

APPDX.

(a) The conveyance should contain a recital showing that it is made in obedience to the order of the Court, and should be executed by the person appointed to convey in his own name.—*Lewin*, 7th Ed., 875.

(b) The person here meant is not a beneficiary; but where a person has become absolutely entitled, the Court can appoint him a trustee, and direct a transfer to him.—*Lewin*, 7th Ed., 876.

(c) The Court under this section can only direct the Bank officer to transfer in the place of the person creating the difficulty; and therefore where the stock was standing in the names of two persons, one of whom was out of the jurisdiction, it was necessary to order the person within the jurisdiction to join in the transfer.—*Wade v. Hopkinson*; *Hodgson v. Hodgson*, 1 Set. on Dec., 4th Ed., 521.

XXI. When any person or persons shall be jointly entitled

When trustee of stock or Government securities out of the jurisdiction.

with any person out of the jurisdiction of the High Court (a), or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust (b), it shall be lawful for the said Court (c) 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 or receive the dividends, interest, or income thereof (d), or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any person or persons the said Court may appoint (e). When any sole trustee (f) of any stock, Government securities, or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, 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 (g), 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 as the said Court may appoint.

Trustee Act, 1850, s. 22.

(a) Where the trustee out of the jurisdiction is incapacitated from lunacy or infancy, the power of the Court must be sought for in the sections applicable to cases of lunatics and infants, and not in this section.—*Lewin*, 7th Ed., 876; *Cramer v. Cramer*, 5 DeG. and Sm., 312. The fact that the trustee is out of the jurisdiction should be recited in the order.—*Re Mainwaring*, 26 Beav., 172.

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

(c) A petition for a vesting order to vest property in a new trustee appointed under a power in the place of a trustee out of the jurisdiction, must be served on all the persons interested in the fund, and it must be proved by affidavit that the power has been properly exercised, and that the proposed trustee is a fit and proper person.—*Re Maynard's Settlement Trust*, 16 Jur., 1084.

(d) One of four trustees of a sum of stock being out of the jurisdiction, an order was made vesting the right to receive the dividends in





the other three, but was, on appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three.—*Re Peyton's Settlement*, 2 DeG. and J., 290.

(e) Where the stock is vested in two trustees one of whom is out of the jurisdiction, the Court has no authority, under the first branch of the section, to vest the right in the person who asks for it as being absolute owner.—*Re Brass's Trust*, 4 W. R. (Eng.), 764; see Lewin, 7th Ed., 877.

(f) *A* and *B* being trustees, the Master found that it was uncertain whether *A* was living or dead, but *B* was living; afterwards *B* died. It was held, that *A* was not a 'sole trustee.' The expression means a person originally a sole trustee, or one who has become sole trustee by surviving.—*Re Randall's Will*, 1 Drew, 401.

(g) This section authorizes an order vesting the right to receive future dividends.—*Re Peyton's Settlement*, 1 DeG. and J., 290.

## XXII. Where any sole trustee (a) of any stock, Government

securities, or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto (b), for the space of twenty-eight days next after a request in writing (c) for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the High Court to make an order (d) vesting the sole right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof (e), or to sue for and recover such thing in action, or any interest in respect thereof in such person or persons as the Court may appoint.

When trustee of stock, &c., refuses to transfer.

Trustee Act, 1850, s. 23.

(a) The words 'sole trustee' may mean all the trustees when there are more than one.—*Re Hartnall*, 5 DeG. and Sm., 111; *Re Spawforth's Settlement*, 12 W. R. (Eng.), 978.

(b) One of several trustees of a sum of stock is not a person absolutely entitled within the meaning of this and the next section, nor is a *cestui que trust* who has only a life-interest in the dividends, at least where the application is to transfer the stock. It is doubtful whether a person having a life-interest in the dividends may be considered absolutely entitled for the purpose of an application to receive the dividends only.—*MacKenzie v. MacKenzie*, 16 Jur., 723.

Duly appointed new trustees are persons 'absolutely entitled.'—*Ex parte Russell*, 1 Sim., N. S., 404; *Re Baxter's Will*, 2 Sm. and Giff., Appx. v; *Re Ellis's Settlement*, 24 Beav., 426.

(c) As to trustee refusing, see s. 27, *post*.

(d) As to the person to be served, see s. 40, *post*.

(e) Section 27 provides for subsequently accrued dividends.

## XXIII. Where any one of the trustees of any stock, Govern-

ment securities, or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action,

When one of several trustees of stock, &c., refuses to transfer or receive and pay over dividends.





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Trustee Act, 1850, s. 24.

(a) Where one of the three executors of a surviving trustee of canal 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.

#### XXIV. When any stock or Government securities shall be

standing in the sole name of a deceased person, and his executor or administrator shall be out of the jurisdiction of the High Court, or cannot be found, or it shall be uncertain whether such executor or administrator (a) be living or dead, or such executor or administrator shall neglect or refuse to transfer such stock or Government securities, or receive the dividends, interest, or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, 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, in any person or persons whom the said Court may appoint.

Trustee Act, 1850, s. 25.

(a) This section applies to a case in which the executor of a surviving trustee has not proved the will and has neglected to transfer on the requisition of new trustees appointed out of Court.—*Re Ellis's Settlement*, 24 Beav., 426; and the Court seems to have made a similar order when the next-of-kin who was entitled to take out administration, had refused to make the transfer.—*In re Stroud's Trusts*, W. N., 1874, p. 180; Lewin, 7th Ed., 878.

#### XXV. Where any order shall have been made under this Act

vesting the right (a) to any stock or Government securities in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney,

Effect of an order vesting the legal right to transfer stock, &c.





and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names, or otherwise, or relating to the receipt of the dividends, interest, or income thereof, to the extent and in conformity with the terms of such order. All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons, so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made. After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock or Government securities or the payment of the dividends, interest, or income thereof.

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Trustee Act, 1850, s. 26.

(a) See s. 29, *post*, and *Re Peacock*, L. R., 14 Ch. D., 212.

XXVI. When any order shall have been made under this Act by the High Court vesting the legal right to sue for or recover any thing in action, or any interest in respect thereof, in any person or persons, such legal right shall vest accordingly; and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any suit or other proceeding for the recovery of such thing in action in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such thing in action.

Trustee Act, 1850, s. 27.

XXVII. Where any person shall neglect or refuse to transfer any stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover any thing in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order (a) vesting all the right of such person to transfer such stock or Government securities, or to receive the dividends,





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Trustee Extension Act, 1852, s. 4.

(a) The order may be made on motion; a petition is not necessary.—*Re Holbrook's Will*, 5 Jur., N. S., 1333.

XXVIII. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall refuse or neglect to transfer such stock or Government securities, or receive the dividends, interest, or income thereof for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, 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, in any person or persons whom the said Court may appoint (a).

Trustee Extension Act, 1852, s. 5.

(a) It is the practice of the Bank of England not to allow the dividend to be split into fractional parts.—*Skynner v. Pelichet*, 9 W. R. (Eng.), 191; Lewin, 7th Ed., 895.

XXIX. When any order being, or purporting to be, under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly (a); and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names, or otherwise to the extent and in conformity with the terms of the order. All companies and associations and all persons shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Trustee Extension Act, 1852, s. 6.

(a) For form of order on appointment of new trustees, where the funds are invested on unauthorized securities, and it is desired not to transfer them into the names of the new trustees, but to sell them and re-invest the funds in accordance with the trusts of the settlement, see *Re Peacock*, L. R., 14 Ch. D., 212.





Where the trustees appointed by a testator died and new trustees were appointed in their place, and all the trust-property was vested in the new trustees, the bank declined to act unless the order directed the new trustees to transfer the stock into their own names.—*Re Glanville's Trusts*, W. N., 1877, p. 248; 1878, p. 2.

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**XXX.** When any minor shall be solely entitled to any stock or Government securities upon any trust, 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 (a). When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, 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, either in the person or persons jointly entitled with the minor, or with him or them together, with any other person or persons the said Court may appoint (b).

Trustee Extension Act, 1852, s. 3.

(a) Agents of executors invested a sum of stock in the names of infants, who had an interest under the will, instead of in the names of the executors, and the Court made a vesting order for the transfer into the names of the executor.—*Rives v. Rives*, W. N., 1866, p. 144; Lewin, 7th Ed., 894. So, where the executors had invested stock in the names of themselves and an infant, and the infant was the survivor.—*Gardner v. Cowles*, L. R., 3 Ch. D., 304.

(b) See *Sanders v. Homer*, 25 Beav., 467.

**XXXI.** When a decree or order shall have been made by the High Court directing the sale of any immoveable property for the payment of the debts (a) of a deceased person, every person holding such property or entitled to a contingent right therein as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act: and the High Court is hereby empowered to make an order wholly discharging the contingent right under the will of such deceased debtor of any unborn person (b).

Trustee Act, 1850, s. 29.

(a) See s. 32, *post*, and *Wake v. Wake*, 17 Jur., 545.

(b) An order in a cause may apparently be made without a petition.—*Wood v. Beettleston*, 1 K. and J., 215. In *Gough v. Bage*, W. N., 1871, p. 437, however, a petition was presented.

**XXXII.** When any decree or order shall have been made (a) by the High Court, whether before or after the passing of this Act, directing the sale of any immoveable property for any purpose whatever (b), every person holding such property, or entitled to a contingent

High Court may make an order for vesting the estate in lieu of conveyance by a party to the suit after a decree or order for sale.





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right therein, being a party to the suit or proceeding in which such decree or order shall have been made and bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act. In every such case it shall be lawful for the High Court (c), if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct (d). Every such order shall have the same effect as if the person so holding or entitled had been free from disability and had duly executed all proper conveyances and assignments of such property for such estate.

Trustee Extension Act, 1852, s. 1.

(a) Where a testatrix devised real estate on trust for sale, but there had never been a trustee of the will, in consequence of the death, during the testatrix's lifetime, of the sole trustee named in the will, and it was not known who was the heir of the testatrix, it was held, that the Court had no jurisdiction under the Trustee Act, 1850, in the absence of the heir, to appoint a trustee and to make an order vesting in him the real estate descended.—*Gunson v. Simpson*, L. R., 5 Eq., 332 : see *Gough v. Bage*, W. N., 1871, p. 437.

