THE

TRUSTEES' AND MORTGAGEES' POWERS ACT.

ACT XXVIII OF 1866.

Received the G.-G.'s Assent on the 24th October 1866

An Act to give Trustees, Mortgagees, and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages, and Wills, and to amend the Law of property, and relieve Trustees.

Whereas it is expedient that, in cases to which English law is applicable, certain powers and provisions usually inserted in settlements, mortgages, wills, and other instruments, should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved. It is enacted as follows.—

(Note).

I.—"Estates of the persons interested."

Estates in English Law—Their creation—"Words of Limitation" necessary for their creation.

See S. 2 of the Indian Trustee Act (XXXVII of 1866).

Interpretation-clause.

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

"Immoveable property" shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth.

"Mortgage" shall be taken to include every instrument by virtue whereof immoveable property is in any manner conveyed, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt.

"Mortgagor" shall be taken to include every person by whom any such conveyance, pledge, or charge as aforesaid shall be made:
"Mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, pledge, or charge as aforesaid is made or transferred, and

"High Court" means any Court established or to be established under Statute 24 and 25 Vic., cap. 104, and includes the Chief Court of the Panjab.

(Notes).

I.—"Immoveable property... land."

N. B.—See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

(1) Definition of immoveable property.

The definition, given in the section is taken from the General Clauses Act, S. 3 (Act X of 1897).

(2) Land—Significance of the word—English Law.

(a) The popular sense of the word "land" is not so extensive as its legal meaning, which includes not only the mere surface soil, but all above and below it. Goddard R. P. p. 9 (4th Ed.).

(b) By the grant of the land or ground itself all that is supra, as, houses, trees, and the like, is granted; and also all that is infra, as, mines, earth, clay, quarries, and the like. Shep. T. 90.

(c) A structure on the land, as a house, or trees growing out of it, are legally included under the term "land," and so is everything lying beneath its surface, as ores, fossils, mines, etc. Allaway v. Waystaff, 4 H. and N. 307; A. v. Tomlins, 5 Ch. D. 750.

(d) (i) Where land is covered by water and where the owner of the land makes a grant thereof to another, the grant cannot pass a right to the water, for "there is no property in water." 2 Bl. 18.

(n) "Water is a moveable wandering thing, and must of necessity continue common by the law of nature, so that one can only have a temporary transient usufructuary property therein, wherefore, if a body of water runs out of one's pond into another man's, he has no right to reclaim it, but the land which that water covers is permanent, fixed, and immoveable, and, therefore, in this he may have a certain substantial property of which the law will take notice and not of the other. 2 Bl. 18. See, also, Co. Litt. 4 a and 4 b.

(c) But a grant of the land carries with it all rights in respect of the use of the water, subject to such rights, if any, as are vested in third persons. While a grant of water, without the land covered by it, passes a right of fishery only. 4 Cruise Dig., p. 268.

(3) Extensive meaning of the word "land" sometimes cut down by context.

(a) Where "land" is spoken of in plain contradistinction to houses, it will not be taken to comprise other things. So, mines lying under a piece of land may be excepted out of a conveyance of such "land." Shep. T. 94.

1.—"Immoveable property...land"—Concluded.

(b) On the other hand, under a gift or grant of a "house," or, of a "messuage," land commonly occupied with it will not pass unless immediately annexed to and enjoyed with the house, as outbuildings, orchard, garden, and curtilage (or courtyard). (Ibid.)

(4) Purchase of land by Railway Companies—what passes under the purchase.

Where a Railway Company purchases land under the Railways Clauses Consolidation Act, the Company is not entitled to the minerals unless expressly purchased, and minerals are deemed to be excepted out of the conveyance unless expressly named and conveyed. 8 and 9 Vic.C. 20, S. 77.

(5) Significance of the word "land" under statutes.

(a) Under Conveyancing and Law of Property ACT 1881.

Under—unless a contrary intention appears, the word "land" includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings. 44 and 45 Vic. C. 41, S. 2. L

(b) Under Acts passed after the year 1850.

In every act passed after the year 1850, the expression "land" shall, unless the contrary intention appears, include messuages, tenements, and hereditaments, houses and buildings, of any tenure. Interpretation Act 52 & 53 Vic. C. 63, S. 3.

2.—"Any benefit to arise out of land."

(1) Scope of the expression "land" under English Law.

Under the English Law, the expression "land" includes all that would be "real property" and possibly many things which are in the nature of benefits or rights arising out of land, such rights being termed "incorporeal rights". 17 B.L.R. 254 (P. C.)

(2) Toda giras hak, included in the conception of immovable property.

Toda giras hak, which is a right to receive an annual payment, and which attaches to the mandar into whose hands the village may pass, is an interest in immovable property and as such it is a benefit which arises out of land. 8 M.I.A. 1, 23 A. 209; N. W. P. H. C. B. (1867) 63 (F.B.)

(3) Haq-i-chaharum, an incident attaching to land.

Similarly—liability to pay customary dues is an incident attaching to land and where the land is alienated, it can be enforced against the vendee unless it is limited to right available only as against the vendor. 13 B.L.R. 254 (P.C.).

(4) Allowances charged on immovable property.

Annual—are included within the definition of immovable property. 23 B. 22.

(5) Hereditary offices—Hindu Law.

Under the Hindu Law, hereditary offices are considered to be immovable property. 9 B.H.C.R 99; 13 B.L.R 254 (P.C.).

(6) Interest of "widow" in immovable property—Hindu Law.

Under the Hindu law, the life interest of a Hindu widow in the income of her husband's immovable property is construed as immovable. 23 B. 1.
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2.—“Any benefit to arise out of land”—(Continued).

(7) Hat, a benefit arising out of land.

(a) A hat is—and as such it is included in the notion of immovable property. 22 C. 752. T

(b) So, a lease of a hat must be made as provided in S. 107 of the Transfer of Property Act (IV of 1882). (Ibid.) U

(8) Other examples of benefits, construed as immovable property.

Rights of common, rights of way, and other profits in alieno solo, rents, pensions, and annuities secured upon land would fall within the term “immovable property.” Gour’s Tr. Pro. Act, p. 37, Vol. I. V

(9) Claim to maintenance, if included in the notion of immovable property.

A claim to maintenance, if charged on the family property of the person against whom it is claimed, is a species of property 21 B. 397. W


(a) Bombay High Court.

