fair, 3 Dr. & War., 512; Giddings *v.* Giddings, 3 Russ., 241.

[4] Griffin *v.* Griffin, 1 Sch. & Lef., 354; Blewett *v.* Millett, 7 Bro. P. C., 367.

[5] James *v.* Dean, 11 Ves., 383.

[6] Colegrave *v.* Manby, 6 Madd., 72; Tanner *v.* Elworthy, 4 Beav., 487.

[7] Cooper *v.* Phibbs, L. R., 2 H. L. Cas., 149: see also Yem *v.* Edwards, 3 K. and J., 564; 1 DeG. and J., 598.

[8] Palmer *v.* Young, 1 Vern., 276; Hamilton *v.* Denny, 1 B. and B., 199; Jackson *v.* Welsh, L. and G., *t*; Plunk, 346.

[9] Featherstonhaugh *v.* Fenwick, 17 Ves., 311; Clegg *v.* Edmondson, 22 Beav., 125; 8 D. M. G., 787; Clegg *v.* Fishwick, 1 Mac. and G., 294; Clements *v.* Hall, 2 DeG. and J., 173.

A mortgagee who renews a lease must hold it for the benefit of the mortgagor.[1] A trustee cannot, by fraudulently incurring a forfeiture of the lease of the trust-property, obtain a renewal to himself.[2] So a tenant who fraudulently fails to pay Government revenue, in consequence of which the estate is sold, and becomes the purchaser, will be declared a trustee of the land for the lessor.[3] Where a trustee who has a right to obtain a renewal sells the right, the trust will attach upon the purchase-money in his hands.[4]

Remedy.

The trustee will have to assign the renewed lease free from all incumbrances, except an under-lease made *bonâ fide* at the best rent,[5] and he must account for mesne rents and profits,[6] even though the lease has expired.[7] The lessor will be entitled to be indemnified against covenants entered into upon the renewal, to his costs,[8] and to money laid out upon lasting improvements.[9] If the trustee has parted with his interest in the renewed lease to a volunteer,[10] or to a purchaser with notice,[11] the *cestui que trust* will, nevertheless, be entitled to the same remedies as against the trustee.[12]

Agent of trustee.

A mere agent of a trustee will not be made to account to the *cestui que trust* as a constructive trustee,[13] unless he becomes a party to the breach of trust, when he will be liable to the extent of his participation.[14]

Legal adviser gaining advantage by ignorance.

A legal adviser is bound to give sufficient advice to his client; and if any advantage or property comes to him by his

[1] Rakestraw *v.* Brewer, 2 P. Wms., 510; Nesbitt *v.* Tredennick, 1 B. and B., 29.
[2] Hughes *v.* Howard, 25 Beav., 575.
[3] Balkrishna Vasudev *v.* Madhavrav Narayan, I. L. R., 5 Bomb., 73.
[4] Owen *v.* Williams, Amb., 734.
[5] Bowles *v.* Stewart, 1 Sch. and Lef., 230.
[6] Mulvany *v.* Dillon, 1 B. and B., 409; Eyre *v.* Dolphin, 2 B. and B., 290.
[7] Eyre *v.* Dolphin, 2 B. and B., 290.
[8] Giddings *v.* Giddings, 3 Russ., 241; James *v.* Dean, 11 Ves., 383; Lawrence *v.* Maggs, 1 Eden, 453.
[9] Walley *v.* Walley, 1 Vern., 484; Lawrence *v.* Maggs, 1 Eden, 453.
[10] Bowles *v.* Stewart, 1 Sch. and Lef., 209; Eyre *v.* Dolphin, 2 B. and B., 290.
[11] Walley *v.* Walley, 1 Vern., 484; Eyre *v.* Dolphin, 2 B. and B., 290; Parker *v.* Brooke, 9 Ves., 583; Coppin *v.* Fernyhough, 2 Bro. C. C., 291.
[12] See Sahebzada Singh *v.* Ghundaree Roy, 1 W. R., 256.
[13] Myler *v.* Fitzpatrick, 6 Madd., 360; Davis *v.* Spurling, 1 R. and M., 64; Maw *v.* Pearson, 28 Beav., 196.
[14] Portlock *v.* Gardner, 1 Hare, 606; Bodenham *v.* Hoskyns, 2 D. M. G., 903.

LECTURE IV.

ignorance or the neglect of his duty, he will be a constructive trustee for the benefit of the person who would have benefited, if the adviser had done his duty. "Whether," said Lord Eldon,[1] "you meant fraud or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it, if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance. It is too dangerous to mankind, that those who are bound to advise, and who being bound to advise ought to be able to give sound and sufficient advice, it is too dangerous to allow that they shall ever take advantage of their own ignorance—of their own professional ignorance—to the prejudice of others." [2]

When a barrister prepared a will for a friend, of which he was appointed executor, and in that capacity became entitled to the personal estate of the testator, he was decreed to hold it as a trustee for the next-of-kin. "The testator's intention," said Lord Chancellor Hart, "was not directed to his personal estate, and he thought he was only disposing of his real estate, it became the bounden duty of the defendant to have informed him, that if he made no disposition of his personal estate, the law, in consequence of his being the executor, would entitle him to retain it for his own benefit. He was bound to inquire of the testator, in plain and distinct terms, whether it was his will that the defendant should so retain the personal estate for his own benefit. . . . . The defendant has stated that he did not know the rule of law which gives to an executor the undisposed of residue. Be it so; but in the administration of justice, what ought to result from that ignorance? The testator relied on the defendant's knowledge of law as well as on his integrity. Will the avowal of ignorance of the law in the legal adviser justify the disinheriting of the testator's relations in favour of that adviser."[3]

[1] Bulkley *v.* Wilford, 2 C. and F., 102.

[2] And see Segrave *v.* Kirwan, Beat., 157; Nanney *v.* Williams, 22 Beav., 452.

[3] Segrave *v.* Kirwan, Beat., 157: and see Bulkley *v.* Wilford, 2 C. & F., 102; Garrett *v.* Wilkinson, 2 DeG. and Sm., 244.

Courts of equity exercise jurisdiction to set aside voluntary gifts made to persons standing in a fiduciary relation to the donor. The relief is granted upon the principle of public policy, and applies to all the variety of relations in which dominion may be exercised by one person over another.[1] For instance, if a legal, medical, or spiritual adviser by availing himself, of his situation as such adviser, gains some pecuniary advantage from the person whom he advises, he will be treated as a trustee.[2]

Gifts to persons in fiduciary capacity.

A voluntary gift to a person who does not stand in any fiduciary or confidential position towards the donor, will not be set aside if there was no fraud, surprise, or undue influence, and the donor acted of his own free will, however improvident the gift may be. In *Villiers* v. *Beaumont*[3] Lord Nottingham said, that if a man will improvidently bind himself up by a voluntary deed, and not reserve liberty to himself by a power of revocation, the Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if the Court gave relief in such a case, it would establish the proposition that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd. *Primâ facie* such a gift is good, but it will be set aside if the donor can prove fraud, surprise, or undue influence.[4]

Voluntary gift where no fiduciary relation when set aside.

Where the fiduciary relation exists, the onus of proving that the transaction is righteous is on the donee.[5] The Evidence Act provides (s. 111) that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. And the following illustrations are given:—(*a*) "The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney; (*b*) the

Onus of proof where fiduciary relation exists.

[1] Huguenin *v.* Basley, 14 Ves., 273; Dent *v.* Bennett, 4 M. and Cr., 277; Pushong *v.* Munia Halwani, 1 B. L. R., A. C., 95. And see Contract Act, IX of 1872, ss. 15—22.

[2] See Act I of 1877, s. 2, illus. (*b*).

[3] 1 Vern., 100.

[4] Hunter *v.* Atkins, 3 M. and K., 113; Toker *v.* Toker, 31 Beav., 629.

[5] Gibson *v.* Jeyes, 6 Ves., 266: Wright *v.* Vanderplank, 8 D. M. G., 133; Hoghton *v.* Hoghton, 15 Beav., 299; Cooke *v.* Lamotte, *ibid*, 234; Sharp *v.* Leach, 31 Beav., 491; Smith *v.* Kay, 7 H. L. Cas., 780; Turner *v.* Collins, L. R., 7 Ch., 329.

LECTURE IV.

good faith of a sale by a son just come of age to his father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father."

Where it does not.

Where the fiduciary relation does not exist, a person who takes a benefit under a voluntary gift which is not subject to a power of revocation, has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable. A gift not meant to be irrevocable, but not subject to a power of revocation, may be set aside at the instance of the donor.[1] Even where the matter appears to rest upon a good consideration, as where there is a sale, the Court will inquire into the circumstances, with a view to ascertain whether undue influence was exercised or not.[2]

Spiritual influence.

If the donee is a person who exercises influence by means of his spiritual ascendency over the donor, the gift will be set aside.[3]

Parent and child.