(b) *Quere.*—Whether the section applies to the case where the person to convey is not under disability?—*Lewin*, 7th Ed., 893.

(c) Where the estate in land sold under the order of the Court is vested in a person of unsound mind, but not found lunatic, an order may be made appointing a person to convey the estate.—*Herring v. Clark*, L. R., 4 Chan., 167.

(d) Where property has been, by an order of the Court, directed to be sold, and where some of the parties interested in such property are either out of the jurisdiction, married women, or minors, and the place of abode of others of them is unknown, the Court will, on petition under this Act, appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into. But the Court cannot make such an order with respect to the interest of a party who has not been served, and who has not entered appearance.—*Lackersteen v. Rostan*, L. L. R., 7 Cal., 32.

XXXIII. Where any decree or order shall be made by the

Court to declare what parties are trustees of immoveable property comprised in any suit and as to the interests of persons unborn.

High Court for the specific performance of a contract concerning any immoveable property (a), or for the partition (b), or exchange of any immoveable property (c), or generally when a decree shall be made for the conveyance of any immoveable property, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of





unborn persons (d) who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act. Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court might, under the provisions of this Act, make concerning the estates, rights, and interests of trustees, born or unborn.

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Trustee Act, 1850, s. 30.

(a) Where a donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the Master, whereby a certain sum was to be appointed as the plaintiff's jointure, and the defendant refused to obey the decree, it was held, that he might be declared a trustee of all the rights, interests, and property acquired by him under the settlement, and the Court appointed a person to execute the requisite deed in his absence.—*Ex parte Mornington*, 4 D. M. G., 537. In a suit for the specific performance of a lease, the Court has no power either to appoint a person to convey in the place of a party refusing to execute the lease or to make a vesting order.—*Grace v. Baynton*, W. N., 1877, p. 79.

(b) In a partition-suit, instead of giving an infant defendant a day to show cause, the Court may declare him a trustee of such parts of the property as are allotted to the other parties.—*Bowra v. Wright*, 4 D. G. and Sm., 265.

Where a decree in a partition-suit had declared a lunatic a trustee of an allotted portion of the land for the plaintiff, it was held, that a vesting order could be made under the Act.—*In re Molyneux*, 4 D. F. J., 365.

(c) In a foreclosure decree on an equitable mortgage, the mortgagor was declared a trustee, and an order was made vesting the estate in the mortgagee (*Lechmere v. Clapp*, 30 Beav., 218): and in such a suit where the estate of the mortgagor was devised in trust for sale, and had become vested in an infant, who was also one of the persons beneficially interested, it was held, that the decree should contain a direction that, in case the mortgages were not redeemed within six months, the infant should be a trustee for them within the meaning of the Act, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf.—*Foster v. Parker*, L. R., 8 Ch. D., 147. See further *Lewin*, 7th Ed., 881.

(d) This includes heirs of a person now living.—*Basnett v. Mozon*, L. R., 20 Eq., 182.

XXXIV. It shall be lawful for the High Court to make declarations and give directions concern-

Power to give directions how the right to transfer stock shall be exercised.

ing the manner in which the right to any stock, Government securities, or thing in action, vested under the provisions of this Act, shall be exercised, and thereupon the

person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced (a).

Trustee Act, 1850, s. 31.



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(a) Under this section the Court has no jurisdiction to order the fund into Court (*Re Parley*, 29 L. J., 72 : see Lewin, 7th Ed., 882) ; nor has it jurisdiction to give any direction as to the property of a person not found lunatic by inquisition except in cases where it is being administered by the Court.—*Re Tayler*, 2 D. F. J., 125.

XXXV. In all cases in which it shall be expedient (a) to appoint (b) a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the High Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or trustees or not at the time of making such order (c), and if there be such trustee or trustees, either in substitution for or in addition to him or them. The person or persons who, upon the making of such order, shall be trustee or trustees, shall have the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted (d).

Power to Court to make order appointing new trustees.

New trustees to have powers of trustees appointed by decree in suit.

Trustee Act, 1850, ss. 32 and 33, and Trustee Extension Act, 1852, s. 9.  
(a) It is 'expedient' to appoint a new trustee where the trustee appointed is an infant.—*Re Porter's Trust*, 2 Jur., N. S., 349 ; *Re Gartside's Estate*, 1 W. R. (Eng.), 196. In such a case the appointment should be without prejudice to any application by the infant to be restored to the trusteeship on coming of age.—*Re Shelmerdine*, 33 L. J., Chan., 474. So it is 'expedient' to appoint a new trustee when there is no representative of a surviving trustee (*Re Matthews*, 26 Beav., 463 ; *Re Davis's Trusts*, L. R., 12 Eq., 214), or there would be difficulties in obtaining a representative.—*Davis v. Chanter*, 4 Jur., N. S., 272. Where two trustees were desirous of retiring, and it was doubtful whether the power of appointing new trustees in the settlement applied to the case, it was deemed 'expedient' to appoint new trustees.—Lewin, 7th Ed., 882, citing *Re Woodgate's Settlement*, 5 W. R., *Re Armstrong's Settlement*, *ibid.* So, a new trustee has been appointed in the place of a trustee who had become bankrupt, had never surrendered, and had not been heard of for several years.—*Re Renshaw's Trusts*, L. R., 4 Chan., 783 ; and see *Coombes v. Brookes*, L. R., 12 Eq., 61. The Court may appoint trustees where there never have been any trustees, or where they have all died in the testator's lifetime.—*Re Smithwaite's Trusts*, L. R., 11 Eq., 251.

(b) The Court has no jurisdiction under this Act to appoint new trustees where there are trustees *de facto* acting as such (*Ex parte Hadley*, 5 DeG. and Sm., 67) ; nor has it jurisdiction to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising and willing to exercise it, although such donee may have disclosed an intention or desire to exercise his power corruptly.—*Re Hodson's Settlement*, 9 Hare, 118.

Where one of two trustees was residing out of the jurisdiction, but it did not appear whether such residence was likely to be permanent, the Court refused to appoint a new trustee in his room.—Lewin, 7th Ed., 882, citing *Re Mair*, 19 Jur., 608. See *Re The Lincoln Primitive Methodist's Chapel*, 1 Jur., N. S., 1011.

The Act was not intended to extend to the displacing of trustees desirous to continue in the trust, and to the appointing of others in their





place; and especially not to the displacing of trustees and the appointing of others, on the ground of alleged misconduct in the trustees to be displaced. The section was meant to apply to cases in which there might be a question about the expediency of what was sought to be done. It was not intended to alter the right of every trustee to have his account taken in Court in the presence of all the parties interested under the trust, so that all might be bound, and to have any balance which might be found due to him on the result of the account paid, or secured to him before he was denounced of the trust-estate.—*Re Blanchard*, 7 Jur., N. S., 505; 3 D. F. and J., 131.

Where a trustee had gone abroad and his whereabouts was not known, a new trustee was appointed.—*Re Harrison's Trust*, 22 L. J., N. S., Chan., 69. See *Re Joyce's Estate*, L. R., 2 Eq., 576; *Re Bignold's Trusts*, L. R., 7 Chan., 223.

So, new trustees were appointed where the trustees had disclaimed, and the parties in whom the power of appointment was vested were in India.—*Re Humphry's Estate*, 1 Jur., N. S., 921.

When the person having power to appoint a new trustee is a lunatic, the Court has power to appoint a new trustee under the Act.—*Re Sparrow*, L. R., 5 Chan., 662.

Where new trustees have been appointed by the donees of a power, the Court will formally re-appoint them for the purpose of making a vesting order.—*Re Pearson*, L. R., 5 Ch. Div., 982. An affidavit of fitness will be required.—*Re Maynard's Settlement Trusts*, 16 Jur., 1084.

Where all the *cestuis que trustent* are resident out of the jurisdiction, the Court will appoint new trustees resident out of the jurisdiction.—*Re Liddiard*, L. R., 14 Ch. Div., 310.

As to appointing new trustees in the place of a lunatic trustee, see Lewin, 7th Ed., 883.

(c) These words are taken from the Trustee Extension Act, 1852, s. 9.

(d) The Court will appoint two trustees in the place of one, as trust-property should be prevented from coming into the hands of a sole trustee *Re Tunstall's Will*, 4 DeG. and Sm., 421, and it has added two new trustees to two original trustees.—Lewin, 7th Ed., 884, citing *Re Baycott*, 5 W. R., (Eng.) 15. But it will not appoint one trustee in the place of two or more *Re Dickinson's Trusts*, 1 Jur., N. S., 724; *Re Ellison's Trust*, 2 Jur., N. S., 62; *Re Porter's Trust*, *ibid.*, 348, unless the trust is to be shortly wound up.—*Re Reynault*, 16 Jur., 233. Two trustees may be appointed in the place of three *Bulkeley v. Earl of Eglinton*, 1 Jur., N. S., 994; or three in the place of four.—*Emmet v. Clarke*, 7 Jur., N. S., 404.

Where a legacy had been bequeathed to a sole trustee upon trust for a tenant-for-life, and then for reversioners absolutely, the Court appointed an additional trustee, and ordered the costs of a petition, presented for that purpose by the reversioners, to be paid by them, and not out of the corpus.—*Re Brackenbury's Trusts*, L. R., 10 Eq., 45.

When a trustee wishes to retire and a successor cannot be found, the Court can appoint the continuing trustees to be sole trustees in the place of the continuing and retiring trustee.—*Re Stokes's Trusts*, L. R., 13 Eq., 333; *Re Harford's Trusts*, L. R., 13 Ch. Div., 135.

In the case of a charity, the Court appointed ten new trustees and vested the estate in the whole body, and directed that when reduced to three, the trustees should apply at Chambers for the appointment of new trustees.—Lewin, 7th Ed., 884, citing *Re Bergholt*, 2 Eq. Rep., 90.

The Court will not, if it can be avoided, appoint a *cestui que trust* to be a trustee.—*Ex parte Clutton*, 17 Jur., 988. As to appointing the husband of a *cestui que trust*, see Lewin, 7th Ed., 884. Nor will the Court appoint an alien resident out of the jurisdiction a trustee, unless it is necessary from the circumstances of the case to do so.—*Re Hill's Trust*, W. N., 1874, p. 228.





