

- (1) பக்தங்கரின் எண்ணிக்கை 92
 (2) புதுக்கித் திருப்பிய நாள் 3.76
 (3) ஆதாரம் குறிப்பவர் சுருக்கொப்பம் _____

தமிழ்நாடு ஆவணக் காப்பகம்.

தமிழ்நாடு அரசு

திரு. துரை

அரசாணை எண்.	257-60	அச்சகம்
மு. கோப்புத் தாள் எண்.	(712-12)	பலவகை
நாள் :	3.2.1881	199

கண்டபடி கையாளலோ கூடாது.

$$\frac{259-260}{1}$$

JUDICIAL DEPARTMENT.

Bills—Legislative.

No. 7. *From H. WIGRAM, Esq., Officiating District Judge of South Malabar, to the Chief Secretary to Government, dated Calicut, 20th December 1880, No. 394.*

2. The Bill (Section 1) provides that the Act should come into force on 1st March 1882. I do not understand the reason of this delay. If the Act is a good one (and it has received so much discussion and criticism that it ought to be a good one), the sooner it is introduced the better for the Courts, the practitioners, and the suitors. I do not think that 1st March 1881 would be too early a date for its introduction.

As an illustration of what I mean I may mention that only a few weeks ago I was asked by a gentleman, who was executor of a will, whether he was at liberty, with the consent of the beneficiaries, to invest money on mortgage instead of purchasing an annuity as directed by the will, and whether there was any limit as to the amount he might advance on the security of a mortgage.

3. Again, by far the most important part of the Bill is Chapter IX, and for myself I may say that it would be of incalculable advantage to all the Mofussil Courts to have the clear principles there laid down for our guidance.

4. I have only two observations to make on the wording of the Bill.

I do not suppose that this was intended. I think that the words "or for a consideration wholly or in part fictitious" might be inserted after the word "gratuitous."

It might be necessary to add a clause that, where the consideration was partly fictitious, the transferee must hold the property for the benefit of the creditors subject to his own *bona fide* claim. As a matter of fact fraudulent transfers of property are almost invariably expressed to be made for some consideration.

செப்பச்சுப்பவர் பெயர்
செப்பச்சுத்திற்காக எடுத்த
உள்ளிட்ட நாள்
சிறப்பாக
மு. ப. ச. ச.
கையொப்பம்
22/5/96

5. Section 89 might perhaps be made clearer. I was once consulted by one of my Munsifs in reference to a case in which a schoolmaster had induced one of his students to join him in executing a joint and several promissory note solely for the benefit of the former.

The question that arose was whether the money-lender who knew the facts of the case could sue the student, the master having become insolvent. It is doubtful whether Section 89 would apply to such a case, but if the section ran "must hold the advantage for the benefit of and can claim no legal rights against the person whose interests have been so prejudiced," I apprehend that the money-lender's suit might have been dismissed at once.

No. 8. - *From F. BRANDT, Esq., District Judge of Trichinopoly, to the Chief Secretary to Government, dated 6th January 1881, No. 2.*

The remarks I have to offer on the Private Trusts Bill (sent to me with G.O., No. 2811, dated 4th December 1880) are few; for these, among other reasons, I submitted what I had to say on the Draft Bill of 1879, and the present Bill follows the former very closely in most respects, and as I took it for granted then that opinions were not asked for on the general principles, scope, and arrangement of the Bill, the more so must I assume this to be so now. Otherwise I might have expressed a doubt whether the law affecting all persons standing in fiduciary relationship one to another—partners, agents, guardians, directors of companies, and others, as well as those within the immediate purview of the Bill—might not have been comprehensively dealt with in one and the same instalment of the general Code, and I am very decidedly of opinion that an Act regulating public trusts is much more required here than one dealing with private trusts.

2. I observe that there has been alteration made in the definition of a trust—an alteration not for the better I think. It might be hypercritical to suggest a doubt whether an obligation can properly be said to arise from a confidence. The obligation arises from, or is attached to, the acceptance of the confidence. But I really think there is a material objection to the wording of the definition in other respects.

In the interpretation clause the word "owner" occurs twice in the first paragraph, and "ownership" once. "Owner" appears again too in defining the interest of the beneficiary, but "owner" is not itself defined. The word "settler" has, I presume, been intentionally not used. Where the word "owner" first occurs it is apparently used as equivalent to trustee (as "owner of the trust property" (?); for the confidence cannot be accepted by any other. In the second place it cannot refer to the trustee, for he accepts the trust for the benefit of some other or others.

It would, I think, be better not to use the word "owner" at all, but either to revert to the wording adopted in the earlier drafts of the Bill, "reposed in or accepted by one person for the benefit of another," &c., and then give the definition; or using "author of the trust" as explaining itself to say "declared by the author of the trust, or reposed by him in, and accepted by, some other than the person for whose benefit the confidence is accepted, for the benefit," &c. The first fifteen words of the second paragraph of the interpretation clause might then be omitted.

And I think that for "against the trustee as owner of the trust property" might be substituted "against the trustee in respect of the trust property, arising out of acceptance of the trust by the trustee."

The definition of a breach of trust does not seem to me to be very satisfactory. An Act to be exhaustive should itself specify all cases in which a trustee will properly be held to have committed a breach of trust. The Bill does (Section 23 illustrations) give some examples of cases, but the definition of "breach of trust" amounts in fact to an admission that the enumeration of such cases is not complete, nor is any hint given as to other laws in force to which reference might be made on the subject, while it was, I presume, the first intention that the law of trusts should

be available in one enactment for those who have not means of reference to many law books.

3. Would it not be better to state specifically whether an appeal lies to the highest Court of appellate jurisdiction from orders passed by the principal Civil Court

Section 34.

on petitions presented under this section? It is not clear whether such appeal would be held to be in virtue of the provisions of the Civil Procedure Code, and I think it would be well to give examples of cases in which the matter should be held to be such as could not properly be dealt with on presentation of a simple petition, and of those who would properly be made parties to suits in such cases. I know of no particulars in which unprofessional Judges experience more difficulty than in marshalling in right order the right parties in Judicial proceedings arising out of disputes connected with relationships of trust.

4. It would be well, I think, to state whether a trust for sale will or will not ordinarily authorise trustees to execute a mortgage; whether a trust to raise money

Sections 37, 38, and 39.

by mortgage will or will not authorise a sale when the latter course might be more beneficial to the estate (see Lewin, p. 391).

5. Again, in respect of benámi transactions, I think that these transactions being recognised the matter might be treated with somewhat more fulness.

Section 81.

There is a good deal in Mr. Mayne's Hindu Law and Usage with respect to cases in which the Court should or should not refuse relief in cases in which the original fraudulent intention is set up or admitted, and in which the fraud has or has not gone beyond the intention as to the rights of third parties, not on the record, to come in and show that suits were really carried on for their benefit, or to show that the suit was in fact against parties no parties to the suit, and as to those who can or should be parties to such suits, which I think might well be worked up into substantive law, now that the matter has been taken in hand.

6. Lastly, I would draw attention to some criticisms which appeared in the Madras Mail some five or six weeks ago. I have not the file here, and write from memory only. It was objected that the Bill does not deal with cases of grants made subject to a charge only; that it is applicable only where there are separate persons—a trustee and a beneficiary—and does not touch the cases of grants subject to the performance of services, while it does include the cases of nominal but not real trusts, as where property is handed over to trustees for the benefit of creditors, which, as the writer (I think rightly) remarked, amounts to a mandate or commission, and not to a trust properly so called.

No. 9. - *From the Hon. P. O'SULLIVAN, Advocate-General, to the Chief Secretary to Government, dated Madras, 11th January 1881.*

With reference to the Order of Government in the Judicial Department, dated the 4th December 1880, No. 2811, I have the honor to state my opinion upon the draft Bill to define and amend the law relating to Private Trusts and Trustees now before the Legislative Council of the Governor-General.

2. I think the present draft, which has been settled by the Indian Law Commission, sets forth the law with the requisite clearness and fulness, and that its enactment is highly expedient.

3. The only suggestions which I have to make are the following:—

(1.) Whether the terms of Section 34 are not too narrow. It is doubtful whether, under it, the Court would be bound to give an opinion upon the construction of a will or other instrument creating a trust, even indirectly. It seems to me that all questions which the Court of Chancery would now decide ought to be decided by the principal Civil Court, subject to appeal to the High Court. By this means trustees would be materially relieved and litigation on the whole avoided.

- (2.) The Bill does not say what principal Civil Court of original jurisdiction is to be applied to, and this may involve difficulties. It would perhaps be advisable to define principal Civil Court in the interpretation clause. I do not know whether it is intended to exclude the Courts of the District Judges in this Presidency in places where there is also a Subordinate Court. Section 62, Clause (f), uses the word "Court" only.

