



LAW COMMISSION
OF INDIA

SEVENTEENTH REPORT

(REPORT ON TRUSTS ACT, 1882)

GOVERNMENT OF INDIA : MINISTRY OF LAW

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D.O. No. F.3(5)/57-LC
5, Jor Bagh, New Delhi—3.
January 6, 1961.

Shri Asoke Kumar Sen,
Minister of Law, Government of India,
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Seventeenth Report of the Law Commission on the Indian Trusts Act.

2. In its meeting held on the 11th May, 1957, the previous Law Commission decided to take up the revision of the Indian Trusts Act, and Dr. N. C. Sen Gupta who was entrusted with the work had also prepared some notes on the subject. At a meeting of the Commission held on the 7th December, 1957, the question was raised whether the law should deal with public trust also, and a decision on the point was deferred to a later stage. After the constitution of the present Commission, the matter was entrusted to Shri P. Satyanarayana Rao and it was also decided that the law should be limited to private trust. The draft Report prepared by him was considered by the Commission at its meeting held on the 18th and 19th March, 1960, and was revised in accordance with the decisions taken therein. The revised draft was circulated for the opinion of the State Governments and other persons and bodies interested. The opinions received from them were considered by the Commission at its meeting held on the 18th and 19th November, 1960. It was left to the Chairman and Shri P. Satyanarayana Rao to finalize the Report in the light of the decisions taken in the meeting.

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3. The Commission wishes to acknowledge the services rendered by Shri Durga Das Basu, Joint Secretary, and by Shri P. M. Bakshi, Deputy Draftsman, in connection with the preparation of the Report.

Yours sincerely,

T. L. VENKATARAMA AIYAR.

REPORT ON TRUSTS ACT, 1882

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REPORT ON TRUSTS ACT, 1882

PART I

GENERAL

1. The concept of trust as it obtains in India is not merely a transplantation of the English concept of trust. Indeed, there is little that is exotic about it, though in the course of the administration of the law of trusts many of the detailed rules have been borrowed from the English law of trusts. Untrammelled by any technical notions and distinctions such as legal and equitable estates, the Indian systems of law evolved a concept of trust in the wider sense "of possession or dominion over property coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor".¹ This wider concept of trust was an integral part of both the Hindu and the Muslim systems. However, the detailed rules applicable to trusts in this sense were not free from doubt, especially in the case of Hindu Law. As pointed out by West J.,² while the substantive Hindu Law insisted strongly on the suppression of fraud and the fulfilment of promises, it failed to furnish the detailed rules by which effect was to be given to its principles. The usual practice of the English judges was, therefore, to determine the estate of the trustee with reference to the personal law of property and to determine the duties annexed to the trust estate, the rights of beneficiaries, and the means by which those rights are made effectual, by reference to which English equity. In short, with the Indian concept of trust as the basis, a system of detailed rules of law embodying well-established principles of English equity came to be developed.

Historical background.

Till 1882 the process of development of the law of trusts was almost completely left to the courts. There were only a few statutory provisions³ relating to trusts. Provision was made in the Penal Code for the punishment of criminal breach of trust. The Specific Relief Act embodied definitions of the terms 'trust' and 'trustee' and provided for suits by trustees for possession of trust property. The Civil Procedure Code⁴ made provisions for suits by and against trustees as also for suits relating to public charities. The Limitation⁵ Act contained certain provisions as

¹*Ganendra Mohan Tagore v. Upendra Mohan Tagore*, 4 Beng. O.C.J. 134.

²*In the matter of the petition of Kahandas Narandas*, 5 Bom. 154 (174).

³See the Statement of Objects and Reasons attached to the Private Trust Bill, Gazette of India, 1880, Pt. V. 494.

⁴Act 10 of 1877.

⁵Act 15 of 1877.

to limitation in action pertaining to trusts and trust properties. Apart from these, there were a few others—the Statute of Frauds, sections 7 to 11, which were in force only in the Presidency Towns and the Indian Trustee Act, 1866 and the Trustees and Mortgagees Powers Act, 1866 (Acts 27 and 28 of 1866 respectively) both¹ of which were generally regarded as applicable only in cases where the parties were European British subjects.

Trusts Act,
1882.

2. Such in short was the position when Whitley Stokes prepared a draft Bill of the law relating to private trusts in 1878-79. This Bill was referred to the Fourth Law Commission consisting of the author of the Bill besides Sir Charles Turner and Raymond West. The Bill as modified by the Commission came to be enacted with a few changes as the Indian Trusts Act, 1882.

The Bill was confined in its application only to private trusts. It gave recognition to the wider concept of trust as already established in Indian Law. Subject to this and taking into account the peculiar circumstances of India, it adapted the rules of English law of trusts. The provisions of the Bill, as the marginal notes² thereto make clear, were based upon leading English and Indian cases and the writings of,—to mention only some—Kent, Story, Smith, Lewin and Underhill. Underhill's treatise on Trusts and Trustees appeared in 1878, about the same time when the Bill was being fashioned out, and it was also used. A few of the provisions were based on the New York Civil Code. Besides, the provisions of the various English Acts relating to trusts were taken note of. With few exceptions, as stated in the Statement of Objects and Reasons, "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"³.

The Trusts Act has proved to be a very successful piece of legislation. It has stood the test of time. Its provisions are remarkable alike for lucidity and conciseness. There have been practically very few difficulties felt in the interpretation of the Act. This is as much due to the skilled draftsmanship of Whitley Stokes as to the fact that the rules of the English law of trusts were well-developed by the time of the drafting of the Act.

Scope of
revision.

3. We have in revising the Act taken note of the changes that have taken place in English Law, both by judicial decisions and by statutes, since the passing of our Trusts Act, and considered how far the same would be suited to

¹Both these Acts were repealed by Act 48 of 1952.

²See the Bill as printed in the Reports of the Fourth Law Commission, Gazette of India, 1880. Supplement p. 155.

³Gazette of India, 1880, Pt. V, p. 494.

India. We have also gone through the Indian case law on the subject. We have also examined the provisions of the American law relating to trusts.

We are satisfied on the whole that the Act requires a few changes only. We are not in favour of any elaborate and detailed statement of rules pertaining to administration of trusts as has been attempted by the (English) Trustee Act, 1925, as we are of the opinion that it is better to leave it to the courts to evolve the detailed rules. This would be conducive to greater flexibility.

4. We have decided not to include public trusts in the Act and that it is better to keep the law relating to private trusts separate. We have, therefore, not touched that subject. If necessary, it may be considered separately. Public
Trusts.

PART II

PROPOSALS RELATING TO SECTIONS

CHAPTER I—Preliminary

Preamble. 5. The preamble merely repeats what is stated in the long title, and may be omitted.

The word "Indian" may be omitted from the title, as has been recommended by us in the case of other Acts.

Section 1. 6. The Act does not extend to the State of Jammu and Kashmir¹. It does not also extend to Andaman and Nicobar Islands, though power is reserved for the Central Government to extend the Act to them. We recommend that it should extend to those Islands.

The exceptions mentioned in the second paragraph may remain. The exception relating to distribution of prizes taken in war among the captors is based on the decision in *Alexander v. Duke of Wellington*². Therein it was decided that all prizes taken in war vest under law in the sovereign. The practice in England was to grant under a Royal warrant the property so taken upon trust to distribute the same amongst the captors. The House of Lords held that such an instrument did not clothe the *cestuis que trust* with any interest and, therefore, the *cestuis que trust* had no right in equity to enforce the trust. Before general distribution the trust itself could, at the pleasure of the sovereign, be revoked or varied. This principle was applied in *Kinloch v. Secretary of State for India in Council*,³ wherein it was held that even though the instrument uses the word "in trust", it is thereby intended only to convey that the person named was appointed as an agent of the sovereign to effect distribution, and does not create a trust. The occasion for the application of the principle may be rare, but we see no reason to omit it.

Section 2. 7. This section and the Schedule to the Act may be omitted, as they are now unnecessary.

Section 3. 8. It is better to number separately each of the definitions as sub-clauses of section 3.

¹See Act 3 of 1951, s. 3 and Schedule, and also the Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956).

²(1830) 2 Russ. & M. 35.

³7 App. Cas. 619, affirming the decision of the Court of Appeal in *Kinloch vs. Secretary of State for India in Council*, 15 Ch. D. 1.

9. The Act uses the expression "principal civil court of original jurisdiction" to denote the district court (outside presidency-towns). In the Report on Judicial Administration¹ the Law Commission opined that there should be devolution of some of the functions of the district court on subordinate courts to relieve the congestion of the work in the district courts. We think that the State Governments should be empowered to authorise subordinate courts to exercise the powers under the Act. A definition, therefore, of district court to bring out these ideas may be included. Consequential changes in the provisions of the Act may be made.

So far as presidency-towns are concerned, we were, at one stage, of the view that the City Civil Court should be treated as the district court for the purposes of the Act. From the comment received from the High Court of Calcutta, however, it appears that in Calcutta, the City Civil Court Act, 1953, (West Bengal Act, 21 of 1953), section 5(4) read with the Schedule, expressly excludes the jurisdiction of the City Civil Court in suits and proceedings relating to or arising out of trusts or endowments. In view of this, we have not mentioned the City Civil Court in the proposed definition. It will be for the State Governments to deal with the matter by notification, if they want to transfer the jurisdiction to the City Civil Court.

10. In order to simplify the various investments which are contemplated by section 20 of the Act and to bring the authorised investments into accord with various kinds of securities which are available for investment, we think, a definition of public securities and also a definition of Government securities may be included. The definition of public securities is naturally of wider scope, as it includes also Government securities and other securities which are not strictly Government securities though they stand, for the purposes of investment, on the same footing as Government securities. In this connection the provisions of the Bombay Public Trusts Act, 1950, section 2(1), may be kept in view. These definitions, being relevant only to section 20, may be placed in that section.