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If a *cestui que trust* institutes a suit for the appointment of a new trustee, when a petition would have been sufficient, he will have to bear the additional costs.—*Legg v. Mackrell*, 1 Giff., 165; *Thomas v. Walker*, 18 Beav., 521.

Where there are two distinct trust-estates under the same will, but only one set of trustees, the Court, with the consent of the representative of the surviving trustee, will appoint new trustees of one estate without dealing with the other estate *Re Dennis*, 12 W. R., (Eng.) 575; and generally the Court assumes the power of appointing separate trustees of separate shares.—*Re Cotterill's Trusts*, W. N., 1869, p. 183. See Lewin, 7th Ed., 884.

The petition for appointment of new trustees must be supported by affidavits of the facts stated, and of the fitness of the proposed trustees, who must give their written consent to the appointment.—*In Re Battersby's Trust*, 16 Jur., 200. Sometimes a reference as to the fitness of the trustees is directed; but it is not necessary if the evidence adduced is sufficient.—*Re Tunstall*, 15 Jur., 645. An affidavit of fitness by the solicitor in a suit is not sufficient.—*Greeny v. Buckridge*, 22 L. J., Chan., 1007.

The new trustee need not appear upon the petition to consent *Re Draper's Settlement*, 2 W. R. (Eng.), 440; though they may appear to consent.—*Re Parke's Trust*, 21 L. J., 218. If they do not appear, an affidavit that the proposed new trustees will consent is insufficient *Re Parke's Trust*, 21 L. J., 218, and their written consent must be proved.—Lewin, 7th Ed., 885.

## XXXVI. It shall be lawful (a) for the High Court, upon

Power to Court to vest immoveable property in new trustee.

making any order (b) for appointing a new trustee or new trustees, either by the same or any subsequent order (c), to direct that any immoveable property, sub-

ject to the trust (d), shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the Court shall direct. Such order shall have the same effect as if the person or persons who, before such order, was or were the trustee or trustees (if any) had duly executed all proper conveyances of such property for such estate (e).

Trustee Act, 1850, s. 34.

(a) The Court has authority to make a vesting order, although there may be a person capable of executing a conveyance.—*Re Manning's Trusts*, Kay, xxviii.

(b) Where an order is made under the Act, subject to the production of evidence to the Registrar, the order will bear date on or after the day of the production of the evidence. Where a party directed to transfer died between the making and the date of the order, the Court made a supplemental order to meet the difficulty, without requiring a further petition.—*Re Havelock's Trust*, 11 Jur., N. S., 906.

(c) The Court has jurisdiction to make a vesting order of the legal estate in mortgaged lands when a transfer of the mortgage has been ordered by the Court, and it is doubtful whether the trustees of the debt have power to convey the legal estate.—*Re Hughes's Settlement Trusts*, 2 H. and M., 695. A vesting order may be made after the appointment of trustees in a suit.—*Ibid.*

(d) Where a sole trustee of leaseholds had died intestate, and had no legal personal representative, and new trustees had been duly





appointed under the settlement, the Court re-appointed the same two persons trustees and made an order vesting the leaseholds in them.—*Re Dalglish's Settlement*, L. R., 4 Ch. D., 143; see further Lewin, 7th Ed., 385.

(c) In a suit to appoint new trustees, it appeared that of two remaining trustees one had gone out of the jurisdiction, and the other was willing to act,—it was held, that a vesting order could be made to vest the estate in the new trustees to be appointed for such estate as was vested in the continuing and absent trustee.—*Smith v. Smith*, 3 Drew, 72.

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XXXVII. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the transfer of stock, or to the same or by any subsequent order, to vest in new trustee. the right to call for a transfer of any stock (a) or Government securities subject to the trust, or to receive the dividends, interest, or income thereof, or to sue for or recover any thing in action subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (b).

Trustee Act, 1850, s. 35.

(a) Under this section the Court cannot vest the right to the stock in the new trustees.—*Re Smyth's Settlement*, 4 DeG. and Sm., 499; see s. 29, ante, p. 430. The Court has power under this section to vest the right as to stock standing in the name of a deceased person who has no personal representative.—*Re Herbert's Will*, 8 W. R. (Eng.), 272, cited Lewin, 7th Ed., 886.

(a) Where a breach of trust has been committed, the Court, though it sanctions the appointment of a new trustee, will make no order respecting the property, lest by so doing it should sanction the breach of trust.—*Re Harrison's Trust*, 22 L. J., Chan., 69.

(b) The effect of a vesting order is to vest the estate at once from its date in the new trustees without any further formality.—*Woodfall v. Arbuthnot*, L. R., 3 P. and D., 109.

XXXVIII. Any such appointment by the High Court of

Old trustees not to be discharged from liability. new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise than as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Trustee Act, 1850, s. 35.

XXXIX. An order under any of the hereinbefore contained

Who may apply under Act. provisions, for the appointment of a new trustee or new trustees, or concerning any immoveable property, stock, or Government securities, or thing in action subject to a trust, may be made upon the application of any person beneficially interested in such immoveable property, stock, Government securities, or thing in action, whether under disability or not (a), or upon the application of any person duly appointed as a



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trustee thereof; and an order under any of the provisions hereinbefore contained concerning any immovable property, stock, Government securities, or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

Trustee Act, 1850, s. 37.

(a) A person who has a contingent interest in a trust-fund has a *locus standi* to present a petition for the appointment of new trustees.—*Re Sheppard's Will*, 4 D. F. and J., 423.

The purchaser of property sold under an order of Court is 'beneficially interested,' and is the proper person to apply for a vesting order.—*Ayles v. Cox*, 17 Beav., 584. He may join with the plaintiffs in presenting the petition.—*Rowley v. Adams*, 14 Beav., 130. Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for the sale of his real estate has been entered into and the purchase-money paid into Court, are 'beneficially interested' in the lands comprised in the contract, and are entitled to apply for a vesting order (*Re Wragg*, 1 DeG. J. and S., 356); but the committee of the lunatic is not.—*Re Bourke*, 2 DeG. J. and S., 426.

XL. When any person shall deem himself entitled to an order

Application may be under any of the provisions hereinbefore by petition. contained, it shall be lawful for him to present a petition (a) to the High Court for such order as he may deem himself entitled to, and he may give evidence by affidavit, or otherwise (b), in support of such petition before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof (c).

Trustee Act, 1850, s. 40.

(a) When a petition has been presented, it may be amended by an order of the Court by adding co-petitioners without being re-answered.—*Re Cartwright's Trust*, 8 W. R., (Eng.), 492, cited Lewin, 7th Ed., 887.

(b) In practice, the evidence adduced is universally by affidavit; but under the words 'or otherwise' the applicant is not confined to evidence by affidavit.—Lewin, 7th Ed., 887.

(c) All the *cestuis que trustent* ought, as a general rule, to be served. See the cases cited, Lewin, 7th Ed., 887; but the Act does not in terms so require, and it is not unusual to dispense with service on all parties.—*Re Blanchard*, 3 D. F. and J., 137; and see *Battersby's Trusts*, L. R., 10 Ch. D., 228.

The persons constituting different classes of *cestuis que trustent* may be proved by affidavit without strict evidence of certificates and affidavits of identity.—*Re Hoskins*, 4 DeG. and J., 436.

On a petition to appoint new trustees in the place of trustees desirous of retiring, the *cestuis que trustent* and the old trustees must appear (*Re Sloper*, 18 Beav., 596), and they will have their costs.—*Futcoye v. Kennard*, 3 L. T., N. S., 687.

It is not, however, necessary to serve the petition on recusant trustees.—*Re Baxter*, 2 Sm. and G., Appx. v.

A petition for an order vesting in a new trustee property, of which a trustee has become lunatic, ought to be served on his committee as the





trustee may have claims.—*Re Sanmarez*, 8 D. M. G., 320; but see *Re Green*, L. R., 10 Chan., 272. APPDX.

Service of a petition vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee upon the guardian of the infant heir is not necessary (*Re Little*, L. R., 7 Eq., 323); but the adult heir of a surviving trustee must be served, for he may have some claim to costs.—*Lewin*, 7th Ed., 1887.

The Court has jurisdiction to order service of the petition upon a person out of jurisdiction.—*Ibid*.

**XXI.** Upon the hearing of any such petition, it shall be lawful for the said High Court, should it be deemed necessary, to direct a reference to one of the Judges of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such petition to stand over, to enable the petitioner to adduce evidence or further evidence before the Court, or to enable notice, or any further notice of such petition to be served upon any person or persons.

Trustee Act, 1850, s. 41.

**XLII.** Upon the hearing of any such petition, it shall be lawful for the High Court to dismiss such petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

Trustee Act, 1850, s. 42.

**XLIII.** Whensoever in any cause or matter, either by the evidence adduced therein, or by the admission of the parties, or by report of one of the Judges of the Court, the facts necessary for an order under this Act shall appear to the High Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or application in the said cause or matter, to make such order under this Act (a).

Trustee Act, 1850, s. 43.

(a) An order may be made in a suit without a petition. See the cases collected, *Lewin*, 7th Ed., 888.

As to whether the order should not be made in Court and not in Chambers, see *Frodsham v. Frodsham*, L. R., 15 Ch. D., 317.

The Court has no jurisdiction to make a vesting order respecting property which is vested in a lunatic, but there must be a petition in lunacy.—*Lewin*, 7th Ed., 888, citing *Jeffreys v. Dryadale*, 9 W. R., 428.

**XLIV.** Whenever any order shall be made under this Act by the High Court for the purpose of conveying any immoveable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or an

Order made by the High Court founded on certain allegations to be conclusive evidence of the matter contained in such allegations.



APPDX. — allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir, or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then, in any of such cases, the fact that the High Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of civil judicature upon any question as to the legal validity of the order: Provided always, that nothing herein contained shall prevent the High Court directing a reconveyance of any immoveable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such property or contingent right to pay any costs occasioned by the order under this Act when the same shall appear to have been improperly obtained.

Trustee Act, 1850, s. 44.

XLV. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of  
 Trustee of charity. 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 (a), 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.

Trustee Act, 1850, s. 45. See further, *ante*, pp. 366-367.

(a) See Seton on Decrees, 4th Ed., 565.