In cases decided under the Code of Civil Procedure (Act XIV of 1882), a debt secured by a mortgage of immovable property has been regarded as moveable property, because it is a “debt not secured by a negotiable instrument” within the meaning of S. 263 of the Code. 10 B. 444; 19 B. 121; 21 B. 236; 4 Bom. L. R. 18 (S. C.); 26 B. 305; 9 B. 64. X

(b) Calcutta High Court.

(i) In one case the High Court observed thus:—“A mortgage is not a mere debt, it represents a substantial interest in the mortgaged property viz., the right of selling it under certain conditions in realization of the debt.” In this case, it was held that such a debt fell into the category of immovable property. 9 C. 511. Y

(ii) But the High Court held contra in the following subsequent cases:—12 C 546; 20 C. 895, 23 C. 150, 5 C. W. N. cviii; 6 C. W. N. 5. Z

(c) Madras High Court.

The view of the Madras High Court is similar to the earlier view taken by the Calcutta High Court. Their Lordships of the Madras High Court observed “regarded as a debt, it is undoubtedly moveable property, but seeing that a debt is made a charge on land, we cannot say that it is not a benefit to arise out of land” within the meaning of the General Clauses Act (X of 1897), and we are constrained to hold that it is immovable property. 9 M. 5; following 9 C. 511; 6 N. W. P. H. C. R. 129; 1 A. 348; 9, B. H., C. R. 64; 10 M. 109. A

N.B.—But see 18 M. 497.

(d) Allahabad High Court.

View similar to that of the Calcutta High Court taken in the later cases prevails in Allahabad. That is, a debt secured by a mortgage of moveable property, has been held to be, in its nature, a moveable property. 13 A. 89; 15 A. 134. B
2.—"Any benefit to arise out of land"—(Continued).

11) **Mortgage decree, if included in the conception of immovable property.**

   (a) A mortgage decree is not included in the term "immovable property." 9 A. 108 (F.B.).

   (b) So, it was held that, since a mortgage decree does not *in itself* purport or operate to create any right, title or interest, in immovable property an assignment thereof by one person to another need not be registered under the Registration Act. 13 A. 89; 23 C. 450, dissenting from 1 B. 267.

12) **Mortgaged property—Equity of redemption, if construed as immovable property.**

   (a) **Equity of redemption, nature of—English law.**

      (i) At Common Law, a mortgagor was bound to repay the mortgage money to the mortgagee on the appointed day mentioned in the instrument of mortgage. Under the Common Law the mortgagor had no legal right to redeem except upon payment on the day named in the "proviso for redemption," and if default was made in payment on that day, the estate was considered to belong to the mortgagee absolutely. See Goodenough pp. 196, 197, 200 and 201 (1897).

      (ii) This stringent rule of the Common Law was mitigated by equity, for was considered that the enforcement of such a rule worked a serious hardship on the mortgagor, because equity said that the mortgagee had possession of the mortgaged property, merely as a security for the money lent and for nothing more. So, since the time of James I in England, the rule was established that, although the mortgagor makes default in payment of the money advanced to him on the appointed day mentioned in the "proviso for redemption, he has a right to pay the money to his creditor (mortgagee), provided he comes within a reasonable time after default is made." This right of the mortgagor, is called "the equity of redemption," because it was only through the instrumentality of equity, that he had got the right. See pp. 201 and 202, Goodenough’s R.P. (1897).

   (b) **Equity of redemption is immovable property.**

      (i) The "equity of redemption" in mortgaged property is considered as immovable property. *Casburne v. Scarfe*, 1 Atk. 603.

      (ii) An "equity of redemption" has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a "settlor." The person, therefore entitled to the "equity of redemption" is considered as the owner of the land. *Per Hardwark L.C. in Casburne v. Scarfe*, 1 Atk. 603; see, also, 18 B. 730, 21 B. 226, 22 C. 333; 18 C. 164 (P.C.); 1 A. 240; 8 A. 705, 4 M. 203; 8 M. 246.

   (N.B.)—But see 3 A. 682; 4 A. 196; 8 B. 403; A W.N. (1885) 155.

13) **The following have been held to be included in the conception of immovable property.**

   (a) A claim to an easement. 24 W.R. 300.

   (b) A right of ferry. 13 M. 54.
2.—"Any benefit to arise out of land"—(Concluded).

(c) A right of fishery. 3 C. 276; 20 C. 446; 24 C. 449.
(d) A right to open a water-course. 4 W.R. 107.
(e) A right to hold land rent-free. 11 B.H C.R. 1; 3 A. 40.
(f) A right for maiškana. 5 C. 921; 9 A. 591.
(g) A right to possession and management of saranjam. 15 B. 247. H to J

(14) The following have been excluded from the category of immoveable property.

(a) a right to customary dues of an hereditary office. 22 M. 351.
(b) a right of a purchaser to have lands registered in his name. 19 B. 43. K

3.—"Things attached...anything which is attached to the earth."

(1) Meaning of the expression "attached to the earth."

The expression,—means

(a) rooted in the earth, as in the case of trees and shrubs;
(b) imbedded in the earth, as in the case of walls or buildings; and
(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Sec S. 3 of Act IV of 1882. L

(2) General rule in respect of things attached to the earth.

As a rule, what is affixed to the soil, becomes, in the contemplation of law a part of it, and is subjected to the same rights of property as the soil itself. Gour’s Transfer of Property Act Vol I, p. 42. M

(3) Trees and shrubs, if immoveable property.

(a) As trees and shrubs are rooted in the earth, they are considered to be attached thereto, and so long as they are so attached, they are construed as immoveable property and form part of the soil to which they are affixed. 23 A. 291 (F.B.), 23 A. 126, 13 M. 15. N

(b) But they lose their character immediately on severance. Re Ausley, 30 Ch. D. 485, Re. Llewellyn, 37 Ch. D. 324. O

(c) So long as such trees and shrubs are not cut, they are prima facie to be taken as passing with the land on which they are grown. 2 N.W.P.H C. R. 351. P

(d) So, where a certain house (with its compound) was sold it was held that the conveyance comprised the trees growing in the compound at the time, unless they were expressly excepted. (Ibid.) 24 A. 294. P1

(∗) Where a mutwalli of a shrine planted fruit-trees on land, which admittedly belonged to the tribe, and where a creditor of the mutwalli having obtained a money decree against him sought to attach the trees in execution thereof it was held that, (i) although the predecessor of the judgment-debtor planted the trees while acting as mutwalli, he could not acquire any property in the trees in so doing apart from the land (ii) that, although the mutwalli who originally planted the grove, and his successors might have derived some benefit by taking the fruits of the trees, they could not acquire any right of ownership in the trees as against the shrine and (iii) that consequently, such trees, until the contrary is established, belonged to the shrine to which the land belonged. 16 B, 547. Q
3.—“Things attached...anything which is attached to the earth”

—(Continued.)

