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In re Tempest.

The principles upon which the Court acts in appointing new trustees were thus stated by Turner, L. J., in *In re Tempest*:[1]—"It was said in argument, and it has been frequently said, that, in making such appointments, the Court acts upon and exercises its discretion; and this, no doubt, is generally true; but the discretion which the Court has and exercises in making such appointments, is not, as I conceive, a mere arbitrary discretion, but a discretion in the exercise of which the Court is, and ought to be, governed by some general rule and principles; and, in my opinion, the difficulty which the Court has to encounter in these cases lies not so much in ascertaining the rules and principles by which it ought to be guided, as in applying those rules and principles to the varying circumstances of each particular case. The following rules and principles may, I think, safely be laid down as applying to all cases of appointments, by the Court, of new trustees:—

"First, the Court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument of trust, or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the Court would not appoint to the office a person whose appointment was so prohibited; and I do not think that upon a question of this description any distinction can be drawn between express declarations and demonstrated intention. The analogy of the course which the Court pursues in the appointment of guardians affords, I think, some support to this rule. The Court in those cases attends to the wishes of the parents, however informally they may be expressed.

"Another rule which may, I think, safely be laid down is this—that the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator or to the interests of others of the *cestuis que trustent*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is in duty bound to look to the interests of all, and not

[1] L. R., 1 Ch., 485.

of any particular member or class of members of his *cestuis que trustent*.

A third rule which, I think, may safely be laid down, is—that the Court, in appointing a trustee, will have regard to the question, whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is, that the trust may be better carried into execution."

And as another rule, it may be said, that the Court will have regard to the wishes of the persons, if any, empowered to appoint new trustees.[1]

Right to compel trustee to do act of duty.

We have seen (*ante*, p. 137) that a trustee is bound to protect the trust-estate; and if he fails in his duty, the *cestui que trust* may institute a suit to compel him to act.[2] Where, by the terms of a marriage settlement, a trustee was to compel payment of a sum of money due on covenant, but by consent of the *cestuis que trustent* the money was left outstanding on that security, it was held, upon their subsequent application to have the money called in and invested, that the trustee was bound, if necessary, to enforce payment by an action on the covenant without requiring any indemnity from the *cestuis que trustent;* and in default of so doing, he was compelled to pay the costs of a suit brought against him to enforce the execution of the covenant.[3]

Injunction.

Not only may a *cestui que trust* institute a suit to compel a trustee to do any particular act of his duty as such, but he may obtain an injunction to restrain his trustee from doing any act which would amount to a breach of trust. It is a principle of the Court of Equity that a trustee shall not be permitted to use the powers which the trust may confer upon him except for the legitimate purposes of the trust.[4] The Specific Relief Act[5] provides that "a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. When the defendant invades, or threatens to invade, the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following case (namely):—

"(*a*) When the defendant is a trustee for the plaintiff."

[1] Middleton *v.* Reay, 7 Hare, 106.

[2] Foley *v.* Burnell, 1 Bro. C. C., 277; Crossley *v.* Crowther, 9 Hare, 386.

[3] Kirby *v.* Mash, 3 Y. and C. Ex., 295; and see Fletcher *v.* Fletcher, 4 Hare, 78.

[4] Balls *v.* Strutt, 1 Hare, 146; M'Fadden *v.* Jenkyns, 1 Ph., 153; Wiles *v.* Gresham, 17 Jur., 779.

[5] I of 1877, s. 54.

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And the following illustration is appended to the section, —"A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach of trust."[1] When the act complained of would, if done, be irremediable, the Court will interfere as a matter of course.[2] The jurisdiction of the Court, however, rests not upon the fact that the injury would be irremediable, but upon the breach of trust.[3] If a sale by trustees is conducted in such a manner that, as between the trustees, who have the power of sale, and the *cestuis que trustent*, it constitutes a breach of trust, the *cestuis qui trustent* are entitled to prevent the sale from being completed, leaving the purchaser to his remedy against the trustees.[4] Any one of the *cestuis que trustent*, however small his interest may be, and though an infant, may sue.[5] Although the words of an Act be imperative, and there is no qualification on the face of the section, the inherent authority of a Court of Equity to repress fraud and prevent unfair dealing, and to exercise a wholesome control over persons standing in the character of trustees, empowers the Court to look into the circumstances and to decide whether it ought or not to do that which the Legislature has, *primâ facie*, commanded to be done. An injunction accordingly was granted, on a proper case being made out, to restrain the directors of a company from acting on an order for payment out of Court to them of a sum of money, notwithstanding the words of the Act under which the order was made were imperative.[6] A *cestui que trust*, who has a common interest with others in the trust-property, is entitled to sue on behalf of himself and the others for the protection of the property by injunction.[7] And the Court may interfere by injunction, even though no breach of trust has been

[1] See *In re* Chertsey Market, 6 Price, 279.

[2] *Re* Chertsey Market, 6 Price, 279; Attorney-General *v.* Foundling Hospital, 2 Ves. Jr., 42; Reeve *v.* Parkins, 2 J. and W., 390.

[3] Webb *v.* Earl of Shaftesbury, 7 Ves., 487; Attorney-General *v.* Corporation of Liverpool, 1 M. and Cr., 210; Attorney-General *v.* Aspinall, 2 M. and Cr., 613; Milligan *v.* Mitchell, 1 M. and K., 446; *Anon.*, 6. Madd., 10, overruling Pechel *v.* Fowler, 2 Anst., 549.

[4] Dance *v.* Goldingham, L. R., 8 Ch., 902.

[5] *Ibid*, 913.

[6] Kerr on Injunctions, 2nd Edn., 462, citing Goodman *v.* De Beauvoir, 4 Ra. Ca., 381.

[7] Scott *v.* Becher, 4 Price, 346; and see Dance *v.* Goldingham, L. R., 8 Ch., 902.

committed, if from the character of the trustee it is probable that the trust-fund may be lost or injured. Thus, an injunction against parting with the trust-property may be obtained against an insolvent trustee,[1] or one who is proved to be of bad character, drunken habits, and great poverty.[2] But the Court will not grant such an injunction merely because the trustee is poor.[3]

There is another important class of cases in which a *cestui que trust* has the right to seek the assistance of a Court of Equity against his trustee,—namely, those in which the trustee has improperly purchased the trust-estate.[4] I now propose to consider the nature of the relief which the Court will grant in such cases.

Wrongful purchase by trustee.

The *cestui que trust*, or his representatives, may, if the property is still in the hands of the trustee, insist upon a reconveyance by the trustee,[5] who will be discharged at once.[6]

If the trustee has sold the property to a purchaser with notice of the breach of trust, the *cestui que trust* can insist upon a reconveyance by the purchaser.[7]

The reconveyance will be without prejudice to the interests of persons, such as lessees, who have contracted with the trustee or his vendor *bonâ fide* before the suit was instituted.[8]

The *cestui que trust* must, on the reconveyance, repay the purchase-money with interest,[9] which in this country would be at the rate of 6 per cent. Where a trustee had paid a part of the purchase-money into Court, and it had

Interest.

[1] Mansfield *v.* Shaw, 3 Mad., 100; Scott *v.* Becher, 4 Price, 346; Taylor *v.* Allen, 2 Atk., 213.

[2] Everett *v.* Prythergch, 12 Sim., 365.

[3] Howard *v.* Papera, 1 Mad., 143; Hathornthwaite *v.* Russell, 2 Atk., 126. As to interfering in the case of religious trusts, see Kerr on Injunctions, 2nd Edn., 463.

[4] See *ante*, p. 256.

[5] Lord Hardwicke *v.* Vernon, 4 Ves., 411; *Ex parte* James, 8 Ves., 351; *Ex parte* Bennett, 10 Ves., 400; Randall *v.* Errington, 10 Ves., 423; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42; Hamilton *v.* Wright, 9 C. and F., 123.

[6] *Ex parte* Bennett, 10 Ves., 400.

[7] Dunbar *v.* Tredennick, 2 Ball and B., 304; Pearson *v.* Benson, 28 Beav., 598.

[8] York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42.

[9] Hall *v.* Hallet, 1 Cox, 134; Watson *v.* Toone, 6 Mad., 153; Campbell *v.* Walker, 5 Ves., 682; *Ex parte* James, 8 Ves., 351; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42.

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been invested in stock, the value of which had risen when the purchase was set aside, it was held, that he was only entitled to his purchase-money with interest, for, if the stock had fallen instead of advancing, he could not have been compelled to take it.[1] The trustee must account for the profits of the trust-property come to his hands,[2] but not with interest.[3] If, however, he was in possession, he will be charged with an occupation-rent.[4]

Allowance for outlay.

If the trustee has expended money in substantial improvements or lasting repairs,[5] or such as have a tendency to bring the estate to a better sale,[6] he will be allowed credit for the moneys so expended. In estimating the improvements, old buildings, if incapable of repair, will be valued as old materials, but otherwise as buildings standing.[7] On the other hand, the trustee will be charged for acts that deteriorate the value of the estate.[8] When the contract is vitiated by the presence of actual fraud, allowance will still be made to the trustee for necessary repairs;[9] and in one case allowance was made for material repairs and lasting improvements.[10] But in another case of actual fraud the Court refused any allowance for improvements. "If," said Lord Fitzgibbon, "a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was to improve the right owner out of the possession of his estate."[11]

Reconveyance.

Where a reconveyance is directed, it must be made at once, unless the trustee is given a lien for the balance on taking the accounts.[12]

[1] *Ex parte* James, 8 Ves., 351.
[2] *Ex parte* Lacey, 6 Ves., 630; *Ex parte* James, 8 Ves., 351; Watson *v.* Toone, 6 Mad., 153; York Buildings Co. *v.* Mackenzie, 8 Bro., P. C., 42.
[3] Macartney *v.* Blackwood, cited Lewin, 7th Edn., 444.
[4] *Ex parte* James, 8 Ves., 351.
[5] *Ex parte* Hughes, 6 Ves., 624; *Ex parte* James, 8 Ves., 352.
[6] *Ex parte* Bennett, 10 Ves., 400; York Buildings Co. *v.* Mackenzie, 8 Bro., P. C., 42.
[7] Robinson *v.* Ridley, 6 Mad., 2.
[8] *Ex parte* Bennett, 10 Ves., 401.
[9] Lewin, 7th Edn., 444, citing Baugh *v.* Price, 1 G. Wils., 320.
[10] Oliver *v.* Court, 8 Price, 172.
[11] Lewin, 7th Edn., 445, citing Kenney *v.* Browne, 3 Ridg., 518.
[12] Trevelyan *v.* Charter, 9 Beav., 140.

The *cestui que trust* may, instead of a reconveyance, require the property to be resold. If he adopts this course, the practice is to put up the estate for auction at the price given by the trustee, together with any sums expended by him for repairs and improvements. If any advance is made, the trustee will not be allowed to have the estate; if not, he will be held to his bargain.[1]

Interest.

If the trustee bought the estate in one lot, and the *cestui que trust* is desirous of selling it in several lots, he must repay the trustee his purchase-money with interest, and then may sell as he likes.[2]

If the trustee has resold the estate, he must account for any profit with interest.[3]

If a trustee, who has purchased the trust-estate, sells to a purchaser for value without notice, the *cestui que trust* may charge the trustee, either with the difference between the price for which the trustee gave, and the price at which he sold,[4] or the real value of the estate at the time of sale[5] with interest.[6]

Costs.

Where a sale to a trustee is set aside, the trustee must pay the costs of the suit.[7] But if there be great delay on the part of the *cestui que trust*, costs will be refused him, though he succeed in the suit;[8] and, on the other hand, if the suit be dismissed, not merely because the transaction was not originally impeachable, but merely on account of the great interval of time, the Court may refuse to order the costs of the defendant.[9]

Following trust-estate into hands of third persons.

We have now to consider the rights of the *cestui que trust* as against third persons to whom the trust-property has been wrongfully conveyed. If the person to whom the property has been conveyed is a volunteer,—that is to

Volunteers.

[1] *Ex parte* Reynolds, 5 Ves., 707; *Ex parte* Hughes, 6 Ves., 617; *Ex parte* Lacey, *ib.*, 625; Lister *v.* Lister, *ib.*, 631; *Ex parte* Bennett, 10 Ves., 381; Robinson *v.* Ridley, 6 Mad., 2.

[2] *Ex parte* James, 8 Ves., 351.

[3] *Ex parte* Reynolds, 5 Ves., 707; Hall *v.* Hallet, 1 Cox, 134.

[4] Fox *v.* Mackreth, 2 Cox, 320; Hall *v.* Hallet, 1 Cox, 134; Whichcote *v.* Lawrence, 3 Ves., 740; *Ex parte* Reynolds, 5 Ves., 707; Randall *v.* Errington, 10 Ves., 422.

[5] Lord Hardwicke *v.* Vernon, 4 Ves., 416.

[6] Hall *v.* Hallet, 1 Cox, 139.

[7] Sanderson *v.* Walker, 13 Ves., 601; Hall *v.* Hallet, 1 Cox, 141; Whichcote *v.* Lawrence, 3 Ves., 740; Dunbar *v.* Tredennick, 2 B. and B., 304.

[8] Lewin, 7th Edn., 447; Attorney-General *v.* Lord Dudley, G. Coop., 146.

[9] Lewin, 7th Edn., 447, citing Gregory *v.* Gregory, G. Coop., 200.

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say, a person who has given no consideration for the conveyance, the trust-estate may be followed into his hands, whether he had notice of the trust or not, for the Court implies notice where no consideration has passed.[1]

Purchasers for value.

If the person into whose hands the property has come, purchased it for valuable consideration, with notice of the trust, he is bound to the same extent and in the same manner as the person from whom he purchased.[2] "If," said Lord Hardwicke, "a person will purchase with notice of another's rights, his giving a consideration will not avail him, for he throws away his money voluntarily, and of his own free will."[3]

So, a purchaser will be affected with any incumbrance on the estate if he had notice of it when he purchased,[4] or of a lien for unpaid purchase-money.[5] And the assignee of a *chose-in-action* must take it subject, as we have just seen, to all the equities.[6]

"The rules of this Court," said Malins, V. C.,[7] "are perfectly well settled, and are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it; and that all persons who obtain possession of trust-funds, with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust-funds."

Purchase from guardian.

When a person, after attaining majority, questions any sale of property made by his guardian during his minority, the burden lies on the person who upholds the purchase, not only to show that, under the circumstances of the case, either the guardian had the power to sell, or that the purchaser reasonably supposed that he had such power, but

[1] Mansell *v.* Mansell, 2 P. Wms., 678; Saunders *v.* Dehew, 2 Vern., 271.

[2] Dunbar *v.* Tredennick, 2 Ball and B., 319; Adair *v.* Shaw, 1 Sch. and Lef., 262; Mead *v.* Lord Orrery, 3 Atk., 238; Mackreth *v.* Symmons, 15 Ves., 350; Mansell *v.* Mansell, 2 P. Wms., 681; Heath *v.* Crealock, L. R., 10 Chan., 22; Mancharji Sorabji Chulla *v.* Kongseoo, 6 Bom. H. C. R., O. C., 59; Dayal Jairaj *v.* Jivraj Ratansi, I. L. R., 1 Bomb., 237; Bego Jan *v.* Luteefun, 5 W. R., 120.

[3] Mead *v.* Lord Orrery, 3 Atk., 238.

[4] Kennedy *v.* Daly, 1 Sch. and Lef., 355; Crofton *v.* Ormsby, 2 Sch. and Lef., 583; Daniels *v.* Davison, 16 Ves., 249; Mancharji Sorabji Chulla *v.* Kongseoo, 6 Bom. H. C. R., O. C., 59.

[5] Mackreth *v.* Symmons, 15 Ves., 329; Dunbar *v.* Tredennick, 2 B. and B., 320; Yellappa-bin-Basappa *v.* Mantappa-bin-Basappa, 3 Bom. H. C., A. C., 102.

[6] See further, Lewin, 7th Edn., 732.

[7] Gray *v.* Lewis, L. R., 8 Eq., 548

further, that the whole transaction as regards the purchaser's part in it was *bonâ fide*. When either the person who sells labours under a disqualification, or the purchaser stands in a fiduciary relation to the owner of the property, the *bona fides* of the dealing cannot be presumed, but must be made out by the purchaser.[1]

Notice of trust.

The notice need not be express, but may be constructive. The principle of constructive notice is, that a man shall be deemed to know such matters affecting the property which he purchases, as would have come to his knowledge if he had made proper inquiries. Where one of three trustees, who was also the solicitor of the purchaser, executed an assignment of leasehold property held jointly by them to a purchaser, and forged the signatures of his two co-trustees, and also the requisite assent of the *cestui que trust* to the sale, it was held, that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of the trust through the knowledge of his solicitor.[2]

Purchaser for valuable consideration without notice.