The Court looks with suspicion upon gifts made by a child to a parent shortly after attaining majority, and such gifts will be set aside if there is any appearance of undue influence having been exercised by the parent. Where a father who had advanced a son during his minority took a bond from the son on his attaining majority for a much greater amount than the sums advanced, the son being without means, the transaction was set aside; Lord Northington saying:—"If the obligor gives a voluntary bond, and never complains of any imposition or hardship in obtaining it, the Court will only postpone it to creditors, and not set it aside for other volunteers. Nay, if it be given with advice and deliberation, this Court will not set it aside for the obligor. But if a man gives a voluntary bond for more than he is able to pay, the transaction speaks weakness on the one side and a sort of imposition on the other."[4] The Court will not interfere where the transaction is fair and reasonable, and no undue influence has been exercised.[5] The principles upon which the Court acts in transactions of this nature were thus stated by Lord Langdale in *Archer* v. *Hudson*.[6] "Nobody has ever asserted that there

[1] Wollaston *v.* Tribe, L. R., 9 Eq., 44.
[2] Clarke *v.* Malpas, 31 Beav., 80; Baker *v.* Monk, 33 Beav., 419.
[3] Huguenin *v.* Basley, 14 Ves., 273; Norton *v.* Rolly, 2 Eden, 286; Nottidge *v.* Prince, 2 Giff., 246; Lyon *v.* Home, L. R., 6 Eq., 655.
[4] Carpenter *v.* Hariot, 1 Eden, 338.
[5] Blackborn *v.* Edgeley, 1 P. Wms., 600, 606; Jenner *v.* Jenner, 2 DeG. F. and J., 359; Baker *v.* Bradley, 7 D. M. G., 597.
[6] 7 Beav., 551, 560.

cannot be a pecuniary transaction between a parent and child, the child being of age; but everybody will affirm in this Court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit proving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party who endeavours to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

Persons *in loco parentis.*

The principles upon which the Court acts in dealing with transactions between parent and child, will be applied in dealings between a minor who has recently attained his majority, and a person who has stood towards him *in loco parentis*.[1]

Guardian and ward.

So, gifts from a ward to a guardian made shortly after the ward's attaining majority will be set aside if there is any suspicion of undue influence on the part of the guardian. "Where," said Lord Hardwicke,[2] "a man acts as guardian, or trustee in the nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage; and therefore the principle of the Court is of the same nature with relief in this Court on the head of public utility . . . . All depends upon public utility; and therefore the Court will not suffer it, though, perhaps, in a particular instance there may not be actual unfairness . . . . The rule of the

[1] Archer *v.* Hudson, 7 Beav., 551; Revett *v.* Harvey, 1 S. and S., 502; Dettmar *v.* Metropolitan and Provincial Bank, 1 H. and M., 641.
[2] Hylton *v.* Hylton, 2 Ves., 549.

LECTURE IV.

Court as to guardians is extremely strict, and in some cases does infer some hardship; as where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance; but the Court has established that on great utility, and on necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances."[1] If, however, the relation of guardian and ward has been completely determined, and the presumption of undue influence has been successfully rebutted, a gift from the ward will be allowed to hold good.[2]

Gift to legal adviser.

A legal adviser, whether counsel, attorney, or vakeel, can take no benefit from his client while he is acting for him in a professional capacity, beyond his regular professional charges. In order to support a gift from a legal adviser to his client, it must appear that the relation has been dissolved.[3] If it is endeavoured to make the gift good, by expressing that valuable consideration has been given by the legal adviser, evidence will be admissible to prove that the consideration is fictitious.[4]

If there is no suit pending, and no undue influence has been exercised by the legal adviser, a gift to him may be supported,[5] and he may take a benefit under a will if it can be proved that the testator acted freely.[6]

In the class of cases we have just considered, undue influence is presumed to have been exerted until the contrary is proved, and the person benefited is bound to show that all the terms and conditions of the contract are fair, adequate, and reasonable.[7]

Extent of rule.

The rule extends to all the relations in which dominion may be exercised by one person over another, even though

[1] See also Ramkissen Pajoshee Mahapatur *v.* Hurrykissen Mahapatur, 15 S. D. A., 274, and the notes to Huguenin *v.* Basley, 2 Wh. and T. L. C., 585.

[2] Hatch *v.* Hatch, 9 Ves., 296; Hunter *v.* Atkins, 3 M. and K., 113.

[3] Moore *v.* Prance, 9 Hare, 299; Walker *v.* Smith, 29 Beav., 394; Gardener *v.* Ennor, 35 Beav., 549; Broun *v.* Kennedy, 4 D. G. J. and S., 217; Ruʼabai *v.* Ismail Ahmed, 7 Bom., O. C., 27; Pushong *v.* Munia Halwani, 1 B. L.R., A.C., 95.

[4] Tomson *v.* Judge, 3 Drew., 306.

[5] Oldham *v.* Hand, 2 Ves., 259; Harris *v.* Tremenheere, 15 Ves., 34; Nuthoo Lall *v.* Buddree Pershad, 1 N. W. P., 1.

[6] Hindson *v.* Weatherill, 5 D. M. G., 301; Walker *v.* Smith, 29 Beav., 394.

[7] Pushong *v.* Munia Halwani, 1 B. L. R., A. C., 95; Nuthoo Lall *v.* Buddree Pershad, 1 N. W. P., 1; and see *ante*, p. 111.

no actual fiduciary relationship in the strictest sense of the words exists. Thus gifts by patients to medical attendants,[1] by a younger sister to an elder,[2] by a woman to her intended husband,[3] and gifts obtained by operating on the fears of another[4] have been set aside.

Gift in expectation of death.

A voluntary deed, which contains no power of revocation, executed in the expectation of immediate death, will be set aside, even though there has been no undue influence, if the settlor did not intend that it should be operative in case he recovered.[5]

Strangers.

The Court has power to relieve against strangers. "Whoever," said Wilmott, C.J.,[6] "receives the gift, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out among his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it." But the Court will not interfere as against a *bonâ fide* purchaser without notice.[7]

Principles on which Court acts.

The principles upon which Courts of Equity act in setting aside voluntary gifts to persons standing in a fiduciary relation to the donor were thus stated by Lord Brougham in *Hunter* v. *Atkins*:[8] "There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself exactly in the same position as a stranger

[1] Dent *v.* Bennett, 4 My. and Cr., 269.
[2] Harvey *v.* Mount, 8 Beav., 439.
[3] Page *v.* Horne, 11 Beav., 227.
[4] Williams *v.* Bayley, L. R., 1 H. L., 200.
[5] Forshaw *v.* Welsby, 30 Beav., 243.
[6] Bridgeman *v.* Green, Wilm., 58.
[7] Blackie *v.* Clark, 15 Beav., 595; and see further the notes to Huguenin *v.* Basley, 2 Wh. and T. L. C., 556.
[8] 3 M. and K., 135.

LECTURE IV.

would have been in, so that he may gain no advantage whatever from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men—men who have the benefits of civility without the evils of excessive refinement and overdone subtlety—can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas in the case of a stranger, it would lie on those who opposed him) to show that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened which might not have happened had no such connection subsisted. . . . . The rule, I think, cannot be laid down much more precisely than I have stated it, that where the known and defined relation of attorney and client, guardian and ward, trustee and *cestui que trust*, exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits, or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict rule should be laid down—any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or

that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach! If any one should say that a rule is thus recognized, which from its vagueness cannot be obeyed, because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves.

The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition; and on the result of the inquiry, we are to say—Has or has not an undue influence been exerted—an undue advantage taken?"

Badges of fraud.

It has been held that a fictitious consideration inserted in the deed is a badge of fraud.[1] So, where there has been concealment from those who ought naturally to have been made acquainted with the transaction.[2] But is not necessary that there should have been such acts as these in order to enable the Court to interfere. The Court will inquire whether the grantor not only executed the deed voluntarily, but also whether he had a full knowledge of the consequences of his act.[3] The mere fact that the deed was read over to him is not sufficient, it must be proved that he understood its nature.[4] And the case will be stronger against the donee when the deed was not prepared under the donor's instructions and was not read over to him.[5] Where persons stand in a fiduciary relation to each other, the party benefited must be able to show that the donor had competent and independent advice, and the capacity of the donor is of importance.[6]

Independent advice.

[1] Bridgeman *v.* Green, 2 Ves., 627; Gibson *v.* Russell, 2 Y. & C. C. C., 104.
[2] Jevers *v.* Jevers, 1 Bro. P. C., 272; Scrope *v.* Offley, *ib.*, 276.
[3] Huguenin *v.* Basley, 14 Ves., 300; Pratt *v.* Barker, 4 Russ., 507; Toker *v.* Toker, 31 Beav., 629.
[4] Hoghton *v.* Hoghton, 15 Beav., 278; Anderson *v.* Elsworth, 3 Giff., 154.
[5] Clarkson *v.* Hanway, 2 P. W., 203.
[6] Griffith *v.* Robins, 3 Madd., 191; Baker *v.* Bradley, 7 D. M. G., 597; Rhodes *v.* Bates, L. R., 1 Ch., 252; Rujabai *v.* Ismail Ahmed, 7 Bom., O. C., 35.

LECTURE IV.

At whose instance set aside.

When undue influence is proved, the deed may be set aside at the instance of the donor or grantor, or after his death, of his representatives or devisees.[1] If the donor or settlor himself requires the aid of the Court to transfer a fund in Court, which is the subject of the settlement, to the donee, the Court cannot refuse its assistance, whether the settlement may or may not, be impeachable upon the ground of undue influence.[2]

If the subject-matter of the gift can be traced into the possession of third persons, it will be affected by the fraud or undue influence which attached to the original transaction.[3]

Acquiescence.

The *cestui que trust*, if competent to contract, must seek his remedies within a reasonable time, otherwise he may be barred by acquiescence.[4]

Confirmation and acquiescence.