(f) Similarly where a tenant plants trees on his holding, he cannot acquire any right to sell or otherwise dispose of them at any rate beyond the term of his own tenancy. 10 A. 159, 21 A. 207, 23 A. 211, 22 C. 742.

(g) Where a tenant holding land for a term only hypothecates trees standing thereon, the benefit of the hypothecation would accrue to the encumbrancer only for the term of the tenancy and would cease to be enforceable with the cessation of the tenancy and tenant’s ejectment. 3 A. 567, 2 A. 896; I N. W. P. H. C. R. 213.

(4) Things attached to the earth—Conveyance, effect of.

(a) Trees and shrubs being attached to the soil pass by a conveyance without any express mention. Willis, P. P. (15th Ed.) 193.

(b) But, if under the conveyance they are reserved and excepted, the law considers them to have been severed from the soil on which they grow, and they would then cease to be immovable property. Harlan’s case, 4 Rep. 63 (b).

(c) Where, under a yoddast, a grant was made to a “to cut and enjoy the trees, etc., and the grass, korai, bamboo shoots, from this day till the close of Paish 1304,” it was held that what was granted was not a mere lease of existing things but also, of what might grow on the ground within the period named, that is, of an interest in immovable property, inasmuch as it was contemplated that the vendee should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land. Marshall v. Green 1 C. P. C. 35.

(d) Where a document creates a right of use over growing trees for a term of years, it was held that the effect of the document was to create an interest in land, and not only in the forest produce which it purports to lease. 12 M. 203. (F.B.).

(5) “Emblements” under English Law, if things attached to the earth.

(a) Emblements, what are.

The term “emblements” is used to designate the growing crops cultivated by the labor, and at the cost of the tenant in possession, which are treated in law for many purposes as moveable chattels, and as the personal property of the tenant, because his intention in cultivating them is to increase his personal estate rather than to benefit the heir or successor to the land. Leake Us. and Prof. p. 44.

(b) What are included in emblements.

(i) The class of things thus designated includes the annual crops of corn and grain, hemp and flax, hops, potatoes, turnips, and the like, clover and artificial grasses. (Ibid.)

(ii) Emblements or the annual crops comprise not only corn and grain sown, but also roots planted and other annual artificial products of the land. Dowlatum v. Gulabchand, (1885) B.P.J., 151.
3.—“Things attached... anything which is attached to the earth”

—(Continued).

(c) Things excluded.

(i) The expression does not include growing grass which is the natural and permanent produce of the land renewed from time to time without cultivation. Co. Litt 55b, Evans v. Roberts, 5 B. and C. 832.  

(ii) Nor does it include timber or other trees, whether mature or immature, the growing fruit of trees, and the growing crops of apples and pears are also excluded from the term (land.) And see, Rodwell v. Phillips, 9 M and W. 505.  

(iii) The expression does not comprise fruit trees, such as pannulas and figs, which pass with the land. Dowlatram v. Gulabchand, (1885) B.P.J. 151.  

(d) Significance of the term as used in law.

The term, as used in law, means only the present annual crop and not the future crops of cultivated products which bear annual crops for several successive years, as of clover and artificial grasses. Graves v. Weld, 5 B and Ad. 119.  

(e) Emblements, nature of—its devolution—reasons.

(i) “Emblements” or growing crops unlike growing trees and other permanent growths, devolve on the personal representatives, and not on the heir of a deceased owner of the inheritance who dies before they are reaped. Gooden p. 23 (1897).  

(ii) The reason for the emblements devolving on the demise of the owner to his personal representatives is that they are mainly the result of the expenditure of the owner’s personal estate. Cooper v. Woolfitt, 2 H. & N. 126.  

(iii) The principle is that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor. The tenant is entitled to such products only as grow by the industry and manurance of man and to one crop only of these products, and the crop must be of a species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed. Graves v. Weld, 5 B. and Ad. 117.  

(iv) Where a tenant for life sows the land, but dies before harvest, his executors have a right to the crop as a return to the tenant for his outlay. Gooden p. 40 (1897).  

(f) Emblements, not immovable property.

(i) The products known as “emblements” are not considered as part of immovable property. Graves v. Weld, 5 B. and Ad. 106.  

(ii) But, on the other hand they belong to the tenant who has grown them, and in the absence of a general agreement he is allowed to gather and take away even on ejectment. 14 C.P.L.R. 89 following Evans v. Roberts, 20 R. R. 491.  

(b) Sale of crops, trees, in a growing state—Nature of interest conveyed.

(a) In a sale of crops or trees or other things existing in a growing state in the land, the question whether the interest conveyed to the vendee is or is not an interest in land depends upon the nature of the agreement between the parties and the rights which such an agreement may give. Smith v. Surman, 9 B. and C. 561.
3.—"Things attached...anything which is attached to the earth"—
(Continued).

(b) The sole test in such cases is that of intention which should be gathered from the terms of the conveyance. *Marshall v. Green*, L. R. 1 C.P.D. 35 (44).

(c) Where the vendee is not to derive any benefit from the soil, but is only to remove, as soon as possible, so much timber as happened to be affixed to the land at the time of the conveyance, it cannot be said that the intention of the parties to the contract was to convey any interest in the land to the vendee. *Gour*, p. 45 (1904) Vol. I.

(d) But where the subject of the conveyance is a young plantation of some rapidly-growing timber which was not to be cut down until it had become substantially changed and derived benefit from the land, it was held that the intention of the parties to the conveyance was to vest in the vendee an interest in the immovable property. *Marshall v. Green*, L.R. 1 C.P.D. 35.

(7) If things imbedded in the earth are things attached thereto, and as such immovable property.

It is a well-known legal maxim that "all that is built on the soil follows, or belongs to, the soil." So houses and other erections on the land belong to the owner of the land on which they are built. *See Elises v. Mawe*, 2 Sm. L C. 7th (Ed.) 185, 3 East. 38.

(8) Erections put up on land by trespasser—To whom such erections belong.

