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signification is derived chiefly from the Statute of Elizabeth (43 Eliz., c. 4). Those purposes are considered charitable which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear, liberality and benevolence can find numberless objects not included in that Statute in the largest construction of it. The use of the word 'charitable' seems to have been purposely avoided in this will, in order to leave the Bishop the most unrestrained discretion. Supposing the uncertainty to be no objection to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects which all mankind would allow to be objects of liberality and benevolence, though not to be said, in the language of this Court, to be objects also of charity? By what rule of construction could it be said, all objects of liberality and benevolence are excluded which do not fall within the Statute of Elizabeth? The question is, not whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case in which the bequest has been held charitable, where the testator has not used that word to denote his general purpose, which this Court has determined to be charitable in its nature."[1]

In *Johnston* v. *Swann*,[2] *Jemmit* v. *Verril*,[3] *Waldo* v. *Coley*,[4] and *Horde* v. *The Earl of Suffolk*,[5] vague bequests were upheld. But with regard to these cases Lord Cottenham, L. C., in *Ellis* v. *Selby*,[6] said: "*Johnston* v. *Swann* and *Jemmit* v. *Verril* are directly at variance with the other cases on the same subject. *Waldo* v. *Coley* was determined before the decision, that a private charity could not be carried into effect by this Court;[7] that explains the case, and reconciles it with the other cases. In *Horde* v. *The Earl of Suffolk*, Sir John Leach took no notice of the objection that a private charity could not be carried into effect, although that objection appears to have been urged."

Instances of uncertainty.

So a gift to a corporation "for a purpose," where no purpose is expressed, is void for uncertainty.[8] Where a testator

[1] And see Williams *v.* Kershaw, 5 C. and F., 111; Ellis *v.* Selby, 1 M. and C., 286.

[2] Amb., 585 (*n*). [4] 16 Ves., 206. [6] 1 M. and C., 292.
[3] *Ibid.* [5] 2 M. and K., 59. [7] See *ante*, p. 354.
[8] Corporation of Gloucester *v.* Osborn, 1 H. L. C., 272; S. C., *nom.* Mayor of Gloucester *v.* Wood, 3 Hare, 131.

bequeathed a sum of money to the trustees of a chapel "to be appropriated according to statement appended," and no statement was appended, it was held, that the Court could not presume a charitable object in the bequest: and if not charitable, the object was so indefinite that the gift must fail.[1] But a bequest for such charities and other public purposes as lawfully might be "in a certain parish," is good, it being a gift to trustees to be laid out in charities for the benefit of the parish.[2]

Parol evidence is admissible to explain a latent ambiguity in the description of a charity in a will.[3]

Principles of construing will.

In construing a will containing charitable bequests, the Court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity.[4] But when a charitable bequest is capable of two constructions, one of which would make it void, and the other which would render it effectual, the latter must be adopted.[5]

In construing a will relating to a charity of great antiquity, contemporaneous usage may be referred to.[6]

Cy près.

If a testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated will not destroy the charity; but the Court will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished, or, as it is called, will execute the testator's intention *cy près*, and for this purpose will direct a scheme to be framed.[7] The doctrine of *cy près* means, that where there is a general charitable purpose for an object mentioned by a testator of such a kind that the Court can satisfy itself that some other object can be found in a reasonable degree nearly answering such charitable purpose, then there shall be an application in favour of that object.[8] The jurisdiction of the Court to act on the *cy près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to

[1] Aston *v.* Wood, L. R., 6 Eq., 419.
[2] Dolan *v.* Macdermott, L. R., 3 Ch., 676; and see Pocock *v.* Attorney-General, L. R., 3 Ch. Div., 342.
[3] *In re* Kilvert's Trusts, L. R., 12 Eq., 183; *ib.*, 7 Ch., 170.
[4] Dolan *v.* Macdermott, L. R., 3 Ch., 678, *per* Lord Cairns.
[5] Bruce *v.* The Presbytery of Deer, L. R., 1 Sc. App., 96.
[6] Attorney-General *v.* Sidney Sussex College, L. R., 4 Ch., 722.
[7] Moggridge *v.* Thackwell, 7 Ves., 69.
[8] Russell *v.* Kellett, 3 Sm. and G., 264, *per* Stuart, V.C.

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charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.[1]

Altering scheme.

The Court has power to alter from time to time the scheme of a charity which has been settled by a previous decree of the Court, if the circumstances require it.[2] But the Court will not subsequently change the application, even to a purpose identical with its original object, unless satisfied that the proposed application will be as beneficial as the existing one.[3] Apparently, when a scheme has once been settled for the application of a charitable fund, an alteration in it can only be made with the consent of the persons authorized to act under s. 539 of the Civil Procedure Code.[4]

Gift for charitable purposes generally.

A trust for "charitable and pious uses" generally,[5] or "to and amongst the different institutions," to which bequests have been given; "or to any other religious institution as my trustees may think proper,"[6] or for "the poor,"[7] is good. Where a testator directed the residue of his personal estate to be divided for certain charitable purposes mentioned by him, "and other charitable purposes as I do intend to name hereafter," and died without naming any other charitable purposes, it was held, that there was a disposition of the residue in favour of charity, to be carried into effect by the Court, having regard to the objects particularly pointed out by the Court.[8]

Particular purpose failing, where gift is to charity generally.

Where a charitable gift is made for particular purposes which fail, and the gift is to charity generally, the Court will execute the intention of the donor *cy près*. "When," said Lord Brougham,[9] "a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the Court may thus execute his intention in the event of an impossibility of applying that portion to its original destination. The character

[1] Mayor of Lyons *v.* The Advocate-General of Bengal, L. R., 3 I. A., 32.
[2] Attorney-General *v.* St. John's Hospital, L. R., 1 Ch., 92.
[3] Attorney-General *v.* Stewart. L. R., 14 Eq., 17.
[4] *Ibid.* [5] Attorney-General *v.* Herrick, Amb., 712.
[6] Wilkinson *v.* Lindgren, L. R., 5 Ch., 570.
[7] Attorney-General *v.* Rance, cited Amb., 422.
[8] Mills *v.* Farmer, 1 Mer., 55. *See* Gangabai *v.* Thava Mulla 1 Bom. O. C., 71.
[9] Attorney-General *v.* The Ironmongers Co., 2 M. & K., 586.

of charity is impressed on the whole fund; there is good sense in presuming that, had the testator known that one object was to fail, he would have given its appropriated fund to the increase of the funds destined to the other objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of *cy près*." And, therefore, gifts to charities which have ceased to exist at the time of the testator's death,[1] or subsequently fail by reason of the objects of the bounty no longer existing, as where a fund was given for ransoming British slaves in Turkey and Barbary,[2] will be administered *cy près*.[3] So, if a sum is devoted to a charitable purpose, but the particular charity to be benefited is not so described as that it can be ascertained, the Court will direct it to be applied to a charity of a similar nature.[4] Again, where a testator gives a sum of stock to trustees, and shows a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does in fact specify some of them and the yearly sums to be paid to them, but leaves blanks for the names of others and for the sums to be paid to them, the Court will carry out the testator's intention *cy près*, and will frame a scheme for the application of the remaining dividends.[5] Where property was given to the Kent County Hospital, and there was no hospital having precisely that name, it was held, that a general hospital must be presumed to have been intended, and the Kent County Ophthalmic Hospital could not take the legacy; but that it must be divided between two hospitals which together supplied the place of a general county hospital.[6]

Particular charity not described.

In the foregoing cases, the gifts were to charities generally, the fund had the character of charity impressed upon it, and the Court, therefore, carried out the general intention of the testator. But there is another class of cases where the testator has not shown an intention to give to charity generally, but only to benefit some particular charity. And if such object fails, the fund will not be

Failure of object where no intention to give to charity generally.

[1] Hayter *v.* Trego, 5 Russ., 113; Marsh *v.* Attorney-General, 2 J. & H., 61.

[2] Attorney-General *v.* Ironmongers Co., 2 M. & K., 576; Cr. & Ph., 208; 10 C. & F., 908; and see Attorney-General *v.* Glynn, 12 Sim., 84.

[3] *In re* Prison Charities, L. R., 16 Eq., 129; Attorney-General *v.* Hankey, *ib.*, 140 (*n*).

[4] Simon *v.* Barber, 5 Russ., 112. [5] Pieschell *v.* Paris, 2 S. & S., 384.

[6] In *re* Alchin's Trust, L. R., 14 Eq., 230.

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applied *cy près*, but there will be an intestacy, and it will fall into the residue. "Now," said Kindersley, V. C.,[1] "there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally."[2]

Again, if the Court has no power to enforce the execution of the proposed trust, nor to settle a scheme for the administration of the charity *cy près*, there will be an intestacy, and the fund will fall into the residue. Thus, where a testator gave certain funds to the President and Vice-President of the United States, and the Governor of Pennsylvania, upon trust, to build and endow a college for the instruction of youth in the State of Pennsylvania, and directed that moral philosophy should be taught therein, and a professor should be engaged to inculcate and advocate the natural rights of the black people of every clime and country until they be restored to an equality of rights with their white brethren throughout the Union, and the trustees disclaimed the gift, it was held that the trust failed.[3]

A friendly society is not a charitable institution, and therefore the doctrine of *cy près* will not, on the society being voluntarily dissolved, be applied to a bequest made to it in aid of its funds; but the same will fall into the testator's residuary estate.[4]

Apportionment of fund.

If a fund is given to trustees upon trust to divide between certain charities and legatees, and the trustees do not apportion it as directed, the Court will divide it between the charities and legatees equally, on the principle that 'equality is equity.'[5] In *Down* v. *Worrall*,[6] a testator

[1] Clark *v.* Taylor, 1 Drew., 644.

[2] See also Cherry *v.* Mott, 1 M. and Cr., 123; Russell *v.* Kellett, 3 Sm. and G., 264; Langford *v.* Gowland, 3 Giff., 627; Fisk *v.* Attorney-General, L. R., 4 Eq., 521; Clephane *v.* The Lord Provost of Edinburgh, L. R., 1 Sc. App., 417; *In re* Maguire, L. R., 9 Eq., 632.

[3] New *v.* Bonaker, L. R., 4 Eq., 655.

[4] *In re* Clark's Trust, L. R., 1 Ch. Div., 497.

[5] Doyley *v.* Doyley and Attorney-General *v.* Doyley, 7 Ves., 58 (*n*); Izod *v.* Izod, 32 Beav., 242.

[6] 1 M. & K., 561.

gave a fund to trustees, upon trust, to settle such part at their discretion either for pious and charitable purposes or otherwise for the benefit of the testator's sister and her children; and it was held, that this was a personal trust which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next-of-kin. The case, apparently, conflicts with those referred to above. But in *Salusbury* v. *Denton*,[1] Wood, V. C., pointed out that the case was distinguishable, saying, "It is one thing to direct a trustee to give *a part* of a fund to one set of objects, *and the remainder* to another, and it is a distinct thing to direct him to give 'either' to one set of objects, '*or*' to another. *Down* v. *Worrall* was a case of the latter description. There the trustees could give all to either of the objects. This is a case of the former description. Here the trustee was bound to give a part to each."

Where a single fund is given for several charitable objects, and one of them is bad, the principle on which the Court acts is, that if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an inquiry on the subject; but if from the nature of the gift it appears impracticable to fix the proportions, the Court divides the fund equally between the different objects.[2] So, if a fund is given to be applied to certain charitable objects in certain proportions and the value of the property increases, the accretions will be apportioned among the different objects of the charity *pro ratâ*.[3]

If property is given for the benefit of a particular charity, and subsequently the charity is severed, as in the case of a gift for the repairs of a church in a particular parish, which is afterwards divided into two parishes, the gift cannot be apportioned.[4]

Where a fund is given for charitable purposes with a gift over in case any of the purposes should be void or fail, the gift over is good.[5] Gift over.

[1] 3 K. & J., 539. [2] Hoare *v.* Osborne, L. R., 1 Eq., 588.
[3] Attorney-General *v.* Marchant, L. R., 3 Eq., 424.
[4] *In re* Church Estate Charity Wandsworth, L. R., 6 Ch., 296.
[5] De Themmines *v.* De Bonnestal, 5 Russ., 288; Hall *v.* Warren, 9 H. L. C., 420.

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Charity in foreign country.

A gift to a charity in a foreign country is good, though the Court cannot see to the administration of the charity.[1] In *Mitford* v. *Reynolds*,[2] a testator bequeathed the residue of his estate "to the Government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, for the exclusive benefit of the native inhabitants, in such manner as they and the Government might regard as most conclusive to that end," and it was held that the bequest was good.

Breach of trust.

The Court has, in the case of charities, jurisdiction to redress a breach of trust, where the objects of the founder have been prevented or neglected. It has also authority to direct a scheme in order to enforce the more complete attainment of those objects. It has power and authority, when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the spirit of the original foundation the actual compliance with which has become impossible. But it has no authority to vary the original foundation and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the Court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by the lapse of time.[3] For instance, a fund given for purpose of establishing a hospital in a particular town cannot be applied towards lighting and paving the town.[4] So a gift to the poor of a certain parish cannot be given to the poor of another parish.[5] But a gift "for the relief of the poor" may be applied to building a schoolhouse and educating the poor of the parish,[6] or in aid of the poor rates, and so in relief of the parish.[7] So, a gift to be applied towards finding a schoolmaster, and for the pains of such master, may be applied towards rebuilding and repairing the schoolroom and schoolhouse, because these are necessary.[8]

[1] Attorney-General *v.* Sturge, 19 Beav., 597. [2] 1 Ph., 185.
[3] Attorney-General *v.* Sherborne School, 18 Beav., 256.
[4] Attorney-General *v.* Kell, 2 Beav., 575.
[5] Attorney-General *v.* Brandreth, 2 Y. & C. C. C., 200.
[6] Wilkinson *v.* Malin, 2 Tyr., 544.
[7] Attorney-General *v.* Blizard, 21 Beav., 233.
[8] Attorney-General *v.* Mayor of Stamford, 2 Swanst., 592. As to funds given for a particular sect, see Attorney-General *v.* Bance, L. R., 6 Eq., 563; or religious worship, Attorney-General *v.* Pearson, 3 Mer., 400; Foley *v.* Wontner, 2 J. & W., 247.

Mode of procedure to obtain redress.

In England, if the trustees of a charity are guilty of a breach of trust, the mode of obtaining redress is by way of information in the name of the Attorney-General at the instance of some person who is called a 'relator.' The sovereign is *parens patriæ*, and it is the duty of the Attorney-General to see that justice is administered to every subject. Relators need not be personally interested. They are required merely because the Attorney-General, prosecuting a suit in the name of the Crown, would not be liable to costs, and unless some persons were made responsible, proceedings might be instituted very oppressive to individuals.[1]

Civil Procedure Code, s. 539.

In this country the mode of redress is regulated by the Civil Procedure Code,[2] which contains the following provisions:—

"In case of any alleged breach of any express or constructive trust created for public charitable purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio*, or two or more persons having a direct interest in the trust, and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree

(*a*) appointing new trustees of the charity;

(*b*) vesting any property in the trustees of the charity;

(*c*) declaring the proportions in which its objects are entitled;

(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged, or exchanged;

(*e*) settling a scheme for its management; or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be exercised also by the Collector or by such officer as the Local Government may appoint in this behalf."

The Advocate-General is not a necessary party to a suit brought by the managers of the temples and endowments of a particular sect, to have a will bequeathing property for the purposes of the temples and endowments construed, for a declaration of the plaintiffs' rights, and to have

[1] Lewin, 7th Edn., 790.

[2] Act X of 1877, s. 539, as amended by Act XII of 1879, s. 82.

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property dedicated by the will to religious purposes ascertained and secured, though it is desirable that such suits should be brought only with his consent or by leave of the Court.[1]

Worshippers or devotees of an idol are entitled to bring a suit, complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple. But it is doubtful whether this section is applicable to the *devasthán* of an idol or temple, dedicated merely to the purposes of such idol or temple.[2]

The representatives of a testator who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such power of enforcing the due administration of religious or charitable trusts by information at the relation of some private individual as is possessed by the Attorney-General in England.[3] Such a suit should not be admitted unless the plaintiff gives security for costs.[4]

The *Vatandar Joshi* of a village has the right to recover pecuniary damages from a person who has intruded upon his office and received fees properly payable to him. But the Court will not grant any injunction against such intruder, which would have the effect of forcing upon any section of the community the services of a priest whom they are unwilling to recognize, and forbidding them to employ a priest whom they are willing to recognize, and forbidding them to employ a priest whose ministrations they desire.[5]

Liability of trustees to account.

