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THE

LAW OF TRANSFER

IN BRITISH INDIA

BEING

A COMMENTARY, ANALYTICAL, CRITICAL AND EXPOSITORY ON THE TRANSFER OF PROPERTY ACT

(Act IV of 1882, as amended to date)

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IN THREE VOLUMES.

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PREFACE TO THE THIRD EDITION.

THIS volume had all been set before the final draft of the present Procedure Code was announced. Pending its enactment the publication of this work was held in abeyance, and when it was enacted, it had to be practically re-written. The volume as now issued has been divided into two parts—the first dealing with the substantive law relating to mortgages and charges, and the second with the procedure applicable thereto. The latter was formerly enacted in the Transfer of Property Act, and therefore formed a necessary part of a professed commentary on that Act. But the transpositions of all such sections to the Code of Civil Procedure would have well justified their omission from the present work. But it would have at the same time made the work proportionately incomplete, since the procedure relating to mortgages is so intimately connected with their principles that the one cannot be wrested from the other. Moreover, it is one of the aims of these volumes to present a complete survey of the subject apart from its treatment in the Act. These sections disguised as rules, have, therefore, been again as fully annotated as if they had remained a part of the Transfer Act.

Besides the new Code of Civil Procedure two other important enactments (the Limitation and the Registration Acts) have been recently amended and re-enacted. The text has been throughout revised in the light of changes introduced by them. The legislation of these Acts has had the effect of settling many controversial points and thus superseding a quantity of case-law which teemed with them. It would have perhaps been simpler to eliminate from the text all such references, but such simplification would have been dearly bought, for nowhere else more than in the law relating to property are such references necessary, both for the purpose of investigating title as for the purpose of understanding the operation and effect of the rules which at any time define and control the transmission of property.

The present work thus remains an unmutilated treatise presenting a complete statement of the law of mortgages and charges, and though forming a volume of the commentary on the Law of Transfer, it will be found to have assumed that garb merely for the sake of convenience and so as to serve the double purpose of expounding the subject as well as the Act.

The references to cases have been brought down to the end of March.

H. S. G.

1*st July*, 1909.

PREFACE TO THE FOURTH EDITION.

OVER three hundred pages have been added to this volume, which has been otherwise throughout revised in the light of recent decisions available up to the latest date of publication.

H. S. G.

1*st June*, 1915.

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THE LAW OF TRANSFER

BY H. S. GOUR, M.A., D.C.L., LL.D.

Vol. I.—General Principles and Sale.—(Ready).

Vol. II.—Mortgage and the Procedure relating thereto.—(Ready.)

Vol. III.—Lease: Exchange: Gifts: Actionable claims: Together with a Supplementary chapter on Conveyancing with Forms: General Index of Cases and subject-matter of the three volumes.—(In the Press).

Press Notices on the 4th Edition, Vol. I.

Dr. Gour's commentaries are nothing if not thorough and the appreciation which his commentaries on the Transfer of Property Act have received in the hands of practising lawyers in this country and of which the best practical demonstration is offered by a fourth edition being called for within the space of 14 years is quite commensurate with their merits. Of the volume under notice it need now only be said that it has been revised and brought up to date, and for convenience of use and reference, the texts of the Regulation of 1806, the Transfer of Property Act and O. 34 of the Civil Procedure Code, a separate Table of Cases and Topical Index for the volume have been added, thus materially increasing its size. We are not sure the Regulation and O. 34 of the Civil Procedure Code would not have more suitably found a place in the second volume in which the portion of the Act dealing with mortgages will be dealt with, the present volume reaching only up to the end of the Chapter on Sales. This however is hardly a matter of any consequence. We feel sure after such examination of the volume as we have been able to make, that the position which the book has already secured in the estimation of lawyers will be fully maintained by the present edition.—19 *Calcutta Weekly Notes*, p. XXI.

By its exhaustive treatment of principles, by its careful statement of English law, and by its accurate summary of the case-law as it stands, Dr. Gour's work on the Law of Transfer has made itself an indispensable item in every lawyer's library in this country. It is hardly necessary for us therefore, to comment on its usefulness or its excellence. That the work should have run through four editions in the short space of thirteen years though the volumes have been growing in size and with it, naturally in price, is in itself an index of its wide popularity. Not that they are too highly priced: for a volume of 750 pages on a legal subject so ably dealt with, it could certainly not be said that Rs. 10 is too high a price. One great improvement in

this edition over the last is the topical index given at the end of the volume. The case-law has been brought thoroughly up to date and in some parts the text too has been revised. Though there has been some increase in size as a result, there is no corresponding rise in price and all those that register their orders now are given the privilege of getting the succeeding volumes also at the same price though changed conditions might require an alteration in the price. The present edition maintains to the full the finish and the get-up of the law.—27 *Madras Law Journal* (Part I) pp. 166, 167.

We cordially welcome this new, revised and enlarged edition of the first volume of Dr. Gour's monumental work on the Law of Transfer in British India. The last edition was published seven years ago, and a new edition had long since been overdue. It would be a piece of supererogation on our part to dwell at any great length on a work so well-known and deservedly well-known to the profession. Suffice it to say that the volume under notice well sustains the claim of being a complete repertoire of all the living case-law, English and Indian, on the subject. The text has been again revised and in parts enlarged and the cases brought down to the latest date of its publication. Several new features, which considerably enhance the value of the work for purposes of ready reference, have been introduced. The bare texts of the Regulation XVII of 1806, the Transfer of Property Act, and order XXXIV of the Code of Civil Procedure preface the commentary. And to make the volume self-contained, a separate Table of Cases and a Topical Index have been added to this Volume. These additions together with the added commentary of a hundred pages have somewhat enlarged the size of the book. With all these improvements the present edition will, we have no doubt, prove as useful and even indispensable, if not more, as any of its predecessors.—12 *Allahabad Law Journal*, 212, 213.

In its fourth edition, Dr. Gour's treatise on the Law of Transfer is more of a new book than a new edition. The whole text has been subjected to a rigorous and thorough revision, which is accountable for an increase of nearly 100 pages in the size of this volume. The bare texts of Regulation XVII of 1806, the Transfer of Property Act, and Order XXXIV of the Civil Procedure Code of 1908 are prefixed to the volume for facility of reference. The volume is made self-contained by the addition of the table of cases and topical index. The overfull congeries of cases and the wealth of detail collected in the notes have earned for it the reputation of a never-failing book of reference. It is noteworthy for the encyclopædic character of its contents. It is a monument of untiring industry.—*Bombay Law Reporter.*

TABLE OF CONTENTS.

THE TRANSFER OF PROPERTY ACT.

VOL. II.

(Numericals placed within brackets refer to paragraphs).

CHAPTER IV.

OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES.

SECTION PAGE

58. "Mortgage," "Mortgagor," "Mortgagee," "Mortgage-money" and "Mortgage-deed" defined: Simple Mortgage: Mortgage by conditional sale: Usufructuary Mortgage: English Mortgage defined 777, 778

Analogous Law (1139, 1140, 1141, 1142, 1143). Common Law Mortgages (1144, 1145, 1146). Mortgage in Civil Law (1147). Prior Indian Law (1148). Principle (1149). Meaning of Words (1150). Historical Retrospect (1151). Mortgages before and under Reg. XVII of 1806 (1152). Characteristics of a Mortgage (1153). Is Mortgage-debt Movable Property (1154). Mortgage is a Transfer of an Interest (1155, 1156). Oral Evidence (1157). Extraneous admissible Evidence (1158, 1159, 1160, 1161, 1162). Rules for construing Intention (1163, 1164). Mere Covenant not to alienate (1165, 1166). A Contract to Mortgage (1167, 1168, 1169, 1170). Novation (1171). Mortgaged Property must be specified (1172, 1173, 1174, 1175, 1176, 1177). Remedy in such case (1178). Agreement not to alienate (1179). Mortgage of after acquired Property (1180). Procedure and form of decree (1181). Hindu and Mahomedan Rule (1182). Sufficient for its Identification (1183, 1184). Mortgage is to secure a Debt: Mortgage or Sale (1185). Parol Evidence (1186, 1187, 1188). Mortgage distinguished from Trust (1189). Mortgage and certain leases distinguished (1190, 1191, 1192). What may be mortgaged (1193). Persons competent to mortgage (1194). What passes on mortgage (1195). Incidents of mortgage Security (1196, 1197, 1198). Substituted security (1199). Consideration of Mortgage (1200, 1201). Running account (1202, 1203). Further advances (1204). Mortgagor and Mortgagee defined (1205). Sub-mortgage: Puisne Mortgage (1206). Sub-mortgage (1207). Incidents of Sub-mortgage (1208, 1209). Mortgage money: Mortgage-deed (1210, 1211). Classification of Mortgage (1212). History of Hypothecation (1213). Simple Mortgage (1214, 1215). Words constituting Simple Mortgages (1216). Power of Sale essential (1217, 1218). Simple Mortgage and Charge distinguished (1219). Simple Mortgage and Mortgage by Conditional Sale (1220). Simple Mortgages before the Act (1221). Limitation for Mortgages (1222, 1223, 1224, 1225, 1226). Mortgage by Conditional Sale (1227). Previous Law as to Conditional Sale: (1) Bengal, U.P. and Central Provinces (1228). Notice under the Regulations (1229). Other Procedure under the Regulations (1230). Extension of Time (1231). Waiver of Irregularity (1232, 1233). (2) In

SECTION PAGE

Bombay and Madras (1234). Madras Cases: (i) Cases down to 1858 (1235); (ii) Cases between 1858-1875 (1236). Judge-made Equity in Madras (1237). Bombay Cases (1238). Old Law and Procedure how affected (1239). Effect of proceedings before the Act (1240, 1241). Form of Mortgage by Conditional Sale (1242, 1243). Limitation (1244, 1245, 1246). Collateral Stipulations: (1) Against Redemption (1247). (2) Personal Covenant (1248). Usufructuary Mortgage (1249). Mortgagor not personally liable, Novation (1250). Other Analogues (1251). Simple Mortgage Usufructuary (1252, 1253, 1254). Zur-i-peshgi Lease (1255, 1256). Ambiguous Deed how construed (1257). Assignment of Usufructuary Right (1258). Vernacular names for Usufructuary Mortgage (1259). Joint-mortgagors (1260). Limitation for Usufructuary Mortgage (1261). Usufructuary Mortgage under the Regulations (1262, 1263). English Mortgage (1264). Essentials of an English Mortgage (1265). Local incidents of English Mortgage (1266). Equity of Redemption (1267). Nature of a Mortgage Suit (1268).

59. Mortgage when to be by assurance 861, 862

Analogous Law (1269). Provisions as to registration how affected by the other Acts (1270, 1271). Law for proving documents requiring attestation (1272). History of Attestation (1273). Previous Law (1274). Principle (1275, 1276). Saving Clause (1277). Meaning of Words (1278). Form of Mortgage (1279, 1280). Valid Registration (1281, 1282, 1283, 1284). Mortgage must be signed by the Mortgagor; What signature includes (1285, 1286, 1287, 1288, 1289). Who may be an Attesting Witness (1290). Meaning and Sufficiency of Attestation (1291, 1292). Attestation of admission condemned (1293). Deficient Attestation (1294). Does Attestation imply consent (1295). Mode of Proof (1296, 1297, 1298, 1299, 1300). Consenting third party (1301). Operation of unattested Mortgage (1302). Personal Covenant when unenforceable (1303). Admissibility and Proof of Unregistered Mortgage (1304, 1305). Compromise and Security-deeds (1306). Stamp (1307). Novation or further charge (1308). When interest excluded (1309). Mortgagee pays for Stamp (1310). Unstamped Mortgage (1311). Registration shifts *onus* (1312). Alterations vitiating Deeds (1313, 1314). Value of altered Deed (1315). Burden of proof (1316). Oral Agreement (1317). Property secured less than Rs. 100 in Value (1318). Assignment of Mortgage (1319). Deposit of Title-deed: Equitable Mortgage (1320). Pre-requisites of an Equitable Mortgage (1321). Deposit of Title-deeds (1322). Meaning of Deposit (1323). Intention to mortgage material (1324, 1325, 1326). Property charged by Deposit of Deeds (1327). May relate to any property (1328, 1329). Sub-mortgage (1330). Conditional Mortgage (1331). No Writing Required (1332, 1333, 1334, 1335). Priority (1336). Equitable Mortgagee's Remedy (1337). Mortgagor's Rights (1338). Other kinds of Equitable Mortgages (1339). Mortgage of Movables (1340).

Rights and Liabilities of Mortgagor.

60. Rights of mortgagor to redeem: Redemption of portion of mortgaged property 898, 899

Analogous Law (1341). Rule of English Common Law (1342, 1343). Principle (1344). Principle of the qualifying Proviso. (1345). Meaning of Words (1346). When a Mortgagor may redeem (1347). Covenant for

SECTION PAGE

Notice (1347). No Redemption before due date (1348). Dekkhan Agriculturist's Relief Act (1349). Where Redemption is impossible (1350). Meaning of "Payable." (1351, 1352). Discharge of mortgage-debt (1353). Payment to Mortgagees (1354, 1355, 1356). Payment by Instalments (1357, 1358). What amount must be paid (1359, 1360). Appropriation of Payments (1361). Mode of Payment (1362, 1363). Payment by money order (1364). Presumption of Payment (1365). Proper time for Payment (1366, 1367). Place of Payment (1368). How determined (1369). Rule of law to determine place of Payment (1370). Deposit in Court (1371). Valid Tender (1372). Tender in Coin and Cheque (1373). Tender under protest (1374). Effect of Insufficient Tender (1375). Who should tender (1376, 1377). Clog on Redemption (1378). Right how enforceable (1379). Suit for Redemption (1380). What interest a person redeeming must prove (1381). Quantum of interest necessary for redemption (1382). Unregistered Mortgage (1383). Right barred (1384). Priority as between claimants (1385). Mortgagor's right on redemption (1386). Return of the Mortgage-deed (1387). Recovery of Possession (1388). How much property must be restored (1389). In what state should property be restored (1390). Reconveyance (1391). Origin of the clause for Reconveyance (1392). Re-transfer by mortgagee (1393). Acknowledgment separate and endorsed on the deed—necessity of registration (1394). Delivery of title deeds (1395). Extinguishment of the right of Redemption (1396). Clog on Redemption (1397). Present English rule stated (1398). Indian Rule considered (1399). Criterion for determining Clog and No Clog (1400, 1401). Covenants clogging Redemption (1402). Nature of such Clogs (1403). Illustrative Cases (1404). Covenants for Pre-emption and Preference (1405). Does not run with the land (1406). How enforced (1407). Commission : bonus : compound interest (1408). No Clog on Redemption ; no Mortgage no Clog (1409). No clog (1410, 1411). "Right to redeem" and "Equity of Redemption" distinguished (1412). By act of Parties (1413). Right how affected by purchase by a mortgagee (1414). Extinction by mortgagor's omission (1415). By Order of a court (1416). Does one suit for redemption bar another (1417). Meaning of "Court" in the section (1418). Provision for notice before redemption (1419). English Law (1420). Limitation for Redemption (1421). Adverse possession of Equity of Redemption (1422). Redemption of a portion of mortgaged property (1423). Exceptions to indivisibility (1424). Mortgagor's right of contribution (1425). Where Co-mortgagors have separate interests: (1) Waiver (1426). Where severance is effected by mortgagee's consent: (2) Consent (1427). Severance by merger : (3) Merger (1428). Meaning of "Acquired" (1429). Redemption of Mortgagee's share (1430, 1431). Rateable abatement when made (1432). No abatement when purchase by a co-mortgagee (1433).

61. Right to redeem one of two properties separately mortgaged ... 959

Analogous Law (1434). Doctrine of Consolidation (1435). Consolidation and Tacking distinguished (1436). Principle (1437, 1438, 1439, 1440). Meaning of Words (1441). Consolidation by Contract (1442). Liability of Assignee (1443). Tacking and Consolidation how combined (1444 and 1445). Doubts on the Doctrine (1446).

62. Right of usufructuary mortgagor to recover possession ... 967

Analogous Law (1447, 1448). Nature of suit contemplated by section (1449). Principle (1450). Meaning of Words (1451). When and how

SECTION PAGE

possession obtained (1452). Estoppel of Mortgagee let into possession by Mortgagor (1453). Successive Suits for Redemption (1454). What the Mortgagor may obtain (1455). Postponement of the Right (1456). Suit where no time fixed—Cl. (*a*) (1457). Mode of taking accounts (1458). When the right to sue accrues (1459). Mortgage for a term—Cl. (*b*) (1460). Liability of Mortgagee in Possession (1461 and S. 76, Comm.). Recovery of Possession in cases not covered by the section (1462).

63. Accession to mortgaged property: Accession acquired in virtue of transferred ownership 975, 976

Analogous Law (1463, 1464). English Law (1465). S. 90. Trusts Act, distinguished (1466). Principle (1467). Kinds of Accessions (1468). Meaning of Words (1469). Mortgagor's Right to all Accessions (1470). Acquisition dating continuance of mortgage (1471). Natural Accessions (1472). Accretion (1473). Mortgagee's Possession not Adverse (1474). Acquired Accessions (1475). Exceptional Cases (1476). Inseparable Acquisitions (1477). Profits set off against interest (1478). Compensation for Improvements (1479).

64. Renewal of mortgaged lease... 983

Analogous Law (1480). Principle (1481). Meaning of Words (1482). Rights of Parties (1483). Mortgagee cannot compel renewal (1484). Does the rule apply to all renewals (1485). S. 90, Trusts Act compared (1486, 1487, 1488).

65. Implied contracts by mortgagor 988, 989

Analogous Law (1489). Principle (1490). Meaning of Words (1491). Statutory Covenants subject to Contract (1492): Covenants for endorsing payments (1493). Mortgagee's title by Estoppel (1494). Covenant for title—Cl. (*a*) (1495). Notice excludes the rule (1496, 1497). Scope of covenant in a Mortgage deed (1498). Effect of a covenant for title during continuance of mortgage (1499). Substituted Security (1500). Transfer of Property with defective title (1501). Extension of the Doctrine of substituted Security (1502). Doctrine of Subrogation (1503, 1504). Covenant for defence of Title and Quiet Enjoyment—Cl. (*b*) (1505). Quiet Possession, how may be secured (1506). Payment of Public Charges—Cl. (*c*). (1507). Validity of lease etc.—Cl. (*d*) (1508). Mortgage with possession of leasehold property, how may be made (1509). English Law (1510). Subsequent incumbrancers—Cl. (*e*) 1511. Exceptional cases (1512). Covenants of the section run with land (1513).

66. Waste by mortgagor in possession 1000

Analogous Law (1514, 1515). Principle (1516). Meaning of words (1517). Mortgagor's liability to preserve property (1518). Waste when restrained (1519). Mortgagee's remedy (1520). Status of Mortgagor in India (1521). Mortgagor's leases in England (1) under Common Law (1522): (2) Under the Conveyancing Act (1523). Mortgagor's leases in India (1524). Express Contract by Mortgagor (1525). Validity of Covenant against alienation (1526). Only binds actual parties (1527).

Rights and Liabilities of Mortgagee.

67. Right to foreclosure or sale 1008, 1009

Analogous Law (1528). Principle (1529). Scope of the section (1530). Meaning of Words (1531). Express contracts barring statutory rights (1532). Estoppel (1533). Due date of payment (1534). Acts not

SECTION PAGE

amounting to Waiver (1535, 1536). Right to pay the Mortgage-money (1537). Demand of payment when necessary (1538). Position of English Mortgagee (1539). Right on partial Failure of Consideration (1540). Statutory Rights of Mortgagee (1541). Provision against sale of property (1542). Mortgagee's Right as limited by Cl. (*a*) (1543). Remedy of Usufructuary Mortgagee (1544, 1545). Case for Compensation (1546). Remedy of a Usufructuary Mortgagee's creditor (1547). Usufructuary Mortgage with covenant to pay (1548). Remedy of Simple Mortgagee (1549, 1550). Remedy of a Charge-holder (1551). Remedy of holder of Security-deed (1552). Rights of Sub-mortgagee (1553). Remedy of Mortgagee by Conditional Sale (1554). Mortgagee's Conflicting Remedies (1555). No Foreclosure if the Mortgagor is Mortgagee's Trustee,—Cl. (*b*) (1556). Works of Public Utility excepted—Cl. (*c*) (1557). Remedy of Part-mortgagee—Cl. (*d*) (1558). Severance of Interests when allowed (1559, 1560). Change of Procedure (1561). Disability of Crown (1562). Suits under S. 99 (1563).

68. Right to sue for mortgage money 1028

Analogous Law (1564). Previous Law (1565). Principle (1566). Meaning of Words (1567). Nature of Right arising under the Rule (1568). English Rule compared (1569). Operation of S. 99 (now O. 34, r. 14), C. P. C. on the Doctrine (1570). Waiver of Mortgage-rights when effected (1571). Mortgagee's Rights against third parties (1572). Covenant to pay (1573). Covenant to pay when implied (Cl. *a*) (1574). Personal relief under the section (1575). Exclusion of personal covenant in a case of simple Mortgage (1576). Instances of personal Covenants (1577). Personal Covenants need not be express (1578). Implied Promise (1579). No Promise (1580). Personal Covenant in Usufructuary Mortgage (1581). Remedy on Failure of Consideration (1582). Does not bind Assignee (1583). Suit for only Interest (1584). Limitation for personal recovery (1585). Wrongful Act or Default of the Mortgagor-Cl. (*b*) (1586). In security of Title (1587). Plea must be raised (1588). Limits of the Rule (1589). Right when enforceable (1590). Disturbance of Possession, Cl. (c) (1591). Rights must arise under the Mortgage (1592). Covenants restricted to lawful Possession (1593). Limits of the Rule (1594). Disturbance by any other person (1595). Disturbance from small area (1596). Loss acquiesced in (1597). Express Consent (1598). Provision for alternative Security—(last clause) (1599). Its operation (1600). Such Suit is not for "debt" (1601). Damages when allowed (1602). Limitation (1603), Reasonable Time (1604). Punjab Limitation (1605).

69. Power of sale when valid 1053, 1054

Analogous Law (1606). Trustees' and Mortgagee's Powers Act, 1866 (1607). Genesis of the section (1608). Principle (1609). Meaning of Words (1610). Power of Sale (1611). Express and Statutory Powers (1612). English Express Powers (1613). English Statutory Powers (1614). Who may exercise the Power (1615). Sale by Agent (1616). Suspension of Power (1617). Power of Assignment (1618). Notice of Sale (1619). Service of Notice (1620). Period cannot be contracted out (1621). Conduct of Sale (1622). Whether by auction or treaty (1623). English rule for Sanction (1624). Mortgagee disqualified from purchasing (1625). Mortgagee's Expenses (1626). Limits of Mortgagee's Discretion (1627). Sale for recovery of Interest (1628). Title of Purchaser on Sale under Power (1629, 1630, 1631, 1632). Power improperly exercised (1633). Mortgagee cannot purchase (1634). Avoidance of Sale (1635). *Onus* on

SECTION PAGE

impeaching sale (1636). Appropriation of Proceeds of Sale (1637). Account on Sale by Mortgagor (1638). Excepted Cases (1639). Jurisdiction (1640).

70. Accession to mortgaged property 1077

Analogous Law (1641). Principle (1642). Meaning of Words (1643). What accessions pass with Mortgage (1644, 1645). Bonus (1646). Trade-Fixtures (1647). Accessions pass to Puisne Mortgagee (1648). Rule limited by Contract (1649).

71. Renewal of mortgaged lease 1081

Analogous Law (1650). Principle (1651). Meaning of Words (1652). Renewed Lease (1653). Mortgagor not compellable (1654).

72. Rights of mortgagee in possession 1083, 1084

Analogous Law (1655). Principle (1656). Meaning of Words (1657). When is a Mortgagee in Possession (1658). Possession as lessee (1659). Conflict of Views (1660). Immaterial Elements (1661). Possession of a Portion (1662). Limits of Admissible Expenditure (1663). Management of the Property, Cl. (*a*) (1664). Admissible expenditure (1665). Preservation, Clause (*b*) (1666). Improvements (1667). English Rule (1668). Salvage-Lien (1669). Forfeiture or Sale (1670). What Payments so considered (1671). Principle of Salvage-Lien (1672). Payment of Government Revenue (1673, 1674, 1675). Extension of the Rule (1674). What Interest allowed (1676). For supporting Mortgagor's Title—Cl. (*c*) (1677). Cl. (*d*)—and his own title against the Mortgagor (1678). Renewal of lease—Cl. (*e*) (1679). Charge for Insurance (1680). Limits of the Rule (1681).

73. Charge on proceeds of Revenue sale 1101

Analogous Law (1682, 1686). Principle (1684, 1685). Meaning of Words (1686). Mortgagee's Charge on the surplus (1687, 1688). Sale free from Incumbrance (1689). Mortgagee's Default (1690). Limitation (1691).

74. Right of subsequent mortgagee to pay off prior mortgagee ... 1106

Analogous Law (1692, 1693). Principle (1694). Meaning of Words (1695). Who may pay: Puisne Mortgagee and others interested (1696, 1697, 1698). Payments by other persons (1699). Defective Title no bar (1700). Voluntary payment excluded (1701). Subrogation of Rights—(1) Puisne Mortgagee (1702, 1703, 1704). Rights of puisne Mortgagee on Subrogation (1705). When Decree is no bar (1706, 1707). Revival of Mortgagor's Right (1708, 1709). Price and Conditions of Redemption (1710, 1711). Receipt (1712, 1713, 1714). Paying Mortgagee's Shield—Effect of the third Mortgagee redeeming the first (1715).

75. Rights of mesne mortgagee against prior and subsequent mortgagees 1122

Analogous Law (1717, 1718). Principle (1719, 1720). Meaning of Words (1721). Rights of Mortgagees *inter se* (1722). Subsequent Mortgagee v. Prior Mortgagee (1723, 1724, 1725). Right to redeem prior Mortgage (1726). Limitation (1727). Prior Mortgagee v. Subsequent Mortgagee—What a prior Mortgagee includes (1728). Position of the prior Mortgagee purchaser (1729, 1730).

SECTION PAGE

76. Liabilities of mortgagee in possession: Loss occasioned by his default 1131, 1132, 1133

Analogous Law (1732, 1733). Extent of the Rule (1734). Principle (1735). Meaning of Words (1736). Possession not as Mortgagee (1737). His possession not adverse (1738). He must manage with ordinary prudence (1739). Collection of Rents and Profits (1740, 1741). Mortgagee's Power to create Tenancies (1742). Where Mortgagor remains in Possession (1743). His accountability for illegal Collections (1744). Payment of Public Charges (1745). Contract to the contrary (1746). Necessary Repairs (1747). Waste (1748). Insurance (1749). Mortgagee's Liability to Account (1750). Extent of Liability (1751, 1752). Scrutiny of Accounts (1753, 1754, 1755). Refusal to Account (1756). What full Accounts must contain (1757). Appropriation of Income (1758, 1759, 1760, 1761). Limitation for Recovery of the Surplus (1762). Effect of Tender by Mortgagor (1763). Loss occasioned by Mortgagee's Default (1764).

77. Receipts in lieu of interest 1152

Analogous Law (1766). Principle (1767). Mortgagee's Non-liability (1768). No accounts if profits vary (1769).

78. Postponement of prior mortgagee 1155

Analogous Law (1770). Principle (1771). Meaning of Words (1772). When a Case for Priority arises (1773). Priority forfeited by Fraud (1774, 1775, 1776). Fraud defined (1774). Fraud (1775, 1776). Misrepresentation (1777). Gross Negligence (1778, 1779). Defences (1780, 1781, 1783). (3) Negligence must be the proximate Cause (1783). (4) Negligence against Negligence (1784). (5) Laches in enforcing right (1785). (6) Mistake (1786). (7) Notice (1787, 1788, 1789). (8) Waiver (1790). Debenture (1791). Agent's Fraud binds Principal (1792).

79. Mortgage to secure uncertain amount when maximum is expressed. 1168

Analogous Law (1794). English Law distinguished (1795). Principle (1796). Meaning of Words (1797). Tacking of further Advances (1798, 1799, 1800, 1801). Subsequent advances on the mortgage of movables (1802).

80. Tacking abolished 1172

Analogous Law (1803, 1804). Principle (1805). Meaning of Words (1806). Tacking when still allowed (1807). Tacking under Ss. 72, 79 (1808). English Doctrine of Tacking (1809).

81. Marshalling securities 1177

Analogous Law (1810). English Law (1811). Origin of the Rule (1812). Principle (1813). Meaning of Words (1814). Marshalling of Securities (1815). (1) Must not impair first mortgage (1816). (2) Cannot defeat other subsequent mortgagees (1817). (3) Volunteer disqualified (1818). (4) Where rights different (1819). (5) Equity Considered (1820). (6) No Notice (1821). (7) Excluded by Contract (1822). (8) Common Debtor (1823). (9) Attaching Creditor v. Mortgagee (1824). Extension of the Doctrine to Purchasers (1825). Charges and Liens (1826). (10) Where Security sufficient (1827). (11) Estoppel (1828).

82. Contribution to mortgage-debt 1184, 1185

Analogous Law (1829). Principle (1830). Meaning of Words (1831). General view of the Doctrine (1832). Liability to Contribution, para

SECTION PAGE

(1833, 1834). Immaterial Elements (1835). Valuation of Properties (1836). Deduction of Incumbrance (1837). Para. 2 of S. 82 (1838, 1839). Does Contribution imply Payment of the whole Debt (1840). Contribution on Compulsory Sale (1841). Recovery of Contribution (1842). No Contribution on void Contracts (1843). Mode of Recovery (1844). Marshalling v. Contribution—Provisos (1845, 1846, 1847, 1848, 1849). Common fund essential (1846). Does Contribution create a charge (1850, 1851, 1852). Duration of the Right (1853). Quantum of Contribution (1854, 1855). Against whom available (1856). Extension of the Rule (1857, 1858). No Contribution (1859).

Deposit in Court.

83. Power to deposit in Court money due on mortgage. Right to money deposited by mortgagor 1204

Analogous Law (1860). Principle (1861). Meaning of Words (1862). Tender by Deposit (1863, 1864, 1865). Conditional Tender (1866, 1867). Who may Deposit (1868). In what Court (1869). Form of Notice (1870). Court's Power in Case of Dispute (1871). Consequences of deposit: Terms of withdrawal (*ib.* 1872). Premature Deposit (1873). Does Delivery of Deed create any Right (1874). Limits of the Rule (1875).

84. Cessation of interest 1212, 1213

Analogous Law (1876). Principle (1877). Meaning of Words (1878). Effect of Deposit upon Interest (1879, 1880). Tender ever ready (1881). Notice when required (1882).

85. Parties to suits for foreclosure, sale and redemption 1215

86. Decree in foreclosure suits 1216

87. Procedure in case of payment of amount due; order absolute for foreclosure: Power to enlarge time 1216

88. Decree for sale: Power to decree sale in foreclosure suit ... 1217

89. Procedure when defendant pays amount due 1217

90. Recovery of balance due on mortgage 1217

91. Who may sue for redemption... 1218

Analogous Law (1883). Principle (1884). Meaning of Words (1885). Mode of Redemption (1886). Rights of the Assignee of the Equity of Redemption (1887). Order of Redemption (1888). Rights acquired on Redemption (1889). Procedure in Redemption Suit (1890). Court-fee (1891). Mortgagor's Right of Redemption (1892). Redemption of the Mortgaged Property (1893). Redemption of the whole or part (*ib.*) Persons interested may redeem (1894, 1895, 1896, 1897). Can Mortgagee redeem (1898). Sub-mortgagee (1899). Persons interested in the Equity of Redemption (1900). Lessees (1901). Superior Proprietor (1902). Surety (1903). Surety's Rights (1904). Guardian (1905). Appointment of Guardian (1906). Procedure (1907). Curator of a Lunatic (1908). Trustee (1909). Reversioner's limited Interest (1910). Attaching Creditor (1911). Creditor in Administration Suit (1912). Crown (1913). Others entitled to redeem (1914).

92. Decree in redemption suit 1235

93. In case of redemption, possession: In default, foreclosure or sale: Power to enlarge time 1236

SECTION PAGE

94. Costs of mortgagee subsequent to decree 1236

95. Charge of one of several co-mortgagors who redeem 1236

Analogous Law (1915). Principle (1916). Meaning of Words (1917). Co-mortgagor's Claim for contribution (1918). Nature of Right acquired by co-mortgagor (1919). (1) Nature of the Right (*ib.*). (2) Who is entitled (1920, 1921). (3) Against whom (1922). (4) For what payments (1923, 1924). (5) When does it commence (1925). (6) Procedure (1926). (7) Limitation (1927).

96. Sale of property subject to prior mortgage 1243

97. Application of proceeds 1243

98. Mortgage not described in S. 58, cls. (*b*), (*c*), (*d*), and (*e*) ... 1244

Analogous Law (1928). Principle (1929). Meaning of Words (1930). Simple Mortgage usufructuary (1931, 1932, 1933). Mortgage Usufructuary by Conditional Sale (1934). Anomalous Mortgage (1935). Madras Customary Mortgages (1936). Madras Mortgages (1937). Kanom (*ib.*) and (1939). Otti (1938, 1940). Punjab Customary Mortgages (1941). San Mortgages (1942). General Incidents (1944). Court Fee (1945).

99. Attachment of mortgaged property 1252

100. Charges 1252, 1253

Analogous Law (1946, 1947). Instances and analogues (1948). Principle (1949, 1950). Meaning of Words (1951). Pre-requisites of a charge (1952). Contingent charge excluded (*ib*). Writing unnecessary (1953). Charges created by act of parties (1954, 1955, 1956, 1957). (1) Charge and Mortgage distinguished (*ib*). (2) Property must be specified (1958). (3) Property must be secured (1959, 1960). Instance of a charge (1961, 1962, 1963). Perpetual charge (1964). Settlements, Wills, etc., (1965, 1966). Not available against transferee without notice (1967). Charge of Annuities (1968). Limitation (1969). Charges by Operation of Law (1970). (1) Statutory charges (*ib*). Equitable charges (1971). (2) Salvage liens (*ib.*) and (1972-1975). (3) Liens of trustee and *cestui que trust* (1976, 1977). (4) Partner's lien (1978). (5) Subrogation (1979). Remedy of charge-holder (1980). Charge on debt (1981). Rights and Liabilities of Parties (1982). Against whom is charge enforceable (1983). Limitation (1984). Rights of Trustees (1985). Charges in other Acts (1986). Charge on Moveables (1987). Valuation of Suits (1988).

101. Extinguishment of charges 1276

Analogous Law (1989, 1990). Previous law (1991). Doctrine of *Toulmin* v. *Steere* considered (1992). English Law (1993). Principle (1994). Meaning of Words (1995). Doctrine of Merger generally (1996, 1997). Pre-requisites of the rule (1998). English Cases on question of Merger of Charge (1999). Case of Merger (2000). Merger where Mortgagee is Mortgagor's Administrator (2001). Interest Index of Intention (2002). Express declarations, Exception 1 (2003). Equivocal declaration (2004). Revival of higher security (2005). Notice immaterial (2006). Implied intention, Exception 2 (2007). Oral evidence admissible (2008, 2009). Time for Election (2010, 2011). Where continuance beneficial, Exception 3 (2012, 2013). Purchase for another (2014). Novation (2015, 2016). Renewal of Mortgage (2017, 2018, 2019). Judgment on later security no bar (2020). Limits of the rule (2021). (1) Existence of another charge essential (*ib*). (2) Stoppage of interest (2022).

SECTION PAGE

(3) Merger against Revenue sale (2023). (4) Knowledge of another charge (2024). (5) Mistake (2025). (6) Fraud (2026). (7) Remedies must be co-extensive (2027). (8) Mortgagor excepted (2028). Limitation (2029).

102. Service or tender on or to agent 1300

Analogous Law(2030). Principle (2031). Meaning of Words (2032). Notice and Tenders (2033).

103. Notice etc., to or by person incompetent to contract 1302

Analogous Law (2034). Principles (2035). Meaning of Words (2036).

104. Power to make rules 1304

Analogous Law (2037, 2038). Principle (2039, 2040). Meaning of Words (2041). Rules framed under S. 104 (2042, 2043, 2044, 2045). Notice under S. 83 (4) (2046). Rule under S. 89 (2047). Bombay High Court Rules (2048). Madras High Court Rules A. General (2049). B. Simple Mortgagees and Charges. Suits for sale (2050). Suits for Redemption (2051). C. English Mortgages and Mortgages by Conditional Sale (2052). Suits for Redemption (2053). D. Deposit in Court of Mortgage moneys (2054). Rule 375, Form No. 47: Plaint in a suit by Mortgagee for Personal decree and sale (2055). Form No. 48: Plaint in a suit upon a mortgage of ancestral property or of the property of an undivided Hindu family (2056). Form No. 49: Plaint in a suit for redemption of Mortgage (2057). Form No. 50: Plaint of second mortgagee to redeem the prior mortgage (2058). Rule 376, Form No. 51: Decree in a suit by the first mortgagee against a subsequent mortgagee and mortgagor (2059). Rule 377, Form No. 52: Decree in a suit by second mortgagee against the first mortgagee and the mortgagor (2060). Form No. 53: Decree in a suit by sub-mortgagee against the original Mortgagee and the Mortgagor (2061). Form No. 54: Decree in a suit by sub-mortgagee where the amount due on the derivative mortgage exceeds the amount due on the original mortgage and the former contains a covenant to pay the mortgage-moneys (2062). Form No. 55: Decree in a suit by a second Mortgagee against the first Mortgagee and the Mortgagor when the first Mortgagee consents to a sale free from his Mortgage (2063). Rule 379, Form No. 56: Interim decree for an account in a redemption suit (2064). Rule 383, Form No. 57: Decree in Suit for Sale (2065). Rule 388, Form No. 58: Declarations to be inserted where the defendants or some of them are not personally liable for the mortgage-moneys (2066). Rule 383, Form No. 59: Order upon payment by the defendant (2067). Rule 382, Form No. 60. Order for sale if defendant has made default in payment (2068). Rule 386, Form No. 61: Order confirming sale (2069). Form No. 62: Order confirming sale, when the sale proceeds are not sufficient to satisfy the decree (2070). Rule 388, Form No. 63: Decree in a redemption suit by the Mortgagor against a single Mortgagee (2071). Rule 389, Form No. 64: Redemption-suit. Order upon Accounts and Objections (2072). Rule No. 391, Form No. 66. Order extending time for redemption (2073). Rule 372, Form No. 67: Redemption-suit. Order for sale on default of payment upon the application of the Mortgagee (2074). Rule 393, Form No. 68: Decree in a Foreclosure Suit (2075). Rule 394, Form No. 69: Suit for foreclosure—Several mortgagees—Decree giving one period to redeem (2077). Form No. 70. Suit for foreclosure-Decree in suit by first Mortgagee against a second Mortgagee and the Mortgagor—Successive periods for redemption (2078). Rule 395, Form No. 71. Decree absolute for foreclosure (2079).

SECTION PAGE

Form No. 72. Final decree in a foreclosure suit or suit for redemption upon payment by the defendant (2080). Rule 396, Form No. 73. Suit for foreclosure—Order for sale on application of the defendant (2081). Rule 397, Form No. 74: English Mortgage or Mortgage by conditional sale. Interim decree in a suit for Redemption (2082). Rule 404, Form No. 75: Notice of payment into Court (2083). Rule 406, Form No. 76: Original petition for payment out of Court to the Mortgagee (2084). Rule 406, Form No. 77: Notice of petition by Mortgagee for payment out of Court (2085).

PART THE SECOND.

Procedure relating to Mortgages and Charges.

RULE.

1. Parties to suits for foreclosure, sale and redemption ... 1343

Analogous Law (2086, 2087, 2038). Change of practice of Original Side (2089). Effect of the Amendment (2090). Principle (2091, 2092). Meaning of Words (2093). Necessary Parties (2094, 2095). Parties to a Mortgage-suit (2096). Persons "interested" (2097). Unnecessary Parties (2098, 2099). Persons not "interested" (2100). (1) Persons pleading *jus tertii* (*ib.*). (2) Adverse Claimants (2101). (3) Claimants by Paramount title (2102). (4) Prior Mortgagee (2103, 2104, 2105). (4*a*) Contingent Interest (2106). (5) Persons whose interest is safeguarded (2107). Parties in a Foreclosure Suit (2108). (1) Necessary Plaintiffs (*ib*). (2) Necessary Defendants (2109). Benamidar Plaintiff (2110, 2111). Heirs of Deceased Mortgagee (2112, 2113). Parties to Redemption (2114). (1) Necessary Plaintiffs (*ib*). (2) Necessary Defendants (2115). Plaintiff as Defendant (2116). Arrayed on wrong side (2117). Time for joining Parties (2118). Joinder after Preliminary Decree (2119). Joinder in Appeal and Execution (2120). Persons wrongly joined (2121, 2122). Partition (2123). Pleadings by Parties joined (2124, 2125, 2126). Necessary Parties (2127, 2128). Puisne Mortgagee (2129). Sub-mortgagee (2130). Assignee of Mortgage (2131). Fraudulent and voluntary transferee (2132). Attaching Creditor (2133). Interest created *pendente lite* (2134, 2135, 2136). Trustees, Administrators, etc. (2137). Debenture holders (2138). Kanomdar (2139). Lessees (2140). Landlord (2141). Surety (2142). Reversioners of a Hindu Female (2143). Members of a Mitakshara Family (2144, 2145). Mitakshara son (2146, 2147, 2148). Limitation (2149). Position of Excluded Interests (2150). (1) English Law (*ib*). (2) Joinder by amendment (2151). (3) Operation of decree on excluded Interests (2152, 2153). Mortgagor's Partners (2154, 2155). When exclusion is immaterial (2156, 2157). Can Mortgagee again sue the excluded parties (2158, 2159). Right of Excluded Co-parcener (2160, 2161, 2162). Right of Excluded Puisne Mortgagee (2163, 2164, 2165). Unintentional omission (2166). Right against the Auction-purchaser (2167, 2168, 2169, 2170). Must holder of several Mortgages enforce all (2171). Price of Redemption (2172, 2173). Rights of Mortgagee under Defective Decree (2174). Position of Excluded Party (2175). Right against Transferee without Notice (2176).

RULE

2. Preliminary decree in foreclosure-suit ... ...

Analogous Law (2177, 2178). Principle (2179). Meaning of Words (2180, 2181). Procedure in Foreclosure-suits (2182). Value of recitals and Registration (2183). Against whom recitals are inadmissible (2184). Proof of Mortgage (2185). Quantum of sufficient evidence (*ib.*). Suit on unregistered Mortgage (2187). What rights must be adjudicated (2188). Limits of enquiry (2189). Foreclosure for an Instalment (2190). Mortgagee's other Rights (2191). Mode of taking Accounts (2192, 2193, 2194). Appropriation and Limitation (2195). Items of Account recoverable (2196). Commission or Nazarana (2197). Rates of allowable Interest (2198, 2199). Stoppage of Interest (2200). Post diem Interest (2201). For what period recoverable (2202). Compound Interest (2203). Rule of Damdupat (2204, 2205, 2206, 2207). Liability of Hindu grandson (2208). Penal Interest (2209). Limits of penal enhancement (2210, 2211). Interest as Compensation (2212). Penalty a Question of fact (2213, 2214). Hard Bargains (2215, 2216). What constitutes undue influence (2217). Proof of Undue Influence (2218). Relief against hard and penal bargains (2219). Limits of Judicial Interference (2220). Costs (2221, 2222). Costs when personally recoverable (2223). Interest on Costs (2224). Appeal against Costs (2225). Form and Contents of Preliminary Decree (2226). Successive periods for redemption when fixed (2227). Form of decree in such a case (2228). When other interests involved (2229). How may decree be varied by compromise (2230, 2231, 2232). Instalments inadmissible (2233). Construction of decree (2234). Illustrative cases (2235, 2236, 2237, 2238, 2239). Set off (2240). Delivery of Deeds (2241). Decree on the mortgage of movables (2242). Jurisdiction (2243). Court-fee (2244). Appeal (2245). Mortgagee's interest under preliminary decree (2246).

3. Final decree in foreclosure suit—Power to enlarge time—Discharge of debt ... ...

Analogous Law (2247). Principle (2248). Meaning of Words (2249). Payment of Debt (2250, 2251). Procedure on Payment (2252). Procedure on Non-payment (2253, 2254, 2255). Form of Application (2256). Inquiry under the rule (2257). Enlargement of Time (2258). Grounds for enlargement or otherwise (2259). Period of Enlargement (2260). Terms of Extension (2261). Redemption after due date (2262, 2263, 2264). Postponing date of redemption (2265). Questions for Consideration (2266). Payment or non-payment of Decretal Amount (*ib.*) Form and effect of final decree for Foreclosure (2267). Final decree and its consequences: Discharge of the Debt (2268, 2269, 2270, 2277, 2278, 2279). Effect on right of Privies (2271). Limitation for Application (2272, 2273). Retransfer of Possession (2274, 2275). Incidents of Possession (2276). Debt Discharged: Germination of other rights (2280) Final Decree when reopened (2281). Appeal (2282). Effect of Erroneous Decree (2283).

4. Preliminary decree in suit for sale: Power to decree sale in foreclosure suit 1479

Analogous Law (2284). Principle (2285). Meaning of Words (2286). Who may obtain a decree for sale (2287). Rights of a Sub-mortgagee (2288). Discretionary power to decree sale (2289,2290). Form of decree (2291, 2292, 2293). Interest (2294). Costs (2295). Succession

RULE PAGE

Certificate (2296). Is the Decree final (2297, 2298). Position of Decree-holder as against third Parties (2299). Enforcement of Charge (2300). Construction of Decree (2301, 2302, 2303). Meaning of "Decree" with Costs (2304). How much Property may be sold (2305). Limitation (2306). Decree on Award (2307). Court-fee (2308). Appeal (2309). Not a Money-decree (2310). Assignment of a Mortgage Decree (2311).

5. Final decree in suit for sale 1495, 1496

Analogous Law (2312). Principle (2313). Meaning of Words (2314). Plaintiff's Application for Final Decree (2315,2316 2317,2318). Notice (2319). Power to enlarge time (2320). For what Payment Sale may be ordered (2321). To what Property the Final decree may relate (2322). What Property may be sold (2323). Procedure in a Decree for Sale (2324). Payment out of Court invalid (2325). Finality of Decree (2326, 2327). Procedure on Sale (2328). Provision for Repurchase (2329). Who may repurchase (2330,2331), Conduct of Sale (2332), Mortgagee may bid (2333). Leave to bid when granted (2334). Purchase without leave (2335). Position of Mortgagee Purchaser (2336). Marshalling of Properties (2337,2338). Objections to Sale (2339, 2340). Distribution of Sale-proceeds (2341) Private Sale (2342). Position of a Stranger-purchaser (2343,2344). Effect of Misdescription (2345). Purchase by Co-mortgagor (2346). Mortgagee's Remedy after Sale (2347), (i) Against the Mortgagor (*ib*). Against third Parties (2348). Limitation (2349). Title of Auction-purchaser (2350). Appeal (2351, 2352). Court-fee (2353).

6. Recovery of balance due on mortgage 1524

Analogous Law (2354). Principle (2355, 2356). Meaning of Words (2357). Case for a Supplementary Decree (2358). (1) Previous Sale necessary (2359). (2) Relinquishment Immaterial (2360). (3) When no Sale (2361). (4) To pay what Amount Decree given (2362). (5) Instalments Allowable (2363). (6) No bar by *res judicata* (2364). (7) Order for Decree made in the same Suit (2365, 2366). (8) Sale without Decree (2367). Rights under Supplementary Decree (2368), Limits of the Rule (2369, 2370, 2371). Personal Remedy must be within Limitation (2372). (i) Starting Point of Limitation (2373). (ii) Period of Limitation (2374, 2375). Does S. 48, Civ. Pro. Code, apply (2376). Costs may be so recovered (2377). Does the section extend also to Charges (2378). Succession Certificate (2379). Order when set aside (2380). Appeal (2381). Court fee (2382).

7. Preliminary decree in redemption suit 1539, 1540

Analogous Law (2383). English Law (2384). Principle (2385). Meaning of Words (2386). Nature of a Suit for Redemption (2387, 2388, 2389). Claim for Over-payments (2390). Redemption Suit by a Co-mortgagor (2391). Apportionment of Debt (2392, 2393, 2394, 2395). Mode of Accounting (2396, 2397). Accounts against other Mortgagees (2398). When nothing is due (2399). Pleadings (2400, 2401, 2402). Limitation (2403). Beneficiary barred by Benamidar (2404). Costs of Redemption (2405). Jurisdiction and Court-fee (2406). *Ad interim* Protection (2407). When Payment made (2408). Contents and Construction (2409). Decree must order Payment within six months (2410). Re-transfer on Redemption (2411). Procedure on Non-payment (2412).

RULE PAGE

8. Final decree in redemption suit 1552, 1553

Analogous Law (2413). Principle (2414). Meaning of Words (2415). Mortgagor's Remedy (2416). Redemption after due date (2417). Extension after due date (2418). Finality of Redemption Decree (2419, 2420, 2421, 2422).

9. Decree where nothing is found due or where mortgagee has been overpaid 1561

Analogous Law (2423). Recovery of Over-payments (2424). Procedure in Execution (2425).

10. Costs of mortgage subsequent to decree 1562

Analogous Law (2426). Principle (2427). Meaning of Words (2428). Taxation of Costs (2429). Against whom available (2430). When Costs Disallowed (2431).

11. Right of mesne mortgagee to redeem and foreclose 1564

Analogous Law (2432). Principle (2433). Meaning of Words (2434). Right of Mesne Mortgagee (2435). Price of Redemption (2436).

12. Sale of property subject to prior mortgage 1566

Analogous law (2437). Principle (2438). Meaning of Words (2439). Sale free of Prior Mortgage (2440). Sale subject to Mortgage (2441, 2442). Limit of the Rule (2443). S. 57, Distinguished (2444).

13. Application of proceeds 1569

Analogous Law (2445). Principle (2446). Meaning of Words (2447). Order of Distribution (2448).

14. Suit for sale necessary for bringing the mortgaged property to sale. 1570, 1571

Analogous Law (2449, 2450, 2451). Previous Law (2452). Principle (2453, 2454, 2455). Meaning of Words (2456). What Sale is Prohibited (2457, 2458, 2459). Limits of the Rule (2460). Effect of Prohibited Sale (2461, 2462, 2463, 2464). Remedy by Suit under S. 67 (2465, 2466, 2467). Purchaser without Notice (2468). Enforcement of Security-bond (2469).

15. Charges 1584

Analogous Law (2470).

LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis' Reports (1834—1841).
	„ „ (N. S. 1841—1862).
Act.	Acton's P. C. (1809—1811).
All.	Allahabad.
A.L.J.R.	Allahabad Law Journal Reports (1904—
Amb.	Ambler's Reports (1737—1784).
A.W.N.	Allahabad Weekly Notes (1881—).
A.C.	Appellate Civil Jurisdiction.
Agra	Agra High Court Reports (1866—1868).
App.Cas.	Law Reports, Appeal Case.
Atk.	Atkins' Reports (1736—1754).
B. & Ad.	Barnewal and Adolphus' Reports (1830—1834).
B. & Ald.	Barnewal and Alderson's Reports (1817—1822).
B. & C.	Barnewal and Cresswell's Reports (1822—1830).
B. & S.	Best and Smith's Reports (1861—1866).
Bac. & Ab.	Bacon's Abridgment.
Beav.	Beavan's Reports (1838—1866).
B. L. R.	Bengal Law Reports (1868—1876).
Bing.	Bingham's Reports (1822—1834).
Bing. N. C.	Bingham's New Cases (1834—1840).
B. H. C. R.	Bombay High Court Reports (1862—1875).
Bom. L. R.	Bombay Law Reporter (1899—).
B. P. J.	Bombay Printed Judgments (1869—1898).
Br. C. C.	Brown's Chancery Cases (1778—1794).
Brow. & Lush	Browning and Lushington's Reports.
Bur. L. R.	Burmah Law Reports (1894—).
Camp....	Campbell's Reports (1807—1816).
C. B.	Common Bench Reports (1845—1856).
C. B. (N. S.)	Common Bench (New Series) (1856—1865).
C. & J.	Crompton and Jervis' Reports (1830—1832).
C. L. R.	Calcutta Law Reports (1877—1883).
C. & M.	Crompton and Meeson's Reports (1832—1834).
C. M. & R.	Crompton Meeson & Roscoe's Reports (1834—1835).
C. & P.	Crompton & Payne's Reports.
Ch. C. C.	Cases in Chancery (1660—1668).
Ch. R.	Reports in Chancery (1650—1712).
Cowp.	Cowper's Reports (1774—1778).
Co. Litt	Coke upon Littleton.
Coll.	Colles (House of Lords) (1697—1714).
C. & P.	Carrington and Payne's Reports (1823—1841).
C. L. J.	Calcutta Law Journal (1904—1905).
C.P.L.R.	Central Provinces Law Reports (1866—1904).
C. P. D.	Law Reports, Common Pleas Division.
Cowp.	Cowper's Reports (1774—1778).
Cr. J.	Crompton and Jervis's Reports (1830—1832).
Cr. M.	Crompton and Meeson (1832—1834).
Cr. M. & R.	Crompton, Meeson and Roscoe's Reports (1834—1836).
C. W. N.	Calcutta Weekly Notes (1896—).

D. & C. ...	... Deacon and Chetty's Reports (1832—1835).
D. M. & G. ...	... DeGex, Macnaghten and Gordon's Reports (1851—1857).
De. G & J. ...	... DeGex and Jones' Reports (1862—1865).
DeG. & S. ...	... DeGex and Smale's Reports (1846—1852).
DeG. F. & J. ...	... DeGex, Fisher and Jones' Reports (1859—1862).
DeG. J. & S. ...	... DeGex, Jones, and Smith's Reports (1862—1866).
DeG. M. & G. ...	... Degex, Macnaghten and Gordon's Reports (1851—1857).
Dick.	... Dicken's Reports (1559—1798).
Doug.	... Douglas's Reports (1778—1784).
Dowl.	... Dowling's Reports (1830—1840).
Dowl. (N.S.) ...	... Dowling's Reports (New Series) (1841—1842).
Dowl. & L. ...	... Dowling and Lownde's Reports (1843—1849).
Dr.	... Drewry's Reports (1852—1859).
Dr. & War. ...	... Drury and Warren's Reports (1841—1843).
Drew. ...	... Drewry's Reports (1852—1859).
Drew & S. ...	... Drewry and Smale's Reports (1859—1865).
Durn. & E. ...	... Durnford and East Reports (1785—1800).
East. ...	... East's Reports (1800—1812).
E. & B. ...	... Ellis and Blackburn's Reports (1852—1858).
E. B. & E. ...	... Ellis, Blackburn and Ellis' Reports (1858).
Ed.	... Edition.
E. & E. ...	... Ellis and Ellis' Reports (1858—1861).
Eq. Ca. Ab. ...	... Equity Cases Abridged (1853—1855).
Esp.	... Espinasse's Reports (1793—1807).
Exch.	... Exchequer Reports (1848—1856).
Ex. D.	... Law Reports, Exchequer Division.
F. B.	... Full Bench.
Fisher... ...	... Fisher on Mortgages (5th Ed.).
Fins.	... Finch's Reports (1673—1681).
Free.	... Freeman's Reports (ch.) (1660—1706).
Giff.	... Giffard's Reports (1857—1865).
Hare	... Hare's Reports (1841—1853).
H. & C. ...	... Hurlstone and Coltman's Reports (1862—1866).
H. & M. ...	... Hemming and Miller's Reports (1862—1865).
H. & N. ...	... Hurlstone and Norman's Reports (1856—1862).
H. & C. ...	... Law Reports, House of Lords Cases.
H. Bl. ...	... Henry Blackstone Reports (1788—1796).
H. L. C. ...	... Clark's House of Lords Cases (1847—1866).
Holt N. S. ...	... Holt's Nisi Prius Reports (1815—1817).
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I. L. R All. ...	... Indian Law Reports, Allahabad Series)
„ Bom. ...	... „ „ „ Bombay Series) (1876).
„ Cal. ...	... „ „ „ Calcutta Series)
„ Mad. ...	... „ „ „ Madras Series)
Ir. ...	... Irish.
Ir. Eq. R. ...	... Irish Equity Reports (1867—).
I. J.	... Indian Jurist.
I. J. (N. S.) ...	... Indian Jurist, New Series.
J. & H. ...	... Jhonson & Hemming's Reports (1859—1862).
Jur.	... Jurist (1837—1854).
Jur. N. S. ...	... Jurist, New Series (1855—1856).
Kay & J. ...	... Kay & Johnson's Reports (1854—1858).
Keen	... Keen's Reports (1836—1838).
Keb.	... Keble's Reports (1661—1679).
Kn.	... Knapp's Reports (P.C.) (1829—1836).
Leon	... Leonard's Reports (1553—1615).

L.J.	... Law Journal Reports (1823—1831).
L.J. (N.S.) ...	... Law Journal Reports (New Series) (1831—).
L.J. Ch. ..	... Law Journal, Chancery.
L.R.	... Law Reports (1866—).
L.R. Ch. ...	... Law Reports, Chancery.
L.R. C.P. ...	... Law Reports, Common Pleas.
L R , Eq. ...	... Law Reports, Equity Cases.
L.R., Ex. ...	... Law Reports, Exchequer.
L.R , H.L. ...	... Law Reports, English and Irish Appeals.
L.R H.L.C. ...	... Law Reports, House of Lords Cases.
L.R., I.A. ...	... Law Reports, Indian Appeals.
L.R., Q.B. ...	... Law Reports, Queen's Bench Cases.
L.T. ...	... Law Time's Reports (1859—).
Mar. ...	... Marshall's Reports (1814—1816).
M. & A. ...	... Montagu & Ayrton's Reports.
M. & C. ...	... Mylne & Craig's Reports (1835—1841).
M. & G. ...	... Macnaghten & Gordon's Reports (1849—1852).
Man. & G. ...	... Manning and Granger (1840—1844).
M H.C.R. ...	... Madras High Court Reports (1862—1865).
M & K. ...	... Mylne & Keen's Reports (1832—1835).
M. & P. ...	... Moore and Payne's Reports (1828—1831).
M.L J.R. ...	... Madras Law Journal Reports (1890—).
M. & S. ...	... Maule & Selwyn's Reports (1813—1817).
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Mad. ...	... Maddock's Reports (1815—1822).
Meq. ...	... Mequeen's House of Lords Cases (1851—1852).
Mac. & G. ...	... Macnaghten & Gordon's Reports (1849—1852).
Marsh. ...	... Marshall's Reports (1813—1816).
Mer.	... Merivale's Reports (1816—1817).
Mont.	... Montagu's Reports (1829—1832).
Mont. & Ayr. ...	... Montagu & Ayrton's Reports (1833—1838).
Mood.	... Moody's Chancery Cases (1824—1844).
M. I. A. ...	... Moore's Indian Appeals (1836—1872).
Moo. P. C. ...	... „ Privy Council Reports (1836—1862).
Moo. P. C. (N.S.) ...	... „ „ (New Series) (1862—1865).
My. & Cr. ...	.. Mylne and Craig's Reports (1835—1841).
My. & K. ...	... „ and Keen's Report (1832—1835).
Nag. L R. ...	... Nagpur Law Reports (1905—).
N. & M. ...	... Neville and Manning's Reports (1832—1836).
N. & P. ...	... Neville and Perry's Reports (1836—1838).
N.S.	... New Series.
N. W.P H.C.R.	... North-Western Provinces High Court Reports (1866—1875).
O.C.	... Original Civil Jurisdiction.
P C.	... Privy Council.
P.D.	... Law Reports, Probate Division.
P.L.R. ...	... The Punjab Law Reporter (1900—).
P.R.	... Punjab Record.
P. Wms. ...	... Peere Williams' Reports (1695—1736).
Phill.	... Phillips' Reports (1841—1849).
Q B. ...	... Adolphus and Ellis' Queen's Bench Reports (1834—1841).
Q. B. D. ...	... Law Reports, Queen's Bench Division.
R. & M. ...	... Russell and Mylne's Reports (1829—1831).
R R. ...	... Revised Reports (1875—).
Russ. ...	... Ruesell's Reports (1826—1829).
S D.A. ...	... Sudder Dewany Adaulat Reports.
S.C. ...	.. Select Cases.

Sch. & Lef.	...	... Schoales & Lefroy's Reports (1802—1806).
Sel. Ca.	...	... Select Cases Anon.
S. J.	...	... Solicitor's Journal.
S. L. C.	...	... Smith's Leading Cases.
Sh.	...	... Shower's Reports (1678—1795).
Sim.	...	... Simon's Reports (1826—1850).
Sm. L. C.	...	... Smith's Leading Cases.
Sm. & Giff.	...	... Smale & Giffard's Reports (1852—1857).
Stark.	...	... Starkie's Reports (1815—1822).
Supra.	...	... Above.
Sup. Vol.	...	... Supplementary Volume.
Sw.	...	... Swanston's Reports (1818—1819).
Taunt.	...	... Taunton's Reports (1807—1819).
T. L. R.	...	... Times Law Reports.
T. R.	...	... Term Reports (1795—1800)
Vaugh.	...	... Vaughan's Reports (1865—1874).
Vern.	...	... Vernon's Reports (1681—1720).
Ves.	...	... Vesey's (Junior) Reports (1789—1807).
Ves. Sen.	...	... Vesey's (Senior) Reports (1746—1755).
Ves. & B.	...	... Vesey and Beame's Reports (1807—1814).
W. N.	...	... Law Reports, Weekly Notes (English).
W. R.	...	... Weekly Reporter (Sutherland's) (1861—1877).
W. R. (Eng.)	...	... Weekly Reporter, English (1852—).
W. & T.L.C.	...	... White & Tudor's Leading Cases.
Willes.	...	.. Willes' Reports (1737—1760).
Y. & C.	...	... Young & Collyer's Reports (1834—1842).
Y. & C.C.C.	...	... Young & Collyer's Chancery Cases (1841—1844).
Y. & J.	...	.. Young & Jervis' Reports (1826—1830).
Y. & C. Ex.	...	... Young and Collyer's Exchequer Reports (1834—1842).
§	...	... Paragraph.

TABLE OF CASES CITED.

PAGE

A

Abadi Begum v. Assaram ... 1007
Abaji v. Lakshman ... 791
Abbakke v. Kinhiamma 830, 1035, 1427
Abbas Aly v. Nund Coomar ... 838
Abbesing v. Jasvat Singh ... 813
Abboy v. Attarmoni ... 875
Abdul v. Balimun ... 873
——— v. Nandlal 1427, 1430, 1431
Abdulbhai v. Kashi 793, 801, 810, 813
Abdul Gani v. Krishnaji ... 1105
——— Hak v Gulam 905, 906
——— Hossein v. Turner ... 1157
——— Kadir v. Bagdade ... 1433
Abdul Majid v. Jawalier ... 1473
——— —— v. Muhammad ... 880
Abdul Qayyum v. Sadruddin 1097, 1098, 1115
——— Rahman v. Noor Mahomed 1020, 1075
——— Sattar v. Satya Bhushan ... 1539
Abdur v. Hafez ... 856
Abdu Rahman v. Ali Hafez ... 791
Abhiram v. Mukunda 1419, 1429
Abir Paramanik v. Jahar Mahmud 1444, 1504
Ablak v. Narain ... 1046
Abney v. Miller ... 986
Abraham v. Bubb 1002, 1004
Abrahams v. Dimmock ... 1436
Abouloff v. Oppenhemer ... 1156
Achalabala v. Surendra Nath 1418, 1484, 1570
Achat Ramchandra v. Hari 1096, 1098, 1198, 1268
Achobandil v. Mahabir ... 914
Achumbheet v. Bhagwant ... 1026
Achumbit v. Kesho Lall ... 857
——— v. Nund Ram ... 841
Achutan v. Kali ... 1250
——— v. Keshavan ... 1250
——— v. Narasimham 1142, 1250
Achutaramaraju v. Subbaraju 789, 790
Adakkalam v. Theethan ... 880
Adams v. Angell 1126, 1279, 1282, 1284, 1287, 1291, 1292, 1293
——— v. Paynter 1371, 1373
——— v. Scott 1059, 1063
Addecott v. Addecott ... 1265
Adityam v. Rana Krishna ... 791
Administrator-General v. Premlal ... 854

PAGE

Afra v Basant ... 790
Afzul Hossain v. Rajbuns ... 1105
Agarchand v. Rikhma 1011, 1158, 1580
Aghore Nath v. Ram Churn ... 1510
Agra and Masterman's Bank, *In re* ... 1410
Agra Bank v. Barry ... 895
Agricultural Cattle, etc., Co. v. Fitzgerald ... 886
Ahadi v. Asaram ... 1273
Ahed Mollah v. Diljan ... 1489
Ahilyabai v. Kashinath ... 1447
Ahinsa Bibi v. Abdul Kader 901, 910
Ahmad Ali v. Bakar Hasain 956, 958 1476, 1513, 1514, 1521
——— —— v. Moung Tou ... 1522
Ahmaduddin v. Banke Rai 1193, 1198
Ahmadullah v. Sitar Baksh 1042, 1043, 1045, 1047
Ahmad Wali Khan v. Shamshul Jahan 857, 1237, 1239, 1242
Ahmed v. Dayabhai ... 1097
——— v. Kunhamed ... 1248
——— v. Union Marine Insurance & Co. ... 1414
——— v. Jowahir Singh ... 1513
Ahmedbhoy v. Valleebhoy 1364, 1365, 1373
Aimadar v. Makhan Lal 1031, 1135, 1512
Aiyappa v. Kuppusami 1003, 1033
Aiythurai v. Santhu ... 1371
Ajaib Nath v. Mathura ... 838
Ajabi v. Mangal ... 873
Ajan v. Manga ... 872
Ajodya v. Sheo Porshad 790, 1460
Ajoodhya v. Girdharee ... 1143
Ajudhia v. Kunjal 911, 912
——— v. Man Singh 981, 1079, 1481
Ajudhia Pershad v. Baldeo Singh ... 1459, 1460, 1465, 1468, 1471, 1474, 1493, 1499, 1506
Akati v. Chirayil ... 1167
Akhara v. Subalal 1118, 1503
Akhe Ram v. Nand Kishore ... 1047
Akhoy Kumar v. Corporation 1259, 1273
Akikunnissa v. Rooplal 1304, 1459, 1468, 1471, 1498, 1506, 1516
Akoba v. Sakharam ... 1232
Akramnissa v. Vali-ul-nissa ... 1471

Sch. & Lef.	...	... Schoales & Lefroy's Reports (1802—1806).
Sel. Ca.	...	... Select Cases Anon.
S. J.	...	... Solicitor's Journal.
S. L. C.	...	... Smith's Leading Cases.
Sh.	...	... Shower's Reports (1678—1795).
Sim.	...	... Simon's Reports (1826—1850).
Sm. L. C.	...	... Smith's Leading Cases.
Sm. & Giff.	...	... Smale & Giffard's Reports (1852—1857).
Stark.	...	... Starkie's Reports (1815—1822).
Supra.	...	... Above.
Sup. Vol.	...	... Supplementary Volume.
Sw.	...	... Swanston's Reports (1818—1819).
Taunt.	...	... Taunton's Reports (1807—1819).
T. L. R.	...	... Times Law Reports.
T. R.	...	... Term Reports (1795—1800)
Vaugh.	...	... Vaughan's Reports (1865—1874).
Vern.	...	... Vernon's Reports (1681—1720).
Ves.	...	... Vesey's (Junior) Reports (1789—1807).
Ves. Sen.	...	... Vesey's (Senior) Reports (1746—1755).
Ves. & B.	...	... Vesey and Beame's Reports (1807—1814).
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W. R.	...	... Weekly Reporter (Sutherland's) (1861—1877).
W. R. (Eng.)	...	... Weekly Reporter, English (1852—),
W. & T.L.C.	...	... White & Tudor's Leading Cases.
Willes.	...	... Willes' Reports (1737—1760).
Y. & C.	...	... Young & Collyer's Reports (1834—1842).
Y. & C.C.C.	...	... Young & Collyer's Chancery Cases (1841—1844).
Y. & J.	...	... Young & Jervis' Reports (1826—1830).
Y. & C. Ex.	...	... Young and Collyer's Exchequer Reports (1834—1842).
§	...	... Paragraph.

TABLE OF CASES CITED.