Although the evidence may show the existence of undue influence at the time of the settlement or gift, it will not be set aside, if the settlor has, during a course of years and in several transactions, acted upon it and treated it as in all respects valid.[5] But acquiescence must be shown to be *after* the discovery of the right to impeach a transaction,[6] in which case it will preclude the parties acquiescing from raising objections afterwards.[7] And where a client dealing with his solicitor executes a voidable instrument, and afterwards chooses to confirm it by will, the confirmation will be effectual.[8] In order that acquiescence or confirmation may be valid, there must be no continuing influence, as otherwise there would be no free agency on which to found acquiescence.[9] And where a confidential and fiduciary relation is shown to exist, its continuance will be presumed, unless there is direct evidence of its termination.[10]

[1] Anderson *v.* Elsworth, 3 Giff., 154.
[2] *Re* Metcalfe, 2 D. J. & S., 122.
[3] Bridgeman *v.* Green, 2 Ves., 627 ; Huguenin *v.* Basley, 14 Ves., 274. In these cases, however, the persons actually in possession or enjoyment of the property so obtained were not purchasers for value without notice, but mere volunteers.
[4] Clegg *v.* Edmondson, 8 D. M. G., 787 ; Peddamuthulaty *v.* Timma Reddy, 2 Mad. H. C., 270.
[5] Brown *v.* Carter, 5 Ves., 862 ; Wright *v.* Vanderplank, 2 K. & J., 1 ; affd., 2 Jur., N. S., 599 ; Dimsdale *v.* Dimsdale, 3 De., 556 ; Jarratt *v.* Aldam, L. R., 9 Eq., 463.
[6] King *v.* Savery, 5 H. L. Cas., 627.
[7] Skottowe *v.* Williams, 3 D. F. & J., 535.
[8] Stump *v.* Gaby, 2 D. M. G., 623.
[9] Hatch *v.* Hatch, 9 Ves., 292 ; Sharp *v.* Leach, 31 Beav., 491.
[10] Rhodes *v.* Bates, L. R., 1 Ch., 252.

Laches.

Laches and considerable delay in applying to the Court to set aside an instrument impeachable by reason of undue influence will, in general, be a bar to relief.[1]

Costs.

Trustees are bound to protect the interests of their *cestuis que trustent*, and are justified, when they are called upon to transfer a fund pursuant to an arrangement between persons standing in a fiduciary relation to one another, in taking every precaution to ascertain that no fraud or undue influence has been exercised by the person to whom the fund is to be transferred. If, however, they act capriciously, or, having ascertained that the transaction is not one which the Court would set aside, they persist in refusing to transfer, and so render a suit necessary, they will be liable to pay costs.[2]

[1] Barwell *v.* Barwell, 34 Beav., 371 ; Skottowe *v.* Williams, 3 D. F. & J., 535 : see Proctor *v.* Robinson, 35 Beav., 329 ; Turner *v.* Collins, L. R., 7 Ch., 329.

[2] See Firmin *v.* Pulham, 2 DeG. & S., 99 ; *Re* Cater, 25 Beav., 361 ; King *v.* King, 3 Jur., N. S., 609 ; *Re* Metcalfe, 2 D. J. & S., 122.

LECTURE V.

PARTIES TO THE TRUST.

Acceptance of trust — Trustees also executors — Acting as agent — Executor of an executor — Renunciation of probate — Partial acceptance — Recitals in deed as to state of trust — Trustee in fact — Liability of trustee — By whom trust may be created — General rule — The Sovereign — Corporations — Prizes of war — Infants — Married women — Stridhan — Alien — Persons convicted of certain offences — Grantee under sanad — Who may be *a cestui que trust* — The Government — Corporations — Aliens — Who may be a trustee. Persons under disability — Aliens — The Sovereign — Not the Government of India — Corporation — Presidency banks — Married women — Insolvent — *Cestuis que trustent* — Relatives — Number of trustees — Disclaimer — How made — Gift to trustee or executor.

Acceptance of trust.

A TRUSTEE may accept the trust by signing the trust-deed when there is one,[1] or, in the case of a will, by express declaration of his assent. *Primâ facie* he is assumed to assent to a devise,[2] and his acceptance may be implied from his neglect to disclaim for a long time, such as twenty years,[3] even though he has not acted in the trust.[4] And acceptance may be implied from acts of a trustee in relation to the trust-estate.[5] It is difficult to lay down any general rule as to what acts of a trustee will amount to acceptance. An executor who takes out probate of the will of his testator, thereby accepts the office, and becomes responsible for any loss incurred by the acts of his co-executor;[6] he cannot escape responsibility on the ground that he has taken no

[1] Buckeridge *v.* Glasse, 1 Cr. and Ph., 131.
[2] *Doe v.* Harris, 16 M. & W., 517; Lord Montford *v.* Lord Cadogan, 19 Ves., 638.
[3] Wise *v.* Wise, 2 J. & Lat., 402.
[4] See *Re* Uniacke, 1 J. & Lat., 1; *In re* Needham, *ib.*, 34.
[5] Lord Montford *v.* Lord Cadogan, 19 Ves., 638.
[6] Mucklow *v.* Fuller, Jac., 198; Booth *v.* Booth, 1 Beav., 135.

active part in the administration of the estate.[1] So if he interferes with the assets of the testator, he will be liable even though he does not take out probate.[2] Thus, where a co-executor who had not proved, after the death of the executor who had proved, gave a power-of-attorney to sell a small part of the testator's assets, which was not acted upon, and had not further intermeddled, it was held that he had accepted the office.[3]

So the joining in an assignment of a lease, for the purpose of passing the legal estate, has been considered to be of itself sufficient evidence that the executor had accepted and acted in the trusts of the will:[4] and an executor will be liable if he exercises acts of authority or ownership over the testator's estate.[5]

Trustees also executors.

If executors are also appointed trustees, taking out probate amounts to an acceptance of the trusteeship as well as of the executorship.[6]

Acting as agent.

If a trustee under a will does not expressly accept, but receives the rents and profits of the trust-property, he cannot escape from liability to account, on the ground that he acted merely as agent or factor.[7] In *Lowry* v. *Fulton*[8] a trustee who acted as agent, and who had not proved, was held not to have accepted the trust; but that was a peculiar case, and cannot be considered as an authority against the general rule.[9]

Executor of an executor.

According to English law, an executor who takes probate of the will of an executor, becomes executor of the will of the first testator, and cannot renounce probate of the first will, and take probate of the second.[10]

But this is not the law as regards persons governed by the Succession Act or the Probate and Administration Act, 1881.[11]

[1] Styles *v.* Guy, 1 Mac. & G., 431.
[2] Graham *v.* Hill, 3 Hill's MSS., 239, cited in Churchill *v.* Lady Hobson, 1 P. Wms., 241 (*n*); White *v.* Barton, 18 Beav., 192.
[3] Cummins *v.* Cummins, 8 Ir. Eq. Rep., 723: see also Doyle *v.* Blake, 2 Sch. & Lef., 231; Malzy *v.* Edge, 2 Jur., N. S., 80.
[4] Urch *v.* Walker, 3 My. & Cr., 702.
[5] James *v.* Frearson, 1 Y. & C. C. C., 375.
[6] Mucklow *v.* Fuller, Jac., 198; Booth *v.* Booth, 1 Beav., 125; Williams *v.* Nixon, 2 Beav., 472.
[7] Conyngham *v.* Conyngham, 1 Ves., 522; Montgomery *v.* Johnson, 11 Ir. Eq. Rep., 476; *Doe* *v.* Harris, 16 M. & W., 517.
[8] 9 Sim., 115.
[9] See further as to acts of acceptance, Lewin on Trusts, Ch. XI.
[10] In the Goods of Perry, 2 Curt., 655; Brooke *v.* Haynes, L. R., 6 Eq., 25.
[11] Act X of 1865, s. 229; Act V of 1881, s. 19; and see DeSouza *v.* Secretary of State, 12 B. L. R., 423.

LECTURE V.

Renunciation of probate.

The renunciation of probate by a person named as executor and trustee, is not in itself a disclaimer of the trust, but it is one circumstance of evidence, and if there be no proof of his ever having acted, the Court, after a long lapse of time, as sixty years, will presume a disclaimer.[1] Where real and personal estate was devised and bequeathed to *B*, upon trust, for sale and conversion, and upon further trusts for the heir-at-law of the testator absolutely, and *B* renounced probate, and died three years afterwards without having disclaimed the trusts, it was held, that he must be taken to have intended to disclaim them when he renounced probate.[2]

Where a person named as a trustee refused to act, but only took the trust-deed into his possession for safe custody, until some one could be found to undertake the trust, it was held, that there was not enough to charge him.[3]

Partial acceptance.

If the instrument of trust contains distinct and separate trusts, and a trustee is appointed to execute all the trusts, he cannot accept some and disclaim the others, but must accept all or disclaim all.[4]

Although the general rule is, that if a trustee acts in the trust, or intermeddles with the trust-property, he will be held to have accepted the trust, yet he may show that acts which apparently show an acceptance are referrible to some other ground.[5] But he cannot so act with reference to a trust-fund as to leave himself at liberty to say afterwards, either that he did, or did not, act as trustee.[6] Parol evidence is admissible upon the question of acceptance or non-acceptance of the trust.[7]

Recitals in deed as to state of trust.

If the instrument creating the trust contains recitals specifying the trust-property, the trustees should, as a matter of precaution, ascertain that the recitals are correct, for otherwise they may be held liable for the property mentioned. But they will not be estopped from averring against, or offering evidence to controvert, a recital in the deeds contrary to the fact, which has been

[1] Lewin, 7th Ed., 185, citing M'Kenna *v.* Eager, 9 I. R. C. L., 79: and see Earl Granville *v.* M'Neile, 7 Hare, 156.
[2] *In re* Gordon; Roberts *v.* Gordon, L. R., 6 C. D., 531.
[3] Evans *v.* John, 4 Beav., 35.
[4] Urch *v.* Walker, 3 My. & Cr., 702.
[5] Stacey *v.* Elph, 1 M. & K., 195; Dove *v.* Everard, 1 R. & M., 231; Lowry *v.* Fulton, 9 Sim., 115.
[6] Conyngham *v.* Conyngham, 1 Ves., 522; Stacey *v.* Elph, 1 M. & K., 195.
[7] James *v.* Frearson, 1 Y. & C. C. C., 370.

introduced into the deed by mistake of fact, and not through their own fraud or deception.[1] In *Fenwick* v. *Greenwell*[2] Lord Langdale said: "A doubt has been raised as to whether Miss Cuthbertson possessed the £5,000 stock at the time of the marriage. Now I cannot say, that the trustees are bound by the recital of that fact, contained in the deed; we have had so many instances of parties representing that they were entitled to particular property, and which representation has afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations, and I am not aware that it has ever been held, that trustees are bound by the representations of parties about to be married of the state of their property. I do not, therefore, accede to the argument that the recital alone binds the trustees."[3]

Trustee in fact.

