

I. Where a trust is created for an unlawful and fraudulent purpose, the 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 (except in one case).

Q.—Why is a beneficiary not allowed to enforce it ?

A.—Because it would be giving effect to an unlawful purpose.

Q.—Why is the author not allowed to recover the estate if he has parted with it ?

A.—Because it would be helping him to take advantage of his own fraud.

II. The one case in which the settlor allowed to recover the property although the trust is for an illegal purpose is the case where the illegal purpose has failed to take effect.

Q.—Why is this exception made ?

A.—There are two reasons :—

(i) The purpose being unlawful no trust arose—it being void *ab initio*.

(ii) The trustee having paid no consideration has no right to retain the beneficial interest in the property which must, therefore, return to the settlor.

III. The disabilities attaching to the author of an unlawful trust do not apply to his legal representatives—

Q.—Why ?

A.—Because they are not parties to the transactions.

5. The reason why section 85 recognizes a trust in favour of legal representatives is because they are innocent parties having nothing to do with the creation of an unlawful trust.

(2) Constructive Trusts arising out of unfair advantage—

I. Section 85.

1. The first case under this head arises where property is bequeathed under a will and the testator during his lifetime wanted to revoke the bequest and he is prevented from revoking it by coercion.

2. Under such circumstances the legatee takes the property not as a beneficial owner thereof but holds it as a trustee for the legal representatives of the testator.

3. The reason is that the legatee has taken unfair advantage by using unfair means. He cannot, therefore, be allowed to retain such an advantage.

II. Section 88

1. The second case arises when any person who is bound to protect the interest of another person by reason of his fiduciary relationship with the latter.

2. Persons who fall in this category are—

- (i) Agent and Principal.
- (ii) Partners in a firm.
- (iii) Guardian and ward.
- (iv) Trustee and beneficiary.
- (v) Executor and Legatee.

3. The section says—

(i) That any such person who gains any pecuniary advantage by availing himself of his fiduciary.

(ii) Enters into any dealings under circumstances in which his own interests are adverse to those of the person whom he is bound to protect and thereby gains for himself a pecuniary advantage

Then

He must hold the advantage so gained for the benefit of the person whose interest he was bound to protect.

4. *Illus.*

(i) A partner buys land in his own name with funds belonging to his firm. He must hold it for the benefit of the partners.

(ii) A trustee, retires from his trust in consideration of a bribe paid to him by his Co-trustee. The trustee must hold the sum for the benefit of the trustee.

(iii) An agent is employed by A to secure a lease from B of a certain property. The agent obtained a lease for himself. The agent must hold it for the benefit of B.

(iv) A guardian buys up the incumbrances on his ward's property at an undervalue. He can charge the ward only for the value he has actually paid for the incumbrances.

III. Section 89

1. The third case arises where advantage is gained at the cost of another person by the exercise of undue influence.

2. This is dealt with in section 89. Section 89 says that such a person must hold the advantage for the benefit of the person who is the victim of such undue influence.

3. This is subject to two limitations—

(i) The advantage must have been gained without consideration or

(ii) The person must have had notice of the advantage having been gained by undue influence.

IV. Section 90

1. The fourth case arises where advantage is gained by a qualified owner availing himself of his position as such in derogation of the rights of other persons interested in the property.

2. This is dealt with in section 90. Section 90 says that such an advantage shall be held for the benefit of all and not merely for the benefit of the one who secured it.

3. Subject to two conditions—

(i) The others must repay their due share of expenses properly incurred for securing such advantage.

(ii) The others must bear proportionate part of their liabilities properly contracted for gaining such an advantage.

4. Cases covered are those of co-tenants, members of joint family, mortgagee, etc.

V. Section 93

1. The fifth case arises where the advantage is gained by a creditor secretly.

2. Such a case generally arises when the creditors accept a composition from a debtor who is unable to pay his debts in full.

3. If it is found that one of the creditors who is a party to the composition has by arrangement with the debtor unknown to the other creditors gains better terms for himself he shall not be

entitled to retain the advantage gained by him by reason of such better terms which have caused prejudice to other creditors.

4. The law will regard him as a trustee for the other creditors in so far as the advantage gained by him is concerned.

(3) Constructive Trusts arising out of Contracts

I. Section 86

1. The first case dealt with by the Trust Act under this head relates to a contract for the transfer of property.

2. It falls under section 86. Section 86 refers to a contract in pursuance of which property is transferred and where the contract is of such a character that—

- (i) It is liable to recession or
- (ii) It is induced by fraud or mistake.