PAGE

A

Abadi Begum v. Assaram ... 1007
Abaji v. Lakshman ... 791
Abbakke v. Kinhiamma 830, 1035, 1427
Abbas Aly v. Nund Coomar ... 838
Abbesing v. Jasvat Singh ... 813
Abboy v. Attarmoni ... 875
Abdul v. Balimun ... 873
——— v. Nandlal 1427, 1430, 1431
Abdulbhai v. Kashi 793, 801, 810, 813
Abdul Gani v. Krishnaji ... 1105
——— Hak v Gulam 905, 906
——— Hossein v. Turner ... 1157
——— Kadir v. Bagdade ... 1433
Abdul Majid v. Jawalier ... 1473
——— —— v. Muhammad ... 880
Abdul Qayyum v. Sadruddin 1097, 1098, 1115
——— Rahman v. Noor Mahomed 1020, 1075
——— Sattar v. Satya Bhushan ... 1539
Abdur v. Hafez ... 856
Abdu Rahman v. Ali Hafez ... 791
Abhiram v. Mukunda 1419, 1429
Abir Paramanik v. Jahar Mahmud 1444, 1504
Ablak v. Narain ... 1046
Abney v. Miller ... 986
Abraham v. Bubb 1002, 1004
Abrahams v. Dimmock ... 1436
Abouloff v. Oppenhemer ... 1156
Achalabala v. Surendra Nath 1418, 1484, 1570
Achat Ramchandra v. Hari 1096, 1098, 1198, 1268
Achobandil v. Mahabir ... 914
Achumbheet v. Bhagwant ... 1026
Achumbit v. Kesho Lall ... 857
——— v. Nund Ram ... 841
Achutan v. Kali ... 1250
——— v. Keshavan ... 1250
——— v. Narasimham 1142, 1250
Achutaramaraju v. Subbaraju 789, 790
Adakkalam v. Theethan ... 880
Adams v. Angell 1126, 1279, 1282, 1284, 1287, 1291, 1292, 1293
——— v. Paynter 1371, 1373
——— v. Scott 1059, 1063
Addecott v. Addecott ... 1265
Adityam v. Rana Krishna ... 791
Administrator-General v. Premlal ... 854
Afra v. Basant ... 790
Afzul Hossain v. Rajbuns ... 1105
Agarchand v. Rakhma 1011, 1158, 1580
Aghore Nath v. Ram Churn ... 1510
Agra and Masterman's Bank, *In re* ... 1410
Agra Bank v. Barry ... 895
Agricultural Cattle, etc., Co. v. Fitzgerald ... 886
Ahadi v. Asaram ... 1273
Ahed Mollah v. Diljan ... 1489
Ahilyabai v. Kashinath ... 1447
Ahinsa Bibi v. Abdul Kader 901, 910
Ahmad Ali v. Bakar Hasain 956, 958 1476, 1513, 1514, 1521
——— —— v. Moung Tou ... 1522
Ahmaduddin v. Banke Rai 1193, 1198
Ahmadullah v. Sular Baksh 1042, 1043, 1045, 1047
Ahmad Wali Khan v. Shamshul Jahan 857, 1237, 1239, 1242
Ahmed v. Dayabhai ... 1097
——— v. Kunhamed ... 1248
——— v. Union Marine Insurance & Co. ... 1414
——— v. Jowahir Singh ... 1543
Ahmedbhoy v. Valleebhoy 1364, 1365, 1373
Aimadar v. Makhan Lal 1034, 1135, 1512
Aiyappa v. Kuppusami 1003, 1033
Aiythurai v. Santhu ... 1371
Ajaib Nath v. Mathura ... 838
Ajabi v. Mangal ... 873
Ajan v. Manga ... 872
Ajodya v. Sheo Pershad 790, 1460
Ajoodhya v. Girdharee ... 1143
Ajudhia v. Kunjal 911, 912
——— v. Man Singh 981, 1079, 1481
Ajudhia Pershad v. Baldeo Singh ... 1459, 1460, 1465, 1468, 1471, 1474, 1498, 1499, 1506
Akati v. Chirayil ... 1167
Akbara v. Subalal 1118, 1503
Akhe Ram v. Nand Kishore ... 1027
Akhoy Kumar v. Corporation 1259, 1273
Akikunnissa v. Rooplal 1304, 1459, 1468, 1471, 1498, 1506, 1516
Akoba v. Sakharam ... 1232
Akramnissa v. Vali-ul-nissa ... 1471

	PAGE
Akshaya Kumar v. Surja Kumar	... 1461
Alagappa v. Vellian	... 1364
Alan Singh v. Gokal Singh	1370, 1382, 1383
Alangaram v. Lakshman	1109, 1293
Alaya Kammal v. Subbaraya	1199, 1268
Alcock, *In re*	... 1458
Alderson v. Langdale	... 887
Alderson v. White	789, 809, 810, 844, 974
Aldons v. Cornwell	884, 885
Aldrich v. Cooper	... 1178, 1179, 1183, 1187, 1239
Aldridge v. Forbes	... 1181
Alen v. Hogan	... 1264
Alexander v. Brown	... 918
——— v. Crosbie	... 1071
Ali Abbas v. Kalkaprasad	941, 1022
Ali Ahmad v. Naziban	1459, 1468, 1473, 1474, 1499, 1522, 1536
——— ——— v. Rahmatullah	808, 836
Aliba v. Nanu	829, 832, 835, 1257
Alijan v. Mariam Bibi	... 1530
Ali Hasan v. Dhirja	1007, 1124, 1293, 1385
Ali Khan v. Indar Pershad	... 884
——— ——— v. Mahomedkhan	... 923, 924, 955, 1405, 1544
Alikjan v. Rambaran	1021, 1359, 1492
Ali Mahomed v. Lalta Baksh	... 979
Alimee v. Roshun Ali	1465, 1466, 1469
Ali Reza v. Tarasoondree	... 922
Ali Saheb v. Shahji	... 1423
Ali Shah v. Amani Begum	... 1406
Alison, *In re*	1066, 1072
Allah Baksh v. Sada Sukh	... 1207
Allu Khan v. Roshan Khan	... 942, 962, 944, 1173, 1174, 1175
Alsager v. Rowley	... 1233
Alston, *Ex parte*	... 1184
Altaf Ali v. Lalta Prasad	971, 1086
——— ——— v. Lalji Mal	... 1091
Altaf Rai v. Lalji	... 1137
Aman Ali v. Azgar Ali	... 1413
Amanat Begam v Bhajan Lal	1223, 1453
Amarchand v. Kila Morar	1246, 1252
Aman Chandra v. Roy Goloke Chandra,	1285
——— ——— ——— v. Shoshi Bhusan	... 1227
Amatool Hossain v. Ahmud Alee	... 1046
Ambika v. Ramudit	... 1026
Ameer Ammal v. Sankaranarayanan	1225, 1266
Ameerchand v. Bakshi Shiva Prasad	1515, 1516
Ameerooddeen v. Ramchand	1133, 1146
Ameeroollah v. Ram Das	1084, 1090, 1093, 1142
Amesbury v. Brown	... 126
Aminabi v. Sidu	... 1463
Amiruddin v. Khairuddin	... 1364
Amirul v. Khairunnessa	... 1441
Amman v. Pakran	... 1199
Ammanna v. Gurumurthi	833, 848
Ammayi v. Rathna	... 1352
Ammu v. Rama	... 1135
Amolachand v. Jowahir	... 1471
Amolak Ram v. Chandan Singh	993, 1418, 1420, 1447, 1484, 1490
Amrita v. Naru	... 1223
Amrit Lall v. Lallu Bhai	... 1143
Amritnath v. Gaurinath	... 1252
Amirto Lall v. Rajonee Kant	... 1359
Amrit Rao v. Kali Khan	... 1386
Amrudh Singh v. Sheo Prasad	1558, 1559
Amruti v. Govind Rao	886, 887
Ananda v. Khudi Ram	... 921
Anandi Ram v. Dur Nijaf Ali	1095, 1096 1206, 1207, 1211
Anand Rao v. Balkrishna	... 1429
——— v. Durga Bai	... 1424
——— — v. Keshavrao	... 1543
— ——— v. Tatya	1242, 404
Anand Rav v. Ravji	1087, 1479
Anant v. Arjun	... 1163
Anantanarayana v. Abdul Karim	... 1445
Anakaran v. Saidawadath	795, 796, 798,
Ancaster v. Mayer	... 1034
Anderson v. Pignett	1279, 1297
——— v. White	... 807
——— v. Radcliffe	... 1477
Andrew v. Harris	... 1198
Angell v. Draper	... 1233
Anglo-Danubian Steam Navigation Co., *In re*	... 942
Anglo Indian Trading Co. v. Brierly	1034, 1038
Annaji v. Raghubai	... 1425
——— v. Bapuchand	822, 1358
Annamalai v. Selleppa	... 1416
——— ——— v. Veerabhadram	... 1423
Anna Pillai v. Thangathammal	... 1491
Annappa v. Ganapati	... 930
Annaswami v. Narranaiyan	1027, 1037
Annoda v. Bhuban	... 871
Anonymous	1351, 1409, 1520
Anrood v. Dummer	... 901
Ansell v. Baker	... 1281
Ansley v. Newman	... 1181
Anund Chunder v. Soobul Chunder	989, 996, 1043
Anundmaye v. Jagumoni	... 1046
Anund Moye v. Grish Chunder	1264, 1266
Anundo Mayee v. Dhonendro Chunder	1163, 1357, 1383
Apa v. Salam	... 1220

PAGE

Apaji v. Raoji ... 1277
Appa v. Bhaskar ... 1561
Appamme v. Ramanna ... 883
Appa Rao v. Krishna 1503, 1505
———— v. Suryanarayana ... 1428
Appasami v. Manikam 887, 1256
———— v. Virappa 1042, 1045
Appiah v. Rama Reddi ... 1459
Applebe, *re* ... 1363
Arab, *re* ... 1181
Aravamutha v. Kumarasami 1126, 1448
Archbold v. Scully ... 1164
Ardesir v. Syed Sirdar Ali ... 1272
Ariabudra v. Dorasami ... 1361
Arimulla v. Secretary of State ... 1438
Ariyaputri v Alamelu 923, 957, 1543
Arjan Bibi v. Asgar Ali ... 1436
Arjun Singh v. Manchabal Singh ... 1475
Arnold v. Baingrigg ... 1567
——— v. Cheque Bank 1162, 1163
Arumugam v. Periasami 924, 1542
———— v. Sivagnana 1051, 1490
Arunachalam v. Ayyavayyan 1029, 1030, 1031, 1039
Arunachola v. Sithaya 982, 1090, 1093, 1094
Aruth Soar v. Juggunnath ... 1027
Aryan Bank v. Venkata 1485, 1498
Asan v. Aru ... 1371
Asansah v. Vamana 952, 1237, 1238
Ashabai v. Rustamji 1365, 1373
Ashbury, *Ex-parte* ... 892
Ashtaq Ahmad v. Wazir Ali 1239, 1242, 1274
Ashraf Ali v. Net Lal ... 1305
Ashton v. Corrigan ... 798
——— v. Dalton ... 897
——— v. Wood ... 1061
Ashutosh v. Tara ... 1444
Ashworth v. Lord 1412, 1564
Asirun v. Sahrip ... 1488
Aspal Singh v. Sheodursun ... 899
Aspden v. Seddon ... 1037
Astley v Miles ... 1287
Asutosh Banerji v. Lukhimoni 1271, 1575
Asutosh v. Behari Lal 1578, 1580, 1583
Atchamma v. Subbarayadu ... 1025
Athar Ali v. Nawazi Lal ... 1036
Athill, *Re* 1178, 1185, 1193
Atmakuru v. Atmakuru ... 1491
Atmaram v. Umed Ram ... 884
Attorney-General v. Bregleton, &c., Association ... 940
———— ———— v. Cooper ... 1363
———— ———— v. Corporation of Birmingham ... 1364

PAGE

Attorney-General v. Crofts 1234, 1235
———— ———— v. Kohler, ... 1151
———— ———— v. Marquis of Ailesbury ... 885
———— ———— v. Munro ... 1023
———— ———— v. Selborne ... 1113
Aubhoyessury v. Gowri Sunkur ... 1015, 1027, 1271, 1272, 1450, 1489, 1574, 1575, 1577, 1579
Audsely v. Horn ... 1564
Auhindro Bhoosun v. Chunnoolall 1145, 1367, 1442
Aundala v. Kandasubba ... 796
Austin v. Chambers ... 911
Autu Singh v. Ajudhia ... 1295
Averall v. Wade ... 1178, 1179, 1181, 1185, 1194, 1196, 1202
Aylward v. Lewis ... 1373
Aynslay v. Reed ... 1233
Ayyavayyar v. Rahimansa 794, 809
Azimdad v. Ghansham ... 1252
Azim-ul-lah v. Najmunnissa ... 1015, 1027, 1575, 1576, 1582
Azimut Ali v. Jowahir Singh ... 957, 958, 967, 1228, 1543, 1544
Azmab v. Sibla Bux ... 888

B

Babaji v. Magniram 924, 927, 1050, 1104
——— v. Tatya ... 1154
Babbu v. Sitaram 884, 1405
Babia and San Francisco. *Re* ... 1410
Baboo Kankha Lal v. Syed Dad Ali ... 1219
——— Lall v. Jamal Ali 859, 1151
——— Prasad v. Khiali Ram ... 1462
——— Rai v. Shadiram ... 994
Bacchu v. Madad Ali ... 1446
Bacchu Koer v. Golab Chand ... 1500
Bachelor v. Middleton ... 1225
Bachhouse v. Charlton ... 896
Badal Ram v. Taj Ali 837, 848
Badam Kumari v. Hari Dasi ... 1521
Badaum Koonwar v. Seetul Pershad ... 1094
Badcock Mont, *Ex parte* ... 1074
Badi v. Sami ... 1421
Badri v. Murli ... 1137
Badri Das v. Inayat Khan 1527, 1528, 1533
Badri Man v. Raja Ram ... 1527
Badri Narain v. Jaikishendas ... 1220
——— ——— v. Kunj Behari 1457, 1468
Badri Prasad v. Doulat Ram ... 1295
———— ——— v. Madan Lal ... 1379
———— ——— v. Murlidhar ... 858
———— ——— v. Sheo Dhian 995, 1043, 1083

	PAGE
Badshah v. Hardi	... 1447
Bafatun v. Bilaiti	... 1454
Bageshri v. Muhammad Nagi	1527, 1535
——— v. Pancho	788, 790
Baghelin v. Mathura Prasad	... 1086
Bagirath v. Nambat Singh	... 1192
Bagnall v. Villar	... 1004
Bagwantappa v. Vishwanath	... 1491
Bahadur v. Balchand	... 872
——— v. Naine Mal	... 1381
——— v. Nawab Jan	... 1223
Bahadur Khan v. Kura Mull	980, 982
Bahri Prasad v. Abdul Karim	... 872
Bai v Manekbai	... 1473
Bai Baiji v. Bai Santok	... 1251
Baid Nath v. Shamanund	1427, 1428, 1487, 1516
Bai Ganga v. Raja Ram	1572, 1577
Baij Nath v. Binoyendra Nath	... 1453
——— v. Harikishen	976, 981
——— v. Maheshwari	848, 1022, 1027
——— v. Murlidhar	1110, 1121
——— v. Naubat Singh	... 1193
——— v. Shah Ali	... 1427
——— v. Sheo Sahay	867, 868
Bai Kantha v. Mohendra	... 1223
Bailey v. Hammond	... 1225
——— v. Richardson	... 1287
Baimanekbai v. Manekji	... 1498
Bai Moti Vahu v. Mamubhai	... 808
Bai Ruttonbai v. Fraser Ice Factory	... 1209
Baishnab Charan Laha v. Basunta	... 1478
Baisuddin v. Khoda Newaz	... 840
Baji Lal v. Gobardhan	... 1550
Bajirao v. Gulab	... 839
Bajnath v. Narain	... 848
Bajranji v. Mahabir	... 1524
——— v. Udit Narain	795, 818, 1026
Baker v. Denning	... 869
——— v. Gray	... 965
Baker's claim, *Re*	... 1536
Bakhar Sajjad v. Udit Narain	... 1418, 1420, 1449, 1450, 1451, 1484, 1486
Bakhtawar Begam v. Husaini Khanum.	903, 904, 905, 906, 908
——— Lal v. Baru Mal	... 1570
Bakshiram v. Darku	... 976, 979, 980, 982
——— v. Liladhar	... 1407
Bala v. Shiva	1222, 1541, 1542
Balabhai v. Gobhraj	1037, 1039
Baladeo Sonar v. Mobarak Ali Khan	... 1379
Balagobind v. Narain Lal	... 1417
Balaji v. Babu	921, 1222
Balaji v. Banabai (Mt.)	... 880
——— v. Dogi	... 1046
——— v. Nana	1093, 1097, 1098, 1142
——— v. Sakharam	912, 1012
——— v. Tatya	... 1152
——— v. Tulsiram	1329, 1379, 1380
——— v. Vithu	... 906
Balakrishna v. Balwant	... 1148
——— v. Vyankatrao	... 1163
Balakushaba v. Abai Amrita	... 970
Balanda v. Diwanu	... 838
Balaram v. Mangla	... 833
——— v. Nanuram	1206, 1211
Balasubramanian v. Ramasawmi	... 1110
——— v. Sivaguru	827, 961, 962, 1257
Balden v. Hushian Singh	... 1519
Baldeo v. Abhiman	... 1503
——— v. Arjun	... 1578
——— v. Baij Nath	1193, 1197, 1202, 1238
——— v. Bulaki	... 1437
——— v. Gokal	... 1416
——— Pershad v. Gur Bux	... 823
Baldeo v. Ibn Hyder	1498, 1500, 1505
Baldoe Singh v. Jaggu Ram	1116, 1117, 1118, 1392, 1519
——— Prasad v. Madan Mohan	... 1516
Baldeo v. Mahabir	... 1289
——— v. Mobarak	1380, 1388, 1389
——— v. Murli	... 788
Baldeo Parshad v. Miller	796, 800, 898
——— Prasad v. Sheo Dial	... 1203
——— ——— v. Umai Shankar	... 1121, 1277, 1281
Baldwin v. Belchar	... 1177
Balfe v Lord	974, 1354
Balgobind v. Bhaggu Lal	... 791
——— v. Lutafat Hossein	... 796
Balhi Mahapatra v. Brojobasi	... 1380
Balkishanji v. Mithu Lal	... 1459
Balkrishan v. Atmaram	1463, 1467
——— v. Legge	789, 790, 792, 811, 812, 1034, 1035, 1406, 1469, 1536
——— ——— v. Luchmeeput	... 1441
——— ——— v. Madan Lal	1433, 1434, 1437
——— ——— v. Run Bahadur	... 1430
Balkrishna v. Bishwanath	... 997
——— ——— v. Har Govind	... 1424
——— ——— v. Madhavrav	1104, 1105, 1106
Balkrishnji v. Mithu Lal	... 1501
Balkristnamma v. Vinayaka	... 1134
Ballam Das v. Amar Raj	1476, 1513, 1521
Ballubdar v. Birjraj Rai	... 810
Balmukund v. Haji Hasan Ali	... 1471

	PAGE
Balmukund v. Moti Narayan	... 1160
——— v Mt. Sangari	1357, 1383, 1391
Baloji v. Tamangouda	1542, 1557
Balshet v. Dhondo	778, 808, 1445
——— v. Ganesh	... 1368
——— v. Krishna	... 783
Balu v. Gopal	... 871
Balwant v. Aman	... 1379
Balwant Rao v. Narayan	... 1368
Balwant Singh v. Amolak Ram	1420, 1486
——— v. Gokaru Pershad	... 1573
——— v. Roshan Singh	923, 1225
Bama Sundari v. Adhar Chunder	... 953
Banapa v. Sundardas	... 788
Banarsi v. Maharani Kuar	... 956
——— v. Nathu Mal	1457, 1468
——— Prasad v. Ram Narain	... 1139
Bandhu v. Shah Muhamad	922, 946, 1478, 1551, 1555
Bandoru v Atchayamma	... 1417
Banga Das v. Ganalal	... 1400
Bank Bai v. Mannilal	1575, 1577
Banke Rai v. Rugubir	... 1389
Bank of Africa v. Salisbury Gold Mining Co.	962, 1168, 1259
Bank of Hindustan v. Shoroshideala	... 839
Bank of New South Wales v. Campbell	1022
——— v. O'Connor	... 897, 1014, 1015, 1213
Banks v. Small	... 993
——— v. Whitall	... 1287
Banku Behary v. Gobindo	... 870
Banner v. Berridge	965, 1215
Banno v. Pir Muhammad	... 887
Bannu Bi v. Uttamchand	... 1580
Bans Bahadur v. Mughla	787, 1583
Bans Gopal v. Rup Narain	1492, 1493
Bansi v. Durga	... 1021
—— v. Girdhar Lal	905, 915
—— v. Skree Mal	... 1511
Bansidhar v. Abu Talib	... 1503
——— v. Bu Ali Khan	... 1436
——— v. Gaya Prasad	1113, 1222, 1459
——— v. Hadi Ali	... 1545
——— v. Sant Lal	805, 806
Bansi Lal v. Durga Prashad	... 822
Banwari v. Mahomed	... 1183
Bapirazu v. Kamarazu	785, 846
Bapu v. Govind Rao	1470, 1475
—— v. Mahadaji	1277, 1290
—— v. Ramji	1514, 1521
Bapuji v. Sattyabhamabhai	... 832, 852, 855, 942
——— v. Senavaraji	785, 901
Bapu Raoji v. Ramji	... 1470
Bapusa v. Ramji	... 1093
Bapu Singh v. Zain-ul-Abdin	... 1288
Baquar Ali v. Nisar Husain	... 1137
——— Hussain v. Balak Ram	... 1252
Baquar v. Nathabai	... 888
Barada Kant v. Bhagwan Das	968, 969
Baranasi v. Birj Lall	1405, 1407
Barbar Naran v. Ramana	909, 910, 1208, 1288
Barada Kant v. Bhagwan	... 921
Barett v. Hartley	... 1090
Barhma Din v. Baji Lal	... 1459
Bark v. Chrisman	... 1188
Barkat v. Ali	... 838
Barnes v. Racaster	1180, 1563
Barnett v. Guilford (Earl)	... 1477
——— v. Weston	... 1176
Barnewell v. Ironmonger	1189, 1190
Baruhart v. Greenshilds	... 807
Baru Mahata v. Shyama Churn	... 1512
Baroda Kant v. Bhagwan Das	... 972
Baroda Sundari v. Dino Bundho	1358, 1359
Barrel v. Sabine	... 808
Barret v. Wells	... 1295
Barry v. Stawell	... 1099
Bartholomew v. May	1186, 1195
Barthorp v. West	... 1227
Bartlett v Franklin	... 949
——— v. Recs	1027, 1442
Barton, *In re*	... 1080
Barton v. Bank of New South Wales	... 789
Barwick v. English Joint Stock Bank	... 1157
Basa Mal v. Tajamal	1051, 1103, 1489, 1490
Basant Lal v. Tapeshri	812, 813
Basant Singh v. Rameshar	... 1203
Basavayya v. Subbarazu	... 1429
Basawa v. Kalakappa	930, 931
Basdeo v. Matadin	... 838
Bashi Chunder v. v. Enayet Ali	... 848
Bashiruddin v. Joshi Singh	... 1523
Basi Poddar v. Ram Krishna	... 1508
Basiruddi v. Kailas	... 1576
——— v. Kalis Kamini	... 1578
Baskett v. Skell	... 925
Baso v. Hurry Das	... 1389
Basso v. Mir Muhammad	... 875
Bassu Kuar v. Dhun Singh	1040, 1042
Baswantapa v. Ranu	... 1517
Batak Nath v. Munni Dei	... 1473
——— v. Pitambar	1485, 1531
Bate, *Exp.*	... 1281
Bateman v. Hunt	1407, 1408
Bates v. Dandy	... 893
—— v. Johnson	925, 1124

	PAGE
Batten Proffit and Scott v. Dartmouth Harbour Commissioners	... 1099
Batul Begum v. Mansur Ali	... 941
Batwell	... 1373
Baul Govind Singh v. Rae Ram Kishen Das	... 951
Bavah Meah v. Khajee Meah	... 916
Bavaji v. Tarya	... 1258
Bavanna v. Balagorivi	... 1113
Bayya Sao v. Narsinga	1206, 1209, 1212
Bazayet Hossein v. Mahomed Wajid	... 1265
Bazloor v. Abdullah	... 841
Beale v. Symonds	... 1235
Beauchamp v. Winn	... 911
Beaton v. Bolton	1464, 1467
Be Betterbee v. Davis	... 1207
Bechoo Singh v. Roy Sheo Sahoy	... 1146
Beckett v. Buckley	... 1234
——— v. Mickleth-waite	... 1375
——— v. Sutton	... 1549
Beckwitte v. Umesh Chandra	... 1006
Bedar Bakht v. Khurram Bakht	... 1024
Beebervaise v. Lewis	... 1546
Beer Nursing Dutt, *re*	... 1438
Beethan, *re*	889, 891, 1175
Beevor v. Luck	963, 965, 1221
Begum v. Muhammad Yakub	... 887
Begvie v Fenwick	... 1081
Behari Lal v. Beni Lal	.. 841
Behari v. Ganpat	... 1502
——— v. Ram Chandra	... 914
——— v. Ram Gholam	1011, 1207, 1214
——— v. Shib Sahai	... 791
Behari Lal v. Tej Narain	... 791
Behram v. Sorabji	... 889
Behramdeo v. Tara Chand	... 996
Bejoy Chunder v. Kally Prosunno	... 1135
Bekana v. Vasuntum	... 990
Bekon Singh v. Deen Dyal	955, 1108
Belchier v. Renford	... 1173
Belding v. Read	804, 806, 1263
Beli Ram v. Bhagwandas	... 885
Bell v. Antwerp	915, 916
—— v. Banks	... 1281
Bellamy v. Brickenden	... 1144
Belshaw v. Blush	... 918
Bemola v. Mohun	... 1389
Benefield v. Solomons	... 1233
Bengal Banking Corporation v. Mackertich	887, 897, 1256
Beni Madhab v. Khatir Mondal	867, 868
——— ——— v. Sourendra Mohun	1352, 1567
Beni Madho v. Debi Saran	... 979
Beni Prasad v. Narain	... 1151
Beni Prasad v. Rewat Lall	817, 1102, 1183
Bennett, *In re*	... 815
Benode Kishore v. Asutosh	... 791
Benode Lal v. Brojendra	1445, 1447, 1450
Benoy Krishna v. Debendra	1036, 1037
Bentham v. Hain croft	... 1134
Bepin Behary v. Jotindra Nath	... 1304
——— ——— v. Makunda	... 1465
Berhamdeo v. Tarachand	1103, 1490
Berkly v. Howell	1067, 1072
Bernard v. Norton	902, 915
Berridge v. Berridge	... 1231
Berry v. Halifax Commercial Banking Co.	1014
Bettyes v. Maynard	... 1073
Bevan v. Habgood	... 1513
———v. Webb	996, 1083
Bevans v. Rees	... 1207
Bew v. Bew	... 1441
Beynon v. Cook	973, 1433, 1434
Bhagabai v. Narayan	818, 820
——— (Mt.) v. Zalim Singh	... 1164
Bhagbut v. Girja Koer	... 1388
Bhagchand v. Radhakisan	... 820
Bhagirath v. Naubat Singh	1191, 1202
——— v. Sheikh Hafizuddin	... 1410
Bhagirthe v. Nathmal	... 838
Bhagmani v. Subh Narain	1382, 1383
Bhag Singh v. Baswa Singh	... 837
Bhagwan v. Bhagwan, 789, 792, 794, 808, 809, 810, 811, 850	
——— v. Debi Dayal	... 1371
——— v. Ganu	1495, 1499, 1533
——— v. Mahabir	... 921
Bhagwan Dass v. Bhawani, 1486, 1567, 1568, 1569	
——— ——— v. Hardei, 1238, 1239, 1241, 1242	
——— ——— v. Karam Husain	1198, 1199
——— ——— v. Mahomed	... 912
——— ——— v. Manoamrat Das	... 1516
——— ——— v. Shamdas	1172, 1175
——— ——— v. Shridhar	1459, 1467
——— ——— v. Tarachand	... 1275
Bhagwan Dei v. Secretary of State	1000, 1003, 1004
——— Gir v. Phagu	... 906
——— Pershad v. Narain Prasad	... 1256
——— Singh v. Mozhat Ali	1188, 1241
Bhagwant v. Daryao	... 1420
——— v. Ganpat	1430, 1432, 1437, 1438
Bhagwantapa v. Vishwanath	... 1459
Bhagwat v. Baldeo	... 838
———v. Suba Lal	... 1379
Bhagwat Das v. Parshad Singh	... 905
Bhagwati v. Radha Kishen	... 1200
Bhairub Chandra v. Lalit Mohan	... 998

	PAGE
Bhaja v. Chunilal	1351, 1357, 1404, 1513
Bhajahari v. Gajendra	1128, 1219, 1229
Bhandin v. Ismail	... 1361
Bhanoomutty v. Premchand	841, 1054, 1055
Bhanushankar v. Raghunath	... 1466
Bhao Pate v. Raja Raghoji	... 1275
Bhapi v. Barham Deo	... 1549
Bharat Singh v. Goraub Mal	1018, 1027
Bhartu v. Dalip	963, 964
Bhawani v. Jang Bahadur	1051, 1053
Bhawani v. Mt. Kutubunnissa	... 1454
Bhawani v. Sheodhal	... 1050
Bhawani Churn v. Joy Kishen	... 1055
——— Koer v. Mathura Prasad	1288, 1295, 1296, 1297, 1298, 1477
——— Prasad v. Kallu	952, 1361, 1362, 1376, 1378, 1379, 1383, 1387, 1389
Bheechuck Singh v. Lutchminarain	... 1145
Bheekun v. Bechun	... 841
Bhera v. Har Kishen	... 1460
Bheri v. Middipatu	806, 1258, 1260, 1263, 1273
Bhero v. Mona	... 840
Bhikaji v. Lakshman	923, 958, 1544
Bhikam Singh v. Shankar Dayal	... 962
Bhikari Das v. Dalip Singh	1183, 1502
Bhikhan Singh v. Shankar	... 942
Bhiku v. Shujat Ali	... 1445
Bhima v. Raghavendra Charya	927, 937
Bhimaraju v. Mt. Rabi	... 839
——— —— v. Sri Kunjabehari	... 816
Bhoalee Singh v. Neemo Behoo	... 1262
Bhobomoyee v. Jugobandhu	... 1477
Bhobosoondree v. Issur Chunder	805, 807
——— ——— v. Rakhal Chunder	846, 1026, 1572, 1575
Bhog Hong v. Ramanathan	... 1408
Bhojobari v. Bhagabati	... 815
Bhola Nath v. Hara Mohan	993, 1042, 1043
——— —— v. Kali Pershad	... 791
——— — v. Kamta Pershad	... 1431
——— —— v. Kanti Chandra	... 1457
—— ——— v. Kartick	... 1390
——— — v. Maqbulunnissa	... 1225
—— ——— v. Muhammad	1027, 1576
—— ——— v. Prafulla	... 1394
——— — v. Unodapersad	1054, 1055
Bhola Pershad v. Ram Lall	... 1358
Bhola Singh v. Kishore Chand	... 1432
Bhora v. Abilac Roy	... 1025
Bhoramal v. Davi Din	... 1416
Bhora Roy v. Abilack Roy	... 1356
Bhowanee v. Bisheshar	... 1044
Bhola Raghubar Singh v. Bhola Singh	Roy ... 1440
Bhuban v. Nunda Lal	... 1512
Bhuggobutty v. Shamacharan	945, 1027, 1579
Bhugwan v. Goburdhan	... 851
——— v. Jeetmull	... 1141
——— v. Parameshwari	... 1033, 1034, 1035, 1036
Bhugwan Acharjee v. Govind Shahoo	... 1043
——— Das v. Ganguli	... 1459
Bhupal v. Jag Ram	... 803
Bhupathi v. Rajah Rangayya	... 1143
Bhup Singh v. Zainat Abdin	909, 910, 1438
Bhura v. Ghuro	... 1128
Bhure Mal v. Jawaya	... 837
Bhurrut Lall v. Gopal Sarun	1155, 1157
Bhuwanee v. Joykishen	1054, 1058, 1059
Bhuwari Lal v. Daya Sundari	... 1368
Bhyroo v. Nuthoo	... 1225
Bibijan v. Sachi	1501, 1507, 1509
Bibi Tasliman v. Harihar	1473, 1479, 1539
Bickerton v. Walker	... 1407
Bidder v. Bridges	... 913
Bidhu v. Sudhury	... 1530
Biggs v. Hoddinott	939, 940
Bigham v. King	... 1493
Bignold, *Ex parte*	897, 1030
Bihari Lal v. Makhdam	... 1407
Bejoy Chunder v. Kally Prosunno	... 975
Bikhu v. Shujat Ali	... 1285
Bikramji v. Dyal Tewari	... 1421
Bikramjit v. Durga Dyal	... 1421
Biku v Shujat	... 1415
Bimal Jati v. Biranja	... 939
Binda Prasad v. Madho Prasad	... 1446
Bindesri v. Ganga Saran	... 887
——— v. Sadho Charan	... 968
Bindu Bashini v. Harendra Lal	... 1241
Binney v. Mutrie	... 1271
Binnington v. Harwood	... 1546
Binns v. Nicholls	... 1180
Biraj Mohini v. Kedarnath	... 881
——— ——— v. Srimati Chinta	... 1444
Birch v. Sherratt	... 1265
Bird v. Wenn	963, 965
Biru Singh v. Nawal Singh	... 1382
Birj Mohan v. Rai Una Nath	... 1305
Birj Mohun Lall v. Rudra	... 1232
Birmingham Canal Co. v. Cartwright	... 807
Bisdee, *Ex parte*	... 892
Bishambhar v. Drigbijai Singh	... 1018
Bishen Dyal v. Bank of Upper India	... 1439
——— — v. Hurruck Narain	... 1046
——— —— v. Mauni Ram	1025, 1356
——— — v. Udit Narain	801, 827

	PAGE
Bishenmun Singh v. Land Mortgage Bank	... 1438
Bishen Singh v. Jainal Singh	... 937
Bisheshur v. Debi Baksh	851, 1531
——— v. Laikh Singh	954, 956, 1028
——— v. Ram Sarup	1186, 1187, 1189, 1190, 1227, 1299, 1515, 1514
Bishonath v. Kishto Mohun,	1177, 1179, 1183
Bishop v. Chambre	... 886
——— v. Sharf	... 1088
Bishop of Winchester's Case	... 1001
——— Winchester v. Paine	947, 1557
Bishumbhar v. Parshadi	970, 991
Bishwanath v. Gosain Dass	... 1027
Bissessur v. Kurmfool	... 841
——— v. Lala Sarnam Singh	996, 1113, 1300
——— v. Luchmesur	... 1389
Bissonath v. Brojonath	841, 1107, 1218
——— v. Madhubmonee	.. 873
Biswanath v. Bani Kanta	... 1454
Black v. Smithe	... 1207
Blackburn v. Caine	... 1464
Blackwood v. London Chartered Bank	1174, 1176
Blake v. Foster	... 1076
——- v. Izard	... 898
——- v. Summersby	... 1460
Blaker v. Herts and Essex Waterworks, Co.	... 1062
Blennerhassett v. Day	911, 1387
Bloomfield v. Gangadhar	... 1375
Bloye's Trusts, *In re*	1023, 1068, 1072
Blumberg v. Life Interests, &c., Corporation	... 918
Blunden v. Desert	926, 931, 1118, 1169
Blyth v. Birmingham Waterworks Co.	... 1159
Boaler v. Mayor	... 1281
Boalman v. Johnston	... 1181
Bodill v. Endle	... 908
Bohra Thakur Das v. Collector of Aligarh	1084, 1085, 1098, 1101, 1203, 1204, 1515
Boistub Dass v. Huro Narain	967, 969
Bojjamma v. Venkataramayya	... 1359
Bolakhi v. Joykisben	... 1046
Bolaram v. Ram Chandra	... 1454
Bollingbroke v. Hinde	... 1407
Bolton v. Carlisle	... 886
——— v. Salmon	1231, 1343, 1362
Bompas v. King	... 1137
Bonithon v. Hoekmore	1090, 1137
Bonner v. Tottenham Building Co.	... 1141
Boodhoo v. Kishen	903, 954
Boojinat Boo v. Sha Nagar	... 1147
Boothe v. Creswicke	... 1463
Bootti v. Salvation Army Building Association	... 937
Borax and Co., *In re*	... 1273
Borough of Hackney Newspaper Co. *Re*.	1162
Boru v. Turner	... 1071
Bosanquet v. Wrag	... 1363
Bostock v. Hume	... 914
——— v. Ramsay Urban Council	... 1438
Bovey v. Spipwith	... 965
Bovill v. Engle	... 948
——— v. Endle	... 904
——— v. Sudle	... 961
Bowen v. Edwards	... 933
——— v. Evans	... 1176
——— v. Owen	... 1214
Bowes v. Heaps	... 1068
Bowles v. Stewart	... 985
Bowman v. Nicholl	... 885
Boyd v. Petri	1062, 1063
Boydell v. Manby	... 1403
Boyes, *In re*	819, 820
Boyle's Trusts, *Re*	... 1511
Brace v. Duchess of Marlborough	1119, 1174, 1176, 1233
Bradford v. Belfield	... 1061
Bradford Bank v. Briggs	962, 1168
Bradley v. Carritt	... 940
Brajonath v. Gobindmani	.. 945
——— v. Khilat Chandra	859, 1399
Brajaraj v. Mohamed	... 1007
Brajeshwaree v. Budhanuddi	1405, 1406, 1407
Brander v. Brander	... 1080
Brandon v. Brandon	... 1138
Brettle, *Re*	1286, 1294
Brewin v. Austin	... 1463
Brierly v. Kendall	... 1065
Briggs v. Jones	... 1161
Brightley v. Norton	1014, 1215
Brij Bhukhan v. Samiuddin	1427, 1431
——— ——— v. Varadarajulu	... 1421
Brij Krishore v. Madho Singh	955, 956, 958, 1368, 1401
Brij Lal v. Bhadani Singh	... 942
Brijnath v. Juggernath	1214, 1440
Brijo Mohun v. Radha	... 841
British South Africa Co. v. De Beers, &c., Ltd.	... 943
Brittain v. Lloyd	... 1268
Broad v. Selfe	... 1090
Broadbent, *Ex parte*	891, 892
Broadbent v. Barlow	... 1184
Brocklesby v. Temperance Building Society	... 1161
Brocklock v. Barnes	... 1138

PAGE

Broderick, *Ex parte* ... 889
Brohmo Dutt v. Dhurmo Dass 1157, 1159
Broja Gopal v. Abmaish 868, 1417
Brojolal v. Gour Churn ... 833
Brojonath v. Bhugobutty 1084, 1091, 1137
——.—— v. Khelut Chunder 1413, 1477, 1549
Bromfield v. Chichester ... 985
Bronard v. Dumaresque 1068, 1071
Brondts, Sons & Co. v. Dunlop Rubber Co. 893
Brooke v. Garrod ... 807
Brown v. Bateman ... 898
——— v. Cole 901, 904, 905, 908
——— v. Savage ... 1161
——— v. Sawer ... 1363
——— v. Storey ... 860
Brown's Estate, *In re* ... 1013
Bruce v. Garden ... 1224
Brunton v. Electrical, &c., Corporation. 1167
Bryan v. White ... 873
Buddhu Lal v. Baldeo Prasad ... 1467
Buggoban v. Pran Coomaree ... 1424
Buhuns Kowar (Mt.) v. Lalla Bahoree Lall 1358, 1359
Bujhawan v. Nanha ... 921
Bukre v. O'Connor ... 1138
Buksban (Mt). v. Mt. Maldai ... 814
Bukshi Ram v. Darku Tukaram 1078, 1079
Bulakhi v. Tukaram Bhat ... 835, 1041, 1054, 1055, 1494
Bulanda v. Duvain ... 840
Bulkeley v. Hope ... 1279
Bulley v. Bulley ... 1270
Bulram v. Huree 851, 1096
Bulwant Singh v. Gokaram Prasad ... 1027
Bulwer v. Astley ... 780
Bunning v. Bunning ... 780
Bunsee Dhur v. Heera Lall ... 889
——— ——— v. Kedar Nath ... 1523
——— ——— v. Sujaat Ali ... 1036, 1409, 1526, 1527
Bunwari v. Ramji 1387, 1392
——— v. Sungum Lal ... 887
Bunwari Das v. Muhammad ... 1157
Bunwari Lall v. Chowdhry ... 1441
—— ——— v. Mahomed ... 852
Burdett v. Spiltsbury ... 872
Burgess v. Eve ... 1168
——— v. Moxon ... 891
Burgh v. Langton ... 1461
Burkur Ram v. Lalji ... 1407
Burlinson v. Hall 823, 830, 1255
Burn v. Boulton ... 1414
—— v. Carvalhoo ... 806
Burno v. Benode ... 899

PAGE

Burnwaree Lall v. Moheshur ... 1416
Burrell, *In re* 823, 926, 1360, 1470
——— v. Earl of Egrement ... 1284, 1287, 1298
Burridge v. Row ... 1144
Burrough v. Cranston 901, 920
Burrows v. Molloy ... 908, 998, 1013, 1014, 1030, 1119
Burton v. Barclay ... 999
——— v. Gray ... 898
Busraj v. Achybur ... 851
Butak Nath v. Pitamber ... 1526
Butchanna v. Varahlu ... 942
Bute (Marquise of) v. Cunynghame ... 1185
Butler v. Bernard ... 1233
——— v. Rice ... 1112
Buttokristo v. Khettra ... 879
Byjnath v. Doolbin ... 1184
——— v. Goberdhan 1008, 1027
——— v. Ramoodin ... 817, 992, 993, 994, 1051, 1081, 1102
——— v. Ramsarup ... 1113
Byron v. Thompson ... 885

C

Caddick v. Cook ... 1343
Caine v. Coulton ... 913
Cairncross v. Bradley ... 821
Calcutta Bank v. Nathumall 1387, 1404
Caldwell v. Parker ... 886
Calisher v Forbes 821, 1176
Callendar v. Howard ... 913
Calvert v. Baker ... 884
Cambefort v. Chafman ... 1295
Campbell, *In re* ... 1381
——— v. Holyland ... 1365, 1373, 1462, 1464, 1467
——— v. Moxhay ... 1464
——— v. Walker ... 1023
Cangayam v. Gompertz ... 1128
Capital and Counties Bank v. Rhodes ... 1284
Capper v. Terringson 925, 1564
Cardwell v. Martin ... 884
Cardwent v. Hunt ... 1445
Carew v. Johnstone ... 1137
Carlisle v. Blamire ... 999
Carmichael v. Gee ... 1265
Carpenter v. Daen ... 799
Carr, *Ex parte* ... 1097
—— v. Acraman ... 804
Carrington v. Smith 1417, 1435
Carriss v. Tottersall ... 885
Carson v. Cochran ... 1565
Carte v. Carte ... 986
Carter v. Carter 1155, 1176

	PAGE
Carter v. Ring	... 1013
Carvalho v. Nurbibi	1439, 1441
Carver v. Bowles	... 1080
Casamajor v. Strode	... 1004
Casborne v. Scarfet	... 861
Casement v. Fulton	... 869
Casey's Patents	... 1263
Casborne v. Scarfe	1070, 1130
Cassidy v. Cassidy	... 853
Caton v. Caton	... 870
Cator v. Cooley	... 1176
Cattey v. Simpson	... 1542
Cattley v. Sampson	... 1235
Catton v. Simpson	... 885
Cave v. Cork	... 1373
Central Ontario Railway v. Trust and Guarantee Co.	... 1024
Chabildas v. Dayal Mowji	1066, 1067, 1070, 1072, 1475, 1477
Chadwicke v Heatley	... 1076
Chagandar v. Gansing	1186, 1191, 1192, 1238, 1240
Chairman, Municipal Council, Rajahmundry v. Suserla	883, 888
Chaita v. Purun Sookh	... 1558
Chait Narain v. Ganga	1008, 1392
Chaitram v. Deodat	... 1459
Chajmal v. Brij Bhukan	1420, 1428
Challa Venkata v. Devbhaktuni	... 791
Chama v. Padala	... 1112
Chamanbu v. Multanchand	895, 931
Champney v. Burland	... 1234
Chandasama v. Ishwargar	... 1457
Chander Pershad v. Sham Koer	... 1468
Chandi Charan v. Ambika Charan	1474, 1531, 1536, 1537
Chandika Singh v. Pokhar Singh	... 1020, 1025, 1026
Chandra v. Tara	... 1444
Chandrabati v. Madho	... 1583
Chandra Kumar v. Iswar Chandra	899, 901
——— v. Subhkaram Das	... 1017
Chandra Sekhar v. Peary Mohun	... 1558
Chandu v. Kombi	921, 1548
Changa Das v. Gansing	... 952
Chaplain v. Southgate	... 1047
Chaplin v. Young	1137, 1145
Chapman v. Hicks	... 1208
Chappan v. Raru	... 1550
Chapple v. Mahon	... 930
Charan v. Lalji Mal	... 1526
Charles v. Jones	1066, 1075, 1076, 1151
Charter v. Watson	... 1544
Chartered Bank v. Hurrish Chunder	... 1374

	PAGE
Chathu v. Kunjan	852, 856, 1016, 1247
Chatoorbhooj v. Doorga Churn	... 1150
Chatring v. Whitchurch	... 1433
Chattarbhuj v. Raghubar	... 905
Chattar Mal v. Thakuri	1527, 1535
Chattarpat v. Natha	... 1390
Chatti v. Pandrangi	... 1273
Chaturbai v. Harbhamji	... 1417
Chaudhri Ahmad v. Seth Raghubar	... 928, 952, 1560
Chedambara v. Renjakrishna	... 1294
Chedambaram v. Karunalaya	... 880
——— v. Muttuvira	... 1294
Cheddi v. Lalu	1473, 1561
Chedilal v. Bhagwan Das	1085, 1238, 1241
Chengiah v. Pichayya	903, 905, 906
Chelaram v. Walidad	... 824
Chellamcherla v. Mummareddi	... 1112
Chenbasapa v. Lakshmana	... 883
Cheni v. Kadum	... 912
——— Bash v. Kumud	... 1012
Chennapatnam v. Tadakumalla	... 1016, 1038, 1039, 1086, 1087
Chenna Venkatasami v. Pedda Kondiah.	1428, 1429, 1431
Chennaya v. Malkapa	1554, 1556
Cheria v. Vishnu	... 1549
Cheruvalath v. Theyyatath	... 1531
Chessum & Son v. Gordon	... 1440
Chetan Das v. Gobind	... 1209
Chet Ram v. Breumal	... 1373
Chetti Gaundan v. Sundaram	... 825, 826, 831, 1257
Chetwynd v. Allen	... 1281
Chhagan v. Lakshman	... 1577
Chhannu v. Dwarka	... 1388
Chhatar Mal v. Baijnath	... 943
Chhiddu Singh v. Durga Dei	... 1472
Chhogmal v. Govind	... 1451
Chhoti Narain v. Mt. Rameshwar	... 1491
Chidambara v. Manikka	... 810
——— v. Ramasami	... 1026
Chidambaram v. Srinivasa	... 1269
Chimman Lall v. Bahadur Singh	... 971
Chimna v Sada Barka	1380, 1381
Chimnaji v. Sakharam	... 923
Chinnammal v. Madarasa	... 1454
Chinnayya v. Chidambaram	888, 1146
Chinnery v. Evans	1118, 1502
Chintaman v. Dulari	1017, 1036, 1039
——— v. Shivaram	... 832
Chintamanrav v. Vithabai	... 1512
Chinto v. Janki	975, 979, 1135
——— v. Suga	... 1222

	PAGE
Chiranjee Lal v. Bhagvan Singh	... 992
Chiranji v. Moti Ram	1440, 1449, 1492, 1538, 1563
——— Lal v. Dharam Singh	... 1457
Chissum v. Dewes	... 1079
Chitkali v. Mathura Lal	... 1015
Chitta Singh v. Devi Din	... 1364
Chockalingam v. Mayandi	... 914
Cholmley v. Countess of Oxford	947, 1557
Cholmley v. Paxton	1067, 1072
Cholmondeley v. Clinton	... 869, 929, 950, 1072, 1135, 1237, 1362
Choonee v. Chundee	... 887
Chooneelal v. Puhulwan	... 803
Choti Lal v. Kalka	1133, 1138
Chotoolall v. Miller	1449, 1459
Choturam v. Dala	1286, 1298
Chowbey v. Chowdree	... 967
Chowdhry v. Gopal	... 1358
——— Wahed v. Juman	... 1366
Chowdhuri v. Koni Meah	... 1457
Chowdry v. Giant Roy	... 1507
Christacharlu v. Karibasayya	884, 885, 886
Christian v. Field	... 1234
Chubammal v. Mir	... 1436
Chubchand v. Kalian Das	... 1126
Chudasama v Ishwargar	... 1554
——— ——— v. Matiani	946, 1014
Chufe's Estate, *In re*	... 1131
Chujjo v. Joorawun	... 1293
Chunder Dutt v. Bhagwat Narain	... 875
——— ——Kishore v. Goorchurn	... 803
———Nath v. Nilkant	... 1548
Chundi Charan v. Banke Behary	... 1523
Chundramoni v. Muttylal	... 1015
Chundra Nath v. Burroda Shoondury	1015, 1272, 1403, 1575, 1579
Chundu v. Kombi	... 970
Chunnalal v. Anandilal	... 958, 1021, 1190, 1299, 1514
Chunni v. Thakur Das	803, 1003, 1007
——— Kuar v. Rup Singh	... 1433
——— ——— v. Udai Ram	914, 1407
——— Lal v. Abdul Ali	... 1488
Chunilal v. Bombanji	... 887
——— v. Fulchand	1177, 1179, 1183
——— v. Mahipatra	... 916
——— v. Srikishan	... 958
——— v. Harnam Das	1459, 1473, 1498, 1499, 1522, 1536
Churaman v. Balli	1261, 1273
Churcher v. Stringer	... 1414
Chutterdharee v. Ramdoolaree	... 1088
Chuttermull v. Chutter Kishore	... 1007

	PAGE
Citizen's Bank v. First National Bank	949, 1011
Clapham v. Andrews	... 967
Claire, *Re*	1059, 1060
Clarke, *Re*	806, 869, 898
Clarke v. Brereton	... 1239
——— v. Royal Panoptican	... 1063
Clathu v. Soolopani	... 857
Clavering v. Clavering	... 1002
Clay v. Sharpe	... 1063
Clayton v. Gresham	... 1080
Clayton's Case	... 1165
Clements v. Mathews	800, 804, 806, 898, 986
Cliff v. Wordsworth	1213, 1215
Clifford v. Arundel	... 1265
——— v. Parker	... 886
Clifton v. Burt	... 1178
Cocher v. Bents	... 1461
Cock v. Coxwell	... 884
—— v. Thomas	... 1152
Cockburn v. Edwards	... 1069
Cockell v. Taylor	... 823
Cockes v. Sherman	... 1401
Colegrave v. Manley	... 986
Collector v. Beti Maharani	793, 800, 802, 1258, 1260
——— v. Bhagwan Prasad	... 1260
— ——— v. Cavaly Venkata	... 1049
——— v. Prithibullub	... 1101
——— v. Sarnam	... 1139
Collins v. Riggs	1398, 1399
Collinson v. Jeffery	970, 1463, 1464, 1467, 1556
Collyer v. Isaacs	804, 898, 1256
Colsell v. Budd	... 914
Colson v. Williams	... 1072
Colyer v. Finch	1160, 1161, 1265
Combe's Case	... 1062
Comfort v. Belts	... 823
Commercial Bank v. Attendralayya	1419, 1420
——— ——— ——— v. Jones	... 1231
Commissioner of Stamps v. Hope	1281, 1286
Congreve v. Evetts	... 804
Connell v. Himalaya Bank	... 1473
Connolly v. Barlet	... 1298
Continental Oxygen Co., *Re*	... 1343
Cooke v. Crawford	... 1061
Cooks v. Boswell	... 1510
Cooling v. Saravana	831, 1257
Coombe, *Ex parte*	... 893
——— v. Stewart	... 1463
Cooper, *In re*	... 1071
Cooper and Allein's Contract, *In re*	... 1062
——— v. Metropolitan Board	... 815
——— v. Smith	... 1364
——— v. Willomatt	... 1092

	PAGE
Coore v. Callaway	... 1208
Copis v. Middleton	... 1230
Coppin v. Fennyhough	... 985
Coppring v. Cooke	... 1134
Corder v. Morgan	... 1063
Cork Harbour Docks Co., *Re*	1279, 1513
Cornwall, *In re*	... 1184
Corser v. Cartwright	... 1265
Countess of Shrewsbury v. Earl of Shrewsbury	... 1290
Courtenay v. Wright	938, 1219
Coventry v. Tulshi Pershad	... 1384
Cowdry v Day	902, 938, 1012
Cracknall v. Janson	960, 965
Cradock v. Piper	... 1371
——— v. Scottish Provident Institution	... 1264
Craythorne v. Swinburne	1192, 1231
Crediton v. Exeter	884, 885
Crenver v. Williams	... 1547
Cripps v Wood	... 1483
Croft v. Graham	... 1432
—— v. Powell	... 1063
Crome, *Re*	... 1104
Cropper v. Smith	... 1464
Cullianji v. Raghowji	... 1270
Cullwick v. Swindall	... 1080
Cumberland Union Co. v. Maryport, &c. Co.,	817, 1002 1081
Cummins v. Fletcher	959, 960, 963, 965
Curlewis v. Clark	... 913
Currie v. M. Knight	797, 890, 1267
Curiet v. Misa	... 918
Curse v. Nowell	... 1062

D

Dabi Prasad v. Daulat Singh	... 1406
——— —— v. Man Khan	... 839
Dabi Rawoot v. Heeramun	903, 1208
Dacre v. Patrickson	... 1264
Dada v. Dhondo	1137, 1422
Dadabhai v. Diog	... 916
Dadnu v. Somnath	... 1149
Dadoba v. Damodar	1118, 1393
Dagdu v. Balwant	1358, 1359
——— v. Bhava	870, 871, 877
——— v. Nana	790, 791
Dagdusa v. Ram Chandra	... 1423
Daji v. Daji	... 1424
—— v. Dhiraj Ram	... 1488
Dakhina Mohan v. Saroda Mohan	953, 1200, 1241, 1268, 1440
——— ——— v. Srimati Basumati	... 1305
Dalip Narain v. Chait Narain	... 1171
Dalip Singh v. Bahadur Ram	786,787,827, 828
——— ——— v. Durga Prasad	... 930
Dallas, *In re*	... 1166
Dallu Mal v. Hari Das	... 1396
Dalpat Rao v. Tara Chand	... 1500
Dal Singh v. Pitam Singh	... 1210
Dalton v. Haytor	... 1354
Daly v. Kelly	... 1373
Damodar v. Atmaram	... 898
——— v. Budhkuar	1440, 1537, 1563
——— v. Naro	... 1124
——— v. Somasundara	... 1160
——— v. Vaman Rao	996, 997, 1099
——— v. Vinayak	1509, 1512, 1523
——— v. Vyanku	... 1531
Danappa v. Yamnappa	1196, 1198, 1201, 1202, 1238, 1239, 1518
Dan Bahadur v. Anandi	... 820
Danee v. Goldingham	... 1067
Daniell v. Skipwith	... 1373
Danks, *Ex parte*	... 917
Daris v. Duffle	.. 1399
Darke v Williamson	... 1274
Darnley v. London Chatham and Dover Ry.	... 911
Darshan Singh v. Hanmanta	801, 866, 887
Dasharatha v. Navalchand	... 1559
Dashwood v. Megniae	... 1438
Datpat Rao v. Tarachand	... 1460
Dattambhat v. Krishnabhat	854, 1017, 1019
Dattaram v. Vinayak	... 1097
Datto v. Ganesh	... 1579
———v. Ramachandra	... 790
———v. Shankar	1474, 1522
———v. Vithu	785, 801, 827, 835, 1257, 1258
Datubhai v. Abubaker	... 797
——— v. Palakdhari	... 820
Daudbhai v. Daudbhai	1076, 1551
Daulat v. Bukandas	... 1457
——— Ram v. Mehr Chand	1379, 1387, 1389
——— Singh v. Pandu	... 820
——— ——— v. Raghubir	... 1488
Daun v. City of London Brewery Co.	... 1170
Daunt v. Daunt	... 1264
Davani v. Ratna Chetty	1044, 1257
David v. Sabin	... 1000
Davidson v. Cooper	884, 886
David Yule v. Ram Khelwan	... 870
Davis v. Cundasami	... 1065
—— v. Humahreys	1192, 1195
—— v. Jones	... 1406
—— v. Tollemache	... 993
—— v. Vernon	... 931
—— v. Wright	... 1493

	PAGE
Davison, *Re*	... 1295
Davlata v. Ganesh	... 1406
Davy v. Barker	... 1089
—— v. Durrant	1068, 1071, 1072,
Daw v. Perrell	.. 890
—— v. Torrel	... 892
Dawood Durveshdas v. Vallubh	... 1423
Dawson v. Bank of Whitehaven	... 1225
Day v. Day	... 901
—— v. Radcliffe	... 907
Daya Chand v. Hem Chand	1276, 1486
—— Kishan v. Nanubi Begum	... 1479
Dayal v. Jivraj	889, 895, 896
Dayrell v. Hoare	... 1067
Dean v. James	... 1206
Debendra v. Behari	... 871
——— v. Mirza Abdul	970, 991, 1051
——— Mohan v. Sona	... 1208
——— Narain v. Ramtaran	... 1116, 1119, 1125, 1128, 1129, 1130, 1352, 1391, 1400
Debi Baksh Singh v. Tirbhavan Singh...	979
—— Charan v. Pirbhu Din	1449, 1491
—— Das v. Bepro Charan	... 1105
—— Dat v. Jadu Rai	... 1376
Debindra v. Behari	... 878
Debi Prasad v. Baldeo	... 793
——— —— v. Dharamjit	1377, 1385
——— v. JaiKaran	... 1506
Debi Sahai v. Ganga Sahai	... 1433
——— v. Sumer Singh	... 1230
Debi Singh v. Jai Ram	... 1376, 1379, 1384, 1389, 1401
De Braam v. Ford	902, 903
Debtor, *Re*	1417, 1432
De Caux v. Skipper	963, 966
Deckey v. Thompson	... 1188
Deefholts v. Peters	... 1510
Deeley v. Lloyd's Bank	1165, 1168
Deen Dayal v. Koylash	1423, 1425
Degg v. Midland Railway Co.	... 1159
Delabere v. Norwood	... 1354
Delhi and London Bank v. Bhikari Das	1118, 1393
——————— v. Kunwar Partap Singh	... 1487
——— ——— ——— v. Tellary	... 1070
Denonath v. Nibaran	973, 1427, 1429, 1433
Deo Chand v. Telluck Singh	... 1027
Deo Dat v. Ram Autar	1213, 1214
Deoji v. Sambhu	1232, 1361, 1386, 1389
Deojit v. Pitambar	801, 806
Deokinandan v. Dhian Singh	... 1018
——— ——— v. Oomrao Singh	... 916
Deo Narain v. Kukur Bind	869, 870
——— ——— v. Nack Pershad	1138, 1242
Deosthan v. Makunda	1223, 1453
D'Epineuil, *In re*	... 804
Deputy Commissioner v. Rampal Singh	802, 1245
Derbmoee v. Debnarain	... 1046
Dering v. Earl of Winchester	1185, 1202, 1237
De Rochefort v. Dawes	1189, 1191
Derswold v. Marsham	... 1382
Desai Lallubhai v. Mundas	... 1116, 1117, 1125, 1392, 1400
Dettilin v. Gale	1092, 1562
Devarakonda v. Devarakonda	... 1439
Deverges v. Sandeman, Clark & Co.	... 1014, 1063, 1077
Devkabai v. Jefferson	1240, 1270
Devnarain v. Naek Pershad	... 1134
Dhakeswab v. Haribat	... 1295
Dhanipal Das v. Maneshar	... 1432, 1433, 1434, 1437
Dhaniram v. Bhagirathi	... 1364
Dhannu v. Bechar	... 812
Dhanram v. Ganpat	... 820
Dhanukdhri v Nathema	... 911
Dhapi v. Barham	1391, 1404
Dharam Singh v. Angan Lal	... 1361, 1362, 1386, 1387
Dharanamma v. Subba	... 1522
Dharani v. Sudarshan	... 1467
Dharma v. Balmakund	... 949
Dharmia Mt. v. Madar Singh	... 837
Dhekeshwar v. Harihar	... 1242
Dhiraj Singh v. Dina Nath	... 1006
——— ——— v. Raja Ram	... 1550
Dhonda v. Megho Rai	... 840
Dhondh Bahadur v. Tek Narain	... 1555
Dhondo v. Balkrishna	... 1439
——— v. Raoji	1011, 1158
——— Ramachandra v. Balkrishna	1049, 1214
Dhondset v. Ravji	... 1424
Dhondu v. Narayan	... 1424
Dhonhal Singh v. Pakker Singh	... 1471
Dhunput v. Sham Soonder	1362, 1387
Dibbs v. Goren	... 1275
Dicho v. Yates	... 1438
Dicker v. Angerstein	1065, 1069, 1078
Dickson v Swansea & Co.	... 1410
Digambar v. Harendra	1214, 1241
———— v. Nishibala	... 819
Digambari v. Debaya	... 1530
Digby v. Craggs	... 1118
Dilawar v. Bhagwat	... 1454
Dildar Ali v. Bhowani	... 1441

PAGE

Dimmar Singh v. Naziruddin ... 1372
Dina v. Nathu 1177, 1179
Dinabandhu v. Mathuda ... 1527
Dina Moyee v. Bon Behary 871, 872
Dina Nath v. Bejoy Krishna 1525, 1526
————v. Dharmala 1429, 1436
————v. Iswar Chandra ... 1473
————v. Lachmi Narain ... 929, 952, 957, 1221, 1227, 1398, 1543, 1544
Dindayal v. Sheoraj Singh ... 1379, 1381, 1398, 1400, 1401
Dinendra Nath v. Chandra Kishore 1572, 1575
Dingle v. Coppen ... 1419
Dingopal v. Bolakee 1392, 1394
Dinnappa v. Yamnappa ... 1269
Dinobundhu v. Jogmaya ... 1175, 1278, 1284, 1291
——— —— v. Nistarini ... 1285
Dip Narain Singh v. Hira Singh ... 913, 1118, 1125, 1391, 1398, 1399, 1400, 1519
Dirgaj Singh v. Debi Singh ... 841
Dirgopal v. Bolakee ... 1548
Dirgpal v. Surab Upadhia ... 970
Dirg Singh v. Manbhar ... 1270
Dixon v. Clarke 918, 1206, 1208, 1214
------v. Muckleston ... 889
———v. Parkes ... 1414
Do v. Pyke ... 986
Dobson v. Land 1114, 1144
Dodd v. Lyda ... 1546
Dodge v. Pringle ... 835
Doe v. Bingham ... 886
——v. Catomore ... 886
——v. Day ... 1032
——v. Lightfoot ... 997
——v. Pott 976, 987, 1078
Doe d. Lord Down v. Thompson ... 1005
Doe d. Williams v. Evans ... 870
Dolman v. Nokes ... 1074
Dolphin v. Aylward 1179, 1181, 1183
Doma v. Nathai ... 838
Domun Sing v. Kasee Ram ... 1191
Dooallubh v. Hurro Kishen ... 1046
Doobie Singh v. Jankee Ram ... 1559
Doody, *Re* 1090, 1099
Dookhchore v. Hidayutoollah 803, 1107
Doolichand v. Nirban Singh ... 994
————— v. Omda Khanum ... 974, 1146, 1403, 1413
Doollee Chand v. Wooma Sunkur 1376, 1390
Doorgachurn v. Burda Soondree ... 1107
Doorga Dabee v. Issur Chunder ... 1144

PAGE

Doorga Pershad v. Gujadhur ... 1096
——— ——— v. Kesho Pershad ... 1361
——— ——— v. Luchmun 841, 1218, 1229
Doraisawmi v. Lakshmanan ... 1295
————— v. Venkataseshayyar ... 961, 962, 963, 966, 1360, 1367, 1396, 1397
Doran v. Simpson ... 1293
Dorappa v. Kundukuri 812, 906
Doraraja v. Ramachandra ... 1548
Dossi Money v. Jonmenjoy 803, 830
Douce, *Re* ... 869
Doucett v. Wise 1054, 1055, 1071
Doudbhai v. Doudbhai ... 1417
Doudh Bahadur v. Tek Narain 970, 1557
Douglas v. Calverwell ... 807
——— —— v. Collector of Benares 817, 1568
Doul Narain v. Runjit Narain ... 856
Dowden and Pook Ltd. v. Pook ... 936
Dowdeswell v. Dowdeswell ... 1375
Dowley v. Winfield ... 1225
Downe v. Morris ... 1235
Downes v. Grazebrook 1068, 1071, 1072
Doyachand v. Hemchand ... 1500
Drake v. Mitchell 1230, 1295
Drant v. Vanse ... 808
Drew v. Earl of Norbury ... 815
Drinkwater v. Coombe 1282, 1290
Drydon v. Frost 1068, 1092, 1099, 1562
Duchess of Kingston's Case ... 1156
Dudheshwar v. Vithal ... 833
Dugale v. Robertson ... 1002
Dula Singh v. Dial Singh ... 1052
Dulhin v. Radha Dulari ... 1454
Dulibai v. Gopibai ... 1379
Dullabhdas v. Lakshmandas ... 1125, 1293, 1294, 1429, 1548
Dullub Sircar v. Krishna Kumar 1011, 1158
Dulsook v. Chugon ... 1012
Dulton v. Thompson ... 1275
Dum Sahu v. Jeo Narain ... 827
Duncan Fox & Co. v. N. W. Bank ... 1231
Duncombe v. Hansley ... 1373
Dungar Mal v. Jai Ram 1091, 1137
Dunlop, *Re* 1185, 1194, 1196, 1200
Dunn v. Flood ... 1067
——— v. Zan ... 978
Duraisamy v. Venkatasheshaiyar ... 1415
Durga v. Bhagwan Das ... 1527
——— v. Bhagwant 1533, 1536
Durga Churn v. Chandra Nath 1118, 1119, 1352, 1391, 1400
——— Kunwar v. Balwant ... 1512
Durga Prasad v. Bhajan Lal ... 886
————— —— v. Dukhi Roy 943, 963, 964

PAGE

Durga Pershad v. Kesho Pershad ... 1488
——— v. Rachla Kuar ... 1276
——— v. Sambhu Nath ... 1163
Durga Rai v, Bhagwat Prasad ... 1526
——— Singh v. Naurang Singh 920, 982, 1093, 1095
Durgayya v. Anantha 1015, 1578, 1579, 1581
Durham Brothers v. Robertson 823, 1272
Du Vigner v. Lee ... 1545
Dwar Buksh v. Fatik Jali ... 1220
Dwarku v. Kesory Lal ... 1351
——— v. Tulsee Ram ... 980
Dwarka Das v. Kameshar ... 1276
——— v. Rutton Singh 989, 992
Dwarkanath v. Sarat Kumar ... 894

E

Ebchcharam v. Appu ... 1223
Eagleton v. Gutteridge ... 885
Earl of Buckinghamshire v. Hobart ... 1282, 1298
——— Cork v. Russell 1234, 1371
Earl Poulett v. Viscount Hill ... 1469
Eaton v. Jaques ... 1140
Elathi v. Kopashou 908, 1248
Ele v. Knowles ... 893
Edge and Son v. Gallon and Son ... 1440
Edmonds, *Ex parte* ... 1270
——— v. Wallingford ... 1237
Edmondson v. Copland ... 1215
Eluljee v. Abdulla ... 870
Elun Bibee v. Golam Alee ... 1046
Edwards v. Cunliffe 1446, 1463
——— v. Martin ... 1012, 1014, 1030, 1221, 1412
——— v. Walters ... 1363
Edward's Estate, *In re* ... 939
Eglington v. Koylashnath ... 1193
Eider, The ... 915
Elders v. Verden ... 1001
Elias v. Jorawar Mall ... 1406
——— v. Snowdon 1079, 1080
Ellappa v. Annamalai ... 869
Ellayadath v. Krishnan ... 1465
Ellias v. Govind ... 798
Elliott v. Elliott ... 914
Ellis v. Deane ... 1373
Ellison v. Wright 1068, 1092, 1039
Emam Momtazoddeen v. Rajcoomar... 1008, 1576
Emerson, *Re* ... 869
Emmanuel College v. Evans ... 900
Emmet v. Tottenham ... 1226
Emmins v. Bradford ... 1037

F

PAGE

Empress v. Debendra ... 779
Enait Ali v. Kuhur Roy ... 1150
Enayet Hossain v. Muddunmoollee ... 1198
English v. Barlow ... 1373
Errington, *In re* ... 1040
Erskin v. Dhan Krishna ... 1007
Erusappa v. Commercial & Land Mortgage Bank 945, 1518, 1574, 1578, 1581
Eshahuq Molla v. Abdul 1205, 1206, 1212
Eshree v. Bindoot Rai ... 879
Eyati v. Matalakat ... 1561
Eusuf Ali v. Azmutoonissa ... 839
Evan v. Elliott ... 860
Evans v. Bicknell ... 1160
———v. Davies ... 1414
———v. Walshe ... 1082
Everitt v. Everitt ... 1275
Exchange and Hop Warehouse, Ltd. v. Association of Land Financiers ... 1063
Exmouth Docks Co., *In re* ... 1024
Exton v. Greaves ... 1094
Eyre v. Dolphin ... 985
—— v. Hanson 1463, 1464
—— v. Hughes 1090, 1098
—— v. Wynn Mackenzie 1099, 1546

F

Factor v. Philpott ... 1081
Fagg's Case ... 1155
Fairclough v. Swan Brewery Co. ... 934
Faizuddi v. Asimuddi ... 1457
Fakeer Buksh v. Chutturdharee ... 1568
Faki Abbas v. Faki Nurudin ... 1243
Fakir v. Khotu ... 931
Fakiraya v. Gadigya 1186, 1188, 1203, 1277, 1279, 1299
Fakir Baksh v. Salat Ali 857, 952, 1238
Fakir Muhammad v. Ali Shet Khan ... 1155
——— v. Ghulam Husain ... 1522
Falcke v. Scottish Imperial Insurance Co. 997, 998, 1200, 1268
Falkner v. Daniel 1282, 1373
——— v. Equitable Reversionary Society 1067, 1071
Falmouth v. Roberts ... 886
Fana v. Tekka ... 1459
Fardley v. Knight ... 1099
Farebrother v. Wodehouse ... 1231
Farhall v. Farhall ... 1264
Farley, *Ex parte* 891, 892
Farmer v. Curties ... 1120
Farquharson v. King & Co. ... 1157
Farrand v. Yorkshire Banking Co. ... 1160
Farrant v. Lovell ... 1004

	PAGE
Farrar v. Farrars, Ltd.	1068, 1072, 1073, 1074, 1075
Farrel v. Irwin	... 1520
Farrow v. Rees	... 1288
Fasihuddin v. Karamal	... 970
Fateh Chand v. Muhammad Baksh	... 861, 1487, 1516
Fate Singh v. Nanackchand	... 1416
Fatick Chunder v. Foley	... 1029, 1030, 1273, 1275
Fatimat-ul-nissa v. Sunder Das	949, 1011
Fawcet v. Fathergill	... 1234
Fazel Sheikh v. Keramuddi	... 868
Fazil Howldar v. Krishna	1474, 1536, 1537
Featherstone v. Fenwick	... 891
Fell v. Brown	1107, 1120, 1228
Feltham v. Clark	... 1353
Fenwick v. Potts	... 890
Ferris v. Mullins	890, 891, 892
Fessard v. Mugnier	... 915
Fewings, *Ex parte*	1096, 1100
Fida Ali v. Iemailji	... 854
Field v. Hopkins	... 1099
Finch v. Shaw	... 1463
Finck v. Tranter	... 897
Fitzgerald v. Mellersh	949, 1013, 1014
——— v. Rainsford	... 988
Fladong v. Winter	... 914
Fleming v. Self	... 907
Fletcher v. Bird	... 1230
Flinn v. Pounain	... 892
Flint v. Howard	1177, 1179, 1180, 1552
Flory v. Denny	... 898
Floyer v. Lavington	853, 1035
——— v. Sherard	... 780
Footner v. Stergis	... 1023
Forbes v. Ameeroonissa	837, 1454
——— v. Jackson	1172, 1231
——— v. Moffat	... 1279
Ford, *Ex parte*	... 1167
—— v. Allen	... 944
—— v. Chesterfield	... 1099
—— v. Kettle	... 871
—— v. Olden	... 943
Forde v. Tynte	... 1404
Fordham v. Wallis	953, 1194, 1241
Forester v. Secretary of State	... 1440
Forster v. Hoggart	... 1064
Foster v. Great Western Railway Co.	... 1438
——— v. Harvey	... 1483
——— v. Ley	... 1268
——— v. Mackinnon	870, 877
Fountaine v. Carmarthan Ry.	... 1410
Fowler v. Scott	... 1520
Fowler v. Welsh	... 1047
Framji v. Sullemanji	... 842
Frances v. Clark	... 891
Francis v. Harrison	... 1373
Franklyn v. Fern Barn	... 1233
Fray v. Drew	... 1235
Freakley v. Fox	... 1363
Fream v. Dowling	... 1264
Freeman v. Cooke	... 1410
——— v. Laing	962, 1166
French v. Baron	1090, 1137
Friend v. Friend	... 1415
Fullerton v. Provincial Bank	... 798
Fulli Bibi v. Basiruddin	... 1406
Fulsa v. Khubchand	... 1118
Fulthorpe v. Foster	... 974
Furber v. Coble	... 1075
Futeh Alil v. Gregory	... 1102
Futtehma v. Mohammad	... 1417
Fuzal Ali v. Bia Bibi	... 1406
Fuzeelun v. Omda Bebee	1358, 1359
Fuzlool Ruhaman v. Ali Kureem	... 1146
Fyezoollah v. Kazim Hossein	... 857