A person may become a trustee in fact though not of right, and if he becomes possessed of a trust fund with notice of the trust, he will be bound by it.[4] The representatives of a deceased trustee will incur personal liability by paying away the residue of their testator's estate, if afterwards a debt is discovered to which it is liable, though they had no notice.[5] And if property has been distributed among the legatees of a person who has committed a breach of trust, though in ignorance of this fact, those who are damnified by the breach of trust may recover from the legatees.[6]

When executors have made an assignment on the appointment of a new trustee, they lose their character of executors and become trustees only.[7] And an executor, to whom a legacy is given upon trust, ceases to hold it as executor, from the time he has appropriated it to the purposes of the trust.[8]

Liability of trustee.

The liability of trustees for loss to the trust estate is the same, whether the acceptance of the trust has been express, or is implied by a Court of equity from their acts.[9]

[1] Brooke *v.* Haynes, L. R., 6 Eq., 25. [2] 10 Beav., 418.
[3] And see Gore *v.* Bowser, 3 Sm. & Giff., 6; Story *v.* Gape, 2 Jur., N. S., 706.
[4] Rackham *v.* Siddal, 1 Mac. & G., 607; Hennessey *v.* Bray, 33 Beav., 96.
[5] Knatchbull *v.* Fearnhead, 3 My. & Cr., 122.
[6] March *v.* Russell, 3 My. & Cr., 31.
[7] Smith *v.* Smith, 1 Dr. & S., 384. See Act X of 1865, ss. 316—326; Act V of 1881, ss. 135—145.
[8] Phillipo *v.* Munnings, 2 My. & Cr., 309; Dix *v.* Burford, 19 Beav., 409.
[9] Lord Montford *v.* Lord Cadogan, 19 Ves., 638. As to the nature of the debt created in England, see Lewin, 7th Ed., 189.

LECTURE V.

By whom trust may be created. General rule.

We have now to consider by whom a trust may be created. As a general rule, it may be said that every person who is competent to contract may create a trust. The Indian Contract Act provides that—

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject:"[1]

And a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it,—

"He is capable of understanding it, and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."[2]

The Act contains the following illustrations:—

"A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

"A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts."

The Sovereign.

The Sovereign, as to his private property, may, by Letters Patent, grant it to one person upon trust for another;[3] and the Government of India, as it has the power of disposing of public property, may convey such property to trustees if it think fit.

Corporations.

Corporate bodies may create trusts. They have the right to alienate the property vested in them, and in consequence may vest it in a trustee.[4] This right has been taken away in England by the Statute of 5 and 6 Wm. IV, c. 76; but as no similar Statute exists in this country, I apprehend that the law as it stood before the Statute would be enforced here.

Prizes of war.

Prizes of war vest in the sovereign, and are commonly, by the Royal Warrant, granted to trustees, upon trust to distribute in a prescribed mode among the captors; but an instrument of this kind is held not to vest an interest in the *cestuis que trustent*, which they can enforce in equity, but

[1] Act IX of 1872, s. 11. [2] *Ibid*, s. 12. [3] Lewin, 7th Ed., 21.
[4] Mayor of Colchester *v.* Lowten, 1 V. & B., 226; Evan *v.* The Corporation of Avon, 29 Beav., 144.

it may be at any time revoked or varied at the pleasure of the sovereign before the general distribution.[1]

Infants.

An infant, as we have seen, cannot contract, and therefore cannot create a trust by any declaration during minority, nor can he create a trust by will.[2]

Married women.

Married women subject to the Indian Succession Act (X of 1865) may create trusts. Section 4 of the Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. This section, so far as regards property, abolishes, by implication, the doctrine of unity of persons between husband and wife.[3] So far as property is concerned, therefore, the wife has as much control over it as if she were unmarried. This section does not apply to Hindus, Mahomedans, Buddhists, Sikhs, or Jains.[4] By the Married Women's Property Act (III of 1874), s. 4—

"The wages and earnings of any married woman acquired or gained by her, after the passing of the Act, in any employment, occupation, or trade carried on by her, and not by her husband, and also any money or other property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all savings from, and investments of, such wages, earnings, and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings, and property."

And she may, therefore, create a trust in respect of such property. This Act does not apply to Hindus, Mahomedans, Buddhists, Sikhs, or Jains.[5]

Stridhan.

With regard to Hindus, a married woman may create a trust of her *stridhan*, or any other property which is absolutely at her own disposal, as she can devise such property.[6] But she cannot devise property inherited from males, since her interest in it ceases at her death,[7] and therefore she cannot create a trust of such property to continue after her death, though she may create a trust of her life-interest.

[1] Alexander *v.* The Duke of Wellington, 2 R. & M., 35; Kinlock *v.* Secretary of State for India in Council, L. R., 15. C D., 1. As to the execution of the trust by the agency of persons deputed by the principals, see Tarragona, 2 Dod's Adm. Rep., 487.

[2] Act X of 1865, s. 46; Cossinath Bysack *v.* Hurrosoondery, 2 M. Dig., 198 (*n*).

[3] Proby *v.* Proby, I. L. R., 5 Calc., 357.

[4] Act III of 1874, s. 2.

[5] Section 2.

[6] See Mayne's Hindu Law and Usage, 2nd Ed., 342.

[7] *Ibid.*

LECTURE V.

Alien.

According to English law, an alien might always have acquired real estate, whether freeholds or chattels, by purchases, though he could not take it by operation of law, as by descent or *jure mariti*; and if he purchased it, he might have held it until office found, but could not give an alienee a better title than he had himself. An alien, therefore, could only create a trust of real estate until the Crown stepped in.

As to personal estate, an alien friend might, although an alien enemy could not be the lawful owner of chattels, personal, and might exercise the ordinary rights of proprietorship over them, and consequently create a trust.

The English law relating to aliens has not been introduced into India, and aliens here may acquire property freely, and deal with it as if they were British subjects.[1]

Persons convicted of certain offences.

In some cases the property of persons convicted of certain offences is liable to forfeiture. In every such case the offender is incapable of acquiring any property, except for the benefit of Government, until he has undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.[2] Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government; and whenever any person is convicted of any offence for which he shall be transported or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rents and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependants as the Government may think fit to allow during such period.[3]

In certain cases the forfeiture of property necessarily follows conviction. Any person who wages war against the Queen, or attempts to wage such war, or abets the waging of such war, or collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging, or being prepared to wage, war against the Queen, forfeits all his property in addition to any other punishment to which he may be sentenced.

[1] See Mayor of Lyons *v.* East India Co., 1 Moo. I. A., 175; Sarkies *v.* S. M. Prosonnomoyee Dossee, I. L. R., 6 Calc., 794.

[2] Act XLV of 1860, s. 62. [3] *Ibid.*

There is another class of offences where the forfeiture of specific property may form part of the punishment awarded. When offenders commit, or prepare to commit, depredation on the territories of any power at peace with the Queen, or receive property with the knowledge that it has been taken in waging war, or committing depredations on a power at peace with the Queen;[1] or if a public officer buys property which he is forbidden to buy, the specific property may be forfeited.[2]

No trust can, therefore, be created of property which may be forfeited if the Government choses to exercise its rights; and of course, no trust can be created where forfeiture necessarily follows the conviction.

Grantee under sanad.

Although a sanad granted by the Government of India, subsequent to the proclamation of March, 1858, of an estate in Oudh, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party.[3]

Who may be a *cestui que trust.*

A trust may be created in favour of any person, or body of persons, so long as the purpose is lawful.

The Government may be a *cestui que trust.*[4]

The Government. Corporations.

In England a trust of lands cannot be limited to a corporation without a license from the Crown.[5] But as the Mortmain Acts do not apply to India,[6] apparently a corporation in this country may be a *cestui que trust.*

Aliens.

An alien also may be a *cestui que trust.*

Who may be a trustee. Persons under disability.

Any person may be a trustee, even an infant, or person of unsound mind, if the trust is purely passive, and does not require the exercise of prudence and discretion. For instance, a discretionary trust for sale cannot be exercised by an infant, for an infant is not a person competent to contract.[7] In *King* v. *Bellord*,[8] a testator devised estates upon trusts, requiring discretion as to the expediency, as to the time, and as to the manner of a sale, to three persons,

[1] Act XLV of 1860, ss. 126, 127. [2] *Ibid.* s. 169.

[3] Thakur Shere Bahadur Singh v. Thakurain Dariao Kuar, I. L. R., 3 Calc., 645.

[4] See as to trusts in favour of the Sovereign Lewin, 7th Ed., 40.

[5] Lewin, 7th Ed., 41.

[6] Mayor of Lyons v. The East India Co., 1 Moo. I. A., 175; Sarkies v. Prosonnomoyee Dossee, I. L. R., 6 Calc., 794.

[7] Act IX of 1872, s. 11. [8] 1 H. and M., 343.

LECTURE V.

one of whom was an infant, and it was held, that a contract of sale entered into by these three trustees was not a valid contract which could be specifically performed. "There can be no doubt upon the authorities from the earliest times," said Wood, V. C., "that if a man by his will gives an infant a simple power of sale without an interest, the infant may exercise it. All the decisions on the subject are referred to by Lord St. Leonards in his work on 'Powers,' and I need not discuss them minutely. They all turn on the execution of powers, and there is not a single authority upon the question whether an infant can sell an estate devised to him upon trust for sale. There is an opinion of Mr. Preston, mentioned without disapproval by Lord St. Leonards, that an infant can exercise a power, even though it be coupled with an interest; but that is very different from selling an estate vested in an infant by a devise in fee.