Trustees of charities must account in the same manner as ordinary trustees. Limitation will not run against them in the case of an express trust.[6] But the misapplication of the funds may have been going on a great length of time, and then the Court may set a limit to the period over which the account is to be taken. "It does not follow,"

[1] Panchcowrie Mull *v.* Chumroolall, I. L. R., 3 Calc., 563. See also Advocate-General *v.* Vishvanath Atmaram, 1 Bom., Appx., ix. As to costs of the Attorney-General upon making an application in the matter of a charity, see *In re* Dulwich College, L. R., 15 Eq., 294.

[2] Radhabai Kom Chimnaji Sali *v.* Chimnaji Bin Ramji Sali, I. L. R., 3 Bomb., 27.

[3] Brojomohun Doss *v.* Hurrololl Doss, I. L. R., 5 Calc., 750.

[4] *Ibid.*

[5] Rajah Valad Shivapa *v.* Krishna Chat, I. L. R., 3 Bom., 232.

[6] See *ante*, p. 186.

said Sir T. Plumer, M. R.,[1] "that relief will be given after a great length of time, it being the constant course of Courts of Equity to discourage stale demands. Even in cases of fraud, in which, if recent, there would have been no doubt, lapse of time has induced the Courts to refuse their interference. In case of charities, this principle has often been acted on when there has been a long period during which a party has, under an innocent mistake, misapplied a fund from the laches and neglect of others,—that is, from no one of the public setting him right; and when the accounts have in consequence become entangled, the Court, under its general discretion, considering the enormous expense of the enquiries, the great hardship of calling upon representatives to refund what families have spent, acting upon the notion of its being their property, has been in the habit, while giving relief, of fixing a period to the account."[2]

Contemporaneous usage may be referred to, and the Court will not assume a long series of breaches of trust to have been committed.[3]

If the trustees have been acting under a mistake, the Court will not call back any disbursements made before the commencement of the proceedings, or before the trustees had notice that their dealings were to be examined into.[4]

New trustees.

If the instrument creating a charitable trust does not contain provisions for the appointment of new trustees, the Court will direct an inquiry as to who are proper persons to be appointed, and will make the appointment.[5]

New trustees of society for maintaining religious worship.

The "Religious Societies Act of 1880"[6] provides,[7] that "when any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any property, and such property has been, or hereafter shall be, vested in trustees in trust for such body, and it becomes necessary to appoint a new trustee in the place of, or in addition to, any such trustee or any trustee appointed in the manner hereinafter prescribed, and no manner of appointing such new trustee is prescribed by any instrument by which it was so vested, or by which the trusts on which it is held have been declared, or such new

[1] Attorney-General *v.* Mayor of Exeter, Jac., 448.
[2] Attorney-General *v.* Sidney Sussex College, L. R., 4 Ch., 722.
[3] As to the periods for which the account may be carried back, see Lewin, 7th Edn., 798.
[4] See Lewin, 799.
[5] Davis *v.* Jenkins, 3 V. and B., 151.
[6] Act I of 1880.
[7] Section 2.

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trustee cannot for any reason be appointed in the manner so prescribed, such new trustee may be appointed in such manner as may be agreed upon by such body, or by a majority of not less than two-thirds of the members of such body actually present at the meeting at which the appointment is made."

Memorandum of appointment.

Section 3 provides, that the appointment shall be recorded in a memorandum under the hand of the Chairman, and registered.

Vesting.

Section 4 provides, that "when any new trustees have been appointed, whether in the manner prescribed by any such instrument as aforesaid, or in the manner hereinbefore provided, the property subject to the trust shall forthwith, notwithstanding anything contained in any such instrument, become vested, without any conveyance or other assurance, in such new trustees and the old continuing trustees jointly, or if there are no old continuing trustees, in such new trustees solely, upon the same trusts and with and subject to the same powers and provisions, as it was vested in the old trustees." And s. 5 saves any existing modes of appointment and conveyance.

Appointment of Official Trustee to charitable trust.

The Official Trustees' Act[1] provides, that "if any person shall be about to grant, assign, or settle any property, moveable or immoveable, of what nature or kind soever, upon or subject to any trust, whether for a charitable purpose or otherwise, it shall be lawful for such person, with the consent of the Official Trustee, to appoint him, by the deed creating the trust, to be the trustee of such settlement; and upon such appointment the property so granted, assigned, or settled shall vest in such officer and his successors in office, and shall be held by him and them upon the trust declared and contained in the said deed. Provided always, that the consent of the Official Trustee shall be recited in the said deed, and that the deed shall be duly executed by the Official Trustee: provided also, that no trust for any religious purpose shall ever be held by the Official Trustee, under this or any other section of this Act."

And s. 10 of the Act 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

[1] XVII of 1866, s. 8.

local limits of the ordinary or extraordinary original civil jurisdiction of the High Court, 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."

Vesting property in trustees of charity.

Section 45 of the Trustee Act[1] provides, that, in cases to which English law is applicable, "it shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immoveable property, stock, Government securities, or thing in action, in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court."

Visitors.

When a charity has been established by charter, the visitors are the founder and his heirs,[2] and failing them, the Crown.[3]

Controlling revenues of charity.

It is the duty of the visitors to regulate and control the management of the charity. And with this duty the Court will not interfere, though it will interfere with the management of the revenues of the charity. "There is nothing better established," said Lord Commissioner Eyre,[4] "than that this Court does not entertain a general jurisdiction or regulate and control charities established by charter. There the establishment is fixed and determined; and the Court has no power to vary it. If the governors established for the regulation of it are not those who have the management of the revenue, this Court has no

[1] XVII of 1866.

[2] Attorney-General *v.* Gaunt, 3 Sw., 148 (*n*).

[3] Attorney-General *v.* Dixie, 13 Ves., 519, 533; *In re* Queen's College, Cambridge, Jac., 1.

[4] Attorney-General *v.* Governors of the Foundling Hospital, 2 Ves. J., 47.

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jurisdiction; and if it is ever so much abused, as far as respects the jurisdiction of this Court, it is without remedy; but if those established as governors have also the management of the revenues, this Court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue. The result is, this Court must not hastily take upon itself to interfere with those who have by charter, or by Act of Parliament, the whole control over the charity. But where, having also the management of the revenues, they are abusing their trust, the Court has jurisdiction."[1] "As to the revenue it is quite clear," said Lord Eldon,[2] "that where there is a local visitor as to the conduct and management of the school if in the original instrument a trust is expressed as to the application of the revenue, this Court has jurisdiction to compel a due application."[3] "Where there is a clear and distinct trust," said Romilly, M. R.,[4] "this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belongs to the various officers which he may take care to see are properly kept up and appointed. It is the duty of the Court to see that the trusts are properly performed, notwithstanding that there may be a special or a general visitor."

Subsequent gift.

If a subsequent donor gives property to the charity without a declaration of a special trust, it will fall under the general Statutes and rules of the charity, and be regulated with the rest of its property.[5]

Purchaser without notice from purchaser with notice.

The rule that a purchaser without notice from a purchaser with notice of a breach of trust is not liable, does not apply in the case of a charity, and in such a case the purchaser is bound by the claim of the charity. In other respects the principles of equity as to the doctrine of notice are applicable to charities in the same manner as between private persons.[6]

[1] And see Attorney-General *v.* Magdalen College, 10 Beav., 402; Attorney-General *v.* Archbishop of York, 2 R. & M., 461.
[2] *Ex parte* Berkhampstead Free School, 2 V. & B., 138.
[3] And see Attorney-General *v.* Browne's Hospital, 17 Sim., 156.
[4] 17 Beav., 466.
[5] Green *v.* Rutherforth, 1 Ves., 473.
[6] Lewin, 7th Edn., 730.

Trustees of charities in England could not, before the restrictions which have been imposed upon them by Statute, have made an absolute disposition of the trust-estate. But there was no positive rule, that in no instance could an absolute disposition be made, for then the Court itself could not have authorized such an act—a jurisdiction which it is acknowledged has, from time to time, been exercised in special cases. "I do not doubt," said Wigram, V. C.,[1] "of the existence of this power in the Court: the trustees have the power to sell at law, they can convey the legal estate, but it is only a Court of Equity that can recall the property, and if that Court should sanction a sale, it would be bound to protect the purchaser." The true principle was, that an absolute disposition was then only to be considered a breach of trust when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity. And the transaction was strongly assumed to be improvident as against a purchaser until he had established the contrary.[2] The principles above stated apply here, as the Charity Acts are not extended to this country.

Alienation of charity estates.

Among Hindus, property of every kind may be dedicated to religious and charitable purposes, whether by gift *inter vivos*, or by will;[3] and such dedications of property do not require the assent of the State.[4] Except in families governed by the Mitakshara law, there is no limit to the amount of property which may be dedicated; in one case all the family property was permitted to be applied to the support and worship of the family idol.[5] According to Hindu law as current in Bengal, the gift of joint and undivided property for religious and charitable purposes to the extent of the donor's share is valid.[6] And under the Mitakshara law, a father may give a small portion of the ancestral estate for pious purposes without the consent of the sons.[7]

Religious trusts among Hindus.

[1] Attorney-General *v.* Mayor of Newark, 1 Hare, 400.
[2] See Lewin, 7th Edn., 491.
[3] Mayne, § 359: and see Ramtonoo Mullick *v.* Ramgopal Mullick, 1 Kn., 245; Sonatun Bysack *v.* S. M. Juggut Soondree Dossee, 8 Moo. I. A., 66.
[4] Juggut Mohini Dossee *v.* M. S. Sokhee Money Dossee, 14 Moo. I. A., 302.
[5] Radhabullub Tagore *v.* Gopee Mohun Tagore, 1 Morley's Dig., 550.
[6] Komlakant Ghosal *v.* Ram Hurree Nund Gramee, 4 Sel., 196.
[7] Gopal Chand Pande *v.* Babu Kunwar Singh, 5 Sel., 24.

LECTURE XII.

Perpetuities.

A gift to charitable or religious purposes forms an exception to the general rule against perpetuities. "It being assumed to be a principle of Hindu law that a gift can be made to an idol, which is a *caput mortuum* and incapable of alienating, that principle cannot be broken in upon by engrafting upon it the English law of perpetuities."[1] But the rule against perpetuities cannot be avoided by means of a colourable gift to an idol. Thus, where a Hindu, by will, devised certain property consisting of a family dwelling-house and land, to trustees for ever, for the residence, maintenance, and performance of the worship of certain family idols, and appointed his sons and their descendants in the strict male line to be *sebaits* of the idols for ever, making provision for their residence in the family dwellinghouse; and the will also contained a clause restraining any partition, division, or alienation of the property so dedicated to the worship of the idols; and the testator appointed the trustees executors of his will, and by a codicil bequeathed certain legacies to various members of his family,—it was held, that the devise to idols was void and inoperative, as being a settlement in perpetuity on the male descendants of the testator and for their use, and not a real dedication for the worship of the idols.[2]

Colourable gift to idol.

Gift must be certain.

The principle of English law, that a gift for charitable or religious purposes must be certain,[3] applies in construing the will of a Hindu. Where a testator by his will directed as follows:—"I do hereby direct my trustee to feed the really needy and poor at Gopeenathjee out of a separate expense out of my estate, to be contributed to the worship of Luckheejonardunjee, my ancestral goddess: I do direct my trustee to spend suitable sums for the annual shradhs, or anniversaries, of my father, mother, and grandfather, as well as of myself after my demise; for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, pundits holding *tolls* for learning in the country at the time of the Doorga Poojah; to spend suitable sums for the

[1] Kumara Asima Krishna Deb, 2 B. L. R., O. C., 47, *per* Markby, J. See also Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377; Krishnaramini Dasi *v.* Anandakrishna Bose, 4 B. L. R., O. C., 231; Rajender Dutt *v.* Sham Chund Mitter, I. L. R., 6 Calc., 106.

[2] Promotho Dossee *v.* Radhika Persand Dutt, 14 B. L. R., 175; and see Chundramoney Dossee *v.* Motilal Mullick, 5 Calc., 496.

[3] See *ante*, p. 355.

perusal of Mohabarat and Pooran, and for the prayer of God during the month of Kartick: should there be any surplus after the above expenditure, then I do direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class and of the poor Brahmins, and towards the education of the sons of the poor amongst my class, and of the poor Brahmins, and other respectable castes, as my trustee will think fit to comply,"—it was held to be doubtful whether the bequests to pundits holding *tolls* and for the reading of the Mohabarat and Pooran and for prayer to God were valid.[1]

Gifts to religious or charitable uses by Oudh taluqdars.

Section 105 of the Indian Succession Act, which imposes certain restrictions on gifts for religious and charitable purposes,[2] does not extend to Hindus. But the "Oudh Estates Act, 1869,"[3] limits, to a certain extent, the powers of taluqdars or grantees in Oudh of disposing of their property for charitable purposes. Section 18 provides, that no taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, shall have power to give his estate, or any portion thereof, or interest therein, to religious or charitable uses except by an instrument of gift executed not less than three months before his death, and subject to the provisions contained in s. 17.

And s. 20 of the same Act provides, that "no taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, having a child, parent, brother, unmarried sister, or a nephew, being the naturally-born son of a brother of such taluqdar or grantee, heir or legatee, shall have power to bequeath his estate or any part thereof, or any interest therein, exceeding in amount or value the sum of two thousand rupees, to religious or charitable uses, except by a will executed not less than three months before his death, and registered within one month from the date of its execution."

Tenure in trustee.

"As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religious purpose, or to impose upon the holder of the lands a trust to defray the expense of the worship.[4] Sometimes the donor is himself the trustee. Such a trust is of course valid, if

[1] Dwarka Nath Bysack *v.* Burroda Persaud Bysack, I. L. R., 4 Calc., 443, See also Gangabai *v.* Thava Mulla, 1 Bom., O. C., 71.

[2] See *ante*, p. 352. [3] Act I of 1869.

[4] See Komlakant Ghosal *v.* Ram Hurree Nund Gramee, 4 Sel., 196.

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perfectly created, though, being voluntary, the donor cannot be compelled to carry it out if he has left it imperfect.[1] But the effect of the transaction will differ materially, according as the property is absolutely given for the religious object or merely burthened with a trust for its support. And there will be a further difference where the trust is only an apparent, and not a real one, and where it creates no rights in any one except the holder of the fund." [2]

Trust imperfect.

"The last case arises where the founder applies his own property to the creation of a pagoda, or any other religious or charitable foundation, keeping the property itself, and the control over it, absolutely in his own hands. The community may be greatly benefited by this arrangement so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and the fact that the public have been permitted to resort to it, will not prevent its being closed, or pulled down, provided there has been no dedication of it to the public." [3] Thus, where two Parsi brothers erected a fire-temple on their estate, and by a document, which they recorded in a solemn meeting of their community, declared that they erected this temple, and placed the sacred fire in it, in commemoration of their deceased father, but that it should always be subject to the authority of themselves and their heirs, and that all the members of the Zoroastrian community were at liberty to have their religious ceremonies performed therein without any obstruction on their part,—it was held, that this document contained no grant of the temple to the Parsi community, but that the entire ownership remained in the brothers, and would pass to their assignees in case of insolvency.[4] So, where the plaintiff sued, as the *shebait* of a certain idol, to recover possession of a zemindari, by setting aside an alienation of it effected by an ancestor, on the ground that it was *debuttur* property and inalienable; and it appeared that the property in dispute was purchased by the grandfather of the plaintiff in the name of the idol, which was set up merely for his private worship in his own house, without any priests to perform regularly any religious service for the public benefit of Hindus; and that the property had been dealt with all along as his own private

[1] *Ante*, p. 53. [2] Mayne, § 362. [3] Mayne, § 363.
[4] *Doe d.* Howard *v.* Pestonji Manockji, Perry, O. C., 535.

property,—it was held, that it was a mere nominal endowment, and that the alienation was not invalid.[1]

Devise subject to trust.

Property may be devised partially subject to a trust in favour of an idol or for some religious or charitable endowment. Thus, where a Hindu, by his will, gave all his moveable and immoveable property to his family idol, and, after stating that he had four sons, he directed that his property should never be divided by them, their sons or grandsons in succession, but that they should enjoy "the surplus proceeds only;" and the will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and to maintain the family, further directed, that whatever might be the surplus after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the testator directed that, after the expenses attending the estate, the idols, and maintenance of the family, whatever nett produce and surplus there might be should be divided annually, in certain proportions, between the members of the family,—it was held, that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the testator's four sons and their offspring in the male line as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol and the provisions in the will for maintenance.[2] Again, where a Hindu lady left, by will to her sons, land belonging to her to support the daily worship of an idol, and to defray the expenses of certain other religious ceremonies, with a provision that, in the event of there being a surplus after these uses had been satisfied out of the revenue of the lands, such surplus should be applied to the support of the family,—it was held, that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might be considerable and could not be presumed to be valueless.[3]

[1] Maharanee Brojosoondery Debia *v.* Ranee Luchmee Koonwaree, 15 B. L. R., 176 (*n*).