No. 10. *From L. McIVER, Esq., Acting Registrar of the High Court of Judicature at Madras, Appellate Side, to the Chief Secretary to Government, dated Madras, 19th January 1881, No. 80.*

With reference to your letter, dated 4th December 1880, and to the Order of Government of the same date, No. 2811, requesting the opinion of the High Court on the "Bill to define and amend the law relating to Private Trusts and Trustees," I am to transmit transcript of the Minute recorded by the Hon. Mr. Justice Innes on the provisions of the Bill.

ENCLOSURE No. 1.

Minute recorded by the Hon. Mr. Justice Innes.

I think Section 3 requires alteration. I am aware that the Law Commission have deliberately determined that the trustee is the owner of the trust property, but I hope to show that it is very inexpedient to assign him that character.

A is the owner of a watch. He gives it to B to be conveyed and delivered as a present to C. Here is unquestionably a trust or confidence reposed in B, but what ownership has B? He is a mere channel and takes no estate or interest in the property.

A devises all his real estate to B directing him to receive the rents and profits and apply them to the benefit of C, or to raise by sale or mortgage enough to pay the debts of C.

In these cases B has a qualified ownership. But while the word "ownership" conveys the notion of plenary dominion, estates of trustees are in quantity infinitely diverse, ranging between no interest at all and almost plenary power of disposal.

In the case of money paid to one for the use of another; in resulting trusts purchases; in trusts *in invitum* where money received cannot conscientiously be withheld from another person; in the purchase of trust property with notice; in the purchase of trust property in violation of the trust; in the purchase of trust property with trust funds—in all these cases what is the basis of reasoning upon which the property so in the hands of the trustee or purchaser from a trustee with notice has to be given up? The recognition that the trustee is *not* the owner.

The fiduciarius in Roman law was bound not to transfer as he would do if the owner, but "restituere" to restore to the beneficiary when the trust was ended and the beneficiary entitled to the trust property.

The notion of the trustee being the owner has attached itself to trusts of real property owing to the evasion of the Statute of Uses.

By "uses" the beneficiary became to all intents and purposes the real holder of land without the lord having that control over him which he had over the original feoffee.

With a view to counteract this and other evils arising therefrom, the Statute of Uses was passed whereby the beneficiary was constituted legally, what he was actually, the owner.

The aim of the Statute of Uses would have been carried out had it not been for the view taken by the Courts of the nature of a use which they considered such that

there could not be a further use in common law engendered upon it, and consequently the Statute of Uses had exhausted itself on the first use and had no effect on the second.

The conveyancers had thus found a way of evading the statute and reintroduced the very practice which the statute was designed to extinguish. If it had been plainly declared that the beneficiary was the owner to the extent of his interest in the property, all difficulty would have been avoided and the purpose of the statute might have been carried out.

The notion of the trustee, being the holder of the legal estate, has introduced, I think, into English law an erroneous concept of his powers and position, especially as regards purchases from the trustee in fraud of the beneficiary. Why should the trustee, who is not the beneficial owner, be declared the owner, and as such capable in certain circumstances of giving a good title to the trust property though by so doing he defrauds the beneficiary? The protection of beneficial owners from fraud is at least as important a consideration as the protection of innocent purchasers, and in a country possessing a careful system of registration, purchasers using caution ought not to be liable to be deceived.

The question of whether a purchaser has or has not had notice is an exceedingly difficult one, and, in the majority of instances, whether detected or not, I should expect that there would be fraud on the part of both trustee and purchaser, though the purchaser may be able to persuade the Court that the purchase was made in good faith for consideration without notice. I would again therefore urge a revision of the rules in Section 62, Exception I, *a* and *b*.

I would point out that if the declaration of the ownership of the trustee is to be left in the Bill, some complication will arise.

The Civil Procedure Code, Section 280, distinguishes between property held by a person as his own and property held on account of or in trust for another. But the Trustees Act will be made to say that property held on account of, or in trust for, another person is the trustee's own property.

I venture to suggest the following amendment of Section 3:—

A trust is an obligation annexed to the possession of property and arising out of a confidence reposed in and accepted by one person designated the trustee or declared and accepted by him for the benefit of another or for the benefit of another and the trustee.

I would not attempt to define the extent of the trustee's estate as that must vary in accordance with the scope and object of the trust.

No. 11. ORDER THEREON, 3rd February 1881, No. 259.

Ordered that the foregoing reports on the Indian Trusts Bill, 1880, be forwarded to the Government of India in the Legislative Department.

2. The Government observe that Mr. Justice Innes' remarks on the question of "ownership" in a trust are deserving of special attention.

(True Extract.)

R. DAVIDSON,
Chief Secretary.

Exd. J. Wright, T. O'Connor and F. R. Bantleman.

Govt. of (1881) Madras.
JUDICIAL.

United Treasury, Secy.

Encl

Recd.

Encl

G.O., 3rd February 1881, No. 259.

FEBRUARY.
Nos. 7-12.

Bills—Legislative.—Resorts from certain officers
on the Indian Trusts Bill, 1880, forwarded to
Government of India, Legislative Department,
with remarks.

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JUDICIAL DEPARTMENT.

Bills—Legislative.

No. 260.

FROM

THE HON. R. DAVIDSON, C.S.I.,
Chief Secretary to the Government of Fort St. George,

TO

THE SECRETARY TO THE GOVERNMENT OF INDIA,
LEGISLATIVE DEPARTMENT.

SIR,

With reference to your letter, dated the 15th November last, No. 1221, I am directed to forward copy of the Proceedings of this Government, dated 3rd instant, No. 259, containing opinions of the High Court, the Advocate-General and the other officers consulted to report on the Indian Trusts Bill, and the remarks of this Government.

2. The Bill was published in the *Fort St. George Gazette* Supplement of the 23rd November 1880.

I have the honor to be,

Sir,

Your most obedient servant,

FORT ST. GEORGE,
3rd February 1881.

Chief Secretary.

Exd. F. R. Bantleman.

1881.
JUDICIAL DEPARTMENT.

From
The Chief Secretary to the Govt. of
East St. George's
To
The Secy. to the Govt. of India,
Legislative Department.

Dated 2nd February 1881.

Forwarded.

Recd.

No. 260.

Enclosure.

Bill—Legislative—Forwarding copy of Proceedings of Government containing opinions of the High Court, the Attorney-General, and other officers, forwarded on the Indian Trusts Bill and the remarks of the Madras Government.

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BILLS—LEGISLATIVE.

Read the following papers :—

From H. WIGRAM, Esq., Officiating District Judge of South Malabar, to the Chief Secretary to Government, dated Calicut, 20th December 1880, No. 394.

I have the honor to reply to G.O., dated 4th December 1880, No. 2811, forwarding for remark the Indian Trusts Bill. I have considered the provisions of the Bill with the Statement of Objects and Reasons and the Report of the Law Commission published in the *Gazette of India* of 24th January 1880, and I am of opinion that the Bill, as now amended, contains an admirable exposition of one of the most difficult branches of the law which it is the duty of the Courts to administer.

2. The Bill (Section 1) provides that the Act should come into force on 1st March 1882. I do not understand the reason of this delay. If the Act is a good one (and it has received so much discussion and criticism that it ought to be a good one), the sooner it is introduced the better for the Courts, the practitioners, and the suitors. I do not think that 1st March 1881 would be too early a date for its introduction.

The Act will contain no law that we are not at present bound to administer without its assistance. The only difference will be that, instead of groping for principles and precedents to guide our decisions, the principles will be ready to our hands.

As an illustration of what I mean I may mention that only a few weeks ago I was asked by a gentleman, who was executor of a will, whether he was at liberty, with the consent of the beneficiaries, to invest money on mortgage instead of purchasing an annuity as directed by the will, and whether there was any limit as to the amount he might advance on the security of a mortgage.

The answers to both these questions are to be found in Sections 11 and 20 of the Bill, but I was only able to inform my querist what was the proposed law.

3. Again by far the most important part of the Bill is Chapter IX, and for myself I may say that it would be of incalculable advantage to all the Mofussil Courts to have the clear principles there laid down for our guidance.

Not a month passes in which some case does not come before me as an Appellate Court in which Sections 81 and 86 are applicable; and I can recall to my recollection cases in which Sections 83, 85, 88, 89, 91 and 93 contain the rule of law which should have governed the decision and which had to be evolved by much labor from the Contract Act, English text-books and precedents, and the Judge's own inner consciousness.

4. I have only two observations to make on the wording of the Bill.

The use of the word "gratuitous" in Section 86 might seem to imply that, if a consideration was set out which was partly real and partly fictitious, the section would not apply.

I do not suppose that this was intended. I think that the words "or for a consideration wholly or in part fictitious" might be inserted after the word "gratuitous."

It might be necessary to add a clause that, where the consideration was partly fictitious, the transferee must hold the property for the benefit of the creditors subject to his own *bona fide* claim. As a matter of fact fraudulent transfers of property are almost invariably expressed to be made for some consideration.