"It is to be observed that all the cases relied on with reference to powers, have gone upon the principle that the infant is merely the instrument by whose hands the testator or donor acts. The donor, it is said, may use any hand, however weak, to carry out his intentions. This principle fails altogether to reach the case of a devise in trust to an infant. It is not in the power of the author of a trust to confer upon an infant a capacity in himself which the law does not give him, although he may make the infant his hand, his agent, to execute his purpose. He cannot give an estate to an infant, and say that he may sell it when the law says that he cannot do so."

It is not advisable, however, to appoint an infant as trustee. The only acts which he can perform are such as are purely ministerial, and he cannot be made to account for money received by him as trustee during his minority.[1] Infants, however, have no privilege to cheat men;[2] and a Court of Equity has jurisdiction to make an infant answerable, on his attaining majority, for a fraud committed by him during his minority, though it is not easy to determine in what cases the Court will thus exert itself.[3]

From the great inconveniences attending the appointment of an infant as trustee, there arises a strong presumption,

[1] Hindmarsh *v.* Southgate, 3 Russ., 327.
[2] Evroy *v.* Nicholas, 2 Eq. Cas. Abr., 489.
[3] Stikeman *v.* Dawson, 1 DeG. and Sm., 90; Wright *v.* Snowe, 2 DeG. and Sm., 321; and see the cases collected, Lewin, 7th Ed., 36.

wherever property is given to an infant, that he is intended to take it not as trustee but beneficially.[1]

Aliens.

An alien may be a trustee of either moveable or immoveable property. In England, before the Statute 33 Vict., c. 14, an alien could not effectually be a trustee in respect of freeholds, or chattels, real, for the policy of the law would not allow an alien to sue, or be sued, to the prejudice of the Crown touching lands in any Court of law or equity; and on inquisition found, the legal estate in the property vested by forfeiture in the Crown.[2] But this did not apply to personal property.[3] In this country, as we have seen,[4] the English law as to aliens is not applicable: and moreover, no person is by reason of his descent or place of birth exempted in any civil proceeding from the jurisdiction of any of the Courts,[5] and alien enemies residing in British India with the permission of the Governor-General in Council and alien friends may sue in the Courts of British India, as if they were subjects of Her Majesty. No alien enemy residing in British India, without such permission, or residing in a foreign country, may sue in any of such Courts.[6]

The Sovereign.

In England, the Sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate and to execute the trusts; but great doubts have been entertained whether the subject can, by any legal process there, enforce the performance of the trust.[7]

Not the Government of India.

And it has recently been expressly decided that the Government of this country cannot be a trustee. In *Kinlock* v. *The Secretary of State for India*,[8] booty of war had been granted by Her Majesty by Royal Warrant to the Secretary of State for India in Council, 'in trust,' to distribute amongst the persons found entitled to share it by the decree of the Judge of the Court of Admiralty, to whom the matter had been referred by the Sovereign for that purpose, with a direction that doubts should be finally determined by the Secretary of State, unless Her Majesty should otherwise order. An action was brought against the Secretary of State by a person claiming to be entitled to share in the fund, and praying for an account. It was held,

[1] Lewin, 7th Ed., 36. [2] Fish *v.* Klein, 2 Mer., 431.
[3] Meinertzhagen *v.* Davis, 1 Coll., 335.
[4] *Ante*, p. 126. [5] Act X of 1877, s. 10.
[6] *Ib.*, 430. [7] See Lewin, 7th Ed., 29. [8] L. R., 15 C. D., 1.

LECTURE V.

that the warrant did not operate as a transfer of property or create a trust, and that the defendant, being merely the agent of the Sovereign to distribute the fund, was not liable to account to any of the parties entitled. James, L. J., said: "The Government of India is not, as it appears to me, capable of being a trustee; nor is the Secretary of State for India in Council (the name by which the Government can be sued) a person capable of being a trustee any more than the Attorney-General in this country would be, or any other person, who sued in certain cases for, or on behalf of, the Crown."

Corporations.

According to the technical rules upon which the doctrine of uses proceeded, a corporation could not have been seised to a use, for, it was said, it had no soul, and therefore no confidence could be reposed in it.[1] But on principles of ordinary and natural justice, a body corporate has been held to be compellable to execute a trust, thus abolishing the rule that there must be a person in whom the confidence is placed.[2] "*Primâ facie*," said Lord Romilly, M. R.,[3] "an ordinary Municipal Corporation has full power to dispose of all its property like any private individual, and the burden of proof lies on the person alleging the contrary to establish a trust. The trust may be of two characters; it may be of a general character, or of a private and individual character. A person might leave a sum of money to a corporation, in trust, to support the children of *B*, and pay them the principal at twenty-one. That would be a private and particular trust, which the children could enforce against the corporation, if the corporation applied the property for its own benefit. On the other hand, a person might leave money to a corporation, in trust for the benefit of the inhabitants of a particular place, or for paving or lighting the town. That would be a public trust for the benefit of all the inhabitants, and the proper form of suit, in the event of any breach of trust, would be by an information by the Attorney-General,[4] at the instance of all or some of the persons interested in the matter. If there was a particular trust in favor of particular persons, and they were

[1] Lewin, 7th Edn., 30.
[2] Green *v.* Rutherford, 1 Ves., 468; Attorney-General *v.* Whorewood, *ib.*, 536; Attorney-General *v.* Caius College, 2 Keen, 165.
[3] Evan *v.* The Corporation of Avon, 29 Beav., 149.
[4] As to the procedure in this country, see Act X of 1877, s. 539.

too numerous for all to be made parties, one or two might then sue on behalf of themselves and the other *cestuis que trustent* for the performance of the trust."

Presidency banks.

There is a statutory exception to the general rule, that a corporation may be a trustee, in the case of the Presidency Banks,—that is to say, the Banks of Bengal, Madras, and Bombay. The Presidency Banks' Act (XI of 1870) provides that, except for the purpose of excluding the provisions of s. 17 (relating to the forfeiture of stocks and shares), the banks shall not be bound or affected by notice of any trust to which any stock or share may be subject in the hands of the proprietor or holder. And the law in England is similar.

Married women.

A married woman may be a trustee. In England it is not advisable to appoint a married woman as trustee, owing, among other reasons, to the doctrine of unity of persons between husband and wife.[1] But this does not apply to persons subject to the Indian Succession Act (X of 1865),[2] nor is it known to Hindu or Mahomedan law.

According to English law, it is a legal presumption (possibly it may be called a legal fiction) that a married woman is subject to the influence of her husband, and therefore she cannot be allowed to execute the trust without his concurrence.[3]

Insolvent.

An insolvent may be a trustee. The property of an insolvent, and such property as he may acquire before he obtains his discharge, vests in the Official Assignee,[4] but not estates vested in him as trustee. These are unaffected by the insolvency,[5] and although the trust-property may be changed, it will not vest if it can be traced, as where it exists in the shape of bills or notes,[6] or any other substituted form,[7] for the assignees of a defaulting trustee have no better right than the trustee.[8] But where the trust-property had become mixed with the bankrupt's general property, and could not be distinguished, it was held that the assignees would take it, and that the *cestui que trust* must prove.[9]

[1] Smith *v.* Smith, 21 Beav., 385; Drummond *v.* Tracy, 1 Johns., 608; Lake *v.* De Lambert, 4 Ves., 593; *Re* Kaye, L. R., 1 Ch., 387.
[2] See *ante*, p. 125.
[3] Avery *v.* Griffin, L. R., 6 Eq., 606; Lloyd *v.* Pughe, L. R., 8 Ch., 88; Wainford *v.* Heyl, L. R., 20 Eq., 321. See further, Lewin, 7th Ed., 32.
[4] 11 and 12 Vict., C. 21, s. 7.
[5] See Houghton *v.* Kœnig, 18 C. B., 235; Winch *v.* Keeley, 1 T. R., 619.
[6] *Ex parte* Dumas, 2 Ves., 582.
[7] Frith *v.* Cartland, 2 H. and M., 417.
[8] *Ibid.* [9] *Ex parte* Dumas, 1 Atk., 234.

LECTURE V.

The possession of a trustee is not a possession with the consent of the true owner under the reputed ownership clause, s. 23 of the Insolvent Act.[1]

Cestuis que trustent.

Cestuis que trustent are not, as such, incapacitated from being trustees for themselves and others, but, as a general rule, they are not altogether fit persons for the office, in consequence of the probability of a conflict between their interest and their duty.[2] Where the trusts are onerous, and other persons cannot be found to undertake them, the Court will appoint a *cestui que trust* to be a trustee.[3]

Relatives.

It is not advisable to appoint relatives to be trustees. The worst breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestuis que trustent* when they are nearly related to them.[4]

Number of trustees.

An adequate number of trustees should be appointed. There are strong reasons against allowing trust property to remain in the hands of one trustee. He has the absolute control over it, and if tempted to commit a breach of trust, he can do so with less fear of detection than if there are co-trustees. When one of several trustees dies, steps should be at once taken to provide a successor. The safe rule, where money is concerned, is to appoint at least three trustees and to keep the number full.[5]

Disclaimer.

No one is bound to accept a trust, and therefore any person who has been appointed a trustee may, if he has not acted in the office, disclaim.[6] If, however, he has exercised any acts of ownership, he cannot disclaim.[7] "Though," said Lord Redesdale,[8] "a person may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede except so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as executor is different from what he has conceived it to be when he entered into the engagement."