[2] Sonatun Bysack *v.* S. M. Juggut Soondree Dossee, 8. Moo. I. A., 66. See also Ram Coomar Paul *v.* Jogender Nath Paul, I. L. R., 4 Calc., 56.

[3] Ashutosh Dutt *v.* Doorga Churn Chatterjee, I. L. R., 5 Calc., 438.

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Sale of property subject to trust.

Where property is wholly dedicated to religious purposes, it cannot be sold; but where a portion only of its profits is charged for such purposes, the property may be sold subject to the charge with which it is burdened.[1] So, where an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindu law.[2]

Partition subject to trust.

In such cases as these we are now considering, the property may be partitioned subject to the trust for the idol.[3]

Alienation.

Although property devoted to religious purposes is, as a rule, inalienable, a *shebait* may alienate a reasonable portion of the endowed property if the alienation is absolutely required by the necessities of the management, such as the restoration of the idol or the repair of the temple;[4] and he may raise the necessary funds by mortgage.[5] But he may not, except distinctly for the benefit of the endowment, incumber it beyond his own life.[6] His position so far as alienation is concerned, is analogous to that of the manager of an infant heir, or of a Hindu widow alienating ancestral property; and the question to be considered is, whether, looking to all the circumstances of the case, the alienation was a prudent and wise act in respect of the purposes for which he was *shebait*; and, in estimating the validity of a sale, it ought to be considered whether the purchasers satisfied themselves, as far as they could, that there was a fair and sufficient ground of necessity for the alienation.[7] The *shebait* may grant leases of the endowed lands;[8] and he can create derivative tenures and estates conformable to usage.[9] But a *mohunt* in charge of an endowment, with only a life-interest in the property, cannot create an interest superior to his own, or, except under the most extraordinary pressure, and for the distinct benefit of the

[1] Basoo Dhul *v.* Kishen Chunder Geer Gossain, 13 W. R., 200.

[2] Mahtab Chand *v.* Mirdad Ali, 5 Sel. Rep., 268. See also Sonatun Bysack *v.* S. M. Juggut Soondree Dossee, 8 Moo. I. A., 66.

[3] Ram Coomar Paul *v.* Jogender Nath Paul, I. L. R., 4 Calc., 56.

[4] Tahboonissa Bibee *v.* Koomar Sham Kishore Roy, 15 W. R., 228.

[5] Prosunno Kumari Debya *v.* Golab Chand Baboo, L. R., 2 I. A., 145.

[6] Khusalchand *v.* Mahadevgiri, 12 Bom., 214.

[7] Juggessur Buttobyal *v.* Rajah Roodro Narain Roy, 12 W. R., 299. Naryan *v.* Chintaman, I. L. R., 5 Bomb., 393; Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341; S.C., L. R., 4 I. A., 52.

[8] *Ibid*; and see Arruth Misser *v.* Juggurnath Indraswamee, 18 W. R., 439.

[9] Maharanee Shibessouree Debia *v.* Mothooranath Acharjo, 13 Moo. I. A., 270.

endowment, bind his successors in office.[1] In a suit to set aside certain alienations of an ancestral mehal, on the ground that the mehal had been dedicated to the worship of an idol, it was contended for the defence, that the estate had not been so dedicated, and that, if it was, there was legal necessity for the alienation. The deeds of transfer contained recitals that the estate transferred was *debuttur*, that the temple was out of repair, and that the purchase-money was wanted to restore it. It was held, that the admissions in the deeds must be taken as a whole, and that, according to them, the sales were justifiable, even if the property were *debuttur*; and that, even if part only of the purchase-money was required for the repairs of the idol, as was represented to have been so required, and this was *bonâ fide* believed by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose.[2]

Evidence of endowment to be given.

A plaintiff, who seeks to set aside an alienation of lands on the ground that they are dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mehal have been applied for a considerable period to the worship of an idol, is not sufficient proof that the mehal is *debuttur*.[3]

How far sale set aside.

Even if a purchaser has notice on a sale of property avowedly *debuttur*, that the whole of the purchase-money is not required for the purposes of the endowment, but that part of it is to be expended on other objects, an action will not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as has been legitimately advanced.[4]

Trustee may not benefit by sale.

Upon the principle that a trustee may not derive any benefit from the trust,[5] the trustees of endowed property cannot transfer it so as to gain any benefit to themselves, even though the transferree undertakes to continue the ceremonies.[6]

[1] Mohunt Burm Suroop Dass *v.* Khashee Jha, 20 W. R., 471; Bunwaree Chand Thakoor *v.* Mudden Mohun Chuttoraj, 21 W. R., 41; Radha Bullub Chand *v.* Juggut Chunder Chowdhree, 4 Sel., 151.

[2] Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R., 2 Calc., 341; S. C., L. R., 4 I. A., 52.

[3] Koonwar Doorganath Roy *v.* Ram Chunder Sen, I. L. R, 2 Calc., 341; S. C., L. R., 4 I. A., 52.

[4] *Ibid.*

[5] See *ante*, p. 250.

[6] Rajah Vurmah Valia *v.* Ravi Vurmah Mutha, L. R., 4 I. A., 76.

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Sale of turn of worship.

The right to the turn of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of the *shebait*. It might happen that the purchaser was of a different religion and not capable of performing the services, and the object of the endower in creating the endowment would be defeated.[1]

Succession to trusteeship.

When property is endowed for charitable or religious purposes, it is usual to appoint some person, who may be a female,[2] to manage the estate and to make provision for succession to the office. If no such provision is made, and there is no evidence of succession by any usage or custom, the heirs of the endower are entitled to the management. In the case of *The elder widow of Raja Chutter Sein* v. *The younger widow of Raja Chutter Sein*,[3] the Pundits of the Sudder Dewany Adawlut gave the following opinions on the question as to the right to manage *debuttur* property :—"*Debuttur* lands are not heritable property ; the management of them, alone, for religious purposes, devolves on the heirs of the person who made the endowment."[4] The principle is, that an estate given to a man simply without express words of inheritance, will, in the absence of a conflicting context, carry by Hindu law (as under the present state of the law it does by will in England) an estate of inheritance.[5]

Where a testator had made a bequest for charitable purposes, and had made no express provision for the management of the trust, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust-fund, the Civil Court should take the fund and the management of the trust summarily into its own hands, it was held, that, in the absence of misconduct, the widow, and not the Collector, was the proper person to be appointed trustee.[6]

Enjoyment of endowed property.

The right to the enjoyment of the endowed property passes with the office, and is not separable from it ; and if

[1] Kalee Gir Gossain *v.* Bungshee Mohun Doss, 15 W. R., 339.
[2] Joy Deb Surmah *v.* Huroputty Surmah, 16 W. R., 282.
[3] 1 Sel. Rep., 180.
[4] And see Jaafar Mohi-u-din Sahib *v.* Aji Mohi-u-din Sahib, 2 Mad. H. C. R., 19.
[5] Jatindra Mohan Tagore *v.* Ganendra Mohan Tagore, 9 B. L. R., 377, 395; S. C. in the Court below, 4 B. L. R., O. C., 103, 182.
[6] Hori Dasi Dabi *v.* The Secretary of State for India, I. L. R., 5 Calc., 228 ; S. C. *nom.* Ramlall Mookerjee *v.* The Secretary of State for India, I. L. L., 7 Calc., 225.

some particular member of a family is designated as the incumbent of the office, the other members of the family have no right to a division of the returns derived from the land.[1]

Turn of worship.

In some cases the members of the family may be entitled to manage in turns, and any infringement of this right can be redressed by a suit.[2] The Court should define the precise periods for which the parties are entitled.[3] A refusal to give up an idol, in consequence of which the person demanding it is prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages.[4]

Limitation.

The right to the exclusive worship of an idol is not in the nature of an interest in immoveable property, and a suit to establish such a right must be brought under Act XV of 1877, sched. ii, art. 120, within six years from the time when the right to sue accrued. A suit to establish a right to a turn of worship is one "to establish a periodically recurring right," and must be brought under art. 131 of the same Act within three years of the time when the plaintiff is first refused the enjoyment of the right.[5]

Management vested in different persons.

If the person creating the endowment has vested the management in several different persons, each of whom is to act in the management, and to be a check on the others, the managers appointed cannot assign over the right of management to any particular person, and so alter the nature of the trust.[6]

Proof of succession.

The succession to *muths*, or religious endowments, must be regulated in each case by the nature of the endowment, and the rule of succession prescribed by the founder of the institution; and if this rule cannot be discovered from the original deed of gift or other documentary evidence, it must be proved in each case by showing what the usage has been on the occasion of each succession.[7]

[1] Jaafar Mohi-u-din Sahib *v.* Aji Mohi-u-din Sahib, 2 Mad. H. C. R., 19.

[2] Anund Moyee Chowdhrain *v.* Boykant Nath Roy, 8 W. R., 193; Ram Soondur Thakoor *v.* Taruck Chunder Turkoruttun, 19 W. R., 28; Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry, 14 B. L. R., 166.

[3] Ram Soondur Thakoor *v.* Taruck Chunder Turkoruttun, 19 W. R., 28; Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry, 14 B. L. R., 170.

[4] Debendro Nath Mullick *v.* Odit Churn Mullick, I. L. R., 3 Calc., 390. As to obtaining a declaration of the right to act as *pujari*, and to receive the proceeds of a *mandir*, see Prunshankar *v.* Prannath Mahanand, 1 Bom., A. C., 12.

[5] Eshan Chunder Roy *v.* Monmohini Dassi, I. L. R., 4 Calc., 683; see also Gaur Mohan Chowdhry *v.* Madan Mohan Chowdhry, 6 B. L. R., 352.

[6] Rajah Vurmah Valia *v.* Ravi Vurmah Mutha, L. R., 4 I. A., 76.

[7] Sitapershad *v.* Thakur Dass, 5 Calc., 73.

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Succession where manager bound to celibacy.

Where the person appointed to manage an endowment is bound to celibacy, he is usually succeeded by one of his disciples, whom he may nominate in his own lifetime,[1] or by will.[2] But he cannot alter the succession of an endowment belonging to ascetics, by any act of his own in connection with the status under which he originally acquired the trust.[3] There are instances of *muths* in which the mohuntship descends to a personal heir of the deceased, and others in which the existing *mohunt* alone nominates his successor; but the ordinary rule is, that the *muths* of the same sect in a district are associated together—the *mohunts* of these acknowledging one of their number (who is for some reason pre-eminent) as a head; and on the occasion of the death of one, the others assemble to elect a successor out of the *chelas* or disciples of the deceased, if possible; or if there be none of them qualified, then from the *chelas* of another mohunt. After the election the chosen disciple is installed in the guddi of his predecessor.[4]

On a claim for the superintendence of an endowment no acknowledgment by any party can do away with the necessity of proof of due nomination according to the rules and usages of the endowment.[5]

In some cases one member of an order of ascetics who has been associated with a *shebait* succeeds to the office. The principle upon which such succession is allowed, is based entirely upon fellowship and personal association with that other, and a stranger, though of the same order, will be excluded.[6]

In the case of a *mourosi muth*, the investiture by the leading neighbouring *mohunts* at the Bandhara ceremony of one who cannot prove that he was actually appointed by the last mohunt, is not sufficient, in the absence of proof that he has a right to be so appointed as being senior *chela* of the last mohunt, to entitle him to succeed to the *guddi*.[7]

[1] Local Agents of Zillah Hooghly *v.* Kishnanund Dundee, S. D. of 1848, p. 253.
[2] Greedharee Doss *v.* Nundokissore Doss, 11 Moo. I. A., 405.
[3] Mohunt Rumun Dass *v.* Mohunt Ashbul Dass, 1 W. R., 160.
[4] Gossain Dowlut Geer *v.* Bissessur Geer, 19 W. R., 215.
[5] Mohunt Gopal Dass *v.* Mohunt Kerparam Dass, S. D. of 1850, p. 250.
[6] Khuggender Narain Chowdhry *v.* Sharupgir Oghorenath, I. L. R., 4 Calc., 543.
[7] Sitapershad *v.* Thakur Dass, 5 Calc., 73.

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A zemindar, claiming a customary right to grant confirmation of the election of a *mohunt*, must prove the custom.[1]

Among *saniasis* generally, no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his lifetime as his successor, which nomination is generally confirmed by the *mohunts* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among his *chelas*, such successor is elected and installed by the *mohunts* and principal persons of the sect in the neighbourhood, upon the occasion of the funeral obsequies of the deceased. Where, therefore, a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela*, without alleging that he had been nominated by the deceased as his successor and confirmed, or that he had been elected as successor to the deceased, the suit was held not to be maintainable.[2]

Reversion.

If a *shebait* dies without having appointed a successor, the managership reverts to the heirs of the person who endowed the property.[3]

Removal of trustee.

Unless the founder has reserved to himself some special powers of supervision, removal, or nomination, neither he nor his heirs have any greater power in this respect than any other person who is interested in the trust.[4]

Removal of mohunt.

Where, by his will, the *mohunt* of an *akra*, or religious endowment, appointed *A* to be the *malik* of the properties comprised in the endowment, and to receive the dues and pay the debts, and to do everything necessarily connected therewith; and provided that if any act was done prejudicial to any of those purposes or to any property set apart therefor, or contrary to the Hindu practice and religion or usages, the property should vest in such disciple of his who should be competent and virtuous, and *A* obtained probate of the will and entered upon the properties mentioned in it,—it was held, that the Court had no power to revoke the probate under s. 234 of the

[1] Rajah Muttu Ramalinga Setupati *v.* Perianayagum Pillai, L. R., 1 I. A., 209.
[2] Madho Dass *v.* Kamta Dass, I. L. R., 1 All., 539.
[3] M. S. Jai Bansi Kunwar *v.* Chattar Dhari Sing, 5 B. L. R., 181.
[4] Mayne, § 365.

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Succession Act, upon the ground that *A* had, since he took charge of the office, taken to an immoral course of conduct, and in consequence had been excluded from the community of *mohunts*; but that the proper course was to proceed under the Religious Endowments Act, I of 1880.[1]

Religious trust irrevocable.

A trust for religious or charitable purposes, when once properly created, is, like an ordinary trust, wholly irrevocable by the grantor.[2]

Execution of trust.

If the objects for which an endowment was created are not carried out, the property cannot be resumed by the heir of the founder,[3] but the Court becomes the trustee, and will consider in what form and manner the trust is to be executed.[4]

The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government, and the Regulations and Statutes which have, from time to time, been passed with regard to such endowments merely define the manner in which that power was thenceforth to be exercised.[5]

Principles to be followed.

The important principle to be observed by the Courts in dealing with the constitution and rules of religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of litigation, and to be guided by them. The custom and practice in such matters is to be proved by testimony.[6]

Right to erect place of worship.

Members of any sect are at liberty to erect a place of worship, either public or private, on their own property, although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect; and to perform worship, provided that they do not cause material annoyance to their neighbours.[7]

Religious trusts among Mahomedans.

Religious and charitable endowments may be created by

[1] *In re* Mohun Dass, I. L. R., 6 Calc., 11; see Appendix for the Act.

[2] Juggut Mohini Dossee *v.* M. S. Sokheemoney Dossee, 14 Moo. I. A., 289, 302.

[3] Ram Narain Singh *v.* Ramoon Paurey, 23 W. R., 76.

[4] Attorney-General *v.* Brodie, 4 Moo. I. A., 199; and see Mayor of Lyons *v.* Advocate-General of Bengal, L. R., 3 I. A., 32.

[5] Rajah Muttu Ramalinga Setupati *v.* Perianayagum Pillai, L. R., 1 I. A., 209.

[6] Rajah Muttu Ramalinga Setupati *v.* Perianaygum Pillai, L. R. 1 I. A., 209.

[7] Seshayyangar *v.* Sheshayyangar, I. L. R., 2 Mad., 143; Madhary *v.* Goburdhun Hulwai, I. L. R., 7 Calc., 694.

Mahomedans. The law relating to such endowments as stated by the Mahomedan authorities has been dealt with by one of my predecessors, Baboo Shama Churn Sircar, *Tagore Lectures*, 1874, and I only propose now to deal with the case-law on the subject. LECTURE XII.

The chief elements of *wuqf* are special words declaratory of the appropriation, and a proper motive cause; and where the declaration is made in a solemnly published document, the *wuqf* is completed.[1] The primary object for which lands are endowed, and which are the objects which all Mahomedans have in view in endowing lands, are to support a mosque and to defray the expenses of the worship conducted in it.[2] Elements of *wuqf*.