G

Gajadhar v. Mulchand	1125, 1357
——— v. Thula	... 1225
Gajapati v. Suryanarayana	... 1275
Galbraith v. Cooper	... 999
Gale v. Burwell	... 806
Galton v. Hancock	... 1034
Ganesh v. Balkrishna	... 1404
——— v. Maya Ram	... 1051
——— v. Narayan	... 1438
——— v. Raghunath	1240, 1241
——— v. Shiva	... 1532,
——— v. Sidhakaram	1439, 1538
Ganeshi v. Charan	... 1399
Ganeshi Kooer v. Deedar	... 899
——— Lal v. Mande Lal	... 1417
——— Singh v. Sujhari Kuar	... 1043
Ganga v. Bani Madhub	... 841
——— v. Lachman	... 1048
——— v. Lochan	... 1036
Gangabai v. Baswant	... 1081
——— v. Kirtarath	... 964
——— v. Pandoo	... 790
Ganga Baksh v. Jagannatha	... 929
Ganga Das v. Genalal	... 1390
——— v. Jogendra Nath	... 956, 1387, 1398, 1399, 1417
Ganga Dayal v. Bachu Lal	... 1428
——— Dei v. Shiam Chunder	... 878

PAGE

Gangadhara v. Sivarama 1120, 1121, 1126, 1286, 1481, 1568
Gangamoyi v. Troiluckhyanath 1405, 1406
Gangappa v. Subbu Naidu ... 873
Ganga Prasad v. Chandrawati ... 1295
——— ——— v. Chuni Lal 824, 1354, 1360, 1370, 1376, 1481, 1482
——— ——— v. Kusyari Din ... 801
——— ——— v. Land Mortgage Bank 1118, 1125, 1398, 1422
——— ——— v. Mowjee Lall ... 1406
Ganga Ram v. Chandan Singh ... 884
——— ——— v. Gomparty ... 1131
——— ——— v. Jaibalia 1416, 1451, 1568
——— ——— v. Kunhaiya Lal ... 1532
——— ——— v. Shriram ... 1415
Ganga Sahai v. Kishen Sahai 846, 1026
Ganges Manufacturing Co., The v. Sourajmall ... 1410
Ganga Mulik v. Bavalt ... 1407
Ganpat v. Aderji ... 891
——— v. Bhangi ... 1230
Ganpati v. Damodar ... 1552
Ganpatji v. Saadat Ali 1078, 1079
Ganpat Rao v. Sakho Bai ... 1581
Gan Savant v. Narayan 947, 1558, 1559
Ganu v. Narayan 1466, 1499
Gapeshur v. Jiban Chandra ... 1474
Garden v. Ingram ... 1100
Gardner v. London, Chatham and Dower Ry. 1024, 1062
——— v. Walsh ... 884
Garrard v. Frankel ... 1166
Garrett v. Justices of Middlesex ... 826
Gaskell v. Gosling ... 1086
Gatti Lal v. Bir Bahadur ... 1532
Gaur Mohun v. Tarachand ... 1471
Gaur Narayan v. Brajanath ... 1277
Gayadin v. Harkaran ... 1432
——— v. Mt. Dulari ... 1406
——— v. Raj Bansi ... 1389
Gaya Pershad v. Ganga Bishun 1045, 1048
——— v. Kalik Prasad ... 1127
——— v. Randhir Singh ... 1580
——— v. Salik Prasad 1120, 1192, 1277, 1293
Gedye v. Watson ... 1376
Geldard v. Hornby 1463, 1464
General v. Tutcliffe ... 1205
General Manager, Raj Darbhanga v. Maharaja Coomar Ramaput Singh ... 1232
Genkin v. Row ... 834
Gennings v. Ward ... 933
Genu v. Sakharam 1104, 1510, 1512

PAGE

Geralopulo v. Wielar ... 877
Gething v. Keighly ... 1382
Ghafur Hasan v. Mhd. Kifayatullah 1208, 1528, 1529
Ghafur v. Raja Ram ... 1091
Ghaleri v. Thandora ... 1578
Ghanashyam v. Gobinda ... 1015
——— ——— v. Moroba ... 1439
Ghanshimlall v. Ram Narain ... 1463
Ghanya v. Ukund Rao ... 1551
Ghasiram v. Dulichand ... 833
——— v. Gokuldas ... 1450
——— v. Jawahir ... 1400
——— v. Jhingwa 1391, 1398, 1400
Ghatayya v. Papayya ... 1419
Ghatti Chalamanna v. Pandrangi ... 1264
Ghellabhai v. Pranjivan ... 1105
Gherun v. Kunj Behari ... 1157
Ghinarain v. Ram Monaruth 1477, 1549
Gholam Ali v. Sahib Alum ... 1046
——— Nuzuf v. Emanund ... 1147
Ghosee Lal v. Govind Lal ... 840
Ghulaji v. Fakir Shah 1127, 1352
Ghulam Husain v. Dina Nath 1372, 1396, 1444
Ghura v. Shitale ... 1006
Ghurphekin v. Purmeshar ... 1405
Gibbs v. Ongier ... 1182
Gibson v. Seagrim 1179, 1180
Gifford v. Fitzhardinge ... 1109
Gill v. Newton ... 1068
Girdhar v. Bholanath 982, 1084, 1085, 1095, 1096, 1098
——— v. Ram Autar 1175, 1277, 1284, 1286, 1291, 1298
Girdharee Lall v. Kanto Lall 1384, 1389, 1390, 1394, 1401
——— v. Lalloo ... 990
——— v. Pareshvatti ... 889
Girendra v. Kumud Kumari 891, 1175
Girijanund v. Sailajanund 830, 1037
Girindra v. Bejoy Gopal 787, 788, 872, 873, 1583
——— v. Khir Narayan ... 911
Girish Chunder v. Iswar Chunder ... 1394
——— ——— v. Juramani 957, 1228, 1230
——— ——— v. Kedar Nath 1398, 1399
——— ——— v. Shoshi Shekhareshwar 1137
Giriya Chettiar v. Sabapathi ... 1345
Girjoji v. Keshavrav ... 1136
Girwar Singh v. Thakur Narayan 801, 831, 833, 835, 850, 1009, 1022, 1247, 1253, 1494
Gittins v. Steele ... 1265
Glasscott v. Day ... 917

PAGE

Gley v. Read ... 1075
Globe New Patent Iron and Steel Co. ... 1162
Gobardhan v. Gokal Das 837, 840
——— —— v. Gopal Ram ... 1457
——— ——— v. Sujan ... 857
Gobind v. Parasharam 1262, 1576
——— v. Ravji ... 1162
Gobinda v. Dwarka 786, 890, 874, 878, 881
Gobind Chunder v. Ram Chundra ... 1262
——— ——— v. Sheogobind Chowdhry. 953
Gobind Lal v. Ramjanam 1125, 1129, 1130
——— Pershad v. Sundri ... 1198
——— Ram v. Sundar Singh ... 1025
——— Sahai v. Sibdut Ram ... 1104
——— Singh v. Kallu ... 1293
Goddard v O'Brien ... 913
Godfrey v. Chadwell 1126, 1382
——— v. Watson 984, 1090, 1091, 1099, 1142
Godha v. Sakal ... 1470
Godh Sukhul v. Sakla ... 788
Gogun Chunder v. Dhuronidhur ... 884
Going v. Farrell ... 1180
Gokhai v. Ganesh Lal ... 1448
Gokul v. Rasheswari ... 1351
Gokul v. Shrimal 1044, 1047
Gokul Chand v. Khaja Ali ... 1436
——— ——— v. Rahman 795, 818
Gokul Das v. Debi Prasad 1226, 1370, 1444, 1482
——— ——— v. Eastern Mortgage Co., 892, 893, 894, 896
——— (Raja) v. Ghasi Ram ... 1486
——— v. Kripa Ram 831, 836, 842, 899
——— v. Puranmal 1175, 1239
——— v. Ram Bux 1279, 1288, 1290
Gokul Mandar v. Padmanund ... 1433
——— Nath v. Premlal ... 888
Golabchand v. Dhondi ... 1373
Golab Koonwur v. Collector of Benares 1256
Golack Chunder v. Mohun Lall ... 1149
Golakdas v. Puranmal 1277, 1278, 1284, 1290, 1292
Golam v. Jogan Singh ... 841
——— v. Judhisthir 1365, 1384, 1516
Golla v. Kali 825, 826, 831, 1257
Goluck Chunder v. Mohun Lall 982, 1146
——— ——— v. Ram Sunker ... 1277
Goluckmonee v. Nobungo ... 1203
Goluck Nath v. Prem Lall 1173, 1284, 1292, 1293, 1294
Gomaji v. Subbarayappa 878, 879, 1409
Gomatham v. Komadur ... 1453
Gonesh v. Shodanund ... 841

PAGE

Goodman v. Grierson 809, 1034
——— v. Kine ... 1003
Goodright v. Richardson ... 800
Goodtitle v. Southern ... 799
Goodwin v. Waghorn 891, 892
Goonomonee v. Parbutty ... 840
Goordyal v. Hunskoonwer ... 840
Gooroopersaud v. Bippropersaud ... 841
Gopal v. Bhojraj ... 1139
———v. Desai ... 813
———v. Dhondya ... 911
———v. Gangaram ... 1424
———v. Parsotam 785, 786, 832
Gopala v. Saminathayyan 861, 1182
Gopalan v. Kunhan 1249, 1251
Gopalasami v. Arunachella 1030, 1035, 1043, 1044, 1047
Gopalchand v. Mohanlal ... 937
Gopal Chunder v. Herembo 1284, 1292, 1293, 1294, 1297
——— ———v. Jadumoney 1409, 1410
——— ——— ———v Surendra Kumar ... 867
Gopal Das v. Ali Muhammad ... 1531
— ———v. Hari Singh ... 1052
Gopal Lal v. Benarsi ... 1367
———— Narayan v. Trimbak ... 931
——— Pandey v. Parsotam Dass ... 1018
——— Rao v. Chinduh ... 1415
——— Singh v. Lalloo Ram ... 791
Gopaludu v. Venkataratnam .. 1427
Gopee Bandhoo v. Kali Pudo 1277, 1293, 1294
—— Chandu v. Liakut Hossein ... 880
—— Chundu v. Herembo ... 1286
—— Krist v. Gunga Pershad 1358, 1359
—— Singh v. Kishan Lal ... 1569
Gopendra Chundu v. Mokaddam ... 1105
Gopi Chand v. Sardar Khan ... 1011
—— Krishna v. Nilkomul 915, 916
—— Narain v. Bansidhar 1114, 1115, 1122, 1272, 1444, 1564
Gopi Nath v. Bhagwat Pershad ... 1358
——— ——— v. Hardeo Singh ... 1494
——— ——— v. Ishur Chunder 1096, 1198, 1268
Gorakh v. Vithal ... 1406
Gordon, *Re* ... 897
——— v. Graham ... 1169
——— v. Horsfall 1483, 1547, 1548
——— v. James 1163, 1167
Gore v. Gibson ... 1266
—— v. Kashi Ram ... 1380
Goreley, *Ex parte* ... 1100
Gossain Chutterbhooj v. Ishri Mul ... 982
——— Munraj v. Deen Dyal ... 1234

	PAGE
Gossyen v. Luchmee	... 1177
Gosto Bihary v. Shib Nath	817, 994, 1103, 1105
Gothing v. Keighly	... 1546
Gough v. Wood & Co.	817, 1002, 1080
Gould v. Tancred	... 1546
Gourchandra v. Prosunno Kumar	... 884
Gourdhana v. Veerasami	... 1400
Gouri Charan v. Sita	1366, 1521
—— Sunker v. Aubhoyeswari	... 1575
Gour Kishen v. Sahay	... 1545
—— Narain v. Braja Nath	... 1173
Gous Mohamed v. Khawas Ali	... 931
Goverdhana v. Veerasami	1115, 1116
Goverdhandas v. The Bank of Bengal	... 1231
Govind v. Kalnak	... 1258
—— v. Parashram	1397, 1573, 1583
—— v. Sakharam	... 1385
—— v. Shamsaya	... 1141
Govinda v. Dwarka	... 1259
—— ——v. Gangaram	... 1463
——v. Jesha	... 808
——v. Narain	... 1575
—— v. Veeran	... 1554
Govindasawmi v. Doraisami	1121, 1122
Govindrav v. Jiwanji	... 853
—— v. Ragho	921, 923
—— v. Ravji	925, 1172
Govindu v. Mana	... 1049
Gower v. Gower	... 1287
Graham v. Walker	... 1150
Grant v. Subramanian	1577, 1580
Grantham v. Howley	806, 898
Graves v. Wright	... 1369
Great Eastern Railway v. Goldsmith	... 1012
Great Western Railway Co. v. Smith	... 1083
Greaves v. Physics	... 869
——v. Tofield	... 780
Green v. Biggs	... 1489
——v. Wynn	1230, 1231
——v. Young	... 1270
Greendu v. Mackintosh	... 1265
Greenough v. Littler	... 1403
Greenwood v. Sutcliffe	918, 1207, 1563
Gregg v. Arnott	1086, 1550
Gregson v. Udoy Aditya	795, 798
Gresley v. Moasley	... 1408
Gretton v. Mess	... 917
Grierson v. National Provincial Bank	... 1165
Griffith v. Pound	966, 1343, 1374
Grimstone, *Ex parte*	... 1232
Grish Chunder v. Bhuggobutty	... 874
——v. Juramoni	... 1375
——v. Shoshi Shikereshwar	... 1091
Grockford v. Alexander	... 1004
Guda Kulita v. Joyram	... 1268
Gudri Koer v. Bhubaneswari	... 1420
Gujadhur v. Kunhya Lall	... 805
Gujarmal v. Sitaram	... 790
Gulabhai v. Shri Datgarpi	... 879
Gulab Rai v. Ram Rai	... 1127
Gulam v. Mahtab	... 1016
—— v. Mt. Banno	... 1241
Gulam Abbas v. Brijbhan	1529, 1531
—— Kadir v. Mustakin	952, 1382
—— Maula v. Mt. Banoo	... 1242
Gul Bibi v. Dakhini	... 1479
Gullett v. Lopes	... 1386
Gumma v. Bhiku	912, 1012
Gundo v. Mardon	... 1105
Gunesh v. Mirza	... 851
Gunga Persaud v. Beharee	... 803
—— v. Chunni Lal	... 924
—— v. Jawahir	1020, 1512, 1571
—— v. Maharani Bibi	... 1418
Gunga Sahai v. Tulshi Ram	... 1104
Gunindra v. Baijnath	1454, 1503, 1504, 1521
Gunnee Biswas v. Sree Gopal	... 869
Gunnesheelal v. Buldeo Singh	... 896
Gunno v. Latafat Hossain	793, 803
Gunpat v. Adarjee	... 894
Gupta Narain v. Bijoya	... 881
Gurdeo Singh v. Chandrikah Singh	... 1108, 1110, 1282
Gurdial v. Jauhri	... 929
Gurditta v Gulam	... 839
Gur Narain v. Shadi Lal	... 1121
Gurney v. Seppings	... 823
Gur Prasad v. Ram Lal	... 1220
Gurubasapa v. Rango	... 988
Gurunath v. Chenbasapa	... 879
Guru Persbad v. Gossain	... 1488
Gurusami v. Kaveri	... 1299
—— v. Swaminadha	810, 811
Guru Vajamma v. Venkatakrishnama	... 1454
Guruvayya v. Dattarayya	... 1389
Gutteridge v. Fleseher	... 1071
Gyananda v. Kristo Chandra	... 1365
Gyles v. Hall	1014, 1215
Gwynne v. Davy	... 1445
—— v. Gwynn	... 1414
—— v. Heaton	... 1069

H

Habibulla v. Jugdeo Singh	... 1401
—— v. Nakched	866, 887
Haddington Island Quarry Co. v. Huson	1071
Hagley, *Re*	... 1072

	PAGE
Hafiz-ud-din v. Damodar	... 1533
Haji Abdul Rahaman v. Haji Noor Mahomed	918, 1076, 1151, 1206, 1208, 1209, 1213, 1214
Haji Hasan v. Mancharam	... 1542
—— Jakaria v. Haji Casim	... 1345
—— Muso v. Haji Nar	... 1430
Hakamchand v. Karam Chand	... 1400
Hakimlal v. Ramlal	954, 993, 994
Hakim Khan v. Sardar	.. 1551
——— Singh v. Ram Singh	... 1350
Hakma v. Keman	... 1425
Haley v. Hammersly	... 1081
Hall v. Dewes	... 1061
—— v. Heward	1134, 1135, 1220, 1401, 1544, 1545
—— v. May	... 1061
Hallas v. Robinson	806, 898
Hallett v. Furze	... 1547
Hallet's Estate, *In re*	820, 994
Hallis v. Allan	... 1080
Halt v. Halt	... 1082
Hambro v. Hambro	... 1275
Hamelin v. Bruck	... 884
Hamid v. Alla Baksh	... 1405
Hamiduddin v. Kedar Nath	1034, 1527, 1535
Hamidul Huq v. Matangini	1454, 1508
Hamilton v. Denny	985, 1270
——— v. Royse	... 1300
——— v. Seal	... 1439
——— v. Wright	... 1023
Hampton v. Hodges	1003, 1004
Hanbury v. Lovett	... 884
Hancock v. Attorney-General	1027, 1235
Hanif Shah v. Murad	... 888
Hanifunnissa v. Fazunnissa	... 791
Hanmantram v. Bowles	... 1013
——— —— v Sadhuram	... 850
Hannibal v. Queen	... 1267
Hansard v. Hardy	... 947
Hanson v. Derby	... 1550
Hans Singh v. Chet Singh	909, 910
Hanuman v. Bhairon	... 838
Hanuman Prasad v. Sheonarayan	... 1173
Hanumanthaiyan v. Meentachi	... 1110
Haradyal v. Chadami Lal	... 1486
Hara Gobind v. Purna Chandra	... 1359
Har Charan v. Har Shankar	... 948
Harcourt v. Knowel	... 1155
Hardasal v. Pirthi Singh	... 1211
Hardeo Das v. Hukam Singh	... 1446
Hardi v. Ram Lal	... 1406
Harding v. Crethorn	... 875
Hardman v. Johnstone	... 986
Hardoon v. Belilios	... 1269
Harek Chand v. Bishun Chandra	790, 857, 878
Harendra Kumar Guha v. Dindayal	1186, 1187, 1516
Harendra Lall v. Maharani Dasi	917, 1444, 1468
——— —— v. Tarini Charan	820, 1172
Harford v. Carpenter	... 891
Har Gobind v. Tula Ram	... 942
Har Gopal v. Bhagwan	838, 840
Hargovandas v. Mohan Bai	... 1449
Hargulal v. Gobind Rai	1399, 1517, 1548
Harhar v. Shivram	... 1575
Hari v. Balambhat	938, 942, 1076, 1172, 1173, 1174
—— v. Jairam	1388, 1389
—— v. Lakshman	1027, 1146, 1573
—— v. Mahadaji	... 1155
—— v. Ramji	1415, 1422, 1433
—— v. Tara Prosanna	1474, 1504, 1510, 1513, 1518
—— v. Vishnu	810, 943, 964
—— v. Yamnabai	... 1504
Hari Balkrishna v. Naro	... 1510
Haribans Rai v. Srinivasa	... 1575
Hari Das v. Gamble	... 1439
—— Gobind v. Akhoy Kumar	1358, 1359
Haribar v. Bholi Pershad	... 909
Hari Kissen v. Viliat Hossein	954, 956, 1356, 1367, 1384, 1394
Hari Krishna v. Jaideb	... 995
——— —— v. Watson & Co	1351, 1358
Hari Lal v. Munman	1377, 1378, 1380, 1383, 1385
——— v. Nazar Jeyram	1423, 1424
Hari Lall Mallick, *In re*	... 1425
—— Mohan v. Baburali	... 1475
—— Narain v. Shama Sundari	1113, 1115, 1119, 1122
—— Raj Singh v. Ahmad-ud-din	1186, 1189, 1191, 1192, 1193, 1197
—— Ram v. Sheo Dayal	820, 821
—— Ravji v. Shapurji	... 947
Harish Chandra v. Jagabandhu	... 1304
Harivalabhdas v. Bhai Jivanji	... 1434
Harjas v. Naurang	... 1263
——— v. Rameshra	1500, 1502, 1506
Harkishan v. Bai Ichha	... 923
Harlal v. Raja Gokuldas	... 1429
Harlock v. Prestley	... 1164
Harmbun v. Behari	... 1577
Harmer v. Priestley	... 1014
Harmongal v. Ganaur	873, 876
Harnam v. Mahomed Yar Khan	... 1494
Harnandan v. Jawad Ali	... 887

	PAGE
Harnett v. Vise	... 1438
Harper v. Aplin	1003, 1004
Har Pershad v. Dalmardhan Singh	... 1392
—— —— v. Oodit Narain	... 1143
Harphan v. Shacklock	... 1176
Har Prasad v. Phul Chand	922, 1120, 1127, 1225, 1293
—— —— v. Sheo Dyal	.. 1251
Harris, *Ex parte*	... 1286
—— v. Ingledew	... 1202
Harrison, *Ex parte*	... 1200
—— v. Ingram	... 1259
—— v. Owen	... 929
—— v. Pennell	... 1371
—— v. Round	... 1287
Harris Paik v. Jahuruddi	... 940
Harrold v. Plenty	896, 1077, 1452
Harsankar v, Sheo Gobind	1110, 1225
Harsukh v. Meghraj	...
Hart v. Eastern Union Railway Co.	1028, 1034
Harter v. Colman	... 963
Hartley v. Burton	... 929
Hartpole v. Walsh	... 853
Harvey, *Ex parte*	... 1286
—— v. Tebbutt	1456, 1564
Hasanbai v. Umaji	1113, 1116, 1130, 1399, 1400, 1551
Haselloot's Estate, *Re*	... 1075
Hasen Ali v. Abdul	... 1304
Hashim v. Anjeet Singh	... 954
Hashum v. Ramdharee	... 1148
Hasmanta v. Gopal	... 946
Hatem Ali v. Abdul Gaffur	... 1459, 1468, 1501, 1506
Hatton v. Haywood	... 1234
Hawkins v. Ramsbottom	1060, 1064
Hay v. Razi-ud-din	947, 1555, 1557, 1558
Haymer v. Cooper	1240, 1270
——v. Haymer	... 1233
Haynes v. Haynes	... 1265
Hazi Mahamed v. Narotam	... 911
Heales v. M'Murray	... 1138
Heath v. Crealock	... 1484
—— v. Pugh	1032, 1070, 1073, 1130
Heera v. Pestonji	... 820
Heeralall v. Janokeenath	817, 997, 1101
—— v. Ozeer Ali	... 1231
—— v. Rutchpool	... 1006
Heeranund v. Oozeerun	... 1262
—— —— v. Rure Khan	... 1439
Heera Singh v. Sahoo Lachman Das	... 1091
Hefner v. N. W. Mutual Life Insurance Co.	... 1358
Hemang Dasi v. Kedarnath	... 1266

	PAGE
Hemangini v. Kumode	1015, 1272, 1579
Hem Ban v. Behari Gir	... 1579
Hemchand v. Vonora	... 870
Hem Chandra v. Tafazzel Hossein	1102, 1106
Hemchunder Ghose v. Thakomoni Devi	993, 1051, 1102
Hemendro v. Rajendra	1288, 1387
Hemraj v. Malik	... 1416
—— v. Trimbak	... 1252
Henderson v. Astwood	983, 1068, 1072, 1074, 1093, 1094
Henderson & Co. v. Williams	... 1156
Henman v. Dickenson	... 886
Henniker v. Wigg	819, 820
Henry Bay, &c., Co., *In re*	... 1024
Henwood v. Oliver	... 1214
Hermann v. Hodges	796, 798
Het Narain v. Ram Dein	1423, 1425
—— Ram v. Ram Sahaee	... 1046
Hewanchal v. Jawahir	903, 908, 1206
Heyman v. Dubois	... 1184
Hiatt v. Hillman	... 1063
Hibernian Bank v. Gilbert	819, 820, 821
Hickes v. Cooke	... 927
—— v. Powell	... 880
Hikmatulla v Imam Ali	852, 1248
Hill v. Brown	... 1023
——v. Howell	... 1188
——v. Kirkwood	... 1070
——v. Rowlands	1450, 1457, 1459
Hillaya v. Narayanappa	... 970
Hilliard v. Fiffe	... 1360
Hill Pottery, *Re*	... 1078
Hills v. Clerk	915, 916
Himalaya Bank v. Quarry	889, 891, 893
Himat Ram v. Khushal	... 1510
Himmat v. Kader Baksh	... 956
Himmat Singh v. Sewaram	866, 887
Hinde v. Poole	1061, 1062
Hindu Singh v. Sardar Singh	... 1562
Hippesley v. Spencer	... 1004
Hira Chand v. Abdul	... 1191
Hiralall v. Ganesh Pershad	... 1140
—— v. Ghasitu	... 1031, 1043, 1045, 1049, 1050
—— v. Kishanlal	952, 1352, 1357
—— v. Parweshar	1362, 1459
Hiran v. Lakhan Singh	... 1268
Hirdy Narain v. Syed Attaoollah	956, 958
Hirschman v. Budd	... 884
Hiru v. Bhikaji	... 923
Hoare v. Contenein	... 1183
—— v. Niblet	... 1295
Hobart v. Abbott	1360, 1370

	PAGE
Hobson v. Bell	1071, 1072
—— v. Gorringe	817, 1080, 1081
Hodgens, *In re*	... 1030
Hodges v. Croydon Canal Co.	... 780
Hodson v. Hodgson	... 897
—— v. Tea Co.	... 1013
Hodson and Howes, *Re*	... 1353
Holden, *In re*	... 1275
Holford v. Yate	... 1463
Holkar v. Dadabhai	... 1453
Holland v. Russell	... 913
Holmes v. Bell	... 1281
Holroyd v. Marshall 804, 805, 898,	1256, 1263
Homed Bux v. Bindrabun	... 1294
Hood v. Easton	... 1136
—— v. Pillips	... 1287
Hoods v. Axton	... 1275
Hoolas Kooeree v. Sufeehun	1020, 1502
Hoole v. Smith	1064, 1065
Hoosainara Begam v. Rahimannessa	909, 910, 1284, 1411
Hope Mills v. Sir Cowasji	935, 1090
Hopkins v. Hemsworth	... 1161
Hopkins v. Ware	... 913
—— v. Worcester and Birmingham Canal Proprietors	... 1034
Hopkinson v. Rolt 962, 1118, 1168,	1169, 1170
Horlok v. Smith	... 1546
Hormasji v. Keshav	... 887
Hornby v. Matcham	925, 1552
Horneey District Council v. Smith	... 1272
Hossain v. Ramlal	... 1089
Houghton v. Sevenquakes	... 983
Howard, *Re*	... 1513
—— v. Harris	... 793, 933, 934, 938, 1223, 1227
Howards Estate, *Re*	... 1279
Howe v. Vigures	... 1483
Howell v. Price	... 902
Howgate and Osborne's Contract, *In re*...	884
Hub Ali v. Waziruunissa	840, 922
Hubdal Khan v. Gajadhar	... 950
Huddersfield Banking Co. v. Lester	817, 1002
Hudson v. Malcolm	... 925
Hughes v. Britania, &c., Building Society	962, 965
—— v. Delhi and London Bank	... 1357
—— v. Howard	... 1082
—— v. Williams	1134, 1136, 1137
Hukum Chand v. Hira Lal	... 1406
—— v. Karam Chand	... 1344
—— v. Shaikh Nasrullah	... 1503
—— v. Taharunnissa	... 820
Hukum Singh v. Raghubir	... 1366
Hulas Rai v. Pirthi Singh	... 1478
Hulkes, *Re*	... 1151
Humphreys v. Harrison	... 1004
Hunnings v. Williamson	... 1351
Hunnoman v. Eshree	... 974
Hunoomanpersand v. Kaleepersaud	... 841, 1026, 1386
—— v. Mt. Babooee	... 792, 814, 1098, 1146
Hunt v. Allen	... 1047
—— v. Elmes	... 1161
—— v. Worsford	... 1547
Hunter v. Daniel	... 917
—— v. Myatt	... 1403
Hurbuns Rae v. Petam Singh	1091, 1138
Hurdeo Narain Singh v. Fuzla Hossein	1044, 1101
Hurlal v. Manickpal	... 838
Hurley's Estate, *In re*	... 1256
Hurmuzi v. Hirday	... 1262
Huro Soonduree v. Punchool	... 1524
Hurreehur v. Dabee	... 954
Hurro Durga v. Surat Sundari	... 1545
Hurronath v. Rundhir Singh	... 1419
Hurry Persad v. Prosuno Chunder	... 1454
Hurst v. Hurst	... 1484
Husaini v. Mulo	... 1406
—— Begum v. Collector of Cawnpur	902, 903, 905, 906, 908, 951, 1439, 1550
—— Khanum v. Husain Khan	903, 904, 905, 906, 908
Husein v. Husein	... 905
—— v. Shankargiri	1101, 1519, 1576, 1578
Hutchison v. Heyworth	... 1276
Huthasanan v. Parameswaran	951, 952, 953, 955, 1224, 1543, 1545
Hutton v. Brown	... 949
Huxham v. Smith	... 917
Huxley v. West London Railway	... 1441
Hyder Buksh v. Hossain Buksh	... 1146

I

Ibu Hasan v. Brij Bhukan	... 1192, 1193, 1195, 1198, 1199
—— v. Ramdai	... 1192, 1193, 1195, 1202, 1238
Ibrahim v. Arumugathayee	1296, 1300
—— v. Cruickshank	... 890
—— v. Rama	... 910
Icharam v. Rartji	... 1277
Idarat Khan v. Ilahi Baksh	... 1549
Idrus v. Vithal	... 1096
Ijjatullah v. Chandra	... 1550
Imam Ali v. Baijnath	875, 1187, 1356, 1367

PAGE

Imam Ali v. Oograh Singh ... 899
Imdad Hasan v. Badri Prasad ... 974, 1086, 1096, 1257
Imdad Husain v. Mannu Lal ... 840
——— v. Tosadduk Husain ... 930
Inayat Husain v. Ghulam Ali ... 1138
Incorporated Society v. Richards ... 1087
Indarjit v. Lal Chand ... 1406
Indar Sen v. Naubat Singh ... 851
——— v. Ridhi Singh ... 1454
Indaspal Singh v. Mewa Lal ... 1577
Inderdawan v. Gobind Lall ... 1182, 1184, 1292, 1293
Indukuri v. Yerramilli ... 1183
Ingle v. Vaughan Tenkris ... 1279
Inman v. Wearing 947, 970, 1353, 1354, 1557
Institute of Patent Agent v. Lockwood 1306
International, &c. Co., *re* 1162, 1183
Ion v. Ashton ... 1264
Iqbal Husain v. Sheo Charan ... 1230
Ishag Ali v. Chunni ... 1372
Ishan Chandra v. Sujan 857, 1045
Ishan Chunder v. Beni Madhub 925, 1220, 1405
——— v. Buks Ali ... 1232
——— v. Sooga Bebee ... 813
Ishri v. Gopal Saran ... 1440
Ishwar v. Gopal, 1463, 1466, 1555, 1556, 1557
Ishwargar v. Chudasama 1463, 1554
Ismail v. Hafiz 791, 1434
——— v. Jagannath ... 875
Ismdar v. Ahmad Husain ... 975
Ismoord v. Claypool ... 1461
Isri Prasad v. Ganga 873, 876, 1272
Issur Chunder v. Gopal Chundra 1358, 1359
Istoop v. Ayappen ... 1233
Itcharam v. Raiji 832, 1155
Ittappan v. Manavikrama ... 861
——— v. Parangodin ... 887
Iyetalli v. Nalamilli ... 790

J

Jadab Chandra v. Bhairab Chandra 912, 1012
Jaddo v. Sheo Shankar 1377, 1380
Jadhowji v. Jetha Shamji 806, 898
Jado v. Mt. Ranee ... 1390
Jadoobungsee v. Moheepat ... 967
Jadu Lall v. Madhub Lall ... 1014, 1573, 1576, 1581
Jadu Nath v. Jagmohun ... 1487, 1531, 1536, 1537
Jadup Lall v. Madhub Lall ... 1581
Jafar Husen v. Ranjit Singh ... 854, 1017, 1019, 1038, 1039, 1050, 1086
Jaffree Begum v. Gunga Ram ... 1144

PAGE

Jaffree Begum v. Ujbee 1133, 1144
Jaffri Begam v. Amir Muhammad ... 1396
Jaffri Begum v. Syed Ali ... 1440
Jagabhas v. Bhukandar ... 1385
Jagadamba v. Ram Chandra ... 850
Jagadhur v. Alliance Bank ... 1527
Jagannath v. Balwant Singh ... 842
——— v. Budhwa ... 1578
——— v. Kera ... 1547
——— v. Mitap Chand ... 1475
Jagannatha v. Babchand ... 1432
——— v. Ganji 1011, 1158, 1580
Jagatdhar v. Brown ... 794, 1121, 1239, 1258, 1260, 1284, 1285, 1454
Jagat Mohini v. Rakhal 788, 790
Jagat Narain v. Dhundley 1517, 1566
——— v. Qutab Husain ... 952, 1191, 1194, 1240
Jagdam Sahai v. Mahabir ... 1582
Jagernath v. Dip Rani ... 1500
Jageshra v. Durga Prasad 1453, 1490
Jageshwar v. Bhuban 1352, 1409
Jagjiwan v. Shridhar 829, 1054, 1055
Jagmohan v. Chaitu ... 850
——— v. Tikairtrae ... 1429
Jagna v. Gainda ... 916
Jagomohun Rai v. Ninu Dasi ... 1252
Jai Govind v. Jaoram ... 1187
Jaijit v Govind ... 974, 1071, 1075, 1133, 1140, 1141, 1150, 1412
Jaikishen v. Bhola Nath 1551, 1555
Jaikissondas v. Zenabai ... 1024
Jai Krishna v. Durga Narain ... 1252
Jailal v. Dhankal Singh ... 1583
Jaipal v. Indar Bahadur ... 1462
Jai Ram v. Makunda ... 849
———v. Shri Kishen ... 1457
Jai Sankari v Bharat Chandra ... 1102
Jaitha v. Haji Abdul 894, 895, 1286
Jajat Tarini v. Naba Gopal ... 1245
Jajneshwar v. Bhuban 1348, 1350, 1351, 1355
Jaka v. Mt. Jamna 1470, 1473, 1474
Jaladanki, *In re* 818, 819, 1269
Jalikar v. Mukunda ... 864
Jamadas v. Bhangi ... 1448
Jamal v. Mahomed 1142, 1545
Jambu Prasad v. Aftab ... 867
James v. Bion 922, 1233
——— v. Boythorpe Colliery Co. ... 1167
——— v. Couchman ... 1275
——— v. Deane 985, 1082
——— v. James ... 896
——— v. Rumsey ... 1552

	PAGE
Jameson v. Stein	... 1282
Jamilunnissa v. Pitambar	... 1110
Jamna v. Ramantal	... 1040
Jamnabai v. Dharsey	... 1408
Jamnadas v. Baimuli	... 1045
——— v. Misri Lal	... 1115
——— v. Najmunnissa	... 1042
Jamuna Pershad v. Ganga Pershad	1357, 1383
Janardan v. Anant	... 814
Jang Bahadur v. Mahadeo	... 1524
Jangi Singh v. Chandar Mal	... 1034
Jankee v. Sambhur Singh	... 1046
Janki v. Bisheshar	... 868
——— v. Sarup	787, 1583
Janki Das v. Ahmad Husain	1119, 1407, 1428
Janki Prasad v. Baldeo Narain	... 1448
—— ——— v. Kishen Datt	... 1353, 1368, 1429
—— ——— v. Sri Matra	1293, 1568
—— ——— v. Ulfat Rai	... 1220
Janki Singh v. Debi Nandan	... 1136
—— ——— v. Sheomongal	... 1018
Janoji v. Janoji	1146, 1151
Janokeenath v. Radha Mohun	... 1501
Jardine, *Ex parte*	816, 817
Jarrah Timber, &c., Corporation v. Samuel	... 936
Jasimuddin v. Bhuban	... 881
Jas Ram v. Sher Singh	... 1377
Jatha Naik v. Venkatapa	... 1232
Jatra Mohun v. Aukhil Chandra	... 1105
Jauha v. Haji Adalvyad	... 891
Jawahir v. Someshwar	1246, 1422
Jawahir Singh v. Baldeo	958, 959
——— —— v. Husein	... 803
——— —— v. Lachman	... 1208
——— —— v. Sardar Kuar	... 1100
Jayram v. Krishnan	... 841
Jeeban v. Khoojab	... 1046
Jeera v. Srinivas	... 1027
Jeetram Dutt v. Durga Doss	... 1191
Jeevanbai v. Manordas	... 1425
Jeewan Ali Beg v. Basa Mal	... 931
Jenkins v. Jackson	... 1439
——— v. Jones	1059, 1070, 1073
Jennings v. Jordan	961, 963, 1174
Jeorakhun v. Hookun Singh	... 840
Jethabai v. Putli Bai	... 891
Jhabbu Ram v. Girdhari Singh	1017, 1043, 1044, 1047
Jhama v. Deobux	873, 875, 877
Jhanda Singh v. Wahiduddin	... 850
Jhander Singh v. Sheikh	... 792
Jian v. Gopadya	... 1379
Jigamba v. Jathai	... 1380
Jivan Das v. Framji	832, 893, 895, 1286
Jivan Lall v. Dhunde	905, 906
Jivanna v. Appalu	... 1419
Jivarathnam v. Srinivasa Mudaliar	... 1577
Jiwan Ali v. Basa	... 883
Jnanendranath v. Khulna	... 1536
Jogemaya v. Thakomoni	1474, 1572, 1575
Jogendra v. Nitai Churn	... 876
——— v. Rama Nath	1450, 1478
Jogendra Chunder v. Fulkumari	... 1102
——— Roy v. Syam Das	... 1381
Jogendranath v. Raj Narain	858, 1093, 1133, 1137, 1142
Jogeshur v. Ghanashyam	1106, 1421
Jogeshwar v. Nitaichand	827, 1036
Jogini v. Bhoot Nath	867, 868, 869
Jogodanand v. Amrita	... 1523
John Brothers &c. Co. v. Holmes	... 1000
Johnson, *In re*	... 1270
——— v. Bourne	1169, 1568
——— v. Child	... 1239
——— v. Evans	... 949
——— v. Holdsworth	... 1371
——— v. Royal Mail Steam Packet Co.	... 1237
——— v. Webster	815, 1285, 1513
Johnstone v. Boys	... 1209
Johnston Foreign Patent Co., *In re*	... 1260
Johurra Bibee v. Sree Gopal	... 1389
Jointee Chunder v. Anunto Lall	... 1438
Jones, *Re*	... 1179
Jones v. Arthur	... 918
——— v. Consolidated Investment Co.	... 821
——— v. Creswicke	1455, 1463
——— v. Davies	... 1075
——— v. Jones	... 1270
——— v. Morgan	... 1282
——— v. Powler	... 1176
——— v. Williams	... 1163
Jone's Estate, *In re*	... 1414
Jonmenjoy Mullick v. Dossmoney Dossee	1027
Jortin v. South Eastern Railway	876, 983, 1093
Joseph v. Lyons	806, 898
Joshi v. Joshi	1158, 1162
Joshi Kalidas v. Dada Abhe Seng	... 1429
Joshyam v. Uppu	... 1464
Jotindra v. Guru Prosunno	1188, 1190
Joti Prasad v. Aziz Khan	991, 1350
——— v. Hakim Ali	... 1432
Jotoni Chowdhrain v. Amor Krishna	... 1489
Joyce v. Joyce	... 1371
Joy Chunder v. Ram Narain	... 1568

PAGE

Joy Govind v. Bhundoo Singh ... 920
Joy Prokash v. Abhoy Kumar ... 1510
——————v. Oorjhan ... 1098
——————v. Ragoobur ... 1089
Joy Sankari v. Bharat Chunder 993, 1051
Jugal Kishore v. Cheda Lal 1474, 1487, 1537
——————— v. Harbans 1187, 1190, 1515
——————— v. Kartic Chunder 952, 1229, 1357, 1368, 1375, 1384, 1394
——————— v. Kedar Nath 958, 1203
——————— v. Ram Narain 1282, 1285
——————— v. Ram Sahai 854, 1017
Jugdeo v. Habibulla 1188, 1387
Jugdeo v. Rajah Singh ... 1398
Jugdeo Singh v. Habibulla ... 1269
Jugdev v. Naubat Singh ... 786
Juggarnath v. Jokhu Tiwari ... 1457
Juggernath v. Ram Dyal ... 917
——————— v. Shah Mahomed ... 1542
Juggilal v. Hukumchand ... 1523
Juggo Mohun v. Manick Chand ... 1252
Juggomohun v. Manickchund ... 1430
Juggutputtee v. Madho Singh 918, 1207
Jugjeewandas v. Ramdas 859, 861, 1138, 1140, 1155
Jugunnath v. Komul Singh ... 1027
Juji v. Annai ... 820
Jusab v. Gul Muhammad ... 887
Juseemoodden v. Huro Soonduree 813, 1045

K

Kaboolun v. Shumsheer Ali ... 880
Kachekalyana v. Kachivijaya ... 1266
Kachu v. Lakshmansingh 1542, 1545
Kadakam v. Otheanan ... 857
Kadakamvalli v. Makkath ... 921
Kadala v. Narisi ... 1374
Kadarsa v. Ramiah ... 831
Kader Moideen v. Nepean 787, 791, 812, 851, 856, 980, 1090, 1133, 1145, 1150
Kader Nath v. Kalichurn ... 1304
Kadrari v. Atmarambhat ... 1425
Kaim Ali v. Luckhy Kant ... 1373
Kaji Inus v. Kaji Inus 1575, 1578
Kakarlapudi v. Uppalapadi ... 1425
——————— v. Vutsavoy 810, 1133
Kalabhai v. Secretary of State 788, 792
Kalachand v. Shib Chunder ... 1431
Kalapa v. Shivaya 924, 928, 946, 1045, 1051, 1104, 1106
Kalee Kishore v. Tara Pershad ... 841
Kalee Koomar v. Prankishore ... 841
——— Pershad v. Ram Pershad ... 1439

PAGE

Kali Charan v. Ahmad Shah 1293, 1383, 1481
——————— v. Balgobind 787, 1583
Kali Krishna v. Secretary of State ... 1447
Kali Nath v. Tralokya Nath ... 1433
Kali Pado v. Dino Nath ... 1500
Kali Pershad v. Raye Kishori 1033, 1034, 1035
Kali Prosonno v. Kamini Soondari 1191, 1470
——————————— v. Lal Mohan ... 1479
——————————— v. Protap Singh 1432, 1434
Kalka Chand v. Shib Chunder ... 1427
Kalka Prasad v. Basant Ram ... 1366
——————— v. Chandan ... 898
Kalka Singh v. Paras Ram ... 1035
Kallan Das v. Nawal Singh ... 1550
Kallan Khan v. Mardhan Khan ... 957
Kallo Singh v. Mt. Lachmi Bai 1459, 1498
Kallu v. Halki ... 857
——— v. Sant Lal ... 1121
Kally Prosonno v. Dinonath ... 1358
Kalu v. Hanmapa ... 814
—— v. Laljee 906, 908, 968, 969, 972, 973
—— v. Latu ... 1447
Kalyan v. Dwarka Prasad ... 1528
Kalyan Das v. Sheo Nundun 967, 969, 982, 1136, 1146, 1147
Kamala Kant v. Abdul Barkat 1106, 1489, 1490, 1494, 1568
Kamalamma v. Narasimhacharlu ... 1487
Kamala Sabai v. Babu Nandun ... 791
Kamat v. Kamat ... 1441
Kamaya v. Devapa 917, 1095, 1096, 1098, 1140, 1209
Kamini v. Pakram 857, 1248, 1249
——————— v. Ramlochun 899, 945, 1023, 1027
Kamini Sundari v. Kali Prosunno 973, 1433, 1434
Kamod Singh v. Rajah Raghoji ... 1012
Kanak Mal v. Sheo Pershad ... 1530
Kanara v. Govinda 906, 1465, 1466
——— v. Kuttooby ... 939
Kanchan v. Baijnath 835, 861, 1487, 1516
Kandasami v. Jagadamba ... 1049
——————— v. Rangasamy ... 875
Kandhai Singh v. Babuain ... 937
Kangaya v. Kalimuthu 1039, 1246, 1252
Kanhale v. Keshaya ... 1385
Kanharankutti v. Uthothi 941, 1549
Kanhaya v. Chidda Singh 1129, 1295
Kanhaya Dubay v. Brindawan ... 1379
Kanhaya Lal v. Anand Lall ... 1424
——————— —— v. Girdhari ... 1406
——————— —— v. Jwala Dei ... 1025
——————— — v. Khettermoney ... 918
——————— —— v. Mahadeo ... 1482

	PAGE
Kanhaya Lal v. Muhammad	800, 1256, 1261
——— —— v. Narayandas	... 1436
——— —— v. Narbar	939, 944
——— —— v. Nirmal	... 889
——— —— v. Nistariny	998, 1137, 1140, 1141
——— —— v. Pyarelal	... 939
——— — —— v. Raj Bahadur	1376, 1379, 1381, 1395
Kanhaya Seth v. Seth Brindawan	1355, 1385, 1389
Kanhoo Lal v. Mt. Manki	949, 950, 1135
Kaniz Fatima v. Waliullah	... 1549
Kankuchand v. Rustomji	912, 1012
Kanna v. Kombi	... 1249
Kannoth v. Vannathan	... 1249
Kannu v. Natesa	... 1041
Kanti Ram v. Kutubuddin	902, 1120, 1123, 1126, 1127, 1352, 1383, 1491, 1541, 1567
Karalia v. Mansukhram	... 887
Karam Ali v Narain Singh	884, 885
Karamut Ali v. Imdad Ali	... 1085
Karan Singh v. Bakar Ali	... 835
——————— v. Mohan Lal	841, 848
Karattole v. Unni	924, 1374
Karia Chengama v. Jatti Kristnamna	... 909
Karim Baksh v. Rahim Baksh	... 867
Karnam v. Tangatur	... 1520
Karoo Lal v. Dalaram	... 1102
Karshaw v. Cox	... 885
Karta Kishen v. Harnarain	... 867
Kartik Chandra v. Hara Gobind	1441, 1479
——— Nath v. Juggernath	1474, 1536, 1537
Karuppan v. Muhammad	... 1111
Karuthasami v. Jagannatha	947, 1558
Kashi v. Bajrang Prasad	... 1542
—— —— v. Gopi	... 992
——— v. Jamuna	... 1491
Kashi Nath v. Chandi Churn	... 791
——— —— v. Hurrikar	... 811
——— —— v. Naria	... 990
——— —— v. Uthamansa	... 1524
Kashi Pershad v. Duleep Narain	... 1577
——— ——— v. Jamuna Pershad	... 1577
——— ——— v. Sheo Sahai	... 1501
Kashiram v. Pande	912, 1012, 1450
——— ——— v. Sardar Singh	... 1030, 1038, 1039, 1050
Kasi Krishnamma v. Bagiammal	... 1515
Kasturi v. Venkatachalapathi	1011, 1158, 1580
Kasumunnissa v. Nilratna	... 972, 1229, 1357, 1368, 1375, 1398, 1548
Katma Nachiar v. Srimut Raja Mootoo	... 1472
Kattamuri v. Padalu	866, 887
Kaua v. Karnavan	... 1261
Kaunsilla v. Chunder Sen	... 1517
——— v. Shri Singh	... 1474
Kavanagh v. Working Man's Society	... 1090
Kaveri v. Ananthayya	1015, 1572, 1575, 1578
Kay v. Johnstone	... 1200
Kayastha, etc., Trust v. Shankar	... 1541
Keane v. Smallbone	... 885
Kedar v. Girindra	... 1400
Kedari v. Atmaram	... 805
Kedar Lal v. Bishen Pershad	... 1422
Kedar Nath v. Chandu Mal	... 1528
——— —— v. Kulenan	... 1447
——— — —— v. Kalichurn	... 1304, 1305, 1468, 1506, 1507
——— ——— v. Lalji	1478, 1498, 1506
——— —— v. Shamlali	893, 894, 895
——— ——— v. Uma Charan	1234, 1523
Kedar Prosanna v. Girindra Prosad	... 1398
Kedar Singh v. Matabadal	... 1453
Keech v. Hall	... 1005
——— v. Sandford	978, 985, 986
Keen v. Briscoe	912, 1012
Kehar v. Hasan Ali	... 988
Kehoe v. Hales	... 1286
Keightley v. Watson	... 909
Keily, *Re*	... 1196
Keith v. Burrows	... 1162
—— v. Butcher	... 1364
—— v. Day	... 1475
Kelappan v. Madhavi	... 1249
Kelcey, *In re*	... 799
Kelly v. Hutton	... 1271
—— v. Kellond	... 805
—— v. Staunton	... 998
Kelwich v. Market	... 1004
Kemchand v. Malloo	786, 874
Kemp v. Garlands	... 912
Kendall, *Ex parte*	1181, 1182, 1183
Kendall v. Hamilton	919, 1183, 1382
Kennedy v. De Trafford	... 1066, 1068, 1071, 1073, 1075
Kensington, *Ex parte*	891, 892, 893, 895, 1175
Keogh, *Re*	... 1168
Kera Koose v. Brooks	... 898
Keramat Ali v. Inayat Husain	.. 1551
Kerr v. Ruxton	... 1035
Kerrick v. Saffery	... 834
Kerr's Policy	... 897
Kershaw v. Kalow	... 1072
Kesavalu v. Arithulai	1417, 1432
Kesavan v Sankaran	... 1365
Keshabi v. Rajendra	... 1304

	PAGE
Keshav v. Bazi	1462, 1467
Keshava v. Keshava	857, 908, 1248
Keshavlal v. Chunnalal	... 953
Keshavram v. Bhavanji	829, 1019, 1054, 1055, 1058
——— v. Ranchhod	1345, 1397
Kesho v. Jawahir	... 1389
Kesree v. Roshun Lall	899, 955
Kesri Mal v. Mubarak	... 1111
Kesu v. Genu	... 820
Ketki (Mt.) v. Dinabandhu	... 978
Kettlewell v. Waston	... 1161
Kevan v. Joyce	... 943
Kevil v. Lyneb	... 869
Kewal Sahu v. Rash Narain	... 856
Key v. Williams	... 866
Khadem v. Emdad	... 1454
Khagaram v. Ram Sankar	1436, 1437
Khairajmal v. Daim	... 946, 949, 950, 1068, 1073, 1135, 1511, 1571, 1577, 1578
Khairati v. Banni Begum	1350, 1355
Khaja Mohammad v. Abdur Rahman	... 1516
Khajeh Lootf Ali v. Goozraz Thakur	... 856
Khaliluddin v. Banni Bibi	... 867
Khan Ali v. Pestonji	... 1102
Khanji v. Rama	... 1044
Khankar v. Ali Hafez	789, 790
Khawja v. Imaman	... 1514
Khelut Chunder v. Tarachunder	... 859
Khema Dabia v. Kumola Kant	... 1193
Khemchand v. Dhanraj	... 1275
——— v. Malloo	830, 878, 1259, 1260
Khemji v. Rama	829, 835, 1255, 1258, 1494
Khem Narain v. Mt. Ganesho Kuar	... 1458
Kherodemoney v. Doorgamoney	... 1265
Kherodhur v. Doolee Chand	... 1052
Khetoosee v. Banee Madhub	1177, 1179
Khetrapal v. Shyama Prosad	... 1516
Khetter Kristo v. Kally Prosunno	1240, 1270
——— Nath v. Manick Lall	... 1516
Khevraj v. Lingaya	... 1573
Khobari v. Bipra Das	... 1095
——— v. Ram Prosad	... 797
Khootal v. Heerachand	... 899
Khubchand v. Kaliandas	803, 827, 1027, 1120, 1124, 1385, 1568, 1573
——— v. Leela Dhur	... 840
Khub Lal v. Navabi	... 1502
——— v. Pudmanund	... 1198
Khuda Baksh v. Alimunnissa	971, 1048, 1049
Khudia v. Mt. Lanki	... 894
Khukroo v. Jhoomuck	... 841
Khuman Singh v. Bholanath	1457, 1459
Khusal Chand v. Ibrahim	... 1425
Khusalo v. Behari	... 879
Khushal v. Punamchand	... 890
Khushali v. Makundi	1018, 1047
Khwaja Baksh v. Imaman	1476, 1531
Khyalee Ram v. Ramdyall	951, 1091
Khyratee v. Chenro	967, 972, 1173, 1293
Kidar Nath v. Lalji	... 1459
——— v. Naipal Singh	... 991
King v. Denison	... 1104
——— v. Hoare	... 1295
——— v. King	780, 853, 1034, 1035
——— v. Smith	1000, 1004
King & Co. v. Gillard & Co.	1439, 1441
Kinlock v. Tota Ram	... 803
Kinnaird v. Trollope	1040, 1213, 1215, 1219, 1220, 1223, 1470, 1564
Kino v. Rudkin	1365, 1373
Kinsman v. Rouse	... 985
Kinu Ram v. Mozaffer Hosain	1095, 1096, 1198, 1199, 1268
——— v. Nitye Chand	... 849
Kirat v. Debi Singh	... 1291
Kirkham v. Smith	1287, 1563
Kirkhand v. Pearfield	... 836
Kirkwood v. Thompson	1066, 1072
Kirpa Ram v. Samiuddin	1433, 1435
Kirtibash v. Gopal	... 1359
Kishen v. Belasoo	841, 1107, 1218
——— v. Krishnaji	... 1404
Kishen Dutt v. Mumtaz Ali	976, 977, 978, 979, 981, 985, 987, 1077
——— v. Norendra	... 921
——— v. Rajah Mumtaz Ali	... 1075
——— Kishore v. Mahomed	... 880
Kishen Lal v. Dhawan	1258, 1260
——— v. Gunga Ram,	786, 827, 828, 829, 831, 832, 835, 1059, 1255, 1257, 1258, 1273
——— v. Umrao Singh	... 1578
Kishen Persad v. Beni Ram	913, 914
——— v. Har Narain	1358, 1376, 1378
——— v. Shamrathi	... 1377
Kishen Pertab v. Lalla Nund	... 1191
——— Singh v. Narindar	... 889
Kishevrav v. Lingaya	... 1519
Kishory v. Ganga Babu	840, 901, 1022, 1098, 1430
——— v. Kally Churn	1367, 1442
——— v. Shib Chandra	... 815
——— v. Umrit	... 1293
Kista Bar v. Banamoyi	... 1474
Knight v. Clement	... 886
——— v. Knight	... 1373

	PAGE
Knight v. Marjoribanks	... 943
—— v. Pursell	... 1439
Knott, *Ex parte*	821, 1024, 1176
Knox v. Simmonds	... 915
—— v. Turner	... 780
Kodai Singh v. Jaisri Singh	1457, 1551
Kokil Singh v. Duli Chand	... 1027, 1229, 1368, 1375
Kola v. Vuppala	825, 848
Koliprosonno v. Protap Singh	... 1417
Komal Prosad v. Savitri	.. 918
Komandur v. Komandur	... 1527
Kommachi v. Pakker	1475, 1499, 1536
Konchadi v. Shiva Rao	795, 1259, 1260
Kondo v. Gangadhar	... 1549
Konna Panikar v. Karunakara	... 952, 1223, 1225, 1545
Koobchand v. Munohar Lal	... 1044
Koondun v. Judoonath	... 1293
Koondun Lal v. Wasseer Ali	... 803
Koopmia v. Chidambaram	1109, 1119, 1122
Koothaperumal v. Secretary of State	... 1359
Ko Po v. U Pe	... 936
Kora Nayar v. Ramappa	... 1208
Korban v. Sharoda Prosad	866, 888
Kortright v. Cady	... 1215
Kossella Koer v. Beharee	... 1438
Kottappa v. Vallur	818, 870
Kraus v. Arnold	... 1209
Kregliner v. New Patagonia Meat, etc., Co., Ltd.	933, 934, 935, 943
Kripa Nath v. Bhashaaye	... 1406
—— v. Ram Lakshmi	1489, 1523
Kripa Sindhu v. Ananda	... 1213
Krishna v. Bishnath	... 876
—— v. Brojo Nath	1429, 1430
—— v. Gopal	... 1190
—— v. Hurry Nath	... 1357
—— v. Keshavan	861, 941, 1549
—— v. Muthu	1203, 1385
—— v. Rama	... 791
—— v. Rangasawmi	... 1541
—— v. Sambhu	... 1389
—— v. Shankara	... 1249
—— v. Srinivasa	... 1094
Krishna Bhaichand v. Hari Janardhan	1037
Krishna Chandra v. Bhairal Chandra	... 1502
—— v. Miran	856, 857
Krishna Gopal v. Miller	... 1079
Krishnaji v. Ganesh	... 922, 923, 1225, 1226, 1542, 1545
—— v. Govind	... 882
—— v. Mahadev	1305, 1506, 1507
—— v. Maheshwar	942, 945
Krishnaji v. Ramchandra	... 998
—— v. Raoji	... 836
Krishnama v. Perumah	... 1357
—— v. Srinivasa	... 1276
Krishnama Chariar v. Annagarachariar.	1397
Krishnamma v. Suranna	... 865
Krishnan v. Chadayan	1117, 1392
—— v. Veloo	811, 812, 857
Krishna Pattar v. Shrinivasa Pattar	... 1090, 1095, 1142
Krishnappa v. Bahiru	... 1155
Krishna Reddi v. Thambu Reddi	... 1379
Krishnasami v. Ramasami	1209, 1390
—— v. Srinivasa	... 1404, 1419, 1420, 1451
Krishnier v. Arropuli	1140, 1141
—— v. Ayyasami	... 1406
Kristo v. Kali Prosunno	... 1198
Kristo Coomar v. Chowdhree Beeraj Singh	... 812
—— Dass v. Ramkant	817, 997, 1183
—— Lall v. Bonomalee	878, 879
—— Nath v. Brown	... 1406
Kubair Singh v. Atmaram	1223, 1453
—— v. Raja Ram	... 1550
Kubra Bibi v. Wajid Khan	838, 840, 1022
Kudhai v Sheo Dayal	955, 956
Kudratullah v. Kubra Begam	... 1352, 1353, 1394, 1518
Kullyan Das v. Sheo Nundun.	1146, 1148, 1149
Kumaretta v. Sabapathy	... 1516
Kumari Bibi v. Sri Nath	... 1260
Kumar Venkata v. Velayuda	... 1531
Kundan v. Thakur Lal	967, 973
Kundan Lal v. Fakir Chand	... 1382
—— v. Sustee Kooer	... 967
Kundan Mal v. Kashibai	... 922, 1133, 1140, 1147, 1148, 1542
Kundbiya v. Chanaar	... 909
Kundu v. Impichi	... 1249
Kunhali Beari v. Keshava	1383, 1389
Kunhan v. Moorthi	... 1374
Kunhanujan v. Anjelu	... 998
Kunhi v. Kutty	... 1542
Kunhi Chundu v. Kunhan Nambiar	... 981
Kunhoo Churn v. Muddun	1096, 1098
Kunj Behari v. Baldeo Rai	... 827
—— v. Kali Baksh	... 1436
Kunj Behari Lal v. Parsotam	... 1051
Kunju v. Manavikrama	... 1249
Kuppusami v. Papathi	922, 952, 953, 1192, 1202
—— v. Raguma	... 1495
Kuraishi (Mt.) v. Mumtaz	... 851

PAGE

Kuramut Ali v. Imdad Ali ... 1098
Kuray Mal v. Puran Mal 953, 957, 1543, 1544
Kureem v. Umme ... 778
Kuriumma v. Madhava ... 1422
Kurmofoot v, Bissessur ... 841
Kurri v. Kurri ... 1249
Kuruthasami v. Jaganatha ... 1556
Kushal v. Punamchand 897, 1441
Kushal Singh v. Shrinivas 1467, 1537
Kutayan v. Palaniappan ... 918
Kuttan v. Krishnan ... 1578
Kuttiamma v. Madhava ... 1257
Kuyhamu v. Attapurette ... 1249

L

La Banque v. La Banque ... 911
Lacey, *Ex parte* ... 1075
——— v. Jugle ... 821
Lachman v. Buldeo 1046, 1049
——— v. Chaturbhuj ... 911
——— v. Khunnu Lal ... 1426
——— v. Madusudan ... 1558
Lachman Das v. Dallu 1386, 1387
——— Rai v. Akbar Khan ... 1251
Lachman Singh v. Kesri 879, 1409
——— ——— v. Saligram 1095, 1096, 1268
Lachmi v. Uman Dat ... 1417
Lachmi Narain v. Indrabhan ... 1355
——— ——— v. Jethu Mal ... 1143
——— ——— v. Jwalanath 1447, 1490
——— ——— v. Kunji Lal ... 1387
——— ——— v. Muhammad Yusuf 953, 955, 1543
——— ——— v. Nand Kishore ... 1576
——— ——— v. Ram Chandra ... 1472
——— ——— v, Sheik Abdul ... 1430
Lachmindayal v. Harduni Lal ... 1537
Lacknart v. Hardy ... 1223
Lacon v. Allan 889, 890, 891
Lacon v. Mertins 984, 986, 1097, 1100
Ladu v. Babaji 836, 1549
Lajja Ram v. Gur Baksh ... 1110
Lake, *In re* ... 1166
Lake v. Brutton ... 1231
—— v. Craddock ... 909
Lakha Singh v. Champet Singh ... 1416
Lakhmichand v. Ganpati 798, 944, 1352, 1442
——— ——— v. Kisan ... 884
Lakhmidas v. Jamnadas [1177, 1179, 1183, 1186, 1189, 1192, 1299
Lakhi Narain v. Chowdhury ... 1539
Lakho Bibi v. Salamat Ali ... 1447
Lakman Devideen v. Baju Bai ... 842
Lakmidas v. Advocate-General 1365, 1373

PAGE

Lakshmamma v. Kameshwara ... 887
Lakshman v. Damodar 880, 883
——— ——— v. Dasrat 784, 825, 826, 832, 1182
——— ——— v. Gopal 817, 993, 1025
——— ——— v. Hari Devkar 921, 1093, 1094, 1142
——— ——— v. Madhav ... 954
Lakshmana v. Krishniah ... 1529
——— ——— v. Sankaramoorthy ... 1290
Lakshmanan v. Kannammal ... 1524
——— ——— v. Kattayan ... 1384
Lakshmaya v. Yerubandi ... 946
Lakshmi v. Bhoop Laul ... 1434
Lakshmi v. Krishna 808, 809, 836, 943
——— v. Ramchandra 928, 1148, 1462, 1467
Lakshmi Doss v. Roop Laul ... 870
Lakshmichand v. Chatur 810, 813
Lakshminarayana v. Venkatarayanam 1275
Lala Bansidhar v. Government 1293, 1294
—— Brij Lal v. India ... 1406
—— Dilwar v. Dewan Bolakram ... 1183
—— Himmat Sahai v. Llewhellen ... 1416
Lalai Ram v. Anant Ram ... 1016
Lala Ram v. Mt. Imami 1126, 1130
—— Ramdhari v. Janessar ... 794
—— Rup Kishore v. Mayaram ... 1453
—— Suraj Prasad v. Golab Chand 1373, 1376, 1379, 1385, 1389
Lal Bazkhan v. Mohumed ... 1107
Lalbhai v. Naval ... 923
Lalchand v. Balkrishna ... 1378
Laldas v. Kishordass 1445, 1450
——— v. Nagji ... 970
Laljee v. Govind Ram 889, 896
——— v. Jangilal ... 1025
Lalji v. Barber ... 1526
—— v. Keshowji 1376, 1379
—— v. Nand Kishore 1193, 1220
Laljimal v. Mohan Lal ... 1018
Lal Kunwar v. Chiranji Lal ... 1148
Lall v. Negroo ... 887
Lalla Chhajmal v. Brij Bhukhun Lall... 1421
—— Kanhoo Lal v. Mauki ... 861
Lallaprasad v. Ram Karan ... 1460
Lalla Tilakdhari Lal v. Court of Wards 1027
—— Tirhini v. Lala Hurruck 1485, 1526, 1531
Lall Behary Dutt v. Thacomoney Dassee 1424
—— Dhur v. Gunput ... 840
—— Doss v, Jamal Ali 1071, 1075
Lalli v. Ram Prasad 1433, 1434, 1436
Lallubhai v. Mankubarbai ... 1472
——— v. Narain 1044, 1255, 1536
Lal Mamud v. Arbullah ... 993
Lalman v. Mohar Singh ... 1352

	PAGE
Lalmandas v. Jagannath	... 1512
Lalmohun v. Nanu Mohamed	... 1511
Lal Singh v. Chaitram	... 1405
———.— v. Pulandar Singh	1384, 1389, 1401
Lampleigh v. Brathwait	... 1237
Land Mortgage Bank v. Abdul Kasim	800, 802
——————— v. Vishnu	860
Landowners, &c., Co. v. Ashford	876, 1094, 1119
Langston, *Ex parte*	891, 893, 895
Langton v. Horton	... 898
———v. Langton	... 1567
Lanoy v. Duke of Atholl	1177, 1179
Lansdowne v Lansdowne	... 902
Lant v. Crisped	... 1209
Lario v. Bonany	... 795
Latouche v. Dunsany	... 1173
Lawley v. Hooper	780, 1034
Lawrence v. Galsworthy	... 1179
——— v. Naggo	... 985
Laxman Rao v. Kesho	... 866
Layer v. Nelson	... 1202
Lazarus v. Audrade	... 804
Lea v. Thursby	1282, 1284, 1285, 1287
Leatherdale v. Sweepstone	... 1209
Le Bas v Grant	... 1475
Le Gros v. Cockerell	... 1070
Ledbrook v. Passman	... 1176
Lee v. Dunsford	... 1403
Lee v. Lood Vernon	978, 985
Leeas Bank v. Walker	... 884
Leedham v. Chawner	... 1275
Leeds and Hanley Theatre v. Broadbent	1012
Lees v. Fisher	896, 1403
Leigh v. Burnett	985, 1081, 1082, 1083
———v. Lloyd	... 1063
Leith's Estate, *In re*	... 1237
Lekha v. Jai Mul	... 1520
Lekhraj v. Abdul Ghafur	921, 1582
Lemayne v. Stanley	... 870
Le Neve v. Le Neve	... 896
Leonino v. Leonino	1185, 1187
Leslie, *Re*	1200, 1270, 1453
Leslie v. French	1096, 1100, 1144, 1269
Letts v. Hutchins	908, 948, 961
Lewes v. Morgan	... 1408
Lewis v. Aberdeen and Plymouth Co	... 1442
———v. Nangle	861, 1225, 1233
Lewitt, *Re*	... 869
Ley v. Ley	... 1190
Lila v. Vasudev	... 908
Liladhar v. Chaturbhuj	1362, 1498, 1510, 1516
Lickbarrow v. Mason	... 1156
Life Interest, &c., Corporation v. Hand-in-Hand Fire, etc., Society	... 1074
Lincoln v. Wright	... 789
Lingam v. Vikrama	... 1275
Lingam Krishna v. Sri Mirza	828, 829, 1040
Lingammal v. Chinna	... 1364
Linga Reddi v. Sama Row	1031, 1043, 1045, 1047, 1052
Lipscombe v. Lipscombe	1187, 1191
Liquidation Estates Purchase Co. v. Willoughby	1279, 1282, 1284, 1285, 1288, 1297, 1298
Lisle v. Reeve	... 1571
Littler v. Holland	... 1445
Liverpool Marine Credit Co. v. Hunter.	1273, 1487
Livesley, *In re*	... 1265
Living, *Ex parte*	... 1138
Lloyd v. Lander	... 1373
———v. Mansell	... 1456
——— v. Roberts	... 877
——— v. Watt	... 922
——— v. Whittey	... 1484
Lloyd's Bank v. Barson	... 1161
——————— v. Bullock	... 1161
Lloyd's Banking Co. v. Jones	... 1160
Llewellyn, *In re*	926, 931
——————— v. Chunni Lall	... 916
Lobb v. Stanley	869, 870
Lochan Singh v Sant Chander	... 1362
Lockhart v. Hardy	... 1470
Locking v. Parker	1066, 1072, 1223
Lomax v. Bird	... 1209
——— v. Buxton	... 804
——— v. Hide	... 1382
Lomba v. Vishvanath	1112, 1286, 1290
London and County Bank v. Lewis	... 798
——————————— v. Ratcliffe	962, 1118, 1168, 1171
London and Globe Finance Corporation v Montgomery	... 942
——————— Provincial Bank v. Roberts	885
——————— S. S. Bank, *In re*	... 913
——————— S. W. Ry. Co. v. Comm	... 940
London, Chatham and Dover Railway Co. v. South Eastern Railway Co.	... 1429
Louquet v. Scawen	780, 974
Lootnarain v. Showkeelal	... 994
Lord Hardwicke v. Vernon	... 1133
—— Kensington v. Bouverie	1086, 1353
—— Ranelagh's Will, *In re*	... 1082
—— Timbleston v. Hamill	983, 1088
Lotan v. Patan Din	... 1226
Lotf Hossein v. Abdool	... 840
Lotif Aly v. Gujraj	901, 908
Lovel's Case	... 1234

PAGE

Lowe v. Fox ... 885
Lows v. Telford ... 1005
Lucas v. Seale ... 1023
Luchmun v. Girdhur ... 1376
Luchmun v. Muddun ... 1458
Luchmun Persad v. Kishun Persad ... 1457
Luchmeshar Singh v. Dookh Mochan ... 852, 1016, 1019, 1039
Luchmi Dai v. Asman Singh 1450, 1503
Luchmiput v. Khairat Ali 878, 879
Luchmissur v. Dakho ... 887
Luckmee Chand v. Zorawar Mull ... 916
Luke v. South Kensington Hotel Co. ... 1357, 1360, 1363, 1382
Lumbsley v. Musgrave ... 1414
Lunn v. Thornton 804, 806
Lusty, *Re* ... 1081
Lutafut Hossain v. Mahomed ... 967
Lutchmanan v. Siva ... 1383
Lutt Ali (Syed) v. Futteh Bahadur ... 1398
Lutton v. Rodd 1213, 1215
Lyon & Co. v. London City & Midland Bank ... 817

