THE INDIAN TRUSTEE ACT, 1866.
(ACT XXVII OF 1866).

RECEIVED THE G. G.'S ASSENT ON THE 24TH OCTOBER 1866.

An Act to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English Law is applicable.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immovable property in British India vested in mortgagees and trustees, in cases to which English law is applicable, It is hereby enacted as follows:

(Notes).

I.— "Preamble.

(1) Preamble of an act—Importance.

The preamble of an act is usually of great importance in construing the extent of the operation of the law and should be read with its sections. 4 C.W.N. cxxvi.

(2) Preamble—Nature of.

(a) It is the introduction to the Act, "a key to open the meaning of the makers of the Act and the mischief it was intended to remedy," Tarquand v. Board of Trade, 11 A.C. 296.

(b) It lays down the limitations and restrictions subject to which the enactment is passed, it being always permissible to refer to it for the purpose of keeping the effect of the Act within its real scope as it usually states and professes to state the intention of the Legislature in passing the enactment. (Ibid.)

(c) But, unless there be something which is inconsistent with the spirit of the Act, it cannot be said that the preamble has cut down its express provisions. Thistleton v. Brewer, 31 L.J. Ex. 280; 3 Bom. L R. 548.

(3) Preamble—Use of.

(a) Where the language of the sections of a statute is clear, the terms of a preamble cannot be resorted to to restrict their operation or to cut them down. Salterd v. Johnson, 5 Q.B. 313; 2 M.H.C.R. 322.

(b) The preamble should be referred to to ascertain the intention of an Act when the enacting part of the Act is ambiguous, although it is not conclusive as a statement of extrinsic fact. Ibid.; 4 Bom.L.R. 550 following 11 A. 262; 9 Bom. H.C.R. 205 (215) 11 B. 551.

(4) Preamble—Object of.

The purpose for which a preamble is framed to a statute is to indicate what in general terms was the object of the Legislature in passing the Act. Taylor v. Corporation, L.R. 4 Ch. D. 395.
I—“Preamble”—(Concluded).

(5) Preamble—Effect of.

The effect of a preamble to an Act, must be understood to overlie the whole Act giving color to and controlling its provisions, and by showing the intention of the Legislature supplying pro tanto the rule for their interpretation. (Ibid.) 11 A. 262.


The preamble is a necessary part of the Act, while the marginal notes are not. The latter should not be looked into for the purpose of construing the sections of the Act. 2 A. 74; 5 C. 300; 8 C. 637; 14 A. 145.

1. [Repealed by Act XIV of 1870.]

Interpretation

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

“Immoveable property” shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

“Stock” shall mean any fund, annuity or security transferable in books kept by any Company or Society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854, or at any port in British India:

“Hold” and “Holding” shall be applicable to any vested estate, whether for life or of a greater or less description, in possession, futurity, or expectancy in any immovable property:

“Contingent right,” as applied to immovable property, shall mean a contingent or executory interest, or possibility coupled with an interest whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent:

“Convey” and “Conveyance,” applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immovable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants-in-tail in accordance with the provisions of Act XXXI, of 1854 (to simplify the modes of conveying land in cases to which the English law is applicable):
"Transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock or Government securities can transfer such stock or Government securities from himself to another:

"High Court" shall mean every Court now or hereafter established under the Statute 24 and 25 Vic., cap. 104, and also the Chief Court of the Panjab, or such one or more Judges of the said Courts respectively as shall be appointed by the Chief Justice or the senior Judge, as the case may be, to entertain applications and make orders under this Act:

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

"Lunatic" shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs:

"Person of unsound mind" shall mean any person not a minor who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs:

In the case of a will made or an intestacy occurring before the first day of January 1866, "Heir" shall mean the person claiming an interest in the immovable property of a deceased person under the laws concerning descent applicable to such property: and "Devisé" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immovable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

In the case of a will made or an intestacy occurring on or after the first day of January 1866 "Heir" shall mean any person claiming an interest in the immovable property of a deceased person under the rules for the distribution of an intestate's estate, and "Devisée" shall mean any person taking immovable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immovable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession:

"Mortgage" shall be applicable to every estate or interest in immovable or moveable property which would in the High Court be deemed merely a security for money.
"Person" shall include any company or association, or body of persons whether incorporated or not:

- Words importing the singular number only shall extend to several persons or things; words importing the plural number shall apply to one person or thing; words importing the masculine gender shall extend to a female.

(Notes).

1."Immovable property."

(1) Definition of the expression.

(a) Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. General Clauses Act, S. 3 (Act X of 1897).

(b) Immovables are tangible things which cannot be moved, such as are lands and houses, whatever may be the interest or estate which a person has in them. Hence the term includes what English lawyers call "chattels real" that is to say, land, etc., in which a person has less than a freehold interest, as, for instance leaseholds. Dicey, p. 71.

(4) Scope of the expressions "immoveables" and moveables.

Immovable property includes all rights over things, which cannot be moved, whatever may be the nature of such rights or interests. Moveable property includes both rights over moveable things, or goods, and rights which are not rights over a definite thing, but are claims by one person against another. Shortly stated, under English Law, immovable property is equivalent to "realty" with the addition of "chattels real." Moveable property is equivalent to "personalty" with the omission of "chattels real." Dicey, p. 72.

(3) Analogous expression in English Law.

The term immovable property does not occur in the English Law where such property is designated real property as distinguished from moveable or personal property. Gour's Transfer of Property Act, Vol. I, p. 35 (1904).

(4) Property—Meaning of.

Property is an ambiguous term; for it may denote either the things which are the objects of rights or ownership, or the rights over or ownership of such objects. Goodseve's Real Property, p. 5 (1906) 5th Ed.