(a) A MERE TRESPASSER:

If the person putting up the erections is a mere trespasser, then they will be considered to be accretions to the land. *Gour*, p. 45 (Vol. I).

(b) INNOCENT TRESPASSER:

But, where a trespasser builds innocently, or under the belief that the owner would compensate him for it, although the owner is entitled to the improvements on the land (they being things imbedded in the earth), the person who made the improvements is entitled to get compensation from the owner. *See S. 51 of Act IV of 1882.

(9) Machinery, planted in the earth, if immovable property.

Besides the erections imbedded in the earth, other fixtures such as machinery, and the buildings accessory thereto, are also to be considered as immovable property. *Per Lord Fitzgerald in Wake v. Hall*, 8 A.C. 195.

(10) Trade fixtures, nature of—Whether they are immovable property or not.

(a) Fixtures, definition of.

(i) The term "fixtures" has the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them. *Hallen v. Render*, 1 C.M. and B. 276.

(ii) Anything annexed or affixed to any building (and not merely laid upon or brought into contact with the building) was, under the Common Law in England, treated as an addition to the property of the owner of the inheritance in the soil and was termed a "fixture." *Goode*, p. 24 (1897).
3.—"Things attached...anything which is attached to the earth"
—(Continued).

(b) General Rule.

(i) The general rule in respect of buildings and trade fixtures is that, whatever has been annexed to the land for the purpose of its better enjoyment, the intention must clearly be presumed to be to annex the erections to the property in the land. *Wake v. Hall,* 8 A.C. 195.

(ii) But, where the nature of the annexation is such as to show that the intention was to annex them only temporarily, then they may be detached and removed from the corpus. *Wake v. Hall,* 7 Q.B.D. 295.

(iii) With regard to the permanent fixtures the law is that they must be deemed to be added to the principal from which they may not be removed. *Buckland v. Butterfield,* 2 Brod. and Bing. 54.

(c) Exceptions.

(i) The increasing cost and importance of trade fixtures have led to the incorporation of several exceptions to this general rule. So where a lease of a certain land was made to A, for a certain number of years, and he makes on the land a furnace fixed with mortar for his advantage, it was held that he was entitled to remove them after the expiration of the lease. (Year Book. 20, Hen VII. 13, A and B, Poole's Case Salk 368).

(ii) Similarly a dyer who makes his vats or vessels, has been held to be entitled to remove them. *Ibid.*

N.B.—But, if either allows them to be fixed to the earth after the term, then they belong to the lessor. *Ibid.*

(iii) Where a fire engine is erected to work a colliery, or a cider mill to make cider, it was held that the machineries were accessories to the carrying on of the trade. *Lawson v. Lawson,* 3 Atk. 13, *Lord Dudley v. Lord Ward Aubier,* 113.

(iv) Matters of ornament, as ornamental marble chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, have been considered to be chattels of a personal nature and as such to belong to the outgoing tenant. *Beck v. Rebou,* 1 P. Wms. 94, *Ex parte Quincey,* 1 Atk. 477.

(v) Gardeners and nurserymen erecting green-houses or hot-houses have been held to be entitled to disannex the structures. *Peneton v. Robert,* 2 East 88.

11) Whether things attached to imbedded things can be said to be 'attached to earth.'

(a) When such things are not immoveable property:—Examples.

(i) Such things if not attached for the permanent beneficial enjoyment of that to which they are annexed are excluded from the category of immoveable property, Gour p. 47 (Vol. i), 1904.


3.—"Things attached......anything which is attached to the earth"—
(Concluded).

(v) Beds fastened to the walls or ceilings. Ex-parte Quincey, 1 Atk. 477.


(vii) Clock-cases, iron ovens, grates, ranges and stoves, although fixed in brick work, iron back to chimney. Harvey v. Harvey, 2 Stra. 1141.

(viii) Things placed in juxtaposition to each other, cannot be said to be "attached to earth," (e.g.) a granary erected on straddles is not "attached to land." Willsheer v. Cuttle, 1 E. and B. 674.

(b) When such things are immovable property.

(i) They are considered to be immovable property when they are permanently attached to houses and are necessary for their permanent beneficial enjoyment. Gour p. 47 (Vol. 1), 1904.

(ii) Doors, windows, shutters of a building, when permanently attached thereto. 11 C. 164 ; 13 M. 518 ; 14 M. 467.

4.—"Mortgage shall......debt."

Mortgage, definition of.
See S. 58 of Act IV of 1882.

5.—"Mortgagor......person."

Mortgagor, definition of.
See S. 58 of Act IV of 1882.

6.—"Conveyance."

Conveyance, definition of—Various forms of conveyance under English Law—Formalities requisite for such conveyance—What passes under such conveyance.
See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

7.—"Charge."

(1) Charge, definition of.
See S. 100 of Act IV of 1882.

(2) Charge distinguished from mortgage.

(a) A mortgage imports the transfer of an interest in immovable property, while a charge holder has not such an interest. He is entitled to have his claim satisfied out of particular property but that property is not transferred to him. It is only in virtue of the decree for sale that an interest passes to the person entitled. Sancred v. Delagoa Bay Co., 23 Q.B.D. 289. Burlinson v. Hall, 12 Q.B.D. 350 ; 13 B. 100 ; 13 A. 28.

(b) A mortgage is created only by act of parties while a charge may be created either by act of parties or operation of law. See Ss. 58 and 100 of Act IV of 1882.

(c) A charge should be enforced within 5 years, but the period for enforcing a mortgage is 12 years. See p. 325 of Act IV of 1882 (Shepperd and Brown's Commentaries).
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8.—"Mortgagee...transferred."

Mortgage, definition of.

See S. 58 of Act IV of 1882.

Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.

2. In all cases where, by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any inmoveable property named or referred to in, or from time to time subject to the uses or trusts of, such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.

(Notes).

1.—"It is expressly...power of sale."

Trustees for sale—Their disabilities.

See notes on Ss. 4, 52 and 53 of the Indian Trusts Act (II of 1882).

2.—"By selling such.....times."

Sale of trust property in lots—Trustee's power in respect of.

See notes on S. 37 of the Indian Trusts Act (II of 1882).

3. It shall be lawful for the persons making any such sale to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale and to re-sell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby.

and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

(Notes).

1.—"It shall be....stipulations."

Power of trustees to sell under special conditions.

See notes on S. 38 of the Indian Trusts Act (II of 1882).
Act XXVIII of 1866 (T. AND M. POWERS ACT)

2.—“Also to buy in...occasioned thereby.”