XLVI. Where any minor or person of unsound mind shall be entitled to any money payable in  
 Money of minors and persons of unsound mind to be paid into Court. discharge of any immoveable property, stock, Government securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court upon petition in a summary way to order any money so paid to be invested in Govern-





ment securities and to order payment or distribution thereof, or payment of the dividends or interest thereof as to the said Court shall seem reasonable. APPDX. —

Trustee Act, 1850, s. 48.

**XLVII.** When in any suit commenced, or to be commenced, in the High Court, it shall be made to appear to the Court that diligent search and enquiry have been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court and had appeared at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid (a).

Trustee Act, 1850, s. 49.

(a) In *Westhead v. Sale*, 6 W. R. (Eng.), 52, cited Lewin, 7th Ed., 890, the Court directed the record and writ clerk to certify that the cause was ready for hearing in the absence of a trustee who could not be found.

**XLVIII.** Every order to be made under this Act which shall have the effect of a conveyance of any Orders made under this Act to be chargeable with the same stamp-duty as deeds of conveyance. shall be chargeable with the like amount of stamp-duty as it would have been chargeable with if it had been a deed executed, or a transfer made (a), by the person or persons holding such property or entitled to such stock, Government securities, or thing in action. Every such order shall be duly stamped for denoting the payment of the said duty.

Trustee Extension Act, 1852, s. 13.

(a) See Act I of 1879 (The General Stamp Act), sched. i, arts., 21, 60.

**XLIX.** The High Court may order the costs and expenses of, and relating to, the petitions, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immoveable or



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moveable property, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper (a).

Trustee Act, 1850, s. 51.

(a) The petition should not pray for costs " incidental to, or subsequent on," the application, as they give rise to uncertainty.—*Re Fellow's Settlement*, 2 Jur., N. S., 62.

The costs of appointing new trustees are paid out of the trust-fund.—*Re Fulham*, 15 Jur., 69; *Ex parte Davies*, 16 Jur., 882; *Re Fellow's Settlement*, 2 Jur., N. S., 62.

On an application for appointment of new trustees of two funds, the costs will be paid out of the funds ratably.—*Re Grant's Trusts*, 2 J. and H., 764.

In *Ex parte Davies*, 16 Jur., 882, a new trustee was appointed in the place of a sole trustee, deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, or that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4 per cent., might form a charge on the inheritance. The Court, on appointing new trustees of real estate, has power under the section to direct the costs to be raised by a mortgage to be settled by the Court.—*Re Crabtree*, V. C. Wood, 11th Jan., 1866; see Lewin, 7th Ed., 891. Where an order is made for vesting estate in property sold in lots under the order of the Court, the costs will be paid by the vendors out of the purchase-money of each lot and not out of the fund in Court generally.—*Ayles v. Cow*, 17 Beav., 584.

The Court has no jurisdiction to award costs adversely against third parties cited to appear as respondents upon a petition to appoint new trustees.—*Re Primrose*, 23 Beav., 590.

L. Upon any petition being presented under this Act to the

Enquiry concerning person of unsound mind.

High Court concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs. Such order shall have the same effect as the like order made under section 1 of Act XXXIV of 1858 (*to regulate proceedings in Lunacy in the Courts of Judicature established by Royal Charter*), and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making an enquiry under the last-mentioned Act. The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.

Trustee Act, 1850, s. 52.

LI. Upon any petition under this Act being presented to the

Suit may be directed. High Court, it shall be lawful for the said Court to postpone making any order upon such petition, until the right of the petitioner shall have been declared in a suit duly instituted for that purpose (a).

Trustee Act, 1850, s. 53.

(a) See *Re Collinson*, 3 D. M. G., 409; *Re Burt*, 9 Hare, 289.





LII. Every order made, or purporting to be made, under this Act by the High Court shall be a complete indemnity to all persons whatsoever for any act done pursuant thereto; and it shall not be necessary for such persons to enquire concerning the propriety of such order, or whether the High Court has jurisdiction to make the same.

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Indemnity to all persons obeying orders passed under this Act.

Trustee Extension Act, 1852, s. 7.

Orders under the Act to be executed as, and have the effect of, decrees.

LIII. Any order made by the High Court under this Act shall have the same effect, and be executed in the same manner, as a decree.

Short title.

LIV. This Act may be cited as "The Indian Trustee Act, 1866."

## THE TRUSTEES' AND MORTGAGEES' POWERS ACT, 1866.

### ACT XXVIII OF 1866.

(Received the assent of the Governor-General in Council on the 24th October, 1866.)

*An Act to give Trustees, Mortgagees, and others, in cases to which English law is applicable, certain powers now commonly inserted in settlements, mortgages, and wills, and to amend the law of Property and relieve Trustees (a).*

(a) This Act applies to the whole of British India, except the Scheduled Districts—Act XV of 1874. Sections 2, 3, 4, 5, 32, 33, 34, 35, 36, and 37 have been repealed in Madras, the North-West Provinces, and the Panjab, and in the territories administered by the Chief Commissioners of Oudh, the Central Provinces, Coorg, and Assam, by Act II of 1882. The Act is founded on the English Statutes 22 & 23 Vict., c. 35 (The Trustees Relief Amendment Act) and 23 & 24 Vict., c. 145 (The Trustees' and Mortgagees' Act).

WHEREAS it is expedient that, in cases to which English law is applicable (a), certain powers and provisions usually inserted in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved; It is enacted as follows:—

Interpretation of terms.

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



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'Immoveable property' shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth :

'Immoveable property.'

'Mortgage' shall be taken to include every instrument by virtue whereof immoveable property is in any manner conveyed, pledged, or charged

as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt :

'Mortgagor' shall be taken to include every person by whom any such conveyance, pledge, or charge as aforesaid shall be made :

'Mortgagor.'

'Mortgagee' shall be taken to include every person to whom or in whose favour any such conveyance, pledge, or charge as aforesaid is made or transferred ; and

'Mortgagee.'

'High Court' means any Court established, or to be established under Statute 24 and 25 Vict., c. 104, and includes the Chief Court of the Punjab,

'High Court.'

and the Supreme Court of Judicature of the Settlements of Prince of Wales's Island, Singapore, and Malacca.

(a) See as to the meaning of these words, *ante*, p. 15.

II. In all cases where, by any will, deed, or other instrument

Trustees empowered to sell may sell in lots, and either by public auction or private contract.

of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale (a), either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject

to, the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.

23 & 24 Vict., c. 145, s. 1. See further, *ante*, p. 223. Partially repealed, see *ante*, p. 443.

(a) These sections of the Act strictly apply to those cases only where there is a power of sale ; but it is probable that a trust for sale would be within the Act.—3 Dav. Convey., 565 n (u).

III. It shall be lawful for the persons making any such sale

Sale may be made under special conditions and trustees may buy in.

to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit ;

and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and to re-sell





the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

23 & 24 Vict., c. 145, s. 2, *ante*, p. 225. Partially repealed, see *ante*, p. 443.

IV. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary.

Trustees exercising power of sale empowered to convey.

23 & 24 Vict., c. 145, s. 3, *ante*, p. 225. Partially repealed, see *ante*, p. 443.

V. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale; and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of

Money arising from sales to be laid out in the manner indicated in the will, &c., and until then to be invested in Government securities.

such persons as would be entitled to the benefit of the money, and the interest and profits thereof in case such money were then actually laid out as aforesaid: Provided that, if the will, deed, or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made.

23 & 24 Vict., c. 145, ss. 4, 7, *ante*, p. 161. Partially repealed, see *ante*, p. 443.

VI. Where any principal money is secured or charged by deed on any immoveable property, or on any interest therein, the person to whom such money shall for the time being be payable,

Powers incident to mortgages.

his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium or any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the

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1st.—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

2nd.—A power to appoint, or obtain the appointment of, a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

23 & 24 Vict., c. 145, s. 11.

VII. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

23 & 24 Vict., c. 145, s. 12.

VIII. No such sale as last aforesaid shall be made, until after six months' notice in writing given to the person, or one of the persons, entitled to the property subject to the charge, or affixed on some conspicuous part of such property, but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damaged by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling.

23 & 24 Vict., c. 145, s. 13.

IX. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:—First, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be.

23 & 24 Vict., c. 145, s. 14.





X. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to, and vest in the purchaser, the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of: Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee-simple of the property comprised therein in cases where the mortgagor could have disposed of such fee-simple at the date of the mortgage.

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23 &amp; 24 Vict., c. 145, s. 15.

Where leaseholds are mortgaged by demise, the mortgagee can, under this section, convey the reversion left in the mortgagor to a purchaser. —*Hiatt v. Hillman*, 19 W. R. (Eng.), 694; Shelf. R. P. Stat., 8th Ed., 736.

XI. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property, subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and then were vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

23 &amp; 24 Vict., c. 145, s. 16.

XII. Any person entitled to appoint, or obtain the appointment of, a receiver as aforesaid, may, from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person, or any one of such persons, to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit. No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

23 &amp; 24 Vict., c. 145, s. 17.





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A receiver who has been appointed under the ordinary power for that purpose in a deed of mortgage drawn according to the English forms (*Jeffreys v. Dickson*, L. R., 1 Chan., 190), or under this Act, is in possession as the agent of the mortgagor. See s. 13, *post*.

XIII. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Receiver deemed to be the agent of the mortgagor.

23 &amp; 24 Vict., c. 145, s. 18.

XIV. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed receiver, by suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Powers of receiver.

23 &amp; 24 Vict., c. 145, s. 19.

XV. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver may be removed.

23 &amp; 24 Vict., c. 145, s. 20.

XVI. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission not exceeding five *per centum* on the gross amount of all money received as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.

Receiver to receive commission not exceeding five per cent.

23 &amp; 24 Vict., c. 145, s. 21.

XVII. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable.

Receiver to insure if required.

23 &amp; 24 Vict., c. 145, s. 22.





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XVIII. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances if any; and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof; and subject as aforesaid shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.

23 &amp; 24 Vict., c. 145, s. 23.

XIX. The powers and provisions contained in ss. 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

23 &amp; 24 Vict., c. 145, s. 24.