5. Section 89 might perhaps be made clearer. I was once consulted by one of my Munsifs in reference to a case in which a schoolmaster had induced one of his students to join him in executing a joint and several promissory note solely for the benefit of the former.

The question that arose was whether the money-lender who knew the facts of the case could sue the student, the master having become insolvent. It is doubtful whether Section 89 would apply to such a case, but if the section ran "must hold the

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2. I observe that there has been alteration made in the definition of trust—an alteration not for the better I think. It might be hypercritical to suggest a doubt whether an obligation can properly be said to arise from a confidence. The obligation arises from, or is attached to, the acceptance of the confidence. But I really think there is a material objection to the wording of the definition in other respects.

In the interpretation clause the word "owner" occurs twice in the first paragraph, and "ownership" once. "Owner" appears again too in defining the interest of the beneficiary, but "owner" is not itself defined. The word "settler" has, I presume, been intentionally not used. Where the word "owner" first occurs it is apparently used as equivalent to trustee (as "owner of the trust property" (?); for the confidence cannot be accepted by any other. In the second place it cannot refer to the trustee, for he accepts the trust for the benefit of some other or others.

It would, I think, be better not to use the word "owner" at all, but either to revert to the wording adopted in the earlier drafts of the Bill, "reposed in or accepted by one person for the benefit of another," &c., and then give the definition; or using "author of the trust" as explaining itself to say "declared by the author of the trust, or reposed by him in, and accepted by, some other than the person for whose benefit the confidence is accepted, for the benefit," &c. The first fifteen words of the second paragraph of the interpretation clause might then be omitted.

And I think that for "against the trustee as owner of the trust property" might be substituted "against the trustee in respect of the trust property, arising out of acceptance of the trust by the trustee."

The definition of a breach of trust does not seem to me to be very satisfactory. An Act to be exhaustive should itself specify all cases in which a trustee will properly be held to have committed a breach of trust. The Bill does (Section 23 illustrations) give some examples of cases, but the definition of "breach of trust" amounts in fact to an admission that the enumeration of such cases is not complete, nor is any hint given as to other laws in force to which reference might be made on the subject, while it was, I presume, the first intention that the law of trusts should be available in one enactment for those who have not means of reference to many law books.

3. Would it not be better to state specifically whether an appeal lies to the highest Court of appellate jurisdiction from orders passed by the principal Civil Court on petitions presented under this section? It is not clear whether such appeal would be held to be in virtue of the provisions of the Civil Procedure Code, and I think it would be well to give examples of cases in which the matter should be held to be such as could not properly be dealt with on presentation of a simple petition, and of those who would properly be made parties to suits in such cases. I know

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6. Lastly, I would draw attention to some criticisms which appeared in the Madras Mail some five or six weeks ago. I have not the file here, and write from memory only. It was objected that the Bill does not deal with cases of grants made subject to a charge only; that it is applicable only where there are separate persons—a trustee and a beneficiary—and does not touch the cases of grants subject to the performance of services, while it does include the cases of nominal but not real trusts, as where property is handed over to trustees for the benefit of creditors, which, as the writer (I think rightly) remarked, amounts to a mandate or commission, and not to a trust properly so called.

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2. I think the present draft, which has been settled by the Indian Law Commission, sets forth the law with the requisite clearness and fulness, and that its enactment is highly expedient.

3. The only suggestions which I have to make are the following:—

- (1.) Whether the terms of Section 34 are not too narrow. It is doubtful whether, under it, the Court would be bound to give an opinion upon the construction of a will or other instrument creating a trust, even indirectly. It seems to me that all questions which the Court of Chancery would now decide ought to be decided by the principal Civil Court, subject to appeal to the High Court. By this means trustees would be materially relieved and litigation on the whole avoided.
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257/7 260

Bills—Legislative.

1019 From L. McIVER, Esq., Acting Registrar of the High Court of Judicature at Madras, Appellate Side, to the Chief Secretary to Government, dated Madras, 19th January 1881, No. 80.

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ENCLOSURE No. 1.

Minute recorded by the Hon. Mr. Justice Innes.

I think Section 3 requires alteration. I am aware that the Law Commission have deliberately determined that the trustee is the owner of the trust property, but I hope to show that it is very inexpedient to assign him that character.

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In these cases B has a qualified ownership. But while the word "ownership" conveys the notion of plenary dominion, estates of trustees are in quantity infinitely diverse, ranging between no interest at all and almost plenary power of disposal.

In the case of money paid to one for the use of another; in resulting trusts where the purposes of the trust are exhausted and there is a *residuum*; in benāmi purchases; in trusts *in invitum* where money received cannot conscientiously be withheld from another person; in the purchase of trust property with notice; in the purchase of trust property in violation of the trust; in the purchase of trust property with trust funds—in all these cases what is the basis of reasoning upon which the property so in the hands of the trustee or purchaser from a trustee with notice has to be given up? The recognition that the trustee is *not* the owner.

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The conveyancers had thus found a way of evading the statute and reintroduced the very practice which the statute was designed to extinguish. If it had been plainly declared that the beneficiary was the owner to the extent of his interest in the property, all difficulty would have been avoided and the purpose of the statute might have been carried out.

The notion of the trustee, being the holder of the legal estate, has introduced, I think, into English law an erroneous concept of his powers and position, especially as regards purchases from the trustee in fraud of the beneficiary. Why should the trustee, who is not the beneficial owner, be declared the owner, and as such capable in certain circumstances of giving a good title to the trust property though by so doing he defrauds the beneficiary? The protection of beneficial owners from fraud is at least as important a consideration as the protection of innocent purchasers, and in a country possessing a careful system of registration, purchasers using caution ought not to be liable to be deceived.

The question of whether a purchaser has or has not had notice is an exceedingly difficult one, and, in the majority of instances, whether detected or not, I should expect that there would be fraud on the part of both trustee and purchaser, though the purchaser may be able to persuade the Court that the purchase was made in good faith for consideration without notice. I would again therefore urge a revision of the rules in Section 62, Exception I, *a* and *b*.

I would point out that if the declaration of the ownership of the trustee is to be left in the Bill, some complication will arise.

The Civil Procedure Code, Section 280, distinguishes between property held by a person as his own and property held on account of or in trust for another. But the Trustees Act will be made to say that property held on account of, or in trust for, another person is the trustee's own property.

I venture to suggest the following amendment of Section 3:—

A trust is an obligation annexed to the possession of property and arising out of a confidence reposed in and accepted by one person designated the trustee or declared and accepted by him for the benefit of another or for the benefit of another and the trustee.

I would not attempt to define the extent of the trustee's estate as that must vary in accordance with the scope and object of the trust.

STATEMENT OF OBJECTS AND REASONS.

Trusts, in the strict sense in which that term is used by English lawyers, that is to say, confidences to the existence of which a 'legal' and an 'equitable' estate are necessary, are unknown to Hindú and Muhammadan law. But trusts in the wider sense of the word, that is to say, obligations annexed to the ownership of property which arise out of a confidence reposed in and accepted by the owner for the benefit of another, are constantly created by the natives of India and are frequently enforced by our Courts. There is, probably," says Mr. Justice Phryar (4 Ben. O. C. J. 134), "no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and possession of dominion over property, coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor, is, I imagine, familiar to every Hindú." So, too, in the case of Muhammadans, where a woman is entitled to a share of her deceased father's estate in the hands of her brother (W. R. 4864, p. 377), or to exigible dower in the hands of her husband (3 W. R. 111). Trusts created by an old man for his own maintenance and ulterior purposes, for a widow, for a daughter, step-daughter or daughter-in-law and her children, are of pretty frequent occurrence amongst the Natives, whether Hindú or Muhammadan, and it is desirable to keep them free from the complication of double estates in which, without the intervention of the legislature, they are certain to become entangled. But apart from the Native property-holder, there is the large body of domiciled Europeans and Eurasians who have for nearly a century enjoyed and taken advantage of a trust-law recognised by our Courts: the number and wealth of this class have increased, and in suits between members of this community every Court in the country may be called upon to administer a trust-law. Nevertheless, with the exception of certain provisions in the Penal Code, the Specific Relief Act, the Code of Civil Procedure, and the Limitation Act, the Indian Statute-book is silent on the subject so far as regards the bulk of the population; for the Statute of Frauds, sections 7 to 11, is in force only in the Presidency towns, and the rules contained in Acts XXV and XXVIII of 1866 extend only to cases to which English law is applicable, and are, in themselves, incomplete.

The object of the present Bill is to codify the law relating to trusts in the wider sense above described: but it saves the rules of Muhammadan law as to *waqf*, and the mutual relations of the members of an undivided family. And it leaves untouched religious and charitable endowments established by Hindús and Buddhists, being matters in which the legislature cannot at present usefully interfere further or otherwise than has been done by Act XX of 1863.