Wuqf implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest: and consecrating it in such manner to the service of God, that it may be of benefit to men, provided always, that the thing appropriated be, at the time of appropriation, the property of the appropriator,[3] even if it consists of an undefined share in an estate. The endowment will in such a case be valid to the extent of the share of the donor when ascertained.[4] Thus, a general dedication of lands for the purpose of a cemetery establishes a *wuqf*, and excepts it from descent to the heirs.[5] But a grant to an individual in his own right, and for the purpose of furnishing him with the means of subsistence, do not constitute a *wuqf*.[6] So, apparently, a *wuqf* cannot be created for the purpose merely of conferring a perpetual and inalienable estate on a particular family, without any ultimate limitation to the use of the poor, or some inextinguishable class of beneficiaries.[7] Creation of.

In *Mahomed Hamidulla Khan* v. *Lotful Huq*,[8] a Mahomedan settled a portion of his property as follows: "I have made *wuqf* of the four annas in favour of my daughter and her descendants, as also her descendants' descendants how low so ever, and when they no longer exist, then in favour of the poor and needy;" and it was held, that this did not

[1] Doyal Chund Mullick *v.* Syud Keramut Ali, 16 W. R., 116.
[2] Muzhurool Huq *v.* Pubraj Ditarey Mohapattur, 13 W. R., 235.
[3] Moohummud Sadik *v.* Moohummud Ali, 1 Sel. Rep., 18.
[4] M. S. Hyotee Khanum *v.* M. S. Koolsum Khanum, 1 Sel. Rep., 217.
[5] Mir Nur Ali *v.* Majidah, 5 Sel. Rep., 136.
[6] Bibee Kuneez Fatima *v.* Bibee Saheba Jan. 8 W. R., 313.
[7] Phate Saheb Bibi *v.* Damodar Premji, I. L.R., 3 Bomb., 84.
[8] I. L. R., 6 Calc., 744.

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create a valid *wuqf*. But this case appears to conflict with the other authorities.

Evidence of appropriation.

No property can be considered as *wuqf* unless it be satisfactorily established that it has been specially so appropriated;[1] for instance, the payment of the expenses of a mosque out of the rents of a particular property is not in itself proof of an endowment.[2] It is not necessary that the grant should be in express terms for the benefit of the endowment, provided that the nature of the tenure be inferrible from the general contents of the grant.[3]

Wuqf to take effect after settlor's death.

The owner of lands may make an endowment settling lands upon himself for life, and after his death, for the support of the poor. In such a case the instrument operates as a will, and is only valid to the extent of one-third of the donor's property.[4] The main object of the Mahomedan law is, that the profits of the land endowed should be endowed for a purpose which always remains in existence. The poor are always with us, and therefore a man making an endowment, and enjoying the profits during his lifetime, to go to the poor after his death, does not make an endowment for uncertain or non-existent objects.[5]

Requisites to valid *wuqf*.

In *Mahomed Hamidulla Khan* v. *Lotful Huq*[6] it was held, that it is necessary among Sunnis, in order to validate a *wuqf*, that the donor should reduce himself to a state of absolute poverty. This is, however, it is submitted, inconsistent with many other rulings.

To constitute a valid *wuqf* according to Shiah law, it must be absolute and unconditional, and possession must be given of the thing granted. Thus, where a Mahomedan lady executed a deed conveying her property, on trust, for religious purposes, reserving for herself for life two-thirds of the income derivable from the property, and only making an absolute and unconditional grant of the rest for the purposes of the trust, it was held, that, under the Shiah law, the deed must be considered invalid with respect to the portion of the income reserved by the grantor to herself for life; but as to the rest that the deed operated as a good and valid grant.[7]

[1] Bindasoondree Dassea *v.* Meheroonissa Khatoon, S. D. A., 1853, pp. 69, 84.
[2] M. S. Shurfoonissa *v.* M. S. Koolsum, 25 W. R., 447.
[3] Kulb Ali Hossein *v.* Syf Ali, 2 Sel. Rep., 139.
[4] *Doe d.* Jaun Beebee *v.* Abdoollah Barber, 1 Fult., 345.
[5] Muzhurool Huq *v.* Pubraj Ditarey Mohapattur, 13 W. R., 235.
[6] I. L. R., 6 Calc., 744.
[7] Hajee Kalub Hossein *v.* M. S. Mehrun Bebee, 4 N. W. P., 155.

According to Mahomedan law, it is not necessary, in order to constitute a valid endowment for religious or charitable purposes, that the word '*wuqf*' should be used in the grant, if from the general nature of the grant it can be inferred that the property is to be so appropriated.[1] And conversely, the use of the word '*wuqf*' is not of itself sufficient to create an endowment. There must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. A Mahomedan cannot, therefore, by using the term *wuqf* effect a settlement of property upon himself and his descendants which will keep such property inalienable by himself and his descendants for ever.[2]

If property has been dedicated for religious or charitable purposes, the use of the words '*inam*,' or '*altamgha*,' in the grant, will not confer an absolute proprietary right in the grantee. By a royal firman granted by Mahomed Firooksir, one lac of *dams* from a certain parganna were endowed and bestowed for the purpose of defraying the expenses of the khankah (a religious establishment) of Sheikh Rubeer, as an *altamgha* grant for him to manage and control and to descend to his heirs in succession from remove to remove. On the petition of Sheikh Gholam, the grandson of Sheikh Rubeer, who had succeeded to the office of sifiada-nashin of the khankah, Mahomed Shah granted a perwannah, enjoining that the lac of *dams* should be considered as an *altamgha-inam* for the purpose of being appropriated to the charges of the travellers to and from the khankah to descend to the offspring in succession; and a similar perwannah was granted on the petition of Sheik Kaim-ood-deen, the son of Sheikh Gholam, after the death of his father. By a subsequent grant by Shah Alam, two lacs of *dams* were granted as an *altamgha-inam* to Sheikh Kaim-ood-deen for the purpose of the frequenters to and from him, and all ranks were enjoined "always to maintain and uphold the august order, and to relinquish the aforesaid *dams* to them to descend to the offspring in succession to be enjoyed by them" free from all Government and revenue charges. In 1807 and 1810, Shah Shum-sood-deen, the then sifiada nashin, alienated part of the property comprised in these grants, and died in 1810,

[1] Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390.

[2] Abdul Ganne Kasam *v.* Hussen Miya Rahimtula, 10 Bom. H. C. R., 7; and see Mahomed Hamidulla Khan *v.* Lotful Huq, I. L. R., 6 Calc., 744.

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leaving the plaintiff, his son, then a minor. In 1829, the plaintiff was appointed by the Government to be mutawalli and sifiada-nashin of the establishment. In a suit instituted by him in 1822 to recover the property alienated by his father, it was held, that, notwithstanding the use of the terms '*inam*' and '*altamgha*' in the royal grants, and the mention therein of the persons on whose petitions the grants were made, yet these grants having been made for the purpose of maintaining a charitable institution, the persons named were not to be considered the proprietors; the establishment of the khankah was the real donee, and the persons named were only mutawallis of the khankah, who as such would have no right to alienate, and therefore that the alienation by Shumsood-deen was illegal.[1]

It is not necessary that the endowment should be in writing, or that the property should be delivered over. A verbal declaration of the intention to create an endowment is sufficient, if in the presence of witnesses.[2] Although the witnesses to the fact depose vaguely, yet their evidence, if corroborated by circumstances, is legally sufficient.[3]

Undue influence.

A *wuqf* will not be valid if the donor was subjected to any undue influence, or was not aware of the nature of the transaction. Thus, where an alleged endower was shown to be an illiterate purdanashin lady, and she denied on oath that, in executing the *wuqfnama*, she had any intention of creating an absolute *wuqf*, or that she understood the effect of the deed when she executed it, it was held, that the onus was on the persons who sought to remove her from the office, to show that she was fully aware of the character of the document and its legal effect, and that she had proper professional advice at the time of its execution, and, in the absence of such proof, that the deed was not binding on her.[4]

Endowment subject to mortgage.

The fact that a mortgage is in existence over property at the time when it is set apart as an endowment, does not invalidate the endowment, which will be considered as being subject to the mortgage. If, after a mortgage, the

[1] Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390; see also M. S. Qadira *v.* Shah Kubeer-ood-deen Ahmud, 3 Sel. Rep., 407.

[2] *Doe* d. Jaun Bibee *v.* Abdoollah Barber, 1 Fult., 345; Shurbo Narain Singh *v.* Ally Buksh Shah, 2 Hay, 415.

[3] Abul Hasan *v.* Haji Mohammad Masih Karbalai, 5 Sel. Rep., 87.

[4] Delross Banoo Begum *v.* Nawab Syud Ashgur Ally Khan, 15 B. L. R., 167; S.C., 23 W. R., 453.

mortgagor endows the land, and dies leaving sufficient assets, his heirs are bound to apply those assets to the redemption of the mortgage, so that the endowment may take effect freed from the mortgage, by the application of other assets of the endower. But, if necessary, the mortgagee may enforce the mortgage by sale of the land, and the endowment will be rendered void as against the heirs of the endower; as against whom the surplus sale-proceeds will be subject to the endowment.[1] So, the mere charge upon the profits of the estate of certain items which must in course of time necessarily cease, and which, after they lapse, will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law.[2]

Revocation.

If property has been given over for religious and charitable purposes and the trust is complete, the *wuqf* cannot be affected by revocation, or by the bad conduct of those responsible for the carrying out of the trusts.[3]

According to Shiah law, the donor may recover back the property from the trustee, if at the time of the creation of the trust he has reserved the right to do so in express terms.[4]

Alienation of *wuqf* property.

As a general rule, it may be stated that the private alienation, temporary or absolute, by mortgage or otherwise, of *wuqf* lands, even though for the repair or other benefit of the endowment, is illegal according to the Mahomedan law;[5] and if endowed property descends as such to the widow of the endower as mutawalli, it cannot be sold in satisfaction of a claim against the estate of the endower.[6] The authorities disagree as to whether the appropriator's right continues or is extinguished; but they agree that it cannot be disposed of by gift or sale, and also that inheritance does not obtain in respect of it.[7]

[1] Shahazadi Hajra Begum *v.* Khaja Hossein Ali Khan, 4 B. L. R., A. C., 86; S. C., 12 W. R., 498.

[2] Muzhurool Huq *v.* Pubraj Ditarey Mohapattur, 13 W. R., 235.

[3] Doyal Chund Mullick *v.* Syud Keramut Ali, 16 W. R., 116. See Gulam Husain Saiyad *v.* Adji Ajam Kurai Shi, 4 Mad., 44.

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

[5] Moulvee Abdoolla *v.* M. S. Rajesri Dossea, 7 Sel. Rep., 268; S. D. A., 1846, p. 266: and see M. S. Qadira *v.* Shah Kubeer-oo-deen Ahmud, 3 Sel. Rep., 543; Abul Hasan *v.* Haji Mohammad Masih Karbalai, 5 Sel. Rep., 87; Kulb Ali Hossein *v.* Syf Ali, 2 Sel. Rep., 139; Moulvee Abdoollah *v.* Ramzoo Dye, S. D. A., 1847, 192; Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390; S. C., 6 W. R., 3.

[6] Fegredo *v.* Mahomed Mudessur, 15 W. R., 75.

[7] Jewun Doss Sahoo *v.* Shah Kubeer-ood-deen, 2 Moo. I. A., 390; S. C., 6 W. R., 3.

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The fact that the land is endowed must be proved, a mere nominal endowment will not prevent alienation.[1]

Nominal endowment.

Alienation subject to trust.

Where the whole of the profits of land are not devoted to religious purposes, but the land is heritable property burdened with a trust,—for example, the keeping up of a saint's tomb,—it may be alienated subject to the trust.[2]

Mortgage by local custom.

By local custom in the Broach District, *wuqf* land may be mortgaged, although the practice is contrary to Mahomedan law; for, by s. 26 of Reg. IV of 1827, the usage of a district in which a suit may arise takes precedence over the law of the defendant in the determination of civil suits.[3]

Lease of *wuqf* property.

If an endowment be wholly *wuqf*, a mutawalli is incapable of granting a lease extending beyond the period of his own life. If, however, the office is hereditary, and the mutawalli has a beneficial interest in the endowment, the property is looked upon as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the mutawalli and his heirs, and he can exercise the right possessed by other proprietors, of granting leases, even in perpetuity.[4]

Where ryots holding land had been in the habit of transferring their holdings with the consent of the mutawallis, it was held, that a mutawalli who considered the practice to be illegal, was not justified in ousting a transferree, but should have taken his legal remedy by action.[5]

Transfer of trust.

The trustee of an endowment has not, as such, the power of transferring his trust to any other person, and where a trustee is empowered to appoint another trustee to act for him, he cannot transfer the right of exercising that power to another or others.[6] An assignment or bequest of the trust by the superintendent to his sons, on his deathbed, is good, but not an assignment made during health, unless he obtained it himself with such power.[7]

[1] Juddo Nundun Burral *v.* Kalee Coomar Ghose, S. D. A., 1852, p. 331.
[2] Futtoo Bibee *v.* Bhurrutlall Bhukut, 10 W. R., 299.
[3] Abas Alli Zenul Abaddin *v.* Gulam Muhammad Valad Baba Mirza, 1 Bom. H. C. R., Cr. Cas., 36.
[4] Dalrymple *v.* Khoondkar Azeezul Islam, S. D. A., 1858, p. 586; see also Shoojat Ali *v.* Zumeerooddeen, 5 W. R., 158.
[5] Moulvee Abdoollah *v.* Ram Zoo Dye, S. D. A., 1847, p. 192.
[6] Rup Narain Singh *v.* Junko Bye, 3 Calc., 112.
[7] Moohummud Sadik *v.* Moohummud Ali, 1 Sel. Rep., 19.

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In dealing with the mutawalli of an endowment, it is not necessary for the purchaser to look further than to the power of the mutawalli under his deed of trust. If the deed gives him power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not.[1]

Purchaser from trustee.

Trustees of an endowment may, if they commit a breach of trust in respect of the trust-property, be made to account to the persons interested in the endowment (see Act XX of 1863, *post*, Appendix). But the fact that trustees have failed to carry out the trusts, will not render the endowment invalid, and cause the property to revert to the heirs of the grantor.[2]

Breach of trust.

Where a mutawalli was proved to have been guilty of waste, the High Court ordered him to file in Court every six months a true and complete account of his income, expenditure, and dealings with the property belonging to the endowment.[3]

If the superintendent of an endowment misconducts himself, he may, according to the Mahomedan law, be removed by the ruling power (see Act XX of 1863, *post* Appendix); and this is sufficient to protect the objects for which the trust was created.[4] But this rule does not apply to the case of a trustee who has an hereditary proprietary right vested in him.[5] In some instances the donor has the power of removing the superintendent. But in order that such power may be exercised, it must have been specially reserved at the time of endowment.[6] Where a plaintiff sued to recover possession of certain property as *wuqf* property, alleging misconduct on the part of the mutawalli in selling a portion of the property, but the plaintiff did not state or prove, that he was entitled to partake of the benefit of the endowment, nor did he show that he was the heir, or even a near relative, of the person who made the endowment,—it was held, that the utmost that he had a right to do as a descendant of the endower

Removal of trustee.

[1] Moonshee Golam Ali *v.* M. S. Sowlutoonissa Bibee, W. R., 1864, p. 242.
[2] Kasheshurree Dassee *v.* Krishnakaminee Dassee, 2 Hay, 557; Reasut Ali *v.* Abbott, 12 W. R., 132; Syud Asheerooddeen *v.* S. M. Drobo Moyee, 25 W. R., 557.
[3] Syud Imdad Hossein *v.* Mahomed Ali Khan, 23 W. R., 150.
[4] Hidait-oon-nissa *v.* Syud Afzul Hossein 2 N. W. P., 420; Moohummud Sadik *v.* Moohummud Ali, 1 Sel. Rep., 19.
[5] Gulam Hussain Saib Saiyad *v.* Adji Ajam Saib Kuraishi, 4 Mad. H. C. R., 44.
[6] *Ibid.*

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was, to have the mutawalli removed and a new mutawalli appointed; and that, in strictness, he ought to show circumstances which, according to law, would justify the Court in selecting a mutawalli.[1]

The appropriator of land for religious or charitable purposes can confer the office of superintendent on another at any time;[2] and a trustee may appoint a manager, but such appointment is not effectual beyond the incumbency of the appointor.[3]

Office of trustee.

When property is appropriated for religious or charitable purposes, it is vested in some person or persons whose duty it is to preserve it and to carry out the trusts created. According to both Sunni and Shiah law, the donor has a right to reserve the superintendence of the *wuqf* to himself, or to appoint some one else.[4] The right to the income of land endowed for such purposes is inseparable from the office for the support of which the land was granted,[5] and cannot be claimed by the grantor's heirs. The fact that a person is a Shiah does not disqualify him for the supervision of a *wuqf* made by a Sunni.[6]

Female may be mutawalli.

A female may act as mutawalli. She may manage the temporal affairs of the endowment, but not the spiritual affairs connected with it, the management of the latter requiring peculiar personal qualifications. These duties she may discharge by proxy.[7]

Succession to the office.