If, however, the trust-property is conveyed to a purchaser for valuable consideration without notice of the trust, the purchaser is entitled to hold the property discharged of the trust, leaving the *cestuis que trustent* to their remedy against the trustees.[3] "From a purchaser for value without notice," said James, L. J.,[4] "the Court takes away nothing which that purchaser has honestly acquired. If the purchaser has got possession of a piece of parchment or of property, or of anything else which he thought he was getting honestly, this Court, in my opinion, has no right to interfere with him."

Purchaser without notice from purchaser with notice.

A purchaser without notice from a purchaser with notice is not liable. He is in the same position as if he had himself originally purchased without notice, and the fact that the sale to him was fraudulent does not affect him.[5]

Purchaser with notice from purchaser without.

Nor is a purchaser with notice from a purchaser without

[1] Roop Narain Singh *v.* Gugadhur Pershad Narain, 9 W. R., 297.

[2] Boursot *v.* Savage, L. R., 2 Eq., 134.

[3] Mansell *v.* Mansell, 2 P. Wms., 681; Dunbar *v.* Tredennick, 2 Ball & B., 318; Jones *v.* Powles, 3 M. & K., 581; Payne *v.* Compton, 2 Y. & C. C. C., 457; Thorndike *v.* Hunt, 3 DeG. & J., 563.

[4] Heath *v.* Crealock, L. R., 10 Ch., 33.

[5] Ferrars *v.* Cherry, 2 Vern., 384; Mertins *v.* Jolliffe, Ambl., 313; Salusbury *v.* Bagott, 2 Swanst., 606.

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notice liable, the reason being, Lord Hardwicke says, to prevent stagnation of property.[1]

Fraud.

If a purchaser, however honest, on the completion of his purchase, acquires a defective title, the Court will not allow that defective title to be strengthened, either by his own fraud, or by the fraud of any other person.[2]

Doubtful equity.

In some cases it may be doubtful what construction would be put on the instrument of trust, and the purchaser may take with a doubtful equity. The question may then arise, how far the purchaser would be bound. Upon this point Lord Leonards said, that where, upon the whole articles, it is plain what construction the Court would have put upon them had it been called upon to execute them at the time they were made, they should be enforced, however difficult the construction might be, even as against a purchaser with notice, but not after a lapse of time, where there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated.[3]

Following converted trust-property.

Where a trustee has wrongfully disposed of trust-property, the *cestui que trust* may follow the purchase-money, or any other property that has been substituted in the place of the trust-estate, in the hands of the trustee or his representatives; and such substituted property will be impressed with the same trusts as the original trust-property was subject to.[4] Thus, if a trustee expends the whole of the trust-money in the purchase of land, the *cestui que trust* will be entitled to the land.[5]

Proof of purchase with trust-money.

The *cestui que trust* must, of course, prove that the land was purchased with the trust-moneys. This may be proved, either by direct evidence, as where trust-money was paid to a trustee by a cheque, which was next day paid over by him in part-payment for the estate,[6] or by mere parol evidence of declarations by the trustees; but these, in the

[1] Mertins *v.* Jolliffe, Ambl., 313; Salusbury *v.* Bagott, 2 Swanst., 606.

[2] Heath *v.* Crealock, L. R., 10 Ch., 33, *per* James, L. J. As to getting in the legal estate, see Lewin, 7th Edn., 729.

[3] Thompson *v* Simpson, 1 Dr. & War., 491.

[4] Taylor *v.* Plummer, 3 M. & S., 575; Rani Kattama Nachiar *v.* Bothagurusami Tevar, 6 Mad. H. C. R., 293; Greender Chunder Ghose *v.* Mackintosh, I. L. R., 4 Calc., 908.

[5] Trench *v.* Harrison, 17 Sim., 111; Taylor *v.* Plummer, 3 M. & S., 575.

[6] Price *v.* Blackmore, 6 Beav., 507; *Ex parte* Chadwick, 15 Jur., 597; Mathias *v.* Mathias, 3 Sm. & Giff., 552.

absence of corroborating circumstances, will be received with great caution.[1] The presumption, however, is, that a purchase made by a trustee, whose duty is so to invest trust-money, has been made in execution of the trust.[2] And where a trustee paid in trust-moneys (applicable to be invested in the purchase of real estate), and moneys of his own, to his general account at his bankers, and then bought real estate, and paid for it by a cheque on his bankers, the Court—the purchase having proved a beneficial one—decided that the *cestuis que trustent* were entitled to hold, that such payment was made out of that part of the moneys standing to the general account which it was proper so to employ,—*i.e.*, the trust-moneys.[3]

The mere fact that a trustee has trust-money in his hands when he makes a purchase, is not sufficient to attach the trust to lands bought by him.[4] The fact that a trustee for purchase of lands has purchased lands, does not necessarily raise the presumption that he invested the trust-money in the purchase. Such a presumption may, however, be raised when the sum paid is the precise, or nearly precise, amount of trust-money.[5]

Money, notes, or negotiable instruments.

Where the trust-property has been converted into money, currency notes, or negotiable instruments, greater difficulty arises in tracing it in the hands of the trustee or his representatives. It was at one time said that such property could not be traced, because it had no 'earmark.' But in *Miller* v. *Race*,[6] Lord Mansfield said: "It has been quaintly said 'that the reason why money cannot be followed is, because it has no earmark;' but this is not true. The true reason is, upon account of the currency of it, it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration; but before money has passed in currency, an action may be brought for the money itself. There was a

[1] Lench *v.* Lench, 10 Ves., 519.
[2] Trench *v.* Harrison, 17 Sm., 111.
[3] Manningford *v.* Toleman, 1 Coll., 670; see Dart V. & P., 5th Edn., 939.
[4] Lewin, 7th Edn., 765, citing Sealy *v.* Stawell, 3 I. R., Eq., 326.
[5] Price *v.* Blakemore, 6 Beav. 507; Mathias *v.* Mathias, 3 Sm. & G., 552; Perry *v.* Phelips, 4 Ves., 108; see also Denton *v.* Davies, 18 Ves., 499; Lewis *v.* Madocks, 8 Ves., 150; 17 Ves., 48.
[6] 1 Burr., 452.

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case in 1 G., 1, at the sittings—*Thomas* v. *Whip*—before Lord Macclesfield, which was an action upon *assumpsit* by an administrator against the defendant for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord Macclesfield held, that the action lay. Now this must be esteemed a finding at least. Apply this to a case of a bank-note,—an action may lie against the finder, it is true; but not after it has been paid away in currency." "It makes no difference in reason or law," said Lord Ellenborough, C. J.,[1] "into what other form, different from the original, the change may have been made,—whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, or into other merchandize, for the product of, or substitute for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way,—*i. e.*, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other moneys, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains in the hand of the factor or his general legal representatives."

These cases show, that money and notes, if not paid away to a *bonâ fide* holder, can be followed into the hands of a trustee. And it has been decided that the same principle applies to bills of exchange and other negotiable instruments.[2] And they may be followed when the transferree had express notice of the trust.[3] The difference between money and notes and negotiable instruments is, that the particular coin cannot be distinguished, but notes

[1] Taylor *v.* Plumer, 3 M. and S., 575.
[2] Frith *v.* Cartland, 2 H. and M., 417.
[3] Joy *v.* Campbell, 1 Sch. and Lef., 345.

and negotiable instruments are distinguishable, as they have distinct marks and numbers on them.[1]

Trust-fund mixed with trustee's money.

Trust-funds may be followed, although the trustee has mixed them with his own money, as by paying them into his own account at a bank. If the trustee has employed the trust-money, together with his own money, in the purchase of an estate, the *cestui que trust* will have a lien over the purchased estate for the whole amount of the fund misapplied, though no particular part of the estate was purchased with the trust-money only.[2] The guiding principle in all cases of this class is, that a trustee cannot assert a title of his own to trust-property. If he destroys a trust-fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust-property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is, that if a man mixes trust-funds with his own, the whole will be treated as the trust-property, except so far as he may be able to distinguish what is his own.[3]

Pennell v. Deffell.

The doctrines upon which a Court of Equity acts in following trust-moneys were very fully discussed in the case of *Pennell* v. *Deffell*.[4] There a trustee paid various trust-funds to his credit at two banks, and the question was, how far the moneys at his credit belonged specifically to the trust. Knight Bruce, L. J., said: "Let us suppose that the several sums for which the trustee was accountable at his death had been (that is to say, that the very coins and the very notes received by him on account of the trusts respectively had been) placed by him together in a particular repository, such as a chest, mixed confusedly together as among themselves; but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain, that, after his death, the coins and notes thus circumstanced would not have formed part of his general assets, would not have been permitted so to be used, but would have been specifically applicable to the purposes of the trusts on account of

[1] Ford *v.* Hopkins, 1 Salk., 283.

[2] Lane *v.* Dighton, Amb., 409; Lewis *v.* Madocks, 17 Ves., 57; Price *v.* Blakemore, 6 Beav., 507; Ernest *v.* Croysdill, 2 DeG. F. and J., 175; Nogender Chunder Ghose *v.* Greender Chunder Ghose, Boul., 389.

[3] Frith *v.* Cartland, 2 H. and M., 420, *per* Wood, V. C.

[4] 4 D. M. G., 372.

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which he had received them. Suppose the case that I have just suggested to be varied only by the fact, that in the same chest, with these coins and notes, the trustee had placed money of his own (in every sense his own) of a known amount, had never taken it out again, but had so mixed and blended it with the rest of the contents of the chest, that the particular coins or notes of which this money of his own consisted, could not be pointed out—could not be identified,—what difference would that make? None, as I apprehend, except (if it is an exception) that his executor would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own, so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust-moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors as representing the general creditors on the other.

"Let it be imagined that, in the second case supposed, the trustee, after mixing the known amount of money of his own with the trust-moneys, had taken from the repository a sum for his own private purposes, and it could not be ascertained whether in fact the specific coins and notes forming it included or consisted of those or any of those which were, in every sense, his own specifically,—what would be the consequence? I apprehend that, in equity at least, if not at law also, what he took would be solely or primarily ascribed to those contents of the repository which were in every sense his own. He would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right; and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible. If these propositions, which I believe to be founded on principle, and supported by authorities, are true,—can the plaintiff be wholly wrong in his actual contention? I apprehend not . . . . When a trustee pays trust-money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done, had it specifically been

placed by the trustee in a particular repository and so remained,—that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on the other, whether the *cestuis que trustent* are bound to take to the debt—whether the deposit was a breach of trust, is a different question.

"This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own."

And Turner, L. J., said: "It is, I apprehend, an undoubted principle of this Court, that, as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to, or affected by, the trust.

"This principle cannot be better illustrated than by referring to a case of familiar, almost daily occurrence, the case of trust-moneys employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock-in-trade and debts of the partnership. The stock-in-trade may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed." His Lordship then referred to the supposed impossibility of ascertaining what portions of the balances at the banker's belonged to the trust, and what portion to the estate of the trustee, and continued: "In order to test this question, suppose a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust-account, and pays in no other moneys: could it for one moment be denied that the moneys, standing to the account of the debt due from the banker's arising from the moneys so paid in, would

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belong to the trust and not to the private estate of the trustee? Then suppose the trustee subsequently pays in moneys of his own, not belonging to the trust, to the same account: would the character of the moneys which he had before paid in, if the debt which had before accrued, be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out part of the trust-moneys which he has before paid in: would the remainder of those moneys and of the debt contracted in respect of them lose their trust character? Then, can the circumstance of the account consisting of a continued series of moneys paid in and drawn out alter the principle? It may, indeed, increase the difficulty of ascertaining what belongs to the trust, but I can see no possible ground on which it can affect the principle."

Re Hallett's Estate.

In the recent case of *In re Hallett's Estate, Knatchbull* v. *Hallett*,[1] trust-money had been paid in by a trustee to his own account at his bankers, and the question was, whether the rule in *Clayton's case*,[2] that the first drawings out by the trustee must be attributed to the first payments, applied to the case of a trustee mixing his moneys with the trust-funds; and it was held, that it did not, the Court dissenting to this extent from *Pennell* v. *Deffell*.[3] "The modern doctrine of equity," said Jessel, M. R., "as regards property disposed of by persons in a fiduciary position, is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property so far as regards the right of the beneficial owner to follow the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust-money, although it is not confined, as I will show presently, to express trusts. In that case, according to the now well-established doctrine of equity, the beneficial owner

[1] L. R., 13 Ch. Div., 696. [2] 1 Mer., 572.
[3] 4 D. M. G., 372.

has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust-money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust-money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust-money laid out in the purchase; and the charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows." His Lordship then stated that there was no distinction between an express trustee, an agent, a bailee, or a collector of rents, or anybody else in a fiduciary position; and continued: "Now that being the established doctrine of equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this—supposing, instead of being invested in the purchase of land or goods, the money were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation,—does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust-money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake or otherwise dropped a sovereign of his own into the bag, could anybody suppose that a Judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns; but if instead of putting it into his bag, or after putting it into his bag

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he carries the bag to his bankers,—what then? According to law the bankers are his debtors for the total amount; but if you lend the trust-money to a third person, you can follow it. If, in the case supposed, the trustee had lent the £1,000 to a man without security, you could follow the debt and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it were a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1,000, the only difference is this, that, instead of taking the bond or the promissory note, the *cestui que trust* would have a charge for the amount of the trust-money on the bond or promissory note. So it would be on the simple contract debt; that is, if the debt were of such a nature as that, between the creditor and debtor, you could not sever the debt into two, so as to show what part was trust-money, then the *cestui que trust* would have a right to a charge upon the whole." And Thesiger, L. J., said: "The principle may be stated, as it appears to me, in the form of a very simple, though at the same time very wide and general, proposition. I would state that proposition in these terms,—namely, that wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel, then either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material."

Upon the question as to whether the principle of *Clayton's case*[1] could be applied to the case of trust-moneys, Jessel, M. R., said: "Nothing can be better settled either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. . . . When we come to apply that principle to the case of a trustee who has blended trust-moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took the trust-money when he had a right to take away his own

[1] Mer., 572.

money. The simplest case put is the mingling of trust-moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they cannot be distinguished, and the next day he draws out for his own purposes £100,—is it tolerable for any one to allege that what he drew out was the first £100, the trust-money, and that he misappropriated it, and left his own £100 in the bag? It is obvious that he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers." And Baggallay, L. J., agreed with Jessell, M. R. But Thesiger, L. J., while agreeing with the reasoning of the Master of the Rolls, felt himself bound by *Pennell* v. *Deffell*[1] as being the judgment of a Court of co-ordinate jurisdiction. LECTURE X.

Lien.

If the trust-fund has been employed together with money belonging to the trustee in the purchase of land, the *cestui que trust* will have a lien on the whole land for the trust-money and interest.[2] But if the trust-fund only has been so employed, the *cestui que trust* has a right to the land itself.[3]

Limitation

It is a well settled principle of equity that time is no bar to a claim by a *cestui que trust* against his trustee in the case of an express trust.[4] Nor is it a bar against a purchaser with notice,[5] but it is otherwise in the case of a constructive trust.[6] Thus, time was held to be a bar as between a *cestui que trust* and a person who had become possessed of the trust-estate even by reason of the breach of trust on the part of the trustee.[7]

[1] 4 D. M. G., 372.
[2] Scales *v.* Baker, 28 Beav., 91; Hopper *v.* Conyers, L. R., 2 Eq., 549.
[3] Trench *v.* Harrison, 17 Sim., 111; see *ante*, p. 294.
[4] Chalmer *v.* Bradley, 1 Jac. & W., 51; see M. S. Ameerun *v.* M. S. Hyatun, 16 S. D. A., 443.
[5] Luteefun *v.* Bego Jan, 5 W. R., 120.
[6] Beckford *v.* Wade, 17 Ves., 97.
[7] Bonney *v.* Ridgard, 1 Cox, 145; Townsend *v.* Townsend, 1 Bro. C. C., 550; Andrew *v.* Wrigley, 4 Bro. C. C., 125; Beckford *v.* Wade, 17 Ves., 97.

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Section 10 of Act XV of 1877 provides, that "no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands, such property, shall be barred by any length of time." This section is substantially the same as s. 10 of Act IX of 1871, which has been construed to mean, that when a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust (either from such person having been originally named as trustee, or having become so subsequently by operation of law), the person or persons who for the time being may be beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time without being barred by limitation; and further, that the language of the section is specially framed so as to exclude implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations.[1] And in *Greender Chunder Ghose* v. *Mackintosh*,[2] it was held by Garth, C. J., that the words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature, such as the law impresses upon executors and others who hold fiduciary positions; and by White, J., that those words are used in a restrictive sense, and limit the character and nature of the trust attaching to the property which is sought to be followed, and that the phrase is a compendious form of expression for trusts of the nature and character mentioned in arts. 133 and 134 of sched. ii to the Act,—namely, such as attach to property conveyed in trust, deposited, pawned or mortgaged.