XX. Where any license to do any act, which without such license would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereinafter granted, shall, at any time after this Act comes into operation, be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made punishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

22 &amp; 23 Vict., c. 35, s. 1.

A covenant not to assign or underlet without the license of the lessor is a fair and usual covenant (*Morgan v. Slaughter*, 1 Esp., 8; *Falkingham v. Croft*, 3 Anst., 700); but it is not a "common and usual" one.—*Henderson v. Hay*, 3 Bro. C.C., 632; *Church v. Brown*, 15 Ves., 258; *Brown v. Raban*, *ibid*, 528; *Buckland v. Papillon*, L. R., 2 Ch., 67. Such a covenant runs with the land (*Williams v. Earle*, L. R., 3 Q. B., 739; *West v.*





APPDX. *Dobb*, L. R., 4 Q. B., 634; 5 Q. B., 460; but not with the equitable title of a *cestui que trust*.—*West v. Dobb*, L. R., 4 Q. B., 634; 5 Q. B., 460.

As a general rule, a Court of Equity will not relieve against a forfeiture for alienation without license.—*Hill v. Barclay*, 18 Ves., 56. If, however, when a written license is necessary the lessor gives a parol license in order to ensnare his lessee, the Court will relieve on the ground of fraud.—*Richardson v. Evans*, 3 Mad., 218. See further, Woodf., L. & T. 10th Edn., 548.

XXI. Where in any lease heretofore granted, or to be hereafter granted, there is or shall be a power of re-entry on assigning or underletting, or doing any other specified act without license, and a license, at any time after the passing of this Act, shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license; or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property, as the case may be, over or in respect of such shares or interests or remaining property; but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

22 & 23 Vict., c. 35, s. 2.

XXII. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for nonpayment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

22 & 23 Vict., c. 35, s. 3.

See Woodf., L. and T., 10th Ed., 550; Shelf., R. P., 8th Ed., 710.

#### *Rent-Charges.*

XXIII. The release from a rent-charge of part of the immoveable property charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice, nevertheless, to the rights





of all persons interested in the property remaining unreleased, and not concurring in or confirming the release. APPDX.

22 & 23 Vict., c. 35, s. 10.

"A person having a rent-charge, by releasing all his right in part of the land extinguishes the whole rent, because it issues out of every part, and cannot be apportioned. But a person having a rent-charge may release part of it to the tenant of the land, and reserve part, for the grantee deals only with that which is his own,—namely, the rent, and not with the land. So, if the lessee surrender part of the land to the lessor, the rent services will be apportioned.

"If a man having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole, because the rent is entire and against common right and issuing out of every part of the land, although it is otherwise where part of the lands out of which the rent issues descends on the grantee. If the grantee of a rent-charge purchases part of the land, and the grantor by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, this amounts to a new grant. A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues notwithstanding the devise is expressly made over and above the rent-charge."—*Shelf. R. P.*, 8th Ed., 714. See as to apportionment of rent-charges, *Mills v. Cobb*, L. R., 2 C. P., 95; *Ley v. Ley*, L. R., 6 Eq., 174.

#### *Powers.*

XXIV. A deed hereafter executed in the presence of, and attested by, two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument: and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

22 & 23 Vict., c. 35, s. 12.

XXV. Where by any will, which shall come into operation after the passing of this Act, the testator shall have charged his immoveable property or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of

Legatee in trust may raise money by sale notwithstanding want of express power in the will.





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money, and shall have bequeathed the property so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid by sale and absolute disposition, by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

22 & 23 Vict., c. 35, s. 14. See Shelf. R. P., 8th Ed., 484.

XXVI. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.

22 & 23 Vict., c. 35, s. 15.

XXVII. If any testator who shall have created such a charge as is described in section 25 of this Act shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property, and such power shall from time to time devolve in, and become vested in, the person or persons (if any) in whom the executorship shall for the time being be vested.

22 & 23 Vict., c. 35, s. 16.

XXVIII. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26, and 27 of this Act, or any of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

22 & 23 Vict., c. 35, s. 17.



*Inheritance.*

XXIX. In cases of intestacies occurring before the first day of January, 1866, where there shall be a total failure of heirs of the purchaser, or where any immoveable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the property shall descend, and the descent shall thenceforth be traced from the person last entitled to the property as if he had been the purchaser thereof. This section shall be read as part of Act No. XXX of 1839 (for the amendment of the Law of Inheritance).

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22 &amp; 23 Vict., c. 35, s. 19.

*Assignment of Moveables and Terms for Years.*

XXX. Any person shall have power to assign moveable property now by law assignable, terms for years of immoveable property, and estates by *elegit*, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

22 &amp; 23 Vict., c. 235, s. 21.

At common law, a man could not assign personalty to himself and another, a rule which occasioned inconvenience in the transfer of trust-property. By this section the continuing and retiring trustees can assign directly to the continuing and new trustees. See *ante*, p. 327, as to appointment of new trustees.

*Purchasers.*

XXXI. The *bond fide* payment to, and the receipt of, any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application thereof, or being answerable for the misapplication thereof.

22 &amp; 23 Vict., c. 35, s. 23.

See Lewin, 7th Ed., pp. 269, 270, 409, 420, & 425; Shelf. R. P., 8th Ed., 488; and *ante*, pp. 171, 228.

*Investment of Trust-Funds.*

XXXII. Trustees having trust-money in their hands, which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty,

On what securities trust-funds may be invested.





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23 & 24 Vict., c. 145, s. 25. See *ante*, pp. 164, 226. Partially repealed, *ante*, p. 443.

*Trustees and Executors.*

XXXIII. In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

23 & 24 Vict., c. 145, s. 26. See *ante*, p. 227. Partially repealed, *ante*, p. 443.

XXXIV. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and





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

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23 & 24 Vict., c. 145, s. 72. See *ante*, p. 333. Partially repealed, *ante*, p. 443.

This section does not take away the jurisdiction of the Court to increase the original number of trustees.—*Viscountess D'Adhomar v. Bertrand*, 35 Beav., 19.

"Where an instrument contains an express power to appoint new trustees in more restricted terms than the statutory powers, it seems doubtful whether the latter is excluded.—*Re Jackson*, 16 W. R. (Eng.), 572. Where a will contained an express power exercisable by the surviving or continuing trustees, and all the trustees having died, an application was made to the Court to appoint new trustees. MALINS, V. C., made the order, although it was opposed, on the ground that, under





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this section, the executor of the surviving trustee was competent to make the appointment.—*Ibid.* But where a deed of separation contained an express power, and, one of the trustees having died, the husband applied that a trustee, whom he had himself selected, should be appointed by the Court, Lord ROMILLY dismissed the petition with costs, on the ground that, by this section, the power was conferred on the surviving trustee."—*Re Souby*, 21 W. R. (Eng.), 256. See Shelf. R. P., 8th Ed., 740.

XXXV. The power of appointing new trustees herein-  
before contained may be exercised in  
Appointment of new trustee in place of trustee predeceasing testator. cases where a trustee nominated in a will has died in the lifetime of the testator.

23 & 24 Vict., c. 145, s. 28. Partially repealed, *ante*, p. 443.

XXXVI. The receipts of any trustees or trustee for any  
Trustees' receipts to be discharges. money payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.

23 & 24 Vict., c. 145, s. 29. See *ante*, p. 229. Partially repealed, *ante*, p. 443.

XXXVII. Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following,—that is to say, "that the trustees or trustee for the time being of the said deed, will, or other

Every trust-instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees. instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or





himself, or pay or discharge out of the trust-premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument. APPDX.

22 & 23 Vict., c. 35, s. 31. See *ante*, p. 210. Partially repealed, *ante*, p. 443.

XXXVIII. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instrument of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

23 & 24 Vict., c. 145, s. 30. See *ante*, p. 222.

XXXIX. No trustee, executor, or administrator making any payment, or doing any act *bonâ fide* under or in pursuance of any power-of-attorney, shall be liable for the moneys so paid, or the act so done, by reason that the person who gave the power-of-attorney was dead at the time of such payment or act, or had done some act to avoid the power: Provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made, as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power-of-attorney.

22 & 23 Vict., c. 35, s. 26.

At common law, an act done under a power-of-attorney after the death of the grantor is void, as the power is revoked by the death.—*Watson v. King*, 4 Camp. 272. But in equity, such act is valid if done *bonâ fide*, and without notice of the death.—*Bailey v. Collett*, 18 Beav., 179.

See *ante*, p. 208.



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**XL.** Where an executor or administrator liable as such to

As to liability of executor or administrator in respect of rents, covenants, or agreements.

the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator or intestate whose estate is being

administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due, and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee, to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to the purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part, or any further part (as the case may be), of the estate of the deceased to meet any future liability under the said lease or agreement for a lease. The executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease. Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

22 & 23 Vict., c. 35, s. 27.

This section protects an executor though he has not applied to the Court. It is retrospective.—*Smith v. Smith*, 1 Dr. and Sm., 384; *Re Green*, 2 De.G. F. and J., 121.

**XLI.** In like manner, where an executor or administrator

As to liability of executor, &c., in respect of rents, &c., in conveyance on rent-charge.

liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to, or made and entered into with, the

testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee, to be laid out on the property conveyed or agreed to be conveyed, although the period for laying out the





same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively, without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance. The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance. Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

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22 &amp; 23 Vict., c. 35, s. 28.

**XLII.** Where an executor or administrator shall have given such or the like notices as, in the opinion

As to distribution of the assets of testator or intestate after notice given by executor and administrator.

of the Court in which such executor or administrator is sought to be charged, would have been given by the High Court in an administration-suit for creditors and others to send in to the executor or ad-

ministrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be. Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

22 &amp; 23 Vict., c. 35, s. 29.

**XLIII.** Any trustee, executor, or administrator shall be at liberty, without the institution of a suit,

Trustee, executor, &c., may apply by petition to Judge of High Court for opinion, advice, &c., in management, &c., of trust-property.

to apply by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate. Such applica-



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tion shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient. The trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application: Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

22 & 23 Vict., c. 35, s. 30. See *ante*, p. 218.

*General Provisions.*

XLIV. For the purpose of this Act, a person shall be deemed

Tenants-for-life, &c.,  
may execute powers,  
notwithstanding in-  
cumbances.

to be entitled to the possession or to the receipt of the rents and income of immoveable or moveable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise, however, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

19 & 20 Vict., c. 120, s. 41.