(5) Movable and immovable property—Distinction between—English Law.

(a) The main distinction between moveable and immovable property is, that, as to the latter, the rules of devolution on the death of the owner follow the lex situs or lex loci rei sitae (i.e.), the law of the place where the immovable property is situate; while, as to the former they are ascertained by the law of the domicile of the owner, or (as it is said) Mobilea sequuntur personam. Goodseve R. P. p. 17 (1906).
1. — "Immoveable property" — (Concluded).

(b) It is a proposition of law that "personal property has no locality." The meaning is, not that personal property has no visible locality but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds in England, dies, that property is claimed according to the right of representation given by the law of his own country. Stitt v. Worstwick, 1 H. Bl. 690; See Westlake's Private International Law, Ch. V.

2. — "Tenement."

(1) Meaning of the word — English Law.

(a) The word "tenement" in its strict legal signification is something which may be holden, that is, which may be the subject of tenure. Goodeve's Real Property, p. 11 (1906) 5th Ed.

(b) But popularly, it is often applied to designate houses or other buildings, (Ibid.)

(c) Thus, under the English Law, in a deed, a house is commonly described as "all that messuage or tenement." 2 Davey Prec. 11, 237.

(d) In Acts of Parliament, the word "tenement" is sometimes used to mean a house. Yorkshire Fire and Life Insurance Co. v. Clayton, 8 Q.B.D. 421; Dashwood v. Ayles, 16 Q.B.D. 295.

(2) Use of the word tenement in "assurance."

The word "tenement," when used in an "assurance" may pass not only the land itself, but certain interests arising therefrom, as for example —

(i) rents arising out of land,

(ii) a right of common of pasture, that is, a right to turn out cattle to pasture on the land of another,

(iii) a right of "turbary," that is, a right to take, from another's soil, turf fit for burning. Co. Litt. 6 a, 19 b, Challis, R.P. 43.

3. — "Hereditament."

(1) Meaning of the word — English Law.

(a) The word hereditament "is the largest word of all in that kind," for, whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real or personal, or mixed. Co. Litt. 6 a.

(b) The word "hereditament," when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land. Challis, R. P. 44.

(c) But in Tomkins v. Jones, 32 Q.B.D. 599, it was observed by Bowen L. J., that the word is not used as describing the quantum of interest in the subject-matter, but as describing the subject-matter itself, namely, the land.
Act XXVII of 1866 (Indian Trustee Act).

3.—“Hereditament”—(Concluded).

(2) Chattels annexed to land are included in hereditaments.

(a) By the Common Law or by special local custom, among hereditaments, the English Law recognises some chattels which are considered as annexed to the inheritance and devolving with it. Goddard’s Real Property, p. 11 (1906).

(b) The owner of chattels of this nature cannot separate them from the inheritance by will, though it is possible for him to sell or dispose of them during his life-time. Co. Litt. 185 b.

(3) Chattels annexed to land—Examples.

(a) Deer in a lawful park unless they have been reclaimed. The case of Swans, 7 Rep. at 17 b. Morgan v. Aberavenny, 8 C.B. 768; Ford v. Tynte, 2 J. & H. 150.

(b) Fish in a pond, rabbits in a warren, doves in a dovecot, muniments of title of an estate of inheritance. See the cases collected 33 Sol. J. 655.

(c) The chest or box containing the muniments of title. Godolphin, Pt. II, C. 14, S. 1.

N.B.—All these pass to the heir with the land at Common Law. Goddard’s Real Property, p. 11 (1906).

(d) “Herlooms”—Such as pictures, plate, or furniture, the enjoyment whereof is annexed to mansion or land, so as to devolve with the inheritance. Co. Litt. 18 b.

N.B.—These devolve to the heir with the inheritance by special local custom.

4.—“Corporeal.”

(1) Corporeal hereditament—meaning of.

(a) Corporeal hereditaments are such as affect the senses, and may be seen and handled by the body, as land, houses, and so forth. Challis, R.P. (47).

(b) (i) Corporeal hereditaments are fixed as to their definition by the legal maxum that at Common Law (i.e., apart from the Act 8 and 9 Vic. C. 106, S. 2) they lie in “livery” and not in grant. Challis R.P. 47.

(ii) The phrase, therefore, includes only lands regarded as a physical object, and legal estates of inheritance in possession. (Ibid.)

(2) Corporeal hereditaments, how conveyed.

The only conveyance in pais (i.e., between party and party) by which these could, at Common Law, be conveyed to a stranger, was a “Feoffment” and the essence of a “feoffment” is the “livery of the seisin.” Challis R.P. 47.

5.—“Incorporeal.”

(1) Meaning of the word.

The words “in corporeal hereditament” apply to such as are not the objects of sensation, cannot be seen nor handled. They are “creatures of the mind and exist only in contemplation.” Challis R.P. 47.
5. — "Incorporeal"—(Concluded).

(2) Incorporeal hereditaments—Examples.

(a) A rent or annuity payable out of land. a right of fishing in a particular stream, or the benefit of the flow of a particular stream: a right of way or common easements in respect of light and air. Challis R.P. 47.

(b) (i) The benefit of a condition annexed to an estate which devolves upon the heir. Winches' case 3 Rep. 2 b. See Challis R.P. 175, 192. K

(ii) For legal purposes a "condition" is defined to be "a qualification or restriction annexed to a conveyance of lands, whereby it is provided, that, in case a particular event does or does not happen, or in case the grantor or grantees does or omits to do, a particular act, an estate shall commence, be enlarged, or defeated." J Cruise Dig. 2; Co. Litt. 201 a.