According to English law, the heir of a trustee cannot disclaim, the reason being that the legal estate, if

[1] 11 and 12 Vict., c. 21. And see *Ex parte* Martin, 19 Ves., 491.
[2] Forster *v.* Abraham, L. R., 17 Eq., 351; Passingham *v.* Sherborn, 9 Beav., 424; Barnes *v.* Addy, L. R., 9 Ch., 244.
[3] *Ex parte* Clutton, 9 Jur., 988.
[4] Wilding *v.* Bolder, 21 Beav., 222. [5] See Lewin, 7th Edn., 39.
[6] Robinson *v.* Pett, 3 P. Wms., 251; Moyle *v.* Moyle, 2 R. and M., 710; Lowry *v.* Fulton, 9 Sim., 123.
[7] Bence *v.* Gilpin, L. R., 3 Ex., 76: and see *ante*, p. 120.
[8] Doyle *v.* Blake, 2 Sch. and Lef., 239.

the disclaimer were allowed, would vest in the Crown.[1] I do not know of any authority on this point as regards estates in India. But as it has been decided that the English rules of succession to immoveable property apply to the descent of estates in land held by European British subjects,[2] probably it would be held that the heirs of a European British subject could not disclaim. As regards other British subjects, the distinction between legal and equitable estates does not exist, and the rules of inheritance are different, and therefore it would seem that the heir of such last named subject may disclaim.

Delay.

The disclaimer should be made without delay, as otherwise a question may arise as to whether there has not been an acceptance by acquiescence. This question is of course in every case one of fact to be decided from the circumstances of the case.[3]

How made.

The disclaimer may be by parol, but it is more prudent that it should be by writing, as there is less fear of ambiguity.[4] The instrument should be a disclaimer, and not a conveyance, though, if the intention to disclaim is apparent on the conveyance, that will be sufficient.[5] A trustee may disclaim in Court[6] or by his written statement.[7] And if notwithstanding he is continued as a party to the hearing, he will be entitled to his costs as between party and party.[8] And there may be conduct which amounts to a clear disclaimer.[9]

Gift to trustee or executor.

A trustee or executor to whom a bequest is given, may take the gift and disclaim the office,[10] unless acting in the office is a condition attached to the gift.[11]

[1] Lewin, 7th Edn., 180.

[2] See Gardiner *v.* Fell, 1 Moo. I. A., 299; Freeman *v.* Fairlie, *ib.*, 305; Mayor of Lyons *v.* The East India Co., *ib.*, 175; Sarkies *v.* S. M. Prosonnomoyee Dossee, I. L. R., 6 Calc., 794.

[3] See Doe *v.* Harris, 16 M. & W., 517; Noble *v.* Meymott, 14 Beav., 471; Paddon *v.* Richardson, 7 D. M. G., 563; James *v.* Frearson, 1 Y. and C. C. C., 370.

[4] See Townson *v.* Tickell, 3 B. and Ald., 31; 1 Stacey *v.* Elph, 1 M. and K., 199.

[5] Nicholson *v.* Wordsworth, 2 Swanst., 372; Urch *v.* Walker, 3 My. and Cr., 702.

[6] *In re* Ellison's Trust, 2 Jur. (N. S.), 62; Foster *v.* Dawber, 1 Dr. and Sm., 172.

[7] Norway *v.* Norway, 2 M. and K., 278. [8] Bray *v.* West, 9 Sim., 429.

[9] Stacey *v.* Elph, 1 M. and K., 199.

[10] Talbot *v.* Radnor, 3 M. and K., 254; Pollexfen *v.* Moore, 3 Atk., 272; Andrew *v.* Trinity Hall, 9 Ves., 525.

[11] Warren *v.* Rudall, 1 J. and H., 1; Slaney *v.* Watney, L. R., 2 Eq., 418; Lewis *v.* Matthews, L. R., 8 Eq., 277.

LECTURE V.

A trustee or executor who has disclaimed may afterwards act as agent for the other trustees or executors. He should, however, be careful to disclaim clearly, as otherwise he may be considered to have accepted by acquiescence.[1]

If one of two co-trustees disclaims, the trust-property is vested in the other, and he becomes sole trustee *ab initio*.[2]

A person named as trustee without his sanction, and called on to disclaim, is authorized in taking the opinion of counsel as to his obligation to execute a disclaimer.[3]

[1] See cases referred to, *ante*, p. 120.
[2] Peppercorn *v.* Wayman, 5 DeG. and Sm., 230.
[3] See *Re* Tryon, 7 Beav., 496.

LECTURE VI.

DUTIES AND LIABILITIES OF TRUSTEES.

Duties and liabilities of trustee — Trustee to acquaint himself of state of property — Trustee bound to protect trust-property — Getting in trust-estate — Estate outstanding on personal security — When securities to be realized — Care required from trustee — Loss occasioned by agent — By act of co-trustee — Trust-fund consisting of money — Control of trust-fund — Failure of banker — Trustee to prevent waste — Permissive waste — *Cestui que trust* may not benefit by waste — Tenants-for-life without impeachment of waste — When Court may interfere — Principle on which Court acts — Waste by Hindu widow — Suit for possession — Receiver — Alienation by widow — Proper parties to sue — Collusion by immediate reversioner — Conversion of perishable property — Howe *v.* Earl of Dartmouth — Pickering *v.* Pickering — Exceptions from rule — Trustee to be impartial — Discretion of trustees not interfered with — Selecting objects of the trust — Modes of investment — Exercise of power by will — Trustee cannot set up title to trust-property — Claim by third person — Delivery up of moveable property — Failure of *cestui que trust* — Trustee to keep accounts — Vouchers — Costs — Good faith — Managing member of Hindu family — Duties of trustee as to investment — Personal security — Shares in companies — Where personal security allowed — One *cestui que trust* not to be benefited at expense of others — Consent of *cestuis que trustent* to change — Continuing investment — Varying securities — Investment or mortgage — Trustees may not lend to themselves — Paying over mortgage-money — Consent of Court to investment — Trustees' and Mortgagees' Powers Acts — Official Trustee's Act of 1864, s. 14 — Remedy in case of non-investment — Remedy in case of wrongful investment — Insolvency of trustee — Duties of trustees for sale or mortgage — Trustee bound to sell to best advantage — Must attend to interest of all parties — Valuation — Absolute trust for sale will not authorize mortgage — Trust to mortgage will not authorize sale — Trust for sale survives — Trustees bound to make good title — Counsel's opinion — Payment of purchase-money — Duties of trustees for purchase.

Duties and liabilities of trustee.

WE have now to consider what are the duties and liabilities incurred by a trustee after he has accepted. On this point Mr. Lewin says:[1] "As soon as a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an *active* part in the execution of the trust. The law knows no such person as a *passive* trustee. If, therefore, an unprofessional person

[1] 7th Edn., 190.

LECTURE VI.

be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called formal acts. If he sign a power-of-attorney for sale of stock, or execute a deed of reconveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor, and had the sole management of the transaction."

And Mr. Spence says:[1] "Every person who accepts a trust is bound to execute it[2] with fidelity, and with reasonable diligence; it is no excuse to say that he had no benefit from it, but that it was merely honorary: the Court of Chancery looks upon all trusts as honorary, and as a burthen upon the honour and conscience of the party intrusted; and for the execution of which he is even precluded from receiving or making any benefit or advantage whatsoever."

Trustee to acquaint himself of state of property.

A trustee is bound to acquaint himself with the nature and particular circumstances of the trust-property. But a new trustee is not liable for any breach of trust committed by his predecessor. He is entitled to assume that everything before his coming in had been duly performed, and he cannot be charged with wilful default, because he did not look back and inquire whether the former trustees had performed their duties up to that time.[3]

If, however, he does not enquire into the state of the trust fund, and does not take steps to get in any part which may be outstanding on improper security, he will be liable for the consequences of his neglect, like any executor who knows that a debt is due to his testator's estate and omits to get it in.[4] Where a marriage settlement contained a covenant on the part of the husband to settle after acquired property, it was held that a new trustee was not liable for not having inquired as to whether any such settlement had been made, there being nothing to lead to a suspicion that any default had been made by

[1] 2 Sp. Eq. Jur., 918.
[2] Charitable Corporation *v.* Sutton, 2 Atk., 406.
[3] *Ex parte* Graves, 25 L. J. Bkcy., 53.
[4] Taylor *v.* Millington, 4 Jur. (N. S.), 204; James *v.* Frearson, 1 Y. and C. C. C., 370; *Ex parte* Graves, 25 L. J. Bkcy., 53; Yode *v.* Cloud, L. R., 18 Eq., 634.

the old trustees or the covenantor.[1] A trustee of chattels, personal, settled for the separate use of a married woman should take care that an inventory is made, otherwise he may be deprived of his costs.[2]

Trustee bound to protect trust-property.

The office of a trustee is to a certain extent onerous. We have seen[3] that the law does not recognize a passive trustee, but that he must take an active part in the execution of the trust. It is one of his primary duties to maintain and defend all such actions as are requisite for the assertion or protection of the title to the trust-property.[4] And as a general rule, trustees are bound to press on all the remedies for the recovery of debts due to the trust-estate; and if any securities seem proper to be continued, it seems the only safe course for trustees to adopt, is to submit the point to the judgment of the Court,—not to decide upon it themselves, unless a discretionary power to that extent be expressly or by clear implication given to them: else they will be answerable for any loss that may ensue in consequence of their misplaced confidence, however good may have been their intention.[5]

Power has been given to trustees in India to sue for the possession of specific moveable property to the beneficial interest in which the person for whom they are trustees is entitled. Possession is to be recovered in the manner prescribed by the Code of Civil Procedure.[6]

Getting in trust-estate.