We also recommend that all certificates, etc., issued as a part of the National Savings Scheme should be included expressly in the definition of public securities, since these may not strictly fall within "Government securities".

11. To make the law uniform and to amplify the definition in the existing Act, the definition of notice in section 3 of the Transfer of Property Act may be adopted.

12. Suggestions have been received that there should be a provision defining the liability of a trustee *de son tort de son tort*, on the lines of sections 303-304 of the Indian Succession Act, 1925.

¹14th Report, Vol. I, page 270, para. 10.

Section 303 of the Indian Succession Act defines an executor *de son tort* and section 304 of the said Act defines the extent of his liability. A trustee who inter-meddles with the trust estate would also stand more or less on the same footing as an executor *de son tort* and his liability also would extend to the extent of the assets which have come into his hands and which have not been rightfully applied.

In the definition of executor *de son tort* in section 303 it is stated that an executor *de son tort* can come into existence only when there is no rightful executor or administrator. This condition, we think, need not be engrafted in the proposed definition. In the first place, even with regard to executor *de son tort* this condition has been held inapplicable in cases governed by Hindu Law.¹ Secondly, this condition is not included in the definitions of executor *de son tort* as given in Halsbury and Williams. In Halsbury's Laws of England the expression is defined thus:

"An executor *de son tort* is one who takes upon himself the office of an executor, or intermeddles with the goods of a deceased person, without having been appointed an executor by the testator's last valid will or a codicil thereto, or without having obtained a grant of administration from a competent court; and the term is thus equally applicable in the case of an intestacy as in the case of testacy, for there is no such term known to the law as an administrator *de son tort*."²

In Williams on Executors and Administrators the expression has been thus defined:

"If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong, or more usually, an executor *de son tort*."³

It would thus be seen that the propriety of retaining the condition as to there being no lawful executor under section 303 of the Indian Succession Act is open to question.

In the case of trust estate, there is no reason why the *cestui que trust* himself should not be enabled to sue the trustee *de son tort* without waiting for the rightful trustee to take action against him even if one is in existence.

In Lewin on Trusts,⁴ it is stated that "if a person by mistake or otherwise assumes the character of trustee, when it really does not belong to him, and so becomes a trustee *de son tort*, he may be called to account by the

¹Narayanasami v. Esa Abbavi, 28 Mad. 351 (353).

²Halsbury's Laws of England (3rd Edn.) Vol. 16, 120.

³Williams on Executors and Administrators, (13th Edn.) Vol. 1, 27.

⁴Lewin on Trusts, (15th Edn.) page 178.

cestui que trust, for the moneys he received under colour of the trust". The learned author does not introduce the condition of the absence of a rightful trustee in order to constitute the intermeddler a trustee *de son tort*. For these reasons we think that the condition that in the absence of a rightful trustee alone a person becomes a trustee *de son tort* by intermeddling with the trust estate need not be engrafted in the section.

Subject to the above observations, we have accepted the suggestion to insert a new section on the lines of section 304. We have, however, considered it unnecessary to have a provision defining the expression "*trustee de son tort*", and then providing for his liability. It would, in our opinion, suffice if the substance of the definition contained in section 303 is incorporated in the substantive section¹ itself.

CHAPTER II—Of the Creation of Trusts

13. To convey the meaning better, for the heading "law- Section 4.
ful purpose" the words "purpose of trust to be lawful" may be substituted. In other respects, the section does not require any alteration. It will be better to number the two paragraphs as sub-sections.

14. In consonance with the policy adopted in the case of other Acts, the illustrations, wherever they occur, may be omitted.

15. To avoid uncertainty in the language of the sections, Sections
and to state clearly the requirements for the creation of a 5 & 6.
valid trust by will or non-testamentary instrument when the subject-matter of the trust is moveable or immovable property or when the trustee is the author of the trust or a stranger, it is better to re-arrange the two sections, sections 5 and 6, and re-draft the clauses.

16. While section 5 states that a valid trust in relation to moveable property could be created by a declaration as aforesaid, meaning thereby by an instrument in writing, signed and registered, section 6 seems to require that even in such a case there should be a transfer of trust property to the trustee. This difficulty was noticed in some of the decisions² and may be obviated by the proposed rearrangement of the clauses of the sections.

17. Clause (b) requires a slight verbal modification. Section 7.
The word "by" may be omitted as a minor cannot, under the procedural law, apply to a court without a guardian.

18. A suggestion has been made that the words "it must Section 8.
not be merely beneficial interest under an existing trust",

¹See section 30A (as proposed), in Appendix I.

²See *Allahabad Bank Ltd. v. Commissioner of Income-Tax, I.T.R. (1952)* 169.

should be omitted. It is no doubt true that in England, there can be a trust of an equitable estate or chose in action or of a right or obligation under an ordinary legal contract just as much as a trust of land.¹ In India equitable estates are not recognised. The Indian Law Commission which considered the Indian Trusts Bill, 1879, was not in favour of creating trusts in respect of the beneficial interest of a beneficiary, the reason given being that the recognition of such a trust would give rise to complications. This opinion was endorsed by the Government, as could be seen from the Statement of Objects and Reasons.² We agree with this view and we see no reason to introduce such a complication in the law. No alteration is necessary.

Section 9.

19. No change.

Section 10.

20. The first paragraph of section 10 consists of two parts. The first part lays down that every person capable of holding property may be a trustee. If the section stops there, minors, lunatics and people of unsound mind who are not competent to contract may also be proper trustees as they are persons capable of holding property. Several difficulties will arise if such persons are qualified to be trustees, as the office of a trustee requires the exercise of discretion and judgment in various matters relating to the administration of the trust. The section, therefore, in the second part proceeds to draw a distinction between acts which involve the exercise of discretion and acts which do not so involve. In the former case, it is provided that a person who is not competent to contract cannot be a trustee. In other cases, it is permissible to have a person who is either a minor or an idiot or a lunatic as a trustee. It is very difficult to draw the line of distinction between matters of purely ministerial character involving no exercise of discretion or judgment and matters which involve exercise of discretion and judgment. Further, a person appointed as trustee has to choose whether to accept or refuse to accept the office. This is also an act involving exercise of discretion. Until there is a valid acceptance by him he cannot act. The trust cannot function. To permit, therefore, a person incompetent to contract to be a trustee would be to create serious difficulties and deadlock in the administration of trust. In England, by section 20 of the Law of Property Act, 1925, it was provided that the appointment of an infant to be a trustee in relation to any settlement or trust shall be void but without prejudice to the power to appoint a new trustee to fill the vacancy. This provision has to be read with section 36 of the Trustee Act, 1925 which provides the machinery for filling up the vacancy. Lewin³ is strongly against the appointment of infants as trustees. Lunatics or idiots also stand on the same footing.

¹See the observations of Lord Shaw in *Strathcona S.S. Co. v. Dominion Coal Co.*, (1926) A.C. 108 (124).

²Gazette of India, 1880, Part V, p. 494.

³Lewin on Trusts (15th Edn.) p. 29.

It is, therefore, suggested that without drawing a distinction between acts which require exercise of discretion and acts which do not it will be better to alter the law by providing, that (while every person capable of holding property may be a trustee), if a person incompetent to contract is appointed to be a trustee, he should not be permitted to execute the trust until the disability ceases and he accepts the trust. Section 10 should be amended accordingly, and to save the trustee's rights, section 73 may be amended to authorise the court to appoint another person to be a trustee in his place until the disability ceases and he accepts the trust.

21. Another suggestion that has been made with reference to this section is, that express provision should be made making 'corporations' eligible for appointment as trustees. We think that that is unnecessary, as the word "person" includes a corporation, and the objection that to repose confidence a conscience is required and that the corporation has not such a conscience, has long been forgotten in English law and corporations were made eligible for appointment as trustees.

CHAPTER III—*Duties and Liabilities of Trustees*

22. The first paragraph of section 11 authorises a modification of the trust with the consent of all the beneficiaries who are competent to contract. If all the beneficiaries are competent to contract, the matter does not create any difficulty, for, they, being the beneficiaries entitled to the property, have the power to modify or vary the trust in any manner they please. The trouble arises only when some or all of the beneficiaries are not competent to contract, in which event it is provided in the second paragraph of the section that consent in such cases may be given by a principal civil court of original jurisdiction on behalf of the persons who are not capable of contracting. The section, however, is silent regarding the principles which should guide the discretion of the court in giving or refusing such a consent. It has been suggested that we should embody the principles established by decisions for guidance of the courts and also extend the protection to unborn beneficiaries. It has been held in *Rajagopala Gramani v. Baggiammal*¹ that the section is based on the well recognised principles of English Law. There is a sharp divergence of opinion in the English courts on the subject whether the court has unlimited inherent jurisdiction to modify or vary trusts where such modification or variation is clearly shown to be for the benefit of all persons interested who are not *sui juris*, including unborn persons. The House of Lords had occasion recently to examine the question in *Chapman v. Chapman*,² which is an appeal against the judgment of the

¹56 Mad. 508, 510-511.

²(1954) 1 All. E.R. 798.

Court of Appeal in that case¹. A perusal of these two decisions would enable one to assess the extent to which the divergence of opinion exists. One view is that the jurisdiction is not unlimited but is confined only to exceptional cases, the exceptions having been enumerated in the judgment of the House of Lords. The other view found favour with Denning L. J., who in his dissenting judgment in the Court of Appeal, traced the history of the jurisdiction from the time of Lord Hardwick and concluded that if the proposed modification or variation of trust is beneficial to the beneficiaries who are not *sui juris*, the court has the power and duty to approve the modification or variation, as the case may be. The rule, as stated by Denning L. J., has simplicity in its favour while an examination of the other views expressed in the courts of England from 1901 onwards would show that the judges were striving from time to time to introduce exceptions which cover a wide field. We think it unnecessary to follow the majority opinion of the English courts and embody the complicated rules recognised by them. It would simplify the law if we adopt the principle laid down by Denning L. J., in his dissenting judgment in the Court of Appeal vesting in the court a wider discretion. The limitation suggested by Denning L. J., would be sufficient to safeguard the interests of the beneficiaries who are not *sui juris* or are unborn.