(c) (i) "Chooses in action." See Goodove's R.P. 14 (1906).

(ii) A "chose in action" may be described as a right of action to recover money or to enforce some legal obligation. The most common instance of a "chose in action" is a right to recover money in respect of a debt. (Ibld.) Cf. the definition of the expression "Actionable claim" in S. 3 of Transfer of Property Act.

(3) Incorporeal hereditaments, how conveyed.

At Common Law—are said to "he in grant," because they would pass by the mere delivery of a deed purporting to convey them and the word "grant" was the most appropriate word of conveyance for the purpose. Co. Litt. 9 a. 3 Cruise Dig. 1, Williams R.P. pp 4, 30.

(4) Classification of hereditaments into corporeal and incorporeal under English law—Criticism of Austin.

(a) The classification is based on a confusion between rights and things which are the subjects of rights. Austin's Jurisp. 371, 704, 804 (4th Ed.)

(b) "If the hereditament mean the right itself, that is always incorporeal, not less in the case of what are called corporeal than what are called incorporeal hereditaments. If the hereditament mean that subject of the right, the subject of an incorporeal hereditament is as corporeal as the subject of a corporeal hereditament." (Ibld.) See Digby's R.P. p. 305.

6. — "Tenure."

(1) Conception of "tenure," the foundation of the English law of property.

(a) Under the English Law, it cannot be said that a person is the absolute owner of land but, he could only be a "tenant," or holder of it for an "estate" (i.e.), an interest giving him and his successors in title a right to the occupation and enjoyment of it, or its rents and profits, for a period which is indefinite or uncertain as to its duration, but is not perpetual; and upon the determination of which the land reverts to the person of whom it is held, who is called the "lord." Goodove's R.P. 19 (1906). See Digby R.P. 60, 61.
6.—"Tenure."—(Concluded).

(b) The common idea prevailing in England is that all lands are vested in the Crown, which grants them to its subjects by the process known as "infusion" (i.e., to hold for various "estates" (i.e., to use and enjoy during the subsistence of those estates. Coke Litt. 1a, 60a, 90a. Attorney-General of Ontario v. Mercir, 8 A.C. 767, per Lord Selborne, C.

(2) Tenure.—Meaning of.

The manner by which one holds land of another, under English Law, is called "tenure." Gooden's R.P. p. 20.

7.—"Estate or interest."

(1) "Interest," meaning of—English Law.

By the term, is meant that amount of owner-ship which the law recognises as conferring, what is technically termed, " an estate " in its subject-matter. See 1 and M. Inst. n. 10. Williams, R.P. 7.

(2) Common meaning of "Interest."

As to, see Co. Litt. 315 b, Elph. N. and C. Interp. 205.

(3) Estate.—Scope and meaning of the term.

Estate signifies such inheritance, freehold, term for years, tenancy by statute merchant, staple, estate, or the like, as any man has in lands or tenements. Co. Litt. 315 a.

(1) "Estates" only in "Reality"—No "estates" in "Personalty."—English Law.

(a) Personal property, under English Law, being essentially the subject of absolute ownership, cannot be held for any estate. See M.L.P. p. 7.

(b) "Reality" only could be held for various "estates." See p. 30 Goodev's R.P. (1906).

(5) Estates under English Law.

(a) Ordinary estates.

The ordinary estates are estates of inheritance (including under the term "estates in fee simple," and "estates in freehold"), and estates for life. Goodev's R.P. p. 19 (1906).

(b) Estates, how created.

Under the English Law, special and technical words must be used to create the various estates. As to such technical words, or "limitations," as they are called, see pp. 33, 78 and 126 of Goodev's R.P. (1906).

8.—"Annuity."

(1) What is "annuity."

An annuity is a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person only. Co. Litt. 144 b.

(2) Annuity.—Common instance of.

The most common instance of such "annuities" is payment of rents, which, under English Law, is of three kinds (viz.), "rent-service," "rent-charge" and "rent-seek." Litt. S. 213. See Elph. N. and C. Interp. p. 617.

(3) Annuity, an "incorporeal hereditament."

Under the English Law, an annuity is considered to be an "incorporeal hereditament." Goodev R.P. p. 12.
9.—"Transferable by deed."

Conveyance under English Law.

(a) The most ancient mode of conveyance under English Law was a "feoffment." See Butler's note to Co. Litt. 271 b. 4 Cruise Dig. 46.

(b) As to the formalities therefor, see pp. 357 and 358 of Gooden's R.R. (1906).

(c) In England, after the year 1845, a "feoffment" could be evidence by a "deed." See Real Property Act (1845), 8 & 9 Vic., C. 106, S. 3.

10.—"By deed accompanied by other formalities."

Formalities necessary for conveyance by "deed"—English Law.

(a) The transferor or his attorney, together with the transferee, or his attorney, come to the land or to the house (the subject of transfer) and there in the presence of witnesses declare the contents of the deed. 2 Bl. 315; Challis R.P. 305; Co. Litt. 48a.

(b) And then, if the subject of transfer be land, the transferor actually delivers to the transferee, all other persons being out of ground at the time, a clod or turf, or a twig or bough there growing, with words to this effect; "I deliver these to you in the name of 'sesin' of all the lands and tenements contained in this deed." (Ibid.)

(c) But, if the subject of transfer be a house, the transferor must take the ring or latch of the door, the house being quite empty, and deliver the same to the transferee in the same form, and then the transferee must enter alone, and shut the door and then open it, and let in the others. (Ibid.)

(d) If the conveyance be in respect of different lands, lying scattered in one and the same county, then in the transferor's possession, mere delivery or "sesin" of any parcel in the name of the rest is sufficient for all. (Ibid.)