M

Macdonald v. Walker ... 1061
Macdonough v. Shewbridge ... 1548
Mackay, *Ex parte* ... 894
Mackenzie v. British Lien Co. ... 1157
——— v. Robinson ... 1483
Mackintosh v. Crow ... 1427
——— v. Haydon ... 884
——— v. Watkins 1114, 1304, 1367
——— v. Wingrove ... 1435
Macnaghten v. Bheekaree 999, 1140
——— v. Lalla Mawa Lall ... 998
Madabhusi v. Singara ... 869
Madan v. Jamna ... 1583
Madan Lal v. Bhagwan Dass ... 1548
——— v. Keshan Singh 1377, 1380, 1383, 1385
Madan Mohan v. Kanai Lal ... 1077
——— v. Nobin Kishore ... 1533
Madari v. Baldeo Prasad ... 1089
Maddocks v. Wren ... 1134
Madhab v. Pamola ... 1522
Madhavi v. Kunhi Pathumma ... 1208
Madho v. Jagannath ... 1467
——— v. Mahtab ... 839
Madho Das v. Ramji ... 1550
——— v. Ram Kishen ... 892
Madho Misser v. Sidh Binaik 811, 1256, 1262
Madhoo v. Doorga ... 1046
Madho Prasad, *In re* ... 1550

PAGE

Madho Prasad v. Baij Nath ... 1028, 1082, 1577, 1578
——— v. Debi Dial ... 1016, 1019, 1029, 1031, 1037, 1039
Madhopersad v. Gajudhur 838, 839
Madho Ram v. Shamshuddin ... 980
Madho Singh v. Achra Singh ... 1027
——— v. Hurnut Ally ... 1390
——— v. Kashi Ram 1433, 1434, 1436
Madhub v. Jhoonuck Lall ... 841
Madhubmoney v. Nundo Lall ... 999
Madhu Sudan v. Kailash Chunder ... 1532
Madhwa v. Venkataramanjulu ... 1425
Madras Building Co. v. Rowlandson 1159, 1297
Madras Deposit and Benefit Society v. Onnamalai 874, 878, 879, 894
Madras Deposit and Benefit Society v. Passana 1059, 1065
Madras Hindu Union Bank v. Venkatrengiah ... 1160
Magan Lal v. Doshi 1507, 1508, 1523
——— v. Shankra ... 1519
Maghal v. Abdul Aziz ... 1352
Magniram v. Gurmukh Roy ... 879
——— v. Mehdi Hossein ... 1190, 1200, 1201, 1202
——— v. Mohunt ... 1488
——— v. Rajpati 1417, 1435
Magnolia Metai Co., *In re* ... 815
Magnus v. Queensland National Bank 1066, 1075, 1401
Mahabir v. Macnaghten ... 945, 946, 1014, 1020, 1490, 1512, 1571
——— v. Sital Singh 1499, 1516
Mahabir Singh v. Saira Bibi 1574, 1582
Mahadaji v. Gunpat Shet 954, 1025, 1026
——— v. Hari ... 1446
——— v. Joti 853, 854, 855, 1419, 1482
——— v. Vyankaji ... 931
Mahadeb v. Gorakh Prasad ... 1223
Mahadeo v. Nago ... 1371
Mahadeo Prasad, *Re* ... 1454
Mahadev v. Ramchandra ... 1090
Mahadin v. Sheoprasad ... 817
Mahadu v. Bhagirathibai ... 1154
Mahalakshmammal v. Sriman Madhwa. 1281, 1288
Mahalinga v. Ganapathi ... 1494
Mahamaya v. Haridas ... 1343
Mahant Ishwargar v. Chaudasama ... 1457, 1466, 1549
Maharajah of Benares v. Har Narain Singh ... 1412

PAGE

Maharajah of Benares v. Nand Ram ... 911, 912
——————— v. Ram Kumar... 824
Maharajah of Bharatpur v. Rani Kanno Dei 1417, 1418, 1419, 1420, 1447, 1449, 1484, 1486, 1491, 1492
Maharaj Singh v. Balwant Singh ... 790
——————— v. Lachman ... 1351
Maharani Dasya v. Harendra Lal ... 1520
Mahesh Singh v. Chanharja 1018, 1052
Mahomed v. Abdulla ... 1116, 1130, 1395, 1396, 1519
——— v. Abdur Rahim 86, 1487
——— v. Ali Koya ... 1010
——— v. Bagas 787, 906
——— v. Bai Cooverbai ... 1498
——— v. Banee Pershad ... 603
——— v. Ez kiel 942, 944, 1148, 1422
——— v. Ghaffar 1225, 1481
——— v. Gobindnath ... 851
——— v. Hossein Bibi ... 874
——— v. Jafor Khan ... 872
——— v. Jairj Mal ... 962
——— v. Jan Patel 827, 833
——— v. Jarao Bai ... 1460
——— v. Jijibhai 850, 937, 939
——— v. Kalyan Das 1117, 1119, 1125
——— v. Lalla Dhundur ... 1357
——— v. Mahomed 936, 1198
——— v. Man Singh 1125, 1357, 1368
——— v. Munshi Ram ... 1528
——— v. Mt. Heengun ... 967
——— v. Nazeer Ali 789, 856
——— v. Noor ... 1091
——— v. Obhoy Narain ... 1046
——— v. Radhe Ram ... 1387
——— v. Ram Lall 1512, 1515
——— v. Ranu ... 930
——— v. Rijbhai ... 936
——— v. Salat Jang ... 889
——— v. Savvasi ... 945, 1305, 1510, 1511, 1513
——— v. Sheodarshan ... 1097
——— v. Shib Sahai ... 1583
——— v. Sookh Dayee 1134, 1146
——— v. Toakurdyal ... 1046
——— v. Toburennissa ... 1460
——— v. Vinayak ... 1256
——— v. Visvanatha ... 1368
——— v. Zinat Begam ... 1473
Mahomed Abdul v. Dilsukh ... 957, 958, 1382, 1513, 1572, 1578, 1579
Mahomed Abdul Hamid v. Jairaj Mal 942, 964
Mahomed Abdul Hye v. Gajraj ... 1440

PAGE

Mahomed Akbar Khan v. Kasturchand 1422
Mahomed Akbar v. Munshi Ram 1527, 1533
Mahomed Ali v. Jaffar Khan ... 871
——— v. Nazarabadi ... 791
Mahomed Alim v. Secretary of State ... 1488
——— Amin v. Jan Patel 1059, 1258
——— Assudoollah v. Karamuttoollah 1082
——— Gazee v. Ram Lall ... 1510
——— Golab v. Mahomed Sulliman. 1157
——— Hamid-ud-din v. Shib Sahai 1580
Mahomed Husain v. Lalji 1406, 1407
——— v. Mulchand 975, 1135
——— v. Sheodarshan 1036, 1546
——— v. Thakur Dharam ... 1512
Mahomed Ibrahim v. Ambika Pershad 1113, 1278, 1282, 1284, 1300
——— Inayat v. Muhammad Karamutullah ... 1138
——— Jin v. Jai Ram ... 778
——— Karamottollah v. Abdool Majeed 1262
——— Sadik v. Ghans Muhammad ... 1121
——— Samiuddin v. Mannulal 947, 1558
——— Samiruddin v. Man Singh 1357, 1362
——— Shamsool v. Shewakram ... 1286
——— Suleman v. Muhd. Yar Khan. 1473
——— Sumsoodin v. Moonshee Abdool Huq ... 1416
——— Taki v. Thomas 1187, 1500, 1516
——— Yusuf v. Mhd. Musa ... 1408
Mahtab v. The Collector 1144, 1152
——— v. Misree Lall 899, 952, 955, 956, 1186
——— Rai v. Santlal 953, 958
Ma Huin v. Osman ... 792
Maina v. Bachchi 1263, 1273
Mainland v. Upjohn 942, 1124
Mailraya v. Subbaraya 857, 937
Major v. Ward 1064, 1065
Makhan v. Bhagirath Prasad 1494, 1519
Makhan Kuar v. Jasoda Kuar 902, 1207
Makhan Lal v. Bunku ... 866
——— v. Shrikrishna ... 1183
Makhdun Khan v. Mt. Jadi ... 1242
Makund v. Babari Lal 1119, 1403
——— Lal v. Goluk Chunder 858, 922
——— Ram v. Ram Sarup 1572, 1575
Malhar v. Anandram ... 1212
Malia v. Nachiappa 1531, 1535
Malkarjun v. Narhari 1384, 1389, 1394, 1460, 1517, 1578
Malkhan v. Bhagirath Prasad ... 1581
Malan v. May ... 936
Mallarkandi v. Narayana ... 1249
Mallikarjuna v. Pullaya ... 1364

PAGE

Mallikarjunadu v. Lingamurti 1304, 1305, 1394, 1459, 1468, 1488, 1489, 1498, 1504, 1506, 1507, 1523, 1526, 1593
——— v. Mallikarjunudu 837, 840, 846
——— v. Narasimha ... 1499
Maloji v. Sagaji 946, 947, 1014, 1557, 1558, 1559
Ma Lon Ma v. Mg Shiva Byu 1260, 1269
Mamraj v. Ramji ... 1121
Mana v. Karnaban ... 1263
—— v. Surya Narayana 1223, 1249
Manager Vithoba v. Vigneshwar ... 1418
Manakal v. Collector of Malabar ... 1365
Manavikraman v. Unniappan ... 1465
Manbahal v. Gopal 1389, 1390
Mancherji v. Thakardas 1446, 1503
Manchersha v. Kamrunisa 1094, 1093, 1142
Manchester Ry. Co. v. North Central Waggon Co. 809, 811
Mankji v. Rustomji ... 897
Manesbar v. Shadi Lal ... 1432
Mangal v. Chandramal 1275, 1361
Mangal Sen v. Shankur Sahai 885, 886
Mangli v. Debi Din ... 1475
Mangniram v. Rajpati ... 1428
Maniappa v. Krishnappa ... 1300
Manickam v. Audinarayana ... 1261
Manick Chand v. Beharee ... 801
——— v. Vishnoo ... 813
Manik Mula v. Parbuttee ... 1198
Manilal v. Motibhai 1018, 1035
Manindra v. Jawahir ... 1520
Maniram v. Bapu ... 983
Mankee Kooer v. Sheikh Munroo ... 859
Manks v. Whiteley 1166, 1278, 1279, 1298
Manlove v. Bale 984, 986, 1100
Manly v. Patterson 836, 859, 1163
Manmatha v. Rohilli ... 1453
Manual v. Sanagapalli ... 1373
Manning v. Lunn 918, 1207
Manno v. Durga ... 1427
Manohar Lal v. Ram Babu 1128, 1400
—— —— Singh v. Sumitra 849, 1405, 1406, 1407
Manoo Lal v. Durga Prasad ... 1420
Mansab v. Golab ... 1421
Mansa Ram v. Umra ... 1550
Mans Deir v. Jewana Lal ... 1271
Mansel v. Queen ... 1381
Manser v. Dix 1062, 1067
Mansfield, *In re* ... 1076
Mansur Ali v. Mahmud-un-nissa 909, 910
Maqbul Fatima v. Lalta Prasad 1440, 1449, 1487, 1492, 1538, 1563

PAGE

Maradugula v. Kotala ... 1254
Marakar v. Punjapatath 923, 957, 1544
Marana v. Pendyala 905, 906, 953, 955, 956, 1543
Marcarr v. Sigg ... 897
Mardan Singh v. Sheo Dayal ... 1198
Mariam Bibi v. Sakina ... 874
Marimuttu v. Desoysa ... 972
Marquis of Bute v. Cunningham ... 1194
Marquis of Northampton v. Pollock 937, 1414
——— v. Salt ... 900
Marrett v. Western ... 1126
Marriott v. Anchor Reversionary Co. ... 1072
Marsh v. Lee 1169, 1173, 1174
Marshall v. Bengal Spinning and Weaving Co. ... 1430
——— v. Shrewsbury 947, 970, 1260, 1557
——— v. South Stafford Tramways... 1024
Martand v. Dhondo 945, 1957, 1510, 513, 1574, 1578, 1579, 1580, 1581
Martin v. Martin ... 1273
——— v. Pursram 827, 1036
——— v. Sheoram Lal ... 879
Martinez v. Cooper 1160, 1161
Martinson v. Clowes 1068, 1073
Maruti v. Krishna 1492, 1561
Marwood v. Turner ... 986
Ma Sein v. Muthuourpan ... 1384
Mashab Mone v. Lambert ... 1474
Mashook v. Maran 812, 906
Mason, *In re* ... 1265
——— v. Bradley ... 884
——— v. Hawkins .. 1080
——— v. Morley ... 890
Massey v. Johnson ... 943
——— v. Scholfield ... 1353
Master v. Miller 884, 887
Mastalla v. Jan Mamud 1277, 1533
Masuma v. Tahira 787, 1259
Mata Ambar v. Sridhar 1529, 1533
Matadeen v. Hookum Singh ... 1046
——— Roy v. Musoodun Singh ... 875
Mata Din v Kazim Husain 783, 1007, 1109, 1118, 1126, 1127, 1293, 1345, 1348, 1352, 1353, 1354, 1356, 1360, 1368, 1383, 1481, 1486, 1503, 1567
Matangini v. Chooneymoney 1015, 1021, 1266 1271, 1272, 1483, 1575, 1579
——— v. Ramnarain ... 1409
Mata Pershad v. Mt. Bhagmanee ... 989
Mather v. Fraser ... 1091
Matheris v. Gulab ... 1368
Matheson v. Clarke 1066, 1075, 1076
Mathew v. Blackmore ... 1016

	PAGE
Mathews, *In re*	... 1363
——— v. Goodday	... 1260
——— v. Mande	... 1080
——— v. Wallwyn	822, 1482
Mathura v. Nathuni	... 1511
Mathura Das v. Kalia	... 832
——— —— v. Lachman Ram	... 1512
——— —— v. Mitchell	... 880
——— —— —— v. Raja Narinder	1418, 1419, 1421
Mathuram v. Dhurm Singh	... 967
Mathuraman v. Ettappasami	... 1573
Matilall v. Misree Lall	... 1189
Mati Singh v. Ramo Hari	... 1151
Matiullah v. Banwari Lal	... 1131
Maundrell v. Maundrell	... 1176
Maung Kat v. Maung So	... 875
——— Kan v. Myat	... 875
——— Kya U v. Sithambaram	... 867
——— Kyaw v. Ranganathan	... 888
——— Kyin v. Ka Shwe La	789, 790, 791
——— —— v. Maung Tha	... 790
Maung Lu v. Malon	... 790
Maung Po v. Chaung Taek	... 1460
——— v. Mhd. Cassim	... 1220
Maung Sen v. Ma Po	... 891
——— ——— v. Maung San	... 888
Maung Tha v. Maung Mya	... 792
Maxfield v. Burton	1163, 1176
Maxwell v. Montacute	... 807
——— v. Tipping	... 942
Maya Ram v. Jayantray	... 1361
——— —— v. Naubat	... 1436
——— —— v. Prag Dat	... 796
Mayavanjari v. Nimini	... 1249
Mayen v. Alston	... 1405
——— v. Crickett	1230, 1231
——— v. Pakuran	945, 1015, 1512, 1573, 1576, 1578, 1579, 1580, 1581
Mayer v. Murray	1133, 1137
Mayilarayar v. Subbaraya	... 938
Mazhar Rai v. Ramgat Singh	... 1097
M'Carogher v. Whieldon	1059, 1062
Mc Dermott v. Mc Henry	... 1535
Mc Henry v. Davies	... 1161
Mc Mersh v. Brown	... 1413
Mead v. Lord Orrery	... 1372
Meadows, *In re*	... 821
Mecca	820, 1451
Megha, *In re*	... 882
Meghraj v. Ganga Baksh	... 1454
——— v. Nursing	... 1420
Meghram v. Makhanlal	... 790
Meham v. Williams	... 907
Mehari Bibi v. Yakub Ali	... 1411
Mehdi Abbas v. Muhammad	795, 797, 798
——— Husain v. Sughra Begum	1376
Meherban v. Nadir Ali	... 1353
Meheroonnissa v. Abdool	... 887
Meherunnissa v. Sham Sunder	1109, 1291
Mehshi Bajrangi v. Udit Narain	... 819
Melbourne Banking Corporation v. Brougham	... 944
Mellor v. Lees	853, 901, 1035
Mercantile Bank v. Evans	... 823
Mercer v. Moore	... 1373
Merchant Banking Co. v. London and Hanseatic Bank	... 1484
Merriman v. Bonner	... 1092
Merwanji v. Syed Sirdar Ali	... 1046
Metcalfe v. Campion	... 1138
——— v. Pulverroft	... 1372
Metropolitan, &c., Building Society v. Smith	... 1005
Metters v. Brown	... 1065
Mg Pe v Ma Baw	... 1522
Miajan v. Abdul Jubbar	1429, 1433, 1436
Michell v. Wilton	... 1265
Middleton v. Brown	... 1432
Mikhi v. Fattu	... 906
Mildred v. Austin	1234, 1371
Miller v. Chartered Mercantile Bank	... 890
——— v. Cook	1068, 1069
——— v. Craig	... 1546
——— v. Digambari	... 1530
——— v. Madho Das	892, 893, 896
——— —— v. Ranganath	... 895, 1033, 1034, 1035, 1041, 1489, 1535, 1536, 1568
Mills v. Fowkes	... 1414
—— v. Jennings	961, 1221, 1343
—— v. United Counties Bank	... 1041
Mills Estate, *Re*	... 1438
Miln v. Walton	1293, 1294
Mir Eusuf Ali v. Panchanan	... 958, 1125, 1129, 1203
Mirza Akbar Ali v. Mt. Ameeroonissa	... 1029
Mirza Ali v. Tarasoonduree	... 1138
Misri Lal v. Abdul Aziz	... 824
——— v. Mithu Lal	1501, 1502
——— v. Mozhar Hossain	805, 806, 898
Mitchell, *Re*	... 1373
——— v. Mathura Das	... 880
——— v. Reynolds	... 956
Mithiram v. Somanatha	874, 878, 1395, 1520
Mitho Beebee v. Madho Persaud	... 1006
Mitholal v. Chunilal	... 1439
Mithubai v. Limji	1365, 1373
Mithulal v. Kishanlal	... 1175

	PAGE
Mitterjeet v. Dulichand	... 1027
——— v. Mookhlal	... 841
Mocatta v. Lindo	... 907
Modan Mohun Chowdhry v. Ashad Ally	850, 1032
Modhusudan v. Rhidoy Moni	807, 808
——— v. Rakhal Chunder	... 1276
Mohabir v. Gungadhur	... 847
Mohamaya v. Haridas	970, 991
Mohan v. Kashinath	1239, 1242
——— v. Togu	1116, 1117, 1125, 1357, 1392
Mohananda v. Akhoy Kumar	... 1221
Mohan Bagchi v. Grish Chunder	... 1027
Mohanlall v. Chaodhri	980, 981
——— v. Golak Chunder	841, 1147, 1148, 1343
Mohendra v. Gopal	... 1512
——— Nath v. Kali Prosad	... 1359
Mohesh Chunder v. Kamini	872, 885
——— v. Prosanna Lal	912, 1012, 1198
——— v. Tarinee	... 838
Mohesh Lal v. Bawan Das	1109, 1278, 1283
——— v. Bussunt Kumary	... 869
Mohidin v. Shivlingappa	... 1201
Mohori Bibi v. Dharmodas	991, 1040
Mohram v. Ajudhia	... 1441
Mohunga Ojha v. Ram Bahadur	... 1492
Moidin v. Oothumanganni	1238, 1241, 1242
Mojiram v. Nandram	... 1276
Mokund Lall v. Goluck Chunder	... 1146
Monmohun v. Durgachurn	912, 1012
Mon Mohini v. Parvati Nath	1350, 1355
——— Dasi v. Lakshminarayanan	1524
Monomohini v. Nara	... 1460
Monomotha Nath v. Greender	... 1145
——— v. Sreenath	... 879
Montagu v. Earl of Sandwich	... 1256
Montesquick v. Sandys	... 1157
Montgomery v. Donohoe	... 1173
Monti v. Barnes	1002, 1080
Monypenny v. Monypenny	... 815
Moody v. Mathews	985, 1082
Moolchand v. Deokoower	1091, 1092
Moona v. Jeymuragul	... 880
Moor v. Grey	... 999
Moore v. Morton	... 1343
——— v. North Western Bank	... 892
——— v. Shelley	1013, 1014, 1065
Moothoranath v. Krishto Kumar	... 953
Mora v. Ramchandra	925, 952, 957, 1544
Morais v. Hafeezun	... 1031
Morecock v. Dickson	... 1176
Morgan v. Jeffreys	935, 940
Morgan v. Rowlands	... 1414
Morley v. Elways	... 1461
——— v. Morley	... 1373
Moro v. Balaji	955, 1191, 1192
Morony v. O'Dea	... 1563
Morrison, *Ex parte*	... 1270
Morret v. Paske	1173, 1176
Morrett v. Western	... 1382
Morton v. Woods	1080, 1081
Morton and Hellett, *Re*	... 1061
Moseebun v. Muncorun	... 1439
Moser v. Marsden	1348, 1355
Moshingan v. Mozari	... 1441
Moss, *Ex parte*	... 891
——— v. Gallimore	... 860
Mosse v. Salt	... 1422
Motaji v. Sheikh Husen	... 1436
Motayappan v. Palani	... 791
Mothair v. Ahmatti	... 1210
Moti v Kanhaya	... 1380
Moti Begam v. Har Prasad	787, 1259
——— v. Zorawar	... 869
Motichand v. Sagan	788, 868, 1016
Motilal v. Anund Chunder	... 791
——— v. Bhagamani Kumari	... 1516
——— v. Carrabuldin	... 1371
——— v. Karrabuldin	... 1537
——— v. Mukund Singh	... 1524
——— v. Russick Chandra	... 1512
——— v. Surajmal	... 915
Moti Ram v. Jethmal	... 1032
——— v. Ram Lakhan	1573, 1575
——— v. Vithal	799, 827, 829, 833, 835, 836, 848, 851, 853, 1246, 1255, 1258
Moti Singh v. Ramohari	1419, 1420, 1421, 1430
Moulvie Mohamed v. Shewuk Ram	... 1112
——— Omer Kurim v. Lala Shewan Lall	1033
Mountfort v. Scott	... 891
Mouzzum v. Mt. Wajdah	... 967
Mower's Trusts, *In re*	1180, 1182
Moxon v. Berkeley Building Society	... 1181
Muddunmohun v. Kalikadeen	... 1101
Muex v. Jacobs	... 892
Mujib-un nissa v. Abdur Rahim	... 867
Mujeedunnissa v. Dildar Hossain	1147, 1357
Mukhoda v. Gopal Chunder	1384, 1394, 1518
Mukund Lall v. Goluk Chunder	... 1091
——— v. Seth Mangaljeet	1463, 1537
——— v. Sreekishen	... 967
Mula Singh v. Budh Singh	... 1078
Mulchand v. Balgobind	803, 1007
——— v. Govind	... 1098
——— y. Janki	... 877
——— v. Lallu	888, 1120, 1127, 1277

	PAGE
Mulchand v. Madhoram	... 857
——— v. Mukta	... 1499
Mulhar v. Anandram	... 1206
Mulla Vittil v. Korambath	900, 1129, 1130
Mullupadi v. Venkatanarasimha	... 1275
Muluk Fukeer v. Manohar	... 1448
Mulu Singh v. Rahim Kuar	... 1457
Mumford v. Peal	912, 1012
——— v. Stohwasser	... 1176
Mumtaz v. Sri Ram	... 1495
Munawar Hussain v. Jani Bijai	... 1537
Munbasi Koer v. Nowrattan Koer	... 1027
Muncherji v. Noor Mahomedbhoy	... 1063, 1064, 1065, 1073
Munchorambhai v. Moola Kutboodeen	... 889
Mungal Pershad v. Girjakant	1384, 1504
Mungli Prasad v. Ishri Prasad	... 1367
Muni Reddi v. Venkata	... 827
Munna Lal v. Munun Lall	... 1400
——— v. Sarat Chunder	... 1473
Munnoo Lal v. Reet Bhoobun	... 1035, 1144, 1152, 1153
Mun Peary v. Shiva	... 901
Munshi v. Daulat	... 957
——— Basiruddin v. Md. Jalish	... 1359
Munsukh v. Tarbhavan	... 1404
Mupana v. Virupa	... 1250
Murari v. Umrao	... 1459
Murat Singh v. Ramlal	... 850
Murlidhar v. Anand Rao	1304, 1489, 1507
——— v. Kanchan	... 850
——— v. Nand Ram	... 1532
——— v. Parasharam	... 1554, 1555, 1557, 1562
——— v. Sher Singh	... 1513
Murugappa v. Nagappa	... 894
Murugastera v. De Souza	... 1547
Musahab Zaman Khan v. Inayetullah	1033, 1034, 1035, 1526, 1527, 1530, 1531, 1533, 1534, 1536
Maushtaq Ali v. Behari Lal	1356, 1383
Musst. Bebee v. Hakeem Abdul	1096, 1098
——— Jamna Koer, *Re*	... 1576
——— Motee v. Indrajit	... 967
——— Mujeedunnissa v. Syed Dildar Hossein	... 793
Mustafa Khan v. Shadi Lall	... 957
Mutana v. Kumarasami	... 1529
Mutha v. Pyanda	881, 1220
——— v. Venkatachelapati	... 868
Muthia v. Kasivasi	... 888
——— v. Subbajan	... 1548
——— Raja v. Appala Raja	... 993
Muthra Das v. Magh Singh	... 1540
Muthu v. Karuppan	1576, 1580, 1581
——— v. Rayalu	... 1548
——— v. Sami	... 1161
——— v. Venkatachallam	824, 1225, 1272, 1353, 1360, 1481, 1482
——— Kumar, *Re*	... 1359
——— Nadan v. Shunmoogatha	... 1273
Muthuraman v. Ettappasami	1492, 1578, 1579, 1580
Muthusami v. Ayyalu	... 1060
——— v. Natesa	... 911
——— v. Venkateswara	... 1266
Mutsaddi v. Muhammad	... 888
Mutta Venkatachellapati v. Pyinda	... 792
Muttughain &c. Building Society v. Thurstan	... 1112
Muttyjan v. Ahmed	... 1396
Muttylal v. Nundalal	1186, 1189, 1203
Mutual Life Assurance Society v. Langley	1178, 1442
Muzaffar v. Parbati	... 1135
Muzhur Hossein v. Hur Pershad	... 939
Mykum v. Hadee	... 799
Mynakka v. Vavaha	... 880

N

Nabbu Khan v. Sita	... 1324
Nabin Chand v. Raj Coomar	... 788
Nachippa v Chokalingam	... 790
Nadir Hossein v. Baboo Pearoo	... 1266
Nafar Chunder v. Bai Kanto	... 1516
Nagarur y. Tangatur	881, 1021
Nagindas v. Kara	... 809
Nago v. Babaji	866, 867, 887
Naib Ram v. Shib Dat	782, 783
Nainappa v. Chidambaram	... 1225, 1238, 1556, 1558, 1559
Nain Dat v. Haribar Dat	... 1418
Najibulla v. Nusir Mistri	803, 830, 1258
Nakchedi v. Nakchedi	... 970
——— v. Ramchariter	... 1017
Nallamuthu v. Betha	1134, 1168
Nallanna v. Palani	843, 844, 899
Nalun v. Krishnasawmy	... 1453
Nama v. Hari	... 1495
Namburi v. Saladipapiah	... 1420
Namdar v. Karamraji	... 1125
Nana v. Anant	... 887
Nanabbat v. Lakshman	... 1179
Nanabin Lukshman v. Anant Babaji	... 866
Nanak Chand v. Mehr, Jamata	... 1052
——— v. Talukdye	... 1392, 1394, 1519, 1548
Nanchand v. Yenawa	861, 1487

PAGE

Nand Coomar v. Brojo Bhokun 950, 1135
Nand Kishore v. Ahmed ... 1358
——————— v. Kaniram 874, 875, 877
——————— v. Raja Hariraj ... 955, 956, 958, 1021, 1190, 1293, 1299, 1514, 1515, 1521
Nand Kumar v. Ajodhya 992, 1032
Nandlal v. Goojar ... 850
——— v. Mt. Radha ... 1430
——————— v. Ramratan 1467, 1555, 1556
Nandram v. Babaji 1466, 1555, 1556
Nanhuji v. Chemina 898, 1452
Nanjappa v. Nanjappa 1012, 1427
Nanjundapa v. Hemapa 1355, 1386
Nanny v. Edward ... 1463
Nanomi v. Mohun 1361, 1378, 1388, 1389
Nanu v. Manchee ... 1207
——— v. Raman 1019, 1049
Nanuvien v. Muthusami 1572, 1578
Naoroji v. Sadik Misra ... 1405
Naradugula v. Kottaya ... 898
Narahari v. Vithal Bhat ... 1544
Narain v. Bhagwandin ... 1429
——————— v. Bhika ... 1407
——————— v. Dataram ... 884
——————— v. Gangaparshad ... 798
——————— v. Raglio ... 1582
——————— v. Shimboo ... 1019
——————— Das v. D'cruz ... 1416
Naran v. Dolataram ... 1125
Narasayya v. Guruvappa 866, 887
Narasimbarav v. Krishnarav ... 1426
Narasimma v. Ramasami ... 790
Narayan v. Anaji ... 1510
——————— v. Anandram 922, 946
——————— v. Bapu ... 1112
——————— v. Ganoji 824, 1360, 1370, 1443, 1444, 1482, 1546
——————— v. Ganpat ... 1514
——————— v. Lakshman Das 874, 878, 1260
——————— v. Mahadu ... 794
——————— v. Motilal 990, 991
——————— v. Nathaji ... 1167
——————— v. Pandurang ... 959, 972, 1173, 1174, 1443, 1548
——————— v. Rangubai 975, 1094
——————— v. Rawji 937, 1445
——————— v. Satvaji ... 1424
Narayana v. Narayana ... 1250
——————— v. Papayya 1465, 1498, 1500
——————— v. Ponniah ... 785
——————— v. Raghavammal ... 1021
——————— v. Rama ... 875

PAGE

Narayana v. Venkataramana ... 883, 894, 895, 960
Narayanasami v. Narayana ... 1519
——————— v. Ramasami ... 1548
Narendra Kumar v. Gorachand ... 1436
Narhar v. Shivram ... 1577
Narindra v. Khadim Husain 1418, 1421
Narpat v. Ram Saran 1017, 1019, 1039
——— v. Ram Ratan ... 1050
Naro v. Balaji ... 1163
——— v. Vithalbhat 923, 924, 952, 957
Narotam v. Sheo Pargash 1036, 1409
Narsidas v. Joglekar 1027, 1573, 1576
Narsingh v. Lukputty ... 1151
——————— v. Mt. Jamna Bai 1352, 1400
Narsinga Das v. Mt. Munna ... 1582
Narsingha v. Tarachand ... 915
Narsingrao v. Narayanrao 1097, 1173
Nash v. Hodgson ... 1414
——— v. Palmer ... 1047
Nathi Lal v. Lala ... 1383
Natho v. Ameerchand 899, 956
Nathubhai v. Mulchand ... 1424
Nathu Krishnama v. Annangara 962, 1023
Nathuram v. Gokuldas 1470, 1473
Nathu Singh v. Gumani Singh ... 921
National Bank v. United Hand-in-Hand Bank 1087, 1134, 1422, 1547
National &c., Building Society v. Raper. 1461
National Mercantile Bank v. Hampson... 1002
——————Provincial Bank v. James 1068, 1092, 1099, 1562
——————————————v. Harle 823, 1255
——————————————v. Jackson ... 1160
Native Iron Ore Co., *Re* ... 1162
Navalbai v. Sivubai ... 791
Navlu v. Raghu 946, 1146, 1559
Nawab Azimut Ali v. Jawahir Singh 955, 970, 1198, 1238, 1239
——— Mahomed v. Har Charan ... 1488
——— Saiyad Baquar v. Babu Balak Ram ... 1484
——— Sarun v. Baroda Kant ... 871
Nawal Kunwar v. Bakhtawar ... 1407
Nazir Ali v. Ojoodhyaram 841, 928
——— Husain v. Niha Chand ... 1356
——— Munzoorad v. Mehidi Begum ... 1449
Needler v. Deeble 1118, 1382
Neelakandan v. Ananthakrishna ... 845
——————— v. Trinilal 937, 1250, 1252
Neelakantan v. Madasamy ... 878
Neelam v. Vinjamuri ... 1136
Neelamegan v. Govindan ... 953
Neerunjun v. Oopendro ... 945

	PAGE
Nekram v. Chynsook	... 967
Nellaya v. Vadakipat	1249, 1545
Nelson v. Booth	... 1087
Nemdhari v. Bissessuri	... 879
Nemichand v. Ganesh	... 851
——— v. Radha Ballabh	... 1423
Nepal Rai v. Dabi Prosad	1223, 1453, 1454
Nerbudda Prasad v. Gokuldas	... 1164
Nesbitt v. Tredennick	985, 988
Neti Chand v. Ashutosh	... 1516
Nettakaruppa v. Kumarasami	850, 1013
Neve v. Pennell	... 966
Nevill v. Snelling	... 1485
Newby v. Sharpe	... 1046
Newcomb v. Bonham	901, 902, 933
Newlove v. Shrewsbury	... 895
Newman v. Newman	... 914
——— v. Selfe	... 1483
Newsham v. Gray	... 1557
Newton v. Aldons	... 1403
——— v. Charlton	1172, 1231
——— v. Earl of Egmont	... 1376
Nga Kye v. Nga Po Min	... 822
Nga Paw v. Nga Lu	... 791
Nga Tok v. Subramanian	... 1099
Nicholas v. Ridley	1115, 1231
Nicholson v. Revill	... 884
Nidha Sah v. Murlidhar	812, 938, 975
Nidhi Ram v. Sarbesur 1125, 1128,	1129, 1381
Nigappa v. Gangawa	... 1524
Nihal Chand v. Gulam Muhammad	... 1482
——— v. Rameshri	... 1471
Nihali v. Mitter Sen	... 1466
Nikka v. Sulaiman	... 1096
Nilawa v. Krishnappa	... 1095
Nilcomul v. Kamini	833, 1009
Nilkant v. Jaennooddeen 859, 1038,	1144, 1146
——— v. Suresh Chandra 924, 955, 958,	970, 1192, 1385, 1398, 1399, 1548, 1551
——— v. Peary Mohun	... 1357
Nilmadhub v. Fatteh Chand	... 879
Nilo Pandurang v. Rama	... 1112
Nim Chand v. Ashutosh Dutt	... 1104
Ningwa v. Bharmappa	925, 1405
Nirabai, *In re*	.. 883
Nirban Singh v. Kumla Sahay	... 916
Nitterjit Singh v. Scott	... 1035
Nittyanund v. Raj Bullubh	... 1406
Nitya v. Nagendra	... 872
Nityananda v. Hira Lal 1305, 1454,	1489, 1508
——— v. Sri Radha	... 1418
Niwas Ram v. Udit Narain	... 1419
Noakes & Co. v. Rice	936, 940
Nobbs, *Re*	... 1547
Nobin Chunder v. Romesh Chunder	1423, 1424, 1425
——— v. Rup Lall	... 1198
——— Chandra v. Nabab Ali	... 940
———Krishna v. Mon Mohan	... 1241
Nobungo v. Goluckmonee	... 1208
Nogender Chunder v. Kamini Dassee	1034, 1095, 1096, 1199, 1200, 1268
Nanhey v. Morgan	... 891
Noor Ali v. Koni Meah	... 1457
Norender v. Dwarka Lal 838, 839, 952,	953, 1024, 1239, 1240, 1357, 1368
Norendra Nath v. Kamal Basini	... 1048
Norfolk Ry. Co. v. M. Namara	... 1281
Norris v. Caledonian Insurance Co.	1100, 1144
——— v. Le Neve	... 986
Norrish v. Marshall	... 1360
Northampton v. Pollock	... 942
North Central Wagon Co. v. Manchester &c. Ry. Co.,	... 895
—— Eastern Railway v. Lord Hastings	790, 811
Northern Fire Insurance Co. v. Whipp	1160, 1161
Norton v. Florence Land & Co.	... 1273
——— v. Wood	... 1012
Norway	... 1208
Nowa Koer v. Abdul Rahim	1177, 1179, 1183
Nowrojee v. Bapuji	... 947
Noyes v. Pollock 926, 930, 1088,	1092, 1145
Nuddear v. Kishoree Lall	... 887
Nudyar v. Roop Das	... 841
Nufar Chandra v. Ram Lal	... 1143
Nuffer Chunder v. Nund Lal	... 1143
Nugur Mall v. Azeemoolah	... 990
Nulla Vittil v. Korambath	... 1125
Nundan v. Jumman	... 1408
Nundo Kumar v. Banomali	... 1375
Nundo Lal v. Prosunnomoyee	... 791
Nura Bibi v. Jagat Narain	921, 1238, 1242
Nurjoon Sahu v. Shah Mozeeroodeen	858, 1098
Nursingh v. Roghoobur	1011, 1158
Nusserwanji v. Laxman	1423, 1424
Nutt v. Easton	1066, 1071, 1075
Nuwal Kishore v. Inayat Ali	... 1139

O

Obai Goundan v. Ramalinga	... 883
Obalampalli v. Ramalakshmana	... 1351
Ocean Accident, &c., Corporation v. Ilford Gas Co.	... 1477
Ockleston v. Heap	... 1061
O'Conner v. Richards	... 944
Odoy Churn v. Bhujohury	... 959

	PAGE
Ogilvie v. Foljambe	... 870
Oliver v. Hinton	... 1163
Omrao Begum v. Government of India	1357
Onkar v. Goverdhan	827, 831, 832
——— v. Lakshmichand	... 1550
Onkar Singh v. Baijnath	... 1580
Oodit Purkash v. Martindell	1045, 1046.
Oodytnarain v. Bhowanee	... 851
Oomda v. Raj Roop	... 1518
Oomrao v. Hashman	... 967
Oo Noung v. Moung	893, 894, 895, 896
Opendra Mohun v. Poorno	... 1373
Order v. Morgan	... 1071
O'Reilly v. Fetherstone	... 986
Oriental Bank v. Gobin Lall	... 1360
Orme v. Wright	1068, 1073
Osborne v. Rawlett	... 1061
Oswald v. Leigh	... 914
Otter v. Lord Vaux	1068, 1073, 1104, 1287, 1513
Oudh Behari v. Nageshar	1459, 1160, 1498, 1499, 1500, 1506, 1517, 1554, 1561
Owen, *Re*	... 1272
Owen v. Thomas	... 800
——— v. Williams	978, 985, 1082
Oxenham v. Ellis	... 1091

P

Padakannaya v. Narasimha	... 1105
Padapa v. Swamirao	814, 1230
Padgaya v. Baji	824, 924, 1360, 1481
Padmakar v. Mahadev	... 1361
Padmanabh v. Khemu	1490, 1570
Page v. Linwood	... 1085
Paget v. Ede	... 944
Pal v. Nag	... 790
Palamali v. S. I. Export Co.	... 1269
Palani v. Rangaya	1361, 1380, 1383, 1389
Palaniappa v. Lakshmana	898, 1276
——— v. Mashine	... 1051
——— v. Sheodar Rai	... 894
Palanyandi v. Veerammal	... 1487
Palk v. Clinton	952, 1120, 1228, 1345
Palmer v. Carlisle	... 1343
——— v. Hendrie	1220, 1223, 1469, 1476
Palmes v. Danby	... 1225
Palonji v. Ganu	... 1157
Pamurlapati v. Samuriapati	936, 937
Panama Co., *In re*	... 1013
Panambatta v. Kalathinpadkil	1140, 1142
Pancham v. Ali Ahmed	... 1238
——— v. Ramudit	... 1545
Pancham Lal v. Kishun Pershad	... 1578
Panchanan v. Mir Abdul	1351, 1371, 1375
Pancho v. Deoraram	... 942
Pandjirav v. Naroji	1209, 1240, 1241
Pandu v. Anpurna	... 979
——— v. Juje	1459, 1471
Pandurang v. Balaji	873, 875
——— v. Dadabhoy	917, 919, 1210
——— v. Krishnabai	... 1489
——— v. Sankhar Chand	1392, 1400
Panigahan v. Raman Nair	... 1140
Paunell v. Hurley	... 1373
Papamma v. Virapratapa	1019, 1020, 1581
Papireddi v. Narasareddi	... 887
Para v. Gobind	... 1436
Parambath v. Puthengattil	... 1560
Paranjape v. Ranade	... 1512
Parashram v. Ganpat	... 931
Parashrampant v. Rama	... 868
Paras Singh v. Dwarka Singh	... 905
Parasurama v. Kunhunni	990, 992
Parayya v. Venkata	... 932
Parbati v. Gobinda	1033, 1034, 1035, 1512
Parbhu v. Beni Singh	... 1268
——— v. Sitaram	... 1453
Parbhudas v. Bhikulal	... 1135
——— v. Dhondu	... 1138
Parbutty v. Bholanath	... 897
Pardas v. Dwarka	... 1466
Pardhan v. Narsingh	1427, 1428, 1430
Pargan v. Mahatam	1039, 1045
Paresh Nath v. Nobogopal	... 1508
Paris v. Paris	... 1080
Parker v. Calcroft	... 1134
——— v. Fullerr	... 1354
——— v. Watkins	1091, 1099
Parkinson v. Hanbury	1023, 1068, 1070, 1072, 1073, 1086, 1087, 1088, 1137, 1479
Parkit v. Chamra	1447, 1491
Parkman v. Welch	... 1188
Parmanand v. Daulat Ram	1577, 1578
——— v. Lokman Das	... 1562
——— v. Sahib Ali	858, 921, 922
——— v. Wasudevrao	... 842
Parmanandas v. Jamnabai	1070, 1477
Parmaya v. Sonde Shrinivasapa	832, 1251
Parmeshri v. Mohan Lal	1459, 1473, 1498, 1522, 1536
Parry v. Wright	... 1286
Parshotam v. Ganesh	... 1568
——— v. Rumal	922, 970, 1548, 1551
Parsi v. Girand Singh	1120, 1127, 1352
Parsotam v. Jaijat Singh	... 1096
——— v. Patesri	... 1295
Parsotam Saran v. Mulu	... 1025
Partab Bahadur v. Gajadhar	1048, 1049

	PAGE
Parvatibai v. Vishwanath	... 1454
Patch v. Ward	1463, 1464, 1466
Patel Ranchod v. Bhikabai	... 794
Patey v. Flint	... 1446
Pathammal v. Sayad Kalai	788, 790
Pati Ram v. Ghasi Ram	... 1400
Pattabhiramayya v. Ramayya	953, 1192
Pattabhiramier v. Vencatrow	785, 842, 844, 899
Patte Ranchod v. Bhikabhai	... 931
Pattinson v. Luckley	... 886
Pattle v. Hornibrook	... 1406
Paw Ma v. Valliappa	... 896
Paya v. Koramel	1228, 1229
Peacock v. Madan Gopal	... 1371
——— v. Pursell	... 913
Pearce v. Morris	922, 923, 929, 1218, 1220, 1223, 1227, 1229, 1401, 1452, 1542, 1545, 1552
——— v. Watkins	1563, 1564
Pearl v. Deacon	... 1231
Peary Mohan v. Narendra	... 1270
——— v. Sreenath	... 871
——— v. Sreeram	... 1520
Pedda v. Ganga	1418, 1419
Peer Mahomed v. Mahomed	911, 1164
Pegge v. Neath Tramways	... 1024
Pelly v. Wathen	926, 931, 1099, 1547
Penal, *Ex parte*	... 1285
Peralathil v. Manakude	858, 1152, 1154
Perayya v. Venkata	... 944
Percival v. Dunn	... 1276
Pergash v. Mahabir	... 846
Periandi v. Angappa	947, 1225, 1556, 1558
Perianna v. Marudainayagam	... 1096, 1119, 1120, 1237
——— v. Somasundara	... 889
Periasami v. Muthia	... 1531
Perikaruppan v. Palaniappa	... 1441
Periya v. Venkatachellum	1195, 1347
Perlad v. Chondi	... 996
Perladh v. Broughton	... 968
Perlad Singh v. Budhoo Sing	... 972
Perlathil v. Mankude	... 857
Perring v. Hone	... 864
Perry v. Attwood	913, 1161
—— v. Baker	1469, 1483
Pertap Chunder v. Mahendranath	791, 887
Perumal v. Alagirisami	850, 1013
——— v. Kaveri	1117, 1125, 1548
Peruvian Guano Co. v. Dreyfus Brothers	1268
Pestonjee v. Hormasjee	... 917
Petch v. Tutin	806, 898
Peter v. Russell	... 1161
Petley v. Eastern Counties Ry. Co.	... 1004
Petty v. Styward	... 909
Peyton v. Ayliffe	... 1234
Pfiel v. Vanbatenberg	... 914
Pheasant v. Benson	... 986
Pheloomonee v. Greesh Chunder	... 791
Pherozsha v. The Sun Mills	... 1447
Phillips v. Gutteridge	1284, 1287, 1292, 1297, 1298, 1483
——— v. Hall	... 1225
—— v. Philips	... 1266
Phillips' Trusts, *Re*	941, 1166
Phul Chand v. Luchmi	... 1389
——— v. Nursingh	1485, 1489, 1496, 1503
——— v. Sandilands	... 1515
Phulkuar v. Murli Dhar	801, 1245
Phulmani v. Nageshar	913, 1118, 1400
Piari v. Khiali Ram	... 827
Pichuvayyangar v. Seshayyangar	... 1447
Pickard v. Sears	1155, 1410
Pickering v. Vowles	985, 1082
Pircey, *Re*	... 877
Pigot's Case	884, 887
Pilcher v. Rawlins	... 1176
Pile v. Pile	... 1080
Pillai v. Pillai	... 1440
Pirbhu v. Amir Singh	1203, 1528
——— v. Baldeo	... 1529
Pirbhu Narain v. Rup Singh	1447, 1491
Pirjada v. Sha Kalidas	... 955
Pitamber v. Banmali	1054, 1055
——— v. Cassibai	... 1439
——— v. Madhu	... 854
——— v. Ramsarun	1029, 1039
——— v. Vanmalai	... 829
Pitt v. Cholmondely	... 1546
—— v. Pitt	... 1287
Plant v. Bourne	... 800
Platt v. Mendel,	1287, 1300, 1441, 1442, 1513
Playford v. Playford	... 1233
Pledge v. Carr	... 964
——— v. White	960, 961, 963, 964, 965
Plimmer v. Mayor of Wellington	... 1270
Plunket v. Mansfield	... 1080
Pogose v. Bank of Bengal	... 897
Pokree Saheb v. Pokree Beary	1091, 1099
Polglass v. Oliver	... 913
Poma v Gillespie	1429, 1436
Ponnambala v. Muthusami	... 1400
Ponnappa v. Pappavayyangar	1361, 1573
Ponnayya v. Muthu Gaundan	.. 884
Ponnusami v. Srinivasa	... 1203
Poole v. Tumbridge	... 915
Pooley v. Goodwin	... 1276
Pooley's Trustee v. Whetham	... 1069

PAGE

Pope v. Onslow ... 959
Poresh Nath v. Ramjadu 1465, 1466, 1467, 1474
Postlethwaite v. Blythe ... 1089
Potter v Edwards ... 941
Powell, *Ex parte* ... 890
——— v. Brodhurst 909, 1414
——— v. London and Provincial Bank 892
——— v. Roberts ... 1564
——— v. Trotter 1095, 1563
Powney v. Blomberg ... 917
Prabhadan v. Bhikulal ... 1135
Prabhakar v. Pandurang 980, 1076, 1133 1136, 1139, 1149
——————— v. Pattannah ... 1522
Prabhakat v. Davlatrao ... 1039
Prabhu Narain v. Beni Singh 1198, 1199
Prag Singh v. Persunna ... 799
Pramatan v. Madati ... 1248
Pramatha v. Khetra Mohan 1506, 1523
Pranal v. Lakshmi 881, 887, 1445
Pranjivan v. Baju ... 994
Prankishore v. Chundee Churn ... 1147
Pran Nath v. Jadu Nath 871, 874, 878, 1260
——————— v. Ramrutton ... 902
——————— v. Rockea 839, 859, 901, 902, 904, 907, 908, 1207
Pransukhram v. Bai Ladkar ... 1374
Pratap Chunder v. Mohomed Ali ... 1416
Prayag v. Chedi Rai ... 1111
——— v. Shyam Lal 1419, 1428, 1430
Prees v. Coke 1460, 1461
Premchand v. Purnima 817, 1102, 1502
Prem Nath v. Kalee Krishun ... 1046
Prem Shook v. Bheekhoo ... 916
Preonath v. Madhu Sudan 789, 791, 811
Prescott v. Tyler ... 1027
President, Taluk Board v. Chilakomarri 1261
Preston v. Melville ... 1080
——— v. Neele ... 780
Price v. Fastnedge ... 1176
—— v. Moulton ... 1281
—— v. Price ... 897
Prichard v. Wilson 1065, 1073
Pride, *In re* 1279, 1285, 1289
Pritt v. Clay ... 1382
Proctor v. Oates ... 1557
Professional Life Assurance Co., *Re* ... 1183
Prosad v. Bhobodeb ... 1503
Prosunno v. Kali Das ... 1512
Prosunno Kumar v. Gooroo Churn ... 1359
Protap Chunder v. Ishan Chunder 1391, 1394
Protector, Endowment Society v. Briece 1431
Provat Chandra v. Cherag Ali ... 1408

PAGE

Prytherch, *Re* 855, 1088
——————— v. Williams ... 1137
Pugh v. Heath 1070, 1130, 1135, 1470, 1475, 1477, 1549
Pulaka v. Thiruthipalli ... 878
Pumfrey, *In re* 1274, 1275
Punchum v. Mungle 839, 1357
Puninthavelu v. Bhashyam Ayyangar ... 830
Punjun Singh v. Mt. Ameena 793, 856, 1144
Punnett, *Ex parte* ... 1080
Puranchand v, Behari Lall ... 1436
Puranmal v. Venkata 1293, 1294
Puran Singh v. Kesar Singh ... 904
Purlhand Chunder v. Chundee Churn 989, 1043
Purmanand v. Dharsey ... 887
——————— v. Jamnabai 1073, 1135
Purna Chandra v. Nil Madhub .. 881
——————————— v. Peary Mohan 904, 905, 906
——————— ——— v. Rada Nath 1527, 1533, 1535, 1536
Pursid Narain v. Hanooman ... 1389
Puthenpurayil v. Mangalaseri 1199, 1268
Puttappa v. Timmaji 950, 1135
—— —— v. Virabhadrappa ... 915
Putti Narayanamurthi v. Marimuthu 1295
Pyari Mohun v. Gazi ... 1438
——————v. Kedar Mull ... 1382
Pym v. Campbell ... 1406
Pyne v. Bowerman ... 922

Q

Quarles v. Knight ... 1463
Quarrell v. Beckford 1034, 1078, 1093, 1151
Queen v. Meares ... 1304
Queensland Land Coal Co., *In re* ... 1260

R

Radhabai v. Ramchandra ... 1144
——————— v. Shamrao 1124, 1125, 1130, 1225, 1548
Radha Benode v. Kripamoyee 1133, 1150
Radha Charan v. Rajchandra ... 1148
——————— Churn v. Parbuttee 999, 1031, 1043, 1044
——————— Gobind v. The Bank of Bengal 1294
Radha Kishen v. Fateh Ali 871, 872
——————————— v. Hem Chandra ... 1225
Radha Krishna v Madhava 904, 905, 906
——————————— v. Municipal Board of Benares ... 1040
——————————— v. Muthu ... 1019
——————————— v. Sheo Dial ... 963
Radha Pearee v. Nobin Chandu ... 1258
——————— Pershad v. Monohur Das ... 1009, 1008, 1229, 1357, 1399, 1548

	PAGE
Radhe Lal v. Angue	790, 803
Radhey v. Bujha	... 841
Radhika v. Brojendra	... 1449
Rafikunnessa v. Iarini	... 1464
Ragho v. Anaji	1084, 1090, 1093, 1142
—— v. Balkrishna	... 957
—— v. Balwant	1174, 1175
Ragho v. Daud	... 1361
Raghoba v. Madho Rao	1118, 1125, 1391, 1398
Raghu v. Bhandu	... 1416
Raghub v. Bhoben	1207, 1214
Raghubans v. Mahabir	881, 1445
Raghubans Kuar v. Ram Sahai	... 1357
Raghubar v. Budhu Lal	905, 906, 908
—— v. Bunyad Ali	... 1238
—— v. Jwala Singh	... 1026
Raghunandan v. Ambika Singh	... 1228, 1229, 1375
Raghunath v. Ashraf Husain	... 1142, 1143, 1152
—— v. Baraik Geereedharee	... 859, 1133, 1136, 1149
—— v. Harlal	... 1192
—— v. Jamuna	1203 1515
—— v. Juravan	... 1120, 1125, 1126, 1293, 1352
—— v. Lalji	... 1104
—— v. Lachman	1133, 1137, 1150
—— v. Moti	806, 898
—— v. Poresh Nath	... 1516
—— v. Thakuri	... 1046
Rahamat v. Abdul	1473, 1535, 1536
Rahamatullah v. Rama	... 1374
—— v. Yusuf Ali	... 983
Rahima v. Nepal Rai	1471, 1478, 1556
Rahiman v. Elahi Baksh	... 790
Raham Ilahi v. Ghasita	1466, 1506
Rahimunnissa v. Badri Dass	... 1129
Raichand v. Naran	... 1408
Raiji v. Purushottam	... 1133
Rai Ramani Dasi v. Surendra Nath	1015, 1027
Raja v. Srinivas	... 1524
Raja Durga Prasad v Rajendra	... 790
Raja Kishen Dutt v. Raja Mumtaz Ali	1073, 1078, 1477, 1490, 1570
Rajani Kumar v. Gouri Kishore	... 819
Raja of Pittapur v. Sri Raja Row	... 1438
Raja of Venkatagiri v. Narayan	... 880
Raja of Vizianagaram v. Rajah Setrucherla	1192, 1193, 1195, 1196, 1197, 1198, 1199, 1200, 1267, 1268, 1274
Raja Peary Mohan v. Ram Chunder	... 1275
Rajaput Rai v. Mahomed Ali	... 1193
Raja Ram v. Chunni Lal	... 1305, 1500, 1502, 1506, 1507, 1510, 1555
—— v. Krishnasami	... 1300
—— v. Luchmun	... 1390
—— v. Vithal	... 982
Raja Saheb Perladh v. Broughton	... 859
Raja Thakur Batham v. Ananta	... 1018
Raj Coomary v. Preo Madhub	... 1352
Raj Kumar v. Ram Dutt	... 792, 794, 803, 828, 831
—— v. Sheo Narain	... 1487
Rajlukhee Debia v. Gokool Chander	... 875
Rajmal v. Shivaji	936, 937, 942
Raj Narain v. Abdur Rahim	871, 872
—— v. Shera Meah	... 1007
Rajpati v. Ram Sukhi	... 887
Rajrup Kuar v. Abdul Hossein	... 1439
Raj Singh v. Parmanand	1526, 1531
Raju v. Krishnarao	... 879
Rakestraw v. Brewer	976, 978, 985, 986, 987, 1081, 1082
Rakhal Chunder v. Dwarka Nath	... 1454
Rakhobari v. Biprodas	1084, 1095
Rakhtawar Lal v. Baru Mal	... 995
Rakken v. Alagappudyan	... 811
Ralla Ram v. Malawa Ram	... 818
Ralph v. Horton	... 1493
Ram v. Jairam	... 1583
Rama v. Anukul	... 1491
—— v. Baburao	... 1222
—— v. Manak	1186, 1193
—— v. Martand	938, 1173
—— v. Shanmugam	... 1536
Rama Chadrachar v Srinivasa	1185, 1193, 1201
Rama Krishna v. Kolta	1453, 1454
—— v. Tripurabai	... 1390
—— v. Vinayak	1381, 1383
Ramalakshmi v. Sivanantha	... 1252
Ramalinga v. Arukkani	826, 832
—— v. Ayyadorai	... 884
—— v. Samiappa	... 860
Raman v. Kandapuni	... 1249
—— v. Vasudevan	... 1248
Ramanadhan v. Alkonda	... 1548
—— v. Nur Muhamad	... 1422
—— v. Zamindar of Ramnad	... 1143
Ramanand v. Nakched	795, 1035
Raman Chetty v. Steel Brothers	1157, 1160
Ramappa v. Ummanna	930, 931
Rama Reddi v. Appaji	... 1421
Ramasawmi v. Bhavani	... 886
—— v. Chinna	... 885, 939, 940, 941, 1549
—— v. Muniandy	909, 910

PAGE

Ramasawmi v. Muthoo ... 1272
——— v. Samiappa Nayakan ... 784, 785, 845, 846, 947, 1247, 1248, 1409, 1558
——— v. Vellaya 1548, 1551
——— v. Virasami 1361, 1380, 1383, 1389, 1579, 1580
——— v. Vythinatha 1397, 1560
Ram Avatar v. Chowdhri Nursingh 1369, 1379
——— v. Tulsi Prasad 1135, 1140
Ramayya v. Guruva 854, 1016, 1038, 1039, 1245, 1247
——— v. Krishnamma 844, 883
——— v. Venkatarma ... 1011
Ram Baksh v. Durjan ... 1406
——— v. Madhusudan ... 1198
——— v. Nohar Pandey 856, 1017
——— v. Ramlall 902, 920, 952
——— v. Sookh Deo 800, 803
Ram Baran v. Gobind Singh 1450, 1503
——— v. Ramker 935, 936
——— v. Sheodevi ... 1041
Rambhat v. Lakshman ... 1390
——— v. Raghu 946, 1559
Ram Bhorosee v. Bissessur ... 1359
Rambir Singh v Drigpal ... 1498
Ram Brich v. Ambica Prasad 977, 978
Ram Chand v. Raj Hans 927, 1143, 1375
Ram Chandra v. Ahmed ... 1154
——— v. Antaji ... 1077
——— v. Balaji ... 921
——— v. Balkrishna ... 1475
——— v. Balmakund ... 1462
——— v. Davee 1417, 1420
——— v. Dhadhai ... 1363
——— v. Goswami 909, 910
——— v. Haji Kassim ... 1568
——— v. Jairam 1011, 1158, 1163, 1580
——— v. Janardan 1145, 1223
——— v. Kallu 1226, 1349, 1355
——— v. Kanyapa ... 1357
——— v. Kesho Bati ... 1210
——— v. Kondaji ... 905
——— v. Kondayya ... 1376
——— v. Kondo ... 1491
——— v. Mahadaji ... 924
——— v. Modheo 833, 835
——— v. Mukund 826, 1222
——— v. Ranjit Singh ... 1365
——— v. Sadashiv 953, 1202, 1238, 1243, 1274
——— v. Sedha ... 896
Ram Charan v. Bhikari ... 870
——— v. Durga Prasad ... 921

PAGE

Ramcharan v. Rameshwar ... 1475
——— v. Sheobarat 1474, 1536, 1537
Ram Chunder v. Haridas ... 875
——— v. Janob Ali ... 889
Ram Connoy v. Johur Lall ... 1425
Ram Coomar v. Ram Saye ... 914
Ram Das v. Byropershad ... 974
——— v. Indromoni ... 1548
——— v. Munna ... 1577
Ramdas v. Sheo Lal ... 1227
Ramdayal v. Mhd. Ghouse 1526, 1531, 1532, 1533
Ram Deo v. Indromoni ... 970
—— Dhari Lal v. Janessar 802, 827
—— Dhun v. Mohesh Chunder ... 1192
—— Dihal v. Maharaja of Vizianagaram ... 1230
Ram Din v. Bhup Singh 1542, 1543, 1561
—— v. Kalka Prasad 827, 835, 1042, 1044, 1254, 1489, 1494, 1536, 1568
Ram Doolary v. Thakoor Roy 813, 866, 887
Ram Doyal v. Ramdas ... 1157
—— v. Ram Kolpa ... 778
Ram Dutt v. Horakh Narain ... 1198
Ramendra v. Serajuddin ... 1427
Rameshwar v. Mahomed ... 1451
——— v. Meddi Hossein 1417, 1418, 1419, 1420
——— v. Mewar ... 841
——— v. Rai Sham Kishen 1415, 1428, 1431
——— v. Subkaran ... 1262
Rameshwar Pershad v. Dowlat Ram ... 1027
Rameshwar Singh v. Hossein Khan ... 1145
——— v. Kanahia Saha ... 1207
Ramford Canal Co., *In re* ... 1410
Ram Gopal v. Blaquiere 1294, 1299
Ram Gulam v. Barsati Singh 1384, 1518
——— v. Chowdhry Babu ... 1500
Ramier v. Shunmugam ... 885
Ramjaban v. Rambit Singh ... 1370
Ramjan v. Chunder Mohan 1477, 1549
Ram Jas v. Sheo Prasad ... 1460
—— Jatan v. Ramhit Singh 1354, 1376
—— Jewan v. Jagarnath 1031, 1039, 1052
Ramji v. Bai Parvati ... 873
——— v. Chhote Lal 868, 888
——— v. Chinto 785, 793, 836, 842, 946, 1084, 1087, 1090, 1093, 1479
——— v. Ramudar ... 1550
——— v. Saiyad Wazir Husain ... 867
Ramjiban v. Dhiku Singh 1408, 1430
Ramkant v. Brindabun 1014, 1020
Ramkant Roy v. Kalee Mohun ... 1145

PAGE

Ram Kanye v. Cally Churn ... 1425
Ram Kirpal v. Mt. Rup Kuari ... 1504
Ram Kishen v. Fakirchand 798, 853
Ram Kishen Singh v. Shah Kundun Lall 1145, 1146
Ram Kishore v. Surajdeo 1034, 1525
Ram Koomar v. Kali Krishna ... 1439
Ram Krishna v. Adityam ... 791
——————— v. Chothmal ... 1294
——————— v. Vinayak ... 1380
Ram Kristo v. Ameeroonissa 922, 953
——————— v. Taradas ... 1471
Ramlal v Govinda ... 1408
——— v. Haran Chandra ... 1425
——— v. Lakhpat Rai ... 1477
——— v. Maharajah ... 1532
——— v. Masum Ali ... 1395
——— v. Muhammad Irsad ... 1003
——— v. Narain 1485, 1503, 1506
——— v. Silchand 1526, 1533, 1534, 1537
——— v. Tulsa 1466, 1555
Ram Lochun v. Kamini ... 945
Rammoy v. Premchand 1356, 1384, 1396, 1441, 1543
Ram Nandan v. Lal Dhar ... 1491
Ram Narain v. Bandi Pershad 1125, 1387 1391, 1392, 1394
——————v. Bhawani ... 1389
——————v. Bisheshar 1472, 1560
——————v. Purtal ... 778
Ram Nath v. Boloram ... 1027
——— v. Brahmamoyi ... 1130
——— v. Gopal Chandra 919, 1206, 1215, 1476
——— v. Lachman 1355, 1379, 1384
——— v. Sonba ... 870
Ram Phul v. Wahed Ali ... 1145
Ram Prosad v. Bhikari 1392, 1397
——————— v. Dungar ... 1559
——————— v. Jagrup ... 935
——————— v. Khem Karan ... 1144
——————— v. Kishna ... 1145
——————— v. Man Mohun ... 1379
——————— v. Mewa Koer ... 880
——————— v. Raghu Nandan 1449, 1491
Ram Pratab v. Sher Ali ... 1137
Ram Pyarabai v. Balaji ... 1403
Ram Ranjan v. Indra Narain 1203, 1493, 1549
Ram Ratan v. Lalta Prasad ... 1301
Ram Sahai v. Bans Gopal ... 1230
Ram Saran v. Amrita Kuar 810, 937
——————— v. Khakhan ... 1111
——————— v. Mahatab ... 833
Ram Saran Dass v. Rampergash ... 1043

PAGE

Ram Sarup v. Ghaurani 1474, 1526, 1533, 1536
——————— v. Kishen Sahai ... 875
Ramsbottom v. Wallis 1013, 1119, 1120
Ramsden v. Langley ... 1099
Ramsebak v. Ramlal ... 1383
Ram Shankar v. Ganesh Prasad ... 783, 822, 1109, 1126, 1127, 1348, 1352, 1370, 1481, 1486, 1503
Ram Shet v. Pandhari 1087, 1479
Ram Sidh v. Balgobind 800, 802, 1262
Ram Singh v. Subba Row ... 1386
Ram Sonji v. Krishnaji 1206, 1212
Ram Subhag v. Narsiurh ... 1225
Ram Surman v. Sahibzada 1208, 1210
Ram Taran v. Rameswar 1369, 1379
Ramtarak Roy v. Asutosh 905, 906
——————— ——— v. Dilwar Ali ... 1512
Ramtonoo v. Gourchunder ... 887
Ram Tuhal Singh v. Bissessur Lall ... 1085, 1112, 1194
Ramu v. Subaraya 1277, 1290
Ramunni v Brahma 857, 947, 1249, 1465, 1556
Ramyad Singh v Lalla Salig Ram ... 1357
Rana v. Cartwright ... 1227
Ran Bahadur v. Parmeshar ... 1475
Ranbir Singh v. Drigpal Singh 1460, 1473, 1474
Ranchordas v. Bai Kasi ... 1441
——————— v. Ranchodars ... 832
Ranchiffe (Lord) v. Parkyns ... 1184
Randall v. Russell 935, 986
Ranee Annapurni v. Swaminatha ... 1432
Ranee Sengur v. Ranee Rugsel ... 1092
Ranee Surnomoyee v. Maharaja Suttes-chunder ... 922
Ranganayakulu v. Sattamma ... 886
Rangasawmi v. Annamalai ... 1160
——————— v. Jethi Badi 1130, 1393, 1399
——————— v. Krishna 1397, 1560
——————— v. Muthukumarappa ... 801, 827, 829, 832, 833, 835, 1257
——————— v. Subbaraya ... 1019
Rangayya v. Kameshwara ... 931
——————— v. Nanjappa ... 1474
——————— v. Parthasarathi 1094, 1519
Rango v. Balaji ... 1424
——— v. Bhomshetti ... 1462, 1466, 1554, 1555, 1556
Rani v. Ajudhia ... 1032
—— v. Amir Baksh 1233, 1241, 1543
Rani Kumari v. Raja Srinath ... 874
Rani Raghubans v Rannak Ali ... 819
Rani Ratan Kuar v. Ratan Lal ... 1583
Ranjit Khan v. Ramdhan Singh 942, 962
Ranu v. Lakman Rao 872, 873, 874

	PAGE
Ranu v. Rafiuddin	... 1043
—— v. Ramabai	... 899
Raoji v. Mahadev	... 1358
——— v. Narayan	1113, 1184
Rashid-un-nissa v. Bhup Singh	... 1094
———————— v. Mhd. Ismail Khan	... 1026
Rashik Lal v. Ram Narain	795, 818, 1014, 1026
Rasmuni v. Prankishen	838, 839
Ratan Kuar v. Jiwan Singh	... 921
Ratan Lal v. Umed Kuar	1230, 1295
Ratan Singh v. Greedharee	... 813
Ratcliffe v. Barnard	... 1161
Rathna v. Perumal	... 1224
Rathnsami v. Subbramanya	835, 1041
Ratiram v Ghasiram	... 1352
Raushan Lal v. Kali Mohan	1239, 1269
Rautan v. Kadangot	... 1249
Ravald v. Russell	... 1233
Rawe v. Chichester	978, 985
Raya Ragholia v. Aunapurnabai	... 867
Rayilu v. Narayan	... 1503
Rayne v. Baker	... 892
Rayzuddi v. Kali Nath	... 878
Razeeooddeen v. Jhabboo Singh	952, 954
Razi-un-nissa v. Sabir Husain	... 868
Rede v. Oakes	... 1062
Reech v. Sandford	... 1082
Reeve v. Lisle	... 943
Reeves v. Barlow	... 804
——— v. Butcher	... 912
Reference under the Court Fees Act,	1453, 1454
Reference under S. 46, Stamp Act	... 779, 794, 795, 814, 825, 972
Reid v. Stein	915, 916
Ren v. Sandford	... 1082
Revard v. Clink	... 1215
Revell v. Hussey	... 1082
Rewa Mahton v. Ram Kishen	.. 1384, 1394, 1517, 1518
Reynolds v. Ashby & Son	... 817
——— v. Coleman	... 915
——— v. Hall	... 886
Reza Ali v. Bhikun Khan	... 880
Rhodes v. Moules	... 925
Riccard v. Prichard	... 1276
Rice v. Nookes & Co.,	... 939
—— v. Rice	... 1162
Richards v. Cooper	... 1121
——— v. Heather	... 919
——— v. Morgan	... 1143
——— v. Overseers of Kidderminster	1088
Ridge, *Ex parte*	... 891
Rigden v. Vallier	... 909
Right v. Price	... 870
Rikhi Ram v. Sheo Pershad	... 1421
Riley v. Hall	... 963
Rivers v. Griffiths	... 1208
Robbins v. Whyte	... 1005
Roberts v. Ball	... 1076
——— v. Croft	891, 1160
——— v. Jeffreys	... 1213
——— v. Sioux City and P. R. Co.	... 884
——— v. Williams	... 1563
Robertson v Norris	1071, 1073, 1134, 1135
Robey v. Snaefell Mining Co.	915, 1013
Robinson v. Cook	... 1207
——— v. Montgomeryshire Brewery Co.	... 891
——— v. Ridley	... 1095
Rochefoucauld v. Boustead	... 1187
Rochfort v. Battersby	... 1564
Roddy v. Willams	... 1300
Rodger v. Asutosh Mukerji	... 1374
Rodhmal v. Ram Harak	... 1183
Rodick v Gandel	... 1276
Roe v. Fork	... 886
Rogers v. Challis	... 795
——— v. Maule	1027, 1235
Roghu Nath v. Harlal	1186, 1202
———— v. Lachmi	1091
———— v. Poresh Nath	... 861
Rolfe v. Chester	... 1175
Rolt v. Hopkinson	962, 1168
Romanath v. Kanai Lal	... 1264
Romunni v. Brahma	... 1558
Rooke v. Lord Kensington	... 816
Rooper v. Harrison	815, 1173, 1176
Roots v. Williamson	... 891
Rose v. Page	... 1121
Rose Ammal v. Rajarathnam	861, 900, 905 906, 908, 971
Roshan Singh v. Balwant Singh	923, 1225, 1266
Ross v. Army and Navy Hotel, Co.	... 1260
Rotleston v. Morton	... 1371
Rowe v. Chichester	... 1082
Roy Gowree v. Bholee	... 855
Royzuddi v. Kali Nath	874, 1260, 1269, 1273
Rudstone v. Anderson	... 986
Rugad Singh v. Satnarain	942, 964, 1272
Rughonath v. Ram Gopal	... 840
Rugoobar v. Bhekaree	... 1548
Rukhmini v. Brojonath	... 1511
Rukhmini Bai v. Venkatesh	971, 1210
Rumney and Smith, *Re*	... 1061
Run Bahadoor v. Lucho Koer	... 1489
Rungiah v. Nanjappa	1522, 1523, 1561

	PAGE
Runjeet v. Shureefoonissa	840
Rupabai v. Audimulam	1292, 1293, 1297
Rupan Singh v. Champa Lal	982
Rupchand v. Balwant	1223
——— v. Dawlatrav	1548
——— v. Fateh Chand	1348, 1355
——— v. Panna Lall	1206, 1420
——— v. Shamsh-ul-jehan	1457
Rup Narain v. Gopi Nath	911
Rushbrook v. Lawrence	944
Rushworth's Case	1082
Russell, *Ex parte*	1275
Rustomji v. Sheth Purushotamdas	1363
Ruter v Daniel	816
Rutnessur v. Jusoda	1440, 1538, 1563
Ryall v. Rolle	1271
Ryland v. Smith	1080