With the few exceptions mentioned in this Statement, the rules contained in the Bill are substantially those now administered by English Courts of Equity and (under the name of 'justice, equity and good conscience') by the Courts of British India.

The Bill distributes the subject under the following heads: I, Preliminary; II, the creation of trusts; III, the duties and liabilities of trustees; V, their rights and powers; V, their disabilities; VI, the rights and liabilities of the beneficiary; VII, vacating the office of trustee; VIII, the extinction of trusts; and IX, certain obligations of the nature of trusts.

The preliminary chapter, in order to prevent the introduction of conceptions resembling the English legal estate and equitable ownership, defines the interest of the beneficiary as *his right against the trustee as owner of the property*. The beneficiary has, under the Bill, no estate or interest in the subject-matter of the trust. The Bill also defines 'breach of trust' as a breach of any duty imposed on a trustee, as such, by any law for the time being in force, and declares that a person has 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information is given to, or obtained by, his agent under the circumstances mentioned in the Contract Act, section 229.

The second chapter deals with the creation of trusts. It declares that a trust may be created for any 'lawful purpose,' and, as there is a general analogy between a trust and a contract, the Bill defines such purpose to be lawful in the cases in which the Indian Contract Act, section 23, declares the object of an agreement to be lawful. An explanation shews that, where the trust-property is land situate in a foreign country, the trust, to be valid, must not create an estate not recognized by the law of that country.

The expediency of excluding oral declarations of trust has long been felt in the case of land, and the Bill (section 5) lays down, in general accordance with the seventh section of the Statute of Frauds, that no trust in relation to *immovable property* is valid, unless declared (a) by a

non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or (b) by the will of the author of the trust, or of the trustee, and that 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. Theoretically, this will modify the Hindu law, which in no transaction absolutely requires a writing (Mad. H. C. Rev. 39); but trust by merely verbal declarations are as rarely met with as mortgages by merely verbal agreements: the proposed change will therefore in practice make no alteration in that law. The rule will not apply where it would operate so as to effect a fraud, as, for example, where a father having power to bequeath certain land is induced not to make a will of that land by the promise thereof for his relatives.

Section 8 declares that the subject-matter of a trust must be property transferable to the beneficiary, and that it must not be a beneficial interest under a subsisting trust. The object of the latter provision is to avoid the complications that would arise from allowing a trust upon a trust.

Section 9 declares that every person capable of holding property may be a beneficiary. As, under Act I of 1869, 'person' included corporation, the Bill here varies from English law. But the variation is intentional, as Statutes are not in force in India.

Chapter III deals with a trustee's powers and liabilities. None of the rules here contained call for remark except sections 20 and 23. Section 20 gives a list of the securities on which alone a trustee may invest trust-funds. The necessity for some such provision has been indicated by the High Court of Bombay in *L. Souza v. De Souza*, 12 Bom. 184. Investments on mortgages of leaseholds for years are forbidden, unless, of course, such securities are expressly authorized by the instrument of trust. In England, no doubt, trustees authorized to lend on a mortgage of realty may invest on long term of years at a peppercorn rent. But in this country such terms are practically unknown. Section 20 also allows a trustee to deposit a trust-fund not exceeding Rs. 1,000 in a Government Savings Bank, and to invest on mortgage of land already pledged as security for an advance under the Land Improvement Act, 1871. A power like the latter is conferred in England by 27 & 28 Vic., cap. 114, section 161. Section 23 declares the measure of the trustee's liability in case of a breach of trust, and embodies, as illustrations, the rules on which Courts of Equity act where trust-property improperly left outstanding is lost, or where trustee retains money which should be invested, or neglects a direction to invest, or to accumulate, or improperly sells trust-securities, or is guilty of unreasonable delay in investing trust-funds or in paying them to the beneficiary.

Chapter IV treats of the rights and powers of trustees. It embodies the substance of Act XXVIII of 1866, sections 2, 3, 5, 32, 33, 36, 37, 39 and 43. Section 34 of the Bill empowers trustees to apply, not only to High Court Judges, but to District Judges, for advice on simple questions respecting the management and administration of the trust-property. Under section 36, which deals with the general authority of trustees, trustees will be able (unless restrained from doing so by the instrument of trust) to grant reasonable agricultural leases, thin timber and otherwise act for the benefit of the trust. Except with the permission of the Court, no trustee will be able to lease trust-property for term exceeding 21 years.

Chapter V deals with disabilities of the trustees. The only section here calling for remark is 52, which declares that no trustee, and no person who has recently ceased to be a trustee, may, without the permission of the Court, buy the interest of the beneficiary in the trust-property, and that such permission shall not be given unless the purchase is manifestly for the benefit of the latter. The Bill here deviates from the present law, according to which a trustee is allowed to buy trust-property from his beneficiary if the latter is *sui juris* and the former can shew that the relation of trustee and beneficiary was, at the time of the purchase, virtually dissolved, and that the fullest information and every advantage were given to the beneficiary. Such a rule seems too vague for insertion in a code intended to be worked, for the most part, by unprofessional Judges; it has, moreover, been disapproved in *Morse v. Royal*, 12 Ves. 372.

In the next chapter—of the rights and liabilities of the beneficiary—the only sections requiring special notice are sections 58 and 60. The former provides for the execution of trusts by the Court, and makes no distinction between the cases where the declaration of trust is complete and those where the trust is executory, i.e., where the declaration of trust is intended to be perfected at some future period.

The latter section declares that all persons taking immovable trust-property inconsistently with the trust hold it subject to the trust, except (a) purchasers in good faith for consideration without notice of the trust, and (b) purchasers for consideration from such purchasers. This agrees with the English rule which, to prevent stagnation of property, exempts from the trust a purchaser with notice from an innocent purchaser without notice, who has got the legal estate.

Chapter VII treats of vacating the office of trustee, and, incidentally, deals with the appointment of new trustees; and declares that, 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.

Chapter VIII treats of the extinction of trusts and, incidentally, of their revocation.

Where no trust is declared, but for the purposes of justice the law deems one to have been created, the trust is by English lawyers termed constructive. *Bendami* transactions, where property is transferred to A for a consideration paid by B, and B makes the payment for his own benefit, have for centuries been familiar to the people of India; gains made by one person at the cost of another are an everyday source of litigation; and in no country, owing to the extreme sub-division of immovable property and the partition of inheritances, are constructive trusts more common. Chapter IX voids the fiction implied in the term 'constructive trusts' by treating such confidences as obligations in the nature of trusts properly so called. It specifies the fourteen principal cases in which such an obligation arises, as follows:—

1. Where it does not appear that the transferor of property intended to dispose of the beneficial interest (section 80):
2. Where property is transferred to one person for a consideration paid by another (section 81):
3. Where the trust is incapable of execution or is executed without exhausting the property (section 82):
4. Where a transfer of property is made for an illegal purpose (section 83):
5. Where a bequest is made for an illegal purpose, or where the revocation of a bequest is forcibly prevented (section 84):
6. Where a transfer is made in pursuance of a voidable contract (section 85):
7. Where a transfer is made in fraud of the transferor's creditors (section 86):
8. Where a debtor becomes his creditor's legal representative (section 87):
9. Where a pecuniary advantage is gained by a person in a fiduciary character (section 88):
10. Where an advantage is gained by the exercise of undue influence (section 89):
11. Where an advantage is gained by a tenant for life or other qualified owner in derogation of the rights of other persons interested in the property (section 90):
12. Where property is acquired with notice of an existing contract affecting it (section 91):
13. Where a person contracts to buy property to be held on trust (section 92):
14. Where one of several compounding creditors, by a secret arrangement with the debtor, gains an advantage over his co-creditors (section 93).

The Bill also contains a general clause (sec. 94) providing for cases not so specified. It is believed that this clause will cover that form of constructive trust which the Panjab Courts have held to arise when a co-sharer in a village community absents himself without expressly abandoning his rights.

The Bill declares that, in the case of all obligations in the nature of a trust, the obligor shall be subject to the liabilities and (with the two exceptions mentioned in section 95) to the disabilities of an ordinary trustee.

Three only of the obligations above specified seem to require further notice. The Bill, it will be seen, does not attempt to suppress the intricate practice of entering into *bendami* transactions, and it must be admitted that in many, perhaps most, of these transactions the parties are actuated by religious or prudential, rather than fraudulent, motives. Section 81, accordingly, declares that, where property is transferred to one person for a consideration paid by another, and it appears that the latter did not intend to pay the consideration for the benefit of the former, the transferee must hold the property for the benefit of the person paying. Resulting trusts, i.e., those that arise where an interest is given for purposes to which the trust is not commensurate (as, for instance, to pay debts which are satisfied, or an annuity which expires), are treated (section 82) as constructive, for there is no declaration of trust as to the portion of the trust-property which is not required for the purpose declared. Section 86 corresponds with 13 Eliz., c. 5, as to settlements added to defraud creditors. That Statute is in force in the Presidency towns, and its principle has been held by the Madras High Court (4 Mad. 88) to apply to Natives in the mufassal.