3. The transferee of the property under such a contract shall hold the property for the benefit of the transferor.

4. This obligation arises only under certain circumstances and is not absolute:

(i) The obligation arises only on receiving notice from the transferor that the contract is liable to recession or that it has been induced by fraud or mistake.

(ii) The obligation will be enforced only on repayment by the transferor of the consideration actually paid by the transferee.

II. Section 91

1. Acquiring property with notice that is subject to a contract with another person.

2. In such a case the person who acquires the property must hold it for the person who had contractual rights in it.

3. This obligation is limited in its extent. It is enforced only to the extent necessary to give effect to the contract.

4. This obligation does not arise in the case of every acquisition of property which is subject to a contract. It applies only in the case of a contract which could be specifically enforced.

III. Section 92

1. Property bought for being held on trust for certain persons.

2. A contracts to buy property from B and represents to B that the purpose of buying it is to hold the property on trust for C. B believing in the representation of A sells the property to A.

3. A must hold the property for the benefit of C.

4. This obligation is also limited in its extent—It is enforced only to the extent necessary to give effect to the contract.

5. The contract may be to hold part of the property in trust for C. In that case the obligation will be enforced only to the extent of the property.

(4) Constructive Trust arising out of merger of two personalities in one individual.

I. Section 87

1. This provides for the case of double personality—one man but two persons.

2. Every contract, debt, obligation or assignment requires two persons.

3. But these two persons may be the same human being.

4. In all such cases, were it not for the recognition of double personality, the obligation or incumbrance would be destroyed by merger.

5. Because no man can in his own right be under any obligation to himself; or own any incumbrance over his property.

6. But with the recognition of the double personality this is possible.

7. In fact this is necessary.

8. *Illustration*—

Debtor becoming executor.

Executor is the owner in the eye of the law.

Merger. Extinction of debt.

9. Section says no.

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PART V

**THE ADMINISTRATION OF A CONSTRUCTIVE
TRUST**

PART V

The Administration of a Constructive Trust

THE INDIAN TRUST ACT

1. The Law relating to Trust is contained in Act II of 1882.

2. It is an Act which defines and amends—that means that it does not introduce any new principle.

3. The Act does not consolidate the Law—That means that it is not an Exhaustive Code.

4. The object of the Act was to group in one to enact the legal provisions relating to trusts. Before the Act of 1882 the statutory law relating to trust was contained in 29 *Car II. C. 31 sections 7—11.*

Act XXVII of 1866

Act XXVIII of 1866

There were also few isolated provisions scattered through the Penal Code, Specific Relief, C. P. Code Stamp Act, Limitation, Government Securities Act, Companies Act, Presidency Banks Act.

5. As originally passed, the Act did not apply to the whole of British India. For instance, it did not apply to Bombay. But provision was made to extend it by notification by local Government.

6. It is unnecessary to discuss here whether the Hindu Law and Mohammedan Law recognized trust as defined in the Trust Act. That may be dealt with by others.

The nature of a Trust

1. Trust is defined in section 3. A trust involves three things :

(1) A person who is the *owner* of some property.

(2) Ownership burden with an obligation.

(3) Obligation to use the property for the benefit of another or of another and himself.

2. It is ownership without beneficial enjoyment. It involves separation of ownership and beneficial enjoyment.

3. A trust arises out of a confidence reposed in and accepted by the owner.

4. The owner in the eye of the law is the trustee. After the trust is created the author of the trust ceases to be the owner of the property.

I. WHAT IS A TRUST.

1. The terms Trust and Trustee are defined in various enactments of the Indian Legislature.

(i) *Definition in Specific Relief Act I of 1877.*

Section 3—

(1) *Obligation* includes every duty enforceable by law.

(2) *Trust* includes every species of express, implied or constructive fiduciary ownership,

(3) *Trustee* includes every person holding expressly, by implication, or constructively a fiduciary ownership.

(ii) *Definition in the Indian Trustees Act XXVII of 1866.*

Section 2—

“Trust shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words *trust* and *trustee* shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person.

(iii) *Definition in Limitation Act IX of 1908.*

Section 2 (ii)—

Trustee does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied or a wrongdoer in possession without title.

(iv) *Indian Trusts Act II of 1872.*

(1) Section 3—“A trust is an obligation annexed to the ownership of property...

(2) Ingredients of a Trust

(i) A Trust in an *obligation*.

(ii) The obligation must be annexed to the *ownership* of property.