Power of trustees to buy in and re-sell.

See notes on S. 33 of the Indian Trusts Act (II of 1882.)

Trustees exercising power of sale, &c., empowered to convey.

4. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary. 1

(Notes).

1.—“For the...necessary.”

Trustees for sale—Power to convey.

See S. 33 of the Indian Trusts Act (II of 1882), and notes thereunder.

Money arising from sales to be laid out in manner indicated in will, &c.

5. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale;

and, until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities 1 for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid:

Provided that, if the will, deed, or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid, would have been payable or applicable in case such sale had not been made.

(Notes).

1.—“The same...securities.”

(1) Investment of trust monies—Securities for such Investment.

See S. 20 of the Indian Trusts Act (II of 1882) and notes thereto.

(2) Power of trustees to vary investments.

See S. 40 of the Indian Trusts Act (II of 1882) and notes thereto.
Powers of Mortgagee.

6. Where any principal-money is secured or charged by deed on any immovable property, \(^1\) or on any interest \(^2\) therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal-money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:—

1st, a power to sell, or concur with any other person in selling, the whole or any part of the property by public auction or private contract subject to any reasonable conditions he may think fit to make and to rescind or vary contracts for sale, or buy in and resell the property, from time to time, in like manner:

2nd, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner herein-after mentioned.

(Notes).

1.—"Where any......property."

(1) Charge, what is.

See notes on S. 1, supra.

(2) Distinction between charge and mortgage.

See notes on S. 1, supra.

2.—"Interest."

"Interest" synonymous with "estate" under English Law—Various "estates" under English Law—How they are created—Nature of such estates—How such estates are conveyed.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.
Section analogous to s. 42 of the Indian Trusts Act.

See s. 42 of Act II of 1882.

1. "Receipts... discharges."

See notes on s. 42 of the Indian Trusts Act (II of 1882).

8. No such sale as last aforesaid shall be made until after six months'
notice in writing given to the person or one of the
persons entitled to the property subject to the charge
or affixed on some conspicuous part of such property;
but, when a sale has been effected in professed exercise of the powers
hereby conferred, the title of the purchaser shall not
be liable to be impeached on the ground that no case
had arisen to authorize the exercise of such power,
or that no such notice as aforesaid had been given,
but any person damned by any such unauthorized
exercise of such power shall have his remedy in damages against the person
or persons selling.

9. The money arising by any sale effected as aforesaid shall be
applied by the person receiving the same as follows:
first, in payment of all the expenses incident to the sale or incurred in
any attempted sale;
secondly, in discharge of all interest and costs then due in respect
of the charge in consequence whereof the sale was made, and
thirdly, in discharge of all the principal-moneys then due in respect
of such charge;

and the residue of such money shall be paid to the person entitled to
the property subject to the charge, his executors, administrators, or assigns,
as the case may be.

10. The person exercising the power of sale hereby conferred shall
have power by deed to convey or assign to and vest in
the purchaser the property sold, for all the estate and
interest therein which the person who created the
charge had power to dispose of:—

Provided that nothing herein contained shall be construed to author-
ize the mortgagee of a term of years to sell and convey the fee simple of
the property comprised therein in cases where the mortgagor could have
disposed of such fee simple at the date of the mortgage.
(Notes).

1. "For all the estate and interest therein."

Estates" under English Law—Their creation—Nature of such estates.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

X

2. "Convey the fee simple....mortgage."

Estates in "fee simple" under English Law—"Words of limitation" necessary for their creation: How they are conveyed.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

Y

11. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, or so ordered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of;

and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

(Notes)

1.- "Owner...of...legal estate."

Charge, definition of—Charge distinguished from mortgage.

See notes on S. 1, supra.

Z

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.
No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed receiver, by suit, distress, or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.¹

(Notes).

1. "To the full ... dispose of"

(1) Estates under English Law—Their nature, creation and how they are conveyed. See full notes in respect thereto, under S. 2 of the Indian Trustee Act (XXVII of 1866).

(2) Charge, nature of—Charge distinguished from mortgage. See notes on S. 1, supra.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge¹, insure and keep insured from loss or damage by fire out of the money received by him the whole or any part of the property included in the charge which is in its nature insurable.
Act XXVIII of 1866 (T. and M. Powers Act). [Ss. 17 to 20]

(Note).

1.—"Money secured by the charge"

Charge, definition of—How it differs from "mortgage."

See notes on S. 1, supra.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue, and of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal-money then charged on the property over which he is receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

Leases.

20. Where any license 1 to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease 2 herebefore granted, or to be hereafter granted, shall, at any time after this Act comes into operation, be given to any lessee or his assigns, every such license shall, unless otherwise expressed extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license);

and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispensable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.
License, definition of.

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a "license."

See S. 52 of the Indian Easements Act (V of 1882).

2. — "Which, without such license... lease."

Forfeiture of leases by lessee—Ways by which forfeiture takes place.

See S. 111 of the Transfer of Property Act (IV of 1882).

21. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting, or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject for such license.

22. Where the reversion upon a lease is reserved, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

(Notes).

1.—"Where the reversion...reserved."

(1) Reversion, what is—English Law.

A reversion is where the residue of the estate does always continue in him that made the particular estate, or where the particular estate is derived out of his estate. Co. Litt. 22b.

(2) Reversion—examples of...—

(a) Where A, an owner of an estate in fee-simple, grants an estate for life to B, B's estate is called a "particular estate," and that part of A's estate in fee-simple which is left in him and which will not take effect in possession till the determination of B's estate is called a "reversion." Goodev's Law of Property, p. 228 (1897).

(b) Similarly if a termor creates by sub-lease out of his own term, a term smaller than his own term, and the sub-lessee perfects his sub-lease by entry, the interest which remains in the termor in right of his superior term is called a reversion. (Ibid.)

(3) Reversion, nature of.

A—under English Law, is an "estate in expectancy" or a "future estate." For the person entitled to a "reversion" has only a vested interest which takes effect in possession at a future time only, i.e., after the estate, on which the reversion is expectant, falls to the ground. Goodev's R.P. p. 227, 228 (1897).

Rent-charges.

23. The release from a rent-charge of part of the immoveable property charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice, nevertheless, to the rights of all persons interested in the property remaining unreleased and not concurring in or confirming the release.

(Note).

1.—"The release from...therewith."