Where a clause of the *wajib-ul-arz* of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such *wajib-ul-arz* was framed, sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such *wajib-ul-arz*, alleging that their property

[1] Kherodemoney Dossee *v.* Doorgamoney Dossee, I. L. R., 4 Calc., 455.
[2] *Ibid*, 897.

had vested in such co-sharer in trust for them, it was held, that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of s. 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation.[1] LECTURE X.

Accrual of cause of action.

Where property has been placed in the hands of another by way of trust, no cause of action arises to the owner until there has been a demand by him for the restoration of the property and a refusal by the trustee to give up the property. The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession.[2]

A suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust, must be brought within three years from the date of the trustee's death, or if the loss has not then resulted, the date of the loss.[3]

Suits to recover possession of moveable or immoveable property conveyed or bequeathed in trust, and afterwards purchased from the trustee for a valuable consideration, must be brought within twelve years from the date of purchase.[4]

Fraud.

No time will cover a fraud so long as it remains concealed; for, until discovery (or at all events until the fraud might with reasonable diligence have been discovered), the title to avoid the transaction does not properly arise. But after discovery, the defendant may avail himself of the Statute, for he has a right to say, "You shall not bring this matter under discussion at this distance of time; it is entirely your own neglect that you did not do so within the time limited by the Statute."[5]

Section 18 of Act XV of 1877 provides that "when any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish

[1] Piarey Lall *v.* Saliga, I. L. R., 2 All., 394; see also Kamal Singh *v.* Batul Fatima, *ib.*, 460.
[2] Rakhaldas Madak *v.* Madhu Sudan Madak, 3 B. L. R., A. C., 409.
[3] Act XV of 1877, sched. ii, art. 98.
[4] Act XV of 1877, sched. ii, arts. 133, 134.
[5] Lewin, 7th Edn., 739; see Durga Prasad *v.* Asa Ram I. L. R., 2 All., 361.

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such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application (*a*) against the person guilty of the fraud or accessory thereto, or (*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it, or compelling its production."

Purchase from manager of joint Hindu family.

A person who lends money to, or purchases from, the manager of a joint Hindu family governed by the Mitakshara law, is bound to enquire into the necessity for the loan or sale.[1] The leading case on this point is *Hunooman Persaud Panday* v. *M. S. Babooee Munraj Koonweree*.[2] Their Lordships of the Privy Council say: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged, sufficient, and reasonably credited necessity is not a condition precedent to the validity of his charge; and they

[1] M. S. Nowruttun Koer *v.* Baboo Gouree Dutt Singh, 6 W. R., 193.
[2] 6 Moo. I. A., 393.

do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improper management; the purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

Position of shebait.

The position of a shebait of a debutter estate is analogous to that of a manager of an infant heir, and the foregoing principles apply to the case of a purchaser from him.[1]

Duty of purchaser.

He who sets up a charge upon a minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there was reasonable ground for believing that the transaction was for the benefit of the estate.[2] It is sufficient for the purchaser or lender to be satisfied of the fact of necessity; he need not inquire into its causes.[3] It is only necessary for him to establish that he made *bonâ fide* enquiry into the matter, and was in that inquiry reasonably led to suppose that the necessity did exist.[4]

Terms on which sale set aside.

When a sale is set aside, the plaintiff can only get possession on repayment of so much of the purchase-money as has been applied towards the liquidation of debts.[5]

Duty of manager.

It is the duty of the manager to pay off debts by strict economy if possible, and not to sell the property, because it is the easier mode of clearing the estate.[6] A sale of family property made by a Hindu father living under the Mitakshara law, merely to enable him to redeem a mortgage, the term of which has not nearly expired, is

[1] Konwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341.
[2] Lalla Bunseedhur *v.* Koonwur Bindeseree Dutt Singh, 10 Moo. I. A., 461; Syud Tasouwar Ali *v.* Koonj Beharee Lal, 3 N. W. P., 10.
[3] Mohabeer Kooer *v.* Joobha Singh, 16 W. R., 221; Sheoraj Kooer *v.* Nukchedee Lall, 14 W. R., 72.
[4] Soorendro Pershad Dobey *v.* Nundun Misser, 21 W. R., 196.
[5] Muthoora Koonwaree *v.* Bootun Singh, 13 W. R., 30; see Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341.
[6] M. S. Bukshun *v.* M. S. Doolhin, 12 W. R., 337.

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not made under such pressing legal necessity as would prevent his son from suing to set it aside if made without the son's acquiescence.

What is sufficient necessity.

Want of acquiescence on the son's part is sufficient to make the sale by the father void in the absence of legal necessity. It is not necessary that the sale by the father should be wasteful, it might even be advantageous.[1] A sale to pay debts and maintain the family is good,[2] so are sales to defray Government revenue or to defray funeral or marriage ceremonies.[3] Where the Court has expressly found the existence of debts, and that the sale of ancestral property was a *bonâ fide* one, the circumstance that there was no actual pressure at the time, in the shape of suits by the creditors for the recovery of their debts, is not of itself sufficient to invalidate the alienation.[4] The fact that there is a decree, an attachment, and a proclamation of sale,[5] or even a decree which may at any time be enforced against ancestral property,[6] is sufficient evidence of pressure and justification for a sale or mortgage. A sale of ancestral property merely for the purpose of procuring funds for the repurchase of other property formerly belonging to the family, cannot, of itself, be considered as a sale for any of the necessary purposes sanctioned by law.[7] Although, as a general rule, it may lie upon those who claim, under an alienation of ancestral property for necessary purposes, to show that the alienation was within the limited powers of the party alienating, yet particular circumstances may shift the burden of proof. No fixed rule can be laid down as to the degree of proof requisite in such cases.[8]

Sale to pay debts.

A father governed by the Mitakshara law may sell ancestral property in order to pay off debts which his sons would be under a pious obligation to pay after his death.[9] "The interests of the sons," said their Lord-

[1] Kullar Singh *v.* Modhoo Dyal Singh, 5 Wym., 28.
[2] Bisambhur Naik *v.* Sudasheeb Mohapattur, 1 W. R., 96.
[3] Sacaram *v.* Laxmabai, Perry, O. C., 129; Saravana *v.* Muttayi, 6 Mad. H. C., 371.
[4] Kaihur Singh *v.* Roop Singh, 3 N. W. P., 4.
[5] Sheoraj Kooer *v.* Nukchedee Lall, 14 W. R., 72.
[6] Purmessur Ojha *v.* M. S. Goolbee, 11 W. R., 446.
[7] Kaihur Singh *v.* Roop Singh, 3 N. W. P., 4.
[8] Kaihur Singh *v.* Roop Singh, 3 N. W. P., 4; Syud Tasouwar Ali *v.* Koonj Beharee Lal, 3 N. W. P., 10.
[9] Girdharee Lall *v.* Kantoo Lall, L. R., 1 I. A., 321; (S. C.) 14 B. L. R., 187.

ships of the Privy Council, "as well as the interest of the father in the property, although it is ancestral, is liable for the payment of the father's debts." Referring to this passage Phear, J., said:[1] "It would, therefore, seem to follow that any disposition of the property, which is reasonably made by the father for the purpose of discharging a debt of this kind, *i.e.*, a debt of the father, which does not fall within the exception (for immoral purposes) is one of those spoken of and authorized as 'unavoidable' by paras. 28 and 29, s. 1, chap. i. Mitakshara. The debt being of such a nature that the property is ultimately liable to discharge it, the alienation of that property, whether by mortgage or sale, by the father, upon reasonable terms, for the purpose of discharging the debt, must be substantially an unavoidable transaction."

The question in these cases is, whether the debt is one which, if left unsatisfied, the sons would, under the Hindu law, be under an obligation to discharge;[2] and the lender is bound to show for what purpose the loan was contracted, and that the purpose was one which justified the father in charging, or which the lender had at least good grounds for believing did justify the father in charging, the interests of the sons in the ancestral property.[3] In *Hunooman Persaud Panday* v. *M. S. Babooee Munraj Koonwaree*[4] their Lordships of the Privy Council said:—"As to the consideration for the bond the argument for the appellants in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge, and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewany Adawlut at Agra in the case of *Oomed Rai* v. *Heera Lall*[5] was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where

Hunooman Persaud Panday's case.

[1] Muddun Gopal Lall *v.* M. S. Gowrunbutty, 15 B. L. R., 271.
[2] Adurmoni Deyi *v.* Chowdhry Sibnarain Kur, I. L. R., 3 Calc., 5.
[3] Bhekuarain Singh *v.* Januk Singh, I. L. R., 2 Calc., 445.
[4] 6 Moo. I. A., 418.
[5] 6 S. D. A., N. W. P., 218.

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the sons of a living father were, with his suspected collusion, attempting to get rid of the charge on an ancestral estate created by the father on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may, perhaps, be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge as well as on the obvious ground in such suits, of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question, on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on, them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,—namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

"It is to be observed that the representation by the manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required.

It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time, and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."[1]

Purchaser under execution.

A purchaser under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it,[2] for a judgment-debt is *primâ facie* proof of necessity.[3]

The rule applies where a minor seeks to set aside a sale made by his guardian to pay off a decree against the minor.[4]

The decree alone is not, however, sufficient proof,[5] but there should be evidence of the nature of the debts on which the decree originated.[6]

In a suit by the members of an undivided family governed by the law of the Mitakshara, to set aside a sale of joint ancestral property which had been sold in execution of a decree obtained against their deceased father, on the ground that the debt was not one for which such property could be made liable, it appeared that, prior to the sale, the plaintiffs had preferred a claim of objection on the same grounds, and that the Court of execution

[1] See also Tandavaraya Mudali *v.* Valli Ammal, 1 Mad. H. C., 398; Lalla Bunseedhur *v.* Koonwar Bindeseree Dutt Singh, 10 Moo. I. A., 461; Syud Tasouwar Ali *v.* Koonj Beharee Lal, 3 N. W. P., 10; Chowdhry Herasutoollah *v.* Brojo Soondur Roy, 18 W. R., 77.

[2] Muddun Thakoor *v.* Kantoo Lall, L. R., 1 I. A., 334; (S. C.) 14 B. L. R., 187, 199.

[3] M. S. Bhowna *v.* Roop Kishore, 5 N. W. P., 89; Budree Lall *v.* Kantee Lall, 23 W. R., 260; M. S. Kooldeep Kooer *v.* Runjeet Singh, 24 W. R., 231; Sheo Pershad Singh *v.* M. S. Soorjbunsee Kooer, *ib.*, 281; Burtoo Sing *v.* Ram Purmessur Singh, *ib.*, 364; M. S. Sham Soondur Kooer *v.* M. S. Jumna Kooer, 25 W. R., 148; Ram Sahoy Singh *v.* Mohabeer Pershad, *ib.*, 185; Shah Wajed Hossein *v.* Baboo Nankoo Singh, *ib.*, 311; Luchmi Dai Koori *v.* Asman Singh, I. L. R., 2 Calc., 213; Venkataramayyan *v* Venkatasubramania Dikshatar, I. L. R., 1 Mad, 358; Bika Singh *v.* Luchman Singh, I. L. R., 2 All., 800.

[4] Sheoraj Kooer *v.* Nuckchedee Lall, 14 W. R., 72; see further, Mayne's Hindu Law, s. 304, as to coparceners.

[5] Pareyasami *v.* Saluckai Tevar, 8 Mad., 157.

[6] Reotee Singh *v.* Ramjeet, 2 N. W. P., 50.

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had declined to adjudicate on the claim, and had directed the sale to proceed, referring the claimants to a regular suit,—it was held by the Privy Council, distinguishing the case of *Muddun Thakoor* v. *Kantoo Lall*,[1] that the purchasers must be taken to have had notice, actual or constructive, of the objections made to the sale by the plaintiffs, and of the order then made, and to have purchased with knowledge of the plaintiffs' claim, and subject to the result of their suit.[2]

Under Hindu law, where there is found to be an ancestral debt, and a sale is effected to pay it, the purchaser at such sale is not bound to inquire whether the debt could have been met from other sources.[3]

It may be shown that the ostensible purpose of the loan was to pay off Government revenue; but to render such a loan binding upon those who had reversionary interests in the property, it must also be satisfactorily proved that such loan was at the time absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor.[4]

Where the lender has shown that a justifiable debt existed, and persons claiming through the borrower allege that it has been satisfied, the ordinary rule requires the party who alleges payment to prove payment, and the debt will not be presumed to be satisfied until the contrary is shown by the creditor.[5]

Purchase from heir of Mahomedan debtors.

The creditors of a deceased Mahomedan, whether in respect of dower or otherwise, cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir-at-law, whether by sale or mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and will be affected with the doctrine of *lis pendens*.[6]

[1] 14 B. L. R., 187; L. R., 1 I. A., 333.
[2] Suraj Bunsi Koer *v.* Sheo Persad Singh, I. L. R., 5 Calc., 148; see Luchmun Dass *v.* Giridhur Chowdhry, I. L. R., 5 Calc., 855.
[3] Ajey Ram *v.* Girdharee, 4 N. W. P., 110.
[4] Damoodur Mohapattur *v.* Birjo Mohapatter, S. D. of 1858, p. 802.
[5] Cavaly Vencata Narrainapah *v.* The Collector of Masulipatam, 11 Moo. I. A., 633.
[6] Syud Bazayet Hossein *v.* Dooli Chund, I. L. R., 4 Calc., 402.

Acquisition by trustee of trust-property wrongfully converted.

If a trustee wrongfully disposes of trust-property to a *bonâ fide* purchaser for value, and subsequently becomes possessed of the same property, the trust attaches again, however many hands the property may have passed through in the meantime.[1]

Liability of executor or administrator to pay interest.

If an executor or administrator retains the assets of his testator after paying debts and legacies, and either neglects to invest or employ the surplus in his business,[2] and does not account to the residuary legatees or next-of-kin as the case may be, he will, after the expiration of the year which he is allowed[3] to realize his testator's assets,[4] be charged with interest on the amount he has retained.[5] And if the money has been employed in his business, he may be charged with compound interest.[6]

It is the duty of executors to make the fund productive, and if there is a debt due from the testator's estate which is carrying interest, they should apply the assets in paying the debt; and if they neglect to do so, they will be charged with the amount of the interest.[7]

So it has been held, that the trustee of a bankrupt's estate, who neglects to declare a dividend for the benefit of creditors, is liable to pay interest on the assets in his hands;[8] and a receiver who neglects to obey a direction to invest the rents and profits of the estate in his hands, must pay interest on the sums he has received.[9] The rate would, in this country, be 6 per cent, the Court rate of interest.[10]

It is no excuse that the executor has made no profit from the money in his hands; it is his duty to make it profitable for the estate, and he will be made to pay interest, though he has left the money in his banker's hands at a separate account.[11]

[1] Bovy *v.* Simth, 2 Ch. Cas., 124; Kennedy *v.* Daly, 1 Sch. and Lef., 379.
[2] Ratcliffe *v.* Graves, 1 Vern., 196. [3] See *ante*, p. 172.
[4] Forbes *v.* Ross, 2 Cox, 113; Johnson *v.* Newton, 11 Hare, 160.
[5] Forbes *v.* Ross, 2 Cox, 113; Piety *v.* Stace, 4 Ves., 620; Tebbs *v.* Carpenter, 1 Madd., 290; Crackelt *v.* Bethune, 1 Jac. and W., 586; Hall *v.* Hallet, 1 Cox, 134; Holgate *v.* Haworth, 17 Beav., 259.
[6] Burdick *v.* Garrick, L. R., 5 Ch., 233.
[7] Hall *v.* Hallet, 1 Cox, 134; Tebbs *v.* Carpenter, 1 Madd., 303; Turner *v.* Turner, 1 J. and W., 43.
[8] Treves *v.* Townshend, 1 Bro. C. C. 384; Hankey *v.* Garrett, 1 Ves., 236.
[9] Hicks *v.* Hicks, 3 Atk., 274.
[10] As to when the rate of interest may be varied, see Lewin, 7th Edn., 313, 314.
[11] Ashburnham *v.* Thompson, 13 Ves., 402.

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Liability of trustee who leaves property unvested.

If a trustee whose duty it is to call in and invest the trust-property, improperly leaves it outstanding, and it is lost, he will be liable for the amount of the property, but not for interest.[1] In a case before the Privy Council,[2] *A* sued *B*, a debtor of his intestate, upon a bond-debt, and obtained a decree against him for the amount. *B* appealed to the Sudder Court. By a deed of arrangement entered into by *A* and *C* after the commencement of the suit, *C* became entitled to a six-anna share of the debt. Pending the appeal to the Sudder Court, *A* entered into a compromise with *B*, postponing the payment of the amount recovered by the decree for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of *C*. *B* failed to pay the amount within the stipulated time, and proceedings were taken by *A* against him, but he had not realized the amount of the decree. In a suit by *C* against *A* to make him chargeable for the six annas share in the decree, the Sudder Court held, that *A* was liable to *C* for such share with interest. On appeal, the Privy Council held, that *A* must be treated as a trustee for *C*, and that, in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to *C* for such amount of the debt as had been recovered, or without his wilful default might have been recovered.