* As to these trusts, Mr. Coghill, a District Judge in the Madras Presidency, writes as follows:—"Cases of constructive trusts are continually arising in all civil Courts [in the mufassal], and are treated on the general principles of equity as fixed by case-made law."

Where a person gives property to as do not exhaust the proceeds, the law to result to the donor or his legal representative the donor's intention by declaring the A similar exception is made when the proceeds, but in consequence of an in subsequently arises. The Bill ignores of resulting trusts was imperfectly the legal representative.

Lastly, it may be remarked that against trustees that advantages gained influence, or as to the escheat of a provided for by the Evidence Act, of 1865, and the general law as to the

The Bill is now published as with the Legislative despatch of the

SIMLA;
6th November, 1880.

¹ The short title and commencement of lapped) have been amended; and in the first "provides."

purposes, and either specifies no objects or such ends, does not suffer the property or its surplus; but the Court takes upon itself to execute purposes to which the fund shall be applied. of the gift at the time exhaust the whole value of the property an excess of income options, which were introduced when the law and which unfairly disregard the interest of

contains no provisions as to the presumption from their beneficiaries are gained by undue interest. The former matter is sufficiently section 111, the latter, by the Succession Act, X

Indian Law Commission¹ and in accordance of State, No. 37, dated 7th October, 1880.

WHITLEY STOKES.

It has been altered: sections 54 and 55 (which over-section 53, the word "allows" has been substituted for

THE INDIAN TRUSTS BILL, 1880.

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THE SCHEDULE.

BILL

TO

Define and amend the law relating to Private Trusts and Trustees.

Trusts in India of various kinds, 13 W. R. (P. C.) 856
Trusts for benefit of creditors, 1 Bomb. 233; 9 Bomb. 249; 10 Bomb. 327. Trusts misapplying trust-funds, 8uth. F. B. 60.

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": and it shall come into force on the first day of March 1882.

Local extent. It extends to the whole of British India; but nothing herein contained affects the rules of Muhammadan law as to *wagf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second chapter of this Act applies to trusts created before the said day.

As to family religious trusts, 10 Beng. 19; North, II, 408. As to Pagoda trustees, see 1 Mad. 415-7 Mad. 77: Act XX of 1866.

Property purchased name of an idol, 15 Ben. 176.

2. On and from that day the Statutes and Acts mentioned in the Schedule hereto annexed shall be repealed to the extent therein mentioned.

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: the person who reposes or declares the confidence is called the "author of the trust": the person who accepts the confidence is called the "trustee": the person for whose benefit the confidence is accepted is called the "beneficiary": 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 instrument, if any, by which the trust is declared is called the "instrument of trust": a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust":

Interpretation clause. "trust": owner or declared and accepted by him, for the benefit of another, or of another and the owner: the person who reposes or declares the confidence is called the "author of the trust": the person who accepts the confidence is called the "trustee": the person for whose benefit the confidence is accepted is called the "beneficiary": 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 instrument, if any, by which the trust is declared is called the "instrument of trust": a breach of any duty imposed on a trustee, as such, by any 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 under the law for the registration of documents for the time being in force: a person is said to have "notice" of a fact either when he 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 Contract Act,

Expressions defined in 1872, section 229; and all 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.

CHAPTER II.

OF THE CREATION OF TRUSTS.

4. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) 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.

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 conveys property to B in trust for C for his life, and after his death to D for his life, and after D's death to such of the sons of D as shall first attain the age of twenty-five. A, B, C and D are persons to whom the Indian Succession Act, 1865, applies. The trust after D's death is void.

(c). 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.

(d). 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.

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.

Whether voluntary declaration of trust is binding against Hindu declarant. 4 Mad. 462. Transmutation of possession unnecessary. 2 Bomb. 143 (Parsi case). Act I of 1877, s. 3. See 7 Bomb. A. C. J. 140.

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.

(e). 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.

Act IX of 1872, ss. 1 & 12.

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.

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.

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.

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.

No one is bound to accept a trust.

Subject to the provisions of section five, a trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

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.

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.

Illustrations.

(a). A bequeathes 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 bequeathes 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.

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.

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 bearing interest, to make such payment with 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.

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.

Illustrations.

4 Moo. L. A. 452.

(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.

Edi Judd v. Tribbards,
9 Bom. 333.

(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.

Act I of 1877, s. 10, s. 1.

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 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.

Illustration.

The trust-property is immovable 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.

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.

Act IX of 1872, ss. 1, 152.

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.

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 favour of the trustee as such, and payable at Bombay. The bills are dishonoured. A is not bound to make good the loss.

(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. A 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 bequeathes 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.

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 bequeathes 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 bequeathes 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.

17. Where there are more beneficiaries than one, the trustee is bound to be impartial, and must execute the trust for the advantage of one at the expense of another.

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.

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.

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 must take measures to prevent such act.

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.

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 must (subject to any direction contained in the instrument of trust) 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 charge 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-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; or

(f) on any other security expressly authorized by the instrument of trust:

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 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.

Nothing in this section shall be deemed to prevent a mortgage of land pledged to Government under Act XXVI of 1871, or in case the trust-money does not exceed one thousand rupees, a deposit thereof in Government Savings Bank.

21. Where a trustee directed to sell within a specified time extends such time, as between himself and the beneficiary, the burden of proving 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.

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.

22. When the purpose of the trust is completely fulfilled, the trustee on completion of purpose must on demand transfer the trust-property to his beneficiary, unless the trustee has notice of any title in another which is paramount to the beneficiary's interest and of an intention to assert such title.

23. Where the trustee commits a breach of liability for breach of trust, he is liable to make good the loss which the trust-property 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 full knowledge of the facts of the case and of his rights as against the trustee.

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 interest thereon.

(b). A bequeathes 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 as 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 which 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 immovable 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 which he might have purchased with the trust-money when the investment should have 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, or to be charged with the present estimated value of the land sold, after deducting therefrom any decrease of price caused by subsequent improvements.

er than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent actually received by such person and, where he is a beneficiary, charge on his interest for such

action shall be deemed to be indemnified who has, in connection with the trust, been guilty of fraud.

may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any matter respecting the management or disposal of the trust-property other than the difficulty or importance, not disposal.

petition shall be served upon, and proof may be attended by, such evidence as is stated in the application as the

ing in good faith the facts in connection with the opinion, advice by the Court shall be deemed, on his own responsibility, to have been given by such trustee in the subject-matter of the application.

every application under this section shall be referred to the discretion of the Court to

duties of a trustee, as such, are not completed, he is entitled to have the accounts of his management of the trust-property examined and nothing is due to the beneficiary, to an acknowledgment in writing.

on to the powers expressly conferred by this Act and by the instrument of trust, and sub-sections, if any, contained in such instrument, to the provisions of section seven, may do all acts which are reasonable for the realization, protection or preservation of the trust-property, and for the protection of a beneficiary who is not connected with the trust.

in the actual possession or receipt of profits of land as defined in the Land Revenue Act, 1871, shall be deemed to be in the possession of the trustee for the purposes of that Act.

the permission of a principal Civil Court of original jurisdiction, no trustee shall lease for a term exceeding twenty-one years, or for a term exceeding the date of executing the lease, nor for a term exceeding the best yearly rent that can be obtained.

Jyoti v. Sonabhat, 2 D.C. 139.
N.W. P. 1870, p. 420.

22. When the transfer to beneficiary on completion of purpose of trust-property to has notice of amount to the beneficiary to assert such

23. Where the liability for breach of trust- property by the beneficiary has committed the breach competent to coercion or undue to bear on him, subsequently acquiescence of the facts against the trustee.

(a). A trustee improperly and it is consequent property lost, but he is

(b). A bequeathes a house the proceeds to C. B no length of time, where market price falls. B is

(c). A trustee is guilty trust-money in accordance it to the beneficiary. The thereon for the period of

(d). The duty of the trustee any of the securities in (a), (b), (c) or (d). In case in his hands. He is liable to be charged either with the and interest, or with the amount might have purchased with investment should have been dividends and interest thereon.

(e). The instrument of trust-trust-money either in any of immovable property. is liable for the principal and

(f). The instrument of trust-trust-money in any of such dividends thereon. The trustee He is liable, at the option of either with the amount of pound interest, or with the amount he might have purchased with investment should have been of the accumulation which was investment of the intermediate

(g). Trust-property is invested mentioned in section twenty, a trustee sells such security for by the terms of the instrument option of the beneficiary, either the intermediate dividends account for the proceeds of the

(h). The trust-property consists the land to a purchaser for of the trust. The trustee is a beneficiary, to purchase other land upon the like trust, or to be of the sale with interest, or to be estimated value of the land and any decrease of price caused by

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.

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.

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 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.

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.

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 be deemed to be a landlord for the purposes of that Act.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably gotten.