(e) But, if the lands lie in several counties, there must be as many deliveries as there are counties, the reason being that, if the title to these lands is subsequently disputed, there must be as many trials as there are counties. (Ibid.)

(f) Originally, the delivery was required to be made before the peers or freeholders of the neighbourhood, who must attest such delivery in the body or on the back of the deed. (Ibid.)

(g) Subsequently, the usual practice came to be established (viz.) to endorse the "livery" or delivery of "sesin" on the back of the deed, specifying the manner, place, and time of making it together with the names of the witnesses. (Ibid.)

II.—"Vested estate"

1. "Vest," meaning of.

(a) The words "to vest" have several senses. Originally, the word had reference only to real estate. As applied to "estates in land," "to vest" signifies the acquisition of a portion of the actual ownership of the land; the acquisition, not of an estate in possession, but of an actual estate. The "fee simple" being supposed: be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus "vested" is nearly equivalent to "possessed." Wills by Hawkins, p. 221.
Act XXVII of 1868 (Indian Trustee Act).

ii. "Vested estate"—(Concluded).

In this, its original sense, "vested" has no reference to the absence of conditionalness or contingency. For example, where an estate is limited to "A for life with remainder to B," B's estate is a vested estate, because such a remainder vests in B an actual portion of the "foo," though the time of its falling into possession is wholly contingent and uncertain. B is invested with a portion of the ownership of the land (Ibid).

(2) Vested estate distinguished from "estate in possession"—English Law.

An estate in possession is one conferring an immediate right to present enjoyment. A vested estate is, strictly speaking, an "estate in expectancy" or a "future estate" conferring a right to enjoyment at a future time. Goodwe R 1 200 (1906)

(3) Vested estate, nature of

A "vested estate" under the English Law, is otherwise called a "vested remainder" such estate being an estate in expectancy. A vested estate does not confer on the person to whom the estate is "limited," an immediate present right to enjoyment but his enjoyment is postponed until the happening of a certain particular event, which must necessarily happen one or the other. Goodwe, p 211 (1906)

(4) Vested estate definition of

(a) Goodwe defines the expression as follow—"A vested remainder is one which is necessarily liable of tending effect on the determination of the particular estate on which it is expectant." Goodwe, p 211 (1906)

(b) The person entitled to a "vested remainder" has an immediate fixed right of future enjoyment that is an estate in possession, though it is only to take effect in possession and permanency of profits at a future period. 2 Couch Dig 401

(5) Vested estate examples of

If land be given to

(a) "A for life, remainder to B." Here the estate given to B is a vested estate for B owns the part of the estate of A drops. B's estate takes effect in possession. So the enjoyment by B of the estate given to him is postponed until the happening of a particular event, on which it is expectant. Goodwe, p 211 (1906)

(b) "A for ten years, with remainder to B." Here, as is mentioned in the 1st illustration, B's estate takes effect, after the enjoyment by A, of the estate for ten years. (Ibid)

12. "Whether for life."

(1) Definition of life estate

A is an estate held during the subsistence of a life or lives. Co Litt 41 b Chattrin R P 111

(2) Life-estate—Two kinds

The life for which the estate is held may be either that of the person to whom the grant is made, or it may be the life of some other person, or even the lives of several persons...
12.—"Whether for life"—(Concluded).

(3) Life-estate, examples of.

(a) The most ordinary form of "limitation" in respect of a life-estate is "To A for life." Goodove, p. 33 (1897), 4th Ed.

(b) Another kind of "limitation" in respect of the creation of a life-estate is "To A for the life of B." Here the estate given to A subsists as long as B lives and the estate drops as soon as B dies. (Ibid.)

(4) Vested life-estate, example of.

Where the settler introduces the following 'limitations' in the settlement (viz., "To A, remainder to D for life") the life-estate given to B is a vested one, because it takes effect (i.e., B comes into enjoyment of property after the death of A. Goodove, p. 240 (1897), 4th Ed.

13.—"Or of a greater or less description."

(1) Estates of greater description than an "estate for life"—English Law.

(a) Under the English Law, "estates of inheritance" are bigger than an "estate for life." By the term "estates of inheritance," is meant those estates which are descendible to the heirs of the grantee, unlike the "life-estate" which could be enjoyed by the grantee only during his life and which are not descendible to his heirs. See pp. 82 and 33 of Goodove (1897), 4th Ed. and Co. Litt. 1 b.

(b) Such "estates of inheritance," are of two kinds (viz.) "estates in fee simple" and "estates tail." Goodove, pp. 81 and 60 (4th Ed.) (1897).

N.B.—Under the English Law, special technical words must be used to create "estates in fee simple" and "estates in fee-tail" or (as it is generally called) "estates tail." Such technical words are called "words of limitations." As to those "words of limitation," see pp. 60, 81, 82, Goodove (1897). (R.P.)

(2) Estates of less description than a "life-estate"—Examples of.

(a) Such estates are "estates less than freehold." Goodove, p. 151 (1897), 4th Ed.

(b) (i) The most ordinary form of an estate which is of a less description than a life-estate, is, what is termed "an estate for years." Goodove, p. 158 (1897), 4th Ed.

(ii) An estate for years is "a contract for the possesses of lands or tenements for some determinate period; and it takes place where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon," Vol. ii, Co. Litt. 43 b.

(c) Where the settlor introduces the following "limitations" in a settlement (viz.), "To A, remainder to B for ten years," the estate given to B under the settlement is a vested one, since the enjoyment of it is postponed till after the death of A and it is less than a "life-estate," since it is only a "term of years" granted to B. Goodove, p. 240 (1897).
Act XXVII of 1866 (INDIAN TRUSTEE ACT).