S

Sabhajit v. Sri Gopal	1516
Sab Lal Chand v. Indarjit	789, 790
Sabnarain v. Chowdhuri	1115
Sachitanand v. Bolaram	1358
Sadagopa v. Ruthna	825, 1257
Sadagopayyangar v. Dorasami	887
Sada Kavar v. Tadepally	878
Sadanand v. Rataoji	1097, 1140
Sadaruddin v. Chajju	790
Sadasheo v. Mt. Karreman	910, 1580
——— v. Krishna	1428
Sadashiv v. Trimback	814
——— v. Vithal	976, 979, 1077, 1079,
——— v. Vyankatrao,	852, 853, 855, 1016
Sadasiva v. Ramalinga	1384
Sadasook v. Baikanta	869
Sadhu Ram v. Arthur Bowles	912
Sadhu Singh v. Maharaja of Benares	1531, 1534
Sadu v. Babaji	1466
— v. Basaviah	878, 879
Saffarkhan v. Satyanunda	1440
Saffrey v. Mayer	1194
Sagoji v. Namdev	884
Sahadev v. Sakhawat Hossain	1539
——— v. Shek Papa	823, 1482, 1483
Sahai v. Sheo Das	1541
Sahib Prahlad v. Budhu Singh	805
Sahibzada v. Parmeshar	921, 968, 969, 972
Sahu Shiamsunder v. Harnarayan	1116
Saiduddin v. Hira Lal	1362
Sailaja v. Jadunath	1410
Saiyid Ali v. Debi Prasad	1077
Sajaji v. Maruti	1429
Sakharam v. Amtha Devji	982, 1093, 1100, 1142, 1388, 1389
Sakharam v. Damodar	1512
——— v. Dhiku	1524
——— v. Gopal	924, 955, 1559
——— v. Vithu	899, 901, 906, 908
Sakhawat Husain v. Gajadhar	1013
Sakhtawari v. Shibhan Lal	837
Sakkarlal v. Sundilapatti	832
Sakwar v. Mukund	1466
Salamabullah v. Partap Singh	1245
Salamat Ali v. Budh Singh	946, 1158
Saligram v. Barun Rai	899, 952
——— v. Beharee	842
——— v. Harcharan	972, 1120, 1293, 1382, 1481
——— v. Muradan	1466
——— v. Murlidhar	1027, 1582
Salimaful v. Kaylashpati	1406
Salt v. Marquess of Northampton	933, 1224
Samar Ali v. Karim-ul-lah	858
Sama Rao v. Doraswami	818
Samathal v. Mathoosri	899
Samayya v. Nagalingam	1016, 1031, 1039
Sambhu v. Babaji	928, 1045, 1051, 1104
——— v. Krishna	883
Sambhuram v. Mt. Khulsami	1575
Sambhusa v. Gopal	910, 911
Sami v. Gopal	916
Sami Achari v. Soma Sundaram	947, 1556
Samia v. Minammal	1454
Saminathan v. Swamiappa	1419
Sami Pillai v. Krishnasami	1524
Sami Rawappa v. Kuppusami	1227
Sammo v. Abdul Wahid	982, 983, 1093
Samoo v. Abdula	874, 878, 1260
Sampson v. Pattison	1023
Samuel v. Jarrah Timber &c., Corporation	935, 940, 944
——— v. Newhold	1432
Samur v. Choga Lal	1252
Sananda v. Emperor	869
Sandagar v. Jan Ali	1400
Sandemann v. Rushton	1273
Sanderson, *Re*	1550
——— v. Jackson	869
Sandon v. Hooper	858, 983, 1090, 1093
Sanfrab v. Changu	1436
Sangappa v. Basappa	879
Sangster v. Cochrane	1174
Sankana v. Virupakshapa	1107, 1125, 1362, 1548
Sankara v. Jagat Narain	1030, 1046
Sankaranarayana v. Sankaranarayana	1429, 1431, 1436
Sankarappa v. Danapa	1446

	PAGE
Sankurbai v. Kassibhai	... 793
Santaji v. Bayaji	923, 1544
Santapa v. Balapa	... 1277
Santee Ram v. Modhoo	... 841
Santley v. Lindley	... 779
Sant Singh v. Jawan Mal	838, 840
Sanwal Das v. Bismillah	1362, 1510, 1516
Sarala Dasi v. Jogendra Narayan	1418, 1419
Sarasibala v. Nandalal Sen	... 836
Saraswati v. Nabawip	... 1234
Sarat Chunder v. Gopal Chunder Laha	1159
——— ———v. Forman	... 1232
———————v. Kartik Chunder	... 1444
———————v. Nahapiet	1131, 1344
Sarat Kumari v. Jagat Chandra	... 1522
—— ——— v. Nimai Churn	... 1511
Saravanna v. Chinnammal	1043, 1049
Sarbamongla v. Sashibhoshan	... 992
Sard v. Rhodes	... 913
Sardar v. Gopal	866, 887
Sardar Singh v. Collector	... 1039
——— ——— v. Ratan Lal	... 1579
Sari v. Motiram	905 , 937
Saru Das v. Attar Bibi	... 1175
—— Surur Jigar v. Baroda Kanta	873, 876, 877
Sashachellum v. Govindappa	... 990
Sashibushan v. Chandra	869, 871
Satish Chunder v. Hem Chunder	1428, 1432, 1433
Sathuvayyan v. Muthusami,	1015, 1578, 1579, 1580
Satnarain v. Chowdhari	1121, 1419
——— v. Gangaparshad	... 853
——— v. Radhakishan	... 1502
Satyabadi v. Hirabati	1215, 1545
Satya Kripal v. Gopi Kishore	1194, 1200
Satyanath v Chedumbrum	... 790
Satyesh Chunder v. Dhunput	... 883
Saunadanappa v. Shivbasawa	1419, 1430
Saunders v. Dunman	... 998
—— —— v. Hawkins	... 1225
—— —— v. Newbold	1437, 1471
—— —— v. Rao Khooman Singh	... 1091
——— — v. Richards	... 1863
Savage v. Foster	... 1159
Savant v. Narayan	... 1466
Savitri v. Raman	... 1374
Savory, *Re*	... 869
Sawaba Khandapa v. Abaji Jotirav	1043, 1046
Sawantee v. Sewa Ram	... 880
Saxton v. Davis	... 1233
Sayeb Ali v. Mahomed	... 1052
Scarfe v. Morgan	... 1208
Schnuder v. Norris	... 869
Scholfield v. Londesborough	... 885
Schoole v. Sale	... 925
Scott v. Jones	... 1266
—— v. Uxbridge Railway Co.	918, 1207
Searle v. Colt	... 1164
Seaton v. Twyford	1030, 1043
Sebag v. Abithol	... 1159
Secretary of State v. Bombay Landing, &c., Co.	... 1105
———————— v. British Empire Assurance Co.	... 900
———————— v. Marjum Hossein	1441
Seeni Chettiar v. Santhanathan	... 931
Seeta v. Juggernath	... 879
Seeta Patta v. Suryudamma	... 1439
Seetaram v. Kishun	... 1155
——— v. Lachman	1109, 1291, 1297
——— v. Nilu	... 1475
——— v. Vasanta	... 871
Seetharama v. Venkatakrishna	1292, 1293
Seetul v. Huzaree	... 1097
Seetul Sah v. Net Singh	... 1047
Selby v. Pomfret	965, 966
Sellers v. Bickford	... 1445
Selwyn v. Garft	1064, 1065, 1066, 1070, 1071, 1072
Seo Nath v. Janki	... 1518
Seraja v. Pratap Narain	... 1430
Seshachala v. Varada	818, 870
Seshagiri v. Girewa	... 979
——— v. Pichu	1196, 1197, 1199, 1202
——— v. Salvadar	1519, 1573
Seshamma v. Chickaya	928, 1148, 1548
Seshayya v. Annamma	835, 1041
Sesha Ayyar v. Krishna	1192, 1193, 1194, 1196, 1197, 1199, 1202, 1238, 1299, 1421, 1518, 1578
Seth Chitor Mal v. Shib Lal	1198, 1267, 1268
Seth Gokul Das Gopal Das v. Murli	1146, 1440
Seth Ratan Lal v. Rani Umed Kuar	... 1275
Setrucherla v. Tirumala	... 975
——— v. Varicherla	... 973
Sevaji v. Chinna	921, 1224, 1541
Seymour v. Pickett	... 1451
Shackell v. Colnett	1279, 1285
Shadi Lal v. Thukur Das	800, 802
Shadi Ram v. Het Ram	1295, 1296
Shafiunnissa v. Fozalrah	1144, 1154
Shahebzada v. Robert Savi Hills	993, 995
Shah Gholam v. Emaman	... 1148
Shah Latafut Hossein v. Chowdhry Mahomed Moneim	859, 969
Shah Makkun v. Sree Kishen Singh	858, 922, 969, 973, 1137, 1145, 1147, 1148, 1153

	PAGE
Shaida Husain v. Hub Husain	... 1505
Shaikh Abdullah v. Haji Abdullah	... 1573
Shaikh Idrus v. Abdul Rahiman	... 855
——— v. Vithal	... 1098
Shaikh Imam Ali v. Oograh Singh	... 951
Shakeram v. Gopal	... 1544
Shama Charan v. Madhub Chandra	... 1475
Shamal v. Lakhimoni	1088, 1453
Sham Charan v. Chowdhry	... 1407
Sham Das v. Batul Bibi	992, 994, 1082, 1083
Sham Lal v. Ghasita	... 1488
Sham Narayan v. Khewajit	879, 880
——— v. Roghoobar	... 840
Shamrathi v. Kishan Prasad	1376, 1377
Shamshul Jahan v. Ahmad	... 857
Sham Sunder v. Ganesh Prasad	... 1528
——— v. Mhd. Ihtisham	... 1459, 1476, 1477, 1499, 1549
Shamu Patter v. Abdul Kadir	872, 873
Shananda v. Srinath	1371, 1372
Shangara v. Krishnan	... 1358
Shanger Rao v. Ganasha	... 1479
Shankar v. Aniaji	... 1240
——— v. Babaji	... 1424
——— v. Hardass	1433, 1435
——— v. Sadashiv	1289, 1296
Sankarapa v. Dinapa	... 1146
Shankarbai v. Kassibhai	836, 842, 899
Shankar Das v. Gobind Ram	... 1227
——— Din v. Gokal Prosad	... 943
——— Lal v. Nanaik Chand	... 1277
——— Rao v. Ramji	... 877
——— Sarup v. Mejo Mal	... 798 853, 1293, 1294, 1517, 1542
Shan Maun v. Madras Building Co.	... 1159, 1160, 1182, 1287
Shanmuga v. Ramanathan	1528, 1532
Shantappa v. Subras	... 1568
Shanto Chandar v. Nain Sukh	1186, 1197
Sharat Chunder v. Hurgobindo	... 1102
Sharp, *Re*	... 1151
Sharpe v. Birch	... 873
——— v. Earl of Scarborough	... 1233
——— v. Gibbs	... 1281
Sharples v. Adams	1176, 1487
Sharpnell v. Blake	902, 908, 1014, 1211
Shaw v. Bunny	1072, 1518
——— v. Foster	... 893
——— v. Neale	1118, 1169
Shearman v. British Empire Assurance Co.	... 998
Sheffield Union Banking Co.	... 892
Sheikh Budan v. Ram Chandar	... 1466
——— Ghazi v. Bhawani Prasad	... 873

	PAGE
Sheikh Golam v. Mt. Alla Rukhee	1547, 1558, 1559
——— Mohamed v. Jamal-ud-din	... 1472
——— Nisibullah v. Sheikh Naser	... 794
——— Parabde v. Sheikh Mahomed	... 791
Shek Abdulla v. Shek Mahammad	... 1541
Shekari Varma v. Mangalam	836, 1248
Shekhara v. Raru	... 1248
Shelmardine v. Harrop	... 1552
Sheo v. Sunkur	... 1406
Sheobarakh v. Sheobhikh	... 1541
Sheobart v. Dharee	... 1425
Sheo Buksh v. Ahmad	... 967
Sheo Charan v. Lali	... 1534
Sheo Churn v. Soorja	... 1143
Sheodeen v. Ram Saran	856, 957, 1513, 1572, 1576, 1578
Sheo Dial v. Prag Dat	... 879
Sheo Dulare v. Brij Bhukan	... 1380
Sheo Dyal v. Bishonath	... 1439
Sheogolam v. Benee Madhoo	... 799
——— v. Ram Roop	841, 1107
Sheogolam Singh v. Roy Dinkur	813, 1051
Sheo Kumar v. Jittu Singh	... 942
Sheolal v. Nande Lal	... 815
Sheomunnog v. Khadim	... 1046
Sheo Nandan v. Sambhu	... 1122
Sheonarain v. Chunni Lal	... 1225, 1266, 1462, 1554, 1561
——— v. Dhondya	... 912
——— v. Jaigobind	... 1018
——— v. Nur Muhammad	... 1184
Sheonath v. Janki Pershad	... 1020, 1510, 1512, 1513, 1570
——— v. Ramnath	... 1454
Sheo Prasad v. Behari Lal	... 1187, 1203, 1528, 1529, 1533
——— v. Lalit Kuar	... 1541
——— v. Ram Lal	... 1526
——— v. Saheb Lal	1388, 1389
——— v. Tiluk Singh	1396, 1543
Sheo Prosunno Singh v. Brojoo Sahoo	1007
Sheoraj v. Harchandi	798, 853, 1283, 1289
——— v. Kameshar	... 1384
Sheoraj Singh v. Amiruddin	... 1359
Sheoratan v. Mahipal	... 799, 801, 828, 829, 832, 853, 1255
——— v. Net Lal Singh	... 1463
Sheo Rutton v. Doorga	... 921
—— Sahai v. Sidh Gopal	... 1541
—— Saran v. Mahabir	... 1151
Shoe Shankar v. Baghee	... 1048
——— v. Jaddo	1377, 1380
——— v. Parma Mahton	942, 943, 964

	PAGE
Sheo Singh v. Sib Bahadur	936, 937
—— Tahal v. Sheodan	1203, 1356
Shephard v. Jones	... 983, 1074, 1089, 1092, 1093, 1094, 1139
Sherry's Case, *Re*	... 1165
Shiamanand v. Harlal	... 953
Shiam Lal v. Ganeshi Lal	... 1388
——— —— v. Nathe Lal	... 1523
—— ——— v. Ram Piari	... 1112
Shib Das v. Kali Kumar	... 1088, 1576, 1578, 1581
Shib Kishen v. Abdool	... 887
Shib Lal v. Bhawani	1227, 1543, 1544
——— v. Ganga Prosad	828, 833
Shib Narain v. Baikunthnath	... 1408
Shibu v. Chandra	... 1581
Shiddeshwar v. Ramchandrarav	... 1041
Shidlingapa v. Chenbasapa	883, 930
Shipway v. Broadwood	... 1090
Shirley v. Watts	... 1233
Shiva v. Monoharlal	... 1210
Shiva Chidambara v. Kamakshi	... 1133
Shiva Devi v. Jaru	846, 1137, 1142, 1152
Shiva Lingaya v. Nagalingaya	... 1542
Shiva Nath v. Manohar	... 1303
Shivlal v. Jolchand	... 1404
——— v. Jumak Lal	... 1448
Shivram v. Dhan	805, 1452
——— v. Genu	1125, 1404, 1548
——— v. Ravji	... 1386
——— v. Saya	1160, 1163
Shivrao v. Pundlik	1199, 1268, 1269
Shobrat v. Bridgman	... 1457
Shosi Bhusan v. Sahadab	... 888
Shouri Anna v. Anthoni	... 968
Shridhar v. Atmaram	... 1124
— ——— v. Krishnaji	... 1124
——— v. Narayan	... 972
Shri Ganesh v. Keshavram	1091, 1421, 1440
Shrikisan v. Gadadar	... 1400
——— v. Sonba	... 869
Shrinivasaswami v. Athmaram	... 818
Shriram v. Harbaiji	... 1263
——— v. Madan Gopal	... 917
Shrish Chandra v. Mungri	... 898
Shumbhoo Chunder v. Mohesh Chunder.	1101
Shunker Lall v. Poorun Mall	... 1086
Shunt Baksh v. Lalla Nund Ram	... 1439
Shushilabala v. Dinbandhu	1102, 1105
Shuttleworth v. Laycock	... 959
Shyam v. Baldeo	... 850
Shyama Churn v. Ananda Chandra	981, 1079, 1519
Shyam Chand v. Land Mortgage Bank	1106
Shyam Kishen v. Sundur	1304, 1500, 1501
Shyam Kumari v. Rameshwar Singh	1414
Shyam Lal v. Bashiruddin	1502, 1509
Shyam Sundar v. Bajpai	787, 788, 1021, 1583
Sibree v. Tripp	... 913
Sichel v Mosenthal	... 795
Sicklemore v. Thisteton	... 1013
Sidha v. Puran	... 1441
Sidhee Nuzur Alley v. Ojoodhyaram	... 1045, 1051, 1141
Sidhessar v. Babaji	... 858
Sidhesuri v. Dharanijit	... 1357
Sidu v. Bali	1214, 1400, 1547
Silberschildt v. Schiott	... 1070
Simmins v. Shirley	1088, 1089
Simmons v. Gutteradge	... 1363
Simpson v. Scottish, &c., Insurance Co.	1100
Singa Reddi v. Sama Rau	... 1029
Singhai Gopal v. Mehtab Bai	... 1002
Singjee v. Tiruvengadam	998, 999, 1036
Sinia Pillai v. Munisami	... 814
Sinnu v. Subramania	... 1515
Sirajuddin v. Sirajuddin	... 1191
Sirbadh Rai v. Ragunath	1121, 1126, 1173, 1175, 1293, 1352, 1568
Sitab Chand v. Hyder Malla	850, 912
Sitanath v. Bissessur	... 868
——— v. Nobin Chunder	... 1358
Sitaram v. Amir Begum	... 1385
——— v. Daji	... 884
——— v. Dharma	1459, 1468, 1506
——— v. Haruku Bai	... 1409
——— v. Madho Lal,	947, 948, 1506, 1547, 1556, 1557, 1558, 1559
——— v. Ramlal	... 793
——— v. Sridhar	909, 910
Sitaramayya v. Venkataramana	1014, 1211
Sitla Baksh v. Lalta Prasad	838, 847, 848
Situ v. Vassudev	... 901
Situal v. Luchmi	... 809
Siva v. Bishen Das	806, 893
Sivakami v. Gopala	1016, 1019, 1038, 1039
——— v. Savundram	... 1037
Siva Pershad v. Nundo Lal	1485, 1503, 1512, 1559
Sivaraman v. Kuppumuthu	1116, 1389, 1394
Sivasami v. Savugan	... 871
Sivasankaran v. Panchani	... 1358
Sivathi v. Ramasubbayar	1125, 1356, 1357, 1383, 1391, 1398, 1399
Skeffington v. Whitehurst	... 1233
Skerrett v. Atley	... 1563
Slade v. Rigg	... 1121
Smith, *Ex parte*	891, 893

	PAGE
Smith v. Chichester	931, 993, 1081
—— v. Davies	... 1454
—— v. Dinonath	1096, 1269
—— v. Dresser	... 1275
—— v. Durrant	1066, 1071, 1072
—— v. East India Co.	... 1445
—— v. Robinson	1483, 1484
—— v. Smith	908, 948, 961
Smithett v. Hesketh	1442, 1443
Smyth v. Carter	... 1143
—— v. Simpson	... 1087
Snow v. Boycott	... 1279
Sobha v. Inderjeet	... 958
Sobhagchand v. Bhaichand	784, 832
Sochet Singh v. Dial Singh	837, 841, 842
Societe Generale de Paris v. Walker	... 892
Sohan Lal v. Jet Singh	... 1110
Solano v. Moran & Co.	1449, 1491
—— v. Roop Cooar	... 1046
Soloman v. Soloman	... 1372
Somasundara v. Sakkarai	1155, 1160, 1161
Somerset, *Re*	... 1285
Somesh v. Ram Krishna	1465, 1466
Somu v. Rangammal	844, 895
Sonatan v. Ali Newal Khan	1485, 1526, 1531
——v. Dina Nath	874, 878
——v. Koonjo	1054, 1055
Sonba v. Lohanoo 1116, 1118, 1126,	1393, 1400
Sone Kolee v. Shoik Ezahar	... 1198
Sonu Singh v. Behari Singh	1576, 1578, 1580
Soobul Chunder v. Nity Churn	... 1234
Sookhmun v. Chooramun	... 839
Soonet Koer v. Mirza Kunwar	... 1235
Soorjoo Kant v. Kristo	... 839
Soorjun v. Imam	... 856
Sorabji v. Rattonji	1352, 1356, 1383, 1453
Sorosheebala v. Nundlal	... 859
Soshi Bhusan v. Gogan Chunder	... 1275
Sotish Chunder v. Nil Comul	1232, 1364
Soudagar v. Masseeta	... 1046
Sourendra Mohan v. Surnamoyi	... 1275
South v. Bloxam	1179, 1184
South African Territories, Ltd. v. Wellington	... 795
South Durham Iron Co., *Re*	... 1162
South Port, etc., Co. v. Thomson	... 1081
South Waite v. Ripon	... 1076
South Western Bank v. Turner	... 1484
Soweitzer v. Mayhew	... 1023
Spalding v. Thompson	... 960
Spece v. Healey	... 1445
Spencer v. Pearson	... 1176
Sporle v. Whayman	... 893
Springett v. Dashwood	... 1076
Spurgeon v. Collier	901, 933
Squire v. Pardoe	... 1563
Sreemunt Dutt v. Krishna Nath	793, 901
Sreenath v. Cally Doss	798, 912
Sribadh Rai v. Raghunath	... 1567
Sri Balasu Ramalakshman v. Collector of Godavari	976, 977
Sri Chand v. Naider Singh	... 1416
Sri Devi v. Virarayan	857, 1249
Sri Gopal v. Pirthi Singh	1345, 1352, 1354, 1367, 1411
Sri Kisan v. Gadadhar	... 1391
—— v. Sonlea	... 871
Srimutty v. Haripada	... 1407
Sri Narain v. Smith	... 1112
Srinath v. Godadhur Das	892, 897
—— v. Hari Poda	... 1447
Srinath Das v. Khettar Mohun	848, 850, 859
Srinivasa v. Ayyathorai	1506, 1508, 1523
—— v. Chundasami	... 1533
—— v. Gnanaprakasa	990, 997
—— v. Yamunabhai	1352, 1447, 1567
Sripati v. Mohip Narain	841, 1229
Sri Raja Papamma v. Vira Protepa	1088, 1448
Sri Raja Rau v. Sri Raja Inuganti	1447, 1490
Sri Raja Setrucherla v. Sri Vaircherla	855 858, 902, 905, 906, 971
Stainton v. Carron Co.	... 1360
Stalkartt v. Guru Das	... 1439
Stamp Duty, *In re*	... 882
Stanley v. Grundy	... 1088
—— v. Wilde	... 939
Steeds v. Steeds	... 909
Steel v. Dixon	... 1231
Steers v. Rogers	... 1087
Stephen v. Green	...
Stephenson, *Ex parte*	... 1184
Stern v. Berk	... 1428
Stevens v. Cooper	... 1188
—— v. Theatres, Ltd.	1059, 1063, 1074
Stewart v. Aston	... 896
Stewart's *Trusts*	1051, 1103
St. John v. Wareham	... 808
Stockton, *Re*	... 1080
Stokes v. Clendon	... 1376
—— v. Lewis	... 1194
—— v. Stokes	... 993
Stone v. Theed	.. 985
Stonehewer v. Thompson	... 1233
Strand Music Hall Co., *In re*	... 1260
Strange v. Hawkes	815, 1191
Stronghill v. Anstey	... 859
Strutt v. Tippett	... 1270
Stuart v. Worrall	... 1557

PAGE

Stublis v. Roth ... 985
Subbaji v. Phiddappa ... 1148
Subbammal v. Muthu Pathu 1200, 1238
Subban v. Arunachalam 1357, 1383
Subbana v. Krishna 1466, 1549, 1554
Subbansu v. Yacoob Ali ... 1099
Subbarama v. Nazammal ... 1504
Subba Rao v. Devoor Shetti 795, 818
Subbaraya v. Ponnusami 1418, 1484
Subbarayudu v. Kotayya ... 1512
—— ——— v. Venkataratnam ... 1445
Subhanrao v. Vinayak ... 1408
Subha Piai v. Ramasawmi ... 1270
Subramania v. Krishnayyan 885, 886, 1013
——— — v. Mahalingasami ... 1268
——— — v. Palaniappa ... 1110
——— ——— v. Rakka ... 1487
——— ——— v. Sadasiva ... 1495
——— ——— v. Subramania ... 1430
Subramaniam v. Dorasinga 871, 875
Subramanian v. Gangaya ... 1410
——— ——— v. Krishnan ... 857
——— ——— v. Kumarappa ... 889
Subramanyan v. Mandayan 954, 955, 1543
——— ——— v. Narayana ... 1503
Subrao v. Munjappa 927, 937
Sudabhat v. Vasudeobhat ... 793
Sudaruddin v. Chajju ... 1445
Sufdar v. Amsad ... 887
Suffell v. Bank of England ... 885
Suganchand v. Mulchand ... 916
Sukalal v Bapu ... 1424
Sukhdeo v. Lachman ... 1485
——— — v. Sheodial 1031, 1042, 1043
Sukhnandan v. Sadaram ... 1172
Sukhudial v. Anant Ram ... 937
Sumera v. Bhagwant 1021, 1190, 1299, 1515
Summers, *In the matter of* ... 891
Sundara v. Subbiah ... 1115
Sundarabai v. Jayavant 1423, 1424, 1426
Sundar Lal v. Chittar Mal ... 951, 1362, 1381, 1472, 1560
Sundarshan v. Ram Pershad ... 1550
Sundar Singh v. Bholu ... 966, 1357, 1383, 1397, 1502
———————— v. Hunam Singh ... 1432
Sunder Koer (Rani) v. Rai Shamkrishen. 1417, 1418, 1420, 1426, 1427, 1428, 1431, 1432, 1434, 1437, 1486
Sunehara v. Shadi ... 1211
Sungut Lal v. Baijnath ... 1427
Sunker v. Hirdey Narain ... 1406
Sunoo v. Latkari ... 1510
Suppanachari v. Chakara ... 1238

PAGE

Suraj Bansi v. Sheo Proshad ... 1389
Sureffoonissa v. Enayet Hossein ... 837
Surendra v. Krishnasakhi ... 1407
Surja Kumar v. Pramada 1495, 1527, 1528
Surjan v. Imambandi ... 901
Surja Narain v. Nanda Lal ... 1080
——— ——— v. Pratap Narain 1416, 1429
Surja Prasad v. Golab Chand 874, 1369
——— ——— v. Raj Mohan ... 1130
Surjan Singh v. Jagannath ... 838
Surji Prasad v. Macnaghten ... 1453
—— Ram v. Berhamdeo ... 956, 1126, 1127, 1187, 1295, 1298, 1348, 1352, 1353, 1367
Surju v. Bhawani ... 794
Surjya v. Sirdhari 1423, 1425
Surnomoyee v. Shrinath Das 850, 859
Suroop Chunder v. Mohendra ... 840
Surwan v. Shahazada ... 835
Surwar Hossain v. Gholam Mahomed ... 1254
Surya Bibi v. Monindra Nath 958, 1366
——— Narain v. Jogendra Narain ... 1417, 1422, 1428, 1435
Susty, *In re* ... 892
Sutherland v. Campbell ... 1107
Sutton v. Smith ... 1235
——— v. Sutton 1033, 1035, 1536
——— v. Toomer ... 884
Suyeedun v. Zuhoor Hossain ... 1145
Swain v. Ayres ... 1549
——— v. Wall ... 1185
Swamidin v. Kaniz ... 876
Swamirao v. Padapa ... 1230
Swan v. North British Australasian Co... 1163
—— v. Swan ... 1270
Sweeting v. Asplin ... 875
Sweny v. Smith 918, 1027
Swinfeen v. Swinfen ... 1287
Syamalaryudu v. Subbarayudu ... 1111
Syed Emam v. Rajcoomar ... 1571
—— Hadi v. Nural Hasan ... 1052
—— Hussain v. Rajagopal ... 946
—— Mahomed v. Shewak Ram ... 1112
—— Wajed Hossein v. Hafiz Ahmed 1110, 1112
Syud Sayet Ali v. Syud Mahomed ... 1043

T

Tadman v. D'Epinenil 1262, 1263
Tafaluddi v. Mahar Ali 878, 1260, 1275
Taig Ali v. Golali ... 1146
Tailby v. Official Receiver 804, 806, 807, 898, 1256
Tajjo Bibi v. Bhagwan Prosad 961, 966, 972, 1174

	PAGE
Taki v. Umabai	... 1154
Taki Nashya v. Puru Muhammad	... 876
Takiuddin v. Akramuddin	... 790
Talbot v. Braddyl	902, 938
Talik Singh v. Jalal Singh	... 1045
Tallappa v. Dattu	.. 1473
Tallis v. Tallis	... 936
Tamaoonnissa v. Woojjulmonee	... 1358
Tamman Singh v. Lachmin	910, 1501
Tancred v. Delagoa Bay Co.	823, 830, 1255
Tangutoori v. Molakapalli	... 1578
Tani v. Hari	1206, 1212
Taniram v. Gajanen	... 1500
——— v. Nundo Lall	... 1495
Tanji v. Nagamma	... 979
Tannart v. Trenchand	... 889
Tanner v. Heard	1066, 1075
Tanqueray, *In re*	... 1037
Tapfield v. Hillman	... 805
Taponidi v. Mathura Lal	... 1568
Tarachand v. Brojo Gopal	... 1464
——— v. Chiman	... 838
——— v. Imdad Husain, 1572, 1576, 1578, 1579	
——— v. Jaikisan	... 783
——— v. Kasinath	... 1522
Tarakani v. Bissonath	... 990
Tarapada v. Kamini	1459, 1465, 1473
Tara Prosad v. Bhobodeb, 1459, 1471, 1485, 1495, 1496, 1498, 1512	
——— v. Kristo Prosad	... 1110
Tara Prosunno v. Satish Chandra	... 1441
—— Sundari v. Khedan Lal	... 1111
Tarayya v. Pichayya	... 1211
Tarini Prasad v. Narayan	... 1275
Taru v. Turner, 1005, 1124, 1224, 1228, 1229, 1452, 1563	
Tasaduk Hossain v. Beni Singh	... 1146
Tasker v. Small	938, 1227
——— v. Smith	... 1219
Tassadduk Rasul v. Ahmad Husain	... 1460
Tassel v. Smith	... 963
Taster v. Marriot	978, 985, 986, 1082
Tatya Rao v. Puttappa	1380, 1381
Tavasi v. Palani	... 1193
Tawakkul Rai v. Lachman Rai	... 840
Taylor v. Blakelock	... 1273
——— v. Eckerseley	... 798
——— v. Haylin	... 1382
——— v. London & County Banking Co.,	1155, 1161
——— v. McKeand	... 1002
——— v. Moseley	... 884
——— v. Mostyn	... 1407
Taylor v. Roe	... 1440
——— v. Russell	1161, 1176
Tazun v. Shib Chunder	... 841
Teatham v. Amor	... 804
Teevan v. Smith	... 1120
Tekchand v. Sohee	... 850
Tekoo Ram v. Karim Chand	... 1376
Tenison v. Sweeney	.. 1294
Tenlon v. Curtis	853, 968
Tennant v. Trenchard 1023, 1072, 1272, 1489	
Teramath v. Lakshmi	... 1374
Teran v. Smith	... 940
Terkinton v. Kearman	... 1004
Tesadale v. Sanderson	... 1200
Thaa v. Govind	... 1406
Thabar v. Singh Ram	... 1282
Thabburam v. Girdhari	... 1031
Tha Hnyn v. Maunguma	... 1391
Thaji v. Thirumalaiappa	... 883
Thakaing v. Ma Htaik	... 1344
Thakun Chowdhry v. Manrup	... 1045
Thakurdas v. Collector of Aligarh	... 1098
——— v. Muhammad	... 838
——— v. Shadi Lal	... 1522
Thakur Ganesh v. Thakur Harihar	... 1430
—— Kalka v. Thakur Debi Singh	.. 1381
—— Rohini v. Vishwanath	1358, 1359
—— Shankar v. Daga Shankar	... 1014
—— Singh v. Gurdit Singh	... 1098
Thaleri v. Thandora	... 1578
Thames Iron Works and Ship Building Co. v. Royal Mail Steam Packet Co	... 1445
Thamman v. Ganga Ram	... 1448
Tharp, *Re*	1200, 1267
Thasi Muthu Kannu v. Shunmugavelu.	889
Thatched house, *Re*	... 1160
Thathara v. Krishnammal	1457, 1522
Thattan v. Mangalath	... 1233
Thayar v. Lakshmi	1413, 1421, 1430
Thenappa v. Marimuthu	1391, 1398, 1400
Thillai v. Ramanatha	923, 1544
Thippa v. Krishnasawmi	... 1140
Thirumalai v. Ramayyar	787, 1583
Thirumathur v. Swaminatha	... 1155
Thirumumpu v. Thirumumpu	... 1560
Thomas v. Evans	... 917
——— v. Kelly	805, 1263
——— v. Nurse	... 1264
Thomson v. Brown	... 1445
——— v. Hudson	... 1012
——— v. Palmer	... 916
Thomson and Holt, *In re*	1065, 1066
Thorn v. City Rice Mill	... 1013
Thornbrough v. Baker	... 808

PAGE

Thorne v. Cann 1126, 1278, 1279, 1289
——— v. Heath and Marsh ... 1076
——— v. Thorne ... 1348
Thorneycroft v. Crokett 1094, 1401, 1540, 1546, 1552
Thornhill v. Manning ... 1462
Thornton v. Court 897, 1469
Thorpe v. Stallwood ... 1477
Thrikaikat v. Thiruthiyal ... 1397
Thambuswamy v. Hossain Rowthen 785, 836, 842, 843, 844, 845, 846, 851, 932
Thurlow v. Mackeson ... 1067
Tidd v. Lister ... 1179
Tikaram v. Deputy Commissioner of Bara Banki ... 814
———v. Kamrain ... 1148
Tilokdhari v. Furlong ... 805
Tilott, *In re* ... 1076
Tiluck Singh v. Parsotam 1459, 1460, 1468, 1471, 1473, 1498, 1506, 1536
Timmappa v. Lakshmamma 952, 1178, 1192
Tingari Singh v. Bhagwan Singh ... 858
Tinison v. Ramsbottom ... 1166
Tinnappa v. Murugappa 1011, 1159, 1580
Tipparapur v. Andugula ... 1014
Tippayya v. Venkata ... 1153
Tipping v. Hawes ... 1556
Tirugnana v. Nallatambi 904, 906, 973
Tirumal v. Pandla 818, 820
——— v. Syed Dastaghiri 1305, 1506, 1507
Titley v. Davies ... 1221
—— v. Wolstenholme ... 1061
Tofaluddi v. Mahar Ali 874, 879
Toghan v. Udwant ... 787
Tohan Das v. Jaso Ram ... 994
Tokhan v. Girwar ... 787, 788, 1021, 1440, 1583
——— v. Roop Narain ... 1583
Tombes, *Re* ... 1138
Tombs v. Rock ... 1202
Toms v. Wilson 1013, 1014, 1065, 1215
Toolsee Ram v. Munno Lall 1177, 1179
Topham v. Duke of Portland ... 1074
Toppoyya v. Venkata ... 858
Tokpin v. Field ... 1052
Toulmin v. Steer 1126, 1277, 1279
Tourett v. Cripps ... 869
Towerson v. Jackson ... 860
Townsends v. Wilson ... 1061
Tracy v. Lawrence ... 1064
Travers v. Blundell ... 799
Travis v. Illingsworth ... 1275
Trevelyan v. Trevelyan ... 940
Tribhovan v. Jamuna ... 1550

PAGE

Tribhovan v. Krishnaram 799, 802
———v. Srinarain Singh ... 1472
Trimbak v. Balwant Rao 1459, 1491
———v. Bhagchand ... 1428
———v. Bhagwan 1065, 1071, 1077
———v. Kashi Nath 1462, 1522
———v. Sakharam 901, 918, 1207, 1361
Trimbleston v. Hamill ... 1149
Trimmer v. Bayne ... 1180
Trodrick, *Ex parte* ... 890
Troughton v. Binkes ... 1293
Troylokya Nath v. Jyoti Prokash ... 1473, 1474, 1521
Trulock v. Robey 1088, 1139
Trumper v. Trumper 986, 1082
Tucker, *In re* ... 1265
Tufail v. Bitola 1110, 1116, 1121
Tuffnell, *Ex parte* ... 822
Tufuzzool Hossein v. Mahomed Hossain 1145
Tukaram v. Anantbhat ... 820
——— v. Khandoji 831, 832
——— v. Ramchand ... 809, 811, 812, 813, 852, 906, 1248
——— v. Satvaji ... 1225
Tulsa v. Khubchand 1284, 1287, 1443
Tulsi Mahto v. Chettoree ... 876
Tulsi Ram v. Gurdial 1230, 1235
———— v. Munnoo Lall ... 1183
Turner v. Bank of Bombay ... 893
——— v. Hayden ... 1159
——— v. Richardson ... 999
——— v. Smith ... 857
——— v. Trelawney ... 1074
Turnstall v. Trappes ... 1233
Tweedale v. Tweedale 960, 965, 1041
Twopenny v. Boys ... 1281
——— v. Young 1285, 1486
Tyabji, *Re* 1113, 1240, 1270
Tyler v. Lake ... 1287
Tyrwhitt v. Tyrwhitt ... 1287
Tyson v. Kelcey ... 799

U

Uda Begam v. Imamudin ... 1164
Udaya Chandra v. Bhajahari ... 1173
Udayana v. Senthivelu ... 833
Udit Narain v. Bapar Sajjad ... 1527
Udwant Singh v. Tokhan Singh 1447, 1500
Ukku v. Kutti ... 1549
Ulfatunnissa v. Hosain 873, 879, 1409
Umamoyi v. Iarini ... 1373
Umarkhan v. Salekhan 1427, 1428, 1431
Umatara v. Umacharan 1105, 1106
Umda v. Umrao 846, 1016

PAGE

Umed v. Jas Ram ... 1578
Umed Hathising v. Gomav ... 1468
—— Mal v. Davulbin ... 1445
Umesh Chunder v. Zahur Fatima 1021, 1088, 1120, 1126, 1129, 1130, 1373, 1383, 1391, 1398, 1400
Umesh Chunder Das v. Chunchun Ojha 846, 847, 848, 1027
Umesh Chundra v. Gopal Lal 1422, 1432, 1434, 1435
———— v. Mothura Mohan 1051, 1052
———— —— v. Sageman ... 799
Umrao Begum v. Valiullah 854, 1017
Umritonath v. Roghoonath ... 1438
Umroonissa v. Muhammad Yar Khan 1242
Unicha v. Valia 923, 1542
Unichaman v. Ahmed 1046, 1052
Union Bank v. Ingram 1483, 1553
———— v. Keni ... 1160
———— v. National Bank 1118, 1168
Unni v Nagammal ... 1174
Unnian v. Rama 923, 1250, 1542
Unnoporna v. Nafar Poddar ... 1405
Unroodh v. Dunner ... 974
Upendra Lal v. Girindra Nath 1198, 1268
———— v. Jara 1095, 1096, 1097, 1269
Uppalakandi v. Kunnan ... 931
Upperton v. Harrison ... 1563
Urjoonji v. Harbaji ... 906
Usborne v. Usborne 1000, 1002
Uchandi v. Ragavachari ... 810
Uttam Ishlok v. Phulman 1255, 1530, 1538
———— —— v. Ram Narayan ... 1530

V

Vadi Lal v. Shah Khusal ... 1328
Vadju v. Vadju 834, 901, 905, 906, 908
Vaidhinathasamy v. Somasundram 1499, 1504
Valiappa v. Kotha ... 892
Vallabha v. Vedapuratti 922, 946, 1465, 1555, 1557
Vallabhan v. Pangunni .. 1511
Valpy and Chaplin, *Ex parte* ... 1162
Vance v. Lowther ... 884
Vandravan v. Manilal ... 1252
Vani v Bani 879, 931
Vanmikalinga v. Chidambara 1268, 1285, 1296, 1502, 1509
Vanneri v. Patanatil ... 856
Varadiah v. Raja Kumara ... 1533
Varden Seth v. Luckpathy 889, 896
Vasli v Durga ... 1287
Vasudev v. Bhagvan ... 1424
———— v. Balaji 1242, 1243

PAGE

Vasudev v. Bhan Lakshman ... 794
———— v. Bhuvan ... 1441
———— v. Krishna ... 1389
———— v. Narayan 970, 1294, 1400
Vasudeva v. Madhava .. 1223
———— v. Srinivasa 831, 833, 834, 849, 1009, 1010, 1254
Vasudevan v. Valia Chathu 1142, 1143, 1250
Vaughan v. Venderstegen ... 1286
———— v. Wood ... 1080
Vayalil v. Udaya 1046, 1249
Vayangara v. Pariangot ... 953
Vazirale v. Suryanarayana ... 885
Vebri Singh v. Chunni Lal ... 1380
Vedapuratti v. Avara ... 1374
———— —— v. Vallabha 1462, 1506, 1554, 1556, 1559
Veera v. Karuppa ... 1027
Veerana v. Muthukumara 1018, 1039, 1397, 1560
Veerapa v. Kannappa 997, 1141
Veeraraghava v. Lakshmana 1285, 1296
Veerasokkaraju v. Papiah ... 1264
Velayuda v. Hyder Hussain ... 1215
Velchand v. Flagg ... 1436
Vellapaddi v. Sriman 1288, 1293
Vellaya v. Moorthy ... 831
Velu v. Balkrishna ... 1010
—— v. Ghose Mahomed ... 1440
Vendall v. Hamilton ... 1295
Vengideswara v. Chatu ... 1439
Venkappa v. Baslingapa 787, 1583
Venkata v. Kannam 888, 1116, 1124, 1399, 1519, 1548
———— v. Parvati 805, 836, 843
———— v. Venkataramayya 1233, 1371
Venkatachariar v. Shrinivasa 980, 1136
Vencatachella v, Panjanadien 1117, 1120, 1126, 1481, 1568, 1573
———— ———— v. Srinivasa 954, 955
Venkatachellam v. Tirumala 974, 1152
Venkatagiri v. Sadagopachariar ... 1130
Venkatakrishna v. Thiyagaraja ... 1517, 1554, 1561
Venkata Narasimha v. Papammal ... 1504
Venkatanarasimma v. Ramiah ... 1486, 1500, 1519, 1548
Venkatarama v. Mangalathammal ... 1517
Venkatarayudu v. Papi ... 879
Venkatarazu v. Chinna 929, 1503, 1521
Venkatasami v. Subramanya 846, 852, 1016, 1480
Venkatasubbayya v. Venkayya 785, 845
Venkatasubbiah v. Govindarajulu 790, 815

	PAGE
Venkatavarada v. Venkata	1036, 1055, 1069
Venkatesh v. Narayan	832, 1258
Venkateshawara v. Kesawa	814, 852, 1051, 1143
Venkat Narayanasami v. Kanni	... 1227
Venkatarammana v. Thimmappa	... 1374
Venkatrao v. Mahabaleshwar	1031, 1039, 1043
Venkatvaraha Charya v. Kotrapa	952, 1364
Venkayya v. Surayya	1581, 1583
Venkayyar v. Venkatasubbayyar	... 950
Venkoba v. Rambhaji	... 1453
Verner v. Winstanley	... 793
——— v Bethell	933, 944
Vestry of Bermondsey v. Ramsey	... 1295
Vezey v. Rashbigh	... 1445
Vickers v. Cowell	... 1343
——— v. Oliver	1182, 1241
Vidyapurna v. Uggannu	... 1140
Vigneswara v. Bapaya	1578, 1579
Vilji v. Bharmal	... 898
Vinayak v. Dattatrya	1542, 1557, 1559
——— v. Dhundiraj	... 1277
Vint v. Padget	965, 1023
Viraragava v. Krishnaswami	927, 1051, 1103
——— v. Venkatacharya	... 1512
Viscount Downe v. Morris	... 1235
Vishnu v. Kashenath	... 944
——— v. Ram Chandra	... 1488
——— v. Tatia	994, 1082
——— v. Venkatrav	... 1389
——— v. Yeshwantrao	... 931
Vishvendra v. Vishnumurthi	... 906
Vishwaram v. Devkuran	... 1282
Visvalinga v. Palaniappa	852, 1048, 1248
Vithal v. Dand Hussain	959, 960, 1173
—— v. Dhondi	... 1093
—— v. Dinkar Rao	1243, 1274
—— v. Shriram	998, 1140
—— v. Visvasrao	952, 1239, 1240, 1241
Vithoba v. Chotalal	... 1051
——— v. Gangaram	975, 1135
——— v. Vigneshwar	... 1421
Vithu v. Bala	... 1545
——— v. Bhima	... 1541
——— v. Keshav	... 949
——— v. Nathu	... 883
Vivian & Co., *In re*	... 1273
Viyathen v. Veerarayen	853, 1249
Vrijbhukandas v. Dayaram	1092, 1093
Vulcan	... 1205
Vydiainada v. Appu	... 1252
Vythilinga v. Ravana	... 1456
Vythilingam v. Kuthiravattah	1249, 1250
Vyvyan v. Vyvyan	... 1547

W

	PAGE
Wade v. Wilson	... 1493
Wade and Thomas, *In re*	925, 1552
Wade's *Case*	917, 1206
Waghela v. Masludin	... 889
Wahid-un-nissa v. Goberdhan,	... 830, 1034, 1035, 1391, 1392, 1398, 1519, 1520, 1521, 1543
Wajahat v. Ratan Lal	... 1204
Wajid Ali v. Shaiakat	... 791
Wake v. Conyers	926, 1222
Wakefield v. Maffet	... 907
—— — v Newborn	926, 931
Wallron v. Sloper	... 1159
Walker, *Re*	... 1231
——— v. Clay	... 1002
——— v. Jones	1220, 1469
——— v. Robtron	... 1276
Wallace v. Eversbed	... 1374
——— v Kelsal	909, 1208, 1288
——— v. Universal, &c., Co.	... 1013
Wallingford v. Mutual Society	1157, 1415
Wallis, *Re*	... 1090
——— v. Smith	973, 1429
——— v. Woodyear	... 1179
Walters v. Northern Mining Co.	... 999
Walton v. Hastings	... 894
Wamanji v. Amba	... 1163
Wankford v. Wankford	... 1284
Ward v. Carttar	... 920
—— v Combe	... 1080
—— v Sharp	... 1546
Waring v. Wards	... 1041
Warington v. Early	... 884
Warner, *Ex parte*	... 892
—— ——v. Jacob	1066, 1069, 1071, 1072
Wasdale, *Re*	... 1166
Wasudev v. Narayan	1368, 1404
Waters v. Tompkins	... 1414
Watkins v. Cheek	... 1265
Watson v. Duke of Wellington	... 1276
Watts, *In re*	... 821
——— v. Symes	960, 965, 1126
Wavell v. Mitchell	... 1363
Wazir v. Dhuman Khan	... 922
Wazir Ali v. Moti Chand	... 1005
Wazir Hussain v. Nihal Chand	... 1356
Wazir Khan v. Kalee Khan	... 1457
——— ——— v. Ramphal	... 876
Wazuroonnessa v. Saeedun	... 1038
Webb v. Herne	... 1410
———v. Lester	... 919
———v. Macpherson	896, 944
———v. Rinchiden	... 1085

	PAGE
Webb v. Rorke	927, 1150
——v. Smith	1178, 1179, 1180, 1181
Webster v. Power	976, 1078
Weldon v. Neal	... 1364
West v. Blakeway	... 1445
—— v. Jones	... 1563
—— v. Reid	998, 1144
—— v. Williams	1163, 1169, 1172
Westerdall v. Dale	... 999
Western Wagon, &c., Co. v. West	795, 797
Westinthus, *In re*	... 1184
West London Commercial Bank v. Reliance, &c., Society	925, 930, 1076, 1077, 1124
Westmoreland, &c., Co. v. Fieldon	... 1281
Weston v. Foster	... 1294
Whatton v. Cradock	... 1463
Wheeler v. Montefiore	... 1032
Whinner, *Ex parte*	... 1259
White v. City of London Brewery Co.	... 1114, 1139
—— v. Hillacre	... 963
—— v. Paruther	... 1360
Whitebeard, *Ex parte*	891, 893, 895
Whiteley v. Challis	1136, 1137
——— v. Delaney	1166, 1278, 1279, 1298
Whitfield v. Roberts	... 1484
Whitworth v. Rhodes	1059, 1070
Whyman v. Garth	... 877
Wickenden v. Rayson	1354, 1567
Wigram v. Buckley	... 1164
Wilkes v. Collin	... 1287
Wilkinson v. Simson	... 1277
Willet v. Winnell	... 933
Williams, *Ex parte*	897, 963
——— v. Bosanquet	999, 1140
——— v. Day	1118, 1382
——— v. Morgan	... 908
——— v. Owen	801, 807, 810, 813, 1118, 1172, 1231
——— v. Sorrell	823, 1482
——— v. Sterne	... 1012
Williamson v. Naylor	... 1266
Willie v. Lugg	... 960
Willington v. Tate	... 1164
Wilmot v. Alton	... 1263
——— v. Barber	... 1441
Wilmott's Trusts, *In re*	... 907
Wilson v. Bannett	... 1061
——— v. Beddard	... 869
——— v. Brett	... 1159
——— v. Cluer	... 1563
——— v. Dunsany	... 1483
——— v. Heather	... 1253
Wilson v. Metcalfe	... 1412
Wilson & Co. v. Osborn	... 1435
Winslow v. Tighe	... 985
Winsor v. Price	... 870
Winter v. Carr	... 963
Wisden v. Wisden	... 1195
Wise v. Charlton	... 896
Witts Steere	... 1080
Wode's Case	... 902
Wolmershansen v. Gullick	... 1041
Wolverhampton, &c., Banking Co. v. George	... 1446
Wood v. Surr	... 1373
Woodman v. Higgins	... 925
Woods v. Hunting Ford	... 1041
Woolley v. Coleman	1484, 1553
Woopendra Nath v. Brojendra Nath	1510, 1511
Worsely v Lord Scarborough	... 1372
Wortby v. Birkhead	1173, 1175, 1176
Worthington v. Morgan	1286, 1299
Wrexham, *Re*	1231, 1285
Wrigby v. Gill	1076, 1098, 1150
Wright, *Ex parte*	... 890
——— v. Horton	... 1162
——— v. Kirby	... 1099
——— v. Morley	... 1230
——— v. Sanderson	... 877
Wrixon v. Vize	... 1070
Wrout v. Dawes	... 1164
Wuzuroonnessa v. Saeedun	957, 1086
Wyatt v. Berry	... 877
Wynne v. Styan	... 1220
Wynn Hall Coal Co., *Re*	891, 1162

Y

Yad Ram v. Umrao Singh	... 1358
Yakub Ali v. Kishan Ali	... 1242
Yashvant v. Vithal	829, 852, 1019, 1038, 1041
——— v. Gopal	888, 1357
——— v. Vithoba	938, 1174
Yellapadi v. Sriman Madhwa	... 1129
Yellappa v. Venkawa	... 946
Yates, *In re*	1067, 1072
Yates v. Ashton	780, 1034
——— v. Hambly	... 853, 968, 1034, 1137, 1355, 1384
——— v. Plumbe	925, 1552
Yeatman v. Yeatman	... 1360
Yekeyamian v. Agniswariam	... 1390
Yeknath v. Warubai	... 1232
Yeo Htean v. Abuzaffer	1012, 1428
Yorkshire Banking Co. v. Mullan	... 1004
York Union Banking Co. v. Artley	... 896
Young, *Ex parte*	... 1200

	PAGE
Young v. Roberts	1062, 1063
—— v. Young	1172, 1176, 1264

Z

	PAGE
Zahir Singh v. Beni Singh	... 1515
Zaibunnissa v. Parichbat	... 950
Zain-ul-Abdin v. Muhammad	1384, 1518
Zalim Gir v. Ram Charan	... 1528
Zaki Hasan v. Deo Nath	... 1482
Zarawar v. Gholam	... 1141
Zebonnissa v. Brojendra	... 1436
Zeinut Begum v. Bheekun	... 967
Zemin Ali v. Hossein Ali	... 841
Zingari v. Bhagwan Singh	... 1541
Zubeda v. Sheocharan	968, 980

TABLE OF ACTS, REGULATIONS AND STATUTES CITED IN THIS VOLUME.

PAGE

ACTS—IMPERIAL.

XXXII of 1839 (Interest) 1419, 1430
I of 1843 (Registration) ... 863
I of 1845 (Sales of Land for Revenue Arrears) ... 841
XXVIII of 1855 (Usury Laws Repeal) 855, 858, 933, 1153, 1425, 1435
XXXV of 1858 (Lunacy) ... 1374
XIV of 1859 (Limitation) 844, 850
XVI of 1864 (Registration) ... 864
X of 1865 (Succession) 799, 874
XX of 1866 (Registration) 864, 1299
XXVIII of 1866 (Trustees' and Mortgagees' Powers) 779, 1055—1057, 1064
I of 1868 (General Clauses) ... 1027, 1302, 1306, 1508
VII of 1870 (Court Fees) ... 1113, 1223, 1453, 1471, 1524, 1550
X of 1870 (Land Acquisition) 1103, 1489
VIII of 1871 (Registration) ... 864
IX of 1871 (Limitation) 844, 850, 941, 946
I of 1872 (Evidence) ... 788, 789, 791, 799, 819, 821, 844, 864, 875, 876, 877, 880, 893, 895, 914, 925, 970, 1011, 1135, 1155, 1225, 1244, 1251, 1264, 1362, 1406, 1407, 1408, 1414, 1445, 1541
IX of 1872 (Contract) ... 778 779, 783, 795, 799, 814, 818, 819, 840, 878, 898, 909, 910, 913, 915, 917, 918, 919, 1013, 1014, 1028, 1031, 1042, 1055, 1077, 1084, 1085, 1096, 1121, 1133, 1151, 1155, 1156, 1157, 1158, 1159, 1172, 1184, 1207, 1208, 1213, 1230, 1231, 1237, 1238, 1253, 1268, 1288, 1303, 1409, 1414, 1425, 1426, 1430, 1431, 1433, 1436, 1437, 1452
IX of 1875 ... 1232
XI of 1876 (Presidency Banks) ... 893
I of 1877 (Specific Relief) 795, 921, 984
III of 1877 (Registration) ... 783, 830, 862, 864, 869, 872, 880, 887, 894, 895, 896, 930, 943, 1119, 1256, 1445

PAGE

ACTS—IMPERIAL.

IX of 1877 (Contract) ... 953
X of 1877 (C.P.C.) 1302, 1303, 1355
XV of 1877 (Limitation) ... 832, 833, 834, 835, 844, 848, 850, 941, 946, 949, 953, 996, 1041, 1042, 1076, 1077, 1106, 1135, 1151, 1195, 1243, 1254, 1255, 1274, 1420, 1421, 1430, 1459, 1473, 1474, 1494, 1498, 1499, 1504, 1506, 1507, 1536, 1537, 1545, 1551, 1556, 1558, 1561, 1562, 1578
I of 1879 (Stamp) ... 778, 779, 794, 814, 825
V of 1881 (Probate and Administration ... 1284
XXVI of 1881 (Negotiable Instruments) ... 907
II of 1882 (Trusts) ... 916, 976, 980, 983, 987, 988, 1000, 1001, 1002, 1040, 1061, 1081, 1082, 1083, 1133, 1136, 1149, 1253, 1254, 1255, 1274
V of 1882 (Easements) 1001, 1002
XIV of 1882 (Civil Procedure) ... 820, 881, 922, 924, 946, 947, 991, 996, 1003, 1004, 1011, 1014, 1015, 1017, 1018, 1020, 1024, 1027, 1043, 1070, 1114, 1116, 1120, 1152, 1175, 1205, 1209, 1211, 1214, 1231, 1234, 1285, 1296, 1302, 1303, 1304, 1305, 1343, 1355, 1363, 1373, 1380, 1381, 1383, 1417, 1424, 1438, 1440, 1446, 1447, 1451, 1454, 1459, 1460, 1471, 1473, 1474, 1487, 1489, 1491, 1494, 1498, 1499, 1500, 1501, 1504, 1506, 1507, 1508, 1509, 1510, 1511, 1516, 1518, 1520, 1523, 1524, 1536, 1537, 1538, 1541, 1559, 1563, 1570, 1579, 1580, 1583
XV of 1882 (Small Cause Courts) ... 1070
III of 1885 (Amending T.P. Act) ... 869, 1053, 1054, 1058
I of 1887 (General Clauses) 846, 866, 1302
VII of 1889 (Succession Certificate) ... 861, 1487, 1516, 1539

PAGE

ACTS—IMPERIAL.

XIII of 1889 (Cantonments) ... 862
VIII of 1890 (Guardian and Wards) 1231, 1232, 1303
I of 1894 (Land Acquisition) ... 994
V of 1894 (Amending) ... 1507
X of 1897 (General Clauses) ... 786, 836, 846, 866, 869, 1301, 1306, 1508
II of 1899 (Stamp) ... 778, 779, 783, 820, 814, 881, 882, 883
VI of 1899 (Contract Amendment) ... 941 1427, 1431, 1433, 1436
II of 1900 (Transfer of Property Amendment) 822
VI of 1901 (Amending) ... 862
III of 1907 (Provl. Insolvency) ... 1235
V of 1908 (Civil Procedure) ... 827, 834, 881, 822, 846, 946, 947, 971, 991, 996, 1003, 1004, 1009, 1014, 1015, 1016, 1017, 1020, 1023, 1027, 1028, 1031, 1043, 1070, 1101, 1114, 1115, 1120, 1122, 1124, 1126, 1128, 1129, 1130, 1152, 1163, 1198, 1205, 1206, 1209, 1211, 1215, 1216, 1217, 1222, 1226, 1231, 1233, 1234, 1235, 1236, 1243, 1252, 1253, 1254, 1285, 1296, 1301, 1302, 1303, 1304, 1305, 1343—1584
IX of 1908 (Limitation) ... 832, 833, 834, 835, 836, 849, 850, 853, 861, 878, 911, 912, 922, 941, 949, 996, 1010, 1032, 1040, 1052, 1103, 1128, 1151, 1195, 1243, 1254, 1274, 1300, 1364, 1381, 1414, 1421, 1473, 1474, 1475, 1494, 1495, 1521, 1522, 1523
XVI of 1908 (Registration) ... 783, 799, 864, 866, 867, 868, 931, 1119, 1406, 1407, 1495

ACTS—LOCAL.

ACTS—BENGAL.

XL of 1858 ... 1231
XI of 1859 (Revenue Sale Law) 982, 1105
VII of 1880 (Public Demands Recovery) 1576
VIII of 1885 (Bengal Tenancy) ... 868, 982, 1097, 1104, 1109, 1227, 1254, 1268, 1275, 1277
I of 1895 (Public Demands Recovery) 1576

ACTS—BOMBAY.

V of 1879 (Bombay Land Revenue Code) ... 982
XVII of 1879 (Dekkhan Agricultural Relief) 783, 822, 873, 906, 1446, 1495

PAGE

ACTS—CENTRAL PROVINCES.

XX of 1875 (Central Provinces Laws) 842
XVIII of 1881 (C. P. Land Revenue).. 1254, 1275
IX of 1883 (Central Provinces Tenancy) 868, 995, 1275
XI of 1898 (C. P. Tenancy) ... 1275

ACTS—MADRAS.

II of 1864 (Madras Revenue Recovery) 1097
VIII of 1865 ... 1105
II of 1869 (Repealing Act) 855, 858, 1425

ACTS—PUNJAB.

I of 1900 (Punjab Limitation) ... 1052
XIII of 1900 (Punjab Alienation of Land) ... 1052

REGULATIONS—AJMERE.

III of 1877 (Ajmere Laws) ... 1423

REGULATIONS—BENGAL.

III of 1793 ... 839
XV of 1793 855, 858, 1145, 1153, 1425
I of 1798 837, 1205
II of 1803 ... 839
XIV of 1803 ... 1153
XXXIV of 1803 837, 855, 858, 1153
VIII of 1805 ... 1153
XVI of 1806 ... 838
XVII of 1806 785, 792, 836, 837, 839, 843, 847, 1153, 1218
XXXIV of 1808 ... 1153
VIII of 1819 ... 1105

REGULATIONS—BOMBAY.

V of 1827 1019, 1153

REGULATIONS—MADRAS.

XXXIV of 1802 855, 858, 1152, 1153, 1425
IV of 1816 ... 1153
V of 1816 ... 1153
VI of 1816 ... 1153
VII of 1816 ... 1153
II of 1825 ... 1153

ENGLISH ACTS & STATUTES.

Rules of the Supreme Court 1343, 1364, 1373, 1438, 1460, 1563
Stamp Act (1891) English ... 779

STATUTES :

12 Edw. II, St. 1, c. 2 (Statute of York) ... 864
29 Car. ii. c. 3 (Statute of Frauds) 798, 870, 890
3 & 4 Will 4, c. 42 ... 1430
14 Geo. 3, c. 78 ... 1100
33 Geo. III. c. 141 (Annuity) ... 780
1 Vic. c. 26 (Wills) ... 870
8 & 9 Vic., c. 16 ... 1167
15 & 16 Vic., c. 24 ... 870

PAGE

STATUTES :

15 & 16 Vic., c. 86 ... 1150, 1343, 1483, 1553
18 & 19 Vic., c. 15 ... 780
19 & 20 Vic., c. 97 1202, 1231
22 & 23 Vic., c. 35 779, 1067, 1074
23 & 24 Vic., c. 145 ... 1060, 1061, 1063, 1074, 1084
24 & 25 Vic., c. 104 ... 1304
25 & 26 Vic., c. 89 ... 1162
26 & 27 Vic., c. 118 ... 1167
27 & 28 Vic., c. 112 ... 1234
28 & 29 Vic., c. 90 ... 1100
30 & 31 Vic., c. 127 ... 1167
33 & 34 Vic., c. 23 ... 1232
36 & 37 Vic., c. 66 (1873) (English Judicature Act) 903, 1176, 1279, 1364, 1438
38 & 39 Vic., c. 87 (Land Transfer) 1061, 1255
42 Vic., c. 12 (1880) Hypothec. Abolition (Scotland) Act ... 826
42 & 43 Vic., c. 78 ... 780

PAGE

STATUTES :

44 & 45 Vic. c. 41 (Conveyancing) ... 780, 782, 783, 818, 821, 822, 834, 929, 959, 961, 989, 996, 999, 1000, 1005, 1009, 1028, 1054, 1061, 1063, 1064, 1066, 1067, 1069, 1074, 1084, 1100, 1133, 1139, 1144, 1254, 1301, 1480, 1483, 1540, 1553
45 & 46 Vic., c 38 ... 1061
45 & 46 Vic., c. 43 (1882) (Bills of Sale) 778, 805, 898, 1263
46 & 47 Vic., c. 52 1172, 1233
47 & 48 Vic., c. 54 ... 1173
51 & 52 Vic., c. 59 (1888) (Eng. Trustee) 1001, 1076
54 & 55 Vic., c. 33 (1891) (Bills of Sale) 778, 805, 898
56 & 57 Vic., c. 53 (Trustee) (1893) ... 1061
58 & 59 Vic., c. 29 (Mortgagees Legal Costs) ... 1100
58 & 59 Vic., c. 87 ... 1173
63 & 64 Vic.; c. 51 (Money Lenders) (1900) 1417, 1432, 1471

AUTHORITIES CITED.

PAGE

Abdy and Walker's Roman Law ... 1292
Addison on Contracts ... 1208
Ameer Ali's Mahomedan Law ... 781
Anson's Contracts (9th Edn.) 864, 872
Ashburner's Principles of Equity ... 796
Assam Gazette, dated 16-4-92 1309, 1509
Bac. Abr. Tender B ... 918
Bacon's Maxims ... 804
Baillie's Digest of Mahomedans Law ... 805
Baillie's Mahomedan Law of Sale ... 781, 784, 805
Bentham's Theory of Legislation ... 1267
Black Comm ... 1386
Bombay Gazette, dated 18-9-91 ... 1310
Butler's Coke upon Littleton ... 792
Calcutta Gazette, dated 6-8-84 ... 1306
Calcutta Gazette, dated 10-3-86 ... 1309
Calcutta Gazette, dated 18-4-92 1309, 1509
Calvert on Parties ... 1343
Chron. Maj. Ed. Luard (1874) Rolls Series ... 933
Cicero Pro Caecina ... 826
Cod. Bk. 8 tit. 19 ... 1178

PAGE

Code Napolean 779, 1051
Coke ... 800
Coke on Littleton ... 815, 859, 864, 977, 1163, 1386
Colebrooke's Digest, Vol. I ... 781, 784, 1055, 1426
Colquhuon Roman Law 902, 1292
Com. Digt. 806, 898
Coobe Mortgage (7th Edn.) ... 1353
Coote on Mortgage (5th Edn.) ... 1215, 1473, 1482
Cro. Eliz ... 1044
Daniell's Chancery Practice, Vol., I (6th Edn.) 1353, 1370
Daniell's Chancery Practice (7th Edn.) 1368
Dart's V. and P. (6th Edn.) ... 808
Davidsons Conveyancing (4th Edn.) ... 929, 986, 1084, 1005
Digest ... 826, 976, 982, 1077, 1292
Domat Civ. Law ... 1178
Elberling on Inheritance ... 805
Finch Law ... 1386

PAGE

Fisher ... 918, 941, 960, 961, 969, 984, 988, 994, 1011, 1024, 1028, 1059, 1077, 1100, 1133, 1139, 1145, 1148, 1150, 1163, 1169, 1195, 1213, 1215, 1218, 1230, 1231, 1253, 1266, 1281, 1287, 1288, 1353, 1372, 1404, 1456, 1458, 1464, 1470, 1473, 1556, 1563

Fisher on Mortgage (5th Edn.) ... 902, 939, 1185

Fisher's Mortgage (6th Edn.) ... 779, 782, 901, 904, 961, 1186

Fort St. George Gazette, dated 16 6 91 1306

Fort St. George Gazette Supplement, dated 16-6-91 ... 1311

Freeman's "Co-tenancy and Partition" 1200

Gain's Bk. 2 ... 979

Gazette of India Extra Supplement, dated 7-2-1882 792, 1038

Gour's Law of Transfer (2nd Edn.) ... 1344, 1502, 1507, 1530, 1531, 1554, 1562, 1575, 1581

Hale De Jure Maris ... 979

Holsbury's Laws of England ... 1280

Hand Castle on the Construction of Statutes (2nd Edn.) ... 1573

Hedaya 781, 805

Historia Major (1684 Edn.) ... 913

Holland's Jurisprudence (7th Edn.) 786, 1266

Hunter's Roman Law 976 1294

Justinian 826, 984

Jone's Mortgage (5th Edn.) ... 1364

Jone's Mortgage (6th Edn.) ... 1011, 1117, 1143, 1260, 1354, 1398, 1399, 1549

Kelleher on Mortgage in Civil Law ... 900

Kent's Comm. American Law ... 1545

Kerr on Fraud ... 896

Law Commissioner's Report 15-11-79 ... 782 865, 903, 1152, 1237, 1244, 1277, 1573

Lewin on Trusts (9th Edn.) ... 1480

Lewin's Trusts (10th Edn.) 1104, 1144

Macnaghten's Mahomedan Law 784, 805

Macnaghten's Mortgage (7th Edn.) ... 783

Macpherson on Mortgage (7th Edn.) ... 813, 814, 948, 968, 971, 990, 1058, 1084, 1133, 1205, 1247, 1244, 1245, 1456, 1546, 1573

Manu 784, 1423

Maine's Village Communities ... 781

Manwell on Interpretation of Statutes (3rd Edn.) 1498, 1573

Mitra's Limitation (3rd Ed.) ... 859

Montriou's cases on Hindu Law ... 1252

New York Code ... 779

PAGE

Perken's Profitable Book ... 804

Pothier on Obligations 905, 1178, 1445

Powell on Mortgages by Coventry ... 807

Robbin's Mortgage ... 729, 884, 853, 960, 984, 986, 1185, 1218, 1232, 1351, 1354, 1499

Sacred Books of the East ... 1426

Savigny Prev. Inter. (Guthrie) ... 915

Select Committee's Report, 2-2-78 ... 778, 1024, 1456

Select Committee's Report, dated 19-2-79 865, 1441

Select Committee's Report, dated 25-2-79 1141

Select Committee's Report, dated 11-3-81 865

Select Committee's Final Report, dated 21-1-82 1057, 1525

Select Committee's Report, Notes on clauses 1468, 1469, 1478

Seton on Decrees (5th Edn.) 1370, 1403, 1463, 1484, 1493

Seton on Decrees (6th Edn.) ... 798, 1444, 1451, 1452, 1473, 1482, 1540

Shepherd and Brown's Comm. T.P. Act (4th Edn.) ... 999

Shep Comm. 4th Edn. ... 988

Shephard Touchstone 815, 859

Shep Touch, by Preston ... 918

Smith's Equity 808, 1143, 1218

Statement of Objects and Reasons on Act V of 1908 ... 1561

Steele on the Law and Custom of Hindu Castes ... 805

Stokes Anglo Indian Codes ... 1015, 1140, 1205

Stok.'s Hindu Law ... 1051

Story on Agency 1062, 1163

Story on Bailments 994, 1055, 1077

Story's Equity Jurisprudence (2nd Eng. Edn.) ... 1218, 1226, 1251

Story's Equity Jurisprudence (11th Edn.) 1437

Story's Equity Pleadings 1107, 1346, 1350,

Strange's Hindu Law 781, 805, 827

Tupper's Punjab Customary Law 1244, 1251

Vyavahara Mayuka 1051, 1423

Webster's Dictionary 872, 907

Wentworth's Executors (14th Edn.) ... 1363

Williams on Executors 1265, 1284

Will's P. P (15th Edn.) 806, 898

Will, R. P. (18th Edn.) ... 1005

Wilson's Glossary 805, 809

W. & T. L. C. ... 1346

CHAPTER IV.

OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES.

58. (*a*) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

"Mortgage," "Mortgagor," "Mortgagee," "Mortgage-money" and "Mortgage-deed" defined.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(*b*) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Simple Mortgage.

Mortgage by conditional sale.

(*c*) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void,

or on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(*d*) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

Usufructuary Mortgage.

(*e*) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

English Mortgage.