When trustee liable to pay interest.

Although a trustee is not liable for interest if he improperly leaves the trust-property outstanding, he will be liable to pay interest if he unnecessarily delay in investing the trust-property or in paying it over to a person entitled to receive, even though the plaint does not pray for interest; and[3] if there has been very great delay, may have to pay the costs.[4]

Trustee employing trust-funds in trade.

If a trustee mixes trust-funds with his own moneys, and employs the mixed fund in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon charging the trustee with the principal and a proportionate

[1] Lowson *v.* Copeland, 2 Bro. C. C., 156; Tebbs *v.* Carpenter, 1 Madd., 290.
[2] Doorga Pershad Roy Chowdhry *v.* Tarra Persad Roy Chowdhry, 4 Moo. I. A., 452.
[3] Woodhead *v.* Marriott, C. P. Coop. Cas., 1837-38, p. 62; Turner *v.* Turner, 1 J. and W., 39; Hollingsworth *v.* Shakeshaft, 14 Beav., 492; Stafford *v.* Fiddon, 23 Beav., 386.
[4] Tickner *v.* Smith, 3 Sm. and Giff., 42.

share of the profits, instead of with the principal and interest only. He cannot claim both interest and profits in respect of the money employed in trade, but must elect between them.[1] The leading case on this point is *Docker* v. *Somes*,[2] and the principles upon which the Court acts were very clearly stated by Lord Brougham, L. C. His Lordship said: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust-estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. Thus, if trust-money is laid out in buying and selling land, and a profit made by the transaction, that shall not go to the trustee who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner (and cases of this kind are more numerous) where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet, for every farthing of profit he may make, he shall be accountable to the trust-estate. So, if he lay out the trust-money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets he must account for and pay over. It is so much fruit—so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held a trustee for my benefit. And so an attorney, guardian, or other person standing in a like situation to another, gains not for himself, but for the client, infant, or other party whose confidence has been abused.

Docker v. Somes.

[1] Vyse v. Foster, L. R., 8 Ch., 334.

[2] 2 M. and K., 664.

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"Such being the undeniable principle of equity—such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that caused it—punished by charging all losses on the wrong-doer, while no profit can ever accrue to him,—can the Court consistently draw the line, as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent—those instances where the trustee is most likely to misappropriate,—namely, those in which he uses the trust-funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the Court could ever, even in appearance, tolerate such an anomaly. The reason which has induced Judges to be satisfied with allowing interest only, I take to have been this—they could not easily sever the profits attributable to the trust-money from those belonging to the whole capital stock; and the process became still more difficult, where a great proportion of the gains proceeded from skill or labour employed upon the capital. In case of separate appropriation there was no such difficulty; as where land or stock had been bought and then sold again at a profit; and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust-money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust-estate.

"This principle is, undoubtedly, attended with one advantage; it avoids the necessity of an investigation of more or less nicety in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust-estates receive the same compensation, whatever risks they may have run during the period of their misappropriation; all profit equally, whatever may be the real gain derived by the trustee from his breach of duty; nor can any

amount of profit made be reached by the Court, or even the most moderate rate of merchantile profit, that is, the legal rate of profits, be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest; and this without regard to the profits actually realized; for, in the most remarkable case in which this method has been resorted to[1] (which, indeed, is always cited to be doubted, if not disapproved), the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it.

"But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this Court in by far the most wholesome, and indeed necessary, exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversation, that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores. It is in vain they are told of the Court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required without which the hand might as well be paralysed or shrunk up. The distinction, I will not say sanctioned, but pointed at, by the negative authority of the cases, proclaims to executors and trustees, that they have only to invest the trust-money in the speculations, and expose it to the hazards of their own commerce, and be charged five for cent on it; and then they may pocket fifteen or twenty per cent by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction."

Apportioning profits.

There is no rule for apportioning the profits according to the respective amounts of the capital, but the division will be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. It is obvious that it must be so; there are many cases in which the profit of a business has no ascertainable

[1] Raphael *v.* Boehm, 11 Ves., 92.

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reference to the capital—*e.g.*, solicitors, factors, brokers, or bankers. Indeed, in almost every case where the business consists of buying and selling, the difference between prosperity and ruin mainly depends on the skill, industry, and care of the dealers; no doubt, also greatly on their credit and reputation and the possession of ready-money to take advantage of favourable opportunities and to enable them to bide their time in unfavourable states of the market, and also greatly on the established good-will and connection of the house.[1]

Compound interest.

If a trustee is expressly directed to invest the trust-funds, and to accumulate the income, and neglects the direction to accumulate, he may be charged with compound interest, although the principal fund may not have suffered any loss.

There must have been an express trust in order to charge the trustee with compound interest.[2] "Where there is an express trust to make improvement of the money," said Lord Eldon,[3] "if the trustee will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he could have lent it if it be principal, and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest."[4]

Trust-funds mixed with trustee's money.

If a trustee mixes trust-funds with his own money, the *cestui que trust* will be entitled to every portion of the mixed fund which the trustee cannot prove to be his own. The principle is, that if a man who undertakes to keep the property of another distinct, mixes it with his own, the whole must be taken to be the property of the other until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part.[5] Thus, where a commission agent mixed his goods with those of his principal, and destroyed his books of account, he was disallowed his commission.[6] "I take it,"

[1] Vyse *v.* Foster, L. R., 8 Ch., 331, *per* James, L. J.
[2] Tebbs *v.* Carpenter, 1 Madd., 290; Attorney-General *v.* Solly, 2 Sim., 518.
[3] Raphael *v.* Boehm, 11 Ves., 92, 107.
[4] See also Burdick *v.* Garrick, L. R., 5 Ch., 233.
[5] Lupton *v.* White, 15 Ves., 436, *per* Lord Eldon.
[6] Gray *v.* Haig, 20 Beav., 219.

said Shadwell, V.C., "that the general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman Civil Law, by subsequent writers upon Civil Law, by the Common Law of this country, and by the decisions in our own Courts of Equity."[1]

The Contract Act[2] has altered the English law as regards the case of a bailee, without the consent of the bailor, mixing his goods with those of the bailor in such a manner that the different goods become undistinguishable. According to English law the bailor takes the whole of the goods.[3] The Contract Act, however, only entitles the bailor to compensation.

Partner trustee employing trust-funds in business.

If a partner, being a trustee, improperly employs trust-moneys in the business, or on the account of the partnership, no other partner is liable, therefor, to the *cestui que trust*, unless he either knew of the breach of trust, or with reasonable diligence might have known it. In either of the last-mentioned cases the partners having such knowledge or means of knowledge are jointly and severally liable for the breach of trust.

The mere fact that trust-funds have been employed in the business of a partnership is not enough to make the firm liable.[4] To make the firm liable, all the partners must have been implicated in the breach of trust. It would be manifestly unjust to make persons liable for a breach of trust of which they were wholly ignorant. If it can be imputed to the partners that they knew, or ought to have known, that trust-moneys were being employed in the partnership business, they will be held bound to see that the trust to which the money is subject authorizes the use of it, and will be answerable for a breach of trust in case of its misapplication or loss.[5]

[1] Duke of Leeds *v.* Earl of Amherst, 20 Beav., 242; and see Mason *v.* Morley, 34 Beav., 470; Cook *v.* Addison, L. R., 7 Eq., 466.

[2] Act IX of 1872, s. 157.

[3] See Lupton *v.* White, 15 Ves., 442.

[4] *Ex parte* Apsey, 3 Bro. C. C. 265; *Ex parte* Heaton, Buck, 386; *Ex parte* White, L. R., 6 Ch., 397.

[5] Lindley on Partnership, 4th Ed., 312; see cases cited *n* (*u*).

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Thus, where a trader appointed an executor, who subsequently entered into partnership with some other persons in the same trade, and employed the testator's assets in the partnership business, giving his partners an indemnity against any claim by the residuary legatees, it was held, that the persons who had entered into the partnership with the executor were jointly liable with him not as partners, but because they had knowingly become parties to the breach of trust.[1]

Election where trust-property to be sold or invested.

Occasionally, a testator directs certain property intended to be the subject of trusts to be sold and invested, either in land or in securities for money. When this is done, the trust-property is impressed with the character of the investment directed;—that is to say, money, or securities for money, directed to be laid out in the purchase of land, or land directed to be sold and turned into money, will be considered as that species of property into which it is directed to be converted; the principle applied being that "what ought to have been done shall be taken as done."[2] And in the case of intestacy, such trust-property will descend as if it had been converted.

But when money has been directed to be converted into land or other security, or land has been directed to be converted into money, but the conversion has not in fact taken place until the whole beneficial interest, whether in land or money, has become vested absolutely in one *cestui que trust*, he may elect to take the property in its original character;[3] the Court will not direct the conversion to be carried into effect, because the *cestui que trust*, having the absolute beneficial interest, can, as we have seen, *ante*, p. 271, claim the property and could immediately re-convert it, and "equity like nature will do nothing in vain."[4]

The *cestui que trust* must be a person competent to contract,[5]

Election by one *cestui que trust* to retain property unconverted.

Where immoveable property is directed to be sold, and the proceeds are to be divided among several persons, no

[1] Flockton *v.* Bunning, L. R., 8 Ch., 323 (*n*); see also Vyse *v.* Foster, *ib.*, 309; on appeal, L. R., 7 H. L. C., 318.

[2] Lechmere *v.* The Earl of Carlisle, 3 P. Wms., 215.

[3] Cookson *v.* Cookson, 12 C. and F., 121.

[4] Seely *v.* Jago, 1 P. Wms., 389.

[5] As to who are competent to contract, see *ante*, p. 124. See also Seeley *v.* Jago, 1 P. Wms., 389; Ashby *v.* Palmer, 1 Mer., 301; Carr *v.* Ellison, 2 Bro. C. C., 56.

one of the *cestuis que trustent* can elect that his own undivided share shall not be sold. "It would," said Romilly, M. R., "be repugnant to the principles on which the doctrine of conversion and reconversion rests to hold, that one of the legatees of an undivided share in the produce of real estate directed by the testator to be converted into personalty could, without the assent of the others, elect to take his share as unconverted, and in the shape of real estate."[1]

The reason is, that a portion of the property would not sell as beneficially as the entire estate.[2] If, however, money is devised to be laid out in the purchase of lands to be settled on several persons, any one of them may elect to take his own share in money, for a portion of the money can be invested as advantageously as the whole sum.[3]

Notification of election.

When a *cestui que trust* elects to take the trust-property unconverted, he may notify his election either by express declaration, which may be by parol,[4] or by his acts. Very slight circumstances are sufficient to show that the *cestui que trust* has elected to take the property in its original character.[5] For instance, if the *cestui que trust* takes money directed to be laid out in land, from the trustee,[6] or enters into possession of land directed to be converted into money,[7] and takes the title-deeds into his own custody, for without them the trustees cannot sell,[8] or mortgages the property,[9] he will be considered to have elected to take the property unconverted. So the presumption will be the same if he keeps the land for a long time unsold.[10]

But the receipt of the income arising from money directed to be laid out in land, is not evidence of an election to take the money unconverted.[11]

[1] Holloway *v.* Radcliffe, 23 Beav., 172.
[2] Chalmer *v.* Bradley, 1 J. & W., 59.
[3] Seeley *v.* Jago, 1 P. Wms., 389.
[4] Crabtree *v.* Bramble, 3 Atk., 685, citing Chaloner *v.* Butcher; Pultney *v.* Darlington, 1 Bro. C. C., 237; Wheldale *v.* Partridge, 8 Ves., 236.
[5] Pultney *v.* Darlington, 1 Bro. C. C., 238; Van *v.* Barnett, 19 Ves., 109; Dixon *v.* Gayfere, 17 Beav., 434.
[6] Pultney *v.* Darlington, 1 Bro. C. C., 238; Trafford *v.* Boehm, 3 Atk., 440; Rook *v.* Warth, 1 Ves., 461.
[7] Dixon *v.* Gayfere, 17 Beav., 433.
[8] Davies *v.* Ashford, 15 Sim., 42.
[9] Padbury *v.* Clark, 2 Mac. & G., 298.
[10] Ashby *v.* Palmer, 1 Mer., 301; Dixon *v.* Gayfere, 17 Beav., 433; Griesbach *v.* Fremantle, *ib.*, 314; Roberts *v.* Gordon, L. R., 6 C. D., 531.
[11] Gillies *v.* Longlands, 4 DeG. & Sm., 372; *Re* Pedder's Settlement, 5 D. M. G., 890.

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It is not necessary that the *cestui que trust* should intend to elect, it is sufficient if he shows an intention to deal with the trust-property in its natural character. "It was argued," said Kindersley, V. C., "that there must be an intention strictly to convert,—that is to say, that, knowing that the money was impressed with the character of land, the party must say, 'I mean that it shall no longer be land, but it shall be in its actual form of money.' I do not, however, think that is the correct view of the law. It is quite sufficient if the Court sees that the party means it to be taken in the state in which it actually is, whether he did or did not know that but for some election by him it would be turned into land is quite immaterial. If, being money, the party absolutely entitled indicated that he wished to deal with it as money, and that it should be considered as money, whether he knew or did not know that but for that wish it would have gone as land, appears to me wholly immaterial."[1]

Liability of *cestui que trust* joining in breach of trust.

If one of several *cestuis que trustent* joins with the trustee in committing a breach of trust, and a loss to the trust-estate is incurred, the other *cestuis que trustent* are entitled to have the whole of his interest in the trust-estate stopped and accumulated in the hands of the trustees until the loss has been repaired. "Nothing," said Lord Langdale,[2] "can be more clear than the rule which is adopted by the Court in these cases, that if one party having a partial interest in the trust-fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought upon them. What the Court does in such a case is, to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire, or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."[3]

In *Raby* v. *Ridehalgh*[4] Turner, L. J. said: —"The

[1] Harcourt *v.* Seymour, 2 Sim. (N. S.), 46; see further as to conversion and election, Lewin, 7th Edn., 801—823.

[2] Lincoln *v.* Wright, 4 Beav., 432.

[3] See also *Ex parte* Mitford, 1 Bro. C. C., 398; Woodyatt *v.* Gresley, 8 Sim., 180; Priddy v. Rose, 3 Mer., 86, 105; M'Gachen *v.* Dew, 15 Beav., 84; Vaughton *v.* Noble, 30 Beav., 34; Walsham *v.* Stainton, 1 H & M., 337; Jacubs v. Rylance, L. R., 17 Eq., 341.

[4] 7 D. M. G., 109

trustees, then, being liable to replace those trust-funds, the next question is, what is the extent of the liability which attaches upon the *cestuis que trustent* for life in consequence of their having induced the trustees to commit the breach of trust? Now the *cestuis que trustent* for life, who instigated the trustees to commit the breach of trust, have derived from that breach of trust the advantage of enjoying the increased income of the fund not duly invested according to the trust, and the consequence of that is, that the *cestuis que trustent* in remainder have a right to have that income refunded and made good by the *cestuis que trustent* for life. It is trust-money received by them under a breach of trust to which they were privy, and the effect, I apprehend, must be, that as the loss which ought to fall on those who instigated the breach of trust has been laid by the Court upon the trustees, the trustees are entitled to stand in the place of the *cestuis que trustent* in remainder, for the purpose of recovering, against the *cestuis que trustent* for life who instigated the breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust. It seems to me to be the necessary consequence of the *cestuis que trustent* for life having received the income of the trust-fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trustent* for life or their estates, to the extent which those estates have been benefited by the improper investment."

Against whom interest of *cestui que trust* applied.

The interest of the *cestui que trust*, who concurs in the breach of trust, will be applied to make good the loss to the trust-fund, as against his assignee in insolvency,[1] judgment-creditors,[2] or general creditors,[3] and as against any persons deriving title through him, except in the case of purchasers for valuable consideration without notice of the breach of trust.[4] And the rule that we are now considering applies to property settled upon a married woman for her separate use, for a married woman acting with respect to her separate property is competent to act in all respects as if she were unmarried.[5] But it does not apply

[1] *Ex parte* King, 2 M. & A., 410; Smith *v.* Smith, 1 Y. & C., Ex., 538; Burridge *v.* Row, 1 Y. & C. C. C., 183, 583.

[2] Lewin, 7th Edn., 778, citing Kilworth *v.* Mountcashell, 15 Ir. Ch. Rep., 565.

[3] Williams *v.* Allen, 32 Beav., 650.

[4] Woodyatt *v.* Gresley, 8 Sim., 180; Priddy *v.* Rose, 3 Mer., 86; Cole *v.* Muddle, 10 Hare, 186; Morris *v.* Livie, 1 Y. & C. C. C., 380.

[5] Hulme *v.* Tennant, 1 Bro. C. C., 20.

LECTURE X.