14.—"In possession."

"Estate in possession," definition of—Example.

(a) An estate in possession is one conferring an immediate right to present enjoyment. Gooden, p. 297 (1897), 4th Ed.

(b) Where land is limited to "To A for life," A acquires an estate in possession and he has got a present right to present enjoyment. (Ibid.)

15.—"Futurity or expectancy in any immovable property."

"Estate in expectancy," definition of—Example.

(a) An estate in expectancy is one conferring a right to enjoyment at a future time. Gooden, p. 297 (1897).

(b) Where an estate is limited to "A for life, remainder to B for life," B's estate is an "estate in expectancy" since B comes into enjoyment of the property at a future time (i.e.) after the dropping of the prior life estate of A. Gooden, pp. 228 and 210 (1897).

16.—"'Contingent right'...property."

(1) "Contingent"—meaning of.

(a) An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain. Fearn C.R. p. 2.

(b) A "contingent remainder" is one which will not come into effect on the determination of the "particular estate" on which it is expectant, unless some event which may or may not happen, does happen before, or simultaneously with, such determination. In other words, it is subject to a condition precedent. Fearn C.R. p. 2.

(2) Contingent right—Nature of.

A person entitled to a contingent remainder has no present right of property, His right cannot arise until the condition is performed, or, the estate commences at a future time in interest as well as in possession. Gooden R.P., p. 241 (1897).

17.—"'Contingent or executory interest."

(1) "'Executory interest," nature of—English Law.

(a) At common law the land itself could not be devised. But the Statute of Wills (32 Hen. VIII C.1) enacted that the land itself (i.e., the legal estate) could be devised by will. Devises of this nature which take effect in derogation of the rules of common law are called "executory devises." Farington v. Dart, Y.B. 9 Hen. VI at 24 b.

(b) The term "executory devise" properly indicates the mode in which the interest is created; but it is commonly used to indicate the interest itself. Challis R.P. 65, 66.

(c) The earliest instance of an "executory devise" occurred in the case of directions given by testators that their executors should sell their tenements, Farington v. Dart, Y.B. 9 Hen. VI at 24 b.
18.—"Or possibility...ascertained."

Executory devises—Possible, not actual, events considered.
(a) Under English Law, in the case of all executory limitations, possible, and not actual events are alone considered. *J. v. Audley*, 1 Cox. 321.

(b) If land be limited to "A and his heirs, remainder, on failure of the issue of B, to C and his heirs," it is evident that, though the issue of B may fail in the life-time of A, it possibly may not fail for centuries; and during that period the property would be maintainable, inasmuch as A or his heirs cannot bar or destroy the interest limited to C, as it is an executory devise. *Goodev* p. 287 (1897).

J9.—"A right of entry...vested or contingent."

(1) Alienability of rights of entry—English Law.
Under the Real Property Act, 1845 (8 and 9 Vic., C. 106, S. 6), a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure may be disposed of by deed.

(2) Provision for right of entry.
In ordinary leases, it is usual to stipulate an express provision for a right to re-enter on non-payment of rent. *Elphinstone’s Introduction*, p. 230; see p. 172, Goodeve (1897).

20.—"Convey and conveyance...necessary or suitable assurance...together with...formalities... conveyance."

(1) The words "convey" and "conveyances." when used.
The words—-are popularly used in regard to "assurances" generally, whether of "freehold" or "leasehold"—*Goodeve*, p. 375 (1897).

(2) Several modes of "conveyance" or "assurance" under English Law.
In England, various modes of "assurances" have, from time to time, been adopted for transferring land from one person to another. *Goodeve*, p. 364 (1897).

(3) Ancient mode of conveyance.
(a) The most ancient mode of conveyance by a subject was, what is known as, a "feoffment." *Burton*, Comp. Ch. I. S. 1.
(b) As to how a "feoffment" is usually made in England, see *Goodeve’s R.P.* (1897) p. 361.

(4) Modes of "assurances" under the English Law.
The most important of the several modes of conveyances under the Law of England are—
(i) "Feoffment"—see notes, supra.
(ii) "Grant" (i.e.) a deed unaccompanied by "livery of seisin." This form of conveyance was applicable only to "incorporal hereditaments," which are said to "be in grant and not in livery." *Co. Litt. 172 a; 4 Byth. and Jarm. 105; 2 Sand. Us. 29.
(iii) "Release" (i.e.), the conveyance of a man’s interest or right (which he has to a thing, to another, who has possession thereof, or some estate therein. *4 Cruise Dig. 77; Challis R.P. 375.*

N.B.—Such "release" should be evidenced by "deed." *Co. Litt. 264 b.*
20.—"Convey and conveyance—necessary or suitable assurance—together with—formalities—conveyance."—(Concluded).

(iv) "Lease and release."—As time advanced, the inconveniences involved in the ancient modes of transfer were keenly felt by the public and several devices were invented to obviate the difficulties; one of them being the conveyance known as "Lease and release." The process is this. A lease is made to the person to whom the land is to be conveyed; and after he had entered into possession under his lease, a "Release" is executed to him of the "foe." He thus acquires an estate "in fee" as effectually as if a regular conveyance had been made to him. Co. Litt. 270 a. See 2 Sand. Us. 74; 4 Cruise. Dig. 115; Williams R.P. 154, 194.

(v) Assignment of leases—which by the Real Property Act (1845), must be by deed. 8 and 9 Vic., C. 106, S. 3.

(5) Formalities to be observed in respect of the several "assurances."

As to ——, see pp. 364 to 380. Goodove (1897).