37. Where the trustee is empowered to sell a trust-property, he may either by public auction or private contract, in lots, and either by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

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

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.

Illustrations.

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

(b). A bequeathes property to B, directing him to sell 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 an indefinite period.

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.

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 in section twenty, and from time to time vary any such investments for others of the same nature:

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.

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 marriage or funeral, the whole or any part of the income 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 result in income thereof from time to time in any of the

securities mentioned 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 sufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his 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.

42. A trustee may give a receipt in writing for any money paid or property transferred to him by reason of the exercise of any trust reposed in him, and, in the absence of fraud, such receipt shall discharge the person paying or transferring the same therefrom, and from seeing to the application thereof or being accountable for any loss or misapplication thereof.

43. 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 number of the remaining trustees.

44. 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.

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

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

46. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless 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 fiduciary, being competent to contract, consents to the delegation.

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

Illustrations.

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

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

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

47. When there are more trustees than one, Co-trustees cannot act singly. They must join in the execution of the trust, except where the instrument of trust otherwise provides.

48. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a court of original civil jurisdiction.

49. In the absence of express directions, a trustee may not contract to the contrary contained in the instrument of trust or to the contrary entered into with the beneficiary or the Court at the time of acceptance of the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in administering the trust.

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

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

51. 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 on his own account or as agent for a third person.

52. No trustee, and no person who has ceased to be a trustee, may buy or become mortgagee of the trust-property or any part thereof, and such permission shall not be given by the principal Civil Court of original jurisdiction, if the purchase, mortgage or lease is manifestly to the disadvantage of the beneficiary.

And no trustee whose duty it is to buy or obtain a mortgage of particular property, may buy it, or obtain a mortgage of it, for himself.

53. A trustee or co-trustees 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 themselves.

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

54. The beneficiary has a right to the rents and profits of the trust-property.

55. 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 possession of the trust-property to him or them, or to such person as he or they may direct: provided that, where the trust is to sell immovable trust-property and the proceeds are to be divided amongst several persons, particular sharers cannot elect that their own respective undivided shares shall not be sold.

Nothing in the second clause of this section applies to property transferred or bequeathed for the benefit of a married woman so that she shall not have power to deprive herself of her beneficial interest.

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 bequeathes 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.

56. The beneficiary has a right 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.

57. The beneficiary, if competent to contract, may transfer his interest, but the transfer is 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:

Provided that when property is transferred bequeathed for the benefit of a married woman 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.

58. 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 trustees or new trustee.

59. 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.

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 or more.

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 insolvent 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 during A's lifetime; then A dies. C is entitled to 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 disclaiming.

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

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

Illustrations.

1). 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 compels B on a proper indemnity to allow C to sue on the contract in B's name.

2). A is trustee of certain land, with a power to sell the land 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.

31. 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, or, if it has been bought from him by any person with notice of the trust, by such person. 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; the trustee or purchaser must (a) account for the net 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—

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

2) entitles the beneficiary to have the property declared subject to the trust or retransferred where the beneficiary, being competent to 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.

32. 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.

Where the trustee has disposed of trust-property, and the money or other property which he has received is converted.

therefor can be traced in his hands, or the hand 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.

Exception I.—Nothing in this section entitles the beneficiary to any right in respect of property in the hands of—

(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 transferee.

A judgment-creditor attaching trust-property is not a transferee for consideration within the meaning of this exception.

Exception II.—Nothing in this section applies to money, currency notes and negotiable instruments in the hands of a *bond fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the Transfer of Property Act, section 13.

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.

63. 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.

64. Where a trustee wrongfully sells trust-property and employs the proceeds in trade or business, the beneficiary may, at his option, charge the principal money and the profits arising from such employment or with the principal money and compound interest.

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

66. If a partner, being a trustee, wrongfully employs trust-property in 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.

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

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.

67. Where one of several beneficiaries—

(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,

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.

Nothing in this section applies to property transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest.

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

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

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

70. 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

(7) by the Court to which a petition for discharge is presented under this Act.

71. Notwithstanding the provisions of section eleven, every trustee in charge from trust 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.

72. Whenever any person appointed a trustee disclaims, or any trustee dies, or is for a continuous period of six months absent from British India, 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 in 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 time being, or legal representative of the last surviving and continuing trustee, or the retiring trustees, if they all retire simultaneously, or the last retiring trustee.

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

The Official Trustee may, with his consent, 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 sole trustee.

For the purposes of this section, any refusal or retiring trustee shall, if willing to act in execution of the power, be considered a continuing trustee.

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

In appointing new trustees, the Court shall have regard (a) to the wishes of the author of the trust expressed in or to be inferred from the instrument of trust; (b) to the wishes of the person or persons, empowered to appoint new trustees; (c) to the question whether the appointment will

not promote or impede the execution of the trust, and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries.

74. Whenever any new trustee is appointed under section seventy-two or section seventy-three, 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.

75. 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.

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

76. A trust is extinguished—

- (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.

77. A trust constituted by will may be revoked at the pleasure of the testator.

A trust otherwise constituted can be revoked only—

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

Illustration.

A conveys property to B in trust to sell the same and pay out of the proceeds the claims 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.

78. No trust can be revoked by the author of the trust so as to defeat what trustees have or prejudice what the trustees may have duly done in execution of the trust.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in nature of trust is created in the following cases.

79. An obligation in nature of a trust is created in the following cases.

80. Where the owner of property transfers bequeathes it and it can be inferred consistently with the attendant circumstances that he intended to divest 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.

be inferred consistently with the attendant circumstances that he intended to divest of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Illustrations.

(a). A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land to B. 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 into the joint names of self 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. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer 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.

81. Where property is transferred to one person for a consideration paid 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.

82. Where a trust is incapable of being executed, or where the trust property is completely exhausted 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 not exhausted, 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 trusts to be hereafter 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.
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 life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.

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(23)

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

(d). A bequeathes 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 land if purchased.

83. 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 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.

84. Where a testator bequeathes certain property upon trust and the purpose of the trust appears in 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.

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.

85. 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.

86. Where the effect of a transfer of property is to defraud or delay the transferor's creditors, present or future creditors of the transferor or co-owners or other persons interested in such property, and the transfer is gratuitous or the transferee has notice of the intended fraud, the transferee must hold the property for their benefit to the extent necessary to satisfy their just demands.

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

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 his own interests are, or may be, adverse to of such other person and thereby gains for himself a pecuniary advantage, he must hold for the fit of such other person the advantage so gained.

Illustrations.

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

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

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

(d). A, a partner, buys land in his own name with the understanding that it is to be held for the partnership. A holds such land for the benefit of the partnership.

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

(f). A and B are partners. A dies. B, instead of settling up the affairs of the partnership, retains all the property in the business. B must account to A's legal representatives 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 retain for himself what he has actually paid.

89. Where by the exercise of undue influence, any advantage is gained by a person in derogation of the interest of another, the person so advantaged, if he has 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 or joint owner of any property, availing himself of his position as tenant for life, co-owner or joint owner, gains an advantage in derogation of the interest of the other persons interested in the property, or where any such owner, as representing the persons interested in such property, gains an advantage, he must hold, for the benefit of the persons so interested, the advantage so gained, subject to repayment by such persons of the due share of the expenses properly incurred, and an indemnity by the same persons against his liability properly contracted, in gaining such advantage.

Illustrations.

(a). A, the tenant for life of leasehold property, lets 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 Hindú family. A, one of the members, pays nazraná to Government and thereby obtains his name to be entered as the inamdar 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.

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.

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.

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.

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.

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.

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 virtue of a contract with the person

for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

96. Nothing contained in this chapter shall ^{Saving of rights of} impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

THE SCHEDULE.

STATUTES.

Number and year.	Short title.	Extent of repeal
13 Eliz. c. 5	An Act against fraudulent deeds, gifts, alienations, &c.	The whole.
29 Car. II, c. 3	The Statute of Frauds.	Sections 7, 8, 9, and 11.

ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Short title.	Extent of repeal
XXVIII of 1866	The Trustees and Mortgagees' Powers Act, 1866	Sections 2, 3, 4, 22, 23, 34, 35, and 37. In sections 39 and 43, the words "trustee" wherever it occurs; and in section 43 the words "management or" and "the trustee or."
I of 1877	The Specific Relief Act, 1877	In section 12, the first illustration.

GOVERNMENT OF INDIA.
LEGISLATIVE DEPARTMENT.

GOVERNMENT OF INDIA.
LEGISLATIVE DEPARTMENT.

R. D.

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ANNEXURE

TO

Bill to define and amend the law
relating to Private Trusts and Trustees.

A
BILL
TO

Define and amend the law relating to
Private Trusts and Trustees.

(Statement of Objects and Reasons.)

(Mr. Stokes.)

G. C. D. Press, Simla.—No. 428 L. D.—12-11-80.—200.

Gork. C. B. Press, Simla.—No. 425. L. D.—12-11-80.—200.