Trustees are bound to place the trust-property in safe securities, and will be liable for loss if they delay in getting it in and investing it.[7] For instance, if debts are outstanding, it is the duty of the trustees to get them in as soon as possible; and if in consequence of their negligence the debts are lost by the debtor's insolvency, or if the right to sue is barred by limitation, they will be personally liable.[8]

So, if a man covenants to settle a certain sum within a given period, and the trustees execute the trust-deed

[1] Graves *v.* Strahan, 8 D. M. G., 291.
[2] England *v.* Downs, 6 Beav., 279.
[3] *Ante*, p. 134.
[4] Goode *v.* Burton, 11 Jur., 851.
[5] Gaskell *v.* Harman, 11 Ves., 489; Lowson *v.* Copeland, 2 Bro. C. C., 157; Tebbs *v.* Carpenter, 1 Madd., 298.
[6] See Act I of 1877, s. 10.
[7] See DeSouza *v.* DeSouza, 12 Bom., 190.
[8] Caffrey *v.* Darby, 6 Ves., 488; Jones *v.* Higgins, L. R., 2 Eq., 538; *Ex parte* Ogle, L. R., 8 Ch., 711; Rowley *v.* Adams, 2 H. L. C., 725; Stone *v.* Stone, L. R., 5 Ch., 74.

LECTURE VI.

and sign a receipt for the money, they will be liable.[1] There is no objection to trustees receiving money before the date on which it is payable, if the debtor chooses to pay it.[2]

Trustees may fairly allow a debt to be paid by instalments, but they will not be justified in granting any great indulgence.[3] In the exercise of a fair discretion they need not commence legal proceedings unnecessarily, but they should exert themselves to get in the debt, and, if necessary, commence compulsory proceedings to obtain it.[4]

When trustees *bonâ fide* exert themselves to discharge their duty, and merely commit an error in judgment, unless there is a plain violation of trust, they will not be visited severely. The fair exercise of their judgment is a protection to them, although the consequences may be bad.[5]

Estate outstanding on personal security.

If part of a testator's estate is outstanding on personal security, it is the duty of the executors to take steps to get it in,[6] even though the debtor is a co-executor.[7]

The fact that the testator approved of the security and had continued it for many years, and that it was good at the time of his death, will not relieve the executors from responsibility in case of loss.[8] Personal security changes from day to day by reason of the personal responsibility of the party giving the security, and as a testator's means of judging of the value of that responsibility are put an end to by his death, the executor who has omitted to get it in within a reasonable time, becomes himself the security.[9] An application to the debtor must be followed up by legal proceedings if not attended to; a mere demand through an attorney will not discharge the executor.[10]

But executors will not be liable for not taking legal proceedings if it appears that the proceedings would have

[1] Lewin, 7th Ed., 265.
[2] Mills *v.* Osborne, 7 Sim., 30.
[3] Caffrey *v.* Darby, 6 Ves., 495.
[4] Caney *v.* Bond, 6 Beav., 486.
[5] Garrett *v.* Noble, 6 Sim., 516.
[6] Lowson *v.* Copeland, 2 Bro. C. C., 156; Bailey *v.* Gould, 4 Y. and C., Ex., 221; Attorney-General *v.* Higham, 2 Y. and C. C. C., 634.
[7] Styles *v.* Guy, 1 Mac. and G., 422; Egbert *v.* Butter, 21 Beav., 560; Candler *v.* Tillett, 22 Beav., 257.
[8] Powell *v.* Evans, 5 Ves., 839; Tebbs *v.* Carpenter, 1 Madd., 290; Clough *v.* Bond, 3 M. & Cr., 496; Bullock *v.* Wheatley, 1 Coll., 130.
Bailey *v.* Gould, 4 Y. & C., Ex., 226, *per* Alderson, B.
[10] Lowson *v.* Copeland, 2 Bro. C. C., 156.

been useless.[1] And if it appears that though the whole debt could not have been recovered, a part might, they will only be liable for what might have been recovered.[2]

A direction in the will that the executors shall call in securities not approved by them, will not discharge them from liability for loss arising from the failure of personal security. Such a direction must be considered as referable to securities upon which a testator's property might, from their nature, be invested, and not as authorizing a kind of investment which a Court of Equity will not sanction.[3]

And if a settlement contain a clause that the trustees are to get in the money, "whenever they shall think fit and expedient so to do," they will be liable if they refrain from enforcing payment out of tenderness to the tenant-for-life, without due regard to the interests of all the *cestuis que trustent*.[4]

When securities to be realized.

If the testator's property is outstanding on securities which may reasonably be considered as safe, the executors are not bound to call them in, until the creditors call for payment of their debts; or unless they have reason to suspect the solvency of the debtor. "What," said Lord Thurlow,[5] "is the executor to do. Is he to call in the securities before creditors require payment of their debts? Must the money lie dead without interest, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction; but on any new securities it will be at his own peril."[6] The trustees, however, should enquire whether the securities are safe, and call them in if they are not.[7]

In all suits concerning property vested in a trustee, executor, or administrator, when the connection is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator represents the persons so interested, and it is not ordinarily necessary to make them parties to the suit; but the Court may,

[1] Clack *v.* Holland, 19 Beav., 262; Hobday *v.* Peters (No. 2), 603; Walker *v.* Symonds, 3 Swanst., 71.
[2] Maitland *v.* Bateman, 16 Sim., 233 (*n*).
[3] Styles *v.* Guy, 1 Mac. & G., 428, *per* Lord Cottenham.
[4] Lewin, 7th Edn., 268, citing Luther *v.* Bianconi, 10 Ir. Ch., 194.
[5] Orr *v.* Newton, 2 Cox, 276.
[6] And see Howe *v.* The Earl of Dartmouth, 7 Ves., 150.
[7] Ames *v.* Parkinson, 7 Beav., 384; Harrison *v.* Thexton 4 Jur., N. S., 550. As to trustees' receipts, see Lewin, 7th Ed., 268.

LECTURE VI

if it thinks fit, order them, or any of them, to be made parties.[1]

Care required from trustee.

A trustee is bound to take the same care of the trust-property as he would of his own, but not more care;[2] and if he has taken such care, he will not be liable for loss, destruction, or deterioration of the trust-property. Thus, a trustee was held not to be liable when the trust-property was stolen from his house, together with property of his own.[3] So, where the defendant, an administratrix, had handed over certain goods to her solicitor, from whose custody they were stolen, it was held that she should not be charged.[4] Where, however, the loss is occasioned by the act of a person employed by the trustee, the trustee will have to bear the loss;[5] as where the loss is caused by his solicitor, having committed a fraud on the occasion of the investment of the fund on mortgage.[6]

Loss occasioned by agent.

By act of co-trustee.

Where the trust-property consists of securities or articles which pass by delivery, and there are several trustees, the property should be deposited with the bankers of the trustees; and if it is so deposited, and the bankers, without the privity or concurrence of the co-trustees, allow one of the trustees to have access to the property, and he makes away with it, the co-trustees remaining ignorant of the fact are not liable to make good any portion of the property misappropriated.[7] An executor is not bound to insure, or continue the insurance of, his testator's property against fire.[8]

Trust-fund consisting of money.

Where the trust-fund consists of money, the trustee, pending investment, may place the money in the hands of a banker.[9] The trustee should open a separate account in the name of the trust-estate, and should not mix the trust-fund with his own money. If he does so, he will be

[1] Act X of 1877, s. 437, as amended by Act XII of 1879, s. 72.

[2] Morley *v.* Morley, 2 Ch. Cas., 2; Jones *v.* Lewis, 2 Ves., 240; Attorney-General *v.* Dixie, 13 Ves., 534; Massey *v.* Banner, 1 Jac. & W., 247.

[3] Morley *v.* Morley, 2 Ch. Cas., 2.

[4] Jones *v.* Lewis, 2 Ves., 240.

[5] Bostock *v.* Floyer, L. R., 1 Eq., 28.

[6] Sutton *v.* Wilders, L. R., 12 Eq., 373.

[7] Mendes *v.* Guedalla, 2 Johns. & H., 259.

[8] Bailey *v.* Gould, 4 Y. & C., Ex., 221; Dobson *v.* Land, 8 Hare, 216; Fry *v.* Fry, 27 Beav., 146.

[9] Routh *v.* Howall, 3 Ves., 565; Jones *v.* Lewis, 2 Ves., 241; Adams *v.* Claxton, 6 Ves., 226.

liable in case the banker fails.[1] And a trustee will be liable for loss, if he allows a person to draw upon the trust-property in the bank, and such person misappropriates the money.[2] And he will be liable for the failure of a banker,[3] or broker,[4] if the money ought to have been invested or otherwise dealt with, and not left in the banker's or broker's hands: and the usual indemnity-clause will not in such cases protect the trustee.[5]

Control of trust-fund.

The trustee must be careful not to put the trust-fund out of his control and under the control of other persons. If he does so, he guarantees the solvency of those persons, and will be answerable for any loss that may ensue;[6] and the liability will be the same, although the persons under whose control the property was left were co-trustees.[7]

In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he had placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the joint account of the co-executors, but the bank was in the habit of answering the cheques of either co-executor singly. "It is the custom of bankers," said Lord Chancellor Hart, "that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and for convenience of business, it is necessary this risk should be incurred, for it would be very hard to transact business if every cheque should be signed by all the executors." However, his Lordship admitted, that "if there were any fraud or collusion, wilful default or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case would be altered."[8] "But," says Mr. Lewin, "even with this qualification the doctrine is so contrary to the principle of other cases, that no trustee or executor could be advised to rely upon it in practice."

[1] Wilks *v.* Groom, 3 Drew., 584; Johnson *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen (No. 5), 29 Beav., 211; Pennell *v.* Deffell, 4 D. M. G., 386; *Ex parte* Kingston, L. R., 6 Ch., 632: and see *In re* Hallett's Estate, Knatchbull *v.* Hallett, L. R., 13 Ch. Div., 696.

[2] Ingle *v.* Partridge, 32 Beav., 661; Evans *v.* Bear, L. R., 10 Ch., 76; Ferguson *v.* Ferguson, *ib.*, 661.

[3] Challen *v.* Shippam, 4 Hare, 555; Swinfen *v.* Swinfen, 29 Beav., 211; Rehden *v.* Wesley, *ib.*, 213.