XLV. The provisions contained in this Act shall, except

Operation of Act.

as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after this Act comes into operation, or under a will or codicil confirmed or revived by a codicil executed after that date, and only to property in British India and to cases to which English law is applicable.

23 & 24 Vict., c. 145, s. 34.

Short title.

XLVI. This Act may be called "The Trustees' and Mortgagees' Powers Act, 1866."





ACT I OF 1880.  
RELIGIOUS SOCIETIES ACT.

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ACT I OF 1880.

*An Act to confer certain powers on Religious Societies.*

WHEREAS it is expedient to simplify the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose, and to provide for the dissolution of such bodies and the adjustment of their affairs and the decision of certain questions relating to such bodies: It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Religious Societies Act, 1880."

Commencement.

It shall come into force at once; and

Local extent.

shall extend to the whole of British India;

but nothing herein contained shall apply to any Hindus, Muhammadans or Buddhists; or to any persons to whom the Governor-General in Council may, from time to time, by notification in the *Gazette of India*, exclude from the operation of this Act.

2. When any body of persons associated for the purpose

Appointment of new trustees in cases not otherwise provided for.

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 such property was so vested or by which the trusts on which it is held have been declared, or such new 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.

3. Every appointment of new trustees under section 2

Appointment under section 2 to be recorded in a memorandum under the hand of the chairman of the meeting.

shall be made to appear by some memorandum under the hand of the chairman for the time being of the meeting at which such appointment is made. Such memorandum shall be in the form set forth in the schedule hereto annexed, or

as near thereto as circumstances allow, shall be executed and attested by two or more credible witnesses in the presence of such meeting, and shall be deemed to be a document of which the registration is required by the Indian Registration Act of 1877, section 17.





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4. 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 wholly, upon the same trusts and with and subject to the same powers and provisions, as it was vested in the old trustees.

5. Nothing herein contained shall be deemed to invalidate any appointment of new trustees, or any conveyance of any property, which may hereafter be made as heretofore was by law required.

Saving of existing modes of appointment and conveyance.

6. Any number not less than three-fifths of the members of any such body as aforesaid may, at any meeting convened for the purpose, determine that such body 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 such body, its claims and liabilities according to the rules of such body applicable thereto, if any, and if not, then as such body at such meeting may determine.

Provisions for dissolution of societies and adjustment of their affairs.

Provided that, in the event of any dispute arising among the members of such body, 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 such body is situate; and the Court shall make such order in the matter as it deems fit.

7. If upon the dissolution of any such body there remains, 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 such body or any of them, but shall be given to some other body of persons associated for the purpose of maintaining religious worship or some other religious or charitable purpose to be determined by the votes of not less than three-fifths of the members present at a meeting convened in this behalf, or in default thereof by such Court as last aforesaid.

Upon a dissolution no member to receive profit.

8. Nothing in sections 6 and 7 shall be deemed to affect any provision contained in any instrument for the dissolution of such body, or for the payment or distribution of such property.

Saving of certain provisions of instruments.





9. When any question arises, either in connection with the APPENDIX  
matters hereinbefore referred to, or other-

Questions may be sub-  
mitted to High Court.

wise, as to whether any person is a mem-  
ber of any such body as aforesaid, or as  
to the validity of any appointment under this Act, any person  
interested in such question may apply by petition to the High  
Court for its opinion on such question. A copy of such petition  
shall be served upon, and the hearing thereof may be attended  
by, such other person interested in the question as the Court  
thinks fit.

Any opinion given by the Court on an application under this  
section shall be deemed to have the force of a declaratory decree.

The costs of every application under this section shall be in  
the discretion of the Court.

### THE SCHEDULE.

(See section 3.)

Memorandum of the appointment of new trustees of the (*des-  
cribe the church, chapel or other buildings and property*) situate  
at a meeting duly convened and held for  
that purpose (*in the vestry of the said* ) on the  
day of 18 , A. B.,  
of Chairman.

Names and descriptions of all the trustees on the constitution  
or last appointment of trustees made the day of  
(*here insert the same*).

Names and descriptions of all the trustees in whom the said  
(*chapel and property*) now become legally vested.

*First.*—Old continuing trustees :—

(*here insert the same*).

*Second.*—New trustees now chosen and appointed :—

(*here insert the same*).

Dated this day of 18 .

Signed by the said A. B., as Chair-  
man of the said Meeting, at and in  
the presence of the said Meeting, on  
the day and year aforesaid, in the  
presence of

A. B.,  
Chairman of the  
said Meeting.

C. D.

E. F.





## THE INDIAN TRUSTS ACT.

## ACT II OF 1882.

*An Act to define and amend the law relating to Private Trusts and Trustees.*

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

## CHAPTER I.

## PRELIMINARY.

1. This Act may be called "The Indian Trusts Act, 1882":  
Short title. and it shall come into force on the first  
Commencement. day of March, 1882.  
It extends in the first instance to the territories respectively  
administered by the Governor of Madras  
Local extent. in Council, the Lieutenant-Governors of  
the North-West Provinces and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the Local Government may from time to time, by notification in the official Gazette, extend it to any other part of British India. But nothing herein contained affects the rules of Muhammadan law as to *wagf* (a), or the mutual relations of the members of an undivided family as determined by any customary or personal law (b), or applies to public or private religious or charitable endowments (c), or to trusts to distribute prizes taken in war among the captors (d); and nothing in the second chapter of this Act applies to trusts created before the said day.

(a) *Anta*, p. 380.

(b) As to waste by Hindu widow, see *ante*, p. 145, and as to liability of karta to account, see p. 158; as to purchaser from manager of a joint Hindu family, p. 306.

(c) See p. 349.

(d) See p. 124.

2. The Statute and Acts mentioned in the schedule hereto annexed shall, to the extent mentioned in the said schedule, be repealed in the territories to which this Act for the time being extends.

3. A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner (a):





the person who reposes or declares the confidence is called the  
'author of the trust': 'author of the trust': the person who ac-  
'trustee': cepts the confidence is called the 'trustee':  
'beneficiary': the person for whose benefit the confidence  
is accepted is called the 'beneficiary':  
'trust-property': the subject-matter of the trust is called  
'trust-property' or 'trust-money': 'the  
beneficial interest' or 'interest' of the beneficiary is his right  
against the trustee as owner of the trust-property; and the in-  
strument, if any, by which the trust is  
'instrument of trust': declared is called the 'instrument of trust':  
a breach of any duty imposed on a trustee, as such, by any  
'breach of trust': law for the time being in force, is called  
a 'breach of trust':  
and in this Act, unless there be something repugnant in the  
subject or context, 'registered' means  
'registered': registered under the law for the registra-  
tion of documents for the time being in force: a person is said  
to have 'notice' of a fact either when he  
'notice.' actually knows that fact or when, but for  
wilful abstention from inquiry or gross negligence, he would have  
known it, or when information of the fact is given to or obtained by  
his agent, under the circumstances mentioned in the Indian Con-  
tract Act, 1872, section 229 (b); and all  
Expressions defined in Act IX of 1872. expressions used herein and defined in  
the Indian Contract Act, 1872, shall be  
deemed to have the meanings respectively attributed to them by  
that Act.

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- (a) See p. 16.  
(b) See p. 276.

## CHAPTER II.

### OF THE CREATION OF TRUSTS.

4. A trust may be created for any lawful purpose. The pur-  
pose of a trust is lawful unless it is (a)  
Lawful purpose. forbidden by law, or (b) is of such a  
nature that, if permitted, it would defeat the provisions of any  
law, or (c) is fraudulent, or (d) involves or implies injury to  
the person or property of another, or (e) the Court regards it as  
immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And  
where a trust is created for two purposes, of which one is lawful  
and the other unlawful, and the two purposes cannot be separated,  
the whole trust is void.



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*Explanation.*—In this section, the expression 'law' includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

*Illustrations.*

(a.) *A* conveys property to *B* in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(b.) *A* bequeaths property to *B* in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support *A's* children. The trust is void.

(c.) *A*, while in insolvent circumstances, transfers property to *B* in trust for *A* during his life, and after his death for *B*. *A* is declared an insolvent. The trust for *A* is invalid as against his creditors.

See Lect. I, pp. 19—50.

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

See Lect. II, p. 51.

6. Subject to the provisions of section five, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

*Illustrations.*

(a.) *A* bequeaths certain property to *B*, "having the fullest confidence that he will dispose of it for the benefit of" *C*. This creates a trust so far as regards *A* and *C*.

(b.) *A* bequeaths certain property to *B*, "hoping he will continue it in the family." This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(c.) *A* bequeaths certain property to *B*, requesting him to distribute it amongst such members of *C's* family as *B* should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(d.) *A* bequeaths certain property to *B*, desiring him to divide the bulk of it among *C's* children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.





(c.) *A* bequeaths a shop and stock-in-trade to *B*, on condition that he pays *A*'s debts and a legacy to *C*. This is a condition, not a trust for *A*'s creditors and *C*.

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As to implied trusts, see Lect. III, and as to benami transactions and constructive trusts, Lect. IV.

Who may create trusts.

7. A trust may be created—

(a) by every person competent to contract, and,  
(b) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

See p. 124.

Subject of trust.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

See p. 25.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

Disclaimer by beneficiary.

See p. 127.

10. Every person capable of holding property may be a trustee: but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract (a).

Who may be trustee.

No one bound to accept trust.

No one is bound to accept a trust (b).

Acceptance of trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance (c).

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

Disclaimer of trust.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust (d).





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*Illustrations.*

(a.) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A*'s will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*.

(b.) *A* transfers certain property to *B* in trust to sell it and to pay out of the proceeds *A*'s debts. *B* accepts the trust and sells the property. So far as regards *B*, a trust of the proceeds is created for *A*'s creditors.

(c.) *A* bequeaths a lakh of rupees to *B* upon certain trusts, and appoints him his executor. *B* severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

(a) See p. 127.

(b) See p. 132.

(c) See p. 120.

(d) See p. 132.