G.O. No. 2811-4/12

Sup Judicial 3909/80

Sup Judicial 3909/80

No 3964

Calcut 20th December 1880

From

H. Wigram Esq.

Offg District Judge of
South Malabar

To

The Honble R Davidson Esq.

Chief Secretary to Government
Judicial Department
Fort St. George

Sir,

I have the honor to reply to G. O. dated
4th December 1880 No. 2811 forwarding for
remark the Indian Trusts Bill. I have
considered the provisions of the Bill
with the Statement of objects and reasons
and the Report of the Law Commission
published in the Gazette of India of
24th January 1880 and I am of opinion
that the Bill, as now amended, contains
an admirable exposition of one of the
most difficult branches of the law which
it is the duty of the Courts to administer.

The Bill (Sec 1) provides that the act

26 should

should come into force on 1st March 1882 - I do not understand the reason of this delay. If the Act is a good one (and it has received so much discussion and criticism that it ought to be a good one) the sooner it is introduced the better for the Courts the practitioners, and the suitors. I do not think that 1st March 1881 would be too early a date for its introduction.

The Act will contain no law that we are not at present bound to administer without its assistance. The only difference will be that instead of groping for principles and precedents to guide our decisions the principles will be ready - our hands.

As an illustration of what I mean may mention that only a few weeks ago I was asked by a gentleman who was executor of a will whether he was at liberty with the consent of the beneficiaries invest money on mortgage instead of purchasing an annuity as directed by

the

the will, and whether there was any limit as to the amount he might advance on the security of a mortgage. 259p 26is 29

The answers to both these questions are to be found in Sections 11 & 20 of the Bill, but I was only able to inform my querist what was the proposed law.

3. Again by far the most important part of the Bill is Chapter IX, and for myself I may say that it would be of incalculable advantage to all the ~~indefinite~~ Courts to have the clear principles there laid down for our guidance.

Not a month passes in which some case does not come before me as an appellate Court in which Sections 81 and 86 are applicable. And I can recall to my recollection cases in which Sections 83, 85, 88, 89, 91 and 93 contain the rule of law which should have governed the decision and which had to be evolved by much labour.

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from the Contract Act, English text books and precedents, and the judge's own inner consciousness.

I have only two observations to make on the wording of the bill.

The use of the word "gratuitous" in section 86 might seem to imply that if a consideration was set out which was partly real and partly fictitious the section would not apply.

I do not suppose that this was intended. I think that the words "or for a consideration wholly or in part fictitious" might be inserted after the word "gratuitous".

It might be necessary to add a clause that where the consideration was partly fictitious the transferee must hold the property for the benefit of the creditors subject to his own bona fide claim. As a matter of fact fraudulent transfers of property are almost invariably expressed to be made

for

for some consideration. 257/926 30
5. Section 89 might perhaps be made clearer. I was once consulted by one of my friends in reference to a case in which a schoolmaster had induced one of his students to join him in executing a joint and several promissory note solely for the benefit of the former.

The question that arose was whether the money lender who knew the facts of the case could sue the student, the master having become insolvent. It is doubtful whether section 89 would apply to such a case, but if the section "must hold the advantage for the benefit of, and can claim no legal rights against the person whose interests have been so prejudiced",

I apprehend that the money lender's suit might have been dismissed at once.

I have the honor to be
your most obedient servant
W. J. G. W. J. G.

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Offg. District Judge

Full. (11/10/1) 2/16
Indian Trusts
from (11/1)

The offg. District Judge
North Malabar

1-03812-1

The Chief Secretary
to Govt. Indian Affairs
Fort St. George

Dated 20th December 1880
Recd 22

Ms 594
2/24/5

Reply to G. O. dated
4th Decr 1880 No 2811
calling for remarks
on the Indian Trusts
Bill - 1/10/1

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Trichinopoly District Court
6th January 1881

No. 2

From

F. Brandt Esq.
District Judge of
Trichinopoly

To The Honble R. Davidson. C.S.I.
Chief Secretary
to Government
Judicial Department
Fort St George

Sir

The remarks I have to offer
on the Private Trusts Bill (sent
to me with G. O. No. 2811, dated 15th Decr
1880) are few; for these among other
reasons. I submitted what I had
to say on the draft Bill of 1879,
and the present Bill follows the
former very closely in most re-
spects, and as I took it for granted
then that opinions were not
asked for on the general prin-
ciples, scope, and arrangement
of the Bill, the more so must I
assume this to be so now. Other-
wise I might have expressed a
doubt whether the law affecting
all persons standing in fiduciary
relationship one to another - part-
ners, agents, guardians, Directors
of Companies, and others, as well

as those within the immediate
purview of the Bill, might not have
been comprehensively dealt with
in one and the same enactment
of the general Code; and I am very
decidedly of opinion that an Act
regulating Public Trusts is much
more required here than one
dealing with Private Trusts.

2. I observe that there has been
alteration made in the definition
of a trust, an alteration not
Sec. 3 for the better I think; it might
be hypercritical to suggest a doubt
whether an obligation can properly
be said to arise from a Confidence.
the obligation arises from, or is
attached to, the acceptance of
the Confidence. But I really think
there is a material objection to the
wording of the definition in other
respects.

In the interpretation clause the
word "owner" occurs twice in the
first paragraph, and "ownership" once.
"owner" appears again too, in defining
the interest of the beneficiary, but
"owner" is not itself defined. The
word "settle" has, I presume, been
intentionally not used, where the
word "owner" first occurs it is, apparent-
ly used as equivalent to trustee (as
"owner of the trust property"?); for
the Confidence cannot be accepted
by any other in the second place
it cannot refer to the trustee, for
he accepts the trust for the benefit
of some other or others.

It would I think be better not to
use

237/260
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use the word owner at all, but either
to revert to the wording adopted in
the earlier drafts of the Bill, re-
posed in or accepted by one person
"for the benefit of another," &c., and
then give the definitions; or, using
the author of the trust as explaining itself
to say, "declared by the author of
the trust, or reposed by him in, and
accepted by, some other than the
person for whose benefit the con-
fidence is accepted, for the
benefit of &c." The first fifteen words
of the second paragraph of the
interpretation clause might then
be omitted.

And I think that for "against the
trustee as owner of the trust proper-
ty" might be substituted "against
the trustee in respect of the trust
property, arising out of acceptance
of the trust by the trustee."

The definition of a breach of
trust does not seem to me to be
very satisfactory. An Act to be
exhaustive should itself specify
all cases in which a trustee will
properly be held to have committed
a breach of trust. The Bill does
(see Section 23 illustrations) give
some examples of cases, but the
definition of "breach of trust" is
amounts in fact to an admission
that the enumeration of such cases
is not complete, nor is any hint given
as to the law in force to which
reference might be made on the
subject, while it was, I presume, the
first intention that the law of trusts
should

should be available in one enactment
as for those who have not means of refer-
ence to many law books.

3. Would it not be better to state
specifically whether an appeal lies
to the highest Court of appellate
jurisdiction from orders passed by
the principal Civil Court on
petitions presented under this
section? It is not clear whether
such appeal would be held to lie
in virtue of the provisions of the
Civil Procedure Code. And I think
it would be well to give examples
of cases in which the matter should
be held to be such as could not
properly be dealt with on presentation
of a simple petition: and of those
in which would properly be made
a party to suits in such cases.
I know of no particulars in which
the unprofessional Judge's experience
is more difficult than in marshalling
the right order the right parties
in judicial proceedings arising
out of disputes connected with
relationships of trust.

4. It could be well I think to
state whether a trust for sale will
or will not ordinarily authorize
trustees to execute a mortgage:
whether a trust to raise money
by mortgage will or will not authorize
a sale when the latter course might

be more beneficial to
the estate. (See Lewis p. 391)

5. Again in respect of business
transactions. I think that these
transactions being recognized

Sec. 81, the matter might be treated
with

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with somewhat more fulness: there
is a good deal in Mr. Mayne's Hindu
Law and Usage with respect to cases
in which the Courts should or
should not refuse relief: in cases
in which the original fraudulent
intention is set up, or admitted,
and in which the fraud has or
has not gone beyond the intention
as to the rights of third parties,
not on the record to come in
and show that suits were really
carried on for their benefit, or to
show that the suit was in fact
against parties no parties to the
suit; and as to those who can
or should be parties to such suits,
which I think might well be
worked up into substantive law,
now that the matter has been
taken in hand.

6. Lastly I would draw attention
to some criticisms which appear-
ed in the Madras Mail some
5 or 6 weeks ago. I have not the
file here, and write from memory.
Only it was objected that the
Bill does not deal with cases
of grants made subject to a charge
only: that it is applicable only
where there are separate persons
a trustee and a beneficiary; and
does not touch the cases of
grants subject to the perfor-
mance of services: while it
does include the cases of
nominal, but not real, trusts,
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as where property is handed over
to trustees for the benefit of credi-
tors, which, as the writer (I think
rightly) remarked, amounts to a
mandate or commission, and not
to a trust properly so called.