Whenever a minor's interests are involved, the test applied is to consider whether the proposed action of the guardian is for the benefit of the minor or not, and that test may equally be applied here. We therefore, suggest that in granting permission the court should take all the circumstances into consideration and decide whether the proposed modification or variation is beneficial to the interests of the beneficiaries concerned. This principle may be embodied in the second paragraph of section 11.

While extending the section to unborn persons, the word "consent" should be substituted by "approval" which is more appropriate with reference to unborn persons (Compare the English Act also on this point).

The decision of the House of Lords in *Chapman v. Chapman*² provoked criticism, and the Lord Chancellor invited the Law Reform Committee "to consider whether any alteration is desirable in the powers of the court to sanction a variation in the trust or a settlement in the interests of beneficiaries under disability and unborn persons, with particular reference to the decision in *Chapman v. Chapman*"². On the recommendation of the

¹(1953) 1 All. E.R. 103.

²(1954) 1 All. E.R. 798.

Committee that the view of Denning L. J., should be preferred to that of the majority, the Act known as the Variation of Trusts Act, 1958, was passed, giving effect to the dissenting judgment of Denning L. J. The Act of 1958 has thus set at rest the sharp divergence of opinion which obtained in England till then. Our view accords with the existing law in England.

23. It is perhaps more convenient to notice one other aspect of the matter. Section 57 of the (English) Trustee Act, 1925, conferred upon the court jurisdiction to sanction certain powers to the trustees which are necessitated in the course of the administration or management of a trust and a corresponding provision is also made in the Settled Land Act, 1925¹. The substance of both the sections is more or less the same. These sections, as observed by the Court of Appeal in the decision already referred to (*Chapman v. Chapman*)² do not purport to codify the entire jurisdiction of the courts of equity to alter or modify the terms of the trust, but are intended merely to empower the courts to give directions to the trustee even though not found in the instrument of the trust, on the ground of expediency and in the interests of better administration. A similar principle may be embodied at the appropriate place, preferably after section 34.

24. No change.

Sections
12, 13, 14.

25. It was suggested that a qualification on the lines of the rule in section 174 of the American Restatement on Trusts³ should be engrafted. The qualification is that "if the trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has". The section, as it now exists, embodies the rules recognised in England from very early times and has not been altered since. We see no reason to increase the standard of care required by a trustee. Besides, it is very difficult to apply the suggested qualification if it is embodied in the Act, as there are no means for determining the degrees of skill between persons. The trustee, it has been held, is not absolved from his responsibility even if he has taken legal advice. We do not therefore accept the suggestion.

Section 15.

26. No change.

Section 16.

27. The language of paragraph 2 of section 17 may be altered to improve the drafting.

Section 17.

¹Section 64.

²See para. 22, *supra*.

³Vol. I, p. 448.

- Section 18. 28. No change.
- Section 19. 29. It was suggested that a section on the lines of Article 49 in Underhill's Trusts¹ providing rules for the apportionment of the charges on the corpus and the income should be included with suitable modifications. The principles embodied in Article 49 of Underhill's Trusts are based on decided cases. It is generally understood that all capital charges should be paid out of the capital, and interest and local rates, etc., should be paid out of the income. These are established rules and have to be applied subject to any contrary rules in the deed of trust. No necessity has been felt for including them in a statute thereby making them inflexible. Liberty should be left to courts to apply them according to the facts of each case. Sometimes the income may not be sufficient and recourse to the corpus may be necessitated. Again, if the current income is insufficient to discharge the interest, it may be a good rule of economics to postpone the payment till the income accrues in the subsequent year; but it is doubtful whether the person who is entitled to payment would stay his hands without enforcing payment by resorting to court. If the principles embodied in them are petrified by giving them statutory force and if the trustee does not carry out the duties in accordance with the rule, he may be guilty of breach of trust. Third parties entitled to payment may not be bound by such rules. We think that it is a needless complication to enact any rigid rules regarding apportionment.
- Section 20. 30. The securities mentioned in the existing section have become outmoded. We, therefore, suggest that the existing Government securities and public securities may be included in the section.² In this connection section 35 of the Bombay Public Trusts Act, 1950 may be generally kept in view. It is better not to enumerate particular securities but to give a general definition of all categories of securities which are in vogue in the market. The securities which have become obsolete may be omitted.
31. The provision in clause (f), enabling the High Court to prescribe the other valid securities, should be omitted with a view to obtaining uniformity. Besides, it may not be possible for the High Court to determine easily which are safe investments and which are not.
- Deposit of money in the State Bank of India or its subsidiaries should also be allowed.
- Section 20A. 32. In the proviso to section 20A, for the reference to (c) and (d) of section 20, reference to the corresponding provisions in the new draft may be substituted.

¹Underhill's Law relating to Trusts and Trustees (10th edn.) page 295.

²See also the discussion in paragraph 10, *supra*.

33. A saving provision to retain investments which have ceased to be authorised may be substituted for existing section 21 on the lines of section 4 of the (English) Trustee Act, 1925. Section 21.

34. We recommend the omission of the clause relating to investment on a mortgage of immovable property already hypothecated for an advance under the Land Improvement Act, 1883 for the reason that in that event the mortgage that has to be created in favour of the trustee will be a second mortgage and as such involves risk, for the security may not be adequate. The only reason given in justification of this clause in the Statement of Objects and Reasons¹ of the original Bill of 1880 is that a similar provision is to be found in England in 27 and 28 Vict. Chap. 114, section 161. The provision as to deposit of trust money in Government Savings Bank may be transposed to section 20.

35. No change.

Section 22.

36. A suggestion was made that a section protecting the trustee from the consequences of a breach committed by him where he acts honestly and reasonably should be introduced in the Act. When the Trusts Act, 1882, was passed there was no power in English courts to save a trustee from the consequences of breach of trust. Sections 8 and 9 of the Trustee Act, 1893 and section 3 of the Trustee Act, 1896 provided for relief in such cases. These sections are now replaced by section 61 of the Trustee Act of 1925. This section empowers the court to relieve a trustee from the consequences of a breach when he has furnished the court with information that he acted in the matter honestly and reasonably. The standard of care required by a trustee is not laid down in any of the provisions of the Trustee Act, 1925; but in India we have section 15. The standard of care and prudence that is required of a trustee has to be borne in mind when considering the proper discharge of the duties enjoined by the Act upon a trustee. If a trustee violates a statutory duty laid down under the Act, he cannot be said to have acted as a man of ordinary prudence even though he might have been honest and reasonable. The standard of prudence has to be judged in the light of the provisions of the Act and not with reference to any objective standard. On this principle it has been held in *Tirupatirayudu v. Lakshminarasamma*² by a bench of the Madras High Court that where a trustee in violation of the provisions of section 20 of the Trusts Act made an unauthorised investment he was not absolved from his liability even though he might have acted honestly and

Section 23

¹Gazette of India, 1880, Pt. V, p. 494.

²I.L.R. 38 Mad. 71, 75.

reasonably. If a trustee violated a definite direction contained in the Act he cannot be said to have acted reasonably and the protection under a provision similar to section 61 of the Trustee Act, 1925 would be of no avail and the court has no power to relieve the trustee from the consequences of a breach. In view of these considerations, we think it unnecessary to make a provision on the lines of section 61 of the Trustee Act, 1925.

37. The corresponding sections in the American Restatement are: Sections 205¹, 207² and 216³ which are general provisions corresponding to sections of the Trusts Act, 1882.

Sections 24 and 25. 38. No change.

Sections 26 and 27. 39. These sections may be altered by recasting the clauses so as to make the scheme more logical. That part of section 27 which refers to "neglect" may be put as a residuary clause under section 26.

40. It is rather difficult to gather from the language of section 26 of the Act what exactly is meant by the expression "subject to the provisions of sections 13 and 15". So far as English and American laws are concerned, no such limitation is imposed. The three exceptions in the proviso to section 26 are well-established under English law, under which a trustee is liable for the acts and defaults of his co-trustee. The rule is clear and simple and is devoid of all complications. Sections 13 and 15, on the one hand, deal with certain specific heads of liability, while section 26 is an independent provision dealing with a different head of liability. The two need not be linked up together. The expression quoted above may as well be omitted.

41. The substance of the last paragraph of section 26 may be transposed to section 30, which, we think, is its proper place.

Section 28. 42. Section 28 exonerates the trustee from liability when he pays or delivers trust property to a person who would have been entitled thereto but for the vesting of the right of the beneficiary in another before payment and without knowledge of it. It does not, however, provide a remedy in favour of a person rightfully entitled to recover it from the trustee. We think that as, under general law, a right of suit against the person who received the money or property lies at the instance of the rightful owner, it is unnecessary to make a special provision.

Section 29. 43. No change.

¹Vol. I, 553 (2).

²*Ibid*, 566.

³*Ibid*, 609.

44. This section is analogous to section 30 of the Trustee Act, 1925, which re-enacts section 24 of the Trustee Act, 1893 which replaced section 31 of the Law of Property (Amendment) Act, 1859. The last part of section 26 should be placed in this section¹. The section may also be made subject to section 27. It may not be necessary to add at the end of the section, the words "unless the same happens through his own wilful default" which occur in section 30 of the Trustee Act, 1925. Section 30.

The question of adding a section regarding a trustee *de son tort* has been discussed already². The section may be added after section 30. Section 30A
(To be added).