Rights and liabilities of transferee from *cestui que trust.*

if the property is settled upon the married woman for her separate use without power of anticipation.[1]

We have seen[2] that a *cestui que trust* may transfer his interest in the trust-fund. The transferree will be bound by all the equities affecting the trust-fund when transferred, whether he had notice of the equities or not.

For instance, a person taking an equitable mortgage, with notice of a prior equitable mortgage, cannot, by assignment to another without notice, give him a better title than he has himself.[3] So, where *A* obtained a mortgage of real and personal estate from *B* without consideration, and it was afterwards deposited with *C* as a security, *C* having no notice of the circumstances under which it had been obtained,—it was held, that *C* could stand in no better position than *A*, and that the deed being void as against *A*, was equally void as against *C*.[4]

If a trustee has a beneficial interest in the trust-estate, and owes money to it, and assigns his interest to a stranger, the assignee is bound to discharge the debt owing to the trust-estate by the trustee before he can take anything under the assignment; and this whether the original debt was contracted before, or after the assignment.[5] Thus, where a testatrix bequeathed a leasehold estate to trustees and executors in trust for sale, and gave one of the executors a beneficial interest for his life in one-fourth part of the estate, and the executor being at that time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage to secure a private debt which he owed to a creditor, and deposited the title-deeds with the creditor,—it was held, in a suit by the co-executors to recover the title-deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the Court decreed the title-deeds to be delivered up, with a declaration that they belonged to the three trustees.[6]

[1] Grigby *v.* Cox, 1 Ves., 518. Married women subject to the Succession Act may deal with their property as if unmarried, see Act X of 1865, s. 4.
[2] *Ante*, p. 271. [3] Ford *v.* White, 16 Beav., 120.
[4] Parker *v.* Clarke, 30 Beav., 54.
[5] Morris *v.* Livie, 1 Y. & C. C. C., 380.
[6] Cole *v.* Muddle, 10 Hare, 186; and see Barnett *v.* Sheffield, 1 D. M. G., 371; Clack *v.* Holland, 19 Beav., 262; Wilkins *v.* Sibley, 4 Giff., 442.

And the rule is the same if the assignment is made by a *cestui que trust*.[1]

If the assignor did not acquire his fiduciary position until after the assignment, there will be no equity against the assignee in respect of a subsequently incurred debt.[2]

A trustee or executor, when he receives notice that a legatee has charged his legacy, is bound to withhold all further payments to that legatee. All rights of set-off and adjustment of equities between the legatee and the executor existing at the date of the notice have priority over the charge, but the trustees can create no new charges or rights of set-off after that time.[3]

[1] Priddy *v.* Rose, 3 Mer., 86; Willes *v.* Greenhill, 29 Beav., 376; Stephens *v.* Venables, 30 Beav., 625.

[2] Irby *v.* Irby, 25 Beav., 632.

[3] Stephens *v.* Venables, 30 Beav., 625. See further as to the rights of assignees and set-off, Lewin, 7th Edn., 596.

LECTURE XI.

VACATING THE OFFICE OF TRUSTEE.

Vacating the office of trustee — Discharge by *cestuis que trustent* — Discharge under power in instrument — Number of trustees — Trustee dying in lifetime of settlor — Payment into Court — Refusing or declining — Retiring — Last survivor — *Cestui que trust* may be appointed — Assignee or devisee of trustee becoming unfit or incapable — New trustee should be within jurisdiction — Trustee paid to retire — Breach of trust — Appointment must be completed — Stamp — Discharge by Court — Grounds of discharge — Whether retiring trustee must appoint successor — Must be by suit — Affidavits of fitness — Official Trustee's Act, s. 10 — Appointment where property lost — Costs — Grounds for discharge — Discharge of representatives of trustee — Executor — Trustees' and Mortgagees' Powers Act, s. 34 — Conveyance to new trustee — Survival of trust — Extinction of trust — Compulsory payment into Court — Nature of interest of plaintiff — Payment in of share — Payment after decrees — Payment in of fund not received — Admission of receipt of money by trustee — Appointment of receiver — Necessary parties to a suit — Suits by or against strangers — Civil Procedure Code — Succession Act, s. 187 — Suits for specific performance — Representative specially constituted — Suits between trustees and *cestuis que trustent* — Representatives of deceased trustee — When trustee unnecessary party — *Cestui que trust* abroad — Suit for aliquot share — Suit between trustees — Executors and administrators — Suit by one *cestui que trust* on behalf of others — When allowable — Severing defence — Costs of severing — Costs — In suits between stranger as parties to trust — Between trustees and *cestuis que trustent* — Costs out of fund — Costs, charges, and expenses — Disclaimer — Costs after decree — Suit necessary by act of trustee — Accounts — Law doubtful.

Vacating the office of trustee.

AFTER a trustee has accepted the office, he cannot by any act of his own, without communication with his *cestui que trust*, denude himself of the character of trustee until he has performed his trust.[1] "The only modes," says Mr. Lewin,[2] "by which a trustee can divest himself of the character of trustee are the following:—*First*, he may have the universal consent of all the parties interested; *secondly*, he may retire by virtue of a special power contained in the instrument creating the trust; or, *thirdly*, he may obtain his release by application to the Court."

[1] Chalmer *v.* Bradley, 1 J. & W., 68. [2] Lewin, 7th Edn., 553.

A trustee can only be effectually discharged by the *cestuis que trustent* if they are all competent to contract, and therefore if any of the *cestuis que trustent* are infants, no discharge by those who are of age, will prevent the trustee from being liable to the infants;[1] and the rule will be the same whatever the disability of the *cestui que trust* may be. All the *cestuis que trustent* must concur in the discharge; a discharge by the majority will not be effectual.[2]

Discharge by *cestuis que trustent.*

If the parties interested in the trust-funds be not all in existence, as where the limitation of the property is to children unborn, it is clear that as the trustee cannot have the sanction of all the parties interested, he cannot with safety be discharged from the trust.[3]

In the second case, as the person who creates the trust may mould it in whatever form he pleases, he may provide that, on the occurrence of certain events, and the fulfilment of certain conditions, the original trustee may retire and a new trustee be appointed. The form of power most commonly in use in instruments drawn according to English precedents is, that, in case the trustees appointed by the instrument of trust, or to be appointed under the power, or any of them shall "die, or be abroad for twelve calendar months, or be desirous of being discharged from, or refuse, decline, or become incapable to act in the trusts," it shall be lawful for the *cestui que trust* to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee, or the executors or administrators of the survivor, by deed or writing, to nominate some other person to be a trustee. The best forms provide that a refusing or retiring trustee shall, if willing to execute the power, be deemed to be a continuing trustee. Sometimes the power is given to the surviving, continuing, or other trustee—an addition which has been found useful in practice.[4] The power then proceeds to declare that the trust-estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall, either before or after the trust-estate shall

Discharge under power in instrument.

[1] Wilkinson *v.* Parry, 4 Russ., 276.
[2] *Ex parte* Hughes, 6 Ves., 622; *Ex parte* Lacey, *ib.*, 628.
[3] Lewin, 7th Edn., 553.
[4] Lord Camoys *v.* Best, 19 Beav., 414.

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have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.[1]

Number of trustees.

The question often arises, whether on the appointment of new trustees it is necessary to adhere to the original number. The result of the authorities seems to be, that it is not, unless such an intention can be gathered from the particular language of the instrument. Thus, appointments of two in the place of three or four, and of three in the place of four or five, have been upheld;[2] but it would not be safe for the survivor of several trustees to retire and appoint one new trustee only;[3] and an increase of the numbers has, in some cases, been allowed.[4]

Trustee dying in lifetime of settlor.

A power to a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, will apply to the case of a person dying in the lifetime of the author of the trust.[5]

Payment into Court.

And it has been held, that the payment into Court of the trust-fund by the trustee is a retiring of such trustee from the trust, and authorizes the appointment of a new trustee in his place under a power for that purpose, to arise in the event of a trustee refusing or declining to act.[6]

Refusing or declining.

There seems no reasonable doubt that the words "refusing or declining" would apply to the case of a trustee once acting and then retiring or declining further to act.[7]

Retiring.

A retiring trustee cannot appoint a new trustee under a power for this purpose given to a surviving or continuing trustee.[8]

Last survivor.

But where there was a power for the surviving or continuing or other trustee or trustees, to appoint new trustees in the place of a trustee or trustees dying or desiring to be discharged, or refusing or declining to act, it was held, that

[1] Lewin, 7th Edn., 554.

[2] *In re* Fagg's Trust, 19 L. J., Ch., 175; *In re* Bathurst's Estate, 2 Sm. & Giff., 172; Miller *v.* Priddon, 1 D. M. G., 335; Emmet *v.* Clarke, 3 Giff., 32; Reid *v.* Reid, 30 Beav., 388.

[3] Hulme *v.* Hulme, 2 M. & K., 682; *Ex parte* Davis, 2 Y. & C. C. C., 468.

[4] D'Almaine *v.* Anderson, cited Lewin, 7th Edn., 564; Meinertzhagen *v.* Davis, 1 Coll., 335: Sands *v.* Nugee, 8 Sim., 130.

[5] *Ex parte* Hadley, 5 DeG. & Sm., 67; Nicholson *v.* Wright, 26 L. J. Ch., 312; Noble *v.* Meymott, 14 Beav., 477.

[6] *In re* Williams's Settlement, 4 K. & J., 87.

[7] Lewin, 7th Edn., 561; Travis *v.* Illingworth, 2 Dr. & Sm., 346.

[8] Stones *v.* Rowton, 17 Beav., 308; Nicholson *v.* Smith, 3 Jur., N. S., 313; Earl of Lonsdale *v.* Beckett, 4 DeG. & S., 73; Travis *v.* Illingworth, 2 Dr. & Sm., 344; Sharp *v.* Sharp, 2 B. & Ald., 415.

an appointment of four new trustees by the last survivor of four trustees who was desirous of being discharged was good.[1]

If, therefore, the power of appointing new trustees in the place of trustees desiring to be discharged, &c., is limited to the surviving or continuing trustees or trustee, and both the trustees for the time being wish to retire, the following course should be adopted:—One of the two trustees should first retire, and a new trustee be appointed in his place by the other as the continuing trustee. The other trustee should then retire, and the newly-appointed trustee under the first appointment should, as the then continuing trustee, appoint a trustee in the place of the last retiring trustee.

If there is only one surviving trustee, and he wishes to retire, he should first appoint a new trustee in the place of the deceased trustee, and then the newly-appointed trustee should appoint a second trustee in the place of the retiring trustee.[2]

Cestui que trust may be appointed.

A person beneficially interested, and even the tenant-for-life under the trust-deed, may be appointed a new trustee, unless the instrument shows an intention to the contrary.[3]

Assignee or devisee of trustee.

The rules which relate to powers generally must be observed in reference to a power for the appointment of new trustees; and such a power can only be exercised by the person to whom it is expressly given by the instrument; so that the assignee or devisee of a surviving or continuing trustee cannot appoint new trustees under a power limited to the surviving or continuing trustee, his executors or administrators only; and if the power is only to be exercised with consent, the power would be extinguished by the death of the consenting party.[4]

So also if a tenant-for-life, in whom a power to appoint new trustees is vested, aliens or mortgages his life-estate, the power cannot afterwards be exercised without the consent of the alienee or mortgagee, unless the right to do so is expressly reserved.[5]

Becoming unfit or incapable.

A power to appoint a new trustee in the place of a person 'becoming unfit' to act, applies to the case of a person becoming insolvent.[6] But insolvency is not a ground for

[1] Lord Camoys *v.* Best, 19 Beav., 414.
[2] 2 Prid. Convey., 9th Edn., 143.
[3] Forster *v.* Abraham, L. R., 17 Eq., 351.
[4] 2 Prid. Convey., 9th Edn., 143.
[5] Lewin, Ch. XXII. [6] *In re* Roche, 2 Dr. and War., 287.

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an appointment under a power to appoint a new trustee in the place of a trustee 'becoming incapable' to act. It is, however, a sufficient ground for his removal from the office by the Court.[1] A trustee who goes to reside abroad does not 'become incapable' to act.[2]

New trustee should be within jurisdiction.

The new trustees should be persons within the jurisdiction of the Court. Where, however, property in the English funds was settled upon a lady on her marriage with an American, and she went to reside with her husband in America, the subsequent appointment of three American trustees, though not expressly authorized by the settlement, was held to be valid.[3]

But where the Court is applied to, to appoint new trustees, it will not, as a rule, do so, if the proposed new trustees reside without the jurisdiction.[4]

Trustee paid to retire.

An appointment of a new trustee in consideration of a sum of money paid to the appointor is bad;[5] and so is the appointment of a trustee for the purpose of committing a

Breach of trust.

breach of trust. In such a case the retiring trustee will remain liable.[6]

Appointment must be completed.

The retiring trustee must be careful not to part with the trust-fund until he is convinced that his successor has been properly appointed, for if the appointment of the new trustee is bad, and any breach of trust has been committed, the retiring trustee will remain liable.[7] And he must see that the circumstances under which he retires are those contemplated by the settlor.[8]

Stamp.

The stamp-duty upon the transfer of trust-property from one trustee to another without consideration is Rs. 5.[9]

Discharge by Court.

We now have to consider the discharge of a trustee by the Court. Upon this Mr. Lewin says:[10] "The trustee may, in every proper case, although the contrary appears to have been at one time supposed,[11] get himself discharged from

[1] Bainbrigge *v.* Blair, 1 Beav., 495.
[2] Withington *v.* Withington, 16 Sim., 104; *Re* Watt's Settlement, 9 Hare, 106.
[3] Meinertzhagen *v.* Davis, 1 Coll., 335.
[4] *In re* Guibert's Trust, 16 Jur., 852.
[5] Sugden *v.* Crossland, 3 Sm. and G., 192.
[6] Palairet *v.* Carew, 32 Beav., 567.
[7] Pearce *v.* Pearce, 22 Beav., 248.
[8] Lewin, 7th Edn., 559 See further as to appointment of new trustees under powers, Lewin, 7th Ed., 553—572.
[9] Act I of 1879, sched. i, art. 60.
[10] 7th Edn., 572. [11] Hamilton *v.* Fry, 2 Moll., 458.

the office by the substitution of a new trustee in his place on application to the Court. A power of appointment of new trustees is very frequently omitted in settlements (and wills), or the donee of the power either cannot or will not exercise it, and were there no means by which a trustee could ever denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task."

Grounds of discharge.

A trustee who has accepted the trust will not be permitted, voluntarily, from mere caprice or other trivial cause, to throw it up at the expense of his *cestui que trust*. The Court must come to a conclusion in each case, whether the conduct of the trustee in the particular instance falls within the rule.[1]

Whether retiring trustee must appoint successor.

It is usual for the trustee who seeks to be discharged by the Court to name some person as his successor, subject to the approval of the Court. It is not, however, necessary that he should do so, and in some cases he may be unable to find any person willing to undertake the trust. "It is quite a mistake," said Lord St. Leonards, "to suppose that a trustee, who is entitled to be discharged from his trust, is bound to show to the Court that there is some other person ready to accept the trust. The Court refers it to the Master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court, and not discharge him. The Court, will, however, take care that the trustee shall not suffer thereby."[2] It is doubtful whether a trustee who has accepted the trust, and committed no breach of trust, can get discharged by the Court, if no other fit person can be found to act and the *cestui que trust* will not consent to his discharge.[3] His only course under such circumstances is to apply to have the trusts executed by the Court.[4]

Must be by suit.

The application to be discharged must be by suit.[5] If, however, a suit relating to the trust-estate is pending, the trustee may move in the suit for his discharge.[6]

Affidavits of fitness.

The application for the appointment must be supported by affidavits

[1] Courtenay *v.* Courtenay, 3 J. and Lat., 533; Forshaw *v.* Higginson, 20 Beav., 487.

[2] Courtenay *v.* Courtenay, 3 J. and Lat., 533.

[3] Ardill *v.* Savage, 1 Ir. Eq., 79, cited Lewin, 7th Edn., 573.

[4] Forshaw *v.* Higginson, 20 Beav., 485; Gardiner *v.* Downes, 22 Beav., 397; see *In re* Stokes's Trusts, L. R., 13 Eq., 333.

[5] *Ex parte* Anderson, 5 Ves., 243; *In re* Fitzgerald, Ll. and G., 22; *In re* Anderson, *ib.*, 29; Barry *v.* Steel, 1 Calc., 80.

[6] ——— *v.* Osborne, 6 Ves., 455; ——— *v.* Robarts, 1 Jac. and W., 251.

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as to the fitness of the person proposed. If no one is proposed, or if the Court is dissatisfied with the affidavits, a reference will be directed to ascertain who is a fit and proper person to act.

Official Trustee's Act, s. 10.