When property is devoted to religious or charitable purposes, it is usual for the appropriator to lay down rules for succession to the office of trustee, and upon these rules, whether they are in writing, or have to be inferred from evidence of usage, the question of succession depends.[8] Should no rules be laid down, the power of appointing a trustee is vested in the appropriator during his life, and upon his death, it is vested in his executor; or should he have left no executor, in the magistrate and sovereign

[1] Hurruck Chund Sahoo *v.* Golam Shuruff, 10 W. R., 453.
[2] Sheik Abdool Khalek *v.* Poran Bibee, 25 W. R., 542.
[3] Shah Moheeooddeen Ahmed *v.* Elahee Buksh, 6 W. R., 277.
[4] Advocate-General *v.* Fatima Sultani Begam, 9 Bom. H. C. R., 19.
[5] Jafar Mohiudin Sahib *v.* Ali Mohiudin Sahib, 2 Mad. H. C. R., 19.
[6] Doyal Chund Mullick *v.* Syud Keramut Ali, 16 W. R., 116.
[7] *Doe d.* Jaun Beebee *v.* Abdoollah Barber, 1 Fult., 345; M. S. Hyatee Khanum *v.* M. S. Koolsum Khanum, 1 Sel. Rep., 217; Hussain Beebee *v.* Hussain Sherif, 4 Mad. H. C. R., 23.
[8] Shah Gulam Rahumtulla Sahib *v.* Mahommed Akbar Sahib, 8 Mad. H. C. R., 63.

power,—that is to say, in the Court.[1] When the donor has specified the class from which the manager is to be selected, he cannot discharge his own trust-deed and name a person not answering the proper description. He is bound by the provisions of the deed, and the appropriator's right of nomination of the person to succeed to the management on his death must be confined to the class mentioned in the deed.[2]

In *Agha Mahomed Eusoof Moosadee* v. *Abdool Hossein Khan*[3] it was held, that the power of appointment of a superintendent of a mosque, if not provided for by some special rule in a deed of endowment, must be governed by the ordinary rule of Mahomedan law, under which, in the absence of all provision on the subject in the deed of endowment, a superintendent is authorized on his death-bed to appoint a successor, though the appropriator has not given him a general permission. And in *Peet Koonwar* v. *Chutter Dharee Singh*,[4] that when the mutawalli of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property.

Where, so far as the will of a founder could be ascertained from the usage of former days, it seemed to authorize a mode of succession originating in an appointment by the incumbent of a successor, it was held, that the Court would not be authorized to find in favour of any rule of succession by primogeniture, solely from the circumstance that the persons appointed were usually the elder sons.[5]

Suits in respect of *wuqf* property.

A suit to recover property alleged to be *wuqf* belongs not to the heirs or descendants of the settlor, but to the mutawallis jointly.[6] But a person who has been convicted of having misappropriated *wuqf* property cannot obtain the assistance of the Court to recover the property in order to enable him to exercise the office of mutawalli.[7] When

[1] Moohumud Sadik *v.* Moohumud Ali, 1 Sel. Rep., 18; Muhammad Kasim *v.* Muhammad Alum Kiyamuddeen, 5 Sel. Rep., 133; Advocate-General *v.* Fatima Sultani Begam, 9 Bom. H. C. R., 19; Phate Saheb Bibi *v.* Damodar Premji, I. L. R., 3 Bomb., 84. See also Act XX of 1863, *post*, Appendix.

[2] Advocate-General *v.* Fatima Sultani Begam, 9 Bom. H. C. R., 19.

[3] S. D. A. 1857, p. 640.

[4] 13 W. R., 396.

[5] Shah Gulam Rahumtulla Sahib *v.* Mahommed Akbar Sahib, 8 Mad. H. C. R., 63.

[6] Phate Saheb Bibi *v.* Damodar Premji, I. L. R., 3 Bomb., 84.

[7] Aga Mahomed Kumul Tehranee *v.* Aga Abbas Tehranee, S. D. A., 1859, p. 285.

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the Court, in the exercise of its charitable jurisdiction, is called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the litigants will be regulated by reference to the religious tenets held by the community in its origin, and a minority holding those tenets will prevail against a majority which has receded from them.[1]

Where a plaintiff who had for eighteen years held a portion of certain lands, though termed *wuqf*, as privately heritable and divisible lands, other portions being similarly held by other parties, co-heirs with the plaintiff, of the last occupiers,—it was held, that the plaintiff could not be allowed to sue for exclusive possession of the whole of the lands as mutawalli, upon tender of proof that they were *wuqf*.[2] In a suit for possession of land granted in trust for purposes connected with the preservation of the tomb of a Mahomedan saint, where the plaintiff claimed as son of the last mutawalli, on the allegation that he had been dispossessed during his minority, and the defendant contended that the property had never been in the possession of mutawallis, but had been divided among the original grantee's heirs, from one of whom the portion in dispute had come into the possession of his (the defendant's) vendor, it was held, that the material point to try was, whether the plaintiff's ancestors had, from the time of the grant, been in possession, or whether the land had been inherited according to the ordinary rules of Mahomedan inheritance by the heirs of the grantee.[3]

The worshippers at a public mosque can maintain a suit to restrain the superintendents of such mosque from using it or its appurtenant rooms for purposes other than those for which they were intended to be used, and from doing acts which are likely to obstruct worshippers from entering or leaving such mosque.[4]

[1] Advocate-General *v.* Muhammad Husen Huseni, 12 Bom. H. C. R., 323.
[2] Hajee Nooroollah *v.* Meer Waris Hossein, S. D. A. 1853. p. 411.
[3] Reasnt Ali *v.* Abbott, 12 W. R., 132.
[4] Abdul Rahman *v.* Yar Muhammed, I. L. R., 3 All., 636.

APPENDIX.

REGISTRATION OF SOCIETIES.

ACT XXI OF 1860.

An Act for the Registration of Literary, Scientific, and Charitable Societies.

WHEREAS it is expedient that provision should be made for improving the legal condition of Societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, or for charitable purposes; It is enacted as follows:

Preamble.

I. Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in section XX of this Act, may, by subscribing their names to a memorandum of association, and filing the same with the Registrar of Joint Stock Companies under Act XIX of 1857, form themselves into a society under this Act.

Societies formed by memorandum of association.

II. The memorandum of association shall contain the following things (that is to say):—

Memorandum of association.

The name of the society.

The objects of the society.

The names, addresses, and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted. A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association.

III. Upon such memorandum and certified copy being filed, the Registrar shall certify under his hand that the society is registered under this

Registration.

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There shall be paid to the Registrar, for every such registration, a fee of fifty rupees, or such smaller fee as the Governor General of India in Council may, from time to time, direct; and all fees so paid shall be accounted for to the Government.

Annual list of managing body to be filed.

IV. Once in every year, on or before the 14th day succeeding the day on which, according to the rules of the society, the annual general meeting of the society is held, or if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar of Joint Stock Companies, of the names, addresses, and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

Property of society how to be vested.

V. The property, moveable and immoveable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title.

How suits by and against societies to be brought.

VI. Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society; and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion: provided that it shall be competent for any person having a claim or demand against the society, to sue the president, or chairman, or principal secretary, or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

Suits not to abate.

VII. No suit or proceeding in any Civil Court shall abate or discontinue by reason of the person, by or against whom such suits or proceedings shall have been brought or continued, dying, or ceasing to fill the character in the name whereof he shall have sued, or been sued, but the same suit or proceeding shall be continued in the name of or against the successor of such person.

How judgment to be enforced against.

VIII. If a judgment shall be recovered against the person or officer named on behalf of the society, such judgment shall not be put in force against the property, moveable or immoveable, or against the body of such person or officer, but against the property of the society. The application for execution shall set forth the judgment, the fact of the party against

whom it shall have been recovered having sued or having been sued, as the case may be, on behalf of the society only, and shall require to have the judgment enforced against the property of the society.

Society may make bye-law to be enforced.

IX. Whenever by any bye-law duly made in accordance with the rules and regulations of the society, or if the rules do not provide for the making of bye-laws, by any bye-law made at a general meeting of the members of the society convened for the purpose (for the making of which the concurrent votes of three-fifths of the members present at such meeting shall be necessary), any pecuniary penalty is imposed for the breach of any rules or bye-law of the society, such penalty, when accrued, may be recovered in any Court having jurisdiction where the defendant shall reside, or the society shall be situate, as the governing body thereof shall deem expedient.

Members liable to be sued as strangers.

X. Any member who may be in arrear of a subscription which, according to the rules of the society, he is bound to pay, or who shall possess himself of, or detain, any property of the society, in a manner or for a time contrary to such rules, or shall injure or destroy any property of the society, may be sued for such arrear or for the damage accruing from such detention, injury, or destruction of property in the manner hereinbefore provided. But if the defendant shall be successful in any suit or other proceeding brought against him at the instance of the society, and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit shall be brought, or from the society; and in the latter case shall have process against the property of the said society in the manner above described.

Members guilty of offences punishable as strangers.

XI. Any member of the society, who shall steal, purloin, or embezzle any money or other property, or wilfully and maliciously destroy or injure any property of such society, or shall forge any deed, bond, security for money, receipt or other instrument, whereby the funds of the society may be exposed to loss, shall be subject to the same prosecution, and, if convicted, shall be liable to be punished in like manner, as any person not a member would be subject and liable to in respect of the like offence.

Societies enabled to alter, extend, or abridge their purposes.

XII. Whenever it shall appear to the governing body of any society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of this Act, or to amalgamate such society, either wholly or partially, with any

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Provision for the dissolution of societies and adjustment of their affairs.

XIII. Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and, if not, then as the governing body shall find expedient; provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of the society is situate; and the Court shall make such order in the matter as it shall deem requisite. Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose. Provided that, whenever the Government is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved without the consent of Government.

Upon a dissolution no member to receive profit.

XIV. If, upon the dissolution of any society registered under this Act, there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said society or any of them, but shall be given to some other society, to be determined by the votes of not less than three-fifths of the members present, personally or by proxy, at the time of the dissolution, or in default thereof by such Court as aforesaid. Provided, however, that this clause shall not apply to any society which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company.

Proviso for joint stock companies.

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XV. For the purposes of this Act, a member of a society shall be a person, who, having been admitted therein according to the rules and regulations thereof, shall have paid his subscription, or shall have signed the roll or list of members thereof, and shall not have resigned in accordance with such rules and regulations; but in all proceedings under this Act, no person shall be entitled to vote or be counted as a member whose subscription at the time shall have been in arrear for a period exceeding three months.

Who is a member.

XVI. The governing body of the society shall be the governors, council, directors, committee, trustees, or other body to whom, by the rules and regulations of the society, the management of its affairs is entrusted.

The governing body defined.

XVII. Any company or society established for a literary, scientific, or charitable purpose, and registered under Act XLIII of 1850, or any such society established and constituted previously to the passing of this Act, but not registered under the said Act XLIII of 1850, may, at any time hereafter, be registered as a society under this Act, subject to the proviso that no such company or society shall be registered under this Act, unless an assent to its being so registered has been given by three-fifths of the members present personally or by proxy at some general meeting convened for that purpose by the governing body. In the case of a company or society registered under Act XLIII of 1850, the directors shall be deemed to be such governing body. In the case of a society not so registered, if no such body shall have been constituted on the establishment of the society, it shall be competent for the members thereof, upon due notice, to create for itself a governing body to act for the society thenceforth.

Registration of societies formed before this Act.

XVIII. In order to any such society as is mentioned in the last preceding section obtaining registry under this Act, it shall be sufficient that the governing body file with the Registrar of Joint Stock Companies, under Act XIX of 1857, a memorandum showing the name of the society, the objects of the society, and the names, addresses, and occupations of the governing body, together with a copy of the rules and regulations of the society certified as provided in section II, and a copy of the report of the proceedings of the general meeting at which the registration was resolved on.

Such societies to file memorandum, &c., with Registrar of Joint Stock Companies.

XIX. Any person may inspect all documents filed with the Registrar under this Act on payment of a fee of one rupee for each inspection; and any person may require a copy or extract

Inspection of documents.

APPDX. of any document or any part of any document to be certified by the Registrar, on payment of two annas for every hundred words of such copy or extract; and such certified copy shall be *primâ facie* evidence of the matters therein contained in all legal proceedings whatever.

Certified copies.

XX. The following societies may be registered under this Act: charitable societies; the military orphan funds or societies established at the several presidencies of India; societies established for the promotion of science, literature, or the fine arts; for instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public; or public museums and galleries of paintings and other works of art; collections of natural history; mechanical and philosophical inventions, instruments, or designs.

To what societies the Act shall apply.

RELIGIOUS ENDOWMENTS.

ACT XX OF 1863.

An Act to enable the Government to divest itself of the management of Religious Endowments.

WHEREAS it is expedient to relieve the Boards of Revenue and the Local Agents in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX of 1810 of the Bengal Code (for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindu temples, colleges, and other purposes; for the maintenance and repair of bridges, serays, kuttras, and other public buildings; and for the custody and disposal of nuzzool property or escheats) and Regulation VII of 1817 of the Madras Code (for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindoo temples, and colleges, or other public purposes; for the maintenance and repair of bridges, choultries, or chuttrums, and other public buildings; and for the custody and disposal of escheats), so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindoo temples, and for other religious uses,—the appropriation of endowments made for the maintenance of such religious establishments,—the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof, or involve any connexion with the management of such religious establishments; and whereas it is expedient for that purpose to repeal so

Preamble.

much of Regulation XIX of 1810 of the Bengal Code, and Regulation VII of 1817 of the Madras Code, as relate to endowments for the support of mosques, Hindoo temples, or other religious purposes; It is enacted as follows :— APPDX.

I. So much of Regulation XIX of 1810 of the Bengal Code, and so much of Regulation VII of 1817 of the Madras Code, as relate to endowments for the support of mosques, Hindoo temples, or other religious purposes, are repealed.

Regulations repealed.

II. In this Act words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Number.

Words importing the masculine gender shall include females.

Gender.

The words 'Civil Court' and 'Court' shall mean the principal Court of original civil jurisdiction in the District in which the mosque, temple, or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act.

III. In the case of every mosque, temple, or other religious establishment to which the provisions of either of the Regulations specified in section I are applicable, and the nomination of the trustee, manager, or superintendent whereof, at the time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such trustee, manager, or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.

Local Government to make special provision respecting mosques, &c., in certain cases.

The words "trustee, manager, or superintendent of a mosque," etc., mentioned in this Act, mean the trustee, manager, or superintendent of a mosque, etc., to which the provisions of the Act are applicable, not the trustee, etc., of any mosque; and such persons are those to whom the provisions of the Regulations mentioned in s. 1 were applicable. The mosques, etc., to which the provisions of those Regulations were applicable, were mosques for the support of which endowments had been granted in land by the Government of the country or by individuals; and the mosques, etc., to which the provisions of this Act apply are, not any mosque, etc., but any mosque for the support of which such endowments have been made—*Jan Ali* v. *Ram Nath Mundul*, Reg. App. No. 149 of 1880, I. L. R., 8 Calc., January number.

Where the tomb of a reputed saint became a place of pilgrimage, and an endowment was made for the maintenance of the shrine and for the performance of certain religious ceremonies, and it appeared that there was a practice on the part of the proprietors and the managers of the institution to divide among themselves the residue of the income, and to dispose by way of sale or mortgage of the share enjoyed by them,—it was held, that this was a religious institution within the meaning of the Act.—*Fakuruddin Sahib* v. *Ackoni Sahib*, I. L. R., 2 Mad., 197.

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A committee appointed under this Act have power to dismiss trustees or superintendents of temples described in this section, without having recourse to a civil suit; but such powers can only be exercised on good and sufficient grounds.—*Chinna Rangaiyangar* v. *Subbraya Mudali*, 3 Mad. H. C. R., 334. Where no such grounds appeared, a suit, brought by the person who had been appointed by the committee as superintendent in place of the defendants for the recovery of the temple and the property belonging to it, was dismissed.—*Ibid.*

Transfer to independent trustees, &c., of all property belonging to their trusts, &c., remaining in charge of Revenue Board or others.

IV. In the case of every such mosque, temple, or other religious establishment which, at the time of the passing of this Act, shall be under the management of any trustee, manager, or superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager, or superintendent all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue or any local agent, and belonging to such mosque, temple, or other religious establishment, except such property as is hereinafter provided; and the powers and responsibilities of the Board of Revenue and the local agents, in respect to such mosque, temple, or other religious establishment, and to all land and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue, or any local agent, previous to such transfer, shall cease and determine.

Where the manager of endowed property had been ejected by the Collector under Regulation VII of 1817, it was held, that, on the passing of this Act, the manager became entitled by virtue of this section to the restoration of the endowment.—*Jusagheri Gosamiar* v. *The Collector of Tanjore*, 5 Mad. H. C. R., 334.