CHAPTER IV.—*Rights and Powers of Trustees*

45. No change.

46. In order to give a speedy remedy, we think it necessary to enlarge the scope of section 34 on lines analogous to the originating summons procedure in England, which has been followed and adopted in the original side rules of the Bombay and Madras High Courts. Many questions which arise in the course of the administration of the trust may be easily disposed of on an application instead of driving the parties to a suit. We therefore, recommend that the scope of the section may be enlarged. At the same time, we recommend a restriction to the effect that the court shall not determine questions involving charges of breach of trust unless the parties have consented for the decision of the question in the proceedings by an application under section 34. Similarly, the court would not decide claims made adversely to the trust and involving the investigation of the title of third parties. Further, if any question of importance arises for decision and the court is of opinion that it should not be disposed of in a summary manner, it may refer the parties to a suit. With these safeguards we think that the amplification of section 34 should work as a boon to the parties concerned.

Sections 31,
32 and 33.
Section 34.

47. We have provided for one appeal against the decision of the court under section 34. Orders under section 34 of the Act are not now appealable³. As we have now proposed⁴ to enlarge the scope of section 34 and make the jurisdiction and the procedure more or less analogous to that of the Chancery Division of the High Court in England under O. 55 (the procedure relating to originating summons), we think it is necessary to provide for an appeal against the decision of the court from an order

¹ See the discussion relating to section 26, *supra*.

² See paragraph 12, *supra*.

³ *Trimbak Mahadev vs. Narayan Hari*, I.L.R. 23 Bom 429, 432.

⁴ See para. 46, *supra*.

made on the application. In England such orders are appealable under O. 55, R. 14(d). But appeal lies only with the leave of the Judge or the court of appeal. We think that it would suffice if the order is made appealable but without any restriction.

48. We are of the view that it will be beneficial if the provisions of the section are made applicable, as far as may be, to proceedings before the court under sections 11, 22, 32, 36, 41, 45, 46, 49, 53, 59 (as proposed) 72, 73 and 74 of the Act and to proposed section 73A, and we recommend accordingly.

Section 34A (to be added) This may be added on the lines already indicated.¹

Section 35. 49. No change.

Section 36. 50. It may not be necessary to retain the provision that the section is subject to the provisions of section 17. It may be omitted.

51. The period for which a trustee may lease property without the permission of the court is 21 years. Whatever might have been the justification in 1882 when the Act was passed, in the present conditions, such a long period whether for agricultural or non-agricultural leases is not justified, as it would result in alienating away the benefit of the future for a longer period. Under some of the present Acts, both Central and State, the period fixed is 5 years. Most of the State Acts relating to religious endowments fix periods ranging from five to ten years. The Bombay Public Trusts Act fixes a period of ten years in the case of an agricultural lease and three years in the case of a non-agricultural lease.² This is the only Act which makes the period as long as ten years, but in view of the recent Acts we think it proper to reduce the period from 21 years to five years.

Sections 37 to 41. 52. No change.

Section 42. 53. The expression "any trustees or trustee" occurring in the beginning of the section has given rise to some difficulties in interpreting the section. What is meant by the expression is, as pointed out in *Nethiri Menon v. Gopalan Nair*,³ that when there is only one trustee, that trustee, and when there is more than one trustee all the trustees, must concur in giving receipt in order to give a valid discharge to the person paying the amount. Section 14 of the (English) Trustee Act, 1925, which corresponds to section 42, merely says 'trustee'. No doubt, the singular includes the plural, but that again may give rise to a difficulty

¹Sec para. 23, *supra*.

²Section 36.

³39 Mad. 597, 601.

in interpretation. Hence it is better to modify the language of the section to make the intention clear.

54. The last clause "This section applies only to trusts created after this Act comes into force" may be deleted as it is now unnecessary. Section 43.

55. No change. Section 44.

56. No change. Section 45.

CHAPTER V.—*Of the Disabilities of Trustees*

57. This section seems to create some difficulty in the light of sections 70, 71 and 73. The intention of the legislature, no doubt, seems to be that renunciation under section 46 would operate as a discharge creating a vacancy as provided under section 70, though on a literal interpretation of section 70 a vacancy would not arise on mere renunciation. Section 73 does not provide for filling up a vacancy caused by reason of a valid renunciation. It may be assumed that renunciation is equal to a discharge. Two of the grounds in section 46(b) and (c) which justify renunciation are also grounds for discharge in section 71. If a renunciation is based on grounds (b) and (c) in section 46, no permission of the court is required. It would operate automatically to create a vacancy in the office. We think that this is a lacuna which has to be supplied. The proper solution would be to insert a provision in section 71 to cover cases of renunciation. This would necessitate the omission of section 71, clause (e), which would become redundant in view of section 46(b). Section 46.

58. This section is very important, as it lays down the conditions under which a trustee may delegate his office or any of the duties either to a co-trustee or to his agent. The principles which govern permissible delegation may be crystallised under four heads. Delegation is permissible if— Section 47.

- (1) the instrument of trust so provides, or
- (2) it is in the regular course of business, or
- (3) the delegation is necessary, or
- (4) the beneficiary being competent to contract, consents to delegation.

After 1926 the law in England was considerably altered and the power of delegation and the appointment of agents by trustees have been liberalised. In this respect attention is drawn to sections 23 and 25 of the Trustee Act, 1925.

Construing the provision, in section 23(1), Maugham, J., in *Re Vickery*¹ remarked:

“It will be observed that sub-section (1) has no proviso or qualification to it such as we find in relation to section 23(3). It is hardly too much to say that it revolutionises the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not. No doubt, he should use his discretion in selecting an agent, and should employ him only to do acts within the scope of the usual business of the agent, but, as will be seen, a question arises whether even in these respects he is personally liable for a loss due to the employment of the agent unless he has been guilty of wilful default”.

In another case, *In Re City Equitable Fire Insurance Co.*,² it has been observed that a person is not guilty of wilful default “unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty”.

From the statement of the law laid down by Maugham J., in *Re Vickery's Case*³ one is led to the conclusion that the power conferred by section 23(1) of the Trustee Act, 1925, is very wide and the trustee is not responsible at all for the loss caused to the trust estate through the default of his agent so long as he satisfies the court that he acted in good faith in the matter of appointing an agent. The earlier law, therefore, as laid down in *Speight v. Gaunt*⁴ and embodied in section 47 of our Act, has been given the go-bye completely, and for the test of “regular course of business” and “moral necessity” which justified delegation under the old law the test of good faith has been substituted. If the trustee acts honestly, though foolishly, he will not be responsible for the acts and omissions and defaults of an agent appointed by him.

It may be observed that there is difference of opinion between text-book writers whether the interpretation of Maugham J., of section 23(1) of Trustee Act, 1925 is correct or not. It is no doubt true that the observations of the learned Judge are *obiter* in the case. The learned editor of the latest edition of Lewin on Trusts takes

¹(1931) 1 Ch. 572, 581.

²(1925) 1 Ch. 407, 434.

³(1931) 1 Ch. 572.

⁴9 A.C.I., 5, 19, 29.

the view that the interpretation is correct.¹ Keeton thinks that the observations of the learned judge quoted above are too wide "in as much as they would render unnecessary section 23(3) and perhaps section 25 of the Trustee Act". If, however, they are to be regarded as the true interpretation of section 23(1), it has been suggested by an eminent critic that they would confer too great an immunity upon the trustee and leave the beneficiary insufficiently protected.² A suggestion³ has been made that the object of section 23(1) is primarily declaratory, since it is only by such interpretation that any real significance can be attached to the language of section 23(1) and section 25. But as against this it may be pointed out that apart from other considerations, the language of section 23 seems to support the view taken by the editor of *Lewin on Trusts*. The section says that the trustee may employ and pay an agent, whether a solicitor, banker, stockbroker, or other person to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

If, as contended by Keeton, the law is merely declaratory and does not in any manner alter or vary the previous law, there is no necessity for us to change section 47. If, on the other hand, the view taken by Lewin is right and the interpretation of *Maugham J.*, is correct—which undoubtedly goes too far—the section leaves the beneficiaries "insufficiently protected".

The Indian cases under this section do not indicate any difficulty in applying the section to the particular facts in each case; nor is there any suggestion anywhere that the language of the section should be amplified so as to enlarge the scope of the power of delegation by a trustee.

59. In order to exclude clearly a beneficiary, the expression "any other person" may be substituted for the words "a stranger".

60. No change.

Sections 48
to 53.

61. At one stage, we thought that after section 53 a provision should be added that a trustee (or a person who has recently ceased to be trustee) authorised to buy

¹Lewin on Trusts (15th edn.), p. 185.

²Keeton: Law of Trusts (2nd edn.), p. 257.

³Keeton: Law of Trusts (2nd edn.), p. 257.

property on behalf of a trust cannot sell his own property to the trust without the permission of the district court and that a sale made without such permission, should be void. On further consideration, we decided to drop the proposed provision, as adequate relief can be obtained under the general provisions of section 88.

Section 54¹ 62. No change.

CHAPTER VI.—*Of the rights and liabilities of the beneficiary*

Section 55. 63. No change.

Section 56. 64. The only point for consideration in connection with this section is whether the last paragraph in section 56 and the proviso in section 58, and the last paragraph of section 68 should be omitted. These are similar to the proviso to section 10 of the Transfer of Property Act, which embodies the English rule of restraint on the power of anticipation.¹ In England, under the Married Women's (Restraint upon Anticipation) Act, 1949², the power of restraint on anticipation has been removed and the married woman holds the property now free from such restraint. It is necessary, therefore, that the law in India should be brought in line with the law in England. We therefore recommend that the Trusts Act should be amended straight-away, removing the provisions relating to married women referred to above. We further recommend that section 10 of the Transfer of Property Act may be amended, bringing it on a line with the provisions of the (English) Married Women's (Restraint upon Anticipation) Act, 1949. We would like to emphasise the need for introducing the necessary amendment in the Transfer of Property Act at an early date, for the sake of uniformity.