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

Powers.

24. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity:
Provided always that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument.

and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

(Notes).

"Mode of execution of powers"

(1) "Power" distinguished from "estate"—English Law.

An estate in land is equivalent to the ownership of the land either for what is practically an absolute interest, as in the case of an estate in fee-simple, or for some limited interest, as in the case of an estate for life or in tail. A power exercisable with respect to land is an authority to dispose of some interest in the land. (Gooden R.P. p. 298 (1897).)

(2) Certain expressions explained with respect to "powers"

(a) Donee.

The person to whom the power is given is called the "donee" of the power. (Gooden p. 298 (1897))

(b) Appointor.

The 'donee' of the 'power' when he exercises it is called the 'appointor'. (Ibid.)

(c) "Appointee."

The person in whose favour the power is exercised is called the 'appointee'. (Ibid.)

(3) Powers, general and special.

A power may be either "general" or "special". Under a "general" power, the "donee" may appoint to any person including himself, under a "special" power an appointment can be made only for the purposes and to the persons or class of persons specified by the donor of the power. (Gooden R.P. (1897) p. 298.)

(4) Division of "powers"—English Law.

(a) Powers under Common Law.
(b) Powers under Statute of Uses.
(c) Statutory Powers.
(d) Equitable Powers.

See pp. 299, 300 Gooden R.P. (1897.)

25. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his immoveable property, or any specific portion thereof, with the payment of his debts 1, or with the payment of any legacy or other specific sum of money, and shall have bequeathed the property so charged to any trustee
or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid by sale and absolute disposition by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other,

and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

(Notes).

1.—"The testator...payment of his debts."

Trust for payment of debts—How such debts are paid—Powers of such trustees.

See notes on Ss. 11 & 43 of the Indian Trusts Act (II of 1882).

2.—"Whole of his estate or interest therein."

"Estates" under English Law—Their creation—"Words of limitation" necessary for their creation—How such estates are conveyed.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1868).

26. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.

27. If any testator who shall have created such a charge as is described in section 25 of this Act shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property, and such power shall from time to time devolve on, and become vested in, the person or persons (if any) in whom the executorship shall for the time being be vested.
28. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26, and 27 of this Act, or any of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Inheritance.

29. In cases of intestacies occurring before the first day of January 1866, where there shall be a total failure of heirs of the purchaser, or where any immovable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the property shall descend, and the descent shall thenceforth be traced, from the person last entitled to the property as if he had been the purchaser thereof.

This section shall be read as part of Act No. XXX. of 1839 (for the amendment of the law of inheritance).

(Notes).

1. — "Descent how traced."

1. Before the year 1833 in England, descent was to be traced from the 'purchaser,' i.e., the person who last acquired the land otherwise than by descent. Inheritance Act (3 & 4 William IV. C. 106), 1833.

2. Considerable difficulty was experienced in finding out the real "purchaser" for the purpose of tracing the descent. It was practically found that how far so ever high in the genealogical tree, a person tried to find out the real "purchaser," he did not succeed in tracing him. In order to obviate this difficulty, the Inheritance Act of 1833 provided that "In every case of tracing descent, the person who is found to be last entitled to the land shall be considered to be the "purchaser," unless the contrary is proved, i.e., unless it is shown that he has acquired the land by descent." (Ibid.)

(2) Devises to "heir"—English Law.

(a) By the Common Law of England, where a man devised land to his heir, the heir was considered to have taken the land by descent and not as devisee. Goodere p. 145 R.P. (1897).

(b) But, the Inheritance Act (1833) provided that the heir shall be considered to have taken the land as devisee, i.e., as "purchaser." (Ibid.)

(3) Limitation to heirs of settlor—English Law.

(a) Where by any assurance (other than a will) land was limited to the person or to heirs of the person who thereby conveyed the same land, such person acquired no new estate. (Ibid.)
1.—"Descent how traced"—(Concluded).

(b) But, the Inheritance Act (1833) provided that, in the case of assurances executed after the year 1833, the person to whom or to whose heirs the land is limited shall be considered to have acquired the same as "purchaser." 1Inheritance Act (3 and 4 Will. IV. C. 106), 1833.

2.—"Where there shall—thereof"

1 Failure of heirs of the purchaser—English Law.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the "purchaser," and there shall be a total failure of the heirs of such ancestor, the land shall descend as if the person last entitled had been the "purchaser." 1Law of Property Amendment Act 1859 (22 and 23 Vic. C. 35. S. 19).

2 Canons of descent under English Law—Changes made by the Inheritance Act (1883).

See pp. 144—150, Goodenough R.P. (1897)

Assignment of Moveables and Terms for years.

30. Any person shall have power to assign moveable property now by law assignable, terms for years of immovable property 1, and estates by "eject," 2 directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

(Notes).

1 Terms for years of immovable property."

1 Estate for years under English Law—definition of.

An estate for years is a contract for the possession 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. Co. Litt. 13 b.

2 Assignment of "terms for years"—English Law.

(a) The Statute of Frauds provided that no leases should be assigned or surrendered unless by deed or note, in writing, signed by the party assigning or surrendering the same or his agents thereto lawfully authorised by writing. Botting v. Martin, 1 Camp, 318.

(b) By the Real Property Act (1845) any lease required by law to be in writing of any tenements or hereditaments, and an assignment of a "chattel-interest," not being copyhold, in any tenements or hereditaments are to be void at law unless made by deed. 8 and 9 Vic C. 106, S. 3.

(c) But though an instrument be void as a lease, as not being by deed, it may be good as an agreement, and where possession has been given, the tenant will hold under the same terms, as if a lease had been granted. Parker v. T業ell, 2 De. G. and J. 559.

(d) The leases which are excepted from the Statute of Frauds, are not required by law to be in writing, and therefore need not be made by deed; but all assignments of leases must be by deed. Goodenough R.P. (152) 1897.
2.—"Estates by elegit."

(1) "Elegit," what is—English Law.

The writ of elegit is a remedy which was originally given to the judgment-creditor by the Statute of Westminster the second, but it has been greatly modified by modern legislation. 13 Ed. I.C. 18; 1 and 2 Vic. C. 110.

(2) Elegit, nature of—Present form under English Law.

In its present form, it is a royal command to the sheriff directing him to deliver to the judgment-creditor all the lands of the judgment-debtor, to hold the same until the amount of his debt with interest shall be levied. Goodeve, p. 383 (1897), R.P.