In 1849 the Board of Revenue interfered in the affairs of a temple. It did not appear whether any transfer of property had been made under this section; but, in 1865, the Judge of Patna appointed a manager of the temple. It was held, that the right of Government officers to control the affairs of the temple had been sufficiently proved—*Dhurm Singh* v. *Kissen Singh*, I. L. R., 7 Calc. 767.

Procedure in case of dispute as to right of succession to vacated trusteeship, &c.

V. Whenever from any cause a vacancy shall occur in the office of any trustee, manager, or superintendent, to whom any property shall have been transferred under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple, or religious establishment to which such property shall belong, or in the performance of the worship or of the service thereof, or the trusts relating thereto, to apply to the Civil Court to

appoint a manager of such mosque, temple, or other religious establishment, and thereupon such Court may appoint such manager, to act until some other person shall by suit have established his right of succession to such office. The manager so appointed by the Civil Court shall have, and shall exercise, all the powers which, under this or any other Act, the former trustee, manager, or superintendent, in whose place such manager is appointed by the Court, had or could exercise, in relation to such mosque, temple, or religious establishment, or the property belonging thereto.

Where an application by a petitioner under this section to be appointed manager of a religious endowment was rejected by the Judge after hearing both sides, on the ground that there had been no transfer of the property by the Local Government under s. 4, the Court refused to interfere under cl. 15 of the Charter, holding, that the Judge had not declined to accept jurisdiction in the case, and that he was right in refusing to accept the jurisdiction vested in him by this section.—*Khajah Ashruf Hossein* v. *M. S. Hazara Begum*, 18 W. R., 396.

VI. The rights, powers, and responsibilities of every trustee, manager, or superintendent, to whom the land and other property of any mosque, temple, or other religious establishment is transferred in the manner prescribed in section IV of this Act, as well as the conditions of their appointment, election, and removal, shall be the same as if this Act had not been passed, except in respect of the liability to be sued under this Act, and except in respect of the authority of the Board of Revenue and local agents, given by the Regulations hereby repealed, over such mosque, temple, or religious establishment, and over such trustee, manager, or superintendent, which authority is hereby determined and repealed. All the powers which might be exercised by any Board, or local agent, for the recovery of the rent of land or other property transferred under the said section IV of this Act, may, from the date of such transfer, be exercised by any trustee, manager, or superintendent to whom such transfer is made.

Rights, powers, and responsibilities of trustees, &c., to whom any charge shall be transferred.

VII. In all cases described in section III of this Act, the Local Government shall once for all appoint one or more committees in every Division or District, to take the place, and to exercise the powers, of the Board of Revenue and the local agents under the Regulations hereby repealed. Such committee shall consist of three or more persons, and shall perform all the duties imposed on such Board and local agents, except in respect of any property which is specially provided for under section XXI of this Act.

Appointment of committees.

A district committee has no right to call for accounts from the trustees of temples which are within s. 4.—*Venkatabalakrishna Chettiyar* v. *Kaliya Naramaiyangar*, 5 Mad. H. C. R., 48; *Ramiengar* v. *Gnanasmbanda Pandarasannada*, *ib.*, 53.

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VIII. The members of the said committee shall be appointed from among persons professing the religion for the purposes of which the mosque, temple, or other religious establishment was founded, or is now maintained, and in accordance, so far as can be ascertained, with the general wishes of those who are interested in the maintenance of such mosque, temple, or other religious establishment. The appointment of the committee shall be notified in the official Gazette. In order to ascertain the general wishes of such persons in respect of such appointment, the Local Government may cause an election to be held, under such rules (not consistent with the provisions of this Act) as shall be framed by such Local Government.

Provision as to qualifications for member of such committee.

IX. Every member of a committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness, and no such member shall be removed except by an order of the Civil Court as hereinafter provided.

Every member to be appointed for life, unless removed for misconduct, &c.

X. Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested as above provided, under rules for elections which shall be framed by the Local Government, and whoever shall be then elected, under the said rules, shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy.

Provision for filling up vacancies.

XI. No member of a committee appointed under this Act shall be capable of being, or shall act, also as a trustee, manager, or superintendent of the mosque, temple, or other religious establishment, for the management of which such committee shall have been appointed.

No member of a committee to be trustee, &c., of the mosque, &c., under charge of such committee.

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XII. Immediately on the appointment of a committee, as above provided, for the superintendence of any such mosque, temple, or religious establishment, and for the management of its affairs, the Board of Revenue, or the local agents acting under the authority of the said Board, shall transfer to such committee all landed or other property which at the time of appointment shall be under the superintendence or in the possession of the said Board or local agents and belonging to the said religious establishment, except as is hereinafter provided for, and thereupon the powers and responsibilities of the Board and the local agents in respect to such mosque, temple, or religious establishment, and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or agents previous to such transfer, shall cease and determine. All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under this section, may, from the date of such transfer, be exercised by such committee to whom such transfer is made.

On appointment of committee, Board and local agents to transfer property.

XIII. It shall be the duty of every trustee, manager, and superintendent of a mosque, temple, or religious establishment, to which the provisions of this Act shall apply, to keep regular accounts of his receipts and disbursements in respect of the endowments and expenses of such mosque, temple, or other religious establishment; and it shall be the duty of every committee of management, appointed or acting under the authority of this Act, to require from every trustee, manager, and superintendent of such mosque, temple, or other religious establishment the production of such regular accounts of such receipts and disbursements at least once in every year, and every such committee of management shall themselves keep such accounts thereof.

Account of receipts and disbursements.

XIV. Any person or persons interested in any mosque, temple, or religious establishment, or in the performance of the worship, or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager, or superintendent of such mosque, temple, or religious establishment, or the member of any committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such trustee, manager, superintendent, or member of such committee, in respect of the trusts vested in or confided to them, respectively, and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent, or member of

Any person interested may sue in case of breach of trust, &c.

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a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, manager, superintendent, or member of a committee.

This section is generally applicable to all religious endowments, and while it in one sense restrains the ordinary Courts from dealing with cases against trustees of religious endowments, it gives special facilities for suits in the principal Civil Court of the district by any of the persons mentioned in these endowments.—*Dhurm Singh* v. *Kissen Singh*, I. L. R., 7 Calc., 767.

Under s. 15 of Reg. XIX of 1810, it was decided that a curator, removed by the Board of Revenue on the ground of misconduct, might bring an action to try the sufficiency of that ground.—*Wasik Ali Khan* v. *The Government*, 5 Sel., 370; 6 *Ibid*, 130.

In a suit by two of the worshippers at a certain mosque, instituted, after having obtained the sanction of the Advocate-General under s. 539 of the Civil Procedure Code, against the mutawalli of the mosque, and two other persons to whom the mutawalli had mortgaged part of the endowed property to secure the repayment of a loan, it appeared that one of the mortgagees had sold some of the *wuqf* property in execution of a decree which he had obtained upon his mortgage, and the property had been purchased by the other mortgagee. The plaintiffs prayed that the property purchased might be declared to be *wuqf*; that the sale in execution might be declared to be invalid; that a mutawalli might be appointed by the Court; and that the costs of doing the acts of the *wuqf* might be defrayed from the profits of the property belonging to the endowment. It was held, that so far as regarded that portion of the prayer as fell within the provisions of s. 539 of the Code, the plaintiffs were not entitled to sue, as they were not "persons having a direct interest in the trust" within the meaning of that section, and that the suit should have been instituted under this section after sanction obtained under s. 18; and that although the plaintiffs might possibly have obtained leave to sue under s. 30 of the Code on behalf of themselves and the other persons attending the mosque, they not having obtained such leave were not entitled to institute the suit for the purpose of obtaining the relief asked for in the other prayers of the plaint.—*Jan Ali* v. *Ram Nath Mundul*, Reg. App., No. 149 of 1880, I. L. R., 8 Calc., January number.

Where a sacred book was kept at a temple and was an object of veneration to the members of the sect entitled to worship there, it was held, that a suit would lie under this section, by some of the persons interested in the temple, to restrain the superintendent from removing the book to another place, and that he should be directed to retain the book as a portion of the furniture of the temple.—*Dhurm Singh* v. *Kissen Singh*, I. L. R., 7 Calc., 767.

An order under this section should be mandatory and not prohibitory.—*Ibid.*

This section empowers the Court to remove trustees, whether hereditary or selected.—*Fakrudin Sahib* v. *Acheni Sahib*, I. L. R., 2 Mad., 197.

Nature of interest entitling a person to sue.

XV. The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate, interest, or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts. Any person having a right of attendance, or having been in the habit of

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attending at the performance of the worship or service of any mosque, temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section.

Nature of suits contemplated by Act.

The suits to which this Act applies are such as come within the provisions of s. 14, which only refer to suits against trustees, managers, or superintendents, or the members of a district committee while in office.—*Jeyangarulavaru* v. *Sri Hati Durma Dossji*, 4 Mad. H. C. R., 2. It applies, in fact, to such religious trusts and endowments which had been, or might come to be, under the management of the Government.—*Kalee Churn Giree* v. *Golabi*, 2 C. L. R., 128. It does not apply to a suit brought by the *dharmakarta* of a temple and one of its worshippers to compel the heir of the late manager to make good, out of the property inherited by him, the deficiency in the *devasthanum* funds caused by the breach of trust and misapplication of the late manager.—*Jeyangarulavaru* v. *Sri Hati Durma Dossji*, 4 Mad. H. C. R., 2.

A suit for the removal of a mohunt and the appointment of another in his place is not within the Act.—*Kishore Bun Mohunt* v. *Kalee Churn Giree*, 22 W. R., 364. And a suit by an officer of a mosque, temple, or other religious endowment, for dismissal from his office, is not a suit for misfeasance, within the meaning of s. 14.—*Syed Amin Sahib* v. *Ibram Sahib*, 4 Mad. H. C. R., 112.

Where the plaintiffs described themselves as the Calcutta Tairo Puntee Anungo Punch Brethren, and alleged that the management and control of the temples, endowments, and worship of the Digumbery sect of Jains was vested in them, and that they formed the committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India, and sued for the construction of a will and a declaration of their rights thereunder as members of the Punch, and to have property dedicated by the will to religious purposes ascertained and secured, it was held, that such a suit did not fall under Act XX of 1863, but came under the ordinary jurisdiction of the Court, which is similar in its general features to that of the Lord Chancellor in England.—*Panch Comrie Mull* v. *Chumroololl*, I. L. R., 3 Calc., 563; S. C., 2 C. L. R., 121.

By whom suits may be brought.

Any person interested in the endowment, and the interest need not be a pecuniary one, may, after leave obtained, sue the trustee, manager, or superintendent, or the members of a committee appointed under the Act, for misfeasance.—*Bibee Kuneez Fatima* v *Bibee Saheba Jan*, 8 W. R., 313.

Frame of suit.

The plaintiff should sue on behalf of himself and the other persons interested in the due performance of the trust, stating what breaches of trust have been committed, and praying that the trustee may be removed; that some proper person may be appointed in his place; that a scheme may be framed for the purpose of having the breach of trust rectified and properly carried out in future; and for an account.—*Kalee Churn Giri* v. *Golabi*, 2 C. L. R., 131; *Rup Narain Singh* v. *Junko Bye*, 3 C. L. R., 115.

It is not necessary to show that the endowment was one which was formerly under the control of the Board of Revenue.—*Ganes Singh* v. *Ramgopal Singh*, 5 B. L. R., Appx., 55.

Act does not apply to wrong-doers.

These sections as to suits deal only with the trustees, managers, superintendents, and committees of temples for acts done by them while filling the office of trustee, manager, superintendent, or committee, and do not apply to persons who, without any authority, by election,

APPDX. appointment, or otherwise, have intruded themselves into the management of a temple and possession of its properties.—*Sabapathi* v. *Subraya*, I. L. R., 2 Mad., 58.

The jurisdiction given to Courts by this Act cannot be excluded by any clause in a deed of endowment.—*Syud Imdad' Hosscin* v. *Mahomed Ali Khan*, 23 W. R., 150.

An appeal does not lie from an order passed under this Act, but the party dissatisfied with the order may seek to set it aside by a regular suit.—*Kudeeram Singh* v. *Sham Singh Poojoory*, W. R., Sp. (Mis.), 25; *Delrus Banoo Begum* v. *Hadjee Aboor Ruhman*, 21 W. R., 368.

Reference to arbitrators.

XVI. In any suit or proceeding instituted under this Act, it shall be lawful for the Court before which such suit or proceeding is pending, to order any matter in difference in such suit to be referred for decision to one or more arbitrators. Whenever any such order shall be made, the provisions of chapter vi of the Code of Civil Procedure shall, in all respects, apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under s. 312 of the said Code.

See now Act X of 1877, chap. xxxvii, and s. 506.

Reference under s. 312 of Civil Procedure Code.

XVII. Nothing in the last preceding section shall prevent the parties from applying to the Court, or the Court from making the order of reference under the said s. 312 of the said Code of Civil Procedure.

See now Act X of 1877, s. 506.

Preliminary application for leave to institute suit.

XVIII. No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court, on the perusal of the application, shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution. In calculating the costs at the termination of the suit, the stamp-duty on the preliminary application shall be estimated, and shall be added to the costs of the suit. If the Court shall be of opinion that the suit has been for the benefit of the trust, and that no party to the suit is in fault, the Court may order costs, or such portion as it may consider just, to be paid out of the estate.

Costs.

Section 18 of Act XX of 1863 applies only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Reg. XIX of 1810, and were transferred to trustees or managers under s. 4 of the Act.—*Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*, 15 B. L. R., 167; S. C., 23 W. R., 453.

A, a Mahomedan lady, executed a wuqfnama, purporting to dedicate the whole of her property to an imambara in her house, for the purpose of perpetuating various Shiah ceremonies. By the wuqfnama she

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constituted herself joint-mutawali with one *B*, and caused the name of herself and *B* as mutawalis to be substituted in the Collector's register for her own name as owner. On the death of *B*, *A* acted as the sole mutawali. The wuqfnama was publicly registered. But though the property was styled 'wuqf' and *A* the mutawali in all documents connected with the estate, *A* continued to deal with it as absolute owner, and the dedication, though made in 1852, was never under the control of the Board of Revenue or of local agents. In a suit, which the plaintiffs obtained leave to institute, under s. 18 of Act XX of 1863, to remove *A* from the mutawaliship, on the ground of misfeasance, it was held, that the wuqfnama did not constitute a public religious establishment within the meaning of Act XX of 1863, and that therefore the Judge below had no authority to give the plaintiffs leave to sue under s. 18, and that his decision was consequently *ultra vires*.—*Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*, 15 B. L. R., 167; S. C., 23 W. R., 453.

The suits mentioned in the Act as needing the authority of the Court for their institution, are solely suits charging trustees, managers, or committees with misfeasance, malversation of the temple property, or neglect of duty. There is nothing in the Act to oust the jurisdiction of the ordinary Courts over suits to establish a right to share in the management.—*Agri Sharma Embrandri* v. *Vistnu Embrandri*, 3 Mad. H. C. R., 198.

The Act, while it empowers persons to sue whose right to sue, independently of the Act, may be doubtful, does not deprive persons, claiming to be beneficiaries under a deed of endowment, of the right to sue which they have independently of the Act: nor does it impose on them the necessity of obtaining the sanction to institute the suit required by s. 18 of the Act.—*Hajee Kalub-Hossein* v. *M. S. Mehrum Beebee*, 4 N. W. P., 155; *Jeyangarulavaru Sri Hati Durma Dossji*, 4 Mad. H. C. R., 2.

An appropriator, who sues on the ground that the trust created, so far as it relates to the appointment of mutawalis, has never been acted upon, and that the original rights of the appropriator remain, is at liberty to bring such a suit without the leave of the Court under s. 18 of Act XX of 1863.—*Hidait-oon-nissa* v. *Syud Afzul Hossein*, 2 N. W. P., 420.

The committee of a district duly appointed under Act XX of 1863 are entitled to maintain a suit in the Civil Court without having obtained the leave of the Court to bring the suit, as well when the object of the suit is to establish their right of control under s. 3 of the Act, as when it is sought to enforce such control against the officers of the temple subordinate to them.—*Venkatasa Naidu* v. *Sadayopasamy Iyer*, 4 Mad. H. C. R., 404.

An order of the Civil Court under this section refusing leave to institute a suit, and deciding that an endowment is governed in a particular manner, is not apparently conclusive upon the question of title between the parties.—*Venkatasa Naiker* v. *Srinivassa Chariyar*, 4 Mad. H. C. R., 410.

It is the duty of the Court acting under s. 18 of Act XX of 1863 to see that there are some sufficient grounds for giving a person permission to institute a suit under the provisions of the Act, for such permission does not only contemplate that the Court may remove such trustee, manager, superintendent, or member of a committe entrusted with the management of the endowed property, but it also contemplates that the Court shall call upon such trustee, manager, superintendent, or member of a committee to file in Court an account of his trust.—*Kishore Bon Mohunt* v. *Kalee Churn Giree*, 22 W. R., 364.