21.—"Tenants-in-tail."

(1) "Estate tail," nature of.—English Law.

An "estate tail" is an "estate of inheritance." It devolves upon successive owners in a course of descent; but it descends only to the heirs who issue from the body of the original donee. 4 Cruise. Dig. 51 (S. 33).

(2) Estate tail, how created.

The technical "words of limitation" generally used for creat of such an estate are "heirs of the body of A." For example if an estate tail be limited to "A and the heirs of his body," the estate descends successively to the lineal descendants issuing from the body of A (the donee). See pp. 60, and 61, Goodove (1897).

(3) Divisions and sub-divisions of "estate tail."

See p. 61, Goodove (1897).

(4) Tenant-in-tail after possibility of issue extinct.

Where a limitation is in "tail special," as for instance "To A and the heirs of his body by his wife M," it may happen that, under given circumstances, it becomes impossible that there should be any issue (heir of the body of the donee in tail) of the prescribed class (s. e.), the donee A may not beget an heir by his wife M, and the wife may die leaving no issue. In such cases the tenant-in-tail is termed "tenant-in-tail after possibility of issue extinct." Co. Litt. 27 b; Challis B. P. 361, 263.

22.—"Including the acts...provisions of Act XXXI of 1854."

(1) Disposition by tenant-in-tail, how effected.

Every tenant-in-tail or other owner of an estate of inheritance less than an estate in fee-simple, either at law or in equity, in any lands or hereditaments shall have power to dispose of, or to enlarge into an estate in fee simple by any deed declaring an intention so to dispose of the said lands or to enlarge his estate therein. See 2 of Act XXXI of 1854.

(2) Disposition by married woman—Acts, etc., to be performed for validating the transfer.

For the acts to be performed and the formalities to be gone through, for validating any disposition by a married woman, See Ss. 3 to 12 (both inclusive) of Act XXXI of 1854.
23.—"The words 'trust' and 'trustee'...constructive trusts.'"

(1) Trust, definition of.

See S. 3 of Indian Trusts Act and notes thereto.

(2) "Implied" and "constructive" trusts, definitions of.

For definition of——, see notes on S. 3 of the Indian Trusts Act (11 of 1882).

(3) Constructive trusts—Cases where such trusts are raised.

For cases——, and other details in connection therewith, see Ss. 87 to 91 (both inclusive) of the Indian Trusts Act and notes thereto.

24.—"Heir shall mean...deceased person.'"

(1) Heir—Conception of the term—English Law.

According to the Law of England, no inheritance can vest, nor can any person be the actual heir of another till the ancestor is previously dead. Before that time, the person who is next in the line of succession is called an "heir apparent" or "heir presumptive." 2 Blackstone 208.

(2) "Heir apparent" distinguished from "heir presumptive"—English Law.

"Heirs apparent" are such, whose right of inheritance is indefeasible provided they outlive the ancestor. While "heirs presumptive" are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born. 2 Bl. 208.

25.—"Not as heir...laws concerning devise and descent.'"

(1) Rules or canons of descent—English Law.

The rules of descent in England had been the same for about 400 years, when Lord Hale reduced them to a series of canons. These rules as modified subsequently by the Inheritance Act (1833, 3 and 4 Will. 4, C. 106) still prescribe the course of descent in England. See pp. 143, 144 of Goodeve (1897).

(2) Such canons of descent seven in number.

For enumeration of the canons and other details in connection therewith, see pp. 144—150, Goodeve (1897).

26.—"Mortgage shall...security for money.'"

Mortgage, definition of.

For the definition of a "mortgage of immovable property," see S. 58 of Act IV of 1882, and compare.

3. The powers and authorities given by this Act to the High Courts shall and may be exercised only in cases to which English law is applicable 1, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively 2.
Scope and effect of section.

(a) Sec. 3 of the Indian Trustee Act which provides that the power and authority given by the Act to the High Court shall be exercised only "in cases to which English Law is applicable, cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. 5 B. 154.

(b) The cases referred to in the section must be cases to which English Law is, in some measure, applicable, but in what measure, is not indicated in the Act. (Ibid.)

(c) English Law must be regarded as applicable in the sense intended if the principles recognised by the English Equity Courts are applicable. (Ibid.)

1. "The powers and authorities to which the English law is applicable."

(1) Establishment of Supreme Courts in India—Effect of, on the administering of Law in India.

(a) At the date of the grant of the Charter for establishment of supreme Courts in India, English Equity had become a system which would deal with a body of quasi-common law in a scientific manner, and in obedience to known and uniform rules. 5 B. 154.

(b) When it applied its method to the determination or constitution of a right, even based on Hindu and Mahomedan Law, it administered English Law. (Ibid.)

(c) In this sense "English Law" was applicable at the date of the passing of the Indian Trustee Act, 1868, to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity. (Ibid.)

(2) Trusts in Hindu and English Law—How Courts give effect to them.

(a) Trusts are recognised in the Hindu as well as in the English system of Law. But, while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trusts. 5 B. 154.

(b) If the Court is called upon to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of the trustee and the rights of beneficiares, it is governed by the rules of English Equity. There are no others that it can apply. (Ibid.)

(c) In meeting an exigency or in taking cognizance of a form of right, not directly provided for in the Shastras, the Court in exercising its jurisdiction under S. 41 of the Charter Act of 1828, may apply Hindu Law. But, taking Hindu Law as one of its data, it applies "English Law" also in the form of equity to all or nearly all the questions that arise. (Ibid.)
2. "May be exercised... said Courts respectively."

Hindu Trusts—Powers of High Court under the Indian Trustee Act in respect of.

