

4. But there can be no trust of a beneficial interest under a subsisting trust. A Beneficiary cannot create a trust of his interest in trust. His interest is transferable but he cannot create a trust of it.

5. This marks an important distinction between the English Law and Indian Law of Trust.

6. Under the English Law a beneficiary can create a trust of his equitable estate.

7. The reason is that the Indian Law does not recognize the distinction between legal and equitable estates in a trust.

Sec. II.—A Trust may be properly created and yet enforceable.

1. A trust may have been properly created but may not be enforceable. To be enforceable a trust must satisfy two other conditions:—

I. The object of the Trust must not be unlawful.

II. The formalities prescribed for the creation of a trust must be satisfied.

Object of the trust

Sec. 4.

1. The object of a trust must be lawful.

2. *What are lawful objects ?*

(1) The purpose must not have been forbidden by Law.

(2) Purpose must not be such which if permitted would defeat the provisions of any law.

What are unlawful objects ?

(1) Purpose which is fraudulent

(2) Purpose which involves or implies injury to the person or property of another.

(3) Purpose which is immoral or opposed to public policy.

Illus.

(1) Trust for the care of female foundings to be trained as prostitutes.

(2) Trust to carry on smuggling business and to maintain it out of the profits.

(3) Trust by a person in insolvent circumstances—defeating creditors.

(4) Trusts for illegitimate children.

(5) Trust for the creation of a perpetuity.

(6) Trust to take effect upon future separation of husband and wife.

3. Whether the trust is lawful or unlawful is to be determined in the case of immoveable property by the law where the property is situated.

4. A trust which is unlawful is *void*.

5. Where a trust has two purposes of which one is lawful and the other unlawful, the validity of the trust depends upon the severability of the two. If they can be severed, the one with a lawful purpose is valid and the one with an unlawful purpose will be void.

If they cannot be separated the whole will be void.

6. Consequences of settlor creating an unlawful trust—

(i) Court will not enforce it in favour of the person intended to be benefitted thereby.

(ii) Court will not help the settler to recover the estate.

Formalities for a valid trust

Sec. 5.

1. A trust may be a trust of immoveable property or it may be a trust of moveable property. The formalities prescribed by law for the validity of a trust differ according as the property is immoveable property or moveable property.

2. *Formalities in case the property is immoveable.*

Such a trust may be made in two ways—

(i) Either by anon-testamentary instrument signed by the author of the trust or by the trustee, or

(ii) By the will of the author of the Trust,

3. *Formalities in the case of a trust of moveable property.*
There are *three* ways by which it could be done.

(1) By a non-testamentary instrument signed by the author of the trust or the trustee.

(2) By a testamentary instrument signed by the author or the trustee.

(3) By transfer of the ownership of property to the trustee.

4. *Difference between declaration and creation of Trust.*

(Not explained in ms.)

5. Transfer of Trust Property

1. No trust is created until the author of the trust has divested him of the trust property. That means he must have transferred the property to the Trustee.

2. This does not apply where the author of the trust is himself the trustee. All that is necessary to show is that he has changed the character in which he holds it.

3. This does not apply when the trust is created by a will. The will operates after his death and the trustees then take possession.

Section II.—A trust may be valid and yet impeachable.

1. A valid trust may be impeached on the following grounds by the following persons :—

(a) By the settlor or his successors in title on the ground:

(i) of the incapacity of Parties.

(ii) of some mistake made by, or fraud practised on, the settlor at its creation.

(b) By the settlor's creditors, by reason of its having been made with a fraudulent intention to defeat or delay them or because it infringes the provisions of the Insolvency Act.

(c) By future purchasers of the property from the settlor without notice of the trust, where the trust property is land, and though was intended by the settlor to defeat the claims of future purchasers.

I. Incapacity of Parties to a Trust

§ Capacity of the author of the Trust.

1. The author of a trust must be a person who is *competent* to contract, i.e.,

(i) He must be major and

(ii) He must be of sound mind.

2. Although this prevents a minor from making a trust yet the law provides for a minor making a trust, if the conditions prescribed are observed under the Law, a trust may be made by or on behalf of the minor, provided it is done with the permission of the Principal Civil Court of original jurisdiction.

The Principal Civil Court of original jurisdiction is according to the Civil Procedure Code the District Court.

3. This competency of the Author of the Trust to make a trust is limited in two ways—

(i) The property which is to be the subject-matter of the trust must be transferable.

(ii) He can transfer it only to the extent permitted by Law for the time being in force. A trust is not valid if the author had no power to dispose of property.

4. What property is transferable and what is not is defined in section 6 of the T. P. Act.

5. The authority to dispose of property and the extent of such power depends upon law.

Illus.

(i) A Hindu father cannot dispose of the ancestral property and therefore, he cannot create a trust thereof.