No order for costs out of the estate can be made where a party to the suit is in fault.—*Sookram Doss Mohunt* v. *Nund Kishore Doss Mohunt*, 22 W. R., 21.

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XIX. Before giving leave for the institution of a suit, or after leave has been given, before any proceeding is taken, or at any time when the suit is pending, the Court may order the trustee, manager, or superintendent, or any member of a committee, as the case may be, to file in Court the accounts of the trust, or such part thereof as to the Court may seem necessary.

Court may require accounts of trust to be filed.

XX. No suit or proceeding before any Civil Court, under the preceding sections, shall in any way affect or interfere with any proceeding in a Criminal Court for criminal breach of trust.

No civil suit to bar proceedings for criminal breach of trust.

See *Anon.*, I. L. R., 1 Mad., 55.

XXI. In any case in which any land or other property has been granted for the support of an establishment partly of a religious and partly of a secular character, or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses, the Board of Revenue, before transferring to any trustee, manager, or superintendent, or to any committee of management appointed under this Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses, and what portion shall be transferred to the superintendence of the trustee, manager, or superintendent, or of the committee, and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the said trustee, manager, or superintendent, or of the committee, and made payable to the said Board or to the local agents for secular uses as aforesaid. In every such case the provisions of this Act shall take effect only in respect to such land and other property as may be so transferred.

Provision for cases in which the endowments are partly for religious and partly for secular purposes.

XXII. Except as provided in this Act, it shall not be lawful, after the passing of this Act, for any Government in India, or for any officer of any Government in his official character, to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any mosque, temple, or other religious establishment, or to take any part in the management or appropriation of any endowment made for the maintenance of any such mosque, temple, or other establishment, or to nominate or appoint any trustee, manager, or superintendent thereof, or to be in any way concerned therewith.

Government not to hold charge henceforth of property for support of any mosque, temple, &c.

XXIII. Nothing in this Act shall be held to affect the provisions of the Regulations mentioned in this Act, except in so far as they relate to mosques, Hindoo temples, and other religious establishments; or to prevent the Government from taking such steps as it may deem necessary under the provisions of the said Regulations, to prevent injury to and preserve buildings remarkable for their antiquity, or for their historical or architectural value, or required for the convenience of the public.

Effect of Act in respect of Regulations therein mentioned and of buildings of antiquity, &c.

XXIV. The word 'India' in this Act shall denote the territories which are or may become vested in Her Majesty by the Statute 21 and 22 Vic., c. 106, entitled "an Act for the better government of India."

'India.'

OFFICIAL TRUSTEES' ACT.

ACT XVII OF 1864.

An Act to constitute an office of Official Trustee.

WHEREAS it is expedient to amend the law relating to Official Trustees, and to constitute an office of official trustee; It is enacted as follows:—

Preamble.

I. The following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the context repugnant to such construction, that is to say:—

Interpretation.

The expression 'High Court' shall mean Her Majesty's High Courts of Judicature at Fort William in Bengal, Fort St. George, and Bombay respectively, in the exercise of their original civil jurisdiction.

'High Court.'

The expression 'Chief Justice' shall mean the Chief Justice or Acting Chief Justice for the time being of any of the said High Courts.

'Chief Justice.'

The word 'person' shall include a corporation.

'Person.'

Words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Number.

Words importing the masculine gender shall include females.

Gender.

II. Act XVII of 1843 (for the appointment of Official Trustees in certain cases) is hereby repealed, except as to any proceedings pending, or any trusts now vested in an Official Trustee under it, and except in so far as that Act is made applicable to the Settlement of Prince of Wales' Island, Singapore, and Malacca, by Act XIV of 1852 (for extending the provisions of Acts XXIV of 1841 nd XVII of 1843 to the Straits' Settlement.)

Act XVII of 1843 repealed.

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III. Every Official Trustee appointed under the said Act XVII of 1843 shall, save as regards the remuneration to be received by him, hold and execute the trusts of which he is trustee, in all respects as if he were an Official Trustee appointed under this Act.

Official trustee under Act XVII of 1843 to act as if appointed under this Act, save as regards remuneration.

IV. In each of the Presidencies of Fort William in Bengal, Fort St. George, and Bombay, there shall be an Official Trustee. The said Official Trustees shall be called the Official Trustee of Bengal, the Official Trustee of Madras, and the Official Trustee of Bombay respectively.

An Official Trustee to be appointed in each Presidency.

V. Every Official Trustee appointed under this Act shall be appointed and may be suspended or removed from his office by the authorities hereinafter named, that is to say—

Appointment, suspension, and removal of Official Trustee.

The Official Trustee of Bengal, by the Chief Justice of Her Majesty's High Court of Judicature at Fort William in Bengal.

The Official Trustee of Madras, by the Chief Justice of Her Majesty's High Court of Judicature at Fort St. George.

The Official Trustee of Bombay, by the Chief Justice of Her Majesty's High Court of Judicature at Bombay.

VI. The Administrator-General or Officiating Administrator-General for the time being of any of the said Presidencies shall be eligible for the office of Official Trustee of that Presidency. Every Official Trustee appointed under this Act shall give security for the due execution of the duties of his office in such manner and to such amount as the Chief Justice by whom he is appointed shall direct.

Administrator-General may be appointed Official Trustee.

Security to be given by Official Trustee.

VII. It shall be lawful for the Chief Justice of the High Court at any of the Presidencies, from time to time, to grant leave of absence to the Official Trustee of that Presidency, but subject always to such and the like rules as may be for the time being in force as to leave of absence of officers attached to such High Court. Whenever any Official Trustee shall obtain leave of absence, it shall be lawful for the Chief Justice to appoint some person to officiate as Official Trustee, and such person, while so officiating, shall be subject to the same conditions and be bound by the same responsibilities as the Official Trustee, and he shall be deemed to be the Official Trustee for the time being under this Act, and shall be liable to give security for the due execution of the duties of his office in like manner as if he had been appointed Official Trustee.

Leave of absence of Official Trustee, and appointment of a person to officiate for him.

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VIII. If any person shall be about to grant, assign or settle any property, moveable or immoveable, of what nature or kind soever, upon or subject to any trust, whether for a charitable purpose or otherwise, it shall be lawful for such person, with the consent of the Official Trustee, to appoint him, by the deed creating the trust, to be the trustee of such settlement; and upon such appointment the property so granted, assigned, or settled shall vest in such officer and his successors in office, and shall be held by him and them upon the trust declared and contained in the said deed. Provided always, that the consent of the Official Trustee shall be recited in the said deed, and that the deed shall be duly executed by the Official Trustee: provided also, that no trust for any religious purpose shall ever be held by the Official Trustee, under this or under any other section of this Act.

Official Trustee may, with his consent, be appointed trustee of a settlement by grantor, &c.

IX. Every Official Trustee appointed trustee of any property under the last preceding section shall be entitled to receive, by way of remuneration in that behalf, such sum or sums only as he shall, by the deed of settlement, be declared to be entitled to receive.

Official Trustee appointed under last preceding section to receive only the remuneration specified in the deed.

X. 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 original civil jurisdiction of the High Court, 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.

Under what other circumstances Official Trustee may be appointed trustee of any property.

XI. The Official Trustee shall be entitled by way of remuneration, in respect of all trust-property transferred to him under the last preceding section, to a commission, the rate of which shall be as follows, that is to say,—

Rate of commission under last preceding section.

On all capital monies received by him,—a commission of one-half per cent. on receiving the same.

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On all capital monies invested by him,—a commission of one-half per cent. on investing the same.

On all sums received by him by way of interest or dividends in respect of monies invested,—a commission of three-quarters per cent.

On all rents collected by him,—a commission of two and-a-half per cent.

What expenses, &c., commission to cover.

XII. The Official Trustee shall defray all the expenses of the establishment necessary for his office, including the provision of office accommodation, together with all other charges to which the said office shall be subject, except those for which express provision is made by this Act, and except those costs of litigation and the like which a trustee would, under ordinary circumstances, be entitled to pay for out of the trust-monies in his hand. The commission to which the Official Trustee shall be entitled is intended to cover all the expenses and risk and responsibility of management, collection, and distribution.

In all cases Official Trustee to be sole trustee.

XIII. It shall in no case be lawful to appoint the Official Trustee to be a trustee along with any other person: but the Official Trustee shall always be sole trustee.

In what securities Official Trustee to invest trust-money.

XIV. The Official Trustee shall cause all capital monies received by him to be invested in Government securities, or otherwise as the Court shall direct: and if in any case the trust-funds or any part of them shall, at the time of their vesting in the Official Trustee, be invested otherwise than as provided in the deed or will creating the trust, or than as ordered by the Court, it shall be the duty of the Official Trustee, as soon as he reasonably can, to realize the funds so improperly invested, and to invest the same in Government securities, or otherwise as the Court shall direct.

High Court may make orders respecting trust-property vested in Official Trustee.

XV. The High Court may make any such orders as shall seem to it necessary respecting any trust-property vested in the Official Trustee, or the interest or produce thereof. All such orders shall be made on petition, unless the Court shall direct a suit to be instituted.

Re-transfer of trust-property to original, or transfer to other, trustees.

XVI. Nothing in this Act shall prevent the re-transfer of any trust-property, which may have become vested in the Official Trustee, to the original or any subsequently appointed trustee, or to such person as the Court shall direct, unless otherwise provided by the deed or will creating the trust.

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XVII. All orders which shall be made appointing any Official Trustee to act as trustee in virtue of his office, shall appoint him by his name of office, and shall authorize the Official Trustee for the time being of the same Presidency to act as Official Trustee of the property to which such order shall relate; and all property and interest which at the time of the death, resignation, or removal from office of any Official Trustee shall be vested in him by virtue of such order, shall, upon such death, resignation, or removal, cease to be vested in him, and shall vest in his successor in office immediately upon his appointment thereto, and all books, papers, and documents kept by such Official Trustee, by virtue of his office, shall be transferred to and vested in his successor in office.

Order of appointment of Official Trustee.

On death, &c., of Official Trustee, property to vest in his successor.

XVIII. All actions, suits, or other proceedings, which shall be commenced by or against any Official Trustee in his official character, may be brought by or against him by his name of office; and no suit, action, or other proceeding already commenced, or which shall be commenced, by or against any person as Official Trustee either alone or jointly with any other person, shall abate by reason of the death, resignation, or removal from office of any such Official Trustee; but the same may, by order of the Court, and upon such terms as to the serivce of notices or otherwise as the Court may direct, be continued against his successor immediately upon his appointment in the same manner as if no such death, resignation, or removal had occurred. Provided, that nothing herein contained shall render any such successor personally liable for any costs incurred prior to the order for continuing the action or suit against him, or shall release an Official Trustee who has resigned or been removed from his office, or the heirs, executors, administrators, or representatives of a deceased Official Trustee from being liable for any such costs.

Official Trustee to sue or be sued by his name of office. Suit not to abate by death, &c.

Proviso.

XIX. Every Official Trustee appointed under this Act shall enter into books, to be kept by him for that purpose, separate and distinct accounts of each trust of which he is the trustee, and of all such sums of money and securities for money, goods, and things, as shall come to his hands, or to the hands of any person employed by him, or in trust for him, under this Act, and likewise of all payments made by him on account of such trust, and of all debts due by or to the same, specifying the dates of such receipts and payments respectively, which said books shall

Official Trustee to keep a separate account of each trust, to be open to the inspection of the Chief Justice and of any person authorized by him to demand inspection.

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be kept in the Official Trustee's office, and shall be at all times open for the inspection of the Chief Justice and of any person authorized by him to demand inspection thereof.

Chief Justice may make and alter rules and orders for custody of trust-funds, &c.

XX. The Chief Justice shall have power, from time to time, to make and alter any general rules and orders consistently with the provisions of this Act, for the safe custody of the trust-funds and securities which shall come to the hands or possession of the Official Trustee, and for the remittance to Europe, or elsewhere, of all sums of money which shall be payable or belong to persons resident in Europe or elsewhere, or in other cases where such remittances shall be required, and generally for the guidance and government of the Official Trustee in the discharge of his duties; and may, by such rules and orders, amongst other things, direct what books, accounts, and statements in addition to those mentioned in this Act, shall be kept by the Official Trustee, and in what form the same shall be kept, and what entries the same shall contain, and where the same shall be kept, and where and how the funds and securities and other the property belonging to the trust, of which the Official Trustee is the trustee, shall be kept or invested or deposited, and how any remittances thereof shall be made.

Publication of orders, &c.

XXI. Such orders shall be published in the Official Gazette, and it shall be the duty of the several Official Trustees to obey and fulfil the same, and the same shall be a full authority and indemnity for all persons acting in pursuance thereof.

Official Trustee to furnish annual schedules, which shall be filed in the High Court.

XXII. The Official Trustee of each of the said Presidencies shall, once in every year,—that is to say, on the first day of March, or on such other day as the Chief Justice shall direct,—deliver to the Chief Justice a true schedule showing the gross amount of all sums of money received or paid by him on account of each trust of which he is the trustee, and the balances during the year ending on the thirty-first day of December next before the day of delivering such schedule, and a true list of all securities accrued on account of each of the said trusts during the same period; and also a true schedule of all trusts which shall have come to an end or of which the Official Trustee shall have ceased to be the trustee, and the property subject to which shall have seen paid or made over to the persons entitled to the same or to new trustees during the same period, specifying the nature and amount or value of such property and the persons to whom paid or made over. The Chief Justice shall cause the said schedule to be filed as record in the High Court; but it shall not be lawful for any

Inspection of schedules so filed.

person to inspect the same or to make copies thereof or of any part thereof, except on an order granted by the Chief Justice permitting him so to do.

Chief Justice to appoint auditors.

XXIII. The Chief Justice shall, from time to time, appoint an auditor or auditors to examine the accounts of the Official Trustee at the time of the delivery of the said schedule, and also at any other time when the Chief Justice shall think fit.

Auditors to examine schedules and accounts of Official Trustee, and to report to Chief Justice.

XXIV. The auditor or auditors shall examine the schedules and accounts, and report to the Chief Justice whether they contain a full and true account of everything which ought to be inserted therein, and whether the books which by this Act are, or which by any such general rules and orders as aforesaid shall be, directed to be kept by the Official Trustee, have been duly and regularly kept; and whether the trust-funds and securities have been duly kept and invested and deposited in the manner prescribed by this Act or which shall be prescribed by any such rules and orders to be made as aforesaid.

Auditors to have power to summon witnesses and to call for books, &c.

XXV. Every auditor shall have power to summon as well the Official Trustee as any other person or persons whose presence he may think necessary, to attend him from time to time; and to examine the Official Trustee or other party or parties, if he shall think fit, on oath or solemn affirmation, to be by him administered; and to call for all books, papers, vouchers, and documents, which shall appear to him to be necessary for the purposes of the said reference; and if the Official Trustee or other person or persons when summoned shall refuse, or, without reasonable cause, neglect to attend or to produce any book, paper, voucher, or document required, or shall attend and refuse to be sworn or make a solemn affirmation, when by law an affirmation may be substituted for an oath, or shall refuse to be examined, the auditor or auditors shall certify such neglect or refusal in writing to the High Court; and every person so refusing or neglecting shall thereupon be punishable in like manner as if such refusal or neglect had been in contempt of the said High Court.

Penalty for refusal or neglect to attend, &c., to produce books, &c.

Costs of preparing schedules, &c., how to be paid.

XXVI. The costs and expenses of preparing the said schedules and accounts, and of every such reference and examination as aforesaid, shall be defrayed by all the trust-estates to which such schedules or accounts shall relate, which costs and expenses, and the portion thereof to be contributed by each of

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Matters to be reported by auditors.

XXVII. If upon any such reference and examination the auditor or auditors shall see reason to believe that the said schedules do not contain a true and correct account of the matters therein contained, or which ought to be therein contained, or that the trust-funds and securities have not been duly kept and invested or deposited in the manner directed by this Act, or which shall be directed by any such rules and orders as aforesaid, or that the Official Trustee has failed to comply with the provisions and directions of this Act, or of any such rules and orders, he or they shall report accordingly to the Chief Justice.

Proceedings upon such report.

XXVIII. The Chief Justice may refer every such report as last aforesaid to the consideration of the Advocate-General for the Presidency, who shall thereupon, if he shall think fit, proceed summarily against the defaulter or his personal representative in the High Court by petition for an account, or to compel obedience to this Act or to such rules and orders as aforesaid, or otherwise as he may think fit, in respect of all or any of the trust-estates then or formerly under the charge of such defaulter; and the Court shall have power, upon any such petition, to compel the attendance in Court of the defendant or defendants and any witnesses who may be thought necessary, and to examine them orally or otherwise as the said Court shall think fit, and to make and enforce such order or orders as the Court shall think just.