## CHAPTER III.

## OF THE DUTIES AND LIABILITIES OF TRUSTEES.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Trustee to execute trust.  
Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

*Explanation.*—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (a) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death; and (b) in the case of debts not bearing interest, to make such payment without interest.

*Illustrations.*

(a.) *A*, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(b.) *A*, a trustee of certain land for *X*, *Y* and *Z*, is authorized to sell the land to *B* for a specified sum. *X*, *Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a less sum. *A* may sell the land accordingly.

(c.) *A*, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B*'s request, trust-property to *B*'s husband, *C*, on the security of his bond. *C* becomes insolvent, and *B* requests *A* to make the loan. *A* may refuse to make it.

See p. 135.





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12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Trustee to inform himself of state of trust-property.

*Illustrations.*

(a.) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(b.) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case require.

See p. 136.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Trustee to protect title to trust-property.

*Illustration.*

The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

See p. 137.

14. The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

Trustee not to set up title adverse to beneficiary.

See p. 155.

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Care required from trustee.

*Illustrations.*

(a.) A, living in Calcutta, is a trustee for B, living in Bombay. A remits trust-funds to B by bills drawn by a person of undoubted credit in favor of the trustee as such, and payable at Bombay. The bills are dishonoured. A is not bound to make good the loss.





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(b.) *A*, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, *B*, then in credit. The rents are accordingly paid to *B*, and *A* leaves the money with *B* only till wanted. Before the money is drawn out, *B* becomes insolvent. *A*, having had no reason to believe that *B* was in insolvent circumstances, is not bound to make good the loss.

(c.) *A*, a trustee of two debts for *B*, releases one and compounds the other, in good faith, and reasonably believing that it is for *B*'s interest to do so. *A* is not bound to make good any loss caused thereby to *B*.

(d.) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. *A* is bound to make good the loss caused thereby to the beneficiary.

(e.) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*.

(f.) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums. *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*.

(g.) *A* bequeaths certain moneys to *B* and *C* as trustees, and authorizes them to continue trust-moneys upon the personal security of a certain firm in which *A* had himself invested them. *A* dies, and a change takes place in the firm. *B* and *C* must not permit the moneys to remain upon the personal security of the new firm.

(h.) *A*, a trustee for *B*, allows the trust to be executed solely by his co-trustee, *C*. *C* misapplies the trust-property. *A* is personally answerable for the loss resulting to *B*.

See p. 140.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

*Illustrations.*

(a.) *A* bequeaths to *B* all his property in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. *A*'s property consists of three leasehold houses, and there is nothing in *A*'s will to show that he intended the houses to be enjoyed in specie. *B* should sell the houses, and invest the proceeds in accordance with section twenty.

(b.) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C*, during his life, and on his death for *D*, and on *D*'s death for *E*. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and *B* should not sell them.

See p. 148.

17. Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Trustee to be impartial.





Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion. APPDX.

*Illustration.*

A, a trustee for B, C and D, is empowered to choose between several specified modes of investing the trust-property. A in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of B, C and D.

See p. 152.

18. Where the trust is created for the benefit of several persons in succession, and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

See p. 142.

19. A trustee is bound (a) to keep clear and accurate accounts of the trust-property, and (b) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

See p. 157.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others :—

(a) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland ;

(b) in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;

(c) in stock or debentures of, or shares in, Railway or other companies, the interest whereon shall have been guaranteed by the Secretary of State for India in Council ;

(d) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a Legislature established in British India ;

(e) on a first mortgage of immoveable property situate in British India : Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-





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(*f*) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf.

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing.

See p. 160, and compare ss. 5 and 32 of Act XVIII of 1866, *ante*, pp. 445, 453.

21. Nothing in section twenty shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immovable property already pledged as security for an advance under the Land Improvement Act, 1871, or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

Mortgage of land pledged to Government under Act XXVI of 1871.

Deposit in Government Savings Bank.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Sale by trustee directed to sell within specified time.

*Illustration.*

A bequeaths property to B, directing him, with all convenient speed and within five years, to sell it, and apply the proceeds for the benefit of C. In the exercise of reasonable discretion, B postpones the sale for six years. The sale is not thereby rendered invalid, but C, alleging that he has been injured by the postponement, institutes a suit against B to obtain compensation. In such suit the burden of proving that C has not been injured lies on B.

See p. 172.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with

Liability for breach of trust.



full knowledge of the facts of the case and of his rights as against the trustee. APPDX.

A trustee committing a breach of trust is not liable to pay interest except in the following cases :—

- (a) where he has actually received interest :
- (b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary :
- (c) where the trustee ought to have received interest, but has not done so :

(d) where he may be fairly presumed to have received interest.

He is liable, in case (a), to account for the interest actually received, and in cases (b), (c) and (d), to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs.

(e) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate :

(f) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

#### *Illustrations..*

(a.) A trustee improperly leaves trust-property outstanding, and it is consequently lost : he is liable to make good the property lost, but he is not liable to pay interest thereon.

(b.) A bequeaths a house to B in trust to sell it and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. B is answerable to C for the loss.

(c.) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section twenty, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(d.) The duty of the trustee is to invest trust-money in any of the securities mentioned in section twenty, clause (a), (b), (c) or (d). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, and the intermediate dividends and interest thereon.

(e.) The instrument of trust directs the trustee to invest trust-money either in any of such securities or on mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(f.) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have



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been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(g.) Trust-property is invested in one of the securities mentioned in section twenty, clause (a), (b), (c) or (d). The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(h.) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

See pp. 181, 190.

As to interest, pp. 178, 291, 313, 314, 318.

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

See p. 192.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

See p. 193.

26. Subject to the provisions of sections thirteen and fifteen, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(a) where he has delivered trust-property to his co-trustee without seeing to its proper application:

(b) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require:

(c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.



*Illustration.*

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A bequeaths certain property to *B* and *C*, and directs them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* accordingly sell the property, and the purchase-money is received by *B* and retained in his hands. *C* pays no attention to the matter for two years, and then calls on *B* to make the investment. *B* is unable to do so, becomes insolvent, and the purchase-money is lost. *C* may be compelled to make good the amount.

See p. 193.

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

See p. 206.

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

See p. 208.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication to Government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the Government may direct in this behalf.

See p. 126.

30. Subject to the provisions of the instrument of trust and of sections twenty-three and twenty-six, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive, and shall





APPDX. — not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

Compare Act XXVIII of 1866, s. 37, *ante*, p. 456, and ss. 15 and 16 of this Act. See also *ante*, pp. 178, 209, 270.

#### CHAPTER IV.

##### OF THE RIGHTS AND POWERS OF TRUSTEES.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

Right to title-deeds.

See p. 211.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

Right to reimburse-  
ment of expenses.

If he pays such expenses out of his own pocket he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Where a trustee has by mistake made an overpayment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such overpayment.

Right to be recouped  
for erroneous overpay-  
ment.

See p. 212; as to overpayment, p. 180.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Right to indemnity  
from gainer by breach  
of trust.





Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

APPDX.  
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See p. 217.

34. Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

Compare Act XXVIII of 1866, s. 43, *ante*, p. 459, and see p. 218.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

See p. 219.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of section seventeen, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

Every trustee in the actual possession or receipt of the rents and profits of land as defined in the Land Improvement Act, 1871, shall, for the purposes of that Act, be deemed to be a landlord in possession.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term





APPDX. exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

See p. 219.

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Power to sell in lots, and either by public auction or private contract.

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to sell under special conditions.

Power to buy-in and re-sell.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Time allowed for selling trust-property.

#### *Illustrations.*

(a.) *A* bequeaths property to *B*, directing him to sell it with all convenient speed and pay the proceeds to *C*. This does not render an immediate sale imperative.

(b.) *A* bequeaths property to *B*, directing him to sell it at such time and in such manner as he shall think fit, and invest the proceeds for the benefit of *C*. This does not authorize *B*, as between him and *C*, to postpone the sale to an indefinite period.

Compare Act XXVIII of 1866, s. 2, *ante*, p. 444; and see p. 222.

Compare Act XXVIII of 1866, s. 3, *ante*, p. 444, and see p. 223; as to buying in, see p. 224; and as to the time for selling trust-property, see p. 172.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

Power to convey.

See p. 225.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section twenty, and from

Power to vary investments.





time to time vary any such investments for others of the same nature. APPDX.

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

See p. 225.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section twenty, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen: Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

See pp. 221, 226, and Act XXVIII of 1866, s. 33, *ante*, p. 454.

42. Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Compare Act XXVIII of 1866, s. 36, *ante*, p. 456; and see p. 229.



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Power to compound,  
 &c.

43. Two or more trustees acting together may, if and as they think fit—

(a) accept any composition or any security for any debt or for any property claimed ;

(b) allow any time for payment of any debt ;

(c) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust ; and,

(d) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

See p. 222. .

44. When an authority to deal with the trust-property is given to several trustees, and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the numbers of the remaining trustees.

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

See p. 232.





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## CHAPTER V.

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## OF THE DISABILITIES OF TRUSTEES.

46. A trustee who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of original jurisdiction, or (b) if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust.

Trustee cannot renounce after acceptance.

See p. 234.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.

Trustee cannot delegate.

*Explanation.*—The appointment of an attorney or proxy to do an act merely ministerial, and involving no independent discretion, is not a delegation within the meaning of this section.

*Illustrations.*

(a.) A bequeaths certain property to B and C on certain trusts, to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust-property to D and E upon the trusts of A's will.

(b.) A is a trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.

(c.) A bequeaths to B fifty houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

See p. 235.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Co-trustees cannot act singly.

See p. 240.

49. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

Control of discretionary power.

See pp. 153 and 242.





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50. In the absence of express directions to the contrary contained in the instrument of trust, or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration.

See p. 242.

Trustee may not use trust-property for his own profit.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

See p. 250.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

See p. 256.

53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it or any part thereof, for himself.

See pp. 261 and 289.

54. A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

See p. 265.





## CHAPTER VI.

APPDX.

## OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

See p. 268.

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest ; and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract, and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

*Illustrations.*

(a.) Certain Government securities are given to trustees upon trust to accumulate the interest until *A* attains the age of 24, and then to transfer the gross amount to him. *A*, on attaining majority, may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(b.) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority, and is otherwise competent to contract. *B* may claim the Rs. 10,000.