Section 57. 65. No change.

Sections 58,
59 and 60. 66. The proviso to section 58 should be omitted.³ As regards section 59, we think that there should be no necessity of filing a suit; the procedure can be by way of application. We also recommend that not only the beneficiary but any person interested in the trust must have a right to take proceedings under the section. Further, the words "where no trustees are appointed" cannot apply at the stage of creation of trust. They apply only to later stages. (See section 6). This requires to be clarified. Necessary changes may be made.

In section 60, *Explanation I*, the words "unless the personal law of the beneficiary allows otherwise" should be omitted. A minor should not be considered a proper person to administer the trust property.

¹See also s. 20 of the Indian Succession Act, 1925.

²12, 13 and 14 Geo. 6, c. 78. See also Graveson : A Century of Family Law, page 125.

³See paragraph 64, *supra*.

The provision to the effect that a married woman is not a proper person should be omitted, as out of tune with modern social notions.

67. No change. The American Restatement, section 199,¹ summarises the remedies of the beneficiary. The beneficiary under a trust can maintain a suit: Section 67.

- (a) to compel the trustee to perform his duties as trustee;
- (b) to enjoin the trustee from committing a breach of trust;
- (c) to compel the trustee to redress a breach of trust;
- (d) to appoint a receiver to take possession of the trust property and administer the trust;
- (e) to remove the trustee.

It will be noticed that all these remedies are available under the law as now obtains in India. A trustee may be compelled to perform his duties as trustee by mandatory injunction and by restraining him from committing a breach by a permanent injunction as provided for by the Specific Relief Act.

As regards remedy (c), in a suit instituted for the purpose, the beneficiary may get redress for the breach, that is, for the loss which the trust property has sustained on account of the breach. An administrative action to administer the trust is also permissible under the Code and in that action, under Order 40 of the Code of Civil Procedure a receiver may be appointed to carry on the administration, pending the suit. A trustee can also be removed by suit. It is, therefore, unnecessary to include a provision analogous to section 199 of the American Restatement on Trusts. The existing law is adequate to protect the rights of the beneficiary.

68. We do not see any distinction for the purposes of the rule in the section between a person who purchases the trust property with notice of the trust from the trustee on the one hand and a person who has acquired it without consideration from such trustee. We therefore recommend that the section may be made applicable to the latter category of persons also, with such modifications as may be appropriate. Section 62.

69. Section 53 prohibits a trustee from buying the beneficiary's interests without permission of the court, while clause (b) of section 62 provides that a beneficiary competent to contract may ratify the unauthorised sale by a

¹Vol. I, 526-527.

trustee of trust property, provided the ratification is made with full knowledge of the facts of the case and without being under undue influence. The two relate to distinct matters. Section 53 has reference to the purchase by the trustee, and the court may grant permission only if the purchase is manifestly for the advantage of the beneficiary. In the case of ratification, where the beneficiary is *sui juris* and is competent to contract, the question of advantage or disadvantage does not arise because it is open to him either to modify or refuse to ratify the same and the question of permission of the court or protecting the interest of the beneficiary does not arise. We have also made some drafting changes of a formal nature in the wording of section 62.

Sections 62
and 63.

70. In sections 62 and 63 it may be made clear that the beneficiary would be entitled to such other reliefs in respect of the property as he may be entitled to under the law. This change is necessary in view of the decision in *Chidambaranatha v. Nelaasiva*¹ and *Janakirama Ayyar v. Nilakanta Ayyar*² where the contention was raised that the beneficiary was entitled only to a declaration and not to any other relief. No doubt, the two learned judges who considered the contention negatived it. But, to avoid all future disputes regarding the language of the sections, it is necessary to clarify the sections. The discussion relating to the placing of section 65 may be seen.³

Section 62A
(to be
inserted).

Section 63.

71. A provision should be made in section 63 treating security deposits as trust property whether or not there is a stipulation for payment of interest. This would set at rest the conflict of decisions.⁴

Section 64.

72. Section 64 gives protection to a transferee of trust property for consideration from a *bona fide* purchaser without notice of the trust.

In England the rule as pointed out in *Lewin*⁵ is that a purchaser with notice from a purchaser without notice is exempt from the trust and this is by reason of the protection which the *bona fide* purchaser without notice enjoys. It is also pointed out that if the innocent purchaser is prevented from disposing of the beneficial interests it would result in stagnation of property. The same rule obtains in America and is contained in section 316 of the American Restatement.⁶

¹I.L.R. 41 Mad. 124.

²I.L.R. (1954) Mad. 537.

³See para. 75, *infra*.

⁴See in *Re Travancore Pylon Bank Ltd.*, A.I.R. 1939 Mad. 337 and *Kshetra Mohan v. Official Liquidator*, A.I.R. 1943 Cal. 105, and the cases referred to therein.

⁵*Lewin on Trusts* (15th edn.), p. 723.

⁶Vol. 2, p. 953.

Under section 64, a transferee for consideration from a transferee in good faith for consideration, without notice of the trust, is protected and this protection extends whether such a transferee had or had not notice of the trust, for the section does not say that he should also be a person acting in good faith and without notice. There is no reason, therefore, to introduce into the section any other qualifications. When once we reach the stage of a *bona fide* transferee without notice, for consideration, of the trust property, the right to follow the trust property comes to an end and enables such a transferee to pass on good title. It is probably on this ground that a transferee for consideration from him is protected whether he had or had not notice of the trust.

But the question for consideration is whether a mere volunteer, that is, a transferee for no consideration with or without notice should also be protected. On principle, when an indefeasible title is vested in a *bona fide* transferee without notice, there is no reason to exclude the protection to a volunteer and draw a distinction between a person who paid consideration and one who had not, and a person who had notice and one who had not. We think that such volunteers should also be protected.

73. There is also another suggestion which may be considered in this connection. If the trustee himself purchases the property from the transferee who fulfils the conditions of clause (a) of section 64, should he be allowed to retain the property in his own right or should it go back to the trust? In England and America, the law is that the property in his hands in that event is subject to the trust.¹ The same is the position under section 65 of the Indian Act. We see no reason to alter the law on this point.

74. The reference in the section to the Contract Act may be replaced by appropriate references to the Sale of Goods Act.

75. Section 65 should be placed after section 62.

Section 65.

76. The view of the Calcutta High Court in *Lalit Mohan v. Kishori Mohan Roy*,² which holds that "transfer" in the section includes also "involuntary transfer", may not be strictly correct; but the conclusion is justified, as it is in the interests of the trust that the trustee should not by a subterfuge allow the trust property to be sold in an execution sale with a view to acquiring the same subsequently from the court auction purchaser. Such sales also must be brought within the net of section 65. To achieve this object, we think that the expression "otherwise transfers" should be amplified.

¹Lewin on Trusts (15th edn.), p. 723 ; American Restatement on Trusts Vol. 2, s. 317 (953).

²A.I.R. (1949) Cal. 288 (291-292).

77. In section 65, provision should also be made on the analogy of section 62, though not to the same extent, that the beneficiary should recover the property only on condition that he pays the purchase-money which was paid to the benefit of the trust when the trustee in the first instance wrongfully alienated the trust property.

78. In order to make the position just and equitable instead of the existing provision that trust property re-acquired by the trustee, under the circumstances stated in the section, becomes subject to the trust, it may be provided, as in section 62, that the beneficiary has a right to have the property declared subject to the trust or to have it re-transferred by the trustee.¹

79. The principle of section 65 should also apply to a case where a person is party to a breach of trust by the trustee. Suitable amendment of section 65 may be made. The American Restatement, section 318² would afford useful guidance in making the alteration. It runs as follows:—

“If the trustee in breach of trust transfers trust property to a person who has notice of the breach of trust and the property is thereafter transferred to a *bona fide* purchaser and subsequently is transferred to the first transferee, that transferee holds it subject to the trust”.

Section 66.

80. It was suggested that in section 66 the word “wrongfully” should be omitted so as to make the principle applicable whether the mixing of the trust funds is rightful or wrongful. The basis for the suggestion is the decision of the Judicial Committee in *Official Assignee, Madras v. Krishnaji Bhatt*.³ The aforesaid decision, however, does not support the view underlying the suggestion. Where the mixing is rightful, the relationship would then be reduced to that of a debtor and creditor, as the money in the hands of the trustee in such an event would cease to bear the character of a trust. If, on the other hand, a trustee wrongfully mixes trust funds with his own, the trust continues and the right to follow the trust property will accrue.⁴ In the case before the Judicial Committee⁵ the fund itself was deposited with a view to investment and, therefore, initially in the hands of the trustee it was impressed with trust. Whether the trustee thereafter invests

¹As regards the broader question as to whether section 65 should be changed and the trustee protected, see the discussion above under section 64 *supra*.

²Vol. 2, 954.

³I.L.R. 56 Mad. 570.

⁴See the discussion in Mulla : Law of Insolvency in India (1958 edn.), 451.

⁵56 I.L.R. Mad. 570.

it separately or invests in his own business, that is, whether the disposition is rightful or wrongful, makes no difference as he still continues to hold the property as trustee. It is not a case of wrongful mixing of trust money at the inception. We therefore, think that the word "wrongful" need not be omitted.

81. Section 67 needs no change.

Section 67.

82. The words "or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries" in clause (c) may be omitted, as it would be wholly unreasonable to throw a burden on the beneficiary to protect the interests of the other beneficiaries, merely because he has knowledge of the breach of trust, on pain of his becoming liable for the loss which the other beneficiaries and himself may suffer. We have tried to find out the basis for this rule in English law, and we found that this section was based on *Raby v. Ridehalgh*,¹ as could be seen from the marginal note in the original Bill as modified by the Commission. On an examination of the case we find that the case itself does not go to that length, and there is no authority either in England or in America to support that view. We think it is an unjustified burden thrown upon the beneficiary. The last paragraph of section 68 may be omitted.²

Section 68.