1139. Analogous Law.—This chapter consisting of sections 58 to 104 deals with the mortgages and quasi-mortgages of immovable property, as sections 172 to 181 of the Indian Contract Act [1] deal with the same subject in respect of movable property. In England mortgage of movable property is governed by the Bills of Sale Acts. This section enumerates the four kinds of pure mortgage; the transactions resulting from the combinations of these are dealt with in section 98 where they are designated anomalous mortgages. The chapter treats only of mortgages of *immovable* property and charges. The Select Committee reported as to this as follows:—"We have made it clear that the mortgages here dealt with are only mortgages of immovable property and sub-mortgages. Mortgages of policies, ships, machinery, furniture, cattle and other movable property require to be separately treated." [2] The definition of "mortgage" in this section is not new. It is the codification of a recognized form of transfer and embodies what was also previously the law. [3] The same term is defined in the several Acts and Statutes. Thus in the Indian Stamp Act it is thus defined:—

2. (17) "'Mortgage-deed' includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates, to or in favour of another, a right over or in respect of specified property." [4]

1140. This definition is obviously much wider than here enacted, inasmuch as it is not only applicable to any "specified property," including even movable property here excluded, but it refers also to "the performance of an engagement" generally, and not only those giving rise to a pecuniary liability.

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(1) Act IX of 1872.

(2) Sel. Com. Rep., dated 2nd Feb. 1878, para. 17.

(3) *Balshet* v. *Dhondo*, I.L.R. 26 Bom., 33 (39); *Ram Doyal* v. *Ram Kolpa* (1864), W.R., 325; *Kureem* v. *Ummee* (1866), P.R. No. 17; *Ram Narain* v. *Purtal* (1866), P.R., No. 20; *Mohamudjin* v. *Jai Ram* (1878), P.R., No. 74.

(4) S. 13, Indian Stamp Act (I of 1879), now s. 2 (17), Indian Stamp Act (II of 1899).

Again, while in the Stamp Act a mortgage *includes* every instrument, it is here a transfer in the sense before defined (§ 176). The two definitions are thus materially different, and while the one in the Stamp Act must alone be referred to for the purpose of ascertaining the stamp, this definition alone should be the guide for ascertaining the nature of a transfer and the incidents to which it may be subject.(1) Thus an instrument evidencing an agreement to secure the repayment of a loan of a certain sum of money with interest for which a certain promissory note payable on demand was given as a collateral security is a mortgage within the meaning of the Indian Stamp Act, though it is not so within the meaning of the definition here enacted.(2) So again the term "mortgagee" as used in section 24 *proviso* of the Indian Stamp Act would include also his assignees, as it is not qualified by prefixing the word "original" so as to exclude his assignees.(3)

1141. In the Code Napolean, mortgage is defined to be "a real right over immovables charged with the acquittance of an obligation." "It is in its nature indivisible, and subsists in entirety over all the immovables affected by it, over each and over every portion of such immovables. It pursues them into whatever hands they may pass."(4) Mortgages in the Code Napolean are classified into either legal, judicial or conventional.(5) Legal mortgage is that resulting from the law. Judicial mortgage is the result of judgments or judicial acts, whilst conventional mortgage is defined to be that which depends on covenants, and on the external form of acts and contracts.(6) In this sense the Act deals only with the first and third, the former, being designated "charges" and the latter alone being mortgages in the limited sense in which the term is defined in the Act.

1142. The Act deals with the last form of consensual securities which are "mortgages" properly so called, the other two forms creating a "charge" which, though also a cognate form of the security, has been differently classified and separately treated in the Act. This distinction has, however, been obliterated in the Conveyancing Act, 1881, in which the significance of the term is thus expressed: "In this Act mortgage includes any charge on any property for securing money or money's worth."(7) A similar comprehensive definition is given in the Trustees' and Mortgagees' Powers Act,(8) and a much more elaborate definition of the term finds place in the English Stamp Act of 1891.(9) These and other similar definitions,(10) however, afford no instructive

(1) *Emp.* v. *Debendra*, I.L.R. 27 Cal., 587.
(2) *Ibid.*
(3) *Reference under the Stamp Act*, 5 Bom. L.R., 523.
(4) Art. 2114.
(5) Art. 2116.
(6) Art. 2117.
(7) S. 2 (vi).
(8) S. 1, Act XXVIII of 1866.
(9) S. 86.
(10) *E.g.*, of "Pledge" in s. 172, Indian Contract Act (IX of 1872); ss. 25, 22 and 23 Viet. c. 35, s. 2, Fisher's Mortgage (6th Ed). "A mortgage is a form of security created by contract, conferring an interest in property, defeasible (*i.e.*, annullable) upon performing the condition of paying a given sum of money with or without interest, or of performing some other condition." In Robbin's Mortgage, p. 6, the definition embraces a contractual security "effected by means of an actual or executory conveyance of real or personal property," which is again too wide in view of the definition here enacted. Lindley M.R. defined the term in *Santley* v. *Uredo* [1899] 2 Ch. 474 in the following words. "A mortgage is a conveyance of property as a security for the payment of a debt or the discharge of some other obligation, and the security is redeemable on such payment or discharge." In the New York Code it is defined to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." (S. 1608).

analogy except for the purpose of distinguishing cases decided with reference to them.

1143. One distinction worthy of note in these definitions is that while the term "mortgage" in the English law has assumed a technical import and usually implies a debt, and therefore a personal promise to pay, (1) such is by no means the invariable feature of every mortgage here defined.

The distinction between a "mortgage" and a "charge" defined in section 100 has been for the first time made by the Act, the two terms having been before used interchangeably.(2)

1144. The Act recognizes four principal forms of mortgages. In the English common law only two forms of landed security were recognized, *viz.*, (1) *vivum vadium*, and (2) *mortuum vadium* which bear some analogy to the modern "usufructuary mortgage" and "mortgage by conditional sale." These mortgages have now fallen into disuse, the only form now surviving is that here designated the "English mortgage." A mortgage by conditional sale is not regarded there as a mortgage at all, but rather as a conditional purchase in which the transferor is strictly kept to his contract which is regarded as defeasible, creating only a right of repurchase in accordance with the condition. giving no right of redemption.(3) Another form of mortgage, called the "Welsh mortgage" which in its incidence resembles the *mortuum vadium*, and its Indian analogue, the "usufructuary mortgage," still exists, though it is by no means the prevailing form in use.

Common Law mortgages.

1145. A form of security at one time extensively in use, but now seldom adopted except by tenants for life,(4) and some insurance companies, is that by "annuity deeds" in which repayment takes the form of an annuity or rentcharge arising out of the property mortgaged, with the power of repurchase at a specified price.(5) This form of mortgage was invented to evade the Usury laws, since the lender having no means of compelling the repayment of the money lent, was not subject to the heavy penalty imposed by the Statute upon usurious dealing.(6) But the very circumstance which gave birth to this contrivance gradually hastened its doom. (7) The trend of modern decisions is to presume against the relationship of debtor and creditor as arising from the mere grant of an annuity, unless an intention to the contrary is perfectly clear.(8)

1146. Another form of mortgage, popular amongst and resorted to by the mercantile community is that designated the "equitable mortgage." But this form has but a limited local application in this country.(9)

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(1) *King* v. *King*, 3 P. Wms. 358; *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86; *Yates* v. *Haston*, 4 Q. B., 182.

(2) See § 890, *post*.

(3) Robb. 19, *Bunning* v. *Bunning*, 1 L.J., Ch. 56.

(4) *Bulwer* v. *Astley*, 1 Ch., 422.

(5) *Lonquet* v. *Scawen*, 1 Ves. (S.), 404; *Floyer* v. *Sherard*, Amb., 18.

(6) *Per* Bacon, V.C., in *Preston* v. *Neele*, 12 Ch. D., 760 (767).

(7) *Lawley* v. *Hooper*, 3 Atk., 280. explained in *Preston* v. *Neele*, 12 Ch. D., 760 (767). The annuity had to be registered by the Annuity Act, 33 Geo., III, c. 141. An annuity must now be registered (18 & 19 Vict., c. 15, s. 12; 42 & 43 Vict., c. 78, s. 475). As to effect of omission to register, *Greaves* v. *Tofield*, 14 Ch. D., 563.

(8) *Preston* v. *Neele*, 12 Ch. D., 760 (770); *Knox* v. *Turner*, L.R., 9 Eq., 155 O A.L.R., 5 Ch., 515. The remedies for recovery of annuities charged on land are now codified by the Conveyancing Act (44 & 45 Vict., c. 41), s. 44.

(9) See s. 59 comm.

Mortgage in Civil Law.

1147. "The oldest form of the contract of pledge," says Saunders, was that of *mancipatio* or absolute sale of the thing subject to a contract of *fiducia* or agreement for redemption. There were so many things to which *mancipatio* was considered inapplicable that the more simple contract of *pignus* quite superseded this *mancipatio contracta fiducia*. A further simplification of the contract of pledge was the *hypotheca*, in which the thing pledged remained with the pledgor. The *mancipatio*, it may be observed, transferred both the property and possession of the thing pledged; *pignus* gave the possession to the creditor, but left the property in the thing with the debtor. The creditor had the right (i) of selling or pledging the thing pledged; (ii) of satisfying his own claim before that of any one else out of the proceeds of the sale or of the money obtained by pledging the thing; (iii) of having himself constituted owner of the thing if no purchaser could be found for it. The creditor could not be deprived even by agreement of his power of sale. Justinian enacted that unless the parties otherwise agreed, the sale should take place not sooner than two years after notice to pay, and in two years more, if no purchaser could be found, the creditor could be declared the owner; (iv) of bringing a real action (termed the *actio quasi serviana*) against any third person who unlawfully detained the thing pledged to him, or if he had only a *hypotheca* against the borrower to put him in possession of the thing pledged. If the same thing was pledged to different creditors, the one to whom it was first pledged had generally a preference, *prior tempore potior jure* But *hypothecæ*, which were created by an instrument signed by three substantial witnesses, had a preference over others by a Constitution of Leo. Gaius speaks of an older form of pledge, the *contractus fiducia*, by which the full property in the thing pledged was made over to the creditor by *mancipatio* or in *jure cessio*, the debtor being entitled to a reconveyance if he paid the debt; but this was obsolete in the time of Justinian. A thing subjected to successive *hypothecæ* belonged to the person in whose favour the first *hypotheca* was constituted. If, therefore, a creditor, whose *hypotheca* was subsequently brought the *actio quasi serviana* against a creditor whose *hypotheca* was prior, he would be repelled by an exception. Even a creditor having a *pignus*, *i.e.*, having been put in possession, was postponed to a prior creditor who had only a *hypotheca*." Similar rules have been laid down by both ancient Hindu[1] and Mohammedan [2] law givers, but since the passing of this Act these have ceased to possess any but historical interest to the practitioner and the public.

Prior Indian Law.

1148. The object of the Legislature in codifying the law relating to mortgages was stated by the late Sir Griffith Evans (then Mr. Evans) in the following words: "Mortgages," he said, "were legislated for in Bengal as early as 1798, but, as the old regulations gave a somewhat cumbrous and unsatisfactory procedure, and did not cover every class of mortgage, money-lenders had resorted to a simple mortgage-bond consisting of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree, and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution-sale of the right, title and interest of the debtor, whatever it might be, it was usual, when the same property was

(1) See Sir H. Maine's "Village Communities," p. 45; Colebrooke's Digest, Vol. I; Sir W. Strange's Hindu Law.

(2) Hedaya, Vol. IV; Baillie on the Mohammedan Law of Sale, pp. 301, 302; Ameer Ali's Mohammedan Law.

pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchaser to fight out in Court the question of what they had bought under their respective sales. There being no machinery for bringing together into one suit the various incumbrancers on the property, endless confusion had been the result, and the decision of the Courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered. It has been the object of this chapter to remedy these and other similar evils."(1) It may be added that the object was also further to settle authoritatively the many controversial points and conflicting rulings of the several High Courts (§§ 1151, 1152).

1149. Principle.—The law of mortgage has its foundation in the desire of the creditor to secure himself against the loss of his money owing to the death, failure or vagary of his debtor. Mortgages were quite common in early Rome, the earliest form of security known to them being the *Mancipatio* (§ 1147). This closely corresponded to our modern mortgage by conditional sale. For as in the one so in the other, the debtor transferred the ownership of his property as security to his creditor, the latter agreeing to restore it to the former upon fulfilment of the obligation. The principles found underlying the various forms of securities are closely associated with their historical evolution and will be unravelled in the ensuing discussion to which reference should be made for more particular information.

1150. Meaning of Words.—The definition of "mortgage" (2) adopted in this section is thus justified by the Indian Law Commissioners in their report: "The objection raised by one eminent critic that this chapter deals with 'matters which do not transfer property but only create a charge upon it,' is one which seems to us to rest on an assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. We, considering ownership as generally divisible, have regarded the term 'transfer' as properly applicable to any interest carved out of the aggregate called 'ownership.' This is consistent with the English Law. 'A security,' says Mr. Fisher in his work on Mortgages, 'is a redeemable estate or right which one person has in the property of another.' The definition here given may be compared with the definition of the term and its inflexions as given in the English Conveyancing Act, 1881, and which is as follows:—'Mortgage includes any charge on any property for securing money, or money's worth; and mortgage-money means money or money's worth secured by a mortage; and the mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purpose of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property.'" (3)

"*A mortgage is the transfer of an interest,*" *i.e.*, the act of conveyancing an interest in certain property. The instrument by which the conveyance is effected

(1) Proceedings of the Legislative Council, *Gazette of India*.
(2) *Naib Ram* v. *Shib Dat*, I.L.R., 5 All., 238.
(3) Law Commissioners' Report, 15th November 1879, s. 32.

is not a mortgage, though it is the mortgage-deed, which, however, is a mortgage under the Indian Stamp Act (§ 1139). It is perhaps not quite accurate to describe a mortgage as a *transfer* of an interest in immovable property, for if it be a transfer in favour of the mortgagee, the property would have to be on redemption, reconveyed to the mortgagor in the same way as the latter had conveyed it to the mortgagee.(1) On the other hand, it cannot be described as a temporary transfer, as was done in a case.(2) It is really the creation of an interest in property defeasible upon performance of the condition which formed its consideration. "*In specific immovable property:*" The word "specific" might mean "specifically described" or that the property mortgaged is *certain*. It however does not merely mean that the property mortgaged should be tangible.(3) The term is used in the same sense in the Dekkan Agriculturists' Relief Act.(4)

"*Immovable property*" is defined or described in section 3, (§§ 61-72), "*charges*" in section 100. "*Payment of money advanced,*" &c., may all be summed up in the words of the English Act "money or money's worth." (5)

"*Engagement*" is not defined either in this or the Contract Act, but it clearly means a contract as defined in section 2 of the Indian Contract Act. Thus, where the object of the mortgage was to secure delivery by the mortgagors of a certain quantity of indigo on a certain day, and the parties had assessed the amount of the pecuniary liability which might arise in anticipation of a breach, the mortgage was held to be valid, being for the purpose of securing the "performance of an engagement" as provided by the definition. (6) "*Which may give rise to a pecuniary liability;*" and which distinguishes engagements such as only give rise to special or moral obligations. Agreements which are legally enforceable and the non-performance of which creates a pecuniary liability, *e.g.*, to pay damages are designated "contracts" to contradistinguish them from agreements which are destitute of legal sanction. "*Pecuniary liability*" implies legal obligation to pay damages whether liquidated or not. (7)

"*The principal money and interest.*"—It seems that in defining mortgage-money the "performance of an engagement" has been overlooked. In the case of such mortgages it is obvious that what is secured is not the payment of "principal money and interest," but the performance of an engagement. No doubt the engagement "may give rise to a pecuniary liability," and the mortgagee may thus indirectly secure the payment of this liability, but this is not the primary object of the mortgage.

The meanings of other terms used in this section will be found set out in the sequel.

1151. Historical Retrospect.—The main points of divergence between the old and present law, being useful not only in determining questions

(1) S. 17 (*b*), Indian Registration Act; (Act XVI of 1908, re-enacting Act III of 1877).

(2) *Tarachand* v. *Jaikisan*. 3 C.P.L.R., 154.

(3) The contrary view taken in *Matadin* v. *Kazim Husain*, I.L R., 13 All., 432, F.B., held ascendancy in that Court for many years, but it was incompatible with the current of decisions of the other Courts, and has been since overruled; *Ram Shankar* v. *Ganesh Prasad*, I. L. R., 29 All., 385, F.B.

(4) Bom. Act XVII of 1879, s. 22; *Balshet* v. *Krishna*, I. L. R., 26 Bom. 33 (39).

(5) Conveyancing Act, 1881; (44 & 45 Vic., Ch. 41), 2 (vi).

(6) Macnaghten's Mort. (7th Ed.), 654.

(7) Cf. *Naib Ram* v. *Shib Dat*, I. L. R., 5 All., 238.

arising under mortgages executed prior to the passing of the Act, but also for the purpose of determining how far the Act has overruled the large number of cases decided under the older ordinances, they may be briefly recapitulated here. Prior to the legislative enactment of 1798, in Bengal and the United Provinces, and for a long time subsequently in the other Provinces, the law administered was according to the personal laws of the Hindus and Mahomedans. These laws recognized no distinction between mortgages of land and pledges of movable property. (1) In both, the pledge might be for a period specified or not, and either usufructuary or simple possession was considered essential to its validity, (2) but it was by no means the invariable rule. When no date was fixed by the parties for redemption, the mortgagor could redeem it at any distance of time, from the mortgagee who acquired no title as against him by prescription or possession, however long. The Hindu mortgagor after he had once mortgaged the property, could not again mortgage it to another, the penalty for such conduct being that meted out to a criminal, the mortgagor being deemed worthy of "whipping" "punishment for theft," "punishment as a robber," and even death. Under the Mahomedan law, taking of interest was forbidden, but the property pledged was always presumed to be in value equivalent to the debt due. (3) The Mahomedan law did not penalize the mortgagor for his severance of the mortgaged property, but the purchaser could be compelled to redeem the property. It appears that under both systems the three forms of mortgages commonly in vogue, were: (i) mortgage by conditional sale, (ii) simple mortgage, (iii) usufructary mortgage. Composite forms of mortgages, composed of the combinations of these simple forms, were also frequent. In England too the primitive forms of mortgages were: (i) *vivum vadium* or an absolute conveyance of land by the debtor to his creditor, to be held by him until he was repaid principal and interest out of the rents and profits, (ii) *mortuum vadium* a feoffment of land by a debtor to his creditor, to be held by him until payment, the creditor being in the meantime entitled to its usufruct, (iii) *Welsh mortgage*, a conveyance similar to the last redeemable at any time, the creditor being entitled to the usufruct in lieu of interest.

The salient features of the Hindu and Mahomedan mortgages have been thus described by Sir Charles Turner(4)—"The form of Hindu mortgage under the names of *Katkabala*, *Muddatakriyam*, and *Gahan lahan* obtains commonly throughout British India, though its incidents may vary. It is generally, though not universally, accompanied by the delivery of possession to the mortgagee with permission to enjoy the usufruct either in lieu or part payment of the interest. Although there is no precise form of words necessary to constitute such a mortgage, it ordinarily differs from the *bye-ul-wufa* of the Mohammedans in this, that, in the Hindu form there is a preliminary mortgage with a condition for future sale, while in the Mahomedan form there is at once an absolute sale, with a counter-agreement for re-sale which may be contained in the original sale-deed, or in a separate contemporaneous instrument. The origin and nature of this form of mortgage among the Mohammedans is explained in Baillie's Mohammedan Law of Sale. (5) It was introduced or adopted in order to defeat the precept of the Mahommedan law prohibiting usury. The lender by stipulating for the usufruct, or for the payment of a price on the re-sale

(1) Cole. Dig. Vol. 1, Ch. 3, Tit. "Pledge:" Manu. Ch. VII, ss. 143-145; Macnaghten's Moh. Law, p. 74.

(2) See *Lakshmandas* v. *Dasrat*, I.L.R., 6 Bom. 168 F.B.; *Sobhagchand* v. *Bhaichand*, I.L.R., 6 Bom. 490, F.B., reviewing and commenting on all the previous cases.

(3) Macnaghten's Moh. Law, 74.

(4) *Ramasan* v. *Samiappanayakan*, I.L.R. 4 Mad. 179 (183).

(5) P. 301.

higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the law."

Mortgages before and under Reg. XVII of 1806.

1152. Prior to the passing of the Bengal Regulation XVII of 1806, [1] a mortgage by conditional sale executed itself on breach of the condition, and the transaction was closed and became one of absolute sale without any further act of the parties and intervention of the Court. The Regulation of 1806 laid down certain rules and formulæ which the mortgagee had to follow before he could convert his conditional sale into an absolute one. Similar practice founded on the English Courts of Equity was introduced in the Madras Presidency in 1858, [2] and in Bombay in 1864.[3] But this practice was condemned by the Privy Council in two successive cases, in which it was held that the practice of allowing time for redemption in England was based upon the fiction that the time stipulated for repayment was not of the essence of the contract, and that such a doctrine was unknown to the ancient law of India. [4] These cases although followed in Madras [5] were not, however, followed in Bombay.[6]

The four classes of mortgage expressly defined in this section do not exhaust all possible kinds of mortgages, for section 98 provides for what are called anomalous mortgages which do not fall under any of the four principal classes.[7]

1153. Characteristics of a Mortgage.—A mortgage may be briefly defined to be a debt secured on land or other property. In commenting upon the definition given in the section, Mahmood, J., observed: "Mortgage as understood in this country, cannot be better defined than by the definition adopted by the Legislature in section 58 of the Transfer of Property Act. That definition has not in any way altered the law; but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text books on Indian mortgages."[8] According to this definition, mortgage is the *transfer* of an interest in the property, or in other words, the right transferred to the creditor is a *real right* available against the whole world. By mortgage the legal ownership is vested in the creditor, only the equitable or effective actual ownership remaining with debtor. The *interest* transferred depends upon the conditions of the mortgage. In a mortgage by conditional sale and the English mortgage, it is the actual ownership that is transferred, the transfer being subject, however, to a condition. In a simple mortgage the interest conveyed is the right to cause the property to be sold. This right comes into existence when the actual sale takes place by virtue thereof, at the time when the mortgage is made, and not because it subsists in the property ever afterwards so long as the mortgage-money remains unpaid and it limits the interests of the mortgagor as they were at the time of the mortgage. Jurisprudence recognizes this right as one of the various species of *jura in re aliena*, or estates carved out of the full ownership of the property. It may happen that

(1) Printed *in extenso* at the beginning of Vol. I.

(2) *Narraina* v. *Ponniah* (1858), Mad. S D. A., 142.

(3) *Ramji* v. *Chinto*, 1 B.H.C.R. 199.

(4) *Pattambhiramier* v. *Vencatarow*, 13 M.I. A., 560; 7 B.L.R., 136; affirmed in *Thumbusawmy* v. *Hossain Rowthen*, I.L.R., 1 Mad. 1 P. C.

(5) *Bapirazu* v. *Kamarazu*, I.L.R., 3 Mad., 26; *Ramasami* v. *Samiyapranayakan*, I.L. R., 4 Mad., 179; followed in *Venkatasubbayya* v. *Venkayya*, 1 L R., 15 Mad., 130.

(6) *Bapuji Apaji* v. *Senavaraji*, I.L.R., 2 Bom., 230.

(7) *Per* Ranade, J., in *Datto Dhundeshva* v. *Vithu*, I.L.R., 20 Bom. 408 (417).

(8) *Gopal* v. *Parsotam*, I.L.R., 5 All., 121 (137), F.B.

the right, though not apparently, is in reality tantamount to absolute transfer. For instance, when land of the value of Rs. 100 is pledged by hypothecation in lieu of a debt amounting to Rs, 101, the mortgagor is simply a nominal owner, and his *nuda proprietas* is worth less than zero.(1) " The right of sale " says Holland, " is one of the component rights of ownership, and may be parted with separately, in order thus to add security to a personal obligation. When so parted with, it is a right of pledge, which may be defined as a right *in rem* realizable by sale, given to a creditor by way of accessory security to a right in *personam*. The *objects* aimed at by a pledge are, on the one hand, to give the creditor a security on the value of which he can rely, which he can readily turn into money, and which he can follow even in the hands of third parties, on the other hand, to leave the enjoyment of the thing in the meantime to its owner, and to give him every facility for disincumbering it when the debt for which it is security shall have been paid."(2) In a usufructuary mortgage the transfer made is of the right of possession and enjoyment of the usufruct.(3) In all mortgages then there is (i) *a transfer* of an interest, (§§ 1155-1171), (ii) in *specific* immovable property, (§§ 1172-1184), (iii) as *security* for the repayment of the loan (§§ 1185-1195). These being the requirements of valid mortgage, any transfer which falls short of them, is not a mortgage in law.

Is mortgage-debt movable property ?

1154. This raises the question whether a mortgage-debt is movable or immovable property. The question is one upon which the High Courts are by no means agreed (§ 64). But having regard to the definition here enacted, it cannot be maintained that the transfer of an interest in specific immovable property " is not a benefit to arise out of land " within the meaning of the General Clauses Act(4) (§ 1150).

1155. Mortgage is a Transfer of an Interest.—The first essential requirement of a mortgage is that there should be a *transfer of an interest*, and in this respect it differs from a charge, in which, though immovable property is made a security for the payment of money, it does not imply the transfer of any interest therein. This difference is material since while the transfer of an interest creates a right *in rem* which is available against all subsequent transferees irrespective of notice, a plea of purchase without notice is a good defence against a prior claimant who has merely a charge falling short of an interest in property.(5) The distinction between a charge and a mortgage as here defined is otherwise not material, and when it is material, it is not easily perceptible.(6) The word " transfer " must be understood to have been used in its most generic sense, as comprehending all the species of contract which pass real rights in property from one person to another (7) (§ 1150). The transfer by mortgage is a conditional transfer defeasible upon the fulfilment of the condition or engagement which forms its consideration. Whether the mortgagor actually transfers an interest in his property in favour of his creditor is, of course, always the question of construction and intention. Such intention may be presumed

(1) *Per* Mahmood, J., in *Gopal* v. *Parsotam*, I.L.R., 5 All., 121 (138), F.B.

(2) Jurisprudence, 152.

(3) *Jugdev* v. *Naubat Singh*, I. L. R., 5 All., 553.

(4) S. 3 (25), Act X of 1897.

(5) *Kishan Lal* v. *Ganga Ram*, I. L. R. 13 All., 28 ; see s. 100 *post* comm.

(6) *Gobinda* v. *Dwarka*, I. L. R., 25 Cal., 837 (843) in which it is said that the distinction between a mortgage and a charge is keenly appreciated by an English lawyer, but the charge in English law is a different thing to the charge defined in s. 100, between which and mortgage the distinction is " somewhat obliterated." *Dalip Singh* v. *Bahadur Ram*, I. L. R. 34 All. 446 (447) ; *Kemchand* v. *Malloo*, 10 N.L.R. 81 ; See s, 100, comm.

(7) S. 5 ; *Gopal* v. *Parsotam*, I. L. R., 5 All., 121 (137), F. B. ; *Kishan Lal* v. *Gangaram*, I. L. R., 13 All., 28 (38).

from the use of apt expressions such as *rehan*, *kifalut*, *mustaghraq* [1] but their use is not conclusive [2] nor does their absence necessarily negative a mortgage since, in the absence of a prescribed statutory form (§ 1156), the expressions used are widely divergent from which the courts have to evolve a sense calling into requisition the rules for interpretation and without overstraining the general context [3] (§§ 336-338).

1156. The section speaks of the transfer of an interest but it does not enact that the transfer shall be express, and it will, therefore, suffice if the transfer is implied or intended by implication. But it could not be inferred from the language of a deed in which the debtor charged his share of an estate for the satisfaction of the principal and interest, and which the court held to constitute no more than a charge, because the expression *muakhiza* meant merely a charge and in the absence of an apter expression evidencing transfer of an interest it was insufficient to convey it. [3] The case was, however, held to be different where the deed provided that in consideration for an advance of a certain sum to the plaintiff, the defendant was to take possession of certain lands of the plaintiffs for 199 years. [4] It may be a question whether the transfer must be in favour of another person, but having regard to the meaning assigned to the term, there can hardly be a question, but that the transfer must be "to one or more other living persons." [5] Thus, where a judgment-debtor having applied for the stay of execution of the decree passed against him, was required to furnish security for the due performance of the decree as may ultimately be passed, and he thereupon executed a mortgage-deed of his certain property for the due performance of any decree or order that may ultimately be passed by the Appellate Court in which his case was then pending. His appeal having been afterwards dismissed, the decree-holder then applied for a sale of the property mortgaged by the security-bond for the realisation of his decree, and the question arose as to whether he could be allowed to proceed in execution, or should have to bring a suit under section 67, the Court held that as the mortgage was not given to the decree-holder or to any body in particular, it did not amount to a mortgage in the strict sense of the term and that therefore the decree-holder could enforce it in execution ; [6] which according to this view the decree-holder would not have been competent to do if the bond had been in favour of a specified person *e.g.*, the Registrar. [7] But this is a distinction without a difference. For in the former case though the security-bond was ostensibly in favour of no one in particular, it was in reality in favour of the Court. Thus, then, the cases of the Calcutta Court are by no means consistent, and the view propounded there has not been assented to by the other Courts. [8] A mere covenant on the part of a person not to alienate property without using words showing an intention to pledge specific immovable property in favour of a specific person does not constitute a mortgage. [9] So where the mortgagor borrowed money

(1) *Dalip Singh* v. *Bahadur Ram*, I. L. R. 34 All. 446 (448).

(2) *Moti Begum* v. *Har Prasad*, 11 A. L. J. 570 ; *Masuma* v. *Tahira*, *ib.* 580.

(3) *Dalip Singh* v. *Bahadur Ram*, I.L.R., 34 All. 446 (448, 449).

(4) *Mahmad* v. *Bagas*, I.L.R. 32 Bom. 569 (571).

(5) S. 5, *ante* (§§ 176—178).

(6) *Girindra* v. *Bejoy Gopal*, I. L. R., 26 Cal., 246 (249) ; *Shyam Sundar* v. *Bajpai*, I, L. R., 30 Cal., 1060 (1062).

(7) *Tokhan* v. *Girwar*, I. L. R. 32 Cal., 494.

(8) *Bans Bahadur* v. *Mughla*, I. L. R., 2 All., 604 F. B. ; *Janki* v. *Sarup*, I. L. R., 17 All., 99 ; *Venkapa* v. *Baslingapa*, I. L. R., 12 Bom. 411 ; *Thirumalai* v. *Ramayyar*, I. L. R., 13 Mad., 1. The Calcutta Court has further held that a security bond given for an appellant in the Appellate Court under s. 545 of the Code cannot be enforced without a separate suit. *Toghan* v. *Udwant*, I. L. R., 22 Cal., 25 ; *Kali Churn* v. *Balgobind*, I. L. R., 15 Cal., 497.

(9) *Kader Moideen* v. *Nepean*, I. L. R., 21 Cal., 882, P. C.

on a bond from the mortgagee stipulating to repay the loan with the mortgage, the bond would not on that account be converted into a mortgage, since the covenant only refers to the date of payment, but effects no transfer.(1) But the security-bond given by the appellants in a case before the Privy Council to the Registrar of the High Court whereby they "put a portion of our zemindari *milkiat* as per schedule given below in security for the Rs. 4,000, being the amount of costs of the respondents" was held to be a mortgage within the meaning of this section, because the mortgagor's interest in the zemindari was transferred by way of security.(2) Where the mortgagor executed a bond stipulating that the amount thereof should be paid with the mortgage, the covenant did not convert the bond into a mortgage.(3) So where the owner had executed two deeds, one a mortgage by conditional sale in 1864, and another in 1865 for a further sum borrowed which was stipulated to be payable out of the person and property both movable and immovable of the debtor, but no property was specified, though the deed closed with these words: "when we offer to pay the amount of the deed of conditional sale, we will first pay the amount with interest of the present deed of conditional sale." On a suit for foreclosure being brought on this deed the court refused to give effect to it holding that it effected no transfer of any interest in any property, nor did it add the further advance to the original mortgage money to make the conditions of the earlier deed applicable to the further advance.(4) A bond stipulating that "as collateral security for payment of the said money, I do not mortgage 23 bighas of property" described is sufficient to constitute a simple mortgage, though Maclean, C. J., somewhat unnecessarily grudged to lend his support to this view.(5) If the terms of a document satisfy the requirements of the term, it is a mortgage, by whatever name it may be called. It may be called a bargain paper, and may even recite that a stamped mortgage would be executed later on within a stated time, but nevertheless it cannot detract it from being a mortgage if it contains all that a mortgage should.(6) Indeed, generally speaking, the name given by the parties to a document is not conclusive as to its nature, but in cases where the document is ambiguous and is susceptible of more than one construction as to its nature and scope, the designation given by the parties themselves cannot then be lost sight of.(7)

Oral evidence.

1157. As to the admissibility of oral evidence for the purpose of showing the real nature of the transaction the question depends upon the interpretation of section 92 of the Indian Evidence Act.(8) Now this section enacts against the admissibility of parol evidence to prove the *terms* of a contract,(9) *as between the parties* thereto.(10) Nor can such evidence be admitted "for the purpose of contradicting, varying, adding to, or subtracting from its terms."(11) There are however six exceptions to this rule, none of which, however, are directly in point. As

(1) *Godh Shukul* v. *Sakla*, 5 A.L.J. R.253.
(2) *Tokhan* v. *Girwar*, 9 C. W. N. 372; *Girindra* v. *Bijoy Gopal*, I. L. R. 26 Cal., 246 (249); but see *Shyam Sunder* v. *Bajpai*, I.L.R. 30 Cal., 1060.
(3) *Godh Shukul* v. *Sakla*, 5 A.L.J. 253.
(4) *Baldeo* v. *Murli*, 10 A.L.J. 120 (123).
(5) *Nabin Chand* v. *Raj Coomar*, 9 C. W. N., 1001.
(6) *Motichand* v. *Sagan*, 6 Bom. L.R. 690.
(7) § 336 r. 8; *Kalabhai* v. *The Secretary of State*, I.L.R. 29 Bom. 19.
(8) Act I of 1872.
(9) S. 91. Indian Evidence Act (I of 1872). The contrary was held in *Mottyloll* v. *Anundochunder*, 5 M. I. A., 72, which has been overruled by the Legislature—*Banapa* v. *Sundardas*, I. L. R., 1 Bom., 383.
(10) Hence a person not a party to the document is not precluded from giving oral evidence—*Jagat Mohini* v. *Rakhal Das*, 2 C. L. J., 338; *Pathammal* v. *Sayad Kalai*, I. L. R., 27 Mad., 329; *Bageshri* v. *Pancho*, 3 A. L. J. R., 314.
(11) Act I of 1872. s. 92.

regards the case-law on the subject it appears to have been uniformly held that evidence *dehors* a deed is always admissible for the purpose of shewing that *a recital of a fact* in a contract or grant was erroneous, (1) and the Courts have even gone the length of holding that oral evidence of the acts and conducts of parties, whether contemporaneous or subsequent, is always admissible in order to shew that the deed, though ostensibly a conveyance, was in reality intended to operate only as a mortgage.(2) It is difficult to perceive any difference between the admission of such evidence manifestly directed to vary the terms of the deed and evidence directly given to vary them. In strict view of the law all such evidence would be wholly inadmissible unless it be reconcilable to the view that the terms constituting the difference between the agreed and written contract were the conditions precedent to the attaching of any obligation under the deed, (3) or that their suppression would compass fraud of the transferor. (4) In admitting, however, such evidence, the Indian Courts have been hitherto in a great measure guided by the practice of the English Courts which afford a wealth of precedents in favour of allowing such evidence. (5) But in the opinion of the Privy Council these cases are no authorities on the construction of the words of an Indian Statute, and by which alone the Courts must be guided. (6) But in construing the section of the Indian Evidence Act, even their Lordships allowed that while evidence of *intention* was out of the question, evidence of the acts and conduct of the parties may be admitted for the purpose of identifying a transaction (§ 1157). Such evidence then as would lead to the consideration of criteria before enumerated has been universally admitted. Any other view may perhaps be more strict and logical, but it would lamentably fail to achieve the very purpose for which writing is prescribed.

Extraneous admissible evidence.

1158. The question how far the intention of the mortgagor may be gathered from sources other than the document itself has now, so far as regards this country, been settled by the Privy Council. In England, the law of which is in this respect divergent, the authorities allow the introduction of evidence *dehors* the document in proof of intention, and this view was in a case followed in India, (7) but this case was on appeal overruled by the Judicial Committee who observed: "Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (8) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Courts of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the

(1) *Sab Lal Chand* v. *Indarjit*, I.L.R., 22 All., 370 (376); *Achu'aramaraju* v. *Subbaraju*, I. L. R., 25 Mad., 7 (14).

(2) *Preonath* v. *Madhu Sudan*, I.L.R., 25 Cal., 603, F. B.; *Khankar* v. *Ali Hafiz*, I.L.R., 28 Cal., 256; *Mahom d* v. *Nazeer Ali*, *ib.*, 289; *Maung Kyin* v. *Shwe La*, I. L. R., 38 Cal., 892 P. C.

(3) S. 92, Proviso (3), Indian Evidence Act, (I of 1872).

(4) *Ibid.*, proviso.

(5) *Barton* v. *The Bank of New South Wales*, 15 App., Cas., 379.

(6) *Balkrishen* v. *Legge*, I.L.R., 22 All., 149 P.C.

(7) *Balkishen* v. *Legge*, I. L. R. 19 All. 434 (446); citing *Alderson* v. *White*, 2 De G. & J. 105; *Lincoln* v. *Wright*, 4 De G. & J. 16; *Bhagwan* v. *Bhagwan*, I. L. R. 12 All. 287 P. C.

(8) Act I of 1872.

Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." (1) For this purpose reference may be made to cognate documents executed at or about the same time, as indicative of the intention of the parties, and evidence allowed of contemporaneous acts and conduct of the parties as distinguished from evidence of oral statements, conversations and preliminary negotiations between them.(2) But evidence of the conduct of the parties *subsequent* to the date of the transaction is clearly inadmissible, as for the purpose of showing that an absolute conveyance was intended to operate only as a mortgage, (3)or *vice versa*. (4) Similarly, no evidence could be admitted to show that the executant of a mortgage signed it not as a mortgagor, but only as a surety,(5) or that his liability appearing to be unconditional was in fact conditional (6), though he may show that he had executed it for himself and as agent of his partner. (7) But a distinction must be made between the admissibility of evidence to show that a recital of a fact in a contract is erroneous and evidence to *vary* its terms. (8) If it were not so, facilities would be afforded for the grossest frauds.(9) If the words of a deed are plain and unambiguous the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, cannot affect the construction of the instrument, and the effect to be given to it. (10) Relying upon this principle, the Court has disallowed oral evidence of even *contemporaneous* oral agreement or statement of intention. (11) And so where a deed purported to be and was on its face an absolute conveyance, oral evidence would be excluded to show that it was at the same time intended to operate merely as a mortgage. (12)

1159. But the rule is, it should be noted, confined only to the actual parties to the deed and their representatives in interest. It does not affect third parties who are debarred by no rule of law from giving oral evidence to show that a mortgage was in fact a sale, or *vice versa*. (13) And even

(1) *Balkishen* v. *Legge*, I. L. R. 22 All., 149 (158, 159) ; P. C., overruling *Balkishen* v. *Legge*, I.L.R. 19 All. 434.

(2) *Maung Kyin* v. *Ka Shwe La*, I.L.R. 38 Cal. 892 (904) ; S. C. *Raja Durga Prasad Singh* v. *Rajendra*, 18 C.W.N. 66 P.C.

(3) *Balkishen* v. *Legge*, I.L.R., 22 All. 149 P.C : followed in *Achutaramraju* v. *Subbaraju*, I.L.R. 25 Mad. 7 (13); *Dagdu* v. *Nama*, 12 Bom. L.R. 972 (976) ; *Maharaj Singh* v. *Balwant Singh*, I.L.R. 28 All. 508 (514); *Sadaruddin* v. *Chajju*, 5 A.L.J. 717 (720); *Ajodhya* v. *Jagdish*, 14 O.C. 321 ; *Iyetalli* v. *Nalamilli*, 9 I.C. 340 ; *contra Nachippa* v. *Chokalingam*, 4 L.B.R. 240 admitting oral evidence on the ground that the deed was drawn not by a lawyer but by a petition-writer cannot be supported; *Gujarmal* v. *Sitaram*, 3 Nag. L.R. 19. The contrary held in *Khankar* v. *Ali Hafez*, I.L.R. 28 Cal. 289, must now be considered as overruled.

(4) *Takiuddin* v. *Akramuddin*, 11 O C. 95 ; § 956 *Maung Kyin* v. *Maung Tha* (1905), Bur. L.R. 113 ; *Pal* v. *Nag*, 2 B.L.R., 1 ; *Satyanath* v. *Chedumbrum* (1905), Bur. L. R., 189.

(5) *Harekchand* v. *Bishun Chander*, 8 C.W.N. 101 ; *Maung Lu* v. *Malon* (1905), Bur. L R. 84.

(6) *Narasimma* v. *Ramasami*, 18 I. C. 696.

(7) *Venkatsubbiah* v. *Govindarajulu*, I.L.R. 31 Mad. 45.

(8) *Sab Lal Chand* v. *Indarjit*, I.L.R., 22 All. 370 P.C.

(9) *Ib.*, *Maung Kyin* v. *Ka Shwe La*, I. L. R. 38 Cal. 892 (905), P.C.

(10) *North-Eastern Ry.* v. *Lord Hastings* (1900), A. C. 260; followed in *Achutaramaraju* v. *Subbaramaraju*, I.L.R. 25 Mad., 7 (14); but cf., 336 rule 7, s. 92, Indian Evidence Act (Act I of 1872).

(11) *Dattoo* v. *Ramachandra*, I.L.R. 30 Bom. 119; *Gujarmal* v. *Sitaram*, 3 Nag. L R. 19.

(12) *Dattoo* v. *Ramachandra*, I. L. R. 30 Bom., 119.

(13) *Maung Kyin* v. *Ka Shwe La*, I.L.R. 38 Cal. 892 (905) P.C.; *Bageshri Dayal* v. *Pancho*, I.L.R. 28 All., 473 ; *Jagat Mohini* v. *Rakhal Das*, 2 C.L.J. 338; *Pathammal* v. *Syed Kalai Ravuthar*, I.L R 27 Mad., 329 ; *Meghram* v. *Makhan Lal*, 13 I. C. 667 669); *Gangabai* v. *Pandoo*, 4 N L.R. 115 (116) ; *Afra* v. *Basant*, (1909) P.W.R. 157; *Radhelal* v. *Angue*, 16 O. C. 213, *contra*; *Rahiman* v. *Elahi Baksh*, I.L. R. 28 Cal. 70.

as regards the actual parties the section does not exclude evidence of fraud, as where one party induces another to contract on the faith of representations made to him, any one of which is untrue, and in which case the Court regards the whole contract as tainted with fraud and which it would then dissolve.(1) So if the mortgagor alleges that he had been fraudulently induced to subscribe to a sale while he was assured that it was a mortgage, (2) oral evidence would be admitted since the general rule is that no party is precluded by any technical rule of law to unravel a fraud of which he has been made the victim. But it is of course one thing to let in evidence, and quite another thing to hold that a person who was a free agent to enter into a transaction which he entered and conformed to all its solemnities and safeguards was duped into a bargain which was far different to what he had assented to. The justification for letting in parol evidence must be found in proviso I to section 92 of the Indian Evidence Act, under which the facts which may be proved must be such as to show either the legal requisites for a valid agreement did not exist in the case at all, or that one of the parties did not give his free consent to it, or that the document does not express what was equally intended to be embodied in it. It has no application to a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with the legal result that the security wanted to bring about; but which for some reason they did not wish to put in writing. (3)

1160. The cases decided under this proviso though not unanimous may be said to have established the following propositions:—(i) that a party will be permitted to adduce evidence of contemporaneous representation, acts and conduct that a sale was intended to operate merely as a mortgage.(4) (ii) But no evidence of subsequent conduct or representation is admissible to prove it; (iii) though evidence of a subsequent *agreement* would stand on a different footing.(5) (iv) Questions relating to receipt or non-receipt of consideration or its illegality (6) may be proved by parol, though evidence could not be given that the consideration was more or less than that stated in the deed; for it will amount to varying its terms. (7) The Bombay Court have struck a discordant note against the first rule, holding as they do, that while proviso 1 to section 92 of the Indian Evidence Act permits parol evidence to *invalidate* a written contract, it does not permit it to *vary* it. (8) In any case an unregistered contemporaneous letter written by the vendee to the vendor assuring him that he should treat

(1) *Pertap Chunder* v. *Mahendranath*, I.L. R. 17 Cal. 291 (297); *Abaji* v. *Laxman*, I.L. R. 30 Bom. 426 (430); *Navalbai* v. *Sivubai*, 8 Bom. L.R., 764; *Kishna* v. *Rama*, *ib.*, 764; *Nag Paw* v. *Nga Lu*, 13 I. C. 375 (376).

(2) *Nga Paw* v. *Nga Lu*, 13 I.C. 375.

(3) *Mottayappan* v. *Palani*, 20 I.C., 924.

(4) *Navalbai* v. *Sirubai*, 8 Bom. L. R. 761, *Krishna* v. *Rama*, *ib.*, 764; *Moti Lal* v. *Anund Chunder*, 5 M. I. A. 72; *Kashi Nath* v. *Chandi Churn*, 5 W. R. 68 F.B. *Pheloomonee* v. *Greesh Chunder*, 8 W. R. 551; *Nundo Lal* v. *Prosunnomoyee*, 10 W. R. 333; *Sheikh Parabdi* v. *Sheikh Mahomed*, 1; B. L. R 37; *Bholanath* v. *Kali Pershad*, 8 B. L. R. 89; *Beharee Lal* v. *Tejnarain*, I. L. R. 10 Cal. 764; *Kadar Moideen* v. *Nepean*, I. L. R. 21 Cal. 882 P. C.; *Preonath* v. *Madhu sudan*, I. L. R. 25 Cal. 603 F. B.; *Mahomed Ali* v. *Nazarabadi*, I. L. R 28 Cal 269; *Abdu Rahman* v. *Ali Hafez*, I. L R. 20 Cal. 256; *Ismail* v. *Hafez Boo*, I.L.R. 33 Cal. 773 P C.; *Maung Kyin* v. *Ka Shwe La*, I.L R. 38 Cal. 892 (905) P. C.; *Hanifunissa* v. *Fazunnissa*, I. L. R. 33 All. 340 P. C.; *Wojid Ali* v. *Shafakat*, I.L. R. 33 All. 122 (124).

(5) *Behari* v. *Shib Sahai*, 18 I. C. 324.

(6) *Balgobind* v. *Bhaggu Lal*, I. L. R. 35 All. 558.

(7) *Adityam* v. *Rama Krishna*, 21 I.C. 458; *Ram Krishna* v. *Adityam*, 21 I. C. 463; *Gopal Singh* v. *Laloo Ram*, 10 C. L. J. 27; *Kamala Sabai* v. *Babu Nandun*, 11 C. L.T. 39; *Challa Venkata* v. *Devabhaktuni*, 14 I. C. 65.

(8) *Dagdu* v. *Nana*, I.L.R., 35 Bom., 93 (96); *cf. Benode Kishore* v. *Asutosh*, 16 C.W.N. 666.

the sale as a mortgage could not be admitted into evidence for want of registration. (1)

1161. In doubtful deeds the test is stated to be whether the relationship of debtor and creditor subsists. (2) But this is restating the same question in another form; for how is the relationship to be ascertained? Two documents are executed the same day, the first an out and out sale, but "subject to the agreement executed by vendee," and another an agreement containing an undertaking to re-convey on certain conditions—is the resultant transaction a mortgage or a sale? In one case it was held to be a mortgage.(3) But in another case (4) the judges differed; according to Stanley, C. J., it was a sale, but according to Banerji, J., it was no more than a mortgage. An attempt has been made before to deduce certain rules which may be regarded as affording some *indicia* of the true nature of the transaction (§ 954) and the rest must be left to the contexual construction of each deed in the light of other admissible evidence.

1162. In construing a deed the Court should look to the substance and not to the mere form of the deed. Thus, where a deed of sale of land for value (executed in 1783) was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. And the deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of repurchase, but after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale. It was held that upon construction of the two deeds, their effect must be taken to constitute a mortgage by conditional sale redeemable under Regulation XVII of 1806, and that having regard to the date of the mortgage, the procedure of this Act was inapplicable. (5)

Rules for construing intention.

1163. The question then being one of construction and intention to be gathered from the document itself, it has been laid down that no particular words are necessary to constitute a mortgage. (6) And so long as the nature of a transaction is substantially such as to stamp it as belonging to a particular class of mortgage, the mere calling it by a different name will not relegate it to another class. (7) So Mr. Butler in a note to his Edition of Coke upon Littleton says: "No particular words or form of conveyance are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears from the deed itself or by any other instrument, it is always considered in equity as a mortgage and redeemable; even though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons.....If the money paid by the grantee was not a fair price for the absolute purchase of the estate

(1) *Mutta Venkatachellapati* v. *Pyinda*, 23 M. L. J. 652.

(2) *Ma Huin* v. *Osman*, 15 I. C. 423; *Maungtha* v. *Maung Mya*, 8 I. C. 981 (982).

(3) *Wajid Ali* v. *Shafakat*, I.L.R., 33 All., 22 (124).

(4) *Jhander Singh* v. *Sheikh*, 7 A.L.J. 484 492, 495).

(5) *Balkishen* v. *Legge*, I.L.R, 22 All., 149 P.C.; distinguishing *Bhagwan* v. *Bhagwan*, I.L.R., 12 All., 387 P.C.

(6) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.R., 393 (411); *Rajkumar Ram Gopal* v. *Ram Dutt*, 5 B.L.R., 264, F.B.

(7) *Kalabhai* v. *The Secretary of State*, I.L.R., 29 Bom., 19; Macpherson on Mortgage, 127.

conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest, or, if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely *pignoritious*. It seems, however, to be settled: *first* that a *bona fide* purchaser of an estate or interest will not be considered a mortgagee on account of a right to repurchase being given to the vendor, though at an advance price,(1) and, *secondly* that, when the mortgagee, or trustee for him, is authorized to sell, if the money be not paid at a particular time, he may make good a title to a purchaser, though the mortgagor do not join in the conveyance." (2)

1164. For the same reason the mere fact that the deed is *described as a mortgage* will not constitute it one unless the contents warrant that description.(3) Thus where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any), as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest due to him), it was held that the deed was a sale liable to be converted into a mortgage and not a mortgage liable to be converted into a sale. (4) So *zur-i-peshgi leases* when they contain a proviso for redemption are treated in all respects as usufructuary mortgages. (5) But in such cases the provision for redemption must be clearly expressed. (6)

Mere covenant not to alienate.

1165. A mere *covenant not to alienate* does not constitute a mortgage or a charge. For instance, an agreement which declared,—"I promise to repay the whole principal, with interest, in the month of Phalgun, 1271, F. S., and till payment of the amount I will not transfer any property by conditional sale or mortgage" (7) was held not to amount to a mortgage, inasmuch as there was no transfer of a specific interest of the debtor's property. So a bond containing a stipulation that "if the principal and interest is not paid up at the stipulated period then the obligee will be at liberty to recover the whole of his money together with the interest fixed by instituting a suit from my movable and immovable property." (8) Here the bond was open also to the objection that the property was not sufficiently specified. So where the debtor stipulated that on his failing to repay the debt the creditor would be entitled to recover it by sale of the "Nyagaon factory and from his person and other properties" there was no mortgage since the covenant did not create a specific lien on the Nyagaon factory, the general effect of the covenant being that on his failure

(1) *Verner* v. *Winstanley*, 2 Sch. & L. 393.

(2) It is, however, not generally so under the Act. *Vide* s. 69, *post*.

(3) *Abdul Bhai* v. *Kashi*, I.L.R., 11 Bom., 462.

(4) *Subhabhat* v. *Vasudeobhat*, I.L.R., 2 Bom., 113; distinguishing *Howard* v. *Harris*, 1 Ver., 190, 2 W. & T. L. C., 947; *Ramji* v. *Chinto*, 1 B. H. C. R., 199; *Sankurbai* v. *Kassibhai*, 9 B.H.C.R., 69.

(5) *Punjun Singh* v. *Mt. Ameena*, 6 W.R. 168; *Mt. Mujeedunnissa* v. *Syed Dildar Hossein*, 20 W.R., 178; *Sitaram* v. *Ramlal*. I.L. R., 18 All., 440; Cf. *Debi Prasad* v. *Baldeo*, I.L.R., 18 All., 123.

(6) *Sreemunt Dutt* v. *Krishna Nath*, 25 W. R., 10.

(7) *Gunno* v. *Latafut Hossain*, I.L.R., 3 Cal., 336.

(8) *The Collector of Ettawah* v. *Beti Maharani*, I.L.R., 14 All., 106.

to pay up, the creditor was at liberty to resort to the remedies open to him at law.(1) A covenant "not to alienate the property of himself and his daughter for which he was about to sue, or the rest of his own property, until the loan secured by the bond was paid off" does not likewise operate as a mortgage.(2) *A* having previously hypothecated certain lands to *B*, executed a conveyance of it to him in 1873 for a consideration which was now found to have been an inadequate price. On the same day, *B* executed to *A* a "counterpart document" by which he covenanted to reconvey the land and return the sale-deed if the sale-amount be repaid to him in cash on 27th May, 1875. The document contained no provision as to interest and reserved no power for the purchaser to recover his purchase-money. In 1888 *A*'s representative alleging that the transaction evidenced by the above documents was a mortgage, brought a suit to redeem it. But it was held that the transaction did not constitute a mortgage, and that the plaintiff was not entitled to redeem.(3) So an agreement whereby the plaintiff acknowledged to have received Rs. 500 and stipulated that if he paid the assessment on the land for 25 years, the defendant should return to the plaintiff the land which he bought from him some years ago, was held not to be a mortgage because the property did not belong to the mortgagor and there was no transfer. Such an agreement would, however, constitute an agreement to sell or convey the land subject to the conditions imposed.(4)

1166. In another case, the plaintiff being indebted to the defendant, transferred certain land to the defendant's name in 1877, in the Government records. In July 1879 the defendant executed the following document to the plaintiff reciting the previous transfer and agreeing to retransfer the land to the plaintiff's name on the 12th July 1880, if the debt which would then be due should be paid off:—"In the village of Behrampur is your (plaintiff's) field survey No. 146, etc., you (plaintiff) have got it transferred it to our name. That field therefore stands in our defendant's name in the Government records. You owe a debt to us. On account of that debt you have transferred it to our name..... The field shall be transferred to your name when you repay the said debt to me ...The debt due to me would in all amount to Rs. 100. If you repay all these rupees due to me till *Vaisakh* Sudh 6th St. 1936, I will take them and retransfer the fields to your name." The instrument provided that in default the fields would not be given back. The defendant contended that the transaction of 1877 was not a mortgage but sale of the land to him, and that the document of July 1897 was an agreement to resell it to the plaintiff. It was, however, held upon evidence received on the point that the transaction of 1877 was a mortgage to the defendant and not a sale.(5) A mere stipulation for repurchase does not make a transaction a mortgage.(6) Where in a bond the covenant not to alienate was followed up by a clause declaring such alienation invalid, it was held that the instrument constituted a simple mortgage.(7) Assignment of a future coffee crop to secure repayment of the loan has been under the Stamp Act held to be a mortgage.(8) So an agreement entered into by the Secretary of State and a Salt Commissioner reciting that

(1) *Jagatdhar* v. *Brown*, 4 C.L.J., 121 (134).
(2) *Sheikh Nasibullah* v. *Sheikh Naser*, 8 C.L.R., 454.
(3) *Ayyavayyar* v. *Rahimansa*, I.L.R., 14 Mad., 170.
(4) *Narayan* v. *Mahadu*, 2 Bom.L.R., 215.
(5) *Patel Ranchod* v. *Bhikabhai*, I.L.R., 21 Bom., 704.
(6) *Vasudeo* v. *Bhan Lakshman*, I.L.R., 21 Bom., 528; *Bhagwan* v. *Bhagwan*, I.L.R., 12 All., 387, P.C.
(7) *Raj Kumar Ramgopal* v. *Ram Dutt*, 5 B.L.R., 204; *Lala Ramdhari* v. *Janessar*, 6 B.L.R. (A.C.) 14; *Surju* v. *Bhawani*, I.L.R., 2 All., 481.
(8) *Reference under S. 46, Stamp Act* (1879), I.L.R., 8 Mad., 104; but see §§ 1139-1140.

the contractor was entitled to the return of the promissory notes deposited by him on the fulfilment of his contract has been similarly treated.(1)

1167. A Contract to Mortgage.—A mere contract for mortgage between the intending debtor and creditor does not create any right *in rem* and such a contract is not, ordinarily, capable of specific performance, since the object of both parties presumably being to make and take a loan, it is a contract for the non-performance of which compensation in money is an adequate relief, and, moreover, no debtor can be compelled to take a loan which he might immediately repay.(2) But a mortgage is an accomplished transfer, and as such, creates rights *in rem* which like all other similar rights stand on a different footing. For instance, while the non-payment of consideration before execution of the mortgage would only give rise to a personal right to damages, if any suffered, with the execution of the mortgage, rights pass which, strictly speaking, remain independently of the payment of consideration. If therefore *A* and *B* entered into a contract, the latter to lend the former a sum of say Rs. 1,000 on the security of *A's* house which he mortgaged on receipt of Rs. 500, the other moiety being promised but never paid, *B* could, in strictness, enforce all the terms of his mortgage, even though he had not paid a part of the consideration (3) though in practice, the Court should be loth to literally decree all its terms without putting the mortgagee on terms, and which would be legally justifiable on the ground that since the payment of loan was the sole purpose of the mortgage, all its terms must be understood as subject to the fulfilment of that condition. This has given rise to some divergence of opinions, some Courts holding that in the case supposed the mortgagor could cancel the mortgage like any other contract (4) while others holding that a mortgage being an accomplished transfer and not merely a contract was beyond the region of cancellation upon that basis. (5) This subject will call for more extended notice later on. (6) But for the present the distinction is noticeable for the two distinct stages of negotiation giving rise to diverse rights and liabilities. While the matter is in the preliminary stage of contract, the relations of the parties are subject to the law of contracts; and if therefore *B* agrees to lend and *A* to borrow a sum of money, *A* cannot compel *B* to make, or *B* compel *A* to take the loan, and no Court will make a decree to make or take a loan of money, whether the loan is to be on security or not. (7) This rule extends to a contract to lend to a company, money payable by instalments, upon the security of debentures to be issued by it. (8) And the fact that the agreement has been partially executed would appear to make no difference. For instance, where the creditor had agreed to lend Rs. 3,000 on the security of a mortgage executed and delivered to him, and the mortgagee afterwards only paid about Rs. 1,375, whereupon the mortgagor sued for recovery of the balance of Rs. 1,625, the Court held

(1) *Reference under S.* 46, *Stamp Act* (1879), I.L.R., 11 Mad., 39.

(2) S. 21 (*a*) Specific Relief Act (Act I of 1877); *Ramanand* v. *Nakchid*, 8 O C. 5; *Mehdi Abbas* v. *Muhammad*, 11 O.C. 217; *Per* Sir John Romilly in *Rogers* v. *Challis* 27 Beav., 175; *Sichel* v. *Mosenthal*, 30 Beav., 371; approved by P C. in *Lario* v. *Bunany*, L R, 5 P.C., 346; *Western Wagon &c., Co.* v. *West* [1892], 1 Ch., 27 (275); *Konchadi* v. *Shiva Rao*, I.L R, 28 Mad., 54.

(3) *Rashik Lal* v. *Ram Narain*, 9 A.L.J. 198.

(4) *Subba Rau* v. *Deon Shetti*, I.L.R. 18 Mad., 126; relying on s. 39 of the Indian Contract (Act Act IX of 1872); *Gokul Chand* v. *Rahman*, (1907) P.R. No. 42, p 274 F.B.

(5) *Bajrangi* v. *Udit Narain*, 10 C.W.N. 932; *Rashik Lal* v. *Ram Narain*, 9 A.L.J. 198.

(6) S. 67 comm. *post.*

(7) *Per* Chitty, J., in *Western Wagon, &c., Co.* v. *West* [1892], 1 Ch., 271 (275).

(8) *Anukardu* v. *Saidamadath*, I.L.R., 2 Mad., 79; *Gregson* v. *Udoy Aditya*, I L.R., 17 Cal., 223 (232, 233), P.C.; *South African Territories, Ltd.* v. *Wallington* [1897], 1 Q. B., 692 O.A. [1898], A.C., 309.

that the mortgagor could not obtain a decree for specific performance, though he might have sued for compensation or damages for breach of contract or for redemption on payment of the amount received.(1) In another case the mortgagor had for consideration previously received executed a mortgage-deed, but took it back for registration, after which he changed his mind and refused to register it, whereupon the mortgagee sued for specific performance by compelling the mortgagor to execute and register an identical mortgage, but the Court refused the prayer holding that the mortgagee's appropriate remedy was a suit for money. (2) But the case was held to be different where the contract was in the nature of a compromise, in which case the Court would enforce the terms of the compromise, not because it embodies a contract, but because it is a compromise. (3) So again, a case for specific performance would arise where the creditor, has, on the faith of the debtor to execute a mortgage, advanced him the money which the debtor is otherwise unable to pay off at once (4) and the recovery of which could not otherwise be secured to the creditor. The principle applicable to such cases would seem to be that the creditor is at least entitled to a refund of his money with damages which should not be imperilled by any breach of contract on the part of the debtor. Consequently, where after the contract is made and money received the debtor incumbers his estate so that the prior creditor stands to lose his money or has an uncertain chance of its recovery, the Court will decree specific performance, against all those who have taken with notice of his contract. Again, in cases of a mortgage in the nature of a lease, *e.g.*, zuripeshgi lease, since the primary object of the creditor is to enjoy the usufruct, the Court will give effect to it, unless it finds compensation an adequate relief (§1169).

1168. There is another class of contracts which the Court of Equity recognizes as capable of specific performance, *viz.*, a mortgage of future property, (§ 183), though such mortgages are not governed by this Act. Indeed, there cannot be any transfer of interest in a specific property when it is not even in existence, but such mortgages are supported in equity, the Courts regarding them as contracts, and holding "that possibilities and expectations might be the subject of contract. If the contract was of a kind of which specific performance was nominally given, the Court enforced it specifically, although it related to a possibility of expectation, and if a contract related to a possibility or expectation and one of the parties had executed the consideration, the Court bound the property from the time when it vested in interest or was acquired even though the contract was not one of which specific performance, strictly so called, was nominally given or could be given."(5) In view of equity a mortgage of future property is nothing more than a contract but the moment the property comes into existence the contract becomes what it was intended to be a mortgage, and without anything being done by the parties it takes effect as such. But before it so takes effect it is no more than the benefit of an obligation and as such subject to the rule as to notice before enunciated.(6) So where A mortgaged to B his indigo factory,

(1) *Anakaran* v. *Saidamadath*, I.L.R., 2 Mad., 79.

(2) *Maya Ram* v. *Prag Dat*, I.L.R., 5 All., 44 (49); *Balgobind* v. *Lutafut Hossein*, 7 W.R., 142.

(3) *Anudala* v. *Kandasubba*, 14 I.C. 213. The reason given in the case that a contract to create a mortgage can be given effect to by a decree of Court where the intention of the parties was that a mortgage only should be created, must be read in the light of the facts stated.

(4) *Hermann* v. *Hodges*, L.R. 16 Eq. 18.

(5) Ashburner's Principles of Equity, p. X 333, cited in *Baldeo Parshad* v. *Miller*, I.L.R. 30 Cal. 667 (675).

(6) S. 40; §§ 680—684, *Baldeo Parshad* v. *Miller*, I.L.R. 31 Cal. 667 (679).

outworks and produce, and then mortgaged with possession to C the indigo cakes of certain years over which B laid his claim by right of his mortgage and the Court found that C had notice of B's mortgage upon which he had previous to C's transaction secured a decree, it was held that B's mortgage took effect as against the indigo cakes as soon as they came into existence and that C being a transferee with notice of B's mortgage could set up no equity in defeasance of B's mortgage.(1) Several pleas were taken in this case for C but they were all negatived. One of them might have embarrassed the Court if the fact upon which it was found had been substantiated. For it was urged that as C's advance was made to prepare the cakes which had been made with his money, he had in the nature of salvage-lien, but the Court held the facts warranting a salvage-lien not proved.(2) It was also urged that B's mortgage of all future produce unlimited as to time was too vague to be effective but the Court held that there was no vagueness in the description of a thing which could be ascertained as soon as it came into existence.(3) It will be noticed that the principle of this equity underlies section 43 (§719) and has been given effect to in several cases, to be presently considered(4) (§ 1180).

1169. A contract to make a loan does not create a debt nor does any future debt arise out of it.(5) But it may give rise to an action for damages for breach of contract. But in such a suit the measure of damages for breach is not the sum agreed to be lent, nor is the claim so laid considered as one liquidated or an ascertained sum of money. On such a contract, the measure of damages is the loss sustained by the breach, and the damages may be merely nominal. They are in no case recovered by way of loan, and what the plaintiff gets becomes, of course, his own money. The damages awarded in such cases bear no analogy to the case of a breach of a contract of sale.(6) The true measure of damages in cases of loan is the loss of interest actually sustained for the time the money is likely to lie idle without investment. In fixing the time regard must be had to the nature and amount of the loan, since the larger the sum, the longer would be the time required to secure re-investments. But fixing this time is to a certain extent a matter of conjecture.(7) In a case where a Bombay money-lender of Rs. 20,000 at 7½ per cent, was thrown out of his bargain, the Court awarded four months' interest (Rs. 100), together with the amount of actual expenses, including the cost (Rs. 200) of preparing the mortgage.(8) But, of course, the damages would have been heavier, if the plaintiff had been resident of a place where the same facilities do not exist for profitable investment. If the plaintiff advances money which the defendant receives but fails to give the security offered, the former may either rescind the contract or recover damages for failing to give the requisite security. On a loan of Rs. 20,000 the intending borrower failed to deliver certain deeds by way of equitable mortgage, whereupon the creditor sued him for damages, and it was held that while the Court was unable to estimate the difference in value of a loan on landed security and the personal security of a merchant, it considered the loss to be one-tenth of the amount advanced, which sum was decreed by way of damages.(9) Where the contract goes off by default of the intending creditor,

(1) *Baldeo Parshad* v. *Miller*, I.L.R. 31 Cal. 667.

(2) *Ib.* pp. 679, 680.

(3) *Ib.* p. 677.

(4) *Khobbari* v. *Ram Prosad*, 7 C.L.J. 387 (392, 393).

(5) *Western Wagon, &c., Co.* v. *West* [1902], 1 Ch. 371(277); *Mehdi Abbas* v. *Muhammad*, 11 O. C. 217.

(6) *Datubhai* v. *Abubaker*, I. L. R., 12 Bom., 242 (245).

(7) *Per* Farran, J., in *Datubhai* v. *Abubaker*, I. L. R. 12 Bom. 242 (246).

(8) *Datubhai* v. *Abubaker*, I. L. R. 12 Bom. 242 (246).

(9) *Per* Peacock, C. J., in *Currie* v. *Muturaman*, 3 B. L.R. (O. C.), 126 (134).

the debtor may recover damages for actual expenses incurred and the loss sustained by him. On the other hand, if the creditor has already made the advance on the faith of the security, there can be no doubt, but that the Court will then decree specific performance against the mortgagor by compelling him to execute a mortgage, (1) and if the security relate to movable property, the Court will issue an immediate order for its protection if necessary by appointing the plaintiff an *ad interim* receiver for a fortnight until the formal appointment of a receiver. (2) Where as a part of the same transaction, the borrower promised to execute a mortgage and give a lease, and the two parts were disseverable, the Court specifically compelled the debtor to execute the lease, although he could not be compelled to take the loan. (3)

1170. Where the mortgage-deed has been executed and a part payment on that account made to the mortgagor, the latter cannot sue for the recovery of the unpaid balance, but it is conceded that he may obtain compensation or damages, in a properly framed suit against the mortgagee for breach of his contract, or he may redeem the mortgage on payment of the sum due. (4) The plaintiff mortgaged certain property to the defendants for Rs. 12,000, receiving Rs. 4000 in cash. Out of the balance Rs. 7,000 was left with them to pay off a prior mortgage; and Rs. 1000 was promised to be paid to the plaintiff after a month and a half. The plaintiff sued to recover this amount, but the defence was that the defendants had paid Rs. 8,400 due on a prior mortgage and were thus due Rs. 400 from the plaintiff, whereupon the plaintiff's suit was thrown out on the ground that being a contract for loan, a suit for its specific performance did not lie (5) A broker who negotiates for a loan of money becomes entitled to his brokerage as soon as a contract is made, although the transaction may subsequently fall through on account of some defect in the mortgagor's title. (6) In England, a contract to mortgage however informal, if it indicates with sufficient certainty the intention to create a mortgage, and satisfies the Statute of Frauds is held to create an equitable mortgage, so that the mortgagee may obtain an injunction restraining the mortgagor from parting with the legal estate, if not already outstanding (7) but such a right is neither created by the Act, nor is the distinction between a legal and equitable mortgage anywhere recognized in India. (8)

Novation.

1171. A contract of usufructuary mortgage may, like any other contract, be renewed, but in order that a mortgage should operate by novation, it is necessary that the new mortgage should have been intended to have extinguished the old one. A mere execution of a fresh mortgage-deed is not *per se* a sufficient act pointing to novation, unless the executee implies or leads others to believe that he had abandoned the first mortgage. (9) If the considerations for the two deeds were distinct the two transactions are necessarily separate. (10) Actual possession is not essential

(1) 1 Seton on Decrees, 443; *Ashton* v. *Corrigan*, L. R., 13 Eq, 76 (V. C. Wickens *dubitante*), *Per* Lord Selborne, L. C., in *Hermann* v. *Hodges*, L. R. 16 Eq., 18; *Gregson* v. *Udoy Adiya*, I. L. R., 17 Cal. 223 P.C.

(2) *Taylor* v. *Eckersley*, 2 Ch. D, 302.

(3) *Gregson* v. *Udoy Adiyta*, I. L. R. 17 Cal. 223 (232, 233), P C.

(4) *Anakaran* v. *Saidamadath*, I. L. R. 2 Mad. 29; *Sreenath* v. *Cally Doss*, I. L. R. 5 Cal. 82.

(5) *Mehdi Abbas* v. *Mahommad*, 11 O. C. 217.

(6) *Elias* v. *Govind*, I.L.R. 30 Cal., 202.

(7) *London & County Bank* v *Lewis*, 21 Ch. D, 490; *Fullerton* v. *Provincial Bank* [1903], A. C. 309.

(8) *Lakhmichand* v. *Ganpati*, 14 C.P.L.R., 177.

(9) See s. 101, comm. *post*; *Sheoraj* v. *Harchandi*, 11 A.L.J. 365; *Ram Kishen* v. *Fakirchand*, *ib* 386; *Sat Narain* v. *Gangaparshad*, 1 I. C. 117 (118).

(10) *Shankar Sarup* v. *Mejo Mal*, I.L.R. 23 All. 313 (323), P. C.

to complete the transfer within the meaning of the section. It is sufficient if the right of entry is given to the creditor [1] (§§ 1049, 1050).