(3) Procedure to be adopted by the sheriff under the writ of "elegit."

(a) On the receipt of the writ, the sheriff, holds an enquiry, called an Inquisition, before a jury, for the purpose of ascertaining what lands in his bailiwick belong to the debtor, what estate he has in them, and their annual value. This proceeding is entirely ex parte, and no notice is given to the debtor, and nothing is done on the land itself. (Ibid.)

(b) On completing the Inquisition, a formal statement of the proceedings under it is drawn up and sealed by the sheriff and the jurors. (Ibid.)

(c) The sheriff then makes up and signs a formal statement of all that he has done in obedience to the writ, which statement when signed, is called the "return to the writ," and he afterwards sends the writ and "the return to the writ" to the Supreme Court. This final act of the sheriff is sometimes called the "return of the writ." (Ibid.)

(4) "Elegit"—Effect of the "return to the writ"—English Law.

As soon as the sheriff sends his "return to the writ," the lands comprised in it are said to be a "delivered in execution" to the execution-creditor; the effect of this is to confer on him a legal right of entry, which he can enforce against the execution-debtor by an action to recover possession. Goodeve, p. 383. 1897 R.P.

(5) "Tenant by elegit," meaning of—Nature of his interest.

The execution-creditor who obtains possession or receipt of the rents and profits is said to be "tenant by elegit," and he has a chattel interest which he may hold till his debt with interest is satisfied out of the rents and profits. Co. Litt. 43 b; 2 Cruise Dig. 54.

(6) Elegit, what could be seized under.

Under an elegit, all land can be seized in which the debtor has a legal estate in possession, or subject only to a term of years, or to an equitable mortgage; or the entire equitable fee, or a legal term of years, or a copyhold estate, or land over which he has a disposing power which he can exercise for his own benefit. Goodeve p 384, 1897, R.P.

Purchasers.

31. The bona fide payment to and the receipt of any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof.¹
32. Trustees having trust-money in their hands, which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature.

Provided always that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person.

(Notes).

1.—"Shall be...securities."

Investment of trust moneys by trustees—Securities.

See S. 20 of the Indian Trusts Act (II of 1882), and notes thereunder.

2.—"To vary...same nature."

Power of trustees to vary investments.

See S. 40 of the Indian Trusts Act (II of 1882) and notes thereunder.

3.—"Provided always...such person."

See S. 40 of the Indian Trusts Act (II of 1882) and notes thereunder.

Trustees and Executors.

33. In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not;
and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time, in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen.

Provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

(Notes).

1. — "Trustee may apply...maintenance."

Power of trustees to give maintenance to minor beneficiaries.

See full notes under Ss. 36 and 41 of the Indian Trusts Act (II of 1882).

2.—Proper securities

Proper securities for investment of trust moneys.

See S. 20 of the Indian Trusts Act (II of 1882) and notes thereunder.

34. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable, to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator, of the last surviving and continuing trustee, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee), by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid.

So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any), which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed...
be conveyed and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court, either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument (if any) creating the trust.

The Official Trustee may with his consent, and by the order of the High 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.

(Notes).

1.—"Provision for appointment of new trustees on death, etc"

1. Death of a trustee or trustees - New trustees, appointment of.

See Ss. 73 and 74 of the Indian Trusts Act (II of 1882) and notes thereunder. R

2. Appointment of new trustees by Court.

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

3. Rules for selecting new trustees.

See notes on Ss. 73 and 74 of the Indian Trusts Act (II of 1882). T

2.—"Transfer of trust property to new trustees."

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

3.—"Powers of new trustees"

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

4.—"Appointment... trustee."

See S. 73 of the Indian Trusts Act (II of 1882). W

35. The power of appointing new trustees herebefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

(Notes).

1.—"Appointment... testator."

See S. 73 of the Indian Trusts Act (II of 1882). X

36. The receipts in writing of any trustees or trustee for any money payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.
37. Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:

"that the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own willful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust-promises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

(Notes).

I. "Every deed ...implication."

Trusts, express and implied—Definition and nature of.

See notes under S. 3 of the Indian Trusts Act (II of 1882).

2. "That the trustees...actually receive...sake of conformity...other loss."

(1) Indemnity of trustees.

See S. 30 of the Indian Trusts Act (II of 1882) and notes thereto.

(2) Non-liability for co-trustee's default.

See notes under S. 26 of the Indian Trusts Act (II of 1882).

(3) Trustee joining in receipt for conformity.

See notes under S. 26 of the Indian Trusts Act (II of 1882).

3. "To re-imburse or other instrument."

Right to re-imbursement of expenses.

See notes under Ss. 32 and 36 of the Indian Trusts Act (II of 1882).
38. It shall be lawful for any executors to pay any debts or claims
upon any evidence that they may think sufficient, and
to accept any composition, or any security for any
debts due to the deceased, and to allow any time for
payment of any such debts as they shall think fit, and also to compromise,
compound, or submit to arbitration all debts, accounts, claims, and things
whatssoever relating to the estate of the deceased, and for any of the pur-
poses aforesaid to enter into, give, and execute such agreements, instru-
ments of composition, releases and other things as they shall think expedient,
without being responsible for any loss to be occasioned thereby.

(Notes.)

1. "Executors may compound."

See S. 43 of the Indian Trusts Act (II of 1882) and notes thereeto.

39. Repealed by the Powers-of-Attorney Act (VII of
1882), S. 6.

40. Where an executor or administrator liable as such to the rents,
covenants, or agreements contained in any lease or
agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator
or intestate whose estate is being administered, shall
have satisfied all such liabilities under the said lease,
or agreement for a lease, as may have accrued due and been claimed up
to the time of the assignment hereinafter mentioned, and shall have set
apart a sufficient fund to answer any future claim that may be made in
respect of any fixed and ascertained sum covenanted or agreed by the
lessee to be laid out on the property demised, or agreed to be demised,
although the period for laying out the same may not have arrived, and
shall have assigned the lease or agreement for a lease to a purchaser
thereof, he shall be at liberty to distribute the residuary estate of the
deceased to and amongst the parties entitled thereto, respectively, without
appropriating any part, or any further part (as the case may be), of the
estate of the deceased to meet any future liability under the said lease or
agreement for a lease.

The executor or administrator so distributing the residuary estate
shall not, after having assigned the said lease or agreement for a lease, and
having, where necessary, set apart such sufficient fund as aforesaid, be
personally liable in respect of any subsequent claim under the said lease or
agreement for a lease.
Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

41. In like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation, or agreement for such conveyance, granted or assigned), to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance.