83. No change.

Section 69.

CHAPTER VII.—Of vacating the Office of Trustee

84. These sections may be considered together. Section 70 speaks of a vacancy occurring in the office of a trustee either by death or by his discharge from his office. The discharge from office is either under section 71 or under section 72. There may be a need to appoint a trustee when the trustee appointed disclaims (section 59). In all these three cases, a trustee has to be appointed. Some other reasons for appointing a new trustee are enumerated in section 73, *viz.*, where the existing trustee—

Sections 70
to 74.

(a) is absent for a continuous period of six months from India; or

(b) is leaving India for the purpose of residing abroad; or

(c) is declared insolvent; or

(d) desires to be discharged from the trust; or

(e) refuses or becomes, in the opinion of a principal civil court of original jurisdiction, unfit or personally incapable to act or accepts an inconsistent trust.

¹ De G.M. & G. 104, 105, 109.

² See para. 64, *supra*.

Regarding the desire to be discharged from the trust, that has to be done on an application under section 72, read with clause (f) of section 71.

Section 71 should be amended to cover cases of renunciation.¹ Further, the discharge under s. 71(a) to (e) is automatic, while that under s. 71 (f) requires an order of the court. To make this clear, suitable verbal changes may be made.

The first principle of filling up a vacancy is to have regard to clauses (a) and (b) of section 73. If that is not possible, recourse must be had to court under section 74 which also lays down the qualifications or the considerations that should be taken into account in selecting a new trustee. A logical and intelligible arrangement of the provisions would be to provide, firstly, for the vacancy in the office of a trust by death or by discharge or by disclaimer; then to provide for other reasons for which a new trustee has to be appointed; and then to lay down the method of filling up the vacancy, first by following the rules in clauses (a) and (b) of section 73 and, if they cannot be applied, by having recourse to court under section 74, and, lastly, to provide for the considerations to be taken into account in selecting a new trustee. Necessary changes may be made to give effect to this arrangement. In this connection, reference may be made to section 47 of the Bombay Public Trusts Act also.

Section 73 should also cover the case of a trustee under disability, etc.²

Sections 75,
76 and 77. 85. In section 75, the reference to sections 73 and 74 may be suitably changed consequential on the proposed re-arrangement of the matter at present contained in those sections. In section 76, the case of disclaimer should be covered. No change is required in section 77.

Section 78. 86. Objection has been taken to the statement in section 78 that a trust created by a will may be revoked by the testator, on the ground that it is an elementary principle of law that a will being ambulatory in effect can be revoked by the testator any time before his death. Probably it was intended to make sure of the law in 1882 when things were not so clear as they are now. It may, however, be modified in a suitable manner. Similarly, it would be better to state in clause (c) the proposition in a positive form rather than in the negative. A trust in favour of creditors becomes operative once it has been communicated, and before that it will be imperfect and can be revoked at any time.

Section 79 87. No change.

¹See discussion under s. 46.

²See discussion above under section 10.

CHAPTER IX.—*Certain obligations in the Nature of Trusts*

88. No change.

Sections 80
and 81.

The language of the second paragraph should be modernised and made comprehensive enough to include all involuntary sales. Section 82.

89. The illustrations to the section constitute a useful gloss on the expression 'trusts incapable of being executed'. As we are omitting illustrations, we suggest that a clause be introduced in the section enumerating the cases contemplated by the illustrations and declaring the same to be deemed to be included among cases where the trust is incapable of being executed. Section 83.

90. No change.

Section 84.

91. In the report of the Law Commission on the Indian Contract Act, it was observed:

"The doctrine underlying section 84 of the Trusts Act is obviously different. But the conditions for the application of the rule are the same in the Trusts Act as under the principle of quasi-contract and the result is similar. The extension of the provision in section 84 to include the contractual aspect would result in the advantage of having a comprehensive provision relating to the subject of frustration of an illegal purpose instead of having two parallel provisions in two separate enactments. The title of the Chapter of the Trusts Act in which section 84 is included is also wide enough to admit of the extension, inasmuch as it does not deal with cases of trusts proper but of 'Certain Obligations in the nature of trusts'."¹

On further consideration we think that this provision should be inserted in the Contract Act. We recommend that this may be borne in mind when the Contract Act is amended.

92. No change.

Sections 85
to 96.

93. We have carefully considered whether there is need for any other reform of the provisions in this Chapter, and have examined the cases and the opinions of text book writers. We have come to the conclusion that no other changes are needed.

94. The Schedule to the Act should be omitted.²

Schedule.

¹13th Report, pages 47-48, para. 100.

²See paragraph 7, *supra*.

Appendices. 95. With a view to presenting a clear picture of the proposals made by us in this Report, we have shown our proposals in the form of draft amendments to the existing Act, in Appendix I.

Appendix II contains the suggestions made by us in respect of other Acts.

- | | |
|------------------------------|-------------------|
| 1. T. L. VENKATARAMA AIYAR-- | <i>Chairman.</i> |
| 2. P. SATYANARAYANA RAO. | } <i>Members.</i> |
| 3. L. S. MISRA. | |
| 4. G. R. RAJAGOPAUL. | |
| 5. S. CHAUDHURI. | |
| 6. N. A. PALKHIVALA. | |

P. M. BAKSHI, *Deputy Draftsman.*

NEW DELHI;

The 6th January, 1961.

APPENDICES

APPENDIX I.—Proposals as shown in the form of Draft Amendments.

(This is a tentative draft only).

2 of 1882.

The preamble to the Indian Trusts Act, 1882 (hereinafter Preamble. referred to as the principal Act), shall be omitted.

For the expression "a principal civil court of original jurisdiction", wherever it occurs in the principal Act, the expression "the district court" shall be substituted.¹

Substitution of the expression "the district court" for "a principal civil court of original jurisdiction".

All illustrations appearing below any section of the principal Act shall be omitted.

Omission of illustrations.

In section 1 of the principal Act,—

Section 1.

(a) in the first paragraph, the word "Indian" shall be omitted;

(b) in the second paragraph, the words "and the Andaman and Nicobar Islands; but the Central Government may, from time to time, by notification in the Official Gazette, extend it to the Andaman and Nicobar Islands or to any part thereof" shall be omitted.

Section 2 of the principal Act shall be omitted.

Section 2.

For section 3 of the principal Act, the following section shall be substituted, namely:—

Section 3.

"3. In this Act, unless the context otherwise requires,—

Interpretation.

(a) "breach of trust" means a breach of any duty imposed on a trustee as such, by any law for the time being in force;

(b) "district court" means, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

Cf. S.3(b), Hindu Marriage Act, 1955.

¹See the discussion in the body of the Report under Section 3—"district court."

(c) "instrument of trust" means the instrument, if any, by which a trust is declared;

(d) "notice".—A person is said to have notice of a fact when he actually knows that fact, or when but for wilful abstention from an inquiry or search which he ought to have made or gross negligence, he would have known it.

Explanation (1).—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated: 16 of 1908.

Provided that—

(i) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder; 16 of 1908.

(ii) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act; and

(iii) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indices kept under section 55 of that Act.

Explanation (2).—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation (3).—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party thereto or otherwise cognizant of the fraud.

(e) "registered" means registered under the law for the time being in force for the registration of documents;

Cf. s. 3(49) and 4(2) of the General Clauses Act 1897.

(f) "trust" means 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; and—

(i) "author of the trust" means the person who reposes or declares the confidence out of which the trust arises;

(ii) "beneficiary" means the person for whose benefit the confidence, out of which the trust arises, is accepted;

(iii) "beneficial interest" or "interest of the beneficiary" means the right of the beneficiary against the trustee as owner of the trust property;

(g) "trustee" means the person who accepts the confidence out of which a trust arises;

(h) "trust-property" or "trust-money" means the subject-matter of the trust; and

(i) all words and expressions used and not defined in this Act but defined in the Indian Contract Act, 1872, shall have the meanings respectively assigned to them in that Act".

9 of 1872.

For section 4 of the principal Act, the following section shall be substituted, namely:—

Section 4-

"4. (1) A trust may be created for any lawful purpose.

Purpose of trust to be lawful.

(2) The purpose of a trust is lawful unless—

(a) it is forbidden by law, or

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law, or

(c) it is fraudulent, or

(d) it involves or implies injury to the person or property of another, or

(e) the court regards it as immoral or opposed to public policy.

(3) 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 immovable and situate in a foreign country, the law of such country.”

Sections 5 and 6. For sections 5 and 6 of the principal Act, the following sections shall be substituted, namely:—

Creation of trust. “5. Subject to the provisions of section 3, 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.

Formalities for creation of trust. 6. (1) No trust in relation to any property shall be valid unless created in the manner hereinafter provided in this section—

(2) A trust may be declared—

Cf. existing s. 5, 1st para., first 24 words and 2nd para., earlier half.

(a) by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered; or

Cf. existing s. 5, 1st para. last 14 words and 2nd para., earlier half.

(b) by the will of the author of the trust or of the trustee.

Cf. existing s. 5, 2nd para., latter half.

(3) A trust in relation to movable property may also be created by transferring the ownership of the property to the trustee in any manner permitted by law.

Cf. existing s. 6, parenthesis and last 6 words.

(4) Except where the trust is declared by will or the author of the trust is himself to be the trustee, the author of the trust shall in every case transfer the trust-property to the trustee.

Cf. existing s. 5, last para.

(5) The provisions of this section do not apply where they would operate so as to effectuate a fraud”.