1172. Mortgaged Property must be specified.—Another and a very important ingredient of a valid mortgage is that the property transferred by way of security must be specified. The term "specific immovable property" is susceptible of a double meaning (§ 1150) but there appears to be little doubt that what is really implied by the term is that the property charged must be clearly defined, and be capable of identification; since the object of having the property described "specifically" is to render the identification as easy as possible, and to shut the door against fraud and controversy. [2] A sufficiently specific description should mark off the property so described from all other similar properties of the same class. So agreements the meaning of which is not certain or capable of being made certain are declared void by the Indian Contract Act. [3] So a will or bequest not expressive of any definite intention is void for uncertainty. [4] Numerous cases have been decided where for want of this specification the instruments have been held not to operate as mortgages. By sections 21 and 22 of the Registration Act, [5] registering officers are now empowered to refuse registration of documents erring in this respect. And it is enacted by the Evidence Act, [6] that when the language used in a document is, on its face, ambiguous or defective, evidence cannot be admitted of facts which would show its meaning or supply its defects. [7] Hence if the property charged has not been specifically and sufficiently described, the mortgagee runs the risk of even losing his security, unless his case falls within the provisos which allow oral evidence under certain circumstances [8] (§§ 337, 1157, 1158). That the property which has been made security for the loan should be well defined is as much to the advantage of the mortgagee as it may be to the advantage of the mortgagor. For if the property is specified but not sufficiently described, the mortgagor may lose more than he intended, to convey. Thus the mortgage of "all that my farm called Trogue's farm now in the occupation of C" would convey the whole farm, though it was not all in C's occupation. [9] So again, if the mortgage be of "my estate at Rampur containing 100 bighas" the property corresponding to that description will pass, whatever may have been the real intention. [10] So a mortgage of "all my real and personal estate" is not void for uncertainty, if at the time of enforcing the mortgage it can be ascertained what properties were referred to by the expression. Such a contract is not opposed to public policy, and it would appear that such a covenant, if suitably expressed, might even create a charge on after-acquired property [11] (§ 1180). Of course, the rule here propounded is one so essentially founded on obvious equity that it has been a recognized canon of Indian Jurisprudence apart from its legislative enactment here. [12]

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(1) *Motiram* v. *Vitul*, I. L.R., 13 Bom. 99 (100) F.B.; See *Sheo Ratan* v. *Mahipat*, I.L.R. 7 All. 258 (266).

(2) *Per* Fry, L.J. in *Carpenter* v *Deen*, 23 Q B.D. 566 (574); *ib. Per* Cotton L. J. pp. 571, 572.

(3) S. 29, Act IX of 1872.

(4) S. 76, Act X of 1865.

(5) Act XIV of 1908. See the sections above cited for how much description and of what nature is considered sufficient by the Act.

(6) Act I of 1872.

(7) S. 93 (*a*).

(8) *Ibid.* Ss. 94-99.

(9) *Goodtitle* v. *Southern*, 1 M. & S., 209; *Travers* v. *Blundell*, 6 Ch. D., 436; *Umesh Chundra* v. *Sageman*, 5 B.L.R. 633 (634); *Tribhovandas* v. *Krishnaram*, I. L. R. 18, Bom., 283 (288).

(10) S 94, Indian Evidence Act (I of 1872).

(11) In re *Kelsey*, *Tyson* v. *Kelsey*, (1899), 2 Ch., 530.

(12) *Sheogolam* v. *Benee Madho* (1861), N. W.P., S. D. A. 171; *Prag Singh* v. *Persunna* (1863), N.W.P., S.D.A. 175; *Mykum* v. *Hadee* (1864), N.W.P., S.D.A., 102; ***Ram***

1173. As a necessary corollary of this rule is the principle embodied in the maxim, *certum est quod certum reddi potest*,(1) that is, the property must be regarded as certain if it can be ascertained,—not necessarily at the time the transfer was made, but at least at the time the security is enforced. So if a person lease his property for so many years, as *A* shall name, it is a good lease for though uncertain at the time, it is capable of being reduced to a certainty.(2) So again, if a lease be granted for twenty-one years after three lives in being, the lease is not uncertain because it is not known when those lives in being shall terminate, yet since such a date is certain, the lease itself is good for in the efflux of time a day will arrive which will make it certain, and that is sufficient. So where an agreement for sale did not describe the house, but stated that the deeds were in the possession of *A*, the house was held to be sufficiently described, since it could be ascertained from the title-deed in *A's* possession.(3) On a similar principle the Court gave effect to a mortgage of all produce of an indigo factory holding that though the produce was not ascertainable on the date of mortgage still it could be clearly identified when it came into existence and which was sufficient. (4) So where the bill of sale was *inter alia* for the High House Farm together with all growing and other crops "which at any time thereafter should be in or about the same or any other premises" the description was held to be sufficiently specific to make a valid assignment of them in equity.(5)

1174. For the purpose of specifying the property it is not essential, though of course it would be prudent to name the property. Thus where *A* created a charge in favour of his brother, on "villages granted" to him, but without naming the villages, it was held that the fact that such instrument did not specify the villages which had been granted to *A* did not constitute such an ambiguity in the instrument as to render the charge created thereby invalid.(6) In such a case the maxim *certum est quod certum reddi potest*(7) would apply.(8) So also where the instrument ran: "To secure this money I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker." (9) And so also where a mortgage deed having specifically charged the property originally offered as security, extended the operation of the mortgage by general language to include all interests in the mehals, villages, and lands comprised in the sanad of a talukdari estate.(10) But where a *karz rokka* (a debt note) provided that the creditor should hold and enjoy a certain piece of land belonging to the debtor for twenty years, that at the end of that period the land should be restored to the debtor free from all claims for payment of the principal or interest of the debt; that if the creditor planted vines, he should be at liberty to retain the land so planted after the lapse of twenty years as a tenant at Rs. 50 *per annum*, it was held that the contract was not a mortgage, since there was no agreement for the payment of

Bkush v. *Sookh Deo*, 1 N.W.P.H.C.R. 159; *Shadi Lal* v. *Thakur Das*, I.L.R., 12 All., 157; *The Collector* v. *Beti Maharani*, I.L.R. 14 All., 162.

(1) "That is certain which is capable of being made certain."

(2) *Goodright* v. *Richardson*, 3 T. R. 463.

(3) *Owen* v. *Thomas*, 3 My. & K.. 353; *Plant* v. *Bourne* (1897); 2 Ch . 281.

(4) *Baldeo Parshad* v. *Miller* I.L.R. 31 Cal. 667 (677).

(5) *Clements* v. *Mathews* 11, Q.B.D. 808.

(6) *Kanhia Lal* v. *Muhammad*, I.L.R., 5 All., 11.

(7) "That is certain which can be rendered certain."

(8) *Kanhia Lal* v. *Muhammad*, I.L.R., 5 All., 11, 14. The Maxim cited is from Coke and means: "That is certain which is capable of being made certain."

(9) *Ramsidh* v. *Gobind*, I.L.R., 9 All., 158.

(10) *Land Mortgage Bank* v. *Abdul Kasim*; I.L.R., 26 Cal., 395, P.C.

either principal or interest. In the event of the grantee's disturbance by a right paramount to the grantor's, the stipulation was for the payment of only damages. On such an agreement as this the grantor could not have based any claim for the payment of Rs. 150 (the sum advanced) or any part of it. Where there was no debt there could not be a mortgage.(1)

1175. A bond containing the following condition was held to be a mortgage: "The security pledged (*taran gahan*) for this is our property, survey Nos. 170 and 778 in the village Ped."(2) But if a mortgagor describing himself as a resident of a place mortgage his "*kul haq haquk*" (all his rights and property) the description is too indefinite to be acted upon. But if in such a case the mortgagor had described himself as the owner of certain property and then gone on to mortgage all his rights and interests, it would have been reasonable to refer the indefinite expression to the description.(3) For instance, if the mortgagor describing himself as a zemindar and shareholder of a certain named mouzah proceed to declare that for a consideration expressed in the deed he mortgaged his "zemindari share" and all other movable and immovable property owned and possessed by him to secure the debt, the mortgage would be good, for the property was defined. (4) But a mortgage of "my house and landed property" is infected with the same vice of uncertainty.(5) On the other hand, where in the recital of the deed the mortgagor specified certain property as belonging to him and then it contained the following provision "our rights and property in the aforesaid talooka Rajapur shall remain pledged and hypothecated for this debt," this clause will be referred back to the recital at the opening, read in conjunction with which it would create a good mortgage of the shares and interests of which the deed recited the obligor to be the owner.(6) So where the obligor declared that "we have mortgaged a house situated in Ghaziabad owned and possessed by us, for Rs. 300 to *K* and *G* for two years" that they had been put in possession thereof, and that "if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage-money in any manner they please," the deed is clearly a mortgage, and it would be idle to contend that all that was conveyed was a two years' use of the house.(7) Such, however, would be the case if the obligor gave half the profits of a specified mouza for a definite period, and charged the remaining moiety of its profits with the payment of the mortgage-debt and interest, even though the mortgagee was by the same deed put into possession of the village for the purpose of management on condition that he should be liable to render accounts to the mortgagor, but that if the mortgagor failed to pay the debt therein mentioned, or should take another loan and fail to pay it within the term therein mentioned, the mortgagee may then remain in possession of the entire mouza until payment of all that might be due. (8) Mortgage of "a ten gandas share in a village" with a provision that it shall not be sold or mortgaged to any one so long as the principal amount with interest remained outstanding is sufficiently definite to amount to a mortgage. (9) The following

(1) *Abdul Bhai* v. *Kashi*, I.L.R., 11 Bom., 462 (466), following *Williams* v. *Owen*, 5 My. & Cr., 303 (308).

(2) *Datto Dudheswar* v. *Vithu*, I.L.R., 20 Bom, 408, F.B.; dissenting from *Ringasami* v. *Muthukumarappa*, I.L.R., 10 Mad., 509; *Girwar Singh* v. *Thakur Narayn Singh*, I. L.R., 14 Cal., 730 (where a similar bond was only to create a charge).

(3) *Deojit* v. *Pitambar*, I.L.R., 1 All., 275.

(4) *Manik Chand* v. *Beharee*, 2 N.W.P., H. C.R., 263.

(5) *Darshan Singh* v. *Hanwanta*, I.L.R., 1 All., 274.

(6) *Bishen Dayal* v. *Udit Narain*, I.L.R., 8 All. 486.

(7) So Sonkie, J., held in *Phulkuar* v. *Murli Dhar*, I.L.R., 2 All., 527 (531) on reference to Stuart, C.J., Oldfield & Straight, JJ., *ib.*, p. 532.

(8) *Ganga Prasad* v. *Kusyari Din*, I.L.R., 1 All., 611.

(9) *Sheoratan* v. *Mahipal*, I.L.R., 7 All., 258.

terms in a deed "that for the security of the payment of this debt, the lands mentioned in this deed are pledged by me; and that, until the principal money and the interest recited in this deed are paid off, I will not on any account transfer the property pledged to anybody by sale or *hiba-bilawar*, or gift or mortgage in any other way," answer all the requisites of a mortgage.(1) But a bond containing a stipulation "that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money together with the interest fixed by instituting a suit from any movable and immovable property, my own *milk*," is too general and indefinite to create a mortgage.(2) Indeed, such a general covenant is implied from the very fact of the loan.

1176. But where the operative words in a deed are by themselves clear, they will be understood in their ordinary sense apart from anything contained in the recital. Thus where a mortgage-deed having specifically charged the property originally offered as security, extended the operation of the mortgage by general language to include all interests in the mahals, villages, and lands comprised in the sanad of a talukdari estate. On a question arising whether one of the villages comprised in the sanad was a part of the mortgaged property, it was decided that it must be held to be included in the mortgage since the operative words were uncontrolled by anything in the recital.(3) A mortgage-deed of certain bhagdari lands stated that "all the properties appertaining to the entire bhag" were thereby mortgaged to the plaintiff. The bhag comprised, *inter alia*, four gabhans or building sites. But the clause, which set forth the particulars of the property mortgaged thereby, specified only two gabhans, one only of which belonged to the bhag, and the other did not. The deed then proceeded: "According to these particulars, lands, houses and gabhans, barnyards, wells, tanks, padars and pasture lands also, together with whatsoever may appertain to the bhag—all the properties appertaining to the whole bhag have been mortgaged and delivered into possession. There is no other property appertaining to the said bhag of which mention is not made here." It was held that the particulars were the leading description, and that the supplementary description of them as constituting the entire bhag should be regarded as *falsa demonstratio*.(4)

1177. Of course, in construing a mortgage-deed the instrument must be taken as a whole, and the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it.(5) In this view no general rule can be formulated as an infallible guide to correct interpretation; and cases will be found in which the decision cannot be reconciled except on the ground that in the one case having regard to what was known of the property it could be ascertained, whereas in the other case it could not be ascertained.(6)

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(1) *Ramdhari* v. *Janessar*, 6 B.L.R. (A.C.) 14.

(2) *Collector of Etawah* v. *Beti Maharani*, I.L. R. 14 All., 162; *Shadi Lal* v. *Thakur Das*, I.L.R. 12, All., 175; *Ramsidh* v. *Bulgobind*, I.L.R., 9 All., 158.

(3) *Land Mortgage Bank* v. *Abdul Kasim*, I.L.R., 23 Cal., 395 P C

(4) *Tribhovandas* v. *Krishnaram* I.L.R., 19 Bom., 283. So the maxim "*falsa demonstratio non nocet cum de corpore* (or *persona*) *constat*:" "Merely false description does not vitiate if there be sufficient certainty as to the object (or the person)."

(5) *Deputy Commissioner* v. *Rampal Singh*, I. L. R., 11 Cal., 237 P. C.

(6) *Cf. Ramsidh* v. *Bulgobind*, I. L. R., 9 All., 158 in which an instrument purporting in general terms to charge all the property of the obligor was held to be a mortgage, whereas a similar bond in *Collector of Etawah* v. *Beti Maharani*, I.L.R., 14 All., 162 was not.

Remedy in such case.

1178. Where for want of operative words the instrument fails to take effect as a mortgage, (§ 337) the covenantee can sue for damages on the breach of contract, the cause of action for which will, it is conceived, accrue upon the obligor breaking his stipulation not to alienate.(1) In some cases a covenant not to alienate has been held to create a charge which has been decreed.(2) If the property mortgaged is different from the property described, the transferee of the mortgaged property is not bound by the mortgage. So where the mortgage of certain plots mis-described in the mortgage-deed as situate in the village A were in fact found to be situate in the village B, but which had been subsequently sold to another person, the Court held the latter in no way bound by the mortgage as affecting the plots in B sold to him.(3) If the property mortgaged, is by a unilateral mistake wrongly described, it is a case for specific performance and not one for rectification of the deed.(4) A mortgage of non-existent property, though inoperative as a conveyance, may still be operative as an executory agreement.

Agreement not to alienate.

1179. But at the same time there are cases which clearly fall into a distinct category, and as to which it is not difficult to formulate a general rule. One such rule is the following, that where a person merely stipulates generally not to alienate his property, he does not thereby create a charge on any particular property belonging to him.(5) Such a covenant is too general to affect any specific property of the obligor, but being regarded as a personal covenant, the obligee may recover damages for the breach of contract,(6) but it cannot be used by a third person not a party to the bond, for the purpose of defeating a subsequent charge upon the same property granted in favour of another creditor of the obligor.(7) Indeed, had such covenants any other effect, the whole of the obligor's property might be shackled during the continuance of the debt irrespective of the proportion it may bear to the debt outstanding. Such a covenant would be as disastrous to commerce as it is mischievous for its generality. The courts have accordingly refused to enforce a general stipulation in a mortgage-deed prohibitory of the transfer of the mortgaged property.(8) But this does not imply that rights in derogation of the mortgagee's interest could be thus created by the mortgagor.(9) Such covenants against alienation professing to mortgage "all his property" without any specification of the locality or nature of the property must be distinguished from those in which the obligor stipulates against alienation of certain specified land, in which case, of course, the transaction would be so far good as a mortgage.(10)

1180. Mortgage of after-acquired Property.—It may be a question whether hypothecation of one's future property is sufficiently specific to

(1) *Rambuksh* v. *Sookdeo*, 1 N W., 111; *Chooneelal* v. *Puhulwan*, 3 Agra 270.

(2) *Mulchand* v. *Balgobind*, I. L. R., 1 All., 610, and cases therein cited.

(3) *Kinlock* v. *Tota Ram*, 15 I.C., 335.

(4) *Jawahir Sing* v *Huscin*, 18 O.C. 1; *Radhe Lal* v. *Angue* 16 O. C 213.

(5) *Bhupal* v. *Jag Ram*, I.L.R., 2 All., 449; *Dookhepore* v. *Hidayu-toolah*, Agra (F.B) 7; *Rambuksh* v *Sookh Deo*, 1 N. W. P. H. C. R., 111; *Gunoo* v. *Latafut Hossain*, I L. R., 3 Cal., 336; *Dossi Money* v. *Jonmenjoy*, I. L. R., 3 Cal., 363; *Najibulla* v. *Nusir Mistri*, I.L.R., 7 Cal., 196.

(6) *Choonee Lal* v. *Phulwan*, 3 Agra, 270; *Rambuksh* v. *Sookh Deo*, 1 N.W.P.H.C.R. 111.

(7) *Koondun Lal* v. *Wasseer Ali*, 3 N. W. P.H.C.R. 205.

(8) *Dookhchore* v. *Hidayat-oollah* (1866) Agra, F. B. 7 (13); *Mahomed* v. *Banee Pershad*, 1 N. W. P. H. C. R, 135; *Chunni* v. *Thakur Das*, I. L. R., 1 All., 126; *Khub Chand* v *Kalian Das. ib*, p. 240, F. B.; *Mulchand* v. *Balgobind*, *ib.*, 610; *Gunga Persaud* v. *Beharee* (1857), S. D. A., 825; *Chunder Kishore* v. *Goorchurn* (1855), S.D.A. 353.

(9) See the subject further discussed under s. 60 *post*.

(10) *Rajkumar Ramgopal* v. *Ram Dutt*, 5 B.L.R., 264, F. B.

form the subject of a valid mortgage. In England, it is the rule that at common law no man could make a grant of what was not at least potentially in existence,(1) unless the grant was ratified by the grantor after he acquired the property, or the mortgage was so framed as to give the mortgagee power to seize the future property of the mortgagor as it should be acquired by him, and such power is acted upon.(2) But in the view of equity such contracts, though not operating as an immediate alienation because there is nothing to transfer, may nevertheless be enforced the moment the property comes into being, provided that the contract is one of which the Court will decree the specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if the contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained. But in order to create such an equity the future property must be also specified. As Lord Westbury, L. C., said : "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction, if necessary, to restrain the seller from delivering it to any other person." (3) And so Jessel, M. R., in another case observed :— "A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in future and when it has come into existence, equity treating as done that which ought to be done fastens upon that property, and the contract to assign then becomes a complete assignment."(4) And it is now agreed that an assignment of future property will be valid if it can be ascertained at least when the security is enforced, though it may not be capable of ascertainment at the time when the security is given. (5) But if the assignment is vague and uncertain, the Court will not give effect to it. Thus a mortgage by a person of "all his present and future personalty" would not create any right over property non-existent at the time.(6) But the property though originally undetermined may become specified by being brought into the place, or for the purpose, by which it may be ear-marked (7) and then property answering that description may be seized, though it may not be the identical property intended.(8) Such property is usually defined with reference to some specific place, as all the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises; (9) but chattels in a house or elsewhere is too vague. (10) On a similar principle,

(1) Bacon's Maxims, R. 14 ; Perkin's "Profitable Book," Tit. Grant. pl. 65,"

(2) *Lunn* v. *Thornton*, 1 C. B. 379.

(3) *Holroyd* v. *Marshall*, 10 H. L. C., 191 (209, 210); *Congreve* v. *Evetts*, 10 Exch., 298; *Carr* v. *Acraman*, 11 Exch., 566 ; *Lomax* v. *Buxton*, L. R., 6 C. P., 107 ; *Lazarus* v. *Audrade*, 5 C P. D., 320 ; *Collyer* v. *Isaacs*, 19 Ch. D., 349 ; In re *D'Epineuil* 20 Ch. D , 758 ; *Clements* v. *Matthews*, 11 Q. B. D., 814 ; *Reeves* v. *Barlow*, 12 Q. B. D., 436 ; *Tailby* v. *Official Receiver*, 13 App. Cas., 523.

(4) *Collyer* v. *Isaacs*, 19 Ch. D., 342.

(5) *Tailby* v. *Official Receiver*, 13 App. Cas. 523.

(6) *Belding* v. *Read*, 3 H. & C. 955 ; In re *D'Epineuil*. 20 Ch. D., 758 (760).

(7) *Teatham* v. *Amor*, 47 L. J. (Q. B). 581; *Lazarus* v. *Audrade*, 5 C. P. D., 318 (320, 321).

(8) *Lazarus* v. *Audrade*, 5 C. P.D. 318 (320).

(9) *Lazarus* v. *Audrade*, 5 C.P.D., 318 (320).

(10) *Belding* v. *Read*, 34 L.J., Exch. 212.

the intention to charge after-acquired property must be clear and will not be presumed from doubtful expressions. (1) In England statutory forms have now been prescribed to insure both specification and precision, (2) and the statute further restricts the enforcements of such assignment as against the grantor only. (3)

Procedure and form of decree.

1181. The procedure for the enforcement of such a security would appear to follow the lines of a mortgage-decree, and a decree *nisi* in the following terms was made in Bombay: "That on replacement within six months from the date of the order of the paddy still due (specifying the amount) the mortgage is to be released, but that on default of the replacement of the paddy aforesaid within six months aforesaid there should be sale of the existing hypothecated property with liberty to apply in case the amount is not realised, the decree to be made absolute on the expiration of six months. (4) The prayer for instalments was refused as six months were allowed. (5)

Hindu and Mahomedan rule.

1182. Although a mortgage of future property is, perhaps, strictly speaking, contrary to both Hindu (6) and Mahommedan (7) law, as being a mortgage of that which was not visible or in existence, (8) and it was so thrown out by Westropp, J., in a Bombay case. (9) still the English equitable rule has long since been followed in this country (10) and it has been held that in order to create an enforceable equity the contract must explicitly and specifically describe the property to be charged. Thus the pledge of a kiln does not *per se* confer on the pledgee any right to bricks made in the kiln in future. (11) But the future indigo crops that may be grown upon a certain plot of land belonging to the mortgagor may be mortgaged, (12) though such a mortgage does not come within the purview of this Act. Neither can it be called a pledge of specific movable property. It is a mortgage of *movable* property that may come into existence in future, and the transaction is in the nature of an agreement which is on the analogy of the English law legally enforceable, not only against the transferor, but also against a transferee with notice of the obligee's equitable interest, (13) though not against a transferee without notice. (14)

(1) *Tapfield* v. *Hillman*, 6 M. & G., 245.

(2) Bills of Sale Act, 1882 (45 & 55 Vic., c. 43), s. 56. Amended in 1891 (54 & 55 Vic., c. 35), ss. 6,9; See *Kelly* v. *Kellond*, 20 Q.B.D., S C., *sub nom Thomas* v. *Kelly*, 13 App. Cas., 506.

(3) *Ib.*, s. 6.

(4) *Shivram* v. *Dhan*, 4 Bom. L.R., 577.

(5) *Ibid.*

(6) Drishtadi, Drishtabandhak Wilson's Glossary, 148; cited in *Kedari* v. *Atmaram*, 3 B.H.C.R. (A.C.), 11 (17), but *contra* in Steele 261. Elberling, 128.

(7) Macnaghten's Mob. Law, Ch. III, S. 14, p. 43. Ch. V. S. V., p. 50; Baillie's D., 519 (520); 2 Hedaya, 372 *et seq*; Baillie on sale, pp. 3,141, *et seq*.

(8) *Kedari* v. *Atmaram*, 9 B.H.C.R. (A.C), 11 (17).

(9) *Ibid*, p. 17; citing *Venkata* v. *Parvati*, 14 H.C.R. 460 (464 *note*) where, according to Colebrooke, in 2 Strange's Hindu Law, 467, 469, a mortgage (*bandhaka*) is defined to be "of real, substantial, *visible* (*drisha*) property, under which the mortgagor remains in possession till the stipulated time arrives."

(10) *Sahib Prahlad* v. *Budhu Singh*, 2 B. L.R, 111 (117), P.C.:—"But how can there be any such transfer, actual or constructive upon a contract under which the vendor sells that of which he has not possession and to which he may never establish a title. The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes into Court showing that he has himself done all that he was bound to do"; followed in *Bhobosoondree* v. *Issur Chunder*, 11 B.L.R., 36 (41) P.C.

(11) *Gujadhur* v. *Kunhya Lall*, 3 Agra, 27; *Tilokdhari* v. *Furlong*, 2 B.L.R. (A.C.), 230.

(12) *Misri Lal* v. *Mozhar Hossain*, I.L.R., 13 Cal., 262 (264).

(13) *Bansidhar* v. *Sant Lal*, I.L.R., 10 All., 133; following *Holroyd* v. *Marshall*, 10 H.L. C., 191.

(14) *Bansidhar* v. *Sant Lal*, I.L.R., 10 All., 133.

Sufficient for its identification.

1183. An assignment of the "produce of the indigo crop for 1292 Fasli of Mauza Jarab has been held to be valid as constituting a sufficiently specific description for the purpose of creating a valid assignment in equity." (1) So a letter written by the obligor to his firm at Bombay informing the latter that "two *Jokhim Hundis* for Rs. 7,100 and 4,000 had been drawn against 48 bags and 128 bags respectively, of sheep's wool shipped in the vessels '*Mahadeoprasad*' and '*Hariprasad*' and directing them, on the arrival of the vessels, to deliver the 77 bags to the plaintiff Jadowji Gopalji," and which was given to the plaintiff, was held to operate as an equitable assignment of the wool to the plaintiff. (2) But there can be no valid mortgage unless the mortgagor has at least a potential interest in that out of which the property may arise. (3) So while a grant of the next year's wool of a man's sheep is valid because he has a potential property in such wool, still a mortgage of the wool of all the sheep which a man ever shall have is void. (4) And so the tenant of land may validly mortgage all the fruit (5) or crops that may grow upon it hereafter, (6) because he has an interest in the land. But he could not assign away the fruit or crops of another's land which he may subsequently acquire. And so an assignment of a man's stock-in-trade would only pass the property in only such articles as existed at the time of the assignment, and not in the after-acquired articles even though the deed may also purport to convey them, (7) unless in the latter case they be specified or ascertained. (8) An assignment of future book debts, though not limited to debts in any particular business, was held sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of assignment or in any other business. (9) Where neither the instrument nor the surrounding circumstances give any clue to identify the property, the transaction is, as observed before, devoid of the specificality required by the definition (s 1172). Thus where it was said "We hypothecate as security for the amount our property with all the rights and interests" and the debtor nowhere in the instrument indicated to what property the condition referred, it was held that the contract was too vague to constitute a mortgage. (10) So also an instrument which contained the following clause: "If it is not so paid we will pay it with the whole of our property." (11) If the instrument is vague at the time of execution, but not vague when the Court is asked to enforce the contract, it can no more be impeached on that ground. (12) A description is too vague only if the Court cannot see what the parties intended to deal with. (13)

(1) *Bansidhar* v. *Sant Lal*, I.L.R., 10 All., 133 (136).

(2) *Jadhowji* v. *Jetha Shamji*, I.L.R., 4 Bom. 333 (342); following *Burn* v. *Carvalho*, 4 M. & Cr., 702.

(3) *Siva* v. *Bisandas*, 2 C.P.L.R., 193, following *Misri Lal* v. *Mozhar Hossain*, I.L.R., 13 Cal., 262; *Grantham Hawley*, Hob., 132; *Petch* v. *Tutin*, 15 M. & W., 110; *Clements* v. *Matthews*, 11 Q.B.D., 808; Will's P. P. (15th Ed.), 91.

(4) Com. Digt. tit. "Grant" (D) Will's P. P. (15th Ed.), 91.

(5) *Grantham* v. *Hawley*, Hob., 132.

(6) *Siva* v. *Bisandas*, 2 C. P. L. R., 193; *Raghunath* v. *Moti*, 10 C.P.L.R., 87.

(7) *Lunn* v. *Thornton*, 1 C.B., 379; *Gale* v. *Burwell*, 7 Q.B., 850; *Joseph* v. *Lyons*, 15 Q.B.D., 280; *Hallas* v. *Robinson*, *ib.*, 288.

(8) Stat. 56 & 57 Vict., c. 71, s. 52.

(9) *Tailby* v. *Official Receiver*, 13 App. Cas., 523; approving In re *Clarke*, *Comb* v. *Carter*, 36 Ch. D., 348; and over-ruling *Belding* v. *Read*, 3 H. & C., 955; In re *D'Epineuil*, 20 Ch. D., 758.

(10) *Deoji* v. *Pitamber*, I.L.R., 1 All., 275.

(11) *Bhera* v. *Maddipatu*, I.L.R., 3 Mad., 351.

(12) *Tailby* v. *Official Receiver*, 13 App. Cas., 536.

(13) *Tailby* v. *Official Receiver*, 13 App. Cas., 523.

1184. A contract to assign future property may be specifically enforced against the obligor or his assignee with notice, failing which the obligee is entitled to recover damages which, under ordinary circumstances, would be the fair price recovered for the thing sold.(1) But in either case, the assignee must allege and prove that he had performed, or, was willing to perform, his part of the contract, but was prevented from so doing by the wrongful act of the defendant.(2) On similar equitable grounds the assignee has a right to subsequently acquired property of the insolvent, unless the latter has obtained a certificate and discharge. The rule is, however, subject to two qualifications—*first*, when the insolvent has acquired property subject to liens and obligations, in which case the property taken is subject to the equities and charges which affect it in the hands of the insolvent; and, *secondly*, when the insolvent carries on trade at a subsequent period, with the assent of the assignee, the property which is acquired in the subsequent trade will be subject in equity to the charge of creditors in that trade, in priority to the claim of the assignee.

1185. Mortgage is to secure Debt.—The third requirement of a mortgage is that it should be executed to secure a debt. This is the feature of a mortgage which distinguishes it from other transfers such as by sale, exchange, gift and lease, since in these the relationship of debtor and creditor does not exist, and the transfer made is not to secure the payment of money or money's worth.

Mortgage or sale.

There are, however, some transactions which, though appearing to be sales, are in reality mortgages. To this class belong cases where there is *ab initio* an absolute *bona fide* sale and conveyance with a collateral agreement for repurchase by the mortgagor on payment of the purchase-money within a stipulated time:(3) and such collateral agreement may be either introduced into the agreement for sale at the time, or may be made at a subsequent period. "Whether a given transaction is a mortgage-property so-called, or is a sale with an option of repurchase, depends upon the special circumstances of each case; and parol evidence is always admitted to show that what appears on the face of the deed to be an absolute conveyance was intended to be a conveyance by way of mortgage only."(4) These circumstances may be here enumerated: (i) where the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him. (ii) where the purchaser was not let into the immediate(5) possession of the property; (iii) where instead of receiving the rents for his own benefit he accounted for them to the grantor, and only retained the amount of interest: (iv) where the expense of preparing the deed of conveyance is borne by the transferor: (v) where there exists a power to the transferee to recover the sum named as the price of the repurchase; (vi) where there is a covenant for the payment of interest; or (vii) where the stipulated period for repurchase is a long one, in all of which cases the deeds are to be taken as constituting mortgages.(6) But a mere stipulation as to the payment of interest is not by itself conclusive to shew that the

(1) *Tailby* v. *Official Receiver*, 13 App. Cas., 536.

(2) *Bhobosoondree* v. *Issurchunder*, 11 W.R., 36 (42) P.C.

(3) *Anderson* v. *White*, 2 De G. & J., 97; *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D., 421.

(4) *Barnhart* v. *Greenshields*, 9 M. R. C. Cas., 18; *Maxwell*. v. *Montacute*, Prec. Ch., 526; *Douglas* v. *Calverwell*, 3 Giff., 251.

(5) Powell on Mortgages by Coventry 125*a*; *Brooke* v *Garrod*, 3 K. & J., 608; De G. & J., 62; *Williams* v. *Owen*, 5 My. & Cr., 303.

(6) *Modhu Sudan* v. *Rhidoy Moni*, 6 C. W. N., 192.

transaction is not an absolute sale, but a mortgage. (1) The difference between a transaction by way of sale with a right of repurchase and a mortgage is very important with reference to the consequences of each; for whereas in a mortgage, even after forfeiture at law, the mortgagor has his right of redemption in equity, yet in the case of a sale with a right of repurchase the time limited, being regarded as of the essence of the contract, must be strictly observed, and there is no principle on which the Court of Equity can relieve, if it is not so observed.(2) There is also this further important difference, *viz.*, that in the case of a sale, with an option of repurchase, if the purchaser die seized, and *then* the right to repurchase is exercised, the money goes to his real representative and not, as in the case of a mortgage, to his personal representative. (3) The law above laid down has been followed in India. (4) In one case the test laid down was that if the vendee could insist upon the recovery of the price of the repurchase, the transaction was a mortgage, otherwise a sale. (5) "The best general test of the intention of the parties in these cases," says Dart "seems to be the existence or non-existence of a power in the original purchaser to recover the sum named as the price of such repurchase; if there is no such power, there is no mortgage." (6)

Parol evidence.

1186. As stated before, is not permissible to the parties to prove by parol, that a sale was intended to be a mortgage, or *vice versa* (§§ 1156, 1157). But this does not exclude parol evidence of contemporaneous acts and conduct which the courts allow as an aid to construction. What then are the acts and facts of which parol evidence may be adduced? Now since a mortgage essentially differs from the other forms of transfer in that it is a *security* for a debt all evidence conducive to that end or calculated to negative such an inference would be both equally admissible. Cases have been given in the previous chapter of transactions which the courts have construed to constitute a sale as distinguished from a mortgage (§§ 956, 957). Those cases in which the transactions have been characterized as mortgages may now be considered, and in considering them the same canon which is the cardinal one for the construction of the Indian deeds, should be kept in view, namely, that what one has to see is not the garb but the gist of the transaction, and that for that purpose not the particular paragraphs but the general context should be taken into consideration. To take an instance. The obligor covenanted: "The lands of the three Inamdars are in my possession. I will give you half their produce as interest and the other half after payment of the assessment in reduction of the principal. If I fail to pay you, you may let the lands to others and take the profits, and I shall not be entitled to have it back until the money is paid." Here the obligor covenants that he will give the obligee the produce of certain lands in payment of the debt and interest. This is then a mortgage and the superaddition of payment by instalments and the power of sale does not transform the nature of the security. (7) A deed provided that the land mentioned in it should be security for the amount stated, that the period of redeeming the land was three months from the date of the deed, and that if the

(1) *Moahu Sudan* v. *Rhiday Moni*, 6 C. W. N., 192, distinguishing without comment—*Bhagwan* v. *Bhagwan*, I. L. R., 12 All. 387; *Ali Ahmad* v. *Rahmatullah*, I. L. R., 14 All., 195; *Bai Moti Vahu* v. *Mamubhai*, I. L. R., 21 Bom., 709.

(2) *Barrel* v. *Sabine*, 1 Vern., 268.

(3) *Thornbrough* v. *Baker*, 2 L. C. 1046; *St. John* v. *Wareham*, cited 3 Swan., 631; and see the case of *Drant* v. *Vanse*, 1 Y. & Co., C. C., 580; Snell's Equity, pp. 651, 352.

(4) *Govinda* v. *Jeshi*, I. L. R., 7 Bom., 73; *Lakshmi* v. *Krishna*, 7 M. H. C. R., 6.

(5) *Ibid.*

(6) Dart's V. & P., (6th Ed.), 925.

(7) *Balshet* v. *Dhondo*, I.L.R., 26 Bom. 33 (39).

amount was not so paid, the executant should have no right of claim to the said land. It contained no provision as to payment of interest. It was held that the transaction evidenced by the deed was a mortgage and not a sale. (1) In construing a mortgage little help cannot be got from the wording of another document which may have been executed under a different set of circumstances. (2)

1187. In another case the *Muddata Kriyam*,(3) dated 10th April 1885, ran as follows:—"As I have conveyed to you as sale for Rs. 6,000 the Papuchetti Seri adjoining the land of Kasbah Jaggannatapuram in the zemindari of Madugula, they are given you for absolute sale: so the said sale-money has been received at the time of sale. In the event of my paying you the principal Rs. 6,000 within six months from this date, you must give back the said land to me. In the event of our not being able to pay according to the said stipulation, you should hereditarily from son to grandson enjoy the produce of the said land, yourself paying to Government the assessment fixed on a subdivision, reckoning this sale-money to be a pure sale." It was held that the document was a sale with a condition for repurchase as the designation of the word *Muddata Kriyam* itself would shew. "The length of time (thirty years)," the Court observed, "is in favour of the hypothesis of sale, as is the fact, much noticed in all the English cases, that there is no remedy for the vendee's money and no interest charged upon it." (4) It is sometimes said that a fair criticism by which the Court is to decide whether a deed be a mortgage or not is—"Are the remedies mutual and reciprocal?" but such a test is obviously inapplicable to an usufructuary mortgage in which the rights of the mortgagee are defined by the special terms of his contract.(5) Thus where a purchaser of land, another person advancing the purchase-money for him, granted to the latter a *mokurari patta*, or perpetual lease, not as a security for the debt, but as an absolute acquittance of it and at the same time an *ikrarnama* was executed, whereby it was stipulated that when the grantor or his heirs should pay to the grantee or his heirs, the amount of the above debt without interest, out of his or their own moneys without borrowing from any other persons, then the *patta* should be cancelled, the grantor having no claim to mesne profits during the possession of the mokuraridar, it was held with regard to the terms of the instruments, and the circumstances under which they were made, that the transaction was not a contract of mortgage, but evidence of a sale and acquittance of a debt with power of repurchase. (6)

1188. A document purporting to be one of sale, though it be accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be

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(1) *Nagindas* v. *Kara*, 6 Bom.L.R., 630.

(2) *Tukaram* v. *Ramchand*, I L.R., 26 Bom., 252 (258), F.B.

(3) This word has been thus translated by Prof. Wilson in his Glossary of Indian terms. "Land mortgaged with option to the vendee to consider it as his property if the mortgage is not redeemed within a stipulated period."

(4) *Lakshmi* v. *Sri Krishna*, 7 M.H.C.R., 6 (12); to the same effect in *Ayyavayyar* v. *Rahimansa*, I.L.R., 14 Mad., 170.

(5) *Situal* v. *Luchmi*, I.L.R., 10 Cal., 30 P.C. So in an English case the L.C. said: "I think that the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be" —*Alderson* v. *White*, 2 DeG. & J., 105, followed in *The Manchester, &c., Ry. Co.*, v. *The North Central Waggon Co.*, 13 App. Cas., 568; *Bhagwan* v. *Bhagwan*, I.L.R., 12 All., 387 (391), P.C.

(6) *Goodman* v. *Grierson*, 2 B. & B., 274; observed on in *Tukaram* v. *Ramchand*, I. L.R., 26 Bom., 252 (257), F.B.

construed as if it were a mortgage [1] though in one case it was so held. [2] In that case the deed purporting to be a sale contained the following clause. "If within six years the amount was paid back the sale would be void." And which was held to constitute a mortgage by conditional sale, and not an out and out sale, because it exactly conformed to the definition of a mortgage by conditional sale as given here. Where no time is mentioned for repurchase, the sale does not necessarily become absolute, so as to deprive the vendor or his representative of the right of repurchase. [3] And a clause as to forfeiture of the right of repurchase on infraction of a condition in the lease will not deprive the vendor of his remedy. [4] Where by two documents contemporaneously executed the vendor absolutely sold, and the vendee agreed to reconvey after reimbursing himself for the expenditure incurred by him on account of the vendor, it was held that the transaction was in the nature of a mortgage, and the counter *kararnama* executed by the vendee, even though not registered, operated as a deed of defeasance to the title acquired under the first agreement. Similarly in another case the facts were these:—"The co-sharers of a certain estate sold it to *B* on the same day as the vendors executed the conveyance of such estate to *B*; the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term on repayment of the purchase-money or a proportionate share thereof, and in such case the sale would be considered cancelled; provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property or otherwise. The heir of one of the vendors having sold his share of such estate to *A*, the latter sued *B* to redeem such share. The case having been referred to the Full Bench, the majority of the Judges held that the nature of the transaction between *B* and his vendors must be determined by looking at both the conveyance and the agreement, and, both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption. [5] But where the plaintiff executed an instrument in consideration of a debt of Rs. 150, in favour of the defendant empowering him to enjoy a certain piece of land for a period of twenty years, after which it was to be restored to the plaintiff free from all claims, it was held that since there was no stipulation for the payment of either the principal or interest, the transaction was not a mortgage. Where certain vendors sold some property to the purchaser and some months afterwards the latter executed an agreement in favour of a vendor agreeing to resell it to him if on a certain date he is paid a fixed sum of money from his own earnings, the Court held that since the two transactions were not between the same parties, the latter agreement could not be used to modify the earlier transaction and convert what was ostensibly a sale into a mortgage. [6]

It is not the name given to the contract, but its contents or the relations constituted by it, that determine its nature. [7] In this respect the law of this country is of a piece with the English law; indeed the rule on this subject is one dictated by common sense; and in every case the question is what, upon a fair construction of the instrument and of the surrounding circumstances

(1) *Bhagwan* v. *Bhagwan*, I.L.R., 12 All., 387, P.C., following *Alderson* v. *White*, 2 De G. & J., 105.

(2) *Gurusamy* v. *Swaminadha*, 2 M.H.C. R., 450.

(3) *Ballubdar* v. *Birjroj Rai*, 10 I. C. 630.

(4) *Chidambara* v. *Manikka*, 1 M.H.C.R., 63.

(5) *Kakerlapoody* v. *Vutsavoy*, 2 M.I.A., 1; *Ram Saranlal* v. *Amrita Kuar*, I.L.R., 3 All., 369, F.B.

(6) *Uthandi* v. *Ragavachari*, I. L. R., 29 Mad., 307.

(7) *Abdulbhai* v. *Kashi*, I.L.R., 11 Bom., 462; following *Williams* v. *Owen*, My. & Cr., 303 (308); *Lakshmichand* v. *Chatur* (1884), B.P.J., 162; *Hari* v. *Vishnu*, I. L. R., 28 Bom. 349 (357).

and conduct of the parties, should be the meaning of the transaction.(1) But if the words of a deed are plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years could not affect its construction and the effect to be given to it.(2) Nevertheless lapse of time is a material factor in determining how the transaction had been regarded by the parties. As Lord Cranworth, L. C., said : "The Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be."(3) In all cases, however, the *onus* of proving that an instrument is not what it purports to be is on the person alleging it, and it has been held that the *onus* gets heavier with each year of possession.(4) Such a transaction cannot, however, be proved so as to affect a *bona fide* purchaser without notice,(5) *i.e.*, an innocent purchaser without notice of the existence of the mortgage who merely buys from a person who was in possession of the title-deeds and was ostensible owner of the property. (6) If the vendor of the property stipulates for its reconveyance to him on certain terms, he must, in order to entitle him to the reconveyance, act up to those terms strictly. (7)

1189. Mortgage distinguished from Trust.—Where the debtor stipulates that he would repay the amount of the loan by a certain date, and that if he did not pay the money as stipulated, he should lose his right to certain land, and that the creditor should take possession thereof, and that after the creditor took possession of the land no interest should be paid by him, the creditor paying the rent out of the profits of the land without any objection, it was held that the document did not amount to a mortgage, nor did it even create a charge. (8) The question whether a document operates as a mortgage or a trust is a question of construction. In one case referred to the Full Bench, the document appointing a *Samudayam* or manager ran thus :—"Teet granted by the Uralers to Chitambara Patter: You are appointed *Samudayam*...and we have received from you a *kanom* of 18,000 fanams on the devasom properties. From the gross rent of 2,850 paras of paddy due to the devasom you are to appropriate 1,800 paras to interest on the money due to you, and after deducting the amount and 400 paras of paddy allowed to tenants for interest on their *kanom* amount, 8,000 fanams, you are to defray the expenses of the devasom with the remainder and keep accounts." It was held that having regard to the fact that the document was not framed like an ordinary *kanom* document and there were no words of demise or *kanom* and no intention of transfer of property or right of possession, the instrument was not a mortgage, although the trustees might be under an obligation to repay the debt before determining the holder's power to collect the rents due to the devasom. In short, the document created a *charge* but not a usufructuary mortgage.(9)

In taking into consideration the effect of an instrument, the Court is to

(1) *Bhagwan* v. *Bhagwan*, I.L.R , 12 All., 387 (391) P. C., following *Alderson* v. *White*, 2 De. G. & J., 105 ; *Balkishen* v. *Legge*, I.L. R., 22 All., 149 P. C. ; *Preonath* v. *Madhusudan*, I.L.R., 25 Cal., 603 F. B.; *Tukaram* v. *Ramchand*, I. L. R., 26 Bom., 252, F. B., and cases cited *supra*.

(2) *North Eastern Ry.* v. *Hastings* [1900], A. C., 260.

(3) *Alderson* v. *White*, 2 De G. & J., 105. See § 336 rule 7.

(4) *Alderson* v. *White*, 2 De G. & J., 105 ; *Manchester Ry. Co.* v. *The North Central Waggon Co.*, 13 App. Cas., p. 568, cited in *Bhagwan Sahai* v. *Bhagwan Din*, I. L. R , 12 All., 387, P. C.

(5) *Rakken* v. *Alagappudayan*, I. L. R., 16 Mad., 80.

(6) *Kashi Nath* v. *Hurrikur*, I.L.R., 9 Cal , 893. See s. 40, *ante*.

(7) Dart, 240, 926 ; *Gurusamy* v. *Swaminadha*, 2 M.H.C.R., 450.

(8) *Madho Misser* v. *Sidh Binaik*, I.L.R., 14 Cal., 687.

(9) *Krishnan* v. *Veloo*, I.L.R., 14 Mad., 301 (309), F.B.

look to the surrounding circumstances, the conduct of the parties and the subsequent documents, petitions or orders affecting it.(1) (§§ 954, 1154—1160).

1190. Mortgage and certain Leases distinguished.—A mortgage sometimes bears much closer affinity to certain forms of leases, from which it is not often easily distinguishable. The criterion for distinguishing such leases from a mortgage is, however, the same, *viz.*, whether the transfer is made to secure a debt. "*Zur-i-peshgi* leases or leases granted on a sum of money being advanced are on the same footing as pure usufructuary mortgages and are dealt with as such, but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be in the nature of a mortgage."(2) This form of a lease is often classed as a form of an usufructuary mortgage,(3) but from which it certainly is distinguishable inasmuch as while a mortgage is a *security* for the payment of money or for the performance of an engagement, a lease, as such, whatever its character, always implies a grant of land for a fixed term free of rent,—it may be in consideration of past and present advances. (4) Thus an instrument purporting to be a mortgage with possession of certain villages for a period of fourteen years which provided that on the expiration of the term the mortgagor "shall come in possession of the mortgaged villages without settlement of accounts..... that on the expiration of the term..... the mortgagee shall have no power whatever in respect of the estate.... and after the expiration of the term this mortgage-deed shall be returned to the mortgagor without his accounting for the mortgage-money secured under the document was nominally a mortgage but in reality only a lease and was so adjudged by the Privy Council who said: "It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances." (5) Of course, such deeds should not be held to be mortgages merely because they are so designated by the parties, (6) although the fact that the parties have so designated it shews that they believed themselves to be clothed with all the rights and remedies incidental thereto. (7)

1191. *Zur-i-peshgi* leases were before the Act indiscriminately regarded as a species of an usufructuary mortgage. Thus a lease at a yearly rent of Rs. 214 from which a deduction of Rs. 111 was to be made on account of interest, and in which it was stipulated that "if on the expiration of the lease the loan should not be repaid, the lease should continue," was held to be a *zur-i-peshgi* lease to be dealt with as a mortgage. (8) But such a case would now be dealt with as a mortgage. A deed headed as a "mortgage-deed with possession regarding land" provided that in consideration of a debt of Rs. 240 due by the plaintiff (an agriculturist) to the defendant, the latter was to take possession of certain

(1) *Kader Moideen* v. *Nepean*, I.L.R., 21 Cal., 882 P.C.: *Krishnan* v. *Veloo*, I.L.R., 14 Mad., 301 (309), F.B.

(2) *Basant Lal* v. *Tapeshri*, I.L.R., 3 All., 1 (4).

(3) It was so held, in *Dhannu* v. *Bechar*, 16 C.P.L.R., 49.

(4) *Nidhasah* v. *Murlidar*, I. L. R., 25 All., 115 (119) P.C.

(5) *Ib.*

(6) *Tukaram* v. *Ramchand*, I. L. R., 29 Bom., 252, F. B., following *Balkishen* v. *Legge*, I. L. R., 22 All., 149, P.C., but *contra*.

(7) *Tukaram* v. *Ramchand*, I. L. R., 26 Bom., 252 (258), F. B.

(8) *Kristo Coomar* v. *Chowdhree Beeroj Singh*, 2 Hay., 159; *Dorappa* v. *Kundukuri*, 3 M. H. C. R., 363; *Mashook Ameen* v. *Marem Reddy*, 3 M. H. C. R., 31. The same view since taken in *Dhannu* v. *Bechar*, 16 C. P. L. R., 49 is unjustified by the Act.

lands for ten years and appropriate the income thereof in liquidation of the debt, and that after the expiry of the said period the right to the land was to cease. The mortgagor having sued for redemption before the expiration of the ten years, it was held that the transaction being undoubtedly an anomalous mortgage and not a lease the mortgagor was entitled to redeem. (1) The fact that a transfer does not fall into the category of one or other of the recognized forms does not make it the less a mortgage, for it may be an anomalous mortgage. (2) In a case the obligor borrowed money from the plaintiff without interest, and executed a deed promising to repay the amount by a given date, failing which he promised to execute a patni lease of certain specified property, the loan being then considered as a bonus for such a lease. It was further agreed that if the obligor failed to execute such a lease, the original deed should be regarded as a patni patta. The last condition having come in for enforcement on the debtor's failure to repay the loan and to execute the patta, it was held that the creditor was entitled to possession on the footing of a patni from the date of suit, and that the transaction was not a conditional sale but a contract to create a patni, subject to certain contingencies. (3)

1192. The earlier decisions on this subject singularly lack in uniformity and while in certain cases a *zur-i-peshgi* lease was invariably held to be an usufructuary mortgage,(4) there are cases in which a *zur-i-pesghi* lease is placed on the footing of an usufructuary mortgage only when there is a power of redemption reserved to the lessor expressly or by implications.(5) A *zur-i-peshgi* lease, of course, presents many common features of an usufructuary mortgage, and so far they are similar, but it does not thence follow that the two are the same. Eliminating their common features the points on which an usufructuary mortgage stands out as apart are, that being a mortgage it secures a *debt* for if there is no debt there can be no mortgage,(6) and in the former case, there being a debt there is the mutuality of remedy.(7)

When a mortgage is given by way of lease, the loan is generally made repayable on the same day that the lease expires, the deed containing a stipulation that if default is made, the lender and lessee shall continue in possession on the terms of the lease, until the debt is repaid from the profits of the land or otherwise.(8) Thus where the plaintiff borrowed Rs. 1,400 from the defendant and leased to him for eight years a piece of land and a warehouse standing thereon on a rental of Rs. 16-12 per mensem, out of which Rs. 14 were to be appropriated towards liquidation of the debt and the balance Rs. 2-12 paid as rent to the plaintiff : on the destruction of the warehouse by fire, the plaintiff having brought a suit to recover the site together with the arrears of rent, before the lessee was fully paid off, it was held that the gist of the agreement being not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises, the relationship between the parties

(1) *Tukaram* v. *Ramchand*, I. L. R., 26 Bom., 252 (258) F. B.

(2) *Ibid.*

(3) *Juseemoodden* v. *Huro Soonduree*, 19 W. R., 274.

(4) *Ratan Singh* v. *Greedharee*, 8 W. R., 310 ; *Sheogolam Siagh* v. *Roy Dinkur*, 12 W. R., 215 ; *Ishain Chunder* v. *Sooja Bebee*, 15 W. R., 331 : *Ram Doolary* v. *Thakoor Roy*, I. L. R., 4 Cal., 61 ; *Basant Lal* v. *Tapeshri*, I. L. R., 3 All., 1.

(5) *Gopal* v. *Desai*, I. L. R., 6 Bom., 674 (680) ; *Abbesing* v. *Jasvat Singh* (1880). Bom., unrep. App., No. 31.

(6) *Lakshmichand* v. *Chatur* (1884), B. P. J., 162 ; *Abdulbhai* v. *Kashi*, I. L. R., 11 Bom., 462 (466) ; *Manickchand* v. *Vishnoo*, 12 C. P. L. R., 96.

(7) *Williams* v. *Owen*, 5 My. & Cr., 303 (308) ; followed in *Abdulbhai* v. *Kashi*, I. L. R., 11 Bom., 402 (466).

(8) Macpherson on Mortgage (7th Ed.), p. 12.

was that of the mortgagor and mortgagee and not that of a landlord and tenant.(1) In another case an instrument therein described as a lease, was executed in consideration of Rs. 120, and it provided that the party paying that sum should remain in possession of certain land for twelve years, but contained no provision for repayment of that sum or for the payment of rent. It was held that the instrument was a usufructuary mortgage and not a lease (2) (§ 1255).

1193. What may be mortgaged.—Any property that is transferable may also be mortgaged. Property which cannot be transferred, and therefore cannot be made the subject of mortgage, has been specified in section 6 where the subject will be found exhaustively set out.

1194. Persons competent to mortgage.—The Act being professedly fragmentary does not deal with the question of persons capable of mortgaging, but it is clear that a mortgage being a contract every person is competent to make it, who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.(3) "The right to mortgage is *prima facie* incident to the right of property and co-extensive with it; but to this rule there are exceptions in the case of minors and persons of unsound mind, and of persons who are disqualified by law from mortgaging. Thus a Hindu widow, holding property belonging to her husband's estate which devolved to her by succession upon his death, cannot, except under legal necessity, (4) make a mortgage which will be valid against her reversioner's property. (§§ 303-309). And if the estate is ancestral property belonging to a Hindu family in which the doctrines of the Mithila school or of the Mitakshara prevail, and has been mortgaged without the consent of all those interested in it, or if the land is *mal-i-wuqf* or *dewuttur* devoted to religious purposes, a mortgage of it may generally be set aside." (5) (§§ 189-193, 219-321). Guardians and managers of the disqulified persons are under certain circumstances allowed to mortgage or sell the property of their wards; as, *e.g.*, when it is for the advantage of the minor, or when the case is one of urgent necessity.(6) A mortgage of a minor's property executed by a guardian without the sanction of the Court, is not void, but voidable, and then he must restore to the mortgagee the benefit that he has received thereunder.(7) The mortgage by a *watandar* of *watan* property has no force beyond the life of the *watandar* mortgagor.(8) Documents executed in the mofussil come within the *dictum* of the Privy Council, that deeds and contracts of the people of India ought to be liberally construed, regard being had to the sense, and not so much to the form of expression.(9) But in construing a deed the first question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all cases of construction, and the

(1) *Venkateshawara* v. *Kesawa*, I. L. R., 2 Mad., 187.

(2) *Reference under Stamp Act*, s. 46, I. L. R., 31 Mad., 358; *Reference under Stamp Act*, s. 46, I. L. R., 7 Mad., 203.

(3) Indian Contract Act (IX of 1872), s. 11. s. 7 *ante*; §§277-329.

(4) Substituted for "certain circumstances" in the original.

(5) Macpherson on Mortgage (7th Ed.), p. 24; *Tikaram* v. *Deputy Commissioner of Bara Banki*, I. L. R. 26 Cal., 707, P. C.; *Surja Prasad* v. *Golab Chand*, I. L. R., 27 Cal., 672.

(6) *Mt. Bukshan* v. *Mt. Maldai*, 3 B. L. R., (A.C.). 423; *Hunooman Pershad* v. *Mt. Babooee*, 6 M. I. A., 392 (412).

(7) *Sinia Pillai* v. *Munisami*; 9 M.L.R., 64; *Sadashiv* v. *Trimback*, I. L. R., 23 Bom., 146.

(8) *Padapa* v. *Swamirao*, I. L. R., 24 Bom. 556 P. C., approving *Kalu* v. *Hanmapa*, I. L. R., 5 Bom., 435.

(9) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.A., 411; *Janardan* v. *Anant*, I.L.R., 32 Bom., 386.

disregard of which, often leads to erroneous conclusions.(1) Under English Law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract, contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it. This is also the law of India, and there is nothing in section 91 of the Indian Evidence Act against it.(2) The subject has been already discussed before to which reference should, if necessary, be made for more particular information (§§ 277-329).

1195. What passes on Mortgage.—It is a well-known rule that on the transfer of a man's whole property, or right, title, or interest therein to a purchaser for value every interest in whatever character vested in him passes by the conveyance, it being immaterial that it did not vest in him in the character in which he became a party to the conveyance.(3) "This is clear," observed Lord St. Leonards, "that when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance." (4) But a person may provide that only a limited interest shall pass, in which case the interest conveyed will of course be so limited. A trustee having also a beneficial interest in the property may provide that only one or the other interest vested in him shall pass, and if it so appear from the context the contrary cannot be presumed.(5) Thus where a person conveys his own right or his own property, it cannot be presumed that he had thereby also intended to convey property which he had in *autre droit*,(6) as an executor. On the other hand, conveyance by a person described as an executor and assigning the estate he held *qua*-executor would not by force of the words "and all the estate, right, title, and interest" pass that which he held in his own right. (7) So on a mortgage of his property the mortgagor shall be deemed to convey all his interest therein in whatever capacity possessed, unless he qualifies it by apt words, or it is necessarily so implied (§§ 344, 345).

1196. Incidents of Mortgage-security.—The incidents of property on transfer generally have been before discussed (§§ 336-366). As regards the incident passing under the consensual security of a mortgage, the question depends upon what is an incident of the property. In addition to the benefits enumerated before (§§ 336 366) such incidents include the good-will of business of an impersonal character as distinguished from that attaching to personal reputation of the owner. (8) Such good-will may comprise the use of the trade-name of the firm, or of its trade-mark (9) and where the property sold is

(1) *Per* Lord Wensleydale in *Monypenny* v. *Monypenny*, (1875) W.N., 201 ; *Kishori Mohan* v. *Shib Chandra*, 7 C.L.J., 291 (295).

(2) *Venkatasubbiah* v. *Govindarajulu*, I.L. R., 31 Mad., 45.

(3) S. 8 *ante*, comm. §§ 339, 344, Co. Litt., 345-*a*, *Allham's Case*, 8 Rep., 150-*b* "If a man be seized of land in fee-simple, or for life, or have an estate in it for years, by Statute merchant, a staple, *eligit* or the like ; and he grants all his estate, or all his right, or all his title, or all his interest of and in the land ; by this grant all his estate, and as much as he is able to grant doth pass." Shep. Touch, 98 ; *Bhojobari* v. *Bhagabati*, 17 I. C. 494 (495, 496), *Sheolal* v. *Nande Lal*, 8 N. L. R. 123 (127).

(4) *Drew* v. *Earl of Norbury*, 9 Ir. Eq. R., 71, 524, to the same effect. *Per* Lord Cranworth, C., in *Johnson* v. *Webster*, 4 DeG. M. & G., 488.

(5) *Strange* v. *Hawkes*, 4 DeG. M. & G., 186.

(6) Or "The right of another."

(7) *Rooper* v. *Harrison*, 2 K. & J., 121.

(8) *Cooper* v. *Metropolitan Board*, 25 Ch. D., 472 (479)—As to when it does not pass ; see In re *Bennett* [1899], 1 Ch., 316.

(9) In re *Magnolia Metal Co.'s Trademark* [1897], 2 Ch., 371.

a public house with the good-will also a right to the licenses. But in such cases the first thing to see is the deed itself, for if it defines the right transferred, more, of course, cannot pass. (1) And so if an interest is transferred it does not imply transfer of another and independent interest which the transferor may possess in the property. A mortgage of "the entire zemindari of Palur" together with the zemindar's "entire right and income and the *kattubadis* or enfranchised inams" was followed by a schedule specifying by name the villages constituting the zemindari, one of these being the village of Sabuliya, in which *qua*-zemindar the mortgagor possessed not only the right to collect a fixed *kattubadi*, but over which at the date of his mortgage he held also a mortgage from the inamdars, which the mortgagee claimed in virtue of his deed. But it was held that the former right alone belonged to him *qua*-zemindar, and was an incident of the zemindari tenure, and would be comprised in the expression "with our entire right and income" occurring in the mortgage-instrument. The latter right, as mortgagee, he did not possess *qua*-zemindari and it was not an incident of the zemindari tenure, *i.e.*, of the estate as permanently settled under the Regulation. If the instrument in question had been an outright sale of the zemindari and not a mere mortgage, it could hardly be seriously contended that the zemindar's mortgage-interest in the village would pass under such conveyance. (2) So in an English case where the mortgagor after specifying certain properties, which were mortgaged, also conveyed by way of mortgage, "all other lands, tenements and hereditaments (if any) in the county of Middlesex" it was held that the mortgage could not be said to have included also the manor of which the mortgagor was seized in fee: "I think the clear intent and purport must be held to be simply a sweeping in of other property *ejusdem generis* with the property which had been so conveyed, if any there should be, certainly not to include a copyhold property, and manorial rights in property of a totally different character from anything attempted to be conveyed or specified throughout the deed." (3) Mortgage of business-premises does not *per se* carry a right to the stock-in-trade, even though it may have been referred to in the inventory. (4) So where a mortgage of a foundry with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith to be signed by the parties hereto, and read and construed as forming part of these presents." The inventory extended over twenty-one pages, on the twentieth page of which contained this clause: "The stock-in-trade consists of bolts, brass work...both finished and in preparation. And at the top of the twenty-first page were these words: "Also all cast and wrought iron...and all other stock-in-trade in and upon the before-mentioned foundry, workshops and premises," which was followed by this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils and things in, upon, or about the foundry mortgaged by us this day." The question being whether the stock-in-trade was included in the mortgage, the Court held that it did not inasmuch as the inventory could not enlarge the deed which made no mention of the stock-in-trade, "even if an express intention to include articles not coming within the terms of the deed had been shewn by a separate writing, that

(1) *Ruter* v. *Daniel*, 30 W.R. (Eng.), 801; *Garrett* v. *Justices of Middlesex*, 12 Q.B. D., 620.

(2) *Bhimaraju* v. *Sri Kunjabehari*, I. L. R., 25 Mad., 42 (49, 50).

(3) *Rooke* v. *Lord Kensington*, 25 L.J., Ch. 795; followed in *Bhimaraju* v. *Sri Kunjabehari*, I.L.R., 25 Mad., 42 (50).

(4) *Per* Bacon, C.J., in *ex parte Jardine*, L.R., 10 Ch., 322 (325 *note*).

could not have made the deed operate in a way inconsistent with its plain terms, however it might lay ground for rectifying it." (1)

1197. Fixtures being incidents of the property to which they are annexed follow as a matter of course the corpus, unless a different intention is expressed or may be inferred to exclude the rule. Such an intention may be inferred in an English mortgage from the mortgagor being left in possession, which is construed to impliedly authorize him to carry on his business, and to hire and bring in such fixtures as are necessary for his trade, and to agree with the owners as to their removal. He cannot claim to include in his security trade-fixtures set up or removed under such agreements.(2) But this case was distinguished by Lindley, L. J., in a subsequent case on the ground that there the things were unfixed on purpose to prevent the mortgagee taking them.(3) Reference to the case itself would, however, shew that North, J., had based his decision on the ground that the fixtures did not belong to the mortgagors who could not confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them.(4) But a real support for such a decision would be found in the doctrine of estoppel, for a mortgagee without notice would be entitled to a fixture as, for instance, a gas engine let out to the mortgagor on the hire-purchase system before the payment of the instalments due thereon.(5)

1198. The question what constitutes a fixture is one which depends upon the nature of the annexation to the land,—the intention of the person annexing it to the soil being material only so far as it can be presumed from the decree and object of the annexation (§§ 77-91). A gas engine affixed to freehold land of the hirer by bolts and screws to prevent it from rocking and used by him for the purposes of his trade, becomes a fixture and an inseparable incident of the land.(6) But chairs hired for use in a hippodrome with an option of purchase do not cease to be chattels merely because they were screwed down in accordance with the requirements of local authority.(7)

Substituted security.

1199. Ordinarily, a mortgage would fasten upon property which the mortgagor may have obtained by exchange or partition and if the original property has been sold the sale-proceeds would be regarded as the shape into which the mortgagee's security had been converted.(8) So on the compulsory acquisition of the mortgaged property, the mortgagee would be entitled to the compensation-money. The subject will be found more fully set out in the sequel.(9)

1200. Consideration of Mortgage.—Any lawful agreement may form the consideration of a mortgage. Indeed, the object of a mortgage being auxiliary to a contract, whatever is a lawful consideration for a contract is

(1) *Per* Sir W. M. James, L.J., in *ex parte Jardine*, L.R., 10 Ch., 322 (327).

(2) *Cumberland Union Co.* v. *Maryport, &c., Co.* [1892], 1 Ch., 415; followed in *Gough* v. *Wood & Co.* [1894], 1 Q.B. 713; *Huddersfield Banking Co.* v. *Lister & Son, Ltd.*, [1895], 2 Ch., 273; *Hobson* v. *Gorringe* [1897], 1 Ch., 182.

(3) *Huddersfield Banking Co.* v. *Lister & Son, Ltd.* [1895], 2 Ch., 273 (282, 283).

(4) *Cumberland Union Co.* v. *Maryport, &c., Co*, [1892], 1 Ch., 415.

(5) *Hobson* v. *Gorringe* [1897], 1 Ch., 182.

(6) *Hobson* v. *Gorringe* [1897], 1 Ch., 181; followed in *Reynolds* v. *Ashby & Son, Ltd.* [1903], 1 K.B., 87.

(7) *Lyon & Co.* v. *London City & Midland Bank* [1903], 2 K.B., 135.

(8) *Bymath* v. *Ramoodin*, 21 W.R. 233 P. C.; *Heera* v. *Janokee*, 16 W.R., 222; *Douglas* v. *Collector of Benares*, 5 M.I.A. 271; *Krishtodas* v. *Ramkant*, I.L.R., 6 Cal., 142; *Premchand* v. *Purnima*, I.L.R., 14 Cal., 546; *Gosto Behary* v. *Shib Nath*, I.L.R., 20 Cal., 241; *Beni* v. *Rewat Lall*, I.L.R., 24 Cal., 746; *Lakshman* v. *Gopal*, I.L.R., 23 Bom., 385; *Mahadin* v. *Sheoprasad*, 16 O.C. 161.

(9) S. 65, comm. *post*.

equally a lawful consideration for a mortgage (§§ 263—271). An agreement to withdraw from a pending case or appeal is a lawful consideration for a mortgage. (1)

1201. The consideration of a mortgage must be, to use a phrase used in the English Conveyancing Act, " money or money's worth," (2) or in other words, money or an obligation having a pecuniary value. The consideration may be past or future, money paid or promised. A mortgage without consideration is, of course, unenforceable. (3) It may consist of the performance of an engagement of a character the breach of which would entitle the obligee to recover damages; that is to say, it must be a legal as distinguished from a moral obligation. It is apprehended that such an engagement may be equally past or prospective. For a singer who had engaged to sing for a consideration takes a good mortgage whether the consideration therefor have been that he had sung in accordance with his agreement or had promised to sing in future. Nor does a mortgage cease to be enforceable merely because a part only of the consideration specified in the bond has been paid. (4) But on this point there is a possibility for divergence of opinions, since if the mortgage contract be regarded as indivisible, then a partial failure of consideration would lead to the failure of the entire mortgage. And this is the view taken in the Punjab (5) where in the absence of a specific contract postponing payment, failure or delay in payment of full consideration either to the mortgagor, or to prior incumbrancer, after such payment has been demanded by the mortgagor, avoids the mortgage and destroys the mortgagor's lien even on subsequent tender of the unpaid consideration, it being immaterial whether the failure or the delay has or has not caused incovenience or loss to the mortgagor. According to this view, in the absence of express stipulation postponing payment, it is presumed that payment is intended to be made immediately or within a reasonable time. (5) The view taken in Madras appears to be that where part only of the consideration is void or fails, or the mortgagee makes default in paying it, the entire mortgage is not void, but that it is good to the extent of the consideration that has validly passed (6); except in a case of fraud (7) or in which it is stipulated that the deed should be inoperative on failure or non-payment of any portion of the consideration. (8) It seems that a solution of the question would be found in section 39 of the Indian Contract Act (9) which enacts that " when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance "—and which puts the mortgagor on election whether to cancel the entire mortgage or acquiesce in its continuance, in which case the entire

(1) *Kotappa* v. *Vallur*, I.L.R., 25 Mad., 50 (54); *Seshachala* v. *Varada*, I.L.R., 25 Mad., 55.

(2) 44 & 45 Vict., c. 41, s. 2.

(3) *Ralla Ram* v. *Malawa Ram*, (1911) P.W.R., No. 123.

(4) *Bajrangi* v. *Udit Narain*, 10 C.W.N. 932; *Rashiklal Lal* v. *Ram Narain*, 9 A.L.J. 198 (204); *Jaladanki* (In re), 11 I.C. 868 (869); *Tirumal* v. *Pandla*, 9 I.C. 289 (290); *Bhagabai* v. *Narayan*, I.L.R. 31 Bom., 352 (358); otherwise in the Punjab *Gokal Chand* v. *Rahman*, (1907), P.R., No. 59 F.B. where the failure of delay in payment of full consideration entails failure of the entire mortgage.

(5) *Gokal Chand* v. *Rahman*, (1907) P.R. No. 59; dissented from in *Rashik Lal* v. *Ram Narain*, I.L.R. 34 All., 273.

(6) *Rajai Tirumal* v. *Pandla*, I.L.R. 35 Mad. 114 (117) distinguishing *Subba Rao* v. *Devoor Shetti*, I.L.R. Mad., 126 on the ground that there the mortgagee had acquiesced in the cancellation of the entire mortgage by the mortgagor; to the same effect *Rashik Lal* v. *Ram Narain*, I.L.R. 34 All., 273 (278); *Bajrangi* v. *Udit Narain*, 10 C.W.N. 93; *Bhagabai* v. *Narayan*, I.L.R. 31 Bom., 352 (358); *Jaladanki* (In re), 11 I.C. 868 (869).

(7) *Sama Rao* v. *Doraswami*, 24 M.L.J. 266.

(8) *Shrinivasaswami* v. *Athmarama*, I.L.R. 32 Mad. 281 (282).

(9) Act IX of 1872.

property would remain charged for the consideration paid,(1) the mortgagee being at the same time entitled to sue for the balance of consideration and damages for its non-payment when due.(2) Where on a sale of property the purchaser mortgages the self-same property to the vendor to secure a balance of price unpaid, if the vendor is unable to give possession, in consequence of which the price of the sale is reduced, a proportionate reduction will also be made in the consideration of the mortgage.(3)

Running account.