The Official Trustee's Act[1] provides, that "if any property is subject to a trust, whether for a charitable purpose or otherwise, and there shall be no trustee willing to act, or capable of acting, in the trusts thereof, who is within the local limits of the ordinary or extraordinary jurisdiction of the High Court (High Court means the High Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay respectively in the exercise of their original civil jurisdiction, Act XVII of 1864, s. 1), or if property is subject to a trust, and all the trustees or the surviving or continuing trustee, and all the persons beneficially interested in the said trust, shall be desirous that the Official Trustee shall be appointed in the room of such trustees or trustee, then, and in any such case it shall be lawful for the High Court on petition, and with the consent of the Official Trustee to appoint the Official Trustee to be the trustee of such property; and, upon such appointment, such property shall vest in the Official Trustee and his successors in office, and shall be held by him and them, upon the same trusts as the same were held previous to such appointment." The Act provides,[2] that no trust for any religious purpose shall ever be held by the Official Trustee.

Appointment where property lost.

In a suit to appoint new trustees of a settlement, where a part of the trust-property had been lost by previous negligence or breach of trust, the Court refused to confine the trust to the remaining property; but appointed the new trustees to be trustees of the whole of the property comprised in the settlement, directing, for the protection of the new trustees, a reference to inquire whether it would be proper to take proceedings for the recovery of the property which had been lost.[3]

Costs.

A trustee has a right to be discharged, but if he retires without good grounds, or from caprice, he will have to bear the costs of the suit.[4] In all other cases he will be entitled to his costs out of the fund.[5]

[1] XVII of 1864, s. 10. [2] Sec. 8. [3] Bennett *v.* Burgis, 5 Hare, 295.
[4] Howard *v.* Rhodes, 1 Keen, 581; Porter *v.* Watts, 16 Jur., 757; Forshaw *v.* Higginson, 20 Beav., 485.
[5] Greenwood *v.* Wakeford, 1 Beav., 581; Forshaw *v.* Higginson, 20 Beav., 485; Courtenay *v.* Courtenay, 3 J. and Lat., 529; Gardiner *v.* Downes, 22 Beav., 395.

If the trustee finds the trust-estate involved in intricate and complicated questions, which were not, and could not have been, in contemplation at the time when the trust was undertaken, he has, in consequence of that change of circumstances, a right to come to the Court to be relieved; and the Court will judge whether the circumstances were such as to make it fair for him to decline acting longer on his own responsibility.[1] Grounds for discharge.

Where the trustees of a marriage settlement, being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant-for-life, in repeatedly charging the trust-estates and funds with annuities and other incumbrances, instituted a suit to be discharged from the trusts, and for the appointment of new trustees under the direction of the Court, the relief sought was granted, and the costs were ordered to be paid out of the interest of the tenant-for-life.[2]

The trust-estate, upon the death of a sole trusee, or of the sole surviving trustee, descends upon his representatives. If they wish to be discharged, they must also apply to the Court; but there is this difference that they cannot be charged with caprice for declining to act.[3] Discharge of representatives of trustee.

An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged even by the Court from his executorship. However, when the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and becomes a trustee in the proper sense, and may then be discharged from the office like any other trustee.[4] Executor.

Cases to which English law is applicable are governed by Act XXVIII of 1866. Section 34 of that Act provides, that "whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable to act in the trusts or powers in him Trustee's and Mortgagee's Powers Act, s. 34.

[1] Greenwood *v.* Wakeford, 1 Beav., 581; Barker *v.* Peile, 2 Dr. and Sm., 340.
[2] Coventry *v.* Coventry, 1 Keen, 758.
[3] Greenwood *v.* Wakeford, 1 Beav., 582; Aldridge *v.* Westbrook, 4 Beav., 212; Legg *v.* Mackrell, 2 DeG. & J., 551.
[4] Lewin, 7th Edn., 575.

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reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee) by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid. So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust-property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall, with all convenient speed, be conveyed and transferred, so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require. Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument (if any) creating the trust. The Official Trustee may, with his consent, and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee."

Conveyance to new trustee.

Upon the appointment of a new trustee, the trust-property must be conveyed to him. If the trustee is appointed by the Court, and there is no person to convey, the Court

will order the trust-estate to be vested in the trustee.[1] In the case of a charitable endowment by a Hindu, if the succession to the office of trustee wholly fails, the right of management reverts to the heirs of the founder.[2]

Survival of trust.

Trustees take the trust-estate as joint tenants, and therefore, on the death of one, the estate, office, and power survive to his co-trustees or trustee.[3] A bare authority committed to several persons is determined by the death of any one, but if coupled with an interest, it passes to the survivors.[4] And this right by survivorship will not be affected, merely because there is a power of appointing new trustees in place of those ceasing to be trustees,[5] unless the instrument creating the trust specially manifests such intention.[6] Where an Act of Parliament declared that the survivors should, and they were thereby required to appoint new trustees, it was said, that the proviso was analogous to the common one in settlements, and that the clause was not imperative, but merely of a directory character.[7]

So also an executorship or administratorship or testamentary guardianship survives.[8]

Extinction of trust.

A trust is extinguished when the purposes for which it was created have been completely fulfilled. For instance, if property is given to trustees on trust to apply the income towards the maintenance and education of the children of *A*, and upon the youngest attaining a certain age, upon further trust to distribute the principal among the children in certain proportions, the trust is extinguished when the youngest child has attained the age mentioned, and the fund has been distributed. And the trust will be extinguished if, owing to the property having been lost or destroyed, there is nothing left to apply towards the purposes of the trust.[9]

[1] See 2 Madd. Ch. Practice, pp. 161—201. As to the inherent power of the Court to appoint trustees, see Dodkin *v.* Brunt, L. R., 6 Eq., 580.

[2] M. S. Jai Bansi Kunwar *v.* Chattar Dari, 5 B. L. R., 181; see as to vesting the trust-estate in a new trustee, Lewin, 7th Edn., 557; and as to vesting in cases to which English law is applicable in India, see Act XXVII of 1866, *post*, Appendix.

[3] Lane *v.* Debenham, 11 Hare, 188; Watson *v.* Pearson, 2 Ex., 581.

[4] Eyre *v.* Countess of Shaftesbury, 2 P. Wms., 108.

[5] Warburton *v.* Sandys, 14 Sim., 622.

[6] Foley *v.* Wontner, 2 J. and W., 245; Jacob *v.* Lucas, 1 Beav., 436.

[7] *Doe v.* Godwin, 1 D. and R., 259.

[8] See Lewin, 7th Edn., 239.

[9] Frith *v.* Cartland, 34 L. J., Ch., 301.

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When a man, previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnization of the marriage; and after the solemnization thereof and after the decease of the settlor, to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife, and such children as he should have by his intended marriage; but if there should be no such child or children, then for the settlor, his executors, administrators, and assigns, it was held, that as no valid marriage could take place between the settlor and his deceased wife's sister, the trust in favour of himself until the solemnization of such marriage continued, and the subsequent trusts never having arisen, the property remained in him and formed part of his general estate.[1]

And a trust ceases when it is revoked.[2]

Compulsory payment into Court.

In certain cases a *cestui que trust* has the right to have the trust-fund paid into Court. The general rule is, that the plaintiffs must be solely entitled to the fund, or have acquired in the whole of the fund such an interest, together with others, as entitles them, on their own behalf and the behalf of those others, to have the fund secured in Court;[3] and apparently the order is a matter of course.[4] If a plaintiff claims to be entitled in a particular character to a fund in the hands of a trustee, and the trustee, by his answer says, he does not know whether the plaintiff fills that character or not, the plaintiff cannot have the fund brought into Court in the suit.[5] The money may be ordered to be paid in on the application of a party having a mere contingent interest in the fund,[6] even though all the parties having vested interests are satisfied with the conduct and custody of the trustees, and are opposed to the application.[7] All the persons having an interest in the fund ought, as a rule, to be before the Court;[8] but this is

[1] Pawson *v.* Brown, L. R., 13 Ch. Div., 202.
[2] See as to revocable trusts, *ante*, pp. 68-76.
[3] Freeman *v.* Fairlie, 3 Mer., 29. [4] Lewin, 7th Edn., 841.
[5] Dubless *v.* Flint, 4 M. and C., 502; and see M'Hardy *v.* Hitchcock, 11 Beav., 77.
[6] Bartlett *v.* Bartlett, 4 Hare, 631; Ross *v.* Ross, 12 Beav., 89.
[7] Bartlett *v.* Bartlett, 4 Hare, 631.
[8] Whitmarsh *v.* Robertson, 4 Beav., 26; Bartlett *v.* Bartlett, 4 Hare, 631.

not absolutely necessary.[1] The application for payment is made by motion, and if some of the persons interested are not necessary parties to the suit, it is not requisite to serve them with notice of the motion.[2] But where all the *cestuis que trustent* were served with the copy of a bill for the appointment of new trustees and transfer to them of the trust-fund, there being nothing asked in the bill as to the transfer of the fund into Court, it was held, that all the *cestuis que trustent* must be served with notice of motion to transfer the fund into Court, as there was nothing in the bill to indicate that it was intended so to deal with the trust-fund.[3]

Nature of interest of plaintiff.

Where the plaintiff in a suit seeking solely the payment into Court of a fund for the relief of poor Armenian orphans had no interest except as a member of the Armenian community, the suit was dismissed, although the trustees consented to the decree sought by the plaintiff.[4]

If the trustee admits that he holds the fund as trustee for some person or persons, and the Court sees a reasonable probability that the plaintiff will establish his title at the hearing, it will order the trustee to pay the trust-fund into Court.[5] In *Richardson* v. *The Bank of England*[6] Lord Cottenham said: "I must, in the first place, observe, that the motion for payment into Court by the defendant of the sum mentioned in the order must be considered as founded upon the supposition of that sum being due from him. It is not the case of a contest as to the title to any particular property, in which the Court will, in some cases, take possession of the subject-matter of the contest for security, until it adjudicates upon the right. Such cases generally arise where the property is in the hands of estate-holders, factors, or trustees, who do not themselves claim any title to it. In ordering money into Court under such circumstances, the Court does not disturb the possession of any party claiming title, or direct a payment before the liability to pay is established."

[1] Wilton *v.* Hill, 2 D. M. G., 807; Hamond *v.* Walker, 3 Jur., N. S., 686.

[2] Marryat *v.* Marryat, 23 L. J., N. S., Ch., 876.

[3] Lewellin *v.* Cobbold, 1 Sm. & G., 572.

[4] Satoor *v.* Satoor, 2 Mad., 10.

[5] M'Hardy *v.* Hitchcock, 11 Beav., 73; Whitmore *v.* Turquand, J. and H., 296; Dolder *v.* Bank of England, 10 Ves., 355; but see Dubless *v.* Flint, 4 M. and C., 502.

[6] 4 M. and C., 170.

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Payment in of share.

It is not necessary that the whole fund should be paid into Court, but where the defendant is clearly entitled to a definite share, he will only be ordered to pay in the shares which are claimed by other parties;[1] and it is not necessary that the defendant should expressly admit that there is trust-money in his hands, it is sufficient if it is shown that he has been served with notice of the intended motion, and has not disputed the affidavit which it is proposed to read to show that he received the fund.[2]

Payment after decree.

When a decree has been made, and the Court finds from the evidence that a certain amount will be found due from the defendant, but that, by reason of unavoidable delay in ascertaining how much will be due, no final decision as to the ultimate balance of the account can be arrived at, it has power to order such amount to be paid into Court;[3] and money may be ordered to be paid in at the hearing without a notice of motion for that purpose having been given.[4] The principle is, that the *cestui que trust* is entitled to have the trust-fund secured by a decree of the Court.[5]

Payment in of fund not received.

Trustees may be ordered to pay the amount of a trust-fund into Court, although it is not in their hands, if it appears that they might have at any time received it. So, trustees cannot excuse themselves from their liability on the ground that a co-trustee has obtained possession of the fund and misapplied it,[6] or indeed that they have lost the fund by any neglect of their duty.[7]

Admission of receipt of money by trustee.

Where an executor or trustee admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and order him, on motion, to pay the balance into Court,[8] and may allow him to retain a reasonable sum for expenses and commission.[9]

[1] Rogers *v.* Rogers, 1 Anst., 174; Hamond *v.* Walker, 3 Jur., N. S., 686; Score *v.* Ford, 7 Beav., 336.
[2] Freeman *v.* Cox, L. R., 8 Ch. Div., 148; see as to the old rule in England, Lewin, 7th Edn., 837.
[3] London Syndicate *v.* Lord, L. R., 8 Ch. Div., 89, *per* Jessel, M. R.
[4] Isaacs *v.* Weatherstone, 10 Hare, App., 30.
[5] Governesses' Institution *v.* Rusbridger, 18 Beav., 469.
[6] Ingle *v.* Partridge, 32 Beav., 661.
[7] See Lewin, 7th Edn., 869, where the cases are collected.
[8] *Anon.*, 4 Sim., 359; Proudfoot *v.* Hume, 4 Beav., 476.
[9] Roy *v.* Gibbon, 4 Hare, 65.

The mere fact that the defendant makes admissions which would entitle the plaintiff to a decree, is not sufficient to warrant the Court in ordering money to be paid into Court;[1] there must be an admission that the defendant has a fund, and that the plaintiff is entitled to it.[2] So, if two persons are jointly liable, one of them cannot, before the extent of the joint liability has been ascertained, compel the other to pay the estimated proportion of his supposed liability into Court.[3] And the Court will not order interest on the fund in the trustee's hands to be paid into Court, unless there is an admission that he has made interest, even though it is clear that he will ultimately have to pay interest.[4]

There are cases where the Court has apparently ordered the payment of a debt upon motion, as where an executor or trustee admits himself to owe a debt to the estate he represents. In those cases the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as moneys realized in the hands of the executor or trustee.[5]

The mere existence of a discretionary power in trustees affords no reason why the Court should not order payment of the fund into Court. But the Court will not order such payment to be made when it appears that trustees are about to exercise their discretion in a proper manner.[6]

The Court will give the defendant a reasonable time within which to transfer the fund into Court. If the fund is capable of immediate transfer, it will have to be paid in at once; but if it is outstanding on securities, time will be given to realize.[7]

Appointment of receiver.

The Court will, upon the application of all the parties beneficially interested, appoint a receiver of the trust-estate

[1] Peacham *v.* Daw, 6 Madd., 98.
[2] Richardson *v.* The Bank of England, 4 M. and C., 174.
[3] *Ibid.*
[4] Freeman *v.* Fairlie, 3 Mer., 43; Wood *v.* Downes 1 V. and B., 50: and see Rothwell *v.* Rothwell, 2 S. and S., 217; Richardson *v.* Bank of England, 4 M. and C., 174.
[5] Richardson *v.* The Bank of England, 4 M. and C., 174; see White v. Barton, 18 Beav., 192.
[6] Talbot *v.* Marshfield, 2 Dr. & Sm., 285.
[7] Vigrass *v.* Binfield, 3 Madd., 62; Wyatt *v.* Sharratt, 3 Beav., 498; Hinde *v.* Blake, 4 Beav., 597; Score *v.* Ford, 7 Beav., 333; Roy *v.* Gibbon, 4 Hare, 65.

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when any of the trustees refuse to act.[1] But a receiver will not be appointed without sureties, even if he is not objected to, when persons not competent to consent are parties.[2]

If all the parties do not consent to the appointment, any one of the *cestuis que trustent* may apply. A strong case must be made out.[3] The fact that a trustee or executor is poor is not of itself a sufficient ground,[4] unless he is in other respects unfit, as for example, if he is of drunken habits, or misapplication of the trust-funds is likely.[5] But if any misconduct, waste, or improper disposition of the assets is shown, the Court will instantly interfere.[6] If, for instance, an executor and trustee neglects to get in his testator's estate, and thereby deprives infant legatees of the maintenance or means of advancement provided for them by the will,[7] or if he is not impartial,[8] a receiver will be appointed. So a receiver will be appointed if the trustee is insolvent,[9] or bankrupt,[10] or incapacitated from acting,[11] or out of the jurisdiction.[12] A receiver was appointed where one of four trustees was dead, another had but little interfered in the trusts of the will, a third was abroad, and the fourth submitted to the appointment.[13] In another case three trustees had disagreed, and a receiver was appointed, the order was taken by arrangement between the parties, but the Court had previously expressed its opinion that, unless the trustees could agree, a receiver must be appointed.[14] Where three trustees disagreed, and

[1] Beaumont *v.* Beaumont, cited in Brodie *v.* Barry, 3 Mer., 696; Browell *v.* Reed, 1 Hare, 435.

[2] Manners *v.* Furze, 11 Beav., 30; Tylee *v.* Tylee, 17 Beav., 583.

[3] Middleton *v.* Dodswell, 13 Ves., 266; Barkley *v.* Lord Reay, 2 Hare, 306.

[4] Howard *v.* Papera, 1 Madd., 142; Hathornthwaite *v.* Russel, 2 Atk., 126.

[5] Everett *v.* Prythergch, 12 Sim., 367; Havers *v.* Havers, Barn., 23.

[6] *Anon.*, 12 Ves., 5; Evans *v.* Coventry, 5 D. M. G., 911.

[7] Richards *v.* Perkins, 3 Y. & C. Ex., 299.