[4] Mathews *v.* Brise, 6 Beav., 239.

[5] Rehden *v.* Wesley, 29 Beav., 213.

[6] Salway *v.* Salway, 2 R. & M., 218; affd., *nom.* White *v.* Baugh, *ib.*, 220.

[7] Lewis *v.* Nobbs, L. R., 8 Ch. Div., 591.

[8] Lewin, 7th Ed., 292, citing Kilbee *v.* Sneyd, 2 Moll., 186.

LECTURE VI.

Failure of banker.

Trustees will be liable for loss incurred by the failure of bankers, if it was their duty to have invested the trust-moneys,[1] or to have paid them over to new trustees,[2] or into Court.[3]

An investment with the bankers themselves upon the security of their notes-of-hand is not sufficient, for that is merely a personal security.[4]

But executors require a certain amount of ready-money to enable them to wind up their testator's estate, and are entitled to keep such a sum uninvested at their bankers, and will not be made liable if it is lost within the year allowed for satisfying claims.[5]

Where executors drew trust-funds out of one bank, and invested them on a deposit account at interest in another bank, such an investment not being authorized by the will, they were held to be personally liable, notwithstanding a clause in the will indemnifying them against losses by a banker of money deposited for safe custody.[6]

It is a grave breach of duty in trustees or administrators taking out letters of administration to estates in this country, under powers-of-attorney from executors or next-of-kin abroad, to mix the incomes raised by them from trust-properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities.[7]

Trustee to prevent waste.

Where a trust is created for several persons in succession, as where property is devised to trustees, upon trust, to permit *A* to enjoy the rents and profits for his life, and after his death an interest in the property is given to *B*, and the person having the life-estate commits, or threatens to commit, any act which is destructive or permanently injurious to the trust-estate, such as cutting down timber or destroying houses, the trustees ought to sue for an injunction to restrain the tenants-for-life from committing the acts of waste. "There can be no doubt," said Lord Lang-

[1] Moyle *v.* Moyle, 2 R. & M., 710; Johnson *v.* Newton, 11 Hare, 160.
[2] Lunham *v.* Blundell, 4 Jur., N. S., 3.
[3] Wilkinson *v.* Bewick, 4 Jur., N. S., 1010.
[4] Darke *v.* Martyn, 1 Beav., 525.
[5] Johnson *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen (No. 5), 29 Beav., 211.
[6] Rehden *v.* Wesley, 29 Beav., 213.
[7] *In re* Cowie, I. L. R., 6 Calc., 70: see Lewin, 7th Ed., 273, for the English authorities.

dale, "that it is the duty of the trustee to protect the property against the improper acts of the tenant-for-life."[1] And if the persons in remainder are unborn, or under disability, the trustees are bound to interfere.[2] This is the duty of the trustees, but if they do not interfere, the remainderman has a right to apply for the injunction.[3] So in the case of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted.[4] LECTURE VI.

An injunction can only be obtained to prevent the commission of acts of active waste, not to restrain the tenant-for-life from allowing permissive waste, as by allowing the trust-property to fall into disrepair.[5] "I think," said Wood, V.C., "that it is not possible to obtain a remedy against permissive waste indirectly through the medium of a trust created in the property. If I were to hold that, it would be most inconvenient. If every trustee is to be considered liable, though merely a trustee under a will, which devises the property to and to his use, as in *Denton* v. *Denton*,[6] in cases of permissive waste for want of repairs, the difficulty which is now felt of getting respectable persons to act as trustees would be increased. I can foresee no end to the demands which would be made upon trustees by remaindermen coming into possession of the trust-property, who might think it not sufficiently repaired, if they might say to the trustees 'it was your duty to look after the tenant-for-life, you had the legal estate, and it was your business to see that he was performing all these trusts; and as you have not done so, we shall fix you with the liability.' I think that such a doctrine cannot possibly be established."[7] On appeal,[8] the decision of Wood, V.C., was affirmed, Lord Cottenham, L.C., saying: "It was argued, independently of the trust, that it is the duty of a tenant-for-life to repair. '*Equitas sequitur legem.*' But even legal liability now is very doubtful.[9] Whatever be the legal Permissive waste.

[1] Pugh *v.* Vaughan, 12 Beav., 517, 520. See also Denton *v.* Denton, 7 Beav., 388; Powys *v.* Blagrave, Kay, 495; 4 D. M. G., 448.
[2] Powys *v.* Blagrave, Kay, 495; 4 D. M. G., 448.
[3] Perrot *v.* Perrot, 3 Atk., 94; Viner *v.* Vaughan, 2 Beav., 469.
[4] Robinson *v.* Litton, 3 Atk., 485; Garth *v.* Cotton, 1 Dick., 183; 1 Ves., 524, 546; Stansfield *v.* Habergham, 10 Ves., 277.
[5] Denton *v.* Denton, 7 Beav., 388; Pugh *v.* Vaughan, 12 Beav., 517.
[6] 7 Beav., 388. [7] Powys *v.* Blagrave, Kay, 495, 506.
[8] 4 D. M. G., 448.
[9] Gibson *v.* Wells, 1 N. R., 291; Herne *v.* Benbow, 4 Taunt., 764.

LECTURE VI.

liability, this Court has always declined to interfere against mere permissive waste. *Lord Castlemain* v. *Lord Craven*;[1] there the Master of the Rolls said, 'the Court never interposes in case of permissive waste either to prohibit or to give satisfaction, as it does in case of wilful waste.' On this ground relief was refused in *Wood* v. *Gaynon*.[2] In that case a tenant-for-life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying that as there was no precedent he would not make one; adopting the argument, that it would tend to harass tenants-for-life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwall* v. *Baylis*,[3] it does not sustain the doctrine for which it was cited. The case of *Re Skingley*[4] was founded on the express obligation of the lunatic to repair. I do not refer to the cases where the question has been as to the right to charge assets. There the decisions have rested on other grounds. There is no precedent for what is asked in this respect. I certainly will not be the first to make one."

Cestui que trust may not benefit by waste.

If the person in possession of the trust-estate, the tenant-for-life, commits active waste, he will not be permitted to derive any benefit from his wrongful act, but the money arising therefrom will be preserved for the remainder-men.[5] If, however, the tenant-for-life has expended money in permanent improvements on the trust-estate, he will be allowed credit for such sums.[6]

Tenants-for-life without impeachment of waste.

If the *cestui que trust* is tenant-for-life without impeachment of waste,—that is to say, if the instrument creating the trust declares that the tenant-for-life shall not be punishable for waste, or the *cestui que trust* is tenant-in-tail after possibility of issue extinct, which is the case where an estate is limited to a man and the heirs of his body by a particular wife, and she dies without having had children, or none of her children are living at her death, the *cestui que trust* may commit ordinary waste.

[1] 22 Vin. Abr., 523, tit. 'Waste,' pl., 11.
[2] Amb., 395. [3] 2 Mer., 408. [4] 3 Mac. and G., 221.
[5] Garth *v.* Cotton, 2 Ves., 524; 1 Dick., 183; Williams *v.* Duke of Bolton, 3 P. Wms., 268 (*a*); Seagram *v.* Knight, L. R., 2 Ch., 628.
[6] Birch Wolfe *v.* Birch, L. R., 9 Eq., 683.

But he will be restrained from committing what is known as 'equitable waste,' by felling timber planted or left standing for the shelter or ornament of the family mansion-house or grounds.[1]

When Court may interfere.

It is not necessary, in order to give the Court ground for interfering, that the plaintiff, whether trustee or remainder-man, should wait until a serious act of waste has been committed;[2] but the Court will interfere if a fair case of prospective injury has been made out.[3] The mere apprehension or belief that waste will be committed is not sufficient;[4] but if an intention to commit waste can be shown to exist, or if a man insists on his right, or threatens to commit waste, there is a foundation for the exercise of the jurisdiction.[5]

If the act of waste is trivial, the Court will not interfere, unless it appears that further waste is intended or threatened.[6]

In order to obtain the assistance of the Court, it is only necessary to prove that a single act of waste, whether legal or equitable, has been committed.[7]

Principle on which Court acts.

The broad principle upon which a Court administering equity acts in restraining a person, who has only a limited interest in property of which he is in possession, from destroying or injuring such property, is, that of protecting property from irreparable injury, and to prevent a malicious, wanton, and capricious abuse of their rights and authorities, by persons having but a temporary and limited interest in the subject-matter. By irreparable injury is meant, not such injury as cannot by any possibility be repaired, but serious and material injury, which cannot be adequately compensated for by pecuniary damages.[8]

Waste by Hindu widow.

Acting upon principles in some respects analogous to those upon which the Court of Equity in England act in

[1] See Garth *v.* Cotton, 1 Ves., 524, 546; 1 Dick., 183, and the notes to that case, 1 Wh. and T. L. C., 4th Edn., pp. 697, 750.

[2] Gibson *v.* Smith, 2 Atk., 182; Coffin *v.* Coffin, Jac., 71.

[3] Tipping *v.* Eckersley, 2 K. and J., 264; Elliott *v.* North-Eastern R. C., 1 J. and H., 145; 2 D. F. and J., 423; 10 H. L., 333; Hext *v.* Gill, L. R., 7 Ch., 700.

[4] Hanson *v.* Gardiner, 7 Ves., 307; Potts *v.* Potts, 3 L. J., Ch., 176; Campbell *v.* Allgood, 17 Beav., 623.

[5] See cases cited in the preceding notes.

[6] Brace *v.* Taylor, 2 Atk., 253; Barry *v.* Barry, 1 J. and W., 653; Lambert *v.* Lambert, 2 Ir. Eq., 210; Coffin *v.* Coffin, Jac., 71.

[7] Coffin *v.* Coffin, 6 Madd., 17.

[8] See Kerr on Injunctions, Ch. III, s. 1.