I have the honor to be

Trichinopoly & Sir
District Court & your most obedt. Servt.
6 Jan'y 1881

F. Brandt
District Judge

To: The Honble R. Davidson C. S. J.
Chief Secretary to
Government
Ind. Departt.
Fort St. George

Original

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Hills Legislative
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The District Judge
of Truckee
R. G. Chief Secretary
to Government
J. L. Beattie
Fort St. George
dated 6th Jan'y 1881
Enclosure
Submitting remarks
on the Private Trust
Bill

25th 11th 7th
Mormon, 13th January, 1881.

From
The Honorable P. O. Sullivan
Associate General
To
The Honorable R. Davidson Esq.
Chief Secretary to Government
Fort St. George

Sir,
With reference to the order of Government,
in the Judicial Department, dated the 4th December
1880, No. 2811, I have the honor to state my opin-
ion upon the draft Bill to define and amend
the law relating to private trusts and trustees
was before the Legislative Council of the Gov.
not General.

I think the present draft, which has been
settled by the Indian Law Commission, sets
forth the law with the requisite clearness and
fulness, and that its enactment is highly expe-
dient.

The only suggestions which I have to make
are the following:-

1. Whether the terms of Section 34 are

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Observations upon the
Ludlow Hunt Rice

Dated 11 January.

Fort.

The Chief Secy: to Govt.

To

Madras.

The Associate General

From

1881.

Judicial (1881) DEPARTMENT.
Bills - Legislative

From

The Advocate General
Madras.

No. —

Dated

Recd.

11th January '81

No. 81

SUBJECT.

Observations upon
the Madras Courts
Bill -

259 & 260/81

From

Lewis Mc Lachlan Esq.,
Acting Registrar of the High
Court of Judicature at Madras.

To

The Honorable R. Davidson, B. S. S.,
Chief Secretary
to Government.

Honorable Sir,

With reference to your letter,
dated 4th December 1880 and to the Order
of Government of the same date, No. 2811,
requesting the opinion of the High Court
on the Bill to define and amend the
Law relating to Private Trusts and Trustees,
I am to transmit transcripts of the minutes
recorded by the Honorable Mr. Justice
James on the provisions of the Bill.

High Court of Judicature,
Madras, 11th January 1881.

I have the honor to be,

Honorable Sir,

Your most obedient servant,

Lewis Mc Lachlan

Acting Registrar,
Appellate Side

257 p 26 to

Minute recorded by the Hon^{ble}
able Mr Justice James.

I think Section 3 re-
quires alteration. I am aware
that the Law Commission have
deliberately determined that
the trustee is the owner of the
trust property, but I hope before
that it is very inexpedient to
aspire him that character.

A is the owner of a batch. He
sells it to B to be conveyed and
delivered as a present to C. Here
is unquestionably a trust or
confidence reposed in B, but

What ownership has B? He is
a mere channel and takes no
estate or interest in the property.

A deveys all his real estate
to B directing him to receive the
rents and profits and apply
them to the benefit of C, or to
raise by sale or mortgage
enough to pay the debts of C.

In these cases B has a qualified
ownership. But while the word
'ownership' conveys the notion of
plenary dominion, estates of trustees
are in quantity infinitely diverse,
ranging between no interest

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at all and almost plenary
power of disposal.

In the case of money
paid to one for the use of another,
in resulting trusts where the
purposes of the trust are exhausted
and there is a residuum; in
beneficial purchases; in trusts
in mortgagor where money received
cannot conscientiously be
withheld from another person
in the purchase of trust property
with notice; in the purchase
of trust property in violation
of the trust; in the purchase of

trust property with trust funds -
in all these cases what is the
basis of reasoning upon which
the property is in the hands of
the trustee or purchaser from
a trustee with notice has to be
given up? The recognition that
the trustee is not the owner.

The Fiduciarius in Roman
law was bound not to transfer
as he would do if the owner, but
'restituere' to restore to the Bene-
ficiary when the trust was ended
and the Beneficiary entitled
to the trust property.

2547 260 11/11
The notion of the trustee being
the owner has attached itself
to trusts of real property owing
to the action of the Statute of
uses.

By 'uses' the beneficiary
became to all intents and
purposes the real holder of
land without the Lord having
that control over him which
he had over the original possessor.

With a view to counteract
these and other evils arising there-
from, the Statute of Uses was
passed whereby the Beneficiary
was constituted legally, what

that he was actually the owner.

The aim of the statute of
uses would have been carried
out had it not been for the
view taken by the courts of the
nature of a use which they
considered such that there
could not be a further use in
Common Law engendered upon
it and consequently the statute
of uses had exhausted it.
= self on the first use and
= had no effect on the second.

The conveyancers had
thus found a way of evading

the statute and re-introduced
the very practice which the statute
was designed to extinguish.
If it had been plainly de-
clared that the Beneficiary
was the owner to the extent of
his interest in the property,
all difficulty would have been
avoided and the purpose of
the statute might have been
carried out.

The notion of the trustee
being the holder of the legal estate
has introduced, I think, into
English law an erroneous concept
of his powers and position

especially as regards purchaser
from the trustee in fraud of
the beneficiary. Why should
the trustee, who is not the
beneficial owner, be declared
as the owner and as such capable
in certain circumstances
of giving a good title to the
trust property though by
so doing he defrauds the
Beneficiary? The protection
of beneficial owners from
fraud is at least as im-
portant a consideration
as the protection of innocent
purchasers, and in a country

possessing a careful system of
registration, purchasers using
caution ought not to be liable
to be deceived.

The question of whether a
purchaser has or has not had
notice is an exceedingly dif-
ficult one and in the majority
of instances whether detected
or not I should expect that
there would be fraud on the
part of both trustee and pur-
chaser though the purchaser
may be able to persuade the
Court that the purchase was
made in good faith for

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Consideration without notice.

I would again therefore urge
a revision of the rules in Sec.
- from 62. Exception I. a and b.

I would point out that
if the declaration of the
ownership of the trustee is
to be left in the Bill, some
complication will arise.

The Civil Procedure Code,
Section 280 distinguishes between
property held by a person as
his own and property held
on account of or in trust for
another - But the Trustees Act

257 & 280 9/17
48
will be made to say that property
held on account of or in trust
for another person is the trustee's
own property.

I venture to suggest
the following amendment of
Section 3.

A trust is an obligation
annexed to the possession of
property and arising out of
a confidence reposed in and
accepted by one person design-
-ated the trustee or declared
and accepted by him for
the benefit of another or
for the benefit of another

and the trustee.

I would not attempt
to define the extent of the trustee's
estate as that must vary
in accordance with the scope
and object of the trust.

True copy

Lemuel Shaw
Acting Registrar,
Appellate Court.

C. P. Lab

W. L. L. L.

in Sud. 1907/8.

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Judicial (1880) Department.
Private Secretary's Office

From

The ⁵ Registrar of the
High Court of Judicature
Madras.

To
The Chief Secretary to
Government.

Dated 19th }
Recd 19 } January 1881.

No: 19th No 80.
With one Enclosure

Transmitting transcript of
the Minute recorded by the Honorable
Mr Justice Lunce on the provisions
of the Bill to define and amend
the Law relating to Private Trusts
and Trustees.

72. Mr. Legislative

Judicial Department. 260
2598

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following letter paper

From H. Wigram Esq. Off. D. Judge, S. Malabar, dated
20 December 1880, No 394.
- " - F. Brandt Esq. D. Judge of Trichinopoly, dated
6th January 1881, No 2.
- " - The Advocate General, dated 11th January 1881
- " - the ⁵ Registrar of the High Court, dated 19th
January 1881, No 80.

No 11 Order thereon, 3rd Feb 1881, No 259.

Ordered that
the foregoing reports
on the Indian Trusts
Bill, 1880, be forwarded
to the Government of India
in the Legislative Dept.

The Government
observe that Mr Justice
Innes' remarks on the
question of "ownership"
in a trust are deserving
of ^{special} attention.

W. (From order)
H. Co.

No 10 - 100 copies

N^o 260

Despatched with 8026
of letters & 1880
872

The Secretary to the Government of India.
Legislative Dept.

With reference to
your letter, dated the
15th November last,
N^o 1221, I am directed
to forward copy of the
Proceedings of this Govt,
dated 3rd instant, N^o 259,
containing opinions of
the High Court, the Sec-
-rete General and the
other officers consulted
to report on the Indian
Trusts Bill, and the
remarks of this Govt.

The Bill was
published in the Port
Saint George Gazette

For St. George
3rd Feb 1881

Supplement of the 23rd
November 1880. 259 & 260

OP
SP
H. 259

L-100 10 p. 10

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1880: 750.

Govt. of {1880} Address.

To