(iii) The ownership must arise out of *confidence* reposed in and accepted by the owner.

- (iv) The ownership must be for the benefit of another (i.e., a person other than the owner) or of another and the owner.

Explanation of Terms

I. THERE MUST BE OBLIGATION.

II. OBLIGATION MUST BE ANNEXED TO OWNERSHIP PROPERTY.

1. There may be an obligation to which a person is subject although there is no property to which it is annexed.

E.g. *Torts* assault—

2. There may be property without there being any obligation attached to it.

E.g. *Full* and *complete* ownership—sale of property.

III. THE OWNERSHIP OF PROPERTY MAY BE FOUNDED IN CONFIDENCE OR IT MAY NOT.

Illus.

A person may transfer ownership to another with the intention of conferring upon him the right to enjoy the property.

A person may transfer ownership to another without the intention of conferring upon him the right to enjoy the property.

The difference between ownership founded in confidence and ownership not founded in confidence consists in this—

(i) In the latter there is *a jus in re* (a complete and full right to a thing) or *jus ad rem* (an inchoate and imperfect right).

(ii) In the former there is not

E.g. Bailment.

3. The nature of a trust can be better understood by contracting it with other transactions resembling a trust.

Trust distinguished from agency

1. Where there is a trust, the ownership of the trust property is in the trustee. The trustee is personally liable on all contracts entered into by him in reference to the trust, although he may have a right of recourse against the trust funds or against the beneficiary.

2. An agent has no ownership in law in the goods entrusted to him. If an agent enters into a contract as agent, he is not personally liable. The contract is with the principal.

Trust distinguished from Condition

1. Cases of condition differ from cases of trust in two respects—

First. A trust of property cannot be created by any one except the owner. But A may dispose of his property to B upon condition express or implied that B shall dispose of his own property in a particular way indicated by A.

Second. The obligation of the person on whom the condition is imposed is not limited by the value of the property he receives, e.g., if A makes a bequest to B, on condition of B paying A's debts, and B accepts the gift, he will be compelled in equity to discharge the debts although they exceed the value of the property.

2. But the words "upon condition" may create a real trust. Thus a gift of an estate to A on condition of paying the rents and profits to B constitutes a trust because it is clear that no beneficial interest was intended to remain in A.

A may dispose of his property to B upon condition express or implied that B shall dispose of his property to C. There is a condition in favour of C.

Is this a trust ?

Trust distinguished from Bailment

1. Bailment is a deposit of chattel and may in a sense be described as a species of trust. But there is this great difference between a bailment and a trust, that the general property in the case of a trust, is in the trustee, whereas a bailee has only a special property, the general property remaining in the bailor.

2. The result of this difference is that an unauthorized sale by a trustee will confer a good title upon a *bona fide* purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee confers as a rule no title as against the bailor.

3. Bailee does not become the owner of the property as a result of the bailment. But a trustee does in law become the owner

of the property as a result of the trust notwithstanding he is under an obligation to deal with the property in a certain specified manner.

Trust distinguished from Gift

Ordinary contract differs from a trust. Contract which confers a benefit on a third party closely resembles a trust.

1. There is a similarity between a Trust and a Gift inasmuch as in both the transfer results in ownership. The Trustee and the Donee both become owners of the property.

2. But there is a difference between the two. In a gift the donee is free to deal with the property in any way he likes. In a Trust the trustee is under an obligation to use the property in a particular manner and for a particular purpose.

Trust distinguished from Contract

1. That there is a distinction between trust and contract is evident from the existence of differing legal consequences attached to a trust and to a contract:

(i) A trust, if executed, may be enforced by a beneficiary who is not a party to it whilst only the actual parties to a contract can, as a rule, sue upon it.

(ii) An executed voluntary trust is fully enforceable while a contract lacking consideration is not.

2. However, the determination of the question whether a given set of facts gives rise to a trust or a contract is not easy. What is the test?

Keetan—pp. 5-6	(1919) A. C. 801	38 Bom. S. R. 610.
	(1926) A. C. 108	

It is a question of intention.

Trust distinguished from Power

1. The term “power” in its widest sense includes every authority given to a person (called the donee of the power) to act on behalf of or exercise rights belonging to the person giving him the authority (called the donor of the power).

2. Powers are of many kinds e.g.

(i) The common law power of an agent to act for his principal, given sometimes by a formal “power of attorney”.

(ii) Statutory power such as the power of sale given to a mortgagee.