In the case of Hindu Trusts, it is competent to the High Court to exercise summary powers conferred upon it by the Indian Trustee Act (XXVII of 1886). 5 B. 154.

4. When any lunatic or person of unsound mind shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance of the property in the same manner for the same estate.

5. When any lunatic or person of unsound mind shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right or disposing of the same to such person or persons as the said High Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

(Note).

1.—"Shall be entitled to any contingent right."

See notes on S. 2, supra.

6. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to anything in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest, in respect thereof;

and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities, or thing in action, upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, either in such person or persons so jointly
entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said High Court may appoint.

7. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when anything in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof in any person or persons the said Court may appoint.

8. Whenever any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate.

9. Where any minor shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct, and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

(Note).

1. "Where any minor...contingent right."

See notes on S. 2, supra.

10. When any person solely holding any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate.
(Note).

1. — "For the same estate."

See notes on S. 2, supra.

11. When any person or persons shall hold any immovable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate. ¹

(Note).

1. — "For the same estate."

See notes on S. 2, supra.

12. When any person solely entitled to a contingent right in any immovable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

(Note).

1. — "Contingent rights of trustees."

See notes on S. 2, supra.

13. When any person jointly entitled with any other person or persons to a contingent right in any immovable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.
14. Where there shall have been two or more persons jointly holding any immovable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate.

15. Where any one or more person or persons shall have held any immovable property upon any trust, and it shall not be known, as to the trustee last known to have held such property, whether he be living or dead, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance of the property in the same manner for the same estate.

(Note).

1.—“Executed a conveyance of the . . . estate”

For notes on “conveyance” and “estate,” see S. 2, supra.

16. When any person holding any immovable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate.

(Note).

1.—“It shall not be known . . . devisee.”

Heir, definition of.

See notes on S. 2, supra.

17. When any immovable property is subject to a contingent right in an unborn person, or class of unborn persons, who, upon coming into existence, would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right, in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would, upon coming into existence, hold in such property.
18. In every case where any person holds or shall hold jointly or solely any immovable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly-authorized agent of such last-mentioned person, requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey the said property for the space of twenty-eight days after such demand, to make an order vesting such property in such person or persons, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right, in the same manner and for the same estate.

19. When any person to whom any immovable property has been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance or vesting of such property, then in any of the following cases it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, that is to say,—

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court, or cannot be found:

when an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such property, or a duly-authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered to him by a person entitled as aforesaid, or a duly-authorized agent of such last-mentioned person:

when it shall be uncertain which of several devisees of such mortgagee was the survivor:
when it shall be uncertain as to the survivor of several devisees of such mortgagee or as to the heir of such mortgagee, whether he be living or dead:

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died, and it shall not be known who is his heir or devisee:

and the order of the said High Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance of the property in the same manner and for the same estate.

(Notes).

N B.—See notes on S. 20. infra.

1.—""After a proper deed tendered.""

Conveyances under the English law.

See notes on S. 2, supra.

20. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient to make an order appointing a person to convey such property, or lease or dispose of such contingent right;

and the conveyance, or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act.

In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer, or join in transferring, the stock to the person or persons to be named in the order:

and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto.
1. "Power to appoint person to convey in certain cases."

Persons out of jurisdiction and under other disabilities—Court's power to appoint person to convey property on behalf of.

(a) Where property has been, by an order of Court, directed to be sold, and where some of the parties interested in such property are out of the jurisdiction, married women, or minors, and the place of abode of others of them is unknown, the Court, upon petition, under the Indian Trustee Act appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into, 7 C. 32.

(b) But the Court cannot make an order with respect to the interest of a party who has not been served, and who has not entered appearance. (Ibid.)

21. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the High Court, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint.

When any sole trustee of any stock, Government securities, or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

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

23. Where any one of the trustees of any stock, Government securities, or thing in action, shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by such person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, in the other trustee or trustees of the said stock, Government securities, or thing in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

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

25. Where any order shall have been made under this Act vesting the right to any stock or Government securities in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names or otherwise, or relating to the receipt of the dividends, interest, or income thereof, to the extent and in conformity with the terms of such order.
All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and they would have been indemnified in complying with the requisition of such person or persons so appointed as the person in whose place such appointment shall have been made.

After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock or Government securities, or the payment of the dividends, interest, or income thereof.

(Notes).
1. "Where any order...Government securities."

(1) Yest, meaning of.
   See notes on Sec. 2, supra.

(2) Distinction between "Yested" "...and contingent."
   See notes on Sec. 2, supra.

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

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

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

29. When any order being or purporting to be under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities, in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly:

and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names or otherwise, to the extent and in conformity with the terms of the order.

All companies and associations, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

30. When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof.
When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

31. When a decree or order shall have been made by the High Court directing the sale of any immoveable property for the payment of the debts of a deceased person, every person holding such property, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act 1:

and the High Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

(Note).

I.—"Shall be...meaning of this Act."

Trust for payment of debts.

For detailed notes in respect of particulars in connection with ———, See notes on Ss. 11, and 15 of Indian Trusts Act (II of 1889).

32. When any decree or order shall have been made by the High Court, whether before or after the passing of this Act, directing the sale of any immoveable property for any purpose whatever, every person holding such property, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act 1.

In every such case, it shall be lawful for the High Court, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct.

Every such order shall have the same effect as if the person so holding or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such property for such estate.
Trustees for sale.

As to liabilities and disabilities, &c. of —— See notes on Ss. 4, 11, 22, 37 to 39, 52 and 53 of Indian Trusts Act (II of 1883).