[8] Talbot *v.* Hope Scott, 4 K. & J., 139.

[9] Middleton *v.* Dodswell, 13 Ves., 266; Scott *v.* Becher, 4 Price, 346; Mansfield *v.* Shaw, 3 Madd., 100.

[10] Gladdon *v.* Stoneman, 1 Madd., 143 (*n*); Langley *v.* Hawk, 5 Madd., 46.

[11] Bainbrigge *v.* Blair, 3 Beav., 421; Taylor *v.* Allen, 2 Atk., 213.

[12] Noad *v.* Backhouse, 2 Y. & C. C. C., 529; Smith *v.* Smith, 10 Hare., lxxi.

[13] Tidd *v.* Lister, 5 Madd., 430.

[14] Lewin, 7th Edn., 843, citing Day *v.* Croft, May 2, 1839, M. R.; and Hart *v.* Denham, W. N., 1871, p. 2.

two of them acted together and took securities in their own names, omitting the name of the dissentient trustee, it was held that a *cestui que trust* was entitled to a receiver.[1]

It is not a sufficient ground for the appointment of a receiver that one of several trustees has disclaimed.[2] But if there are only two trustees, and one disclaims, a receiver may be appointed; and either of the trustees may be at liberty to offer himself.[3] Nor is it the practice to appoint a receiver solely because one of several trustees is inactive, or has gone abroad.[4] And the fact that trustees have let a purchaser into possession before receiving the purchase-money, is not, of necessity, such misconduct as to induce the Court to interfere.[5]

Where a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested: and therefore, he will not be discharged merely on the application of the parties at whose instance he is appointed.[6]

Necessary parties to a suit.

Suits in equity affecting trusts are either (1) between strangers on the one hand and the persons interested in the trust on the other; or (2) between persons interested in the trust *inter se*.[7]

Suits by or against strangers.

I. As a general rule, according to English practice, in suits by or against strangers, all the trustees and all the *cestuis que trustent*, as together constituting but one interest, must be made parties.[8]

Civil Procedure Code.

The Civil Procedure Code[9] provides, that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment." Section 27 contains provisions for substituting or adding plaintiffs. And s. 28 provides, that "all persons may be joined as defendants against whom the right to any relief

[1] Swale *v.* Swale, 22 Beav., 584.
[2] Browell *v.* Reed, 1 Hare, 434.
[3] Tait *v.* Jenkins, 1 Y. & C. C. C., 492.
[4] Browell *v.* Reed, 1 Hare, 435.
[5] *Ibid.*
[6] Bainbrigge *v.* Blair, 3 Beav., 423.
[7] Lewin, 6th Edn., 796.
[8] Bifield *v.* Taylor, 1 Moll., 198; Adams *v.* St. Leger, 1 B. and B., 184.
[9] Act X of 1877, s. 26.

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is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment."

Section 437, as amended by Act XII of 1879, s. 72, however, modifies the general rule as to parties. By that section it is provided, that "in all suits concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent the persons so interested; and it shall not, ordinarily, be necessary to make them parties to the suit. But the Court may, if it think fit, order them, or any of them, to be made such parties."

Succession Act, s. 187.

The Succession Act[1] provides, that "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under s. 180."

The provisions of this section extend to Hindus, Jainas, Sikhs, and Buddhists.[2]

Section 190 of the Succession Act[3] provides, that "no right to any part of the property of a person who has died intestate can be established in any Court of Justice unless letters of administration have been first granted by a Court of competent jurisdiction."

This section has not been extended to Hindus, Jainas, Sikhs, or Buddhists.[4]

Suits for specific performance.

In suits for the specific performance of a contract, or to have it cancelled upon any ground, the general rule is, that the parties to the contract are the only parties to the suit, and therefore if trustees enter into a contract, not as the agents of their *cestuis que trustent*, but as principals (though the property of the *cestuis que trustent* is in fact concerned), they may sustain a suit either as plaintiffs or defendants without the presence of the *cestuis que trustent*; and not only is it unnecessary, but in many cases it would be highly improper, to make the *cestuis que trustent* parties. But where persons, sustaining a fiduciary character, enter

[1] X of 1865, s. 187.
[2] Act XXI of 1870, s. 7.
[3] X of 1865.
[4] Act XXI of 1870, s. 1.

into a contract, not as principals, but on behalf and as the agents of other parties, those other parties as the principals, and not their agents, are the proper parties to sue.[1]

Representative specially constituted.

Where several persons have united in constituting another their representative in a matter for all purposes, there, it seems, such representative may sue or be sued in the absence of the *cestui que trust*. But the intention to constitute such a representative must clearly appear; for trustees are not themselves owners of the property: they are, in a sense, agents for the owners in executing the trust; but they are not constituted agents for the purpose of defending the owners against the adverse claims of third parties.[2]

Suits between trustees and *cestuis que trustent*.

II. In suits between trustees and *cestuis que trustent*, it is a general rule that all the trustees and all the *cestuis que trustent* must be parties, the object being to take the necessary accounts at once, and to avoid multiplicity of suits;[3] and the rule holds good even though the liability of the trustees as between themselves may hereafter have to be ascertained in a suit for contribution.[4] A third person who reaps the benefit of a breach of trust must be made a party, as he is liable to the *cestuis que trustent*.[5] But a transferree from the trustees without notice of a breach of trust is not a necessary party.[6]

Representatives of deceased trustee.

The representatives of a deceased trustee may be made parties, but a plaintiff may waive any relief as against them.[7] And it is not necessary to make the representatives of a deceased trustee, who, when he died, had no interest in the subject-matter of the suit, parties.[8] Nor is it necessary to make them parties, if the deceased trustee was not a party to a breach of trust in respect of which relief is sought,[9] or if the suit is not for the purpose of charging the trustees personally.[10]

[1] Lewin, 6th Edn., 798; and see Act I of 1877, s. 27.
[2] Lewin, 6th Edn., 799.
[3] Latouche *v.* Dunsany, 1 Sch. and Lef., 137; 2 Sch. and Lef., 690; Coury *v.* Cantfield, 2 B. and B., 255.
[4] Perry *v.* Knott, 4 Beav., 180.
[5] Perry *v.* Knott, 4 Beav., 179; 5 Beav., 297; Consett *v.* Bell, 1 Y. and C. C. C., 569; Williams *v.* Allen, 29 Beav., 292; 4 D. F. J., 71.
[6] Knye *v.* Moore, 1 S. and S., 61.
[7] Selyard *v.* Harris, 1 Eq. Ca. Ab., 74; Moore *v.* Blake, 1 Moll., 284.
[8] Beattie *v.* Johnstone, 8 Hare, 169.
[9] Simes *v.* Eyre, 6 Hare, 137.
[10] London Gas Light Company *v.* Spottiswoode, 14 Beav., 271.

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When trustee unnecessary party.

So a trustee who disclaims,[1] or is beyond the jurisdiction of the Court,[2] or cannot be compelled to appear,[3] need not be made a party. An insolvent trustee must be made a party, for he may subsequently be in a position to meet his liability;[4] but it is not necessary to make his representatives parties, for they can have no assets.[5] And it is not necessary to make a trustee party who has been discharged and has transferred his interest,[6] or a trustee who is a mere agent.[7]

Cestui que trust abroad.

If a *cestui que trust* is abroad and cannot be found, he should be made a party, and the suit may proceed in his absence; but the Court will protect his interest in the decree, and he may subsequently come in and have the decree amended.[8] If, however, his interest is proposed to be affected, no decree can be made in his absence.[9]

Suit for aliquot share.

In a suit by a *cestui que trust* for an aliquot share in an ascertained fund, the other *cestuis que trustent* need not be parties.[10] But if the fund is not ascertained, the other *cestuis que trustent* must be parties.[11]

Suit between trustees.

In a suit between trustees to recover a fund which has been lost by the breach of trust of the defendant, the *cestuis que trustent* need not be parties.[12] But in a suit for contribution between trustees, a *cestui que trust* who has concurred in the breach of trust must be made a party.[13] Persons who claim adversely to the trust cannot be parties to a suit for the execution of the trust.[14]

Executors and administrators.

Where there are several executors or administrators they must all be made parties to a suit against one or more of them. But executors who have not proved their testator's

[1] Wilkinson *v.* Parry, 4 Russ., 274. [2] Walley *v.* Walley, 1 Vern., 487.
[3] Butler *v.* Prendergast, 2 Bro. P. C., 174.
[4] Thorpe *v.* Jackson, 2 Y. and C. Ex., 560; Haywood *v.* Ovey, 6 Madd., 113.
[5] Devaynes *v.* Robinson, 24 Beav., 98; Moore *v.* Morris, L. R., 13 Eq., 139.
[6] Bromley *v.* Holland, 7 Ves., 11; Reed *v.* O'Brien, 7 Beav., 32.
[7] Slade *v.* Rigg, 3 Hare, 35.
[8] Attorney-General *v.* Balliol College, 9 Mod., 407; Willats *v.* Busby, 5 Beav., 193.
[9] Browne *v.* Blount, 2 R. and M., 83; Holmes *v.* Bell, 2 Beav., 298; Willats *v.* Busby, 5 Beav., 193.
[10] Hutchinson *v.* Townsend, 2 Keen, 675; Hughson *v.* Cookson, 3 Y. and C. Ex., 578; Perry *v.* Knott, 5 Beav., 293.
[11] Lenaghan *v.* Smith, 2 Ph., 301; Alexander *v.* Mullins, 2 R. and M. 568.
[12] Peake *v.* Ledger, 4 DeG. and Sm., 137; Noble *v.* Meymott, 14 Beav., 471; Bridgman *v.* Gill, 24 Beav., 302.
[13] Jesse *v.* Bennett, 6 D. M. G., 609.
[14] Attorney-General *v.* Portreeve of Avon, 3 DeG. J. and S., 637.

will, and executors and administrators beyond the local limits of the jurisdiction of the Court, need not be made parties.[1] And unless the Court directs otherwise, the husband of a married administratrix or executrix need not be a party to a suit against him or her.[2]

Suit by one *cestui que trust* on behalf of others.

If the *cestuis que trustent* are very numerous, some may sue or defend on behalf of the others. The Civil Procedure Code[3] provides, that, "where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such suit on behalf of all parties so interested. But the Court shall, in such case, give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service, or (if from the number of parties or any other cause such service is not reasonably practicable), then by public advertisement, as the Court in each case may direct."

The trustees must in such a case be parties.[4]

When allowable.

In order that some *cestuis que trustent* may sue on behalf of others, the relief sought must be beneficial to those on whose behalf the suit is brought, and their interests must be identical.[5] What number of *cestuis que trustent* will be considered 'numerous' is not very clear, but apparently any number over twenty-one will be so treated.[6]

Severing defence.

"In a contest between the trust on the one hand and a stranger on the other, the trustees and *cestuis que trustent* represent but one interest, and costs must not be multiplied unnecessarily by the severance of them in the suit.

Sir Anthony Hart laid it down, that a *cestui que trust* about to file his bill, ought to apply to his trustee to allow his name to be used as co-plaintiff. This (he said) the trustee is bound to comply with upon being indemnified against costs. Should the trustee refuse, he would be departing from his duty; and, in such a case would not be entitled to his costs when made defendant in consequence of his refusal. But where no application is made to the trustee to permit his name to be used as co-plaintiff, he is in no default; and the *cestui que trust* would be bound to

[1] Act X of 1877, s. 438. [2] *Ibid*, 439. [3] Act X of 1877, s. 30.

[4] Holland *v.* Baker, 3 Hare, 68.

[5] Bainbridge *v.* Burton, 2 Beav., 539; Richardson *v.* Larpent, 2 Y. and C. C. C., 507; Evans *v.* Stokes, 1 Keen, 24.

[6] Harrison *v.* Stewardson, 2 Hare, 533; Smart *v.* Bradstock, 7 Beav., 500; Bateman *v.* Margerison, 6 Hare, 496.

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pay the costs of the trustee for his own unreasonable negligence in not having required the trustee to be co-plaintiff."[1]

Trustees and *cestuis que trustent*, if they are made defendants in the same right, should not sever in their defence and put in separate written statements;[2] they cannot be compelled to join,[3] but only one set of costs will be allowed if they do not.[4]

In suits by *cestuis que trustent*, against trustees, all the *cestuis que trustent*, whose interests are identical, should join as plaintiffs.[5]

Costs of severing.

Trustees should defend jointly, and will only be allowed one set of costs if they do not, which will be apportioned between them,[6] unless one trustee has expressed his willingness to join, when he alone will get his costs;[7] and an innocent trustee need not join with a co-trustee who has been guilty of a breach of trust, and who is the accountable defendant.[8] The costs in such a case will be awarded to the innocent trustee. So trustees will be justified in severing if their answers would be different, or if they are residing so far apart that a joint written statement is impracticable.[9]

Costs in suits between strangers and parties to trust.

In suits between strangers and trustees, and *cestuis que trustent*, as in the case of a suit for specific performance of a contract, if the trustees are unsuccessful, they must pay the costs.[10] If a suit by a stranger is dismissed with costs, a trustee who is a defendant will not, as is usual between trustee and *cestui que trust*, be ordered his costs as between attorney and client, but only as between party and party.[11]

Between trustees and *cestuis que trustent*.

When the suit is between the trustees and *cestuis que trustent*, the general rule is, that the trustees shall have

[1] Lewin, 6th Edn., 811.
[2] Woods *v.* Woods, 5 Hare, 229; Farr *v.* Sheriffe, 4 Hare, 528.
[3] Van Sandau *v.* Moore, 1 Russ., 441.
[4] Lewin, 6th Edn., 811.
[5] Hosking *v.* Nicholls, 1 Y. and C. C. C., 478.
[6] Gaunt *v.* Taylor, 2 Beav., 347; Shovelton *v.* Shovelton, 32 Beav., 143; Course *v.* Humphrey, 26 Beav., 402; Attorney-General *v.* Wyville, 28 Beav., 464.
[7] Attorney-General *v.* Cuming, 2 Y. and C. C. C., 156.
[8] Webb *v.* Webb, 16 Sim., 55; Cummins *v.* Bromfield, 3 Jur., N. S., 657.
[9] See further Lewin, 6th Edn., 312.
[10] Burgess *v.* Wheate, 1 Eden, 251, *Ex parte* Angerstein, L. R., 9 Ch., 479; Elsey *v.* Lutyens, 8 Hare, 164.
[11] Mohun *v.* Mohun, 1 Swanst., 201; Saunders *v.* Saunders, 3 Jur., N. S., 727.

their costs either out of the trust estate or from the *cestuis que trustent* personally if they are of age.[1]

Costs out of fund.

If there is a fund in Court,[2] or if there is no fund in Court, if the trustees have been blameless, they are entitled to their costs as between solicitor and client; in the latter case, as against the trustees personally.[3]

Costs, charges, and expenses.

When it appears that the trustees have sustained charges and expenses beyond the costs of suit, they will be allowed costs, charges, and expenses properly incurred. But an order made in a suit in this form will not include costs, charges, and expenses incurred in defending other suits, unless they are specially mentioned.[4] As to costs in creditor's and legatee's suits, where the fund is deficient, see Lewin, 6th Edn., p. 829.

Disclaimer.

A trustee who disclaims will be entitled to his costs as between party and party.[5]

Costs after decree.

Where a trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon paying the costs of the day, the order was made. But if the decree has been passed, a trustee who has omitted to ask for his costs at the hearing, cannot have the cause re-heard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition.[6]

Suit necessary by act of trustee.

If a suit has been rendered necessary by the misconduct, negligence, or caprice of the trustee, he must, as we have seen, pay the costs personally; and if such an order is made, he cannot deduct the costs from the trust fund.[7] If, however, the wrongful acts charged have only been partially proved, the trustee will only have to pay costs in respect of the allegations proved.[8] So if he has not been guilty of any wilful breach of trust, but the suit has been rendered necessary by an innocent mistake, the Court will not order him to pay the costs of the other side, and may even allow him his costs.[9] And if a breach of trust is discovered in

[1] Hall *v.* Hallet, 1 Cox., 141; Attorney-General *v.* City of London, 3 Bro. C. C., 171; Rocke *v.* Hart, 11 Ves., 58; Taylor *v.* Glanville, 3 Madd., 176.
[2] Mohun *v.* Mohun, 1 Swanst, 201; Moore *v.* Frowd, 3 M. & C., 49.
[3] Attorney-General *v.* Cuming, 2 Y. & C. C. C., 155; Edenborough *v.* Archbishop of Canterbury, 2 Russ., 112.
[4] Payne *v.* Little, 27 Beav., 83.
[5] Norway *v.* Norway, 2 M. and K., 278.
[6] Lewin, 6th Edn., 829.
[7] Attorney-General *v.* Daugars, 33 Beav., 621.
[8] Pocock *v.* Redington, 5 Ves., 800; Sanderson *v.* Walker, 13 Ves., 601.
[9] See Lewin, 6th Edn., 831.