In section 7 of the principal Act, for clause (b), the following clause shall be substituted, namely:—

“(b) on behalf of a minor, by his lawful guardian with the permission of the district court;”

For section 10 of the principal Act, the following section shall be substituted, namely:—

“10. (1) Every person capable of holding property may be a trustee. (2) No one is bound to accept a trust. (3) A trust is accepted by any words or acts¹ of the trustee indicating with reasonable certainty such acceptance. (4) 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. (5) 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. (6) Where a person incompetent to contract by reason of minority or other disability is appointed to be a trustee, he cannot execute the trust until the disability ceases and he accepts the trust”.

Competence to be a trustee and acceptance of trust.

In section 11 of the principal Act, for the second paragraph, the following paragraph shall be substituted, namely:—

“Where a beneficiary is incompetent to contract, or unborn,² the district court may, for the purposes of this section, give its approval to any modification, provided the court is of opinion that the modification is or would be for the benefit of the beneficiary.”

In section 17 of the principal Act, for the second paragraph, the following paragraph shall be substituted, namely:—

“Where the trustee has a discretionary power, nothing in this section shall be deemed to authorise the court to control the exercise of such discretion, so long as that discretion is exercised reasonably and in good faith.”

¹In the India Code, Vol. VIII B, Part IX, page 22, in section 10, third para. the word “facts” is printed ; but it should be “acts”.

²Cf. s. 1 (1) (c), Variation of Trusts Act, 1958 (6 & 7 Eliz. 2, Ch. 53).

Section 20. For section 20 of the principal Act, the following section shall be substituted, namely:—

Investment
of trust
money.

Cf. s. 35(1),
main para.
of the Bom-
bay Act
and also
s. 21, Indian
Trusts Act,
1882, last 7
words.

“20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust)—

(a) to deposit the money in the State Bank of India or any bank which is its subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959; or

18 of 1959.

(b) to deposit it in a Government Savings Bank; or

Cf. s. 35 (1),
main para.
of the Bom-
bay Act.

(c) to deposit it in a co-operative bank specified in this behalf by the State Government by notification in the Official Gazette; or

Cf. s. 20 (a),
(c) (d),
Indian
Trusts Act,
1882.

(d) to invest it in public securities; or

Cf. s. 12,
State Bank
of India
Act, 1955.

(e) to invest it in shares in the State Bank of India;¹ or

Cf. existing
s. 20 (e),
Indian
Trusts Act,
1882.

(f) to invest it on a first mortgage of immovable property situated in any part of the territories to which this Act extends, if the property is not a leasehold for a term of years and the value of the property exceeds by one-half the mortgage-money; or

Cf. existing
s. 20 (a)
Proviso,
Indian
Trusts Act,
1882.

(g) to invest it in securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by the Government; or

Cf. existing
s. 20 (f),
Indian
Trusts Act,
1882.

(h) to invest it in any other manner expressly authorised by the instrument of trust;² and to invest it in no other manner.

¹It is considered unnecessary to add subsidiary banks here.

²Investments authorised by rules made by the High Court have been omitted as proposed.

Explanation.—In this section, “public securities” means— *Cf. s. 2 (12) Bombay Public Trusts Act, 1950.*

(a) Government securities, that is to say, securities of the Government, including securities created or issued by the Government for the purpose of raising a public loan in any of the following forms, namely:—

(i) stock transferable by registration in the books of the Reserve Bank of India; *Cf. s. 2 (2) (a) (i) and (ii), Public Debt Act, 1944, which replaces s. 2 (a) of the Indian Securities Act, 1920.*

(ii) promissory notes payable to order;

(b) certificates, bonds and other documents issued by the Central Government as a part of the National Savings Scheme, whatever be the designation under which they are issued;

(c) stocks, debentures or shares in any company or corporation, the interest or dividend on which has been guaranteed by the Government; *Cf. s. 20(c) Indian Trusts Act, 1882.*

(d) debentures or other securities for money issued by or on behalf of any local authority in exercise of the powers conferred by any Central, State or Provincial Act.”. *Cf. s. 20 (d), Indian Trusts Act, 1882.*

In section 20A of the principal Act, in the proviso to sub-section (1), for the words, letters, brackets and figures “clauses (c) and (d) of section 20”, the words letters, brackets, and figures “clauses (c) and (d) of the *Explanation* to section 20” shall be substituted. Section 20A.

For section 21 of the principal Act, the following section shall be substituted, namely:— Section 21.

“20. A trustee shall not be liable for a breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law.” *Cf. s. 4 Non-liability (English) for retaining investments which have ceased to be authorised. Act, 1925. (15 Geo. 5. c. 19).*

In section 26 of the principal Act,— Section 26.

(a) in the first paragraph, the words and figures “Subject to the provisions of sections 13 and 15” shall be omitted;

(b) to the proviso, the following clause shall be added, namely:—

*Cf. existing
s. 27 1st
para.*

“(d) where he has, otherwise by his neglect, enabled the other trustee to commit a breach of trust.”.

(c) the last paragraph shall be omitted.¹

Section 27. In section 27 of the principal Act, for the first paragraph, the following paragraph shall be substituted, namely:—

“Where co-trustees jointly commit a breach of trust, or where one of them becomes liable under the proviso to section 26 for any breach of trust committed by his co-trustee, each is liable to the beneficiary for the whole of the loss occasioned by such breach.”.

Section 30. For section 30 of the principal Act, the following section shall be substituted, namely:—

*Indemnity of
the trustee.
Cf. s. 30(1),
(English)
Trustee Act
1925.
(15 & 16
Geo. 5 Ch.
19).*

“30. (1) Subject to the provisions of the instrument of trust and of sections 23, 26 and 27, a trustee shall be chargeable only for money, stocks, funds and securities actually received by him, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

*Cf. s. 26
last para.,
Indian
Trusts Act,
1882.*

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

Section 30A [New]. After section 30 of the principal Act, the following section shall be inserted, namely:—

*Liability of a
trustee de son
tort.
Cf. s. 303
and s. 304,
Indian
Succession
Act, 1925.*

“30A. When a person intermeddles with the trust-property or does any other act which belongs to the office of the trustee, he is answerable to the rightful trustee or to the beneficiary, to the extent of the trust-property which may have come to his hands, after deducting payments made to the rightful trustee and payments made in due course of administration of the trust.

1. Section 26, last paragraph is proposed to be omitted, since its substance is embodied in section 30 as proposed.

(2) A person who intermeddles with the trust-property for the purpose of preserving it or providing for the immediate necessities of the property, or dealing in the ordinary course of business with trust-property received from another, shall not be answerable under this section".¹ Cf. s. 303, Indian Succession Act, 1925.

For section 34 of the principal Act, the following section shall be substituted, namely:— Section 34.

"34. (1) Any trustee or beneficiary may, without instituting a suit, apply by petition to the district court for— Right to apply to court for opinion.

(a) its opinion on any question affecting the rights and interests of any other person claiming to be a beneficiary;

(b) a direction—(i) for the furnishing of any particular accounts by the trustee and the vouching, when necessary, of such accounts, or (ii) for the auditing of any particular accounts in a manner to be specified by the court;

(c) a direction to the trustee to do or abstain from doing any particular act in his character as such trustee;

(d) its opinion, advice or direction on any other present question respecting the management or administration of the trust property. Cf. existing s. 34, 1st para.

(2) Notice 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. Cf. existing s. 34, 2nd para.

(3) Where the trustee is a respondent, the issue of summons on such petition shall not interfere with or control any power or discretion vested in the trustee, except in so far as such interference or control is necessarily involved in the particular relief sought.

(4) The jurisdiction of the court on a petition made under this section shall not extend to the determination of—

(a) questions involving charges of breach of trust, unless the parties have consented;

(b) claims made adversely to the trust;

(c) questions of detail, difficulty or importance not proper in the opinion of the court for summary disposal. Cf. existing s. 34, 1st para.

¹See the discussion in the body of the Report under section 3—
"Trustee de son tort".

Cf. existing
s. 34, 3rd
para.

(5) 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.

(6) An order made under this section shall be binding, subject to the result of any appeal under sub-section (9), on all persons who are parties to the proceedings and on all persons on whom notice is served under sub-section (2).

(7) The court may, in a proceeding under this section, take evidence, if it thinks necessary, and after hearing the parties or the persons interested or their pleaders, shall pass such order as it thinks fit.

Cf. s. 34,
4th para.

(8) The costs of every petition under this section shall be in the discretion of the court to which it is made.

(9) Against an order made by the court under this section, an appeal shall lie to the court to which appeals ordinarily lie from the decrees of that court.

(10) The provisions of this section shall apply, as far as may be, to proceedings before the court under sections¹ 11, 22, 32, 36, 41, 45, 46, 49, 53, 59, 72, 73, 73A and 74."

Section 34A. After section 34 of the principal Act, the following section shall be inserted, namely:—

Power of
court to
authorise
dealings with
trust-
property.

Cf. s. 57
(English)
Trustee Act,
1925. (15 &
16 Geo. 5.
Ch. 19)

"34A. (1) Where in the management or administration of any trust-property, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is, in the opinion of the court, expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the instrument of trust (if any), or by law, the court may, by an order made on an application under section 34, confer upon the trustee, either generally or in any particular case, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, as between capital and income.

¹Section 34A, proposed to be added, is not mentioned here, as that section refers back to section 34. Section 50 speaks of a "contract" and hence has not been mentioned here.

(2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3) An application to the court for the purposes of this section may be made by the trustees, or by any of them, or by any beneficiary".¹

In section 36 of the principal Act,—

Section 36.

(a) the words and figures "and to the provisions of section 17" shall be omitted;

(b) for the words "exceeding twenty-one years", the words "exceeding five years" shall be substituted.

In section 42 of the principal Act, for the words "Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him", the words "A trustee, or, if there are more trustees than one, all of them jointly, may give a receipt in writing for any money, securities or other movable property payable, transferable or deliverable to him or them" shall be substituted.

Section 42.

In section 43 of the principal Act, the last paragraph shall be omitted.

Section 43.