33. Where any decree or order shall be made by the High Court for the specific performance of a contract concerning any immovable property, or for the partition or exchange of any immovable property, or generally when any decree shall be made for the conveyance of any immovable property, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit, wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act.

Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court might, under the provisions of this Act, make concerning the estates, rights, and interests of trustees born or unborn.

34. It shall be lawful for the High Court to make declarations and give directions concerning the manner in which the right to any stock, Government securities, or thing in action vested under the provisions of this Act shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

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

(Notes).

General.

Nature and source of section.

*(a) The Act (XXVII of 1866) S. 35 is analogous to the English statute 13 & 14, Victoria Chapter 60: The terms of the section are almost identical with the terms of S. 32 of the English Act. 6 N.W.P. 54 (56).

(b) In cases to which English Law is applicable, Courts in India although they may not be bound to accept the rulings of the highest Courts in England, cannot but regard such rulings as important authorities. (Ibid.)

I.— "Power to Court to make order appointing new trustees."

*(1) Appointment of new trustees—Rules.

See notes on Ss. 60, 73 and 74 of the Indian Trusts Act.


*(a) Where an application was made to the High Court, under S. 35 of Act XXVII of 1866 for removal of certain trustees under a will on the grounds inter alia of non-payment of legacies, misappropriation, waste and breach of trust, it was held that matters mentioned above are much too grave to be disposed of on a mere application. 6 N.W.P. 54 (56).

(b) Where, in such cases, there is also opposition for the appointment of new trustees, the applicant should be referred to a regular suit. (Ibid.)

(c) The Court of Chancery in England has considered the scope and effect of the corresponding section in the English Act and has held that the Court cannot under that section remove a trustee who is willing to act, and that if there be ground for removing a trustee for misconduct or other causes, the application to Court should be by bill. (Ibid.)

2.— "Powers of new trustees."

See notes on Ss. 73 and 75 of the Indian Trusts Act (II of 1882).

36. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any immovable property subject to the trust shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees, for such estate as the Court shall direct.
Such order shall have the same effect as if the person or persons, who, before such order, was or were the trustee or trustees (if any), had duly executed all proper conveyances of such property for such estate.

1. "That any immoveable property... for such estate shall direct."

Yielding of trust property in new trustees.

See notes on § 75 of the Indian Trusts Act (Act II of 1882).

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

1. "Power to Court to vest right to sue in new trustees."

See notes on § 75 of the Indian Trusts Act (II of 1882)

38. Any such appointment by the High Court of new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

1. "Old trustees not discharged from liability."

See notes on §§ 73 and 75 of the Indian Trusts Act (II of 1882).

39. An order under any of the hereinbefore contained provisions, for the appointment of a new trustee or new trustees, or concerning any immoveable property, stock, or Government securities, or thing in action subject to a trust, may be made upon the application of any person, 1 beneficially interested in such immoveable property, stock, Government securities, or thing in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and an order under any of the provisions hereinbefore contained, concerning any immoveable property, stock, Government securities, or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage.
1. — "An order for appointment of new trustee, may be made upon the application of any person."

(1) Application for new trustees.

See notes on S. 74 of the Indian Trusts Act, (II of 1882).

(2) Trustees for partnership business—Close of partnership business and sale thereof by new trustee appointed—Deed of transfer by new trustee to vendee.

On the closing of a partnership business subject to a trust, the shareholders appointed a new trustee to sell the business, who accordingly sold it to B. In the meanwhile, the old trustees had left the country. Where an application with consent of all parties was put in that a might sign the deed of conveyance to B, it was held that it was necessary to show that the old trustees had no lien on any other property in the business before the order asked for could be made. In the matter of Fort Gloucester Mills Co, v. Bowste, O.C. 260.

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

1. — "Application may be by petition."

(Note).

See Notes on S. 74 of the Indian Trusts Act (II of 1882).

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

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

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

44. Whenever any order shall be made under this Act by the High Court for the purpose of conveying any immovable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee or an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the High Court, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir, or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died, and it is not known who is his heir or devisee, then in any of such cases the facts that the High Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of Civil Judicature upon any question as to the legal validity of the order:

Provided always that nothing herein contained shall prevent the High Court directing a re-conveyance of any immovable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such property or contingent right, to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

45. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immovable property, stock, Government securities, or thing in action in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court.

46. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immovable property, stock, Government securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then
depending concerning such money, or, if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court;

and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable.

47. Where, in any suit commenced or to be commenced in the High Court, it shall be made to appear to the Court that diligent search and enquiry have been made, after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared at the hearing of such cause:

Provided always that no such decree shall bind, affect, or in any wise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

48. Every order to be made under this Act, which shall have the effect of a conveyance of any immovable property, or a transfer of any such stock, Government securities, or thing in action as can only be transferred by stamp-deed, or for the transfer of which a stamp is necessary, shall be chargeable with the like amount of stamp-duty as it would have been chargeable with if it had been a deed executed, or a transfer made, by the person or persons holding such property or entitled to such stock, Government securities, or thing in action.

Every such order shall be duly stamped for denoting the payment of the said duty.

49. The High Court may order the costs and expenses of and relating to petitions, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immoveable or moveable property, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper.
50. Upon any petition being presented under this Act to the High Court concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs.

Such order shall have the same effect as the like order made under section 1 of Act XXXIV of 1858 (to regulate proceeding in Lunacy in the Courts of Judicature established by Royal Charter), and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making enquiry under the last mentioned Act.

The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.

51. Upon any petition under this Act being presented to the High Court, it shall be lawful for the said Court to postpone making any order upon such petition, until the right of the petitioner shall have been declared in a suit duly instituted for that purpose.

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

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

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