Costs upon such proceedings, &c., how to be defrayed.

XXIX. The costs, including those of the Advocate-General, and of the reference to him, if the same shall be directed by the Court to be paid, shall be defrayed either by the defendant or defendants, or out of the trust-estates ratably as the said Court shall direct; and whenever any costs shall be recovered from the defendant or defendants, the same shall be repaid to the estates by which the same shall have been in the first instance contributed, and the Court shall have power to order the Official Trustee or other person or persons, defendants, to receive his or her costs out of the said estates, if it shall think fit.

Orders of the High Court to have same effect, and to be executed in the same manner as decrees.

XXX. Any orders which shall be made by any of the said High Courts shall have the same effect and be executed in the same manner as decrees.

XXXI. Any order under this Act may be made on the application of any person beneficially interested in any trust-property, or of any trustee thereof, whether under disability or not.

Who may apply for order under this Act.

XXXII. If any infant or lunatic shall be entitled to any gift or legacy or residue or share thereof, it shall be lawful for the executor or administrator by whom such legacy, residue, or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, legacy, residue, or share, to pay or transfer the same to the Official Trustee appointed under this Act; provided that the leave of the High Court to make such payment or transfer shall be first obtained by motion made on petition. Any money or property paid or transferred to the Official Trustee or vested in him under this section shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee under the provisions thereof.

Executor or Administrator may, by leave of the High Court, pay to Official Trustee, legacy, share, &c., to which an infant or lunatic is entitled.

THE INDIAN TRUSTEE ACT, 1866.

ACT No. XXVII OF 1866.

An Act to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in mortgagees and trustees in cases to which English law is applicable.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees, in cases to which English law is applicable; It is hereby enacted as follows (*a*):—

Preamble.

(*a*) As to the meaning of these words, see *ante*, p. 15. The Court has no jurisdiction under this Act to decide on a disputed question of title.—*In re Draper's Settlement*, 9 W. R. (Eng.), 805.

The Act applies only to the Lower Provinces, the North-Western Provinces, the Presidencies of Madras and Bombay, and the Punjab. It is mainly founded on the English Statutes, 13 and 14 Vict., c. 60 (The Trustee Act), and 15 and 16 Vict., c. 55 (The Trustee Extension Act).

I. [*Repealed by Act XIV of* 1870.]

II. In this Act, unless there be something repugnant in the subject or context—

Interpretation.

'Immoveable property' shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

'Immoveable property.'

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'Stock' shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share (*a*) or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854, or at any port in British India (*b*):

'Stock.'

'Hold' and 'holding' shall be applicable to any vested estate, whether for life or of a greater or less description, in possession, futurity, or expectancy in any immoveable property:

'Hold' and 'holding.'

'Contingent right,' as applied to immoveable property, shall mean a contingent or executory interest, or possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

'Contingent right.'

'Convey' and 'conveyance' applied to any person shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immoveable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants-in-tail in accordance with the provisions of Act XXXI of 1854 (*to abolish real actions and also fines and recoveries, and to simplify the modes of conveying land in cases to which English law is applicable*):

'Convey' and 'conveyance.'

'Transfer' shall mean the execution and performance of every deed and act by which a person entitled to stock, or Government securities, can transfer such stock or Government securities from himself to another:

'Transfer.'

'High Court' shall mean every Court now or hereafter to be established under the Statute 24 and 25 Vict., cap. 104, and also the Chief Court of the Punjab, or such one or more Judges of the said Courts respectively as shall be appointed by the Chief Justice or the senior Judge (*c*), as the case may be, to entertain applications and make orders under this Act:

'High Court.'

'Trust' shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the

'Trust;' 'trustee.'

subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person (*d*):

'Lunatic.' 'Lunatic' shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs:

'Person of unsound mind.' 'Person of unsound mind' shall mean any person not a minor who, not having been found to be a lunatic, shall be incapable from infirmity of mind (*e*) to manage his own affairs:

'Heir' and 'devisee.' In the case of a will made, or an intestacy occurring before the first day of January, 1866 (*the day on which the Indian Succession Act came into force*) 'heir' shall mean the person claiming an interest in the immoveable property of a deceased person under the laws concerning descent applicable to such property; and 'devisee' shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent.

In the case of a will made, or an intestacy occurring on or after the first day of January, 1866, 'heir' shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate's estate; and 'devisee' shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession:

'Mortgage.' 'Mortgage' shall be applicable to every estate or interest in immoveable or moveable property which would in the High Court be deemed merely a security for money:

'Person.' 'Person' shall include any company or association, or body of persons, whether incorporated or not (*f*).

Number and gender. Words importing the singular number only shall extend to several persons or things; words importing the plural number shall apply to one person or thing; words importing the masculine gender shall extend to a female (*g*).

The preceding definitions correspond substantially with those in the Trustee Act, 1850, 13 and 14 Vict., c. 60.

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(*a*) See *Re Angelo*, 5 De G. and S., 278.
(*b*) 18 and 19 Vict., c. 91, s. 10.
(*c*) See Act IV of 1866, s. 3.
(*d*) A vendor, after a contract, has been held to be a trustee of shares in a joint-stock bank for the purchaser. But in cases of immoveable property, if not universally, at least where the alleged trustee can possibly dispute the trust, the constructive trust must first have been declared by the decree of the Court, and the infant heir of the vendor, who died intestate after having contracted to sell real estate, is not a constructive trustee for the purchaser unless so declared by decree.—Lewin, 7th Edn., 867. See *Re Lowry's Will*, L. R., 15 Eq., 78. A vendor who refused to convey after tender of a deed settled by the Judge, or to receive the purchase-money, was declared a trustee; and on the purchaser paying his purchase-money into Court, his solicitor was to execute the conveyance for the vendor.—*Warrender* v. *Foster*, 1 Set. on Decrees, 4th Ed., 538.

The Court has jurisdiction to recognize a constructive trusteeship of stock within the meaning of that term as used in the Act.—*Re Davis's Trust*, L. R., 12 Eq., 214.

The definition of 'trustee' includes the case of stock which has been transferred into the name of an infant, who is the sole beneficial owner, subject to a direction in regard to maintenance or otherwise, vested in some one else.—*Gardner* v. *Cowles*, L. R., 3 Ch. D., 304.

An heir who elects to hold on the trusts of an inoperative will is a trustee.—*Dewar* v. *Maitland*, L. R., 2 Eq., 834. After a bankruptcy and the appointment of assignees, one of them went abroad; it was held, that he was a trustee, and the estate was vested in the remaining assignees.—*In re Joyce's Estate*, L. R., 2 Eq., 576.

(*e*) See *Re Wakeford*, 1 J. and Lat., 2; *Re Jones*, 6 Jur., 545.
(*f*) See *Lackersteen* v. *Rostan*, I. L. R., 7 Calc., 32.
(*g*) See the General Clauses Act, I of 1868.

The High Courts to have jurisdiction in what cases.

III. The powers and authorities given by this Act to the High Courts shall and may be exercised only in cases to which English law is applicable (*a*), and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively.

(*a*) Up to a very recent period, the words "cases to which English law is applicable" have been considered to apply only to cases in which the parties have been European British subjects. In *Re Kahandas Narandas*, I. L. R., 5 Bomb., 154, however, it was held, that the High Courts may exercise the summary powers conferred upon them by this section in the case of Hindu trusts; *ante*, p. 15.

High Court may convey estates of lunatic trustees and mortgagees.

IV. When any lunatic or person of unsound mind (*a*) shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested (*b*) in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect

as if the trustee or mortgagee had been sane, and had duly executed a conveyance of the property in the same manner for the same estate.

Trustee Act, 1850, s 3.

(*a*) Where the unsoundness of mind is contested, the case is not within the Act.—*Re Walker*, Cr. and Ph., 147; *Re Campbell*, 18 L. T., 202.

(*b*) The vesting order being a conveyance, should be so worded as to make it clear by the description what property passes.—*Re Ord's Trust*, 3 W. R. (Eng.), 863. Where the circumstances require a severance of the property, the Court will make two vesting orders instead of one general. —*Brader* v. *Kerby*, W. N., 1872, p. 174; see Lewin, 7th Ed., 869.

High Court may convey contingent rights.

V. When any lunatic or person of unsound mind shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said High Court shall direct, and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

The Trustee Act, 1850, s. 4.

High Court may transfer stock or Government securities of lunatic trustees and mortgagees.

VI. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to any thing in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof (*a*): and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities, or thing in action upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid (*b*), or in such last-mentioned person or persons, together with any other person or persons the said High Court may appoint (*c*).

Trustee Act, 1850, s. 5.

(*a*) Where a person of unsound mind was entitled to a sum of stock as trustee, and also entitled to another sum of the same stock beneficially, as the bank would not apportion the past dividend between the trust-estate and the beneficial estate, the Court, in appointing new trustees, vested the right to receive the whole dividend in the new trustees upon their undertaking that they would invest in the name of

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the old trustee so much as belonged to him beneficially.—*Re Stewart*, 2 DeG. F. and J., 1; *Hodges* v. *Wheeler*, 1 Set. on Dec., 4th Ed., 522; Lewin, 7th Ed., 870.

(*b*) When one of the three executors of a surviving trustee of shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything, it was held, that an order could be made vesting the right to transfer the shares in the persons beneficially interested.—*In re White*, L. R., 5 Chan., 698.

(*c*) The lunatic husband of a married woman, a trustee, is within the Act.—*Re Wood*, 3 D. F. J., 125; *Ex parte Bradshaw*, 2 D. M. G., 900.

Power to transfer stock or Government securities of deceased person.

VII. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when any thing in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

Trustee Act, 1850, s. 6.

High Court may convey estates of minor trustees and mortgagees.

VIII. When any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct (*a*); and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate (*b*).

Trustee Act, 1850, s. 7.

(*a*) As to barring dower, see Lewin, 7th Ed., 871.

(*b*) See *Powell* v. *Mathews*, 1 Jur., N. S., 973.

An order has been made to vest the legal estate in the devisees of a mortgagor subject to a charge created by his will.—*Re Ellarthorpe*, 18 Jur., 669.

Contingent rights of minor trustees and mortgagees.

IX. When any minor shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct, and the order shall have the same effect as if the minor had attained his majority and had duly executed a deed so releasing or disposing of the contingent right.

Trustee Act, 1850, s. 8.

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X. When any person solely (*a*) holding any immoveable property upon any trust (*b*) shall be out of the jurisdiction of the High Court (*c*), or cannot be found (*d*), it shall be lawful for the said Court (*e*) to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate.

High Court may convey the estate of a trustee out of the jurisdiction of the Court.

Trustee Act, 1850, s. 9.

(*a*) As to coparceners, see *McMurray* v. *Spicer*, L. R., 5 Eq., 527.

(*b*) An heir who takes the trust-estate by the disclaimer of the trustees (*Wilks* v. *Groom*, 6 D. M. G., 205), or by the death of the trustee in the testator's lifetime (*Re Gill*, 1 Set on Dec., 4th Ed., 520), is a trustee within the section; and an heir of a mortgagee who had taken possession has been held to be a trustee for the mortgagee's executors.—*Re Skitter's Mortgage*, 4 W. R. (Eng.), 791. Where a person had contracted to sell an estate, which in equity had converted it into personalty, but before he executed the conveyance died intestate, it was held that the heir was a trustee for the personal representative.—See Lewin, 7th Ed., 871, citing *Re Badcock*, 2 W. R. (Eng.), 386.

(*c*) Temporary absence does not bring a case within the Act.—*Hutchinson* v. *Stephens*, 5 Sim., 499. A trustee may be treated as out of the jurisdiction although he appears by counsel—*Stilwell* v. *Ashley*, 1 Set. on Dec., 4th Ed., 520.

(*d*) See *Lechmere* v. *Clamp*, 30 Beav., 218; 31 Beav., 578.

One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off; and by a deed to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferree of the mortgagee. Afterwards a new trustee was appointed in his place. It was held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Act, and that the Court had jurisdiction to vest the outstanding legal estate in the transferree.—*In re Walker's Mortgage Trusts*, L. R., 3 Ch. D., 209.

(*e*.) This section applies when the trustee out of the jurisdiction is of unsound mind.—*Re Gardner's Trusts*, L. R., 10 Ch. D., 29.

XI. When any person or persons shall hold any immoveable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee (*a*) out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate (*b*).

High Court may make order in cases where persons hold immoveable property jointly with persons out of jurisdiction.

Trustee Act, 1850, s. 10.

(*a*) A mortgage of real estate was made by two persons, one of whom

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went abroad. Upon a sale of the mortgaged property by the mortgagor, so much of the purchase-money as was payable to the mortgagee was invested in their joint names. It was held, that the Court had no jurisdiction upon a petition by the mortgagor and the mortgagee within the jurisdiction to make an order vesting in the purchaser the estate of the absent mortgagee.—*In re Osborn's Mortgage Trusts*, L. R., 12 Eq., 392.

(*b*) The Court has power to vest the lands in the joint owners within the jurisdiction, and another as joint tenants.—*Smith* v. *Smith*, 3 Drew., 72; *Re Marquis of Bute's Will*, Johns., 15.

If one of the co-heirs of a mortgagee be out of the jurisdiction, he is a trustee within this section for the persons entitled to the mortgage-money, and the entirety on their petition may be vested in the co-heir within the jurisdiction.—*Re Templers's Trusts*, 4 N. R., 494; *Re Hughes's Settlement*, 2 H. and M., 695. See Lewin, 7th Ed., 873.

Contingent rights of trustees.

XII. When any person solely entitled to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Trustee Act, 1850, s. 11.

High Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the Court to a contingent right in immoveable property.

XIII. When any person jointly entitled with any other person or persons to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons, together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

Trustee Act, 1850, s. 12.

When it is uncertain which of several trustees was the survivor.

XIV. Where there shall have been two or more persons jointly holding any immoveable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the

said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate. APPDX.

Trustee Act, 1850, s. 13.

When it is uncertain whether the last trustee be living or dead.

XV. Where any one or more person or persons shall have held any immoveable property upon any trust, and it shall not be known, as to the trustee last known to have held such property, whether he be living or dead, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance of the property in the same manner for the same estate.

Trustee Act, 1850, s. 14.

When trustee dies without an heir.

XVI. When any person holding any immoveable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate (*a*).

Trustee Act, 1850, s. 15.

(*a*) This section does not apply to leaseholds for years.—Lewin, 7th Ed., 873. But a vesting order as to leaseholds for years may be made on the appointment of new trustees under s. 36. See *Re Dalgleish's Settlement*, L. R., 4 Ch. D., 143.

Contingent right of unborn trustee.

XVII. When any immoveable property is subject to a contingent right in an unborn person, or class of unborn persons who, upon coming into existence, would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such person or class of unborn persons would, upon coming into existence, hold in such property.

Trustee Act, 1850, s. 16.

XVIII. In every case when any person holds, or shall hold jointly or solely, any immoveable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused (*a*) or neglected to convey the said property for the space of twenty-eight days after such demand (*b*), to make an order vesting such property in such person or persons in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right in the same manner and for the same estate (*c*).

Power to make an order for vesting the estate on refusal or neglect of a trustee to convey or release.

Trustee Extension Act, 1852, s. 2. See further as to vesting, *ante*, pp. 334-5.

(*a*) It has been decided that a married woman is capable of refusing — *Rowley* v. *Adams*, 14 Beav., 130.

(*b*) In *Knight* v. *Knight*, W. N., 1866, p. 114, a divorced woman obtained a vesting order against her late husband.—Lewin, 7th Ed., 894.

Where a mortgagor had covenanted to surrender copyholds to his mortgagee and neglected to make such surrender within twenty-eight days after demand and tender of engrossment by the mortgagee, the Court, on the petition of the mortgagee, made a vesting order without requiring service of the petition on the mortgagor.—*In re Crowe's Mortgage*, L. R., 13 Eq., 26.

XIX. When any person to whom any immoveable property has been conveyed by way of mortgage, shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance or vesting of such property, then in any of the following cases it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct,—that is to say—

Power to convey in place of mortgagee.

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court or cannot be found;

when an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same,

or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person;

when it shall be uncertain which of several devisees of such mortgagee was the survivor;

when it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead;

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died, and it shall not be known who is his heir or devisee;

And the order of the said High Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance of the property in the same manner and for the same estate.

Trustee Act, 1850, s. 19.

Power to appoint a person to convey in certain cases.

XX. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient, to make an order appointing a person to convey such property, or release or dispose of such contingent right; and the conveyance or release or disposition of the person so appointed (*a*) shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer or join in transferring the stock to the person or persons to be named in the order (*b*); and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto (*c*).

Trustee Act, 1850, s. 20.