(c.) *A* transfers certain property to *B*, and directs him to sell or invest it for the benefit of *C*, who is competent to contract. *C* may elect to take the property in its original character.

See p. 271.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

See p. 272.





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58. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:

Right to transfer beneficial interest.

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

See p. 273.

59. Where no trustees are appointed or all the trustees die, disclaim or are discharged, or where, for any other reason, the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

See p. 282.

60. The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Right to proper trustees.

*Explanation I.*—The following are not proper persons within the meaning of this section :—

A person domiciled abroad : an alien enemy : a person having an interest inconsistent with that of the beneficiary : a person in insolvent circumstances ; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

*Explanation II.*—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

*Illustrations.*

(a.) A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from B's being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.

(b.) A bequeaths certain jewels to B in trust for C. B dies during A's lifetime ; then A dies. C is entitled to have the property conveyed to a trustee for him.

(c.) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.





(d.) *A* conveys certain property to three trustees in trust for *B*. All the trustees disclaim. *B* may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

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(e.) *A*, a trustee for *B*, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. *B* may institute a suit to have *A* removed and a new trustee appointed in his room.

See p. 284.

61. The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

*Illustrations.*

(a.) *A* contracts with *B* to pay him monthly Rs. 100 for the benefit of *C*. *B* writes and signs a letter declaring that he will hold in trust for *C* the money so to be paid. *A* fails to pay the money in accordance with his contract. *C* may compel *B* on a proper indemnity, to allow *C* to sue on the contract in *B*'s name.

(b.) *A* is trustee of certain land, with a power to sell the same and pay the proceeds to *B* and *C* equally. *A* is about to make an improvident sale of the land. *B* may sue on behalf of himself and *C* for an injunction to restrain *A* from making the sale.

See p. 287.

62. Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (a) account for the nett profits of the property, (b) be charged with an occupation-rent, if he has been in actual possession of the property, and (c) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(a) impairs the right of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or

(b) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to





APPDX. — contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

See p. 283.

63. Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

Following trust-property—  
into the hands of third persons;

Where the trustee has disposed of trust-property, and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

*Illustrations.*

(a.) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. B is entitled to the land.

(b.) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so misemployed.

See p. 291.

64. Nothing in section sixty-three entitles the beneficiary to any right in respect of property in the hands of—  
Saving of rights of certain transferees.

(a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or—

(b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in section sixty-three applies to money, currency notes and negotiable instruments in the hands of a *bonâ fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred.

See p. 291.





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65. Where a trustee wrongfully sells or otherwise transfers trust-property, and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Acquisition by trustee of trust-property wrongfully converted.

See p. 313.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Right in case of blended property.

See p. 314.

67. If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

Wrongful employment by partner-trustee of trust-property for partnership purposes.

The partners having such notice are jointly and severally liable for the breach of trust.

#### *Illustrations.*

(a) *A* and *B* are partners. *A* dies, having bequeathed all his property to *B* in trust for *Z*, and appointed *B* his sole executor. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *Z* may compel him, as partner, to account for so much of the profits as are derived from *A*'s share of the capital. *B* is also answerable to *Z* for the improper employment of *A*'s assets.

(b) *A*, a trader, bequeaths his property to *B* in trust for *C*, appoints *B* his sole executor, and dies. *B* enters into partnership with *X* and *Y* in the same trade, and employs *A*'s assets in the partnership-business. *B* gives an indemnity to *X* and *Y* against the claims of *C*. Here *X* and *Y* are jointly liable with *B* to *C* as having knowingly become parties to the breach of trust committed by *B*.

See p. 319.

68. Where one of several beneficiaries—

Liability of beneficiary joining in breach of trust. (a) joins in committing a breach of trust, or

(b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(d) has deceived the trustee, and thereby induced him to commit a breach of trust,





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the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

See p. 322.

Rights and liabilities  
of beneficiary's trans-  
feree.

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

See p. 324.

## CHAPTER VII.

### OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

See p. 326.

Discharge of trustee.

71. A trustee may be discharged from his office only as follows :—

- (a) by the extinction of the trust;
- (b) by the completion of his duties under the trust;
- (c) by such means as may be prescribed by the instrument of trust;
- (d) by appointment under this Act of a new trustee in his place;
- (e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or
- (f) by the Court to which a petition for his discharge is presented under this Act.

See p. 327.

72. Notwithstanding the provisions of section eleven, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and if the Court finds that there is sufficient reason for such discharge,





it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

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See p. 330.

73. Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) the person nominated for that purpose by the instrument of trust (if any), or

(b) if there be no such person, or no such person able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

Compare Act XXVII of 1866, s. 34, *ante*, p. 433; and see p. 333.

74. Whenever any such vacancy or disqualification occurs, and it is found impracticable to appoint a new trustee under section seventy-three, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.





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In appointing new trustees, the Court shall have regard (a) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; (b) to the wishes of the person, if any, empowered to appoint new trustees; (c) to the question whether the appointment will promote or impede the execution of the trust; and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries.

Compare Act XXVII of 1866, s. 35, *ante*, p. 434; and as to selecting new trustees, see p. 285.

75. Whenever any new trustee is appointed under section seventy-three or section seventy-four, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Compare Act XXVII of 1866, s. 36, *ante*, p. 435.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

See p. 335.

## CHAPTER VIII.

### OF THE EXTINCTION OF TRUSTS.

Trust how extin- 77. A trust is extinguished—  
guished.

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or
- (d) when the trust, being revocable, is expressly revoked.

See p. 335.





Revocation of trust. 78. A trust created by will may be APPDX.  
revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

(a) where all the beneficiaries are competent to contract—by their consent ;

(b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust ; or

(c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

*Illustration.*

A conveys property to B in trust to sell the same, and pay out of the proceeds the claim of A's creditors. A reserves no power of revocation. If no communication has been made to the creditors, A may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

See pp. 53, 68—76 and 336.

Revocation not to defeat what trustees have  
duly done. 79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

See *Wilding v. Richards*, 1 Coll., 655.

CHAPTER IX.\*

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in  
nature of trust is creat-  
ed. 80. An obligation in the nature of a trust is created in the following cases.

81. Where the owner of property transfers or bequeaths it, and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Where it does not appear that transferor intended to dispose of beneficial interest.

*Illustrations.*

(a.) A conveys land to B without consideration, and declares no trust of any part. It cannot, consistently with the circumstances under which

\* This Chapter deals with implied, resulting, and constructive trusts. As to these, see Lectures III and IV.





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the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the land. *B* holds the land for the benefit of *A*.

(*b.*) *A* conveys to *B* two fields, *Y* and *Z*, and declares a trust of *Y*, but says nothing about *Z*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in *Z*. *B* holds *Z* for the benefit of *A*.

(*c.*) *A* transfers certain stock belonging to him into the joint names of himself and *B*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the stock during his life. *A* and *B* hold the stock for the benefit of *A* during his life.

(*d.*) *A* makes a gift of certain land to his wife *B*. She takes the beneficial interest in the land free from any trust in favour of *A*, for it may be inferred from the circumstances that the gift was for *B*'s benefit.

## 82. Where property is transferred to one person for a

Transfer to one for consideration paid by another.

consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide

such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (*to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency*), section 36.

## 83. Where a trust is incapable of being executed, or where the

Trust incapable of execution or executed without exhausting trust-property.

trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit

of the author of the trust or his legal representative.

*Illustrations.*(a.) *A* conveys certain land to *B*—

“upon trust,” and no trust is declared; or

“upon trust to be thereafter declared,” and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect; or

“in trust for *C*,” and *C* renounces his interest under the trust.

In each of these cases *B* holds the land for the benefit of *A*.

(*b.*) *A* transfers Rs. 10,000 in the four per cents. to *B*, in trust to pay the interest annually accruing due to *C* for her life. *A* dies. Then *C* dies. *B* holds the fund for the benefit of *A*'s legal representative.

(*c.*) *A* conveys land to *B* upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. *B* sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. *B* holds the first moiety and the part unapplied of the second moiety for the benefit of *A* or his legal representative.





(d.) *A* bequeaths Rs. 10,000 to *B*, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. *B* holds for the benefit of *A*'s legal representative the undisposed of interest in the money or land if purchased.

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84. Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

85. Where a testator bequeaths certain property upon trust, and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed, and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

86. Where property is transferred in pursuance of a contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

#### Illustrations.

(a) *A*, an executor, buys at an undervalue from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.



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(b.) *A*, a trustee, uses the trust-property for the purpose of his own business. *A* holds for the benefit of his beneficiary the profits arising from such user.

(c.) *A*, a trustee, retires from his trust in consideration of his successor paying him a sum of money. *A* holds such money for the benefit of his beneficiary.

(d.) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.

(e.) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.

(f.) *A* and *B* are partners. *A* dies. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A*'s legal representative for the profits arising from *A*'s share of the capital.

(g.) *A*, an agent employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.

(h.) *A*, a guardian, buys up for himself incumbrances on his ward *B*'s estate at an undervalue. *A* holds for the benefit of *B* the incumbrances so bought, and can only charge him with what he has actually paid.

89. Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

90. Where a tenant-for-life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

*Illustrations.*

(a.) *A*, the tenant-for-life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease.

(b.) A village belongs to a Hindu family. *A*, one of its members, pays nazrana to Government, and thereby procures his name to be entered as the ināmdār of the village. *A* holds the village for the benefit of himself and the other members.

(c.) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*.





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91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Property acquired with notice of existing contract.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries, and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Purchase by person contracting to buy property to be held on trust.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Advantage secretly gained by one of several compounding creditors.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Constructive trusts in cases not expressly provided for.

#### *Illustrations.*

(a.) *A*, an executor, distributes the assets of his testator *B* to the legatees without having paid the whole of *B*'s debts. The legatees hold for the benefit of *B*'s creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(b.) *A* by mistake assumes the character of a trustee for *B*, and under colour of the trust receives certain moneys. *B* may compel him to account for such moneys.

(c.) *A* makes a gift of a lakh of rupees to *B*, reserving to himself, with *B*'s assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and *B* holds that sum for the benefit of *A*.

95. The person holding property in accordance with any of the preceding sections of this chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Obligor's duties, liabilities and disabilities.

Provided that (a) where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and (b) where he holds the property by