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the course of a suit, the trustee will only have to pay so much of the costs as are thereby occasioned.[1] After a trustee has cleared his default, he will be allowed his subsequent costs.[2]

Accounts.

It has been decided, that though, as a general rule, when a trustee commits a breach of trust, he must pay the costs of a suit to repair it, yet he will be entitled to his subsequent costs relating to the ordinary taking of the accounts.[3] If, however, the taking of the accounts has been rendered necessary by the breach of trust, it is difficult to see why the trustee should be exonerated from paying the costs incident to the accounts.

Law doubtful.

Trustees will not have to bear the costs of discussing a doubtful point of law.[4] But a trustee will have to pay the costs of a suit instituted for the purpose of determining a question relating to his own private interests.[5] And as a general rule it may be laid down that a trustee, who refuses to account, or claims to be a creditor of the trust fund, or denies assets, or behaves in an obstructive way in the taking of the accounts, will be ordered to pay the costs caused by his misconduct.[6]

[1] Tebbs *v.* Carpenter, 1 Madd., 290; Pride *v.* Fooks, 2 Beav., 430.
[2] Birks *v.* Micklethwait, 33 Beav., 409.
[3] Hewett *v.* Foster, 7 Beav., 348; Bate *v.* Hooper, 5 D. M. G., 345; *Re* King, 11 Jur., N. S., 899.
[4] Raphael *v.* Boehm, 13 Ves., 592.
[5] Henley *v.* Phillips, 2 Atk., 48.
[6] See Lewin, 6th Edn., 833.

LECTURE XII.

RELIGIOUS AND CHARITABLE TRUSTS.

Religious and charitable trusts — Trust of immoveable property — Bequests to religious or charitable uses — What are charitable purposes — Religious purposes — Inhabitants of particular place — Improvement of particular place — Trust for particular classes or persons — Educational purposes — Gift must be for the public — Must be certain — Morice *v.* Bishop of Durham — Instances of uncertainty — Principles of construing will — *Cy près* — Altering scheme — Gift for charitable purposes generally — Particular purpose failing, where gift is to charity generally — Particular charity not described — Failure of object where no intention to give to charity generally — Apportionment of fund — Gift over — Charity in foreign country — Breach of trust — Mode of procedure to obtain redress — Civil Procedure Code, s. 539 — Liability of trustees to account — New trustee — New trustees of society for maintaining religious worship — Memorandum of appointment — Vesting — Appointment of Official Trustee to charitable trust — Vesting property in trustees of charity — Visitors — Controlling revenues of charity — Subsequent gift — Purchaser without notice from purchaser with notice — Alienation of charity-estate — Religious trusts among Hindus — Perpetuities — Colourable gift to idol — Gift must be certain — Gifts to religious or charitable uses by Oudh taluqdars — Tenure in trustee — Trust imperfect — Devise subject to trust — Sale of property subject to trust — Partition subject to trust — Alienation — Evidence of endowment to be given — How far sale set aside — Trustee may not benefit by sale — Sale of turn of worship — Succession to trusteeship — Enjoyment of endowed property — Turn of worship — Limitation — Management vested in different persons — Proof of succession — Succession where manager bound to celibacy — Reversion — Removal of trustee — Removal of mohunt — Religious trust irrevocable — Execution of trust — Principles to be followed — Right to erect place of worship — Religious trusts among Mahomedans — Elements of *wuqf*, Creation of — Evidence of appropriation — *Wuqf* to take effect after settlor's death — Requisites to valid *wuqf* — Undue influence — Endowment subject to mortgage — Revocation — Alienation of *wuqf* property — Nominal endowment — Alienation subject to trust — Mortgage by local custom — Lease of *wuqf* property — Transfer of trust — Purchaser from trustee — Breach of trust — Removal of trustee — Office of trustee — Female may be mutawalli — Succession to the office — Suits in respect of *wuqf* property.

Religious and charitable trusts.

IN this Lecture I shall deal with the English law relating to religious and charitable trusts, the Hindu law on the same subject, and the Mahomedan law of *wuqf*. The provisions of Act XX of 1863, an Act to enable the Government to divest itself of the management of religious endowments, will be found in the Appendix.

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Charities may be established by charter, or may be placed under the management of individual trustees. A charitable gift is a gift to the general public, and extends to the poor as well as to the rich.[1]

According to English law, all trusts, whether of moveable or immoveable property, for superstitious purposes, come under the class of trusts void as being against the policy of the law. Such gifts are not void by the Common Law, but were first made void by the Statute,[2] by which gifts to superstitious uses then existing were expressly prohibited, such as gifts for prayers and masses for the benefit of the soul.[3] But this Statute does not apply to India.

Thus a gift for the performance of masses is valid. In *Das Merces* v. *Cones*,[4] Norman, J. said: "By the law of England, gifts to superstitious uses appear to be void, as being contrary to the policy of the law, for two reasons: *first*, because they tend to produce the same losses and inconveniences to the Crown and subjects of the realm, as in cases where lands are aliened in Mortmain, *see* the preamble of the Statute 23 Hy. VIII, c. 10; and, *secondly*, because the superstitions and errors in Christian religion have been brought into the minds and estimation of men, by reason of their ignorance of their every true and perfect salvation through the death of Jesus Christ, and by devising and phantasying vain hopes of purgatory, and masses satisfactory to be done for those which be departed, which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals (offices for the dead continuing thirty days or consisting of thirty masses), charities, or other provisions made for the continuance of the said blindness and ignorance. *See* the preamble of Statute I Ed. VI, c. 14. So in Bacon's Abridgment, title 'charitable uses,' and 'Mortmain' (*D*), it is said, that the king is entitled to such uses 'by force of several Statutes,

[1] Jones *v.* Williams, Amb., 651; Attorney-General *v.* Aspinall, 2 M. & C., 622; Kendall *v.* Granger, 5 Beav., 300; Trustees of the British Museum *v.* White, 2 S. and S., 596.

[2] 1 Ed. IV, c. 14.

[3] West *v.* Shuttleworth, 2 M. and K., 684; Attorney-General *v.* The Fishmongers' Co., 5 M. and Cr., 11; Heath *v.* Chapman, 2 Drew., 417; *In re* Blundell's Trusts, 30 Beav., 360.

[4] 2 Hyde, 65; and see Andrews *v.* Joakim, 2 B. L. R., O. C., 148; Judah *v.* Judah, 5 B. L. R., 433; Khusal Chand *v.* Mohadevgiri, 12 Bom. H. C. R., 214.

and as the head of Church and State, and entrusted by the Common Law to see that nothing is done in maintenance or propagation of a false religion.' A law intended for the support and maintenance of the Protestant branch of the Catholic Church, and to discourage the teaching of doctrines at variance with it, cannot have been intended to be introduced here at a time when the Christian religion was not, and never could have been supposed to be likely to be, the established religion of the country." His Lordship then referred to cases showing that the Statute did not extend to Ireland, and continued: "If such a gift be not void in Ireland, *a multo fortiori*, it is not void here, where the Crown cannot be supposed to have contemplated, either the end which the English legislature had in view in passing the Statute 14 Ed. VI, or the means by which that end was to be attained. It is clear, that the policy of the law intended to be introduced into this country not only by the Charter of Geo. I, but by all subsequent Charters and Acts, was one of toleration; that the English Government never considered it as any part of their duty to impose the Protestant religion on their subjects, or in any way to interfere with their religious opinions or practices connected therewith, however erroneous or false . . . . For the above reasons, I am of opinion that that portion of Common Law which declares gifts to superstitious uses void, does not apply to the gifts of persons born and domiciled in Calcutta."

Trust of immoveable property.

In England, devises of immoveable property for charitable purposes are void under the Mortmain Act.[1] This Statute does not extend to India, as the object for which it was passed was purely political. "I conceive," said Grant, M. R.,[2] "that the object of the Statute of Mortmain was purely political, that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged . . . Framed as the Mortmain Act is, I think it is quite inapplicable to *Grenada*, or to any other colony. In its causes, its objects,

[1] 9 Geo. II, c. 36. [2] Attorney-General *v.* Stewart, 2 Mer., 161.

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its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred as it stands into the code of any other country."[1]

Persons governed by the English law in this country may, therefore, subject however to the provisions of the Succession Act,[2] create trusts of immoveable property for religious or charitable purposes.

Section 105 of that Act provides that—

Bequests to religious or charitable uses.

"No man having a nephew or niece, or any nearer relative, shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons."

And the following illustration is given :—

"*A* having a nephew makes a bequest by a will not executed, nor deposited as required—

For the relief of poor people ;
For the maintenance of sick soldiers ;
For the erection or support of a hospital ;
For the education and preferment of orphans ;
For the support of scholars ;
For the erection or support of a school ;
For the building or repairs of a bridge ;
For the making of roads ;
For the erection or support of a church ;
For the repairs of a church ;
For the benefit of ministers of religion ;
For the foundation or support of a public garden ;
All these bequests are void."

Subject to the foregoing limitations, bequests of any property for charitable or religious purposes are valid.

What are charitable purposes.

Charitable purposes are : the relief of aged and impotent people ; the maintenance of sick and maimed soldiers and poor mariners ; schools of learning ; free schools and scholars in universities ; the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways ; the education

[1] And see Mayor of Lyons *v.* East India Co., 1 Moo. I. A., 175 ; Das Merces *v.* Cones, 2 Hyde, 70 ; Sarkies *v.* Prosonnomoyee Dossee, I. L. R., 6 Calc., 794 ; Yeap Cheah Neo *v.* Ong Cheng Neo, L. R., 6 P. C., 381. In Broughton *v.* Mercer, 14 B. L. R., 442, a devise of immoveable property to trustees in trust for hospital purposes was supported as a charitable trust.

[2] X of 1865.

and maintenance of orphans; the relief, stock, or maintenance of houses of correction; the marriages of poor maids; the aid and help of young tradesmen, craftsmen, and persons decayed; and the relief or redemption of prisoners or captives.[1]

Religious purposes.

Besides these, gifts of personal property for the purpose of upholding the doctrines of Dissenters of various denominations,[2] Roman Catholics,[3] and Jews,[4] are valid. The gift may be either for the particular religious object or to a minister as such.[5] So, gifts of funds to be employed in the purchase of bibles and other religious books,[6] for keeping the chimes of a church in repair, for payments to be made to singers in the gallery of a church,[7] to build an organ gallery in a church,[8] and to keep in repair and ornament a church,[9] are gifts for charitable purposes, and valid. A gift of land or money for the purpose of building a church, or a house, or otherwise for the maintaining and propagating the worship of God, without more, will be considered as a gift for maintaining and propagating the established religion. But if it is clearly expressed, that the purpose is that of maintaining dissenting doctrines, so long as they are not contrary to law, the Court will execute the trust according to the express intention.[10]

Inhabitants of particular place.

Gifts for the widows and children of seamen of a certain port,[11] to the widows and orphans,[12] or poor inhabitants[13] of a certain parish, for the purpose of building and endowing an almshouse,[14] or hospital,[15] for the use of the inhabitants of

[1] 43 Eliz., c. 4.
[2] Attorney-General *v.* Cock, 2 Ves., 273; Shrewsbury *v.* Hornby, 5 Hare, 406; Attorney-General *v.* Lawes, 8 Hare, 32; Thornton *v.* Howe, 8 Jur., N. S., 663; 1 Wm. and M. C., 18; 55 Geo. III, c. 160.
[3] Walsh *v.* Gladstone, 1 Ph., 290; 2 and 3 Will. IV, c. 115.
[4] *In re* Michel's Trust, 28 Beav., 39; 8 and 9 Vict., c. 59, s. 2.
[5] Attorney-General *v.* Lawes, 8 Hare, 32; Thornber *v.* Wilson, 3 Drew., 245; 4 *ibid*, 350.
[6] Attorney-General *v.* Stepney, 10 Ves., 22.
[7] Turner *v.* Ogden, 1 Cox, 316.
[8] Adnam *v.* Cole, 6 Beav., 353.
[9] Hoare *v.* Osborne, L. R., 1 Eq., 585.
[10] Attorney-General *v.* Pearson, 3 Mer., 409.
[11] Powell *v.* Attorney-General, 3 Mer., 48.
[12] Attorney-General *v.* Comber, 2 S. and S., 93; Russell *v.* Kellett, 3 Sm. and G., 264; Thompson *v.* Corby, 27 Beav., 649.
[13] Attorney-General *v.* Clarke, Ambl., 422; Bishop of Hereford *v.* Adams, 7 Ves., 324.
[14] Attorney-General *v.* Tyndall 2 Eden, 207.
[15] Pelham *v.* Anderson, *ibid*, 296.

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a certain town,[1] and for the improvement of a certain town,[2] are gifts for charitable purposes. Such a gift as the last-mentioned one will be construed to mean improvements carried on under statutory powers and not by private persons.[3] So, a gift for the benefit and advantage of the country,[4] or a gift in exoneration of the national debt,[5] or for the assistance of literary persons who have not been successful in their career,[6] for the increase and encouragement of good servants,[7] for the release of debtors from prison,[8] and for the redemption of slaves,[9] are valid as gifts for charitable purposes. But a bequest for purchasing the discharge of poachers "committed to prison for nonpayment of fines, fees, or expenses under the game laws," was held to be void, as encouraging offences and opposed to public policy.[10]

Improvement of particular place.

Trust for particular classes of persons.

Educational purposes.

Again, gifts for the purpose of founding schools,[11] scholarships,[12] or lectureships,[13] for the benefit of a particular college,[14] for the advancement and propagation of education and learning in every part of the world,[15] are good charitable gifts. In *Beaumont* v. *Olivera*[16] gifts to the Royal Society, which has for its object the improvement of natural knowledge, and the Royal Geographical Society, the object of which is the improvement and diffusion of geographical knowledge, were held to be good. So gifts to the British Museum,[17] and for the purpose of establishing a perpetual botanical garden,[18] are gifts for charitable purposes.[19]

Gift must be for the public.

The gift must be for public purposes. Thus gifts for private purposes, such as keeping up a tomb,[20] a private

[1] Jones *v.* Williams, Amb., 651; Mitford *v.* Reynolds, 1 Ph., 185; Attorney-General *v.* Bushby, 24 Beav., 299.
[2] Howse *v.* Chapman, 4 Ves., 542. [3] *Ibid.*
[4] Nightingale *v.* Goulburn, 2 Ph., 594.
[5] Newland *v.* The Attorney-General, 3 Mer., 684.
[6] Thompson *v.* Thompson, 1 Coll., 395.
[7] Loscombe *v.* Wintringham, 13 Beav., 87.
[8] Attorney-General *v.* Painter-Stainers Co., 2 Cox, 51.
[9] Attorney-General *v.* The Ironmongers' Co., 2 M. and K., 576.
[10] Thrupp *v.* Collett, 26 Beav., 125.
[11] Attorney-General *v.* Earl of Lonsdale, 1 Sim., 105.
[12] Rex *v.* Newman, Levinz, 284.
[13] Attorney-General *v.* Margaret and Regius, Professors, 1 Vern., 54.
[14] Attorney-General *v.* Tancred, 1 Eden, 10.
[15] Whicker *v.* Hume, 7 H. L. C., 124. [16] L. R., 4 Ch., 309.
[17] The Trustees of the British Museum *v.* White, 2 S. and S., 594.
[18] Townley *v.* Bedwell, 6 Ves., 194.
[19] See the Registration of Societies Act, XXI of 1860, and the Religious Societies Act, I of 1880, *post*, Appendix.
[20] *Ante*, p. 49; and see *In re* Williams, L. R., 5 Ch. Div., 735; *In re* Birkett, L. R., 9 Ch. Div., 576.

museum,[1] for the benefit of a private company,[2] or to be given in private charity,[3] are void if they infringe the rule against perpetuities.

Must be certain.

A trust for charitable purposes must not be uncertain and indefinite. Thus, a gift to executors, in trust to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons, in such shares as they should think fit, is too general and undefined to be executed by the Court.[4]

Morice v. Bishop of Durham.

In *Morice* v. *The Bishop of Durham*,[5] the leading case on the subject, a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should approve, was held to be void. "That it is a trust," said Grant, M. R., "unless it be of a charitable nature, too indefinite to be executed by this Court, has not been, and cannot be, denied. There can be no trust over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for a charity. Every other trust must have a definite object. There must be somebody in whose favour the Court can decree performance. But it is now settled, upon authority which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the King in some cases, in others by this Court.

"Then is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its

[1] Thomson *v.* Shakespear, 1 D. F. J., 399.
[2] Attorney-General *v.* Haberdashers Co., 1 M. and K., 420.
[3] Ommaney *v.* Butcher, 1 T. and R., 260.
[4] Vezey *v.* Jamson, 1 S. and S., 69; Fowler *v.* Fowler, 33 Beav., 616; *In re* Jarman's Estate, Leavers *v.* Clayton, L. R., 8 Ch. Div., 584.
[5] 9 Ves., 399.