(ii) A Hindu widow cannot dispose of the estate inherited by her from her husband. She having only a life-estate in it—therefore, she cannot dispose of it by way of Trust.

(iii) A Mohammedan cannot dispose of more than 1/3 of his property after the payment of debts and funeral expenses— therefore, cannot dispose of more than 1/3 by way of a Trust.

§ Capacity to be a Trustee—

Sec. 10.

1. Every person capable of holding property is competent to be a trustee.

2. *Who is capable of holding property ?*

Every *living person* is capable of holding and taking property. Therefore, every living person whether a minor or a lunatic is capable of being a trustee.

3. There is a difference between capacity to contract and capacity to hold and take property. Every living person does not have the capacity to contract; but every living person has the capacity to hold and take property.

4. This distinction is necessary to make and important to bear in mind because a person may not have capacity to contract yet he may be competent to be a trustee provided he has capacity to hold

and take property ;be not dead physically he must not be dead civilly:

(1) A person who is sentenced to transportation is not civilly dead.

7. There is one further distinction which is to be noted. Ordinarily a person who is competent to be a trustee is also competent to execute a trust. But in the case where a trust involves the use of discretion the person who is competent to be a trustee is not necessarily competent to execute a trust.

8. Where the trust is such that it does not involve the use of discretion the requirement for competency to execute a trust is the same for being a trustee, namely, capacity to hold and take property.

9. Where the trust is such that its execution does involve the use of discretion, then the trustee must have capacity to contract.

Capacity to be a Beneficiary—

Sec. 9.

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

2. The requirement for being a beneficiary is the same as for being a trustee.

3. That is every living person can be a beneficiary. That is a trust can be created in the interest of every living person. It is not necessary that a beneficiary should have contractual capacity. In this respect his position is regulated by the same provisions as that of the trustee.

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CHAPTER III
**The Revocation of an Express Trust
Declared**

Sec. 78.

1. Whether a trust can be revoked depends upon how the trust is created.

(i) If the trust is created by a will then it can be revoked by the testator *at his pleasure*. This is because will does not take effect till death. There is can be revoked before it takes effect.

2. If the trust is created otherwise than be a will—i.e., by a non-testamentary instrument or by word of mouth then it can be revoked in the following circumstances only—

(i) If the power of revocation is expressly reserved to the author of the trust.

(ii) If the beneficiaries consent, provided all of them are competent to contract

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CHAPTER IV
The Extinction of an Express Trust
Sec. 77.

1. A trust comes to end in the following cases—

- (i) When the purpose is completely carried out.
- (ii) When its purpose becomes unlawful.
- (iii) When the fulfilment becomes impossible.
- (iv) When the trust being revocable is expressly revoked.

(v) If there is only one beneficiary or if there are several (whether entitled concurrently or successively) and they are or they are not under any disability (such as infant, lunatic) the trust may be extinguished by them without reference to the wishes of the settor or the trustees.

2. The terms for the extinction of a trust are the same as those for the extinction of a contract.

1. Two questions remain to be considered.

- (i) When does a trust becomes administrable ?
- (ii) What estate does the Trustee and Beneficiary have in the trust ?

2. These questions are preliminary to the question of the administration of the trust.

I. When does a trust begin to function ?

A trust becomes administrable when it has been accepted by the Trustee and the beneficiary—

I. DISCLAIMER AND ACCEPTANCE OF A TRUST

Acceptance Art. 34=Sect. 10.

1. Although the author of the trust may appoint a person as a trustee, the person so appointed is not bound to accept such appointment.

2. A person appointed to the office of a trustee may accept the office or he may disclaim it.

3. The acceptance of the office may be indicated expressly or by conduct. If it is by conduct it must indicate with reasonable certainty such acceptance.

Illus.—*A* by his will bequeaths certain properties to *B* and *C* as Trustees for *D*, *B* and *C* prove *A*'s will. On a question being raised whether *B* and *C* had accepted the office of Trustee, held that their conduct in proving the will was tantamount to acceptance of office.

4. Other illustrations of acceptance by conduct are :—

(i) Acceptance by acquiescence—Permitting an action regarding trust property being brought in his name.

(ii) Acceptance by exercising dominion over the trust property—such as advertising for sell—giving notice to tenants.

(iii) Acceptance by dealing with property—unless the dealing is plainly referable to some other ground.

(iv) Acceptance by long silence with notice of the trust and in the absence of any satisfactory explanation of the silence.

(v) Acceptance of a part of the trust is acceptance of the whole, notwithstanding any attempted disclaimer of part.

5. The law does not say how a disclaimer is to be made by a trustee who does not wish to accept the office. It only says that a trustee must do so within reasonable time.