(iii) The various express and implied equitable powers possessed by trustees and executors.

(iv) Powers to appoint trusts so as to create equitable interests.

3. The power of appointment is a transaction which resembles a trust and it is this which must be distinguished from a trust.

The word appointment means -pointing out, indicating- the act of declaring the destination of specific property, in exercise of an authority conferred for that purpose-the act of nominating to an office.

The last class termed *powers of appointment* are made use of where it is desired to make provision for the *creation* of future interests, but to postpone their complete declaration.

Thus in a marriage settlement, property may be given to trustees upon trust for the husband and wife for their lives and, after the death of the survivor upon trust for (i) *Such of the children* of the marriage as the survivor shall appoint, or (ii) *All the children* of the marriage in such shares as the survivors shall appoint. In such a case, upon appointment being made, the child to whom it is made takes exactly as if a limitation to the same effect had been made in the original instrument.

A power of this kind, where there is a restriction as to its objects (i.e., persons in whose favour it may be exercised) is termed a *special power of appointment*. But there may be a *general power* of appointment when there is no such restriction, so that the donee may appoint to himself. In such a case the donee having the same powers of disposition as an owner, is for most purposes treated as the owner of the property :

(i) A power may give a mere discretion and therefore is distinct from a trust, which creates an obligation or (ii) A power may impose an obligation to exercise the discretion.

In the former case there is no trust. In the latter case there is. The former is called mere *power*. The latter is called power in the nature of a trust or *power coupled with trust*.

(iii) There is also a third category of cases which are cases of a *trust coupled with a power*.

These are cases where a trustee of a property though under an obligation to apply it for the benefit of certain individuals or purposes, may have a *discretion* as to whether he will or will not do certain specified acts, or as to the amount to be applied for any one individual or purpose or as to the time and manner of its application. In such cases, the Court will prevent the trustee from exercising the power unreasonably, it will not compel him to do such acts or attempt to control the proper exercise of his discretion.

1. Power resembles a trust and also differs from it.

(i) It resembles a trust inasmuch as a power is an authority to dispose of some interest in land, but confers no right to enjoyment of land.

(ii) It differs from a trust inasmuch as a power is discretionary, whereas a trust is imperative; the trustee if he accepts must necessarily do as the settlor directs.

* VII. NEW TRUSTEES.

(1) Survivorship of the office and estate or trustee on death.

*(2) Devolution of the office and estate on Death of the survivor.

*(3) Retirement or Removal of a Trustee.

*(4) Appointment of New Trustees.

* VIII. APPOINTMENT OF A JUDICIAL TRUSTEE.

* IX. THE PUBLIC TRUSTEE.

(1) Nature and Function.

*(2) Appointment of a Public Trustee as an ordinary Trustee.

* Except the title, each page is left blank in M.S.—ed.

*(3) Appointment and Removal of the Public Trustee.

*(4) Duties, Rights and Liability of the Custodian Trustee and Managing Trustee.

*(5) Special Rules relating to the Public Trustee.

* X. THE RIGHTS OF THE TRUSTEE.

(1) Right to Reimbursement and Indemnity.

*(2) Right to discharge on completion of Trusteeship.

*(3) Right to pay Trust Funds into Court.

*XI. RIGHT OF TRUSTEES AND BENEFICIARIES TO SEEK THE ASSISTANCE OF PUBLIC TRUSTEE OR COURT.

*(1) Right of Official audit.

*(2) Right to take direction of Court.

*(3) Right to have Trust administered by Court.

*(4) Right to take direction of Court.

*(5) Right to have Trust administered by Court.

XII. CONSEQUENCES OF A BREACH OF TRUST.

1. *Definition of Breach of Trusts.*—Breach of trust is defined in section 3, 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.

2. *Under the English Law.*—Any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust.

3. *Breach of Duty.*—A trustee has Duties, Right, Powers and disabilities. Only breach of duty is breach of trust.

1. *The measure of liability* is the loss caused to the trust property.

* This is the title on each page. There are no details—ed.

2. Is he liable to pay interest ? Only in the following cases—

- (a) Where he has actually received interest.
- (b) Where the breach consists in unreasonable delay in paying trust-money to the beneficiary.
- (c) Where the trustee ought to have received interest, but has not done so.
- (d) Where he may be fairly presumed to have received interest.
- (e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends.
- (f) Where the breach consists in the employment of trust property or the proceeds thereof in trade or business.

3. Is he entitled to set off a gain from breach of trust against a loss from breach of trust.

He cannot.