In section 47 of the principal Act, for the first paragraph, the following paragraph shall be substituted, namely:—

Section 47.

"A trustee cannot delegate his office or any of his duties either to a co-trustee or to any other person, unless—

- (a) the instrument of trust so provides, or
- (b) the delegation is in the regular course of business, or
- (c) the delegation is necessary, or
- (d) the beneficiary, being competent to contract, consents to the delegation."

In section 56 of the principal Act, the last paragraph shall be omitted.

Section 56.

In section 58 of the principal Act, the proviso shall be omitted.

Section 58.

For section 59 of the principal Act, the following section shall be substituted, namely:—

Section 59.

"59. Where, after a trust has been validly created¹.—

Right to apply for execution of trust.

- (a) all the trustees die, disclaim or are discharged; or

¹Proposed section 34A is based on the suggestion made in the body of the Report, *vide* the discussion relating to section 11.

(b) for any other reason the execution of the trust by the trustee is or becomes impracticable,

the beneficiary or any other person interested in the trust may make a petition to the district court for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee."

Section 60. In section 60 of the principal Act, in *Explanation I*, the words "unless the personal law of the beneficiary allows otherwise, a married woman and" shall be omitted.

Section 62. For section 62 of the principal Act, the following section shall be substituted, namely:—

Wrongful purchase of trust-property by trustee.

"62. (1) Where a trustee has wrongfully purchased trust-property, the beneficiary has a right to have the property declared subject to the trust or re-transferred by the trustee, if it remains in his hands unsold, or, if it has been purchased from him by any person with notice of the trust or acquired from him by any person without consideration, by such person but in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as have been properly incurred in the preservation of the property by the trustee or purchaser or such person; and the trustee or purchaser or such person 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 deteriorated by reason of any act or omission of the trustee or purchaser or such person.

(2) Nothing in this section shall—

(a) impair the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or re-transferred, have contracted in good faith with the trustee or purchaser or such person; or

(b) entitle the beneficiary to have the property declared subject to the trust or re-transferred where he, being competent to contract, has

¹As death, disclaimer and discharge are the only situations in which a vacancy arises, the words "no trustees are appointed" have been omitted consequential on the proposal to confine the section to subsequent vacancies.

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; or

(c) be construed as impairing any right of the beneficiary to obtain any other relief to which he may be entitled in respect of the property.”.

After section 62 of the principal Act, the following Section 62A. section shall be inserted, namely:—

Cf. existing section 65.

“62A. (1) Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration. Acquisition by trustee of his transferee of trust-property wrongfully converted.

(2) Where a trustee, in breach of trust, sells or otherwise transfers trust-property to a person who has notice of the breach of trust, and the transferee transfers the property to any other person and afterwards himself becomes the owner of the property, the beneficiary has the right to have the property declared subject to trust or retransferred by the first-mentioned transferee, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

(3) The beneficiary shall not be entitled to the benefit of this section unless he pays to the trustee or the transferee, as the case may be, the value of the consideration for the wrongful sale or transfer which, having been received by the trustee for the wrongful sale or transfer, has been applied for the benefit of the beneficiary.

Explanation.—For the purposes of this section, a trustee who wrongfully allows the trust-property to be sold by or under the decree or order of a competent court or in pursuance of any law for the recovery of arrears of land revenue or sums recoverable as such arrears, shall be deemed to have wrongfully sold the property, and the provisions of this section shall apply in relation to such sale accordingly.”.

To section 63 of the principal Act, the following paragraph and *Explanation* shall be added, namely:— Section 63.

“Nothing in this section shall be construed as impairing any right of the beneficiary to obtain any other

relief to which he may be entitled in respect of the property.

Explanation.—Where money¹ or other property is deposited with any person as security for the due discharge of the duties of any office or for the performance of any contract, such person shall, for the purposes of this section, be deemed to be holding such money or other property in trust for the depositor, and the provisions of this section shall apply thereto accordingly”.

- Section 64. In section 64 of the principal Act,—
- (a) in the first paragraph, in clause (b), the words “for consideration” shall be omitted;
- (b) in the last paragraph, for the words, figures and brackets “the Indian Contract Act, 1872 (IX of 1872), section 108”, the words and figures “sections 27, 28, 29 and 30 of the Indian Sale of Goods Act, 1930”, shall be substituted.
- 3 of 1930.
- Section 65. Section 65 of the principal Act shall be omitted.
- Section 68. In section 68 of the principal Act,—
- (i) in the first paragraph, for clause (c), the following clause shall be substituted, namely:—
- “(c) becomes aware of a breach of trust committed or intended to be committed and actually conceals it, or”;
- (ii) the last paragraph shall be omitted.
- Section 71. In section 71 of the principal Act,—
- (i) for the words “may be discharged”, the words “is discharged” shall be substituted;
- (ii) for clauses (e) and (f), the following clauses shall be substituted, namely:—
- “(e) by renunciation under section 46; or
- (f) by an order of the Court to which a petition for discharge is presented under section 72.”

¹As to “money or other property” compare existing section 62, second paragraph also. For money that has passed in circulation to a *bona fide* holder, see section 64.

²This is consequential on the proposed addition of section 62A.

Sections 73, 73A and 74. For sections 73 and 74 of the principal Act, the following sections shall be substituted, namely:—

“73. (1) Whenever any trustee, either original or substituted,— **Appointment of new trustee.**

Cf. existing s. 73, opening part.

(a) disclaims or dies; or

(b) is for a continuous period of six months absent from India, or leaves India for the purpose of residing abroad; or

(c) is declared an insolvent; or

(d) desires to be discharged from the trust; or

(e) refuses to act as a trustee; or

Cf. s. 47 (1)(g), Bombay Public Trusts Act, 1950.

(f) becomes, in the opinion of the district court, unfit or physically incapable to act in the trust or accepts a position which is inconsistent with the trust;

then, a new trustee may be appointed in his place.

Explanation.—The provisions of this sub-section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator.

(2) Where a person incompetent to contract by reason of minority or other disability is appointed to be a trustee, the district court shall appoint another person to act as a trustee in his place until the disability ceases and he accepts the trust.

Cf. existing s. 73, 1st para., clauses (a) and (b).

73A. (1) The appointment of a new trustee under section 73 may be made by— **Person competent to fill up vacancy.**

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

(b) if there be no such person, or no such person able and willing to act,—

(i) the author of the trust, if he be alive and competent to contract; or

(ii) the surviving or continuing trustees or trustee for the time being; or

(iii) the legal representative of the last surviving and continuing trustee; or

(iv) (with the consent of the district court), the retiring trustees, if they all retire simultaneously, or, with the like consent, the last retiring trustee.

Cf. existing s. 73, 2nd, 3rd and 4th paras.

(2) Every such appointment shall be made by writing under the hand of the person making it.

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

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

Explanation.—The provisions of this section relating to a continuing trustee include the case of a refusing or retiring trustee if willing to act in the execution of the power.

Appointment
by court.

74. (1) Whenever a trustee is to be appointed under section 73 and it is found impracticable to make an appointment under section 73A, the beneficiary may, without instituting a suit, apply by petition to the district court for the appointment of a new trustee, and the court may appoint a new trustee accordingly.

(2) In making an appointment under sub-section (1), the court shall have regard—

(a) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust;

(b) to the wishes of the person, if any, empowered to appoint new trustees;

(c) to the question whether the appointment will promote or impede the execution of the trust; and

(d) where there are more beneficiaries than one, to the interests of all such beneficiaries”.

Section 75.

In section 75 of the principal Act, for the words and figures “section 73 or section 74”, the words and figures “section 73, section 73A or section 74” shall be substituted.

Section 76.

For section 76 of the principal Act, the following section shall be substituted, namely:—

Survival of
trust and
powers of
trustees on
death,
discharge or
disclaimer.

“76. On the death or discharge of one of several co-trustees or the disclaimer of the trust by one of them, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.” *Cf. existing s. 76.*

Section 78.

For section 78 of the principal Act, the following section shall be substituted, namely:—

Revocation
of trust.

“78. (1) A trust created by will does not become effective until the death of the testator and may be revoked at the pleasure of the testator.

(2) A trust created otherwise than by will can be revoked only—

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

(b) in exercise of a power of revocation expressly reserved to the author of the trust.

(3) Where the trust is for the payment of the debts of the author of the trust, it does not become effective until it has been communicated to the creditors, and may be revoked, before it is so communicated, at the pleasure of the author of the trust”.

In section 82 of the principal Act, for the second paragraph, the following, paragraph shall be substituted, namely:—

5 of 1908.

“Nothing in this section shall be deemed to affect the provisions of section 66 of the Code of Civil Procedure, 1908, or any similar provision in any law relating to recovery of arrears of land revenue or sums recoverable as such arrears.”

To section 83 of the principal Act, the following *Ex- Section 83.*
planation shall be added, namely:—

“*Explanation.*—In particular and without prejudice to the generality of the provisions of this section, the following shall be deemed to be cases where the trust is incapable of being executed:—

(a) where property is conveyed upon trust, and no trust is declared;

(b) where property is conveyed upon trust to be declared afterwards, and no such declaration is ever made;

(c) where the trusts are too vague to be executed;

(d) where the trusts become incapable of taking effect;

(e) where the beneficiary renounces his interest under the trust”.

The Schedule to the principal Act shall be omitted.¹ The Schedule.

¹This is consequential on the proposed omission of section 2.

APPENDIX II

Suggestions in respect of other Acts

1. *The Transfer of Property Act, 1882.*

Section 10 should be amended¹ on the lines of the (English) Married Women (Restraint upon Anticipation) Act, 1949.

2. *The Indian Contract Act, 1872.*

A comprehensive provision to deal with the subject of frustration of an illegal purpose should be inserted in the Contract Act.²

¹See paragraph 64 of the body of the Report.

²See paragraph 91 of the body of the Report.