6. Although the law is silent on the point, the following points with respect to disclaimer have been settled by judicial decisions—

(i) The disclaimer should be before acceptance. Once a trustee has accepted the office he can renounce it only under circumstances mentioned in section 46.

(ii) A person can disclaim a trust although he may have consented to act as a trustee during the lifetime of the settlor.

(iii) A person cannot disclaim the office as to a part of the trust and accept as to the rest.

(iv) A disclaimer may be by words or by conduct.

7. Effect of disclaimer.

(i) If there is only one trustee a disclaimer prevents the trust property from vesting in him.

(ii) If there are two more trustees and if one of them disclaims, such a disclaimer vests the trust property in the other or others or makes him or them the sole trustee or trustees from the date of the creation of the trust.

8. What happens when there is only one trustee and he disclaims.

Two things can happen :—

(i) A new trustee may be appointed under section 73—

(a) By one mentioned in the trust.

(b) If there be none such, by the settlor if alive and competent to contract.

(ii) If no trustee is appointed in place of the one who has disclaimed the property reverts to the settlor or his representatives if he is dead.

9. What happens to the property ? Is it freed from the trust ? Does it remain subject to the trust ?

The answer is that the trust is not extinguished. The settlor or his representatives, if the settlor is dead, holds it on trust for the beneficiary. In other words the settor or his representative becomes the trustee in place of the trustee who has disclaimed.

The rule is that a trust will never fail for want of a trustee. Wherever a trust exists, and there is no trustee to execute it, the person in whom the legal estate vests holds the property as trustee. This rule is intended to protect the beneficiary.

Mallott vs. Wilson (1903) 2 Ch. 494.

II. DISCLAIMER AND ACCEPTANCE BY BENEFICIARY—

Section 9

1. A beneficiary is not bound to accept the trust. He may accept it or he may disclaim it.

2. His disclaimer amounts to a renunciation of his interest under the trust.

3. If he wishes to disclaim he can do so in two ways :

(i) By a disclaimer addressed to the trustee or

(ii) By setting up a claim inconsistent with the trust with the knowledge of the trust.

4. A claim inconsistent with the trust would be a claim such as ownership of the trust property.

4. What happens to the trust when the beneficiary disclaims ?

III. THE ESTATE OF A TRUSTEE UNDER A TRUST. (Page left blank)

IV. THE ESTATE OF A BENEFICIARY UNDER A TRUST. (Page left blank)

PART III
THE ADMINISTRATION OF A TRUST

PART III

THE The Administration of a Trust^{UST}

In connection with the Administration of a Trust, the Trustee has certain—

- (i) Duties—Sections 12—20.
- (ii) Liabilities—Sections 23—30
- (iii) Rights—Sections 31—36.
- (iv) Powers—Sections 37—45.
- (v) Disabilities—Sections 46—54.

Similarly the beneficiary has certain—

- (i) Rights—Sections 55—67.
- (ii) Liabilities—Section 68.

I. Duties of a Trustee

Sections 12—20

V (2) Duty to obey directions contained in the Trust.

IV (3) Duty to act impartially between the beneficiaries.

IV (4) Duty to sell Wasting and Reversionary property.

IV (5) Duty in relation to payment of outgoing of Crops and income.

IV (6) Duty to exercise reasonable care.

IV (7) Duty in relation to the Investment of Trust Funds.

IV (8) Duty to pay Trust moneys to the Right Persons.

* Each page contains only the heading and not the details—ed. thoried.

IV (9) Duty in relation to delegation of Duties and Powers.

IV (10) Duty to act jointly when there are more than one Trustees.

* IV (11) Duty not to set up *Jus Tertii*

* IV (12) Duty to act gratuitously.

* IV (13) Duty not to traffic in Trust Property.

* IV (14) Duty to be ready with Accounts.

V. Powers of a Trustee

Sections 37—45.

V. The powers of a Trustee

*V (1) General Powers of a Trustee.

* V (2) Power of Trustees to sell or mortgage the Trust Property.

* V (3) Power in relation to conduct of sales.

* V (4) Power to give receipts.

* V (5) Power to compound and settle disputes.

* V (6) Power to allow Maintenance to Infants.

* V (7) Power of Trustees to pay Cost of Beneficiary.

* V (8) Suspension of the Trustee's Powers by Administrative Action.

* Each page contains only the heading and not the details—ed.

VI. Powers of the Beneficiaries

* VI (1) Power of a sole beneficiary.

* VI (2) Power of one of several beneficiaries.

25. Is a trustee liable for breach of trust by his predecessor ?
He is not.

26. Is a trustee liable for the breach of trust committed by a Co-trustee ?

He is not except in the following cases:—

(i) Where he has delivered trust-property to his Co-trustee without seeing to its proper application.