The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance.

Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons, to or among whom the said assets may have been distributed.

(Notes).

1. — "Whether any such rent...use."

(1) "Use," what is—English Law.

(a) The purpose for which property was held by the person having the legal estate for the benefit of another, was termed a "use." Goodev's R.I. (1897).

(b) A "use" has been defined by Lord Coke, thus—. "A trust or confidence, which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person, touching the land: the cestui que use" shall take the profits, and "the feoffee to use" shall make estates according to his direction. So that, he who had an "use" had only a confidence and trust, for which he had remedies under equity and not under Common Law. Chudleigh's Case, 1 Rep. 121 b.
I.—"Whether any such rent...use"—(Concluded).

(2) "Uses," examples of—"Statute of uses"—English Law.

(a) Where there is a limitation in this manner viz.,—"To A to the use of B," before the Statute of uses, the legal estate in the land will vest in A, who must apply the rents and profits arising therefrom to the benefit of B, B being the owner of the equitable estate: but after the passing of the Statute of uses (27 Henry VIII, c. 10), the legal estate would no longer remain in A, and it would pass through A and become vested in B. Or in other words, B would himself be the owner of the land in law as well as in equity. See pp. 274—277 of Goodeve's R.P. (1897).

(b) The "Statute of uses" (27 Henry VIII, c. 10), was passed with the express object of abolishing the doctrine of "uses." It unites the "legal seisin" or interest to the "equitable or beneficial interest." It provides that the cestus que use shall have the same estate in the land as he has in the "use," but also divests the person who is "seized to the use" of a corresponding portion of his estate and vests it in the cestus que use. In other words, the Statute "executes" the "use;" that is, it conveys the possession to the "use," and transfers the "use" into possession, thereby making the cestus que use complete owner of the land and tenements at law and equity.

See pp. 276 and 277, Goodeve (1897).

N B.—For full history of the doctrine of "uses"—see pp. 268—297, of Goodeve's R.P. 1897.

42. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the High Court in an administration-suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof as the case may be.

Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the lands of the person or persons who may have received the same respectively.
48 Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate.

Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient.

The trustee, executor, or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application:

Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator, in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction, and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

(Notes)

General.

(1) Scope of section.

(a) It is no part of the duty of a Judge, under S 48 of the Trustee's and Mortgagor's Act, to give any opinion on a point on the decision of which may depend questions of right or title. 7 B. 381 at 384.

(b) The questions arising in the administration contemplated by S. 48 are not questions which, involve difficulty in determining them. Ibid.

(c) The object of the section is to assist trustees in the execution of the trusts as to little matters of discretion. 7 B. 381

(d) The Court should not deal, under the power given to it under S. 48, with a point of law, which is full of difficulty. 7 B. 381 at 385.

(e) Under S. 48, a trustee may apply, without instituting a suit, to any judge of the High Court, for his opinion, advice or direction, and by acting on such opinion, the trustee is deemed to have properly discharged his duty. 12 B. 638 at 644.

(2) English Law analogous provision.

The section is substantially the same as S. 30 of Lord St. Leonards Act (92 and 23 Vic. C. 85).

1. "Trustee, executor, etc., etc., may apply by petition, etc., trust property."

(1) Advice and direction in management of trust estate—Right to apply to Court for:

See S. 34 of the Indian Trusts Act (II of 1882) and notes thereto.

(2) Powers of the Court under Section.

A, a Hindu, died in 1865, possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will, he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879, the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of A, still unadministered. As administratrix, she continued to apply the income of the said land as directed in the will.

She subsequently filed another petition alleging that the said income, which amounted to about Rs. 900 per mensem was insufficient to keep up the said charity. She stated that a sum of Rs. 12,600 was urgently required for certain purposes connected with the said charity, and that she had agreed with one Y that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 per mensem. Subsequently her adopted son served her with a notice to desist from granting the said lease. She therefore presented a petition to the Court under S. 43 of the Trustees' and Mortgages' Powers Act (XXVIII of 1866) praying:

(a) that she might be advised whether she had power to grant the said proposed lease,

(b) that the said lease might be sanctioned or directed by the Court; and

(c) that the Court might give such opinion, advice or direction in the circumstances of the case as the Court might think fit.

Held.—

(1) that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had the power to grant it.

(2) The Court will not under this section advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investments, sale of a house, compromises, taking proceedings etc., and

(3) that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of the amount, or as to the work to be done, the Court cannot give any opinion. 12 B. 638 Q.

(3) Restrictions imposed upon the Court by the section.

Obviously the Court must act with caution, and only advise in matters when the rights of the parties inter se are not in dispute either in law or in fact. 12 B. 638 at 644.
I.—"Trustee, executor, etc., may apply by petition...trust property"—(Concluded).

4. Administrator-General taking opinion of Court on questions respecting the administration—Refusal of Court to express opinion

The Administrator-General of Bombay having taken out letters of administration (having effect throughout the Bombay Presidency) to the estate of the deceased A, and having a balance in his hands to the credit of the said estate, after having fully administered the same, was applied to by X (the brother of the said A deceased), who had taken out letters of administration in England to the estate of his deceased brother, to hand over to him (the said X), the balance in question,—the said X claiming to be the administrator of the domestic of the deceased and, as such, to be entitled to all the personal assets of his estate wherever situate.

Being in doubt as to whether he ought safely accede to the request, the Administrator General of Bombay by petition under § 43 (1) of the Indian Trustees’ and Mortgages’ Act XXVIII of 1866, submitted the question to the High Court for its opinion, advise and direction.

Held that the question being one of considerable difficulty and importance, and involving, moreover, in its decision, questions which might seriously affect the rights of the parties inter se, it was not a question such as was contemplated by § 43 of the Indian Trustees’ and Mortgages’ Act XXVIII of 1866, nor one upon which the Court ought to give any opinion merely on an ex parte petition of this character. 7 H. 381.

General Provisions

44. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of immovable or moveable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent, but the estate or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

45. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after this Act comes into operation, or under a will or codicil confirmed or revived by a codicil executed after that date, and only to property in British India and to cases to which English Law is applicable.

46. This Act may be called "The Trustees’ and Mortgages’ Powers Act, 1866."

47. Repealed by the Repealing Act 1874 (XVI of 1874).