(ii) Where he allows his Co-trustee to receive trust property and fails to make due inquiry as to the Co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require.

(iii) Where he becomes aware of a breach by a Co-trustee and conceals it or does not take proper steps to protect the property.

27. Breach of Trust jointly committed by Co-trustees.

What is the liability for each ? Is it for the whole ? Each is liable for the whole to the beneficiary. There will be a right of contribution from the rest.

28. Liability for Payment by a Trustee to a person who is not the person in whom the beneficiary's interest is not vested.

Trustee is not liable, provided :

(i) He had no notice that the interest had vested in another person.

(ii) That the person to whom payment is made was a person who was entitled to payment.

XIII. Protection to Trustees

* (1) General Protection.

*XIII (2) Statute of Limitation.

* XIII (3) Concurrence of or waiver or Release by the Beneficiary.

* XIII (4) Protection against acts of Co-Trustees.

* XIII (5) Right of contribution and indemnity as between Co-trustees.

* XIV. Liability of Third Parties and Beneficiaries.

* XIV (1) Liability of Third Parties and Beneficiaries who are parties to a Breach of Trust.

* XIV (2) Following Trust Property into the hands of Third Parties.

* The pages contain only the headings and not the details—ed.

PART IV

CONSTRUCTIVE TRUSTS

PART IV

Constructive Trusts

1. There are *fourteen* cases of constructive trusts which are enumerated in the Trust Act.

2. They fall under *five* heads :—

(1) CONSTRUCTIVE TRUSTS ARISING OUT OF TRANSFERS—SECTIONS 81, 82, 84, 85.

(2) CONSTRUCTIVE TRUSTS ARISING OUT OF UNFAIR ADVANTAGE GAINED BY ONE PERSON AS AGAINST ANOTHER PERSON—SECS. 85, 88, 89, 90, 93.

(3) CONSTRUCTIVE TRUSTS ARISING OUT OF CONTRACTS MADE—SECS. 86, 91, 92.

(4) CONSTRUCTIVE TRUSTS ARISING OUT OF A MERGER OF TWO PERSONALITIES IN ONE INDIVIDUAL—SECTION 87.

(5) CONSTRUCTIVE TRUSTS ARISING OUT OF A PAST TRUST—SECTION 83.

(1) TRANSFER OR BEQUEST OF PROPERTY

(i) Section 81.

1. In certain cases the transfer or bequest of property imposes an obligation upon the transferee or legatee in the nature of a trust in favour of the owner or his legal representative.

Ordinarily the transferee or legatee would take the property absolutely without any such obligation.

2. When can it be held that the transferee or legatee takes it subject to an obligation? He takes it subject to an obligation when there is no intention on the part of the owner to dispose of the beneficial interest in the property to the transferee or legatee.

3. How is intention to be determined?—In the light of the circumstances of the case. It is the circumstances which must be referred to in order to find out the intention of the owner.

(ii) Section 82.

1. The second case where the transfer of property imposes an obligation upon the transferee in the nature of a trust is the case where the transferee is made to one and the consideration is paid by another—in such a case the transferee holds it on trust for the person who paid the consideration.

Ordinarily the transferee would be the owner in the eye of the law, the property being conveyed to him by the transferor.

2. This rule that a transferee who has not paid consideration holds it on trust for a person who has paid consideration applies generally except in one case—

3. *Exception :*

This rule does not apply where there is an intention on the part of the person who paid the consideration to benefit the transferee.

4. *Proof of intention.*

(iii) TRANSFER FOR AN ILLEGAL PURPOSE.

Section 84.

1. Ordinarily when a transfer is for an unlawful purpose the Court will neither enforce the transaction in favour of the transferee nor will it assist the transferor to recover the estate if he has parted with it.

2. But the rule does not apply under *all* circumstances. The rule does apply under certain circumstances.

3. What are the circumstances in which the rule does not apply ?

The circumstances in which the rule does not apply are—

(i) If the purpose is not carried into execution.

(ii) If the transferor is not as guilty as the transferee.

(iii) If the effect of permitting the transferee to retain the property might be to defeat the provisions of any law.

4. In these cases the Court will help the transferor and impose upon the transferee an obligation to hold the property for the benefit of the transferor.

(iv) BEQUEST UPON TRUST FOR AN ILLEGAL PURPOSE.

Section 85.

1. The position in law with regard to transfers for an illegal purpose is on a par with trust for an illegal purpose.

2. That is, a Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate if he has parted with it.

9 Bom. S.R. 542.

3. Section 85 recognizes a trust although the purpose is unlawful. This is in contrast with the general principle enunciated in section 4 of the Trust Act and therefore requires some explanation.

4. The general principles governing the rights of the parties to an unlawful trust and the exceptions to those principles may formulate as follows:—