1202. The consideration of a mortgage may be either (*a*) "the payment of money advanced or to be advanced by way of loan"; (*b*) "an existing or future debt"; or (*c*) the performance of a legal obligation. It will be noticed that since mortgage is a security for a debt, there is no mortgage if there is no debt. In this respect a mortgage is distinguishable from a lease in which money may be advanced, though not by way of loan. but the difficulty of distinguishing an advance from a loan often presents itself in practice, and it marks the narrow line which at times distinguishes the two transactions. "Money advanced by way of loan" is of course a past debt though it may fail to be an existing debt and may have become barred or otherwise irrecoverable. It will, however, support a mortgage, if the contract is otherwise good.(4) Money to be advanced by way of loan is, however, to be distinguished from a future debt, since while in the one case the money is presently payable as a part of the contract, in the other case it may not be so payable, though it is promised to be paid and would have to be paid in time. These terms would, for instance, include a mortgage given as a running security for the balance of an account.(5) So the mortgagor might execute a mortgage "as collateral and continuing security for any advances from them" and in which case the Court in Ireland admitted parol evidence to show that the security included past as well as future advances.(6) "It is apprehended that the same view might find favour should a similar case arise in this country.(7) A mortgage for "money to be advanced by way of loan" need not be limited either as to the amount secured thereby or the period during or within which it is to be advanced, though in practice both are usually specified. A security given for the balance of a current account would be presumably construed as a continuing security, and would, as such, hold good till the account is closed.(8) The question is one of construction and intention. A mortgage made for a sum to be advanced to the mortgagor was permitted to be proved as intended to be a continuing security to meet the running balance from time to time that might be due from the mortgagor.(9) Where a mortgage is given to secure payment by A to B of a specified sum, it is not an invariable rule of law that all payments made by A are to be applied in immediate and final liquidation of the sum named, or of first items in A's debt, or that, even if A, on a long course of transaction, should, after the execution of the mortgage, be for a time in advance to B, the mortgage is thereby satisfied. It may, in the absence of express stipulation, be presumed from the language and conduct of the parties after execution of the

(1) *Rajani Kumar* v. *Gauri Kishore*, I.L.R. 35 Cal., 1051; *Mehshi Bajrangi* v. *Udit Narain*, 10 C.W.N. 932, *Jaladanki*, In re, 11 I.C. 868 (869).

(2) *Rani Raghubans* v. *Raunak Ali*, 10 O. C. 69.

(3) *Digambar* v. *Nishibala*, 8 I.C. 91 (94).

(4) *Cf.* s. 25, Indian Contract Act (Act IX of 1872).

(5) *Henniker* v. *Wigg*, 4, Q.B. 792; *Boyes* (In re) L.R. 10 Eq. 467.

(6) *Hibernian Bank* v. *Gilbert*, (1877) 23 Ir. L.R. 321.

(7) S. 92 proviso (6) *ill.* (*p*), Indian Evidence Act (Act I of 1872).

(8) *Boyes* (In re), L.R. 10 Eq. 467 (470).

(9) *Ib.*, 6; 469.

mortgage that they intended it to stand as a continuing security. (1) But *prima facie* such a mortgage would be presumed to have been executed for an amount paid or payable. (2) Where the mortgagor allows a portion of the mortgage money to remain with the mortgagee in a deposit account in such a way that he could draw upon it and obtain the money at any time, it is as good as paid to him, and would be treated as covered by the mortgage. (3)

1203. The meaning of the term "debt" has been before considered (§§95—102). The consideration of a mortgage may consist of a decree obtained by the mortgagee. A mortgage-deed so executed is not unenforceable on the ground that it merely suspends the right to execute the decree,(4) but it has the effect of putting an end to the remedy on the decree by the fact of its being the actual and present satisfaction of the judgment-debt.(5) But, where the new contract contravened the provisions of section 257-A of the Code of Civil Procedure, 1882, omitted from the present Code, it was held to be unenforceable even by a separate suit. Hence if the mortgage be for a sum in excess of the sum decreed, the new contract was held void and even unenforceable, (6) to the extent of the decretal amount constituting its consideration. (7) Even the bargaining for any interest (8) or for an unusual rate of interest, as 36 *per cent.* (9) or even $10\frac{1}{2}$ (10) *per cent.* was construed to be an evasion of the law, and as such sufficient to vitiate the contract, unless it was sanctioned by the Court. But these restrictions only applied to the parties to the suit in which the decree was passed. They were held to have no application to a stranger who might promise to pay a larger sum in consideration of the postponement of the execution of the decree against the judgment-debtor.(11)

Further advances.

1204. A mortgage may be given not only for an existing debt, but also as a security against future or further advances. Such mortgages are not uncommonly given to bankers to secure a current debit-account. It does not appear to be essential that a limit should be placed upon the amount to be so secured, but if the maximum has been beforehand fixed, it cannot be exceeded without entering into a fresh agreement. And prudence dictates that the sum thus secured should always be specified not only to prevent the parties from making dishonest use of the ambiguity, but also to prevent injustice to them as well as the third parties who may be thereby affected. In England (12) a defect in this respect may be cured by parol evidence. Thus a mortgage to a bank "as collateral and continuing security

(1) *Henniker* v. *Wigg*, A.Q.B. 792; 114 E. R. 1065; *Hallet's estate* (In re) 13 Ch. D. 739; on the creditor's right of appropriation see ss. 59, 60, Indian Contract Act (Act IX of 1872); and *Mecca* (*The*) [1897] &c. 286 (295); assumed, in *Harendra Lal* v. *Tarini*, I.L.R. 31 Cal. 807—a case under s. 269 of the Stamp Act.

(2) *Per* Romilly M.R. in *Boyes* In re, L.R. 10 Eq. 467 (469, 470).

(3) *Hari Ram* v. *Sheo Dayal*, I.L.R. 11 All. 136 (142, 143).

(4) *Cf.* s. 257A., C.P.C., 1882.

(5) *Tukaram* v. *Anantbhat*, I.L.R., 25 Bom. 252; *Juji* v. *Annai*, I.L.R., 17 Mad., 382.

(6) *Heera* v. *Pestonji*, I.L.R. 22 Bom., 693 F.B.; *Dhanram* v. *Ganpat*, I.L.R., 27 Bom., 96.; *Bhagabai* v. *Narayan*, I.L.R. 31 Bom., 552; *Datu* v. *Palakdhari*, I.L.R., 18 All., 479; s. 257-A., para. 2, of the Civil Procedure Code, 1882.

(7) *Bhagabai* v. *Narayan*, I.L.R., 31 Bom. 552; *Tirumal* v. *Pandla*, 9 I.C. 289.

(8) *Daulat Singh* v. *Pandu*, I.L.R., 9 Bom., 176; *Bhagchand* v. *Radhakisan*, 5Bom. L.R. 672. If the agreement as to payment of interest is separable, so much only of the contract should be ignored—*ib.*, p. 673.

(9) *Heera* v. *Pestonji*, I.L.R., 22 Bom., 693 F.B.

(10) *Dhanram* v. *Ganpat*, I.L.R., 27 Bom., 96.

(11) *Kesu* v. *Genu*, I.L.R., 23 Bom., 502; *Cf. Dan Bahadur* v. *Anandi*, I.L.R., 18 All., 435; *contra* in *Hukam Chand* v. *Taharunnissa*, I.L.R., 16 Cal., 504, dissented from.

(12) *Hibernian Bank* v. *Gilbert*, 23 L.R.Ir., 321.

for any advances from them" may be supplemented by parol evidence shewing that the advances spoken of included both past as well as future advances. So where a policy was held as a security in case of death "for any notes of hand or bills of exchange, you may have cashed for me" evidence as to subsequent dealings was admitted (1) in order to shew that the words contemplated the state of the account at the time of the death of the mortgagor. (2) It may be presumed that such evidence is not excluded by the Indian Law of Evidence. (3) A security given to secure the money advanced on a bill of exchange for £62 10s. and "for any further sum or sums that you may advance, or for which I may be liable to you," is a continuing security the priority of which is not affected by the renewal of the original bill of exchange, but it does not give the mortgagee a charge on the fund for unsecured debts due to other persons which he might buy up. (4) But this is a mere matter of construction, for while in the last case the words "liable to you" could not be fairly construed as contemplating giving a security to anybody, the mortgagor may stipulate that his security shall extend to what is due from the mortgagor, his executors, administrators or assigns on any account whatsoever, in which case the security would embrace a wider latitude, (5) and would cover advances to a tenant for life under the mortgagor's will. (6) The future advance is part of the existing consideration of a mortgage-deed, and, indeed, it could not be otherwise regarded. Thus where a mortgage included not only the consideration actually paid but also a sum of money to be advanced by the mortgagee for defraying the expenses of an indigo concern, this sum being in effect a deposit in the hands of the mortgagee upon which the mortgagor could draw upon at any time, must be regarded as covered by the mortgage. (7) But a mortgage to secure a balance of accounts not to exceed a certain sum does not include further advances. (8) Costs, charges and expenses are not regarded as "further advances" though they are added to the security. (9) Further advances not originally made on the security of the mortgage cannot be subsequently charged thereon. (10) But if the mortgage contains a borrowing clause, subsequent advances would be presumed to have been made on its security. (11)

1205. Mortgagor and Mortgagee defined.—The definition of mortgagor like that of mortgagee in this section is much narrower than in the English Act, where the term is defined to include "any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property." And likewise a mortgagee includes "any person from time to time deriving title under the original mortgagee." (12) The term "incumbrancer," sometimes used in the Act but which is nowhere defined, is in the English Statute declared to be a generic term as including "a mortgage in fee or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum." (13) An incumbrancer has then a meaning corresponding with that of incumbrance, and includes every person

(1) *Hibernian Bank* v. *Gilbert*, 23 L.R. Ir., 321.
(2) *Jones* v. *Consolidated Investment Co.*, 26 Beav., 256.
(3) *Cf.* s. 92, Prov. 2, Indian Evidence Act I of 1872.
(4) *Calisher* v. *Forbes*, L.R. 7 Ch., 109 (113, 114).
(5) In re *Watts*, 22 Ch. D., 5.
(6) *Ibid.*
(7) *Hari Ram* v. *Sheodayal*, I.L.R., 11 All. 136 (143).
(8) In re *Meadows*, 5 Jur. (N. S.) 421.
(9) Ss. 72, 86, 87, 88, 94.
(10) *Ex parte Knott*, 11 Ves. 617; *Lacey* v. *Jugle*, 2 Ph. I. 413.
(11) *Cairncross* v. *Bradley*, 2 Dr. & Wall., 482.
(12) Conveyancing Act, 1881 (44 & 45, Vict., c. 41), s. 2 (vi).
(13) *Ibid*, s. 2 (vii).

entitled to the benefit of an incumbrance, "or to require payment or discharge thereof." (1) It is apprehended that these latter terms have been used in the English sense in the Act, (2) though it is by no means invariably so: for instances are not wanting in which the two terms "mortgage" and "incumbrance" have been regarded as synonymous.(3) This anomaly is sometimes perplexing and engenders ambiguity in construction which might have been obviated. Strictly construed the terms "mortgagor" and "mortgagee" do not include their assignees, but such is by no means the tenor of the other Indian enactments.(4)

1206. Sub-mortgage: Puisne Mortgage.—An assignment by way of mortgage of his security by the mortgagee is termed a "sub-mortgage," a term which has passed into legal parlance, but which is sometimes misapplied to designate a puisne mortgage, which connotes a second or subsequent mortgage executed by the mortgagor. Thus then a second mortgage executed by the mortgagee of his security would create a sub-mortgage, but that executed by the mortgagor creates a puisne mortgage. The Act deals partially with the rights and liabilities of puisne incumbrances, but it is silent as to the rights and liabilities of sub-mortgagees. Formerly, a mortgage-debt was classed as an actionable claim and the rights and liabilities of parties were determined on that basis. But since the amendment of the Act, (5) although secured debts are no longer regarded in that light, the law relating to them remains practically unchanged, and it may be conveniently recapitulated here.

1207. Sub-mortgage.—Since mortgage is the transfer of an *interest* in specific immovable property there is nothing to prevent the mortgagee from mortgaging his mortgage, in which case he will stand to his mortgagee in the same relation as his mortgagee stands to him. A sub-mortgage may, it seems, be created without any writing, since no formal assignments are necessary in this country. (6) There is no privity, between the original mortgagor and his sub-mortgagee. If the original mortgagor, at the time he paid the mortgage-money to his mortgagee had no notice of the existence of a sub-mortgage, the sub-mortgage is extinguished and the sub-mortgagee has no claim upon the original mortgagor and cannot hold the property against him; but, if the original mortgagor had such notice, the mortgage-debt due to the sub-mortgagee is not discharged by the payment to the original mortgagee, and the sub-mortgagee is entitled to hold the mortgaged property until his sub-mortgage is redeemed. (7) And in case of non-payment his remedy is to obtain an order for sale of the interest mortgaged to him under section 67.

Incidents of sub-mortgage.

1208. A sub-mortgage may be made either by an assignment by the mortgage of his interest, or by deposit of the deed where this is permissible. (8) A sub-mortgage is only good to the extent of the amount due on the original security, on payment of which the security is released and the deeds must be handed back to the mortgagor. (9)

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(1) Conveyancing Act, 1881 (44 and 45 Vict., c. 41) S. 2 (vii).

(2) *E. g.*, s. 101 *post*.

(3) *E. g.*, ss. 65 (*e*), 74 and 85, for the last of which now see Sch. 1, O. 34, r. 1, Code of Civil Procedure (Act V of 1908).

(4) *Annaji* v. *Bapuchand*, I.L.R., 7 Bom., 520, in which "mortgagor" as used in s. 3, cl. (*z*) of Act XVII of 1879 (Dekkhan Agriculturists' Relief Act), was held to include his assignee.

(5) By Act II of 1900, as to which see Ch., VIII *post*.

(6) *Bansi Lal* v. *Durga Prashad*, 9 C.L.J. 429.

(7) *Ram Shankarlal* v. *Ganesh Pershad*, I.L.R., 29 All., 385, F. B.; *Nga Kye* v. *Nga Po Min* (1906), U.B.R., sub-mortgage 1.

(8) S. 59 *post*.

(9) *Matthews* v. *Wallwyn*, 4 Ves., 118; *Ex parte Tufnell*, 4 D. & C., 29.

A sub-mortgage comprises (*a*) the personal covenant of the sub-mortgagor, (*b*) the transfer of the original mortgage-debt and mortgaged property with the benefit of all powers and remedial clauses, contained in the original mortgage, and (*c*) in the case of an English mortgage a power of sale enabling the sub-mortgagee to dispose of the original mortgage-debt and security. Under the first covenant the position of the mortgagee in relation to the sub-mortgagee is closely analogous to that of a surety, and he is thus entitled to recover the debt from the original debtor, but which he is bound to pay over to the sub-mortgagee in discharge of the sub-mortgage. On the other hand, he can recover nothing if the sub-mortgagee has released him from his personal security and has reconveyed to him any property of his own which the mortgagee may have assigned to him by way of collateral security. (1) Under the second covenant the sub-mortgagee obtains all the rights of an assignee, and is also subject to certain though not all the liabilities of the assignee of an actionable claim; so that if the original mortgage is void, so is also the sub-mortgage. (2) In exercise of the last power the sub-mortgagee may validly pass receipts to purchasers which would be effectual discharges so far as regards the mortgagor and those claiming under him. The sub-mortgagee must give notice of the assignment to the debtor, who must then pay the debt to the sub-mortgagee. (3) Hence, it has been held in Bombay where registration operates as notice that a payment made in good faith to the mortgagee without knowledge of the registered sub-mortgage is not vitiated on the ground that it was made subsequent to the registration of the sub-mortgage. (4) Indeed, a person who accepts a sub-mortgage of property does so at the risk of his security disappearing by redemption of the original mortgage; his interest in the property then continues only so long as his mortgagor has interest in the property. (5)

In the event of the mortgagor's insolvency the sub-mortgagee may prove the whole original debt, but he is held disentitled to recover more than his own principal with interest and costs.

1209. The question whether an assignment by way of sub-mortgage is an absolute assignment (6) or an assignment only by wayof charge, has been agitated in England without any satisfactory result. For while there are cases upholding the former view, (7) cases are not wanting in which such an assignment has been construed to be by way of charge only. (8) The distinction is material inasmuch as in the latter view the assignee is not entitled, unless expressly so authorized, to sue the debtor without the concurrence of the assignor. It can perhaps hardly be questioned that to deny the right of suit to the assignee would lead to practical inconvenience if not positive injustice, and so far as regards this country the assignee's right to recover in his own right can scarcely be doubted. There is privity between a mortgagor and his sub-mortgagee, though no doubt the right of the sub-mortgagee in the mortgaged property is limited to the interest passed by the sub-mortgagor, that is the original mortgagee, and the sub-mortgagee cannot recover therefrom anything more than the amount due to the original mortgagee from the original mortgagor whatever may be the state

(1) *Gurney* v. *Seppings*, 2 Phil., 40.
(2) *Cockell* v. *Taylor*, 15 Beav., 103.
(3) In re *Burrell*, L. R., 7 Eq., 399 (407).
(4) *Sahadev* v. *Shekh Papa*, I. L. R., 29 Bom., 199; following *William* v. *Sorrell*, 4 Ves., 389.
(5) *Baldeo Pershad* v. *Gur Bux* (1905), O. C., 140.
(6) In re *Burrell*, L. R., 7 Eq., 399 (408).
(7) *National Provincial Bank* v. *Harle*, 6 Q.B.D., 626; *Burlinson* v. *Hall.*, 12 Q.B.D., 347; *Tancred* v. *Delagoa Bay Co.*, 23 Q.B.D., 239; *Comfort* v. *Betts* [1891], 1 Q. B., 737; *Durham Brothers* v. *Robertson* [1898], 1 Q. B., 765.
(8) *Mercantile Bank* v. *Evans* [1899], 2 Q. B., 613.

of the account between himself and the original mortgagee. The original mortgagor is entitled to sue the sub-mortgagee for redemption, and conversely the sub-mortgagee may sue the mortgagor, for recovery of his money from the mortgaged property. The sub-mortgage is extinguished by the payment of the mortgaged-debt by the mortgagor, if he has no notice or knowledge of the sub-mortgage, and acts in good faith ; similarly payments made under these circumstances towards the mortgage-debt to the mortgagee will reduce the same *pro tanto* so far as the sub-mortgagee is concerned ; but no payment made with notice or knowledge of the sub-mortgagee will discharge wholly or partially the mortgage-debt due to the sub-mortgagee. Following these principles, a sub-mortgagee of property is entitled to retain its possession against the original mortgagor until the amount due on the sub-mortgage is paid off, and he is not bound to seek his remedy against the original mortgagee. The sub-mortgagee cannot get anything more than the amount due to the original mortgagee at the time when the mortgagor learns of the sub-mortgage.(1)

1210. Mortgage-money: Mortgage-deed.—The term "mortgage-money" is here defined to include only "principal money and interest of which payment is secured for the time being." Whatever else is recovered under the security, as for instance interest allowed by way of damages in a mortgage where there is no covenant to pay *post diem* interest would appear to be outside the term. And it has been accordingly held that while *post diem* interest may be added to the security it cannot be recovered for more than six years. This is a question which calls for extended notice, and will be found adequately discussed elsewhere.(2) The term, again, is not used uniformly as defined in the Act. Thus in clause (*d*) which defines an usufructury mortgage it appears to have been used in the still narrower sense as meaning the principal money advanced, and it is as such contradistinguished from the interests due thereon, and the same sense is preserved in section 76 (*h*). The term does not correspond in its sense with "the amount for the time being due on the mortgage,"(3) which may besides the mortgage-money properly so-called include just allowances made to the mortgagee in possession. But all sums expended by the mortgagee on objects specified in section 72, being added to the principal necessarily become part of the mortgage-money.(4)

1211. A mortgage deed is here defined to be an "instrument" (if any) by which the transfer is effected. It is then different from the transaction called "mortgage" and is not even invariably necessary to complete it. (5) But in cases in which it is necessary it is the sole evidence of the transaction and all its terms must be found stated therein. Though a mortgage-deed is primarily the sole memorial of the mortgagor's contract still inasmuch as it defines the mutual rights and liabilities of both the mortgagor and mortgagee the latter is as much bound by its recitals affecting himself as the former. The question whether a deed is a mortgage-deed depends upon whether its terms make for a mortgage. A deed may be worded as an absolute or conditional sale, and its terms might be subject to a contemporaneous deed so as to render the transaction one of mortgage, though there is no mortgage-deed to evidence it. In such a case an assignment of the deed might raise an equity in favour of the

(1) *Chelaram* v. *Walidad*, 1 P. L. R., 21 ; following *Muthu* v. *Venkatachallam*, I. L. R., 20 Mad., 35 ; *Narayan* v *Ganoji*. I.L.R., 15 Bom., 692 ; to the same effect *Maharaja of Benares* v. *Ram Kumar*, 1 A. L. J. R., 330 ; *contra* in *Ganga Prasad* v. *Chunilal*, I.L.R., 18 All., 113 ; *Misri Lal* v. *Abdul Aziz*, (1901), A. W. N., 153 ; *Padgaya* v. *Baji*, I. L. R., 20 Bom., 549 ; and P. R. No. 12 of 1895, dissented from.

(2) S 86 *post* comm.

(3) S. 76 (i) *post*.

(4) S. 72 *post*.

(5) See s. 59, comm.

assignee which, apart from the qualifying deed of which if he had no notice, would convey an interest larger than that intended to be conveyed thereby. The form of the deed should, therefore, correspond with the transfer intended, and it will be so presumed. But in the absence of any statutory form, the transfer of interest necessary to create a mortgage need not be couched in any set phraseology nor be, indeed, even in express terms. It is sufficient if the instrument taken as a whole operates to create such a transfer.(1) In the presidency and certain other towns mortgage may be created by deposit of deeds.(2) Where a salt contractor deposited certain Government promissory notes to secure the due fulfilment of the contract, the document embodying the agreement, was held to be a mortgage within the meaning of the Stamp Act.(3) An instrument described as a lease was executed in consideration of Rs. 120, and it provided that the party paying that sum should remain in possession of certain land for twelve years, but it contained no provision for repayment of that sum or for the payment of rent. It was held that the instrument was a usufructuary mortgage and not a lease.(4) Other similar cases have been already set out in the preceding discussion (§§ 1187—1192).

1212. Classification of Mortgage.—The Act classifies mortgages into (i) simple mortgage, (ii) mortgage by conditional sale, (iii) usufructuary mortgage, and (iv) English mortgage, which are the elementary forms, defined in the section, but to which should be added (v) simple mortgage usufructuary—a form of security resulting from the combination of (i) and (iii). Another composite form is that resulting from the combination of (ii) and (iii), and is called (vi) mortgage usufructuary by conditional sale.(5) But these recognized forms of mortgages do not exhaust the possible combinations, but all such are classed as (vii) anomalous mortgages in which the rights and liabilities of the parties are determined by their contract as evidenced in the mortgage-deed, or by local usage,(6) to which may be added (viii) equitable mortgage, as by deposit of deeds,—the result being eight kinds of securities contemplated in the Act. Now since the incidents of anomalous contracts are thus quite different to those of the other forms of mortgages which are subject to the provisions of the Act, it follows that the distinction between the two forms of securities is more than merely verbal. But this section deals only with the first four elementary forms, the remaining three forms being relegated to section 98. This clause has considerably altered the pre-existing law, which, so far as regards Hindus and Mahomedans, generally though not invariably required a mortgage to be accompanied by a change of possession in favour of the mortgagee.(7) Before the present codification the Courts appear to have made no perceptible difference between transactions now classed as simple mortgages, and hypothecation, charge or lien, which terms appear to have been indiscriminately used, and between which little attempt was made at differentiation.(8)

1213. History of Hypothecation.—The security of hypothecation was borrowed from the civil law, and which marked the final stage of the right *in rem* which the Roman jurisprudence gradually developed and recognized.

(1) *Kola Venkatanarayana* v. *Vuppala*, I.L.R., 29 Mad., 531.
(2) S. 59 comm.
(3) *Reference under* s. 46 *Indian Stamp Act* 1879, I.L.R. 11 Mad., 39, F.B., *Q.E.* v. *Debendra*, I.L.R. 27 Cal, 587.
(4) *Reference under* s. 46, *Indian Stamp Act* 1879, I.L.R. 21 Mad. 358, F.B.; *Reference under* s. 49, *Indian Stamp Act*, 1879, I.L.R. 17 All. 55, F.B.
(5) *Ib.*
(6) *Lakshmandas* v. *Dasrat*, I. L. R., 6 Bom., 168. F. B.
(7) S. 98 *post.*
(8) *Chetti Gaundan* v. *Sundaram*, 2 M. H. C. R., 51; *Golla* v. *Kali*, 4 M. H.C.R., 434; *Sadagopa* v. *Ruthna*, 5 M. H. C. R., 457.

The earliest form of the Roman security, called *fiducia*, may be regarded as the prototype of the English mortgage to be presently discussed. In this security an actual conveyance was executed by the debtor to the creditor on condition (*contractus fiduciæ*) that if the purchase-money were repaid by a day named the creditor would reconvey the property to the debtor. In this security the debtor naturally ran a great risk, for having parted with his ownership he had only a personal action against the creditor. (1) The intervention of the proctor was only a matter of time. And the law was next modified by an edict declaring that while the creditor retained possession of the property, its ownership remained with the debtor. This is *Pignus* and marked the second stage in the history of civil mortgages. But the creditor did not always care to take possession of the thing pledged, nor did the debtor always wish to part with the possession. And so Servius dispensed with the transfer of possession and thus arose the *hypotheca* or pledge of a thing by mere agreement, without any formality, and without the delivery of possession. Servius gave the creditor remedy not only against the debtor, but against all other persons, and thus established a true right *in rem*. The creditor's remedies in a hypothecation were—(*a*) rights *in rem* i. e., he could recover the very thing pledged, (*b*) the right of sale. As regards the latter right Justinian enacted that if the creditor had possession of the *hypotheca* he could not sue without giving a previous formal notice to the debtor, and if he had not possession he must obtain a judicial decree. In either case he could not sell except after two years from either the notice or the decree. (2) Hypothecation may be created by (*a*) agreement (*nuda consentio*), or (*b*) by operation of law (*tacita hypotheca*). The security given by the debtor was collateral to his own personal security, which is not determined by sale of the *hypotheca* except in so far as the amount obtained sufficed. (3) Hypothecation, as such has long since ceased to exist, except that it survives only in a modified form in cases of holders of bottomry bonds, and of seamen in merchant service in respect of their unpaid wages and who have a claim against the ship *in rem*. But even these cases are, strictly speaking, cases of liens rather than of hypothecation. A mortgage of movable property without possession is perhaps the nearest survival of this form of absolute security.

In France, however, it still exists under the same name *hypotheque*, and the *Hypothec* of the Scotch law is another relic, but which too has now but a limited operation. (4)

In the absence of any statutory law the Indian Courts were fain to act on the analogy of hypothecation, and many cases have been so decided, (5) but which, were they again to occur, would now be classed under simple mortgage, or charge. (6)

1214. Simple Mortgage.—The leading characteristics of a simple mortgage are the personal obligation of the mortgagor to pay the mortgage-money, and in default to allow the mortgagee to put the property to sale. An obligation to pay a certain amount with hypothecation of property as a security for its payment are the usual incidents of this mortgage, and the mortgagee is under his contract entitled to realize

Cl. (b).

(1) *Cicero Pro Caecina*, 31-7-9.
(2) Just., C. 8, 34, 3: 1 Dig., 13, 7, 4 *ib.*, 13, 7, 5.
(3) Dig., 12, 1, 28.
(4) *Cf.* Hypothec. Abolition (Scotland) Act 1880, 42 Vict., c. 12.
(5) *Chetti Gaundan* v. *Sundaram*, 2 M.H.C.R., 51; *Golla* v. *Kali*, 4 M.H.C.R., 434; *Sadagopa* v. *Ruthna*, 5 M.H.C.R., 457; *Lakshmandas* v. *Dasrat*, I.L.R., 6 Bom., 168, F B.
(6) *Ramalinga* v. *Arukkani*, 9 I.C. 163.

his security either from his mortgagor personally or from the property mortgaged to him, or both. Both the remedies may be pursued at the same time, although, of course, the claimant cannot recover more than the amount due on the obligation.(1) A simple mortgage then comprises two contracts: (i) a personal obligation on the part of the mortgagor to pay the debt, and (ii) a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge, however, does not confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a civil court directing a sale.(2) The mortgagee in the case of a simple mortgage has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation. He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only, he obtains what is known as a money-decree, but in execution of which he would not be entitled to bring the mortgaged property to sale except by instituting another suit under section 67;(3) if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.(4) If, however, he seeks both the remedies in one suit an order will be made for the sale of the property, and for recovery of the balance if any from the mortgagor personally. The mortgagee's failure to seek one or other of the two remedies in the same suit does not in any case bar his right to enforce the remaining remedy by a separate suit,(5) since the causes of action in the two cases are, as laid down above, different.(6)

1215. Simple mortgage is known under various vernacular terms, *e.g.*, *arh* and *mustaghraq* in the United Provinces,(7) *drishta bandhaka* in Hindustan and the Provinces subject to Bombay,(8) where it is also known as *nazar-gahan* (or "sight-mortgage,") and "*tarangahan*," (*i.e.*, security-pledged)(9) while in Madras, it is known as *idu adamanam*.

Words constituting simple mortgages.

1216. In the usual forms of these mortgages the mortgagee is given the power of sale, but no formal words of hypothecation are necessary to make an hypothecation valid, if the intention of the parties is sufficiently expressed.(10) Thus the following terms in a deed were held to amount to a mortgage: "That, for the security of the payment of this debt, the lands mentioned in this deed are pledged by me."(11) Or that "in default I shall on the security of the house site belonging to me pay and make good the principal and interest."(12) So the provision "our rights and property in the aforesaid talooka Rajapur shall remain pledged and hypothecated for this debt."(13) So also on the principle

(1) *Muni Reddi* v. *Venkata*, 3 M.H.C.R., 241 (243).

(2) *Cf. Mohamed* v. *Jan Patel*, 12 C.P.L.R., 26.

(3) S. 99, repealed by Act V of 1908.

(4) *Per* Turner, J., in *Khubchand* v. *Kalianda*, I.L.R., 1 All., 240 (243), F.B.

(5) *Jogeshwar* v. *Nitaichand*, 4 B. L. R. (A. C.), 48, wherein only a money-decree was sought and allowed.

(6) *Dum Sahu* v. *Jeo Narayan*, 4 B.L.R. (A.C) 27 note; *Piari* v. *Khiali Ram*, I.L.R., 3 All., 857; *Cf.* also *Ramdin* v. *Kalka Prasad*, I.L.R., 7 All., 502, P.C.

(7) *Kishan Lal* v. *Gunga Ram*, I.L.R., 13 All., 28; *Dalip Singh* v. *Bahadur Ram*, I L.R., 34 All, 447.

(8) 1 Strange's Hindu Law, 289; *Rangasami* v. *Muttukumarappa*, I.L.R., 10 Mad., 509 (516).

(9) *Motiram* v *Vetai*, I.L.R., 13 Bom., 90 (97, 98); F B.; *Onkar Ram* v. *Govardhan*, I.L.R., 14 Bom., 577; *Datto* v. *Vithu*, I.L.R., 20 Bom., 408.

(10) *Martin* v. *Pursram*, 2 Agra., 124.

(11) *Ramdharilal* v. *Janessar*, 6 B.L.R. (A. C), 14.

(12) *Balasubramania* v. *Sivaguru*, 11 I.C. 629.

(13) *Bishen* v. *Udit Narain*, I.L.R., 8 All., 486.

that precise words are not necessary to create a mortgage, words of the debtor declaring that, "until the repayment of the money covered by the land, he would not, from the date of the agreement, convey the property mentioned therein to any one by deed of sale, or deed of conditional sale, or *mokarari pottah*, or deed of mortgage, or *zur-i-peshgiticca pottah*. Should he make any of these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid, and as executed in favour of nominal parties, for evading payment of the money covered by the said lands"—were held to be sufficiently indicative of the intention to mortgage.(1) In one case an instrument which ran thus: "To secure this money we have mortgaged a five gandas share of a ten gandas share in each of the villages..... So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to anyone"—was held to conform to the requirements of the definition of a simple mortgage.(2) The question in such a case might be whether such words confer on the mortgagee a power to cause the property to be sold—an essential ingredient of such a security. Such power, it should be noted, may be conferred either expressly or *implicdly*, and in the case last cited the terms of pledge and mortgage used were held necessarily to imply a right of sale over the property, "for the obvious intention of pledging the property as security for the debt is that the debt should be realised by its sale, and the instrument would be meaningless and the intention of the parties would be defeated on any another construction of it."(3) But such loose language will not, it seems, suffice to create a mortgage in Allahabad. There in a case the debtor had stipulated, placing the burden of his debt upon a certain specified property, but there was no express covenant for sale, though the debtor used a certain vernacular word (4) of doubtful import and which was held to fall short of importing a power of sale, which the Court added was usually implied by other words. (5) A mortgage deed which was designated a simple mortgage provided that if the whole or a portion of the interest remains unpaid by the due date, the mortgagee "shall take possession of the mortgaged properties immediately thereafter, and enjoy the said properties as under unfructuary mortgage." The Privy Council held that the mortgage was a simple mortgage because it was so called in the deed itself and though the mortgagee was *entitled* to take possession in case of default as therein provided, he was not *bound* to do so nor was it his only remedy.(6)

Power of sale essential.

1217. A simple mortgage is a *transfer* in that it is the transfer of the right of sale, but for which the transaction would not be a mortgage, although it may then be a charge. (7) But the power of sale may be given by words which commonly import such a power. Such words, for instance, as *rehan* (mortgage) *arh* and *mustaghraq* have been held to be of themselves sufficient to convey it. (8) So

(1) *Raj Kumar* v. *Ram Dutt*, 5 B.L.R., 246; 13 W.R., 82, F.B. (Markby, J., *dubitante*).

(2) *Sheoratan* v. *Mahipal*, I.L.R., 7 All., 258, F.B.

(3) *Sheoratan* v. *Mahipal*, I.L.R., 7 All., 258 (264), F.B.; following *Shib Lal* v. *Ganga Prasad*, I.L.R., 6 All., 551, F.B. [It may be noted that the dissentient judgment of Petheram, C.J., holding that a simple mortgage must confer on the mortgagee the power to sell the property himself overlooks the words used in the clause—"cause the mortgaged property to be sold," and is clearly untenable.]

(4) *Muakhiza*: meaning having satisfaction, or calling to account.

(5) *Rehn*, *Kifalat*, *Mustaghraq*: *Dalip Singh* v. *Bahadur Ram*, I.L.R., 34 All., 447. It is submitted that the words taken contextually sufficed to create a simple mortgage.

(6) *Lingam Krishna* v. *Sri Mirza*, 13 C.L.J. 584 P.C.

(7) S. 100.

(8) *Kishan Lal* v. *Ganga Ram*, I.L.R., 13 All., 28 (40, 41); *Dalip Singh* v. *Bahadur Ram*, I.L.R., 34 All. 446.

again words—"if the hypothecated property is destroyed by some unforeseen calamity or proves insufficient for the bond-debt, then the creditor can recover it from the other property"—cannot but have the same effect.(1) But while this essential pre-requisite of this form of mortgage distinguishes it from a "charge" defined in section 100, and in which there is no (i) *transfer* of an interest, in (ii) *specific* immovable property,(it being unessential that the property charged should be specific), in not a few cases the transactions, in reality mortgages, have been so construed. Indeed, the main rock against which several Courts have foundered appears to lurk in the construction of the right of sale possessed by the mortgagee, it being supposed that while the Court has the power of sale both in a simple mortgage as well as in a charge, the former differed from the latter in that it gave the mortgagee a power to sell *otherwise* than through the intervention of a Court. (2) "He has the right," observed Birdwood and Jardine, JJ., in a case, "to have his charge realized by sale under a decree, but he is not a mortgagee, as no power is given him expressly or by implication "to sell the property out of Court." (3) But this is certainly not implied by the language used in the definition which only confers on the mortgagee "a right to *cause the mortgaged property to be sold*"—a phrase which necessarily postulates the intervention of the Court. Indeed, if the contrary were intended, it is difficult to see why the language here used should have been different to that used in section 69, in which such a power is conferred on the mortgagee who is declared to possess the power in no other cases. The power of sale does not necessarily imply a power to sell without the intervention of the Court, and the mortgagees, except in the case of a mortgage in the English form,(4) do not appear to have ever exercised such a power in the mofussil. (5) Indeed, the question whether the mortgagee's power of sale is to be exercised with or without the aid of the Court is one of procedure merely: it does not affect the principle. (6)

1218. The question whether a term has become sufficiently associated with certain incidents so that they may be safely inferred from it, is of course a question which must in a great measure depend upon the usage of a given locality.

The covenant to repay would be inferred from the statement that the principal has been received on the mortgage of property, and which implies that the property may be sold for satisfaction of the debt, (7) unless some other terms are superadded in the deed to make it a mortgage of another character. But a mortgage does not cease to be a simple mortgage, if the mortgagee is placed in possession of the property. Thus where a mortgage provided that possession of the mortgaged property, if taken by the mortgagee, is only to be taken for securing due payment of the interest, the mortgagee paying the balance (if any) of the profits to the mortgagor, the transaction was held not to be an usufructuary but a simple mortgage.(8) So, again, it is not necessary in this form that the mortgagor should covenant for personal security. No doubt the presumption is that the mortgagor *qua*, a simple mortgagor, is personally liable to pay the

(1) *Kishan Lal* v. *Ganga Ram*, 13 All. 43; 1; *Jagjivan* v. *Shridhar*, *ib.*, 252.

(2) *Aliba* v. *Nanu*, I.L.R., 9 Mad., 218 (222); *Rangasami* v. *Muttu*, I.L.R., 1 Mad., 509 (515); *Khemji* v. *Rama*, I.L.R., 10 Bom., 519.

(3) *Khemji* v. *Rama*, I.L.R., 10 Bom., 519 to the same effect *per* Petheram, C.J., in *Sheoratan* v. *Mahipal*, I.L.R., 7 All., 258. *Motiram* v. *Vitai*, I.L.R., 13 Bom., 90, F.B;

(4) *Pitamber* v. *Vanmali*, I.L.R., 2 Bom.,

(5) *Keshavaram* v. *Bhavanji*, 8 B. H. C. R. (A.C.), 142.

(6) *Cf. Per* Mahmud, J., in *Kishan Lal* v. *Ganga Ram*, I.L.R., 13 All., 28 (50).

(7) *Yashvant* v. *Vithal*, I.L.R., 21 Bom., 267.

(8) *Yashvant* v. *Vithal*, I.L.R., 21 Bom., 267; *Lingam Krishna* v. *Sri Mirsa*, 13 C.L.J. 584, P.C.

debt, but it is always open to the mortgagor to exclude his personal liability by a specific covenant to the contrary, and the mortgage would for that matter be no less a simple mortgage.(1) Of course, in order that a transaction may be classed as a simple mortgage, it must be in the first place a mortgage and for this purpose answer the tests before enumerated. It is then to see into what sub-division the transaction falls.

1219. Simple Mortgage and Charge distinguished.—A simple mortgage presents the closest affinity to a charge dealt with further on in the Act.(2) But the two present really distinguishing features and are subject to different equities and which make the distinction of more than academic interest. A charge may in one sense be regarded as a *genus* of which the simple mortgage is one species. A charge may, however, be created both by agreement as well as by operation of law. It need not be confined to a specific immovable property but may extend to and be enforced against the general estate including movable property. A charge does not involve the transfer of any interest in property which is an essential feature of a mortgage. It only gives a right to payment out of a particular fund or particular property, without transferring that fund or that property, (3) and hence while a plea of *bona fide* purchase without notice may be perfectly good against a charge, it will be wholly unavailing against a mortgage. No writing is essential to create a charge, but if it be by writing, it must be then registered (4) unless the writing be the decree or order of Court in which case registration is not imperative. (5) A charge does not necessarily imply the existence of a debt, and indeed, it is generally created by a settlement or will, in which case it does not even imply the existence of a living transferee. (6) And even where there is an obligor who has agreed to pay out of a particular fund, it does not seem that it imports a personal obligation which the obligee could enforce, whatever other remedies might be open to him. (7) But while these are the leading features of a charge they are by no means present in every transaction. Indeed, the line of demarcation between charge and mortgage is invisible, and it is only when the transaction does not amount to a mortgage that it is to be construed as a charge. A charge-holder of movable property is more akin to a mortgagee of goods, inasmuch as a mere charge is treated as an equitable assignment, so that the assignee is treated as the substantial owner, and has been regarded as the "reputed owner" under the Indian Insolvency Act. (8)

Simple mortgage and mortgage by conditional sale.

1220. The question whether a given transaction was intended to be a simple mortgage or one by conditional sale is one which must naturally turn upon the language of the deed and the expressed intention of the mortgagor. Such intention may be gathered from the manner the instrument was treated and such other auxiliary circumstances of which oral evidence is admissible. Intention of the parties may also be gathered from the manner the bond was treated at the Registration office.(9) In a Privy Council case where the bond

(1) *Wahid-unnissa* v. *Goberdhan*, I.L.R., 22 All., 453 (461), F.B.; *Abbakke* v. *Kinhiamma*, I.L.R., 29 Mad., 491 (495).

(2) S. 100 *post*.

(3) *Burlinsen* v. *Hall*, 12 Q.B.D., 347; *Tancred* v. *Delagoa, &c., Ry. Co.*, 23 Q.B.D., 239; *Gobinda* v. *Dwarka Nath*, 7 C.L.J., 492 (497); *Kemchand* v. *Malloo*, 10 N.L.R. 81.

(4) S. 17, Indian Registration Act (III of 1877).

(5) *Gobinda* v. *Dwarka Nath*, 7 C.L.J., 492 (495).

(6) S. 5, *ante*.

(7) *Girijanund* v. *Sailajanund*, I.L.R., 23 Cal., 645.

(8) *Puninthavelu* v. *Bhashyam Ayyangar*, I.L.R., 25 Mad., 406 (416); Fisher, Mort. (5th Ed.), § 225.

(9) *Najibulla* v. *Nasir Mistri*, I.L.R., 7 Cal., 196; *Doss Money Dossee* v. *Jonmenjoy Mullick*, I.L.R., 3 Cal., 363.

provided that, "if I fail to pay the money as stipulated, I and my heirs shall, without objection, cause the settlement of the said village to be made with you," it was held that the effect of the bond was to create a simple mortgage and not a conditional deed of sale. In so holding, their Lordships, relying upon the contemporaneous facts and circumstances, said: "Now, upon that it is to be observed that when the deed was executed, the consent of the Revenue officers would have been required in order to carry out such a stipulation; that the proprietary right of the mortgagor had not then been declared in the terms in which it was afterwards declared; and that, supposing that it had been so declared, the instrument would not, like an ordinary deed of conditional sale, have imported in terms a sale of the interest of the party which was to become absolute and conclusive upon his failure to pay the stipulated sum at a certain date. Such a contract would, independently of any rule of law to the contrary, execute itself, and the remedy of the party upon it would, if he were out of possession, be a suit for possession."(1) So, where the clause ran thus: "In respect of this we have given to you, in writing, as a *nazar-gahan* (*i.e.*, sight-mortgage), the fields which belong to ourselves, and which we ourselves are enjoying. . . . If we do not pay according to contract, you may sell the said fields through the court and recover the amount. If any balance remains, we will pay it off personally, or by means of our other property."(2) So, also, where the instrument ran that "on failing to pay the amount within the said term, we will sell the land to you for the said amount, present a *razinama* and have the *patta* transferred."(3) All documents commonly regarded as creating the relationship of mortgagor and mortgagee will still be regarded as mortgages under the Act, however inaptly worded, for the object of the Transfer of Property Act was never to exclude such transactions.(4) It is also not necessary to confer by express words the power of sale on the mortgagee, if the same can be inferred from the contract.(5) In many of the above cases the distinction between a *mortgage* and a *charge*, now clearly drawn by the Act, was not recognized, but, as remarked before, the distinction was nowise important except as affecting the question of limitation,(6) and with the recent decision and its consequent legislation even that importance has disappeared.(7)

Simple mortgages before the Act.

1221. In cases arising before the passing of the Transfer of Property Act the several High Courts were at variance on the effect of simple mortgage upon subsequent purchasers without notice, as also on the power of sale, which the mortgagee could exercise upon his instrument In Madras, where transactions of this kind had long been recognized, it was held that where the instrument operated as a hypothecation-bond, it might be effective as a security even as against a *bona fide* purchaser without notice,(8) and in the absence of any other remedy expressly provided therein it was held to impliedly carry a power of sale, which

(1) *Gokul Dass* v. *Kripa Ram*, 13 B.L.R., 205 (210), P.C.

(2) *Onkar Ram Shet* v. *Govardhan Parshatum Dass*, I.L.R., 14 Bom., 577; see also *Tukaram* v. *Khandoji*, 6 B.H.C.R., 134.

(3) *Chetti Gaundan* v. *Sundaram*, 2 M.H.C.R., 54; *Vellaya* v. *Moorthy*, 4 M.H.C.R., 174.

(4) *Motiram* v. *Vitai*, I.L.R., 13 Bom., pp. 97, 98; *Kishen Lal* v. *Gangaram*, I. L. R., 13 All., p. 47.

(5) *Per* Mahmud, J., in *Kishan Lal* v. *Ganga Ram*, I.L.R., 13 All., at p. 47; *Raj Coomar* v. *Ram Dutt*, 13 W.R., 82, F.B.

(6) *Girwar Singh* v. *Thakur Narayan*, I.L.R., 14 Cal., 730 (739), F.B.

(7) *Vasudeva* v. *S. Srinivasa*, I.L.R., (1907); 30 Mad., 426, P.C.; Act IX of 1908.

(8) *Kadarsa* v. *Ramiah*, 2 M.H.C.R., 108; *Golla Chinna* v. *Kali Appin*, 4 M.H.C.R., 434; followed in *Cooling* v. *Saravana*, I. L.R., 12 Mad., at p. 71.

could be exercised through court as it is now under the Act.(1) Possession was not deemed essential in Madras, but in Bombay possession in the mortgagee was as a general rule deemed essential(2) and a mortgage without possession was there held to create no valid title, as against subsequent purchasers without notice.(3) To this rule several exceptions were made in the judgment the most notable being in favour of *San* mortgages of Gujrat.(4) And "this rule does not apply when the person claiming in competition with the prior mortgagee is the mortgagor himself or a volunteer claiming under him(5); nor does it apply as against a purchaser at a court-sale, for such purchaser can take only that which the judgment-debtor could honestly dispose of;(6) nor does the rule hold good as between the mortgagee and trespassers on the mortgaged property. It is competent to him, without taking possession, to sue such person for possession."(7)

1222. Limitation for Mortgages.—Prior to the passing of the present Limitation Act (8) there existed also a considerable diversity of opinion on the question of limitation in cases where the instruments did not clearly provide for the power of sale. For, as it has been seen before, instruments providing either expressly or impliedly for the power of sale, were all construed as mortgages. But, in a number of cases,(9) the documents did not stipulate for such power. And in such cases the High Courts were divided, some holding the bonds to be mortgages, while others held them to be only charges. This conflict of opinion would have been a merest logomachy were it not for the fact that upon the question, whether a particular document constituted a *charge* or a *mortgage* depended, at one time the important question of limitation, namely, whether the mortgagee had 12 years for his suit, under Article 132 of the Limitation Act or 60 years under Article 147 of the same Act. Before the passing of this Act, there was no statutory enactment distinguishing a charge from a mortgage.(10) Still the Limitation Act of 1877 (11) for the first time provided two separate periods of limitation for these two classes of incumbrances:—

Art. 132.	*Art.* 147.
132. To enforce payment of money charged upon immovable property—*twelve years*—from when the money sued for becomes due.	147. By a mortgagee for foreclosure or sale—*sixty years*—from when the money secured by the mortgage becomes due.

The questions that gave rise to controversy may be stated to be (i) whether Article 147 or 132 applied to simple mortgages; (*a*) executed before or, (*b*) since the passing of the Act IV of 1882? (ii) if the former article applied, did Article 132 provide for cases of only *charge:* and, if so, (iii) what was the

(1) *Ramalinga* v *Arukkani*, 9 I.C., 163; *Sakkaral* v. *Sundilapatti*, 16 I.C., 236.

(2) *Lakshman* v. *Dasrat*, I.L.R., 6 Bom., 169, F.B.

(3) *Ibid.*

(4) *Ibid.*, and see *Mathura Dass* v. *Kalia*, 7 B.H.C.R. (A.C.), 24; *Itcharam* v. *Raiji*, 11 B H C.R., 41; *Ranchodas* v. *Ranchodas*, I.L.R., 1 Bom, 581.

(5) *Jivan Das* v. *Framji*, 7 B.H.R. (O.J.), 45, where the cases are elaborately reviewed; *Chintaman* v. *Shivaram*, B.H.C.R., 304.

(6) *Sobhagchand* v. *Baichand*, I.L.R., 6 Bom., 193; *Bapuji* v. *Satybabhambhai*, *ib.*, 493; for a form common in Kanara, see *Venkatesh* v. *Narain*, I.L.R., 15 Bom., 184; *Parmaya* v. *Sonde Shinivasapa*, I.L.R., 4 Bom., 459.

(7) *Krishanji* v. *Govind*, 9 B.H.C.R., 275.

(8) Act IX of 1908.

(9) *E.g.*, *Aliba* v. *Nanu*, I.L.R., 9 Mad., 218; *Rangasami* v. *Muttukumarappa*, I.L.R., 10 Mad., 511; *Gopal* v. *Parshotam*, I.L.R., 5 All., 121; *Sheoratan* v. *Mahipal*, I.L.R., 7 All., 258; *Kishan Lall* v. *Ganga Ram*, I.L.R., 13 All. 29; *Tukaram* v. *Khandoji*, I.L.R., 6 Bom., 134; *Onkar* v. *Govardhan*, I.L.R, 14 Bom., 577; *Venkatesh* v. *Narain*, I.L.R., 5 Bom., 183.

(10) See s. 100 *post* comm.

(11) Act XV of 1877.

difference between a mortgage and a charge in view of which the two articles were separately enacted ?

1223. The determination of the first question became somewhat complicated by the fact that prior to the passing of this Act [1] there were no *suits* for foreclosure, the mortgagee by conditional sale, having his remedy in an *application* filed in the Court of the District Judge, who issued notice to the mortgagor to pay up within the year of grace allowed to him, after which the mortgage was foreclosed. [2] In cases of English mortgage, however, the mortgagee could bring a suit for foreclosure, or, in the alternative for sale, and a Full Bench of the Calcutta High Court [3], therefore, held that Article 147 was intended to provide for only cases arising under this species of mortgage and this view has now been affirmed by the Privy Council [4] and acquiesced in the present law of limitation under which all mortgages other than an English mortgage and charges have now the uniform limitation of 12 years as provided by Article 132 of Schedule II of that Act [5].

1224. This view necessarily disposes of the second and third questions; for if Article 147 does not apply to simple mortgages and those by conditional sale the only other articles under which they could be dealt with are the two articles abovenamed. The view taken by the Calcutta High Court and since confirmed by the Court of last resort was accepted in the Punjaub [6], and it was hesitatingly followed by a Full Bench of the Madras High Court [7] who however afterwards retracted their former view. [8] On the other hand, a different note was struck by the Full Benches of the Bombay and Allahabad High Courts, [9] which held that under Article 147, a suit for foreclosure or sale meant distributively a suit for foreclosure or a suit for sale, and not as maintained by the Calcutta High Court a suit in which the two remedies were alternatively available; and in this view simple mortgages with power of sale were to be governed by the 60 years' limitation as provided in Article 147 and not Articles 132 and 135. This view had found support also in the Central Provinces [10] and the Punjab. [11] In this state of the conflict, the question went up to the Privy Council for decision and their Lordships' judgment was delivered by Sir Arthur Wilson who substantially reiterated his view expressed in his reference as Judge of the High Court to the Full Bench in the Calcutta case. [12] His Lordship said: " Their Lordships think that the reasons for adopting the narrower interpretation of Article 147 greatly outweigh those on the other side. The preponderating considerations in

(1) Act IV of 1882.

(2) This procedure is still adopted in the Punjab and other places to which this Act has not been yet extended.

(3) *Girwar Singh* v. *Thakur Narain*, I L. R., 14 Cal., 731, F. B., overruling *Brojolal* v. *Gour Churn*, I L.R., 12 Cal., 111; followed by *Nilcomal* v. *Kamini*, 1 L.R., 20 Cal., 269; *Balaram* v. *Mangla*, 11 C.W N., 959, since approved in *Vasudeva* v. *Srinivasa*, 11 C.W. N., 105 P.C.; I.L.R., 30 Mad., 426 P.C., *Ramsaran* v. *Mahatab* (1890), P.R. No. 112.

(4) *Vasudeva* v. *Srinivasa*, I.L.R., 30 Mad. 426, P C.

(5) Act IX of 1908.

(6) *Ramsaran* v. *Mahtab* (1890), P.R. No. 112.

(7) *Ramchandra* v. *Modhu*, I.L.R., 21 Mad. 326, F.B. (Law said not to be clear).

(8) *Narayana* v. *Venkataramana*, I.L.R., 25 Mad., 220, F B., followed in *Chairman, Municipal Council, Rajahmundry* v. *Suserla*, 16 M.L.J.R., 53.

(9) *Motiram* v. *Vithal*, I.L.R., 13 Bom. 90 F.B., *Dudheshwar* v. *Vithal*, I.L.R., 20 Bom. 408, F.B., *Shiblal* v. *Ganga Prasad*, I.L.R., 6 All., 551, F.B; and see *Rangasami* v. *Muttukumarappa*, I.L.R., 10 Mad., 509, F.B.; see also *Amanna* v. *Gurumurthi*, I.L.R., 16 Mad. 64; *Udayana* v. *Senthivelu*, I.L.R., 19 Mad., 411.

(10) *Ghasiram* v. *Dulichand*, 2 C.P.L.R. 57; *Mohamed* v. *Janpatel*, 12 C P.L R., 26.

(11) *Ramsaran* v. *Mahtab* (1890), P.R. No. 112.

(12) *Girwar Singh* v. *Thakur Narain*, I.L. R., 14 Cal., 730, F.B.

their Lordships' opinion are the following: The narrower construction escapes the necessity of attributing to the Legislature a great and sudden change of policy. It also gives effect to the ordinary presumption, that the Legislature, when it repeats in substance in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. The other construction fails in both these particulars." (1) So far as regards the Indian Courts, this decision has set at rest the controversy that had previously divided the High Courts. Under this view, while the mortgagor will under Article 148 clearly have 60 years within which to redeem, the mortgagee would have only 12 years within which he could foreclose his mortgage, and yet the two rights are, in the absence of any stipulation to the contrary, co-extensive. (2) Of course, all limitation is arbitrary, but there is no reason why it should be illogical. To the argument that the suits for foreclosure were unknown in 1877, it may be replied that the Bill which became the present Act was then pending, and the Legislature may have thought fit to provide for cases which were sure to arise under the new Act. Again, if it be supposed that the article was intended to contemplate suits for foreclosure or in the alternative for sale, it is sufficient to state that no such suits can be maintained either under the Act,(3) or under the English law.(4) No doubt the Court of both the countries may in certain cases and under certain circumstances pass a decree for sale in lieu of a decree for foreclosure(5) but a suit with this possibility cannot be described as a suit "for foreclosure or in the alternative for sale."

1225. And as regards the continuity of intention, their Lordships have in another case remarked: "The respondent maintained this singular proposition that, in dealing with a consolidated Statute, each enactment must be traced to its original source, and when that is discovered, must be construed according to the state of the circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is passed."(6) But these were considerations for the Legislature, which passed the enactment of 1908, without altering the language of the two articles in question, and which has had the effect of relegating all mortgages admitting of foreclosure or sale to Article 132, in which the term "charge" would now comprise both a charge properly so called as defined in section 100, as well as the two forms of mortgages to which that article has now been held applicable. This view was perceived to load to much hardship to those who placing reliance upon their local rulings had abstained from putting there mortgages in suit, and consequently, section 3i was enacted to enable these outcasted mortgagees to realize their securities within the period of grace of two years, thereby allowed, which having expired in 1910, the uniform rule of twelve years now applies to all suits whether they be for the enforcement of a mortgage other than an English mortgage or for the enforcement of only a charge. These two terms are now clearly defined in the Act.(7) Before 1882 they seem to have

(1) *Vasudeva* v. *Srinivasa*, 11 C.W.N., 105, P.C., I.L.R., 30 Mad., 426 P.C.

(2) *Vadjee* v. *Vadjee*, I.L.R., 5 Bom., 22.

(3) *Narayana* v. *Venkataramana*, I.L.R., 25 Mad., 220 (238), F.B.

(4) Robb, Mort. 1018; *Genkin* v. *Row*, 5 De. G. & S., 107 (119); v. *Kerrick* v. *Saffery*, 7 Sim., 317.

(5) *Administrator General* v. *Premlal*, I.L.R., 22 Cal., 788 (796) P.C.; s. 69, comm.

(6) S 86, now O. 5, r. 22, Sch. 1, C.P.C. (Act V of 1908). See Pt. II, s. 25 (2) Conveyancing Act, 1881 (44 & 45 Vict., c. 41).

(7) Simple mortgage in s. 58 (*b*), and charge in s. 100.

been differentiated by the fact that while in a charge the remedy of the holder was against only the property subject to it, under a mortgage he had two remedies, one against his debtor's person, and another against the property made liable. Where a creditor seeks his remedy by a claim upon the land, it is now decided by the Privy Council[1] that Article 132 would apply. But supposing that the creditor were to abandon his charge and claim payment of only money, has he still the limitation provided by Article 132, or only such limitation as is provided for the recovery of unsecured debts? It is decided that in such a case the creditor would only have the period of three or six years according as the instrument he sues upon is or is not registered.[2]

1226. Another question upon which the High Courts have maintained conflicting opinions is that stated in the third question. While the majority of the High Courts were agreed that in the case of a simple mortgage with a power of sale, Article 147 would undoubtedly apply, they are by no means agreed in their view of what constitutes a simple mortgage, or in other words, does the simple mortgagee as such have the power of sale contemplated by Article 147. It is conceded that such a power is clearly implied in the case of mortgages executed after the passing of the Transfer of Property Act.[3] The question being then narrowed down to the state of the law anterior to the 1st July 1882, the High Court of Madras is of opinion that a hypothecation bond executed before that date is not a mortgage, to constitute which there must be a transfer of some interest of the mortgagor, or an acquisition by the mortgagee of a power to sell the hypothecated property otherwise than through the intervention of the Court.[4] According to this view, under section 58 (*b*) of the Act, the mortgagee has even now this power. But it is submitted that the clause "to cause the mortgaged property to be sold" is certainly susceptible of no such interpretation (§ 1153). As has been pointed out by Mahmud, J., a power of sale without the intervention of the Court is not necessary to constitute a simple mortgage within the meaning of section 58 (*b*).[5] This view accords with that taken by the Bombay[6] and Madras[7] High Courts, and is so far not opposed to that of the Calcutta High Court.[8] And in the amendment of section 69, which specifies the kind of mortgages in which, and the circumstances under which, the mortgagee may sell without the intervention of the Courts, the addition of the words "and in no others" was clearly intended to limit the power of sale only to cases therein specified, thereby effectually enacting against the exercise of such a power by any other class of mortgagees.[9] In one case, again, the Privy Council in referring to a hypothecation bond said: "That is what is usually called a mortgage-bond."[10] If so, it was certainly not the

(1) *Ramdin* v. *Kalka Prosad*, I.L.R. 7 All. 502, P.C.

(2) *Miller* v. *Ranganath*, I.L.R., 12 Cal., 389 (395); *Khimiji* v. *Rama*, I.L.R., 10 Bom. 519 (525); *Seshayya* v. *Annama*, I.L.R., 10 Mad., 100; *Rathnasami* v. *Subramanya*, I. L. R., 11 Mad., 56; *Bulakhi* v. *Tukaram Bhat*, I. L. R., 14 Bom., 377. (In this case it is stated that the limitation for *personal* remedy is only three years, probably through an oversight of the fact that the instrument sued upon was registered).

(3) S. 58 (*a*); *Aliba* v. *Nanu*, I. L. R., 9 Mad., 218; *Rungasami* v. *Muttukumarappa*, I. L. R., 10 Mad., 509.

(4) *Per* Muttuswamy Ayyar, J., in *Rungasamy* v. *Muttukamarappa*, I. L. R., 10 Mad., 509.

(5) *Kishna Lal* v. *Gangaram*, I. L. R., 13 All., 28 (47).

(6) *Motiram* v. *Vithal*, I. L. R., 13 Bom. 90 (97, 98), F. B.; *Datto* v. *Vithu*, I. L. R., 20 Bom., 408, F. B.

(7) *Narayan* v. *Venkataramana*, I. L. R., 25 Mad., 220 (238) F. B.; dissenting from *Ramchandra* v. *Madhu*, I. L. R., 21 Mad., 326, F. B.; *Girwar* v. *Narain Singh*, I.L.R., 14 Cal., 730, F. B.

(8) *Surwan* v. *Shahazada*, 9 W. R., 170, F. B. at p. 173; *Kanchan* v. *Baijnath*, I.L.R., 19 Cal., 336 (340).

(9) See s. 69, and comm.

(10) *Karan Singh* v. *Bakar Ali*, I. L. R., 5 All., 1 at p. 5, P.C.

object of the Act to exclude them. (1) There can be no doubt that the terms *rehan* and hypothecation were commonly used in the same sense as a simple mortgage, and to differentiate them is to create a distinction which is wholly foreign to the notions of the people on the subject. And if this view be correct then the definition of *rehan*, hypothecation, or simple mortgage as understood before the Act would be the same as given by this clause.

It will be observed that while section 54 dealing with sale refere to property both tangible and intangible, this section and the next do not specifically refer to this distinction which, in the case of a mortgage was unnecessary, since a mortgage being the transfer of an "interest" in land it may relate to any rights therein which law permits to be transferred, and which for the purpose of limitation, would be treated as immoveable property.(2) So in England, a mortgage of reversion is, for the purpose of limitation, regarded as a mortgage of land even though that reversion may not have yet fallen into possession. (3)

1227. Mortgage by Conditional Sale.—This is the form of security now commonly met with in practice, and is known as *kutkubala* in (4) Bengal, as *Kutbandhaka* in tracts dominated by the Uriya-speaking races, as *bai-bil-wafa* in the United (5) and Central Provinces, (6) as *muddatakriyam* (7) or *drishtabandhaka* (8) in Madras, as *gohan lahan* in the Maratha provinces, (9) and in Malabar as *pornathan*. (10) The mortgage is called by conditional sale, because its essential characteristic originally was that on the breach of the condition of repayment the contract executed itself, and the transaction was closed and became one of absolute sale, without any further act of the parties or accountability between them. (11) In other words, by such mortgage the debtor sold absolutely his property subject only to the right or condition of redemption. (12) And so in Regulation XVII of 1806, it was defined to be "a conditional conveyance of land as a security for the repayment of a loan with a stipulation that, if the money borrowed be not paid, with or without interest, by a certain day, the sale shall become absolute." There was thus in effect no difference between such mortgages and out-and-out sales with a condition for repurchase. (13) And such mortgages were, therefore, sometimes erroneously supposed to be sales from which, however, they are at any rate now clearly distinguishable. (14) Such mortgages may or may not be accompanied by possession. If, however, possession was given to the mortgagee, it was usual to stipulate that the usufruct should be in lieu of interest.

Cl. (c).

1228. Previous Law as to Conditional Sale.—Anterior to the year 1806, the rights of a holder of *bai-bil-wafa* (conditional sale) were enforceable according to the strict terms of the agreement. It was then necessary for the mortgagor, if he

(I) Bengal, U.P. and Central Provinces.

(1) *Per* Sargent, C. J., in *Motiram* v. *Vithal*, I. L. R., 13 Bom. 90 (97, 98), F. B.

(2) Art. 132, Limitation Act (Act IX of 1908); S. 3 (25) General Clauses (Act X of 1897).

(3) *Kirkland* v. *Pearfield*, [1903], 1 K.B., 756.

(4) *Gokuldas* v. *Kriparam*, 13 B.L.R., 105 P.C.

(5) *Ali Ahmad* v. *Rahmatullah*, I.L.R., 14 All., 195.

(6) *Murat Singh* v. *Ramlal*, 8 C. P. L. R., 83

(7) *Venkata* v. *Parvati*, 1 M.H.C.R., 460.

(8) *Lakshmi* v. *Krishna*, 7 M.H.C.R., 6.

(9) *Shankarbhai* v. *Kassibhai*, 9 B.H.C.R. 69; *Krishnaji* v. *Raoji*, 9 B.H.C.R, 79, F.B. For etymology of the word see *Ramji* v. *Chinto*, 1 B.H.C.R., 199 (202).

(10) *Shekari Varma* v. *Mangalam*. I.L.R., 1 Mad., 57.

(11) *Thumbuswamy* v. *Hossain Rowthen*, I. L. R., 1 Mad., 1, P.C.

(12) *Sarasibala* v. *Nandalal Sen*, 5 B.L.R. 389 (393); *Manly* v. *Patterson*, I.L.R., 7 Cal., 394 (404)

(13) *Ladu* v. *Babaji*, I.L.R., 7 Bom., 534.

(14) *Ali Ahmed* v. *Rahmatullah*, I.L.R., 4 All., 195.

wished to save his estate from forfeiture, to pay the amount when due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798, (1) within the stipulated period for the repayment of the loan, and on default, the property passed to the mortgagee without any further act on his part, or the intervention of the Court. (2) The mortgagor had then no right of redemption, and the transaction once closed could not be re-opened. (3) By the Bengal Regulation XVII of 1806, founded upon the practice of the English Courts of Equity, a modification of this strict rule of the rights given to the holder of such a contract was introduced. The seventh section gave the mortgagor a right of redemption within one year commencing from an application by the mortgagee to the Court under the eighth section for the foreclosure of his mortgage. Under the Regulations, the mortgagee could not acquire absolute title over the property mortgaged to him without an order of the District Judge to that effect foreclosing the mortgage. After such an application the mortgagor must either pay or tender the money lent, or the balance then due, or he must make a deposit pursuant to Bengal Regulation I of 1798, section 2. The general effect of these Regulations was that, if anything remained due on the mortgage, and the mortgagor made no deposit, or an insufficient one, the right was gone at the expiration of the year of grace. But the title of the mortgagee was not completed: he had to bring a suit to recover possession, or obtain a declaration by the Court of his title, if he was in possession, and in that suit the mortgagor could contest the validity of the conditional sale, or the regularity of the proceedings taken under Regulation XVII of 1806, in order to make it absolute, or he might prove that nothing was due, or that the deposit was sufficient to recover what was due; but the issue, so far as the right of redemption is concerned, was whether anything remained due to the mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that was found against the mortgagor, his right of redemption was then effectually shut out. (4) In a subsequent case it was held that the condition of foreclosure required by section 8, Regulation XVII of 1806, was that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge in order that he may within a year from the time of such notice, redeem the property. The provisions of the Regulations were so strictly enforced that the mortgagor was held not to have entirely lost his right to redeem unless all its terms had been duly complied with, (5) though parties were free to contract themselves out of the Regulations. (6)

Notice under the Regulations.

1229. The functions of the Judge under the section were merely ministerial, and the year of the grace was held to run from the time of service of the notice upon him, and which had to be established by the mortgagee seeking foreclosure by evidence apart from the Nazir's certificate. The year of grace allowed to the mortgagor for redemption ran from the date of service of notice and not from the date of the

(1) This Regulation applied in the first instance only to Bengal, Behar, Orissa, and Benares, but was extended to the provinces ceded by the Nawab Vizier by Beng. Reg. XXXIV of 1803, ss. 12—15.

(2) *Sureffoonissa* v. *Enayet Hossein*, 5 W. R., 88, F.B.

(3) *Mallikarjunudu* v. *Mallikarjunudu*, I. L.R., 8 Mad., 185; *Gobardhan* v. *Gokal Das*, I.L.R., 2 All., 633.

(4) *Forbes* v. *Ameeroonissa*, 10 M.I.A., 340.

(5) *Kunj Behari* v. *Baldeo Rai*, 3 A.L.J. 531 (533); *Badal Ram* v. *Taj Ali*, 4 A.L.J. 417; *Mt. Dharmia* v. *Madar Singh*, 12 I.C. 345 (346); *Sochet Singh* v. *Dial Singh*, (1907) P. R. No. 46; *Mt. Sakhtawari* v. *Shibhan Lal*, 13 I.C. 621.

(6) *Bhure Mal* v. *Jawaya*, (1905) P.L.R. No. 61; *Bhag Singh* v. *Baswa Singh*, (1906) P.R. 50.

order or of its issue.(1) The provisions of section 8 were regarded as imperative, and as prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and as having, for their object, the protection of mortgagors from fraud.(2) The title of the mortgagee to the land became absolute and his rights as mortgagee ripened into ownership as soon as the year of grace expired.(3) The Judge was accordingly required to certify due service in accordance with the requirements of the Regulation, to which he might add any elucidating facts necessary to be recorded as occurring within the year of grace.(4) It was accordingly held that if the notice did not correctly describe the various courses open to the mortgagor under the Regulations, it was a defective notice, vitiating the foreclosure proceedings.(5) A foreclosure notice should have issued on expiry of the stipulated period; otherwise it was treated as premature and useless.(6) Where a mortgagor appeared, on receipt of a defective notice of foreclosure to contest the notice and offered to pay, it did not amount to a waiver of his rights.(7) The notice was not held defective simply because the area of the land was not entered or the amount was not specified, or that the Judge's signature was not his official signature, or that it was illegible to ordinary people.(8) A mis-statement as to the amount due on the mortgage did not invalidate the notice (9) though if the year of grace was set down as running from the date of the notice itself, instead of from the date of its service, the defect was held to be fatal.(10) The notice or notices were to bear the Judge's full signature and not mere initials, (11) though if they bore also the seal of the Court, the principle of *Omnia præsumuntur rite esse acta* would apply.(12) A notice without the signature of the Judge or with the signature only his *munserim*, (13) or sheristadar, (14) but bearing the seal of his Court, was held to be informal and bad and vitiated the whole foreclosure proceedings *ab initio*.(15) Where the mortgaged property was situate in two districts, an order made by the Judge of one district for foreclosure of the whole of the mortgaged property was sufficient.(16) So the foreclosure proceedings taken in the North-Western Provinces were held to operate on the property situate in Oudh where the Regulations were in force at the time of the foreclosure-proceedings.(17) Of course, as observed before, the due service of the notice of foreclosure was an all essential preliminary to a foreclosure proceeding and its service should have been evidenced by the clearest proof, and should have been in all cases, if not personal, at least such as to leave no doubt in the mind of the Court that the

(1) *Mohesh Chunder* v. *Tarinee*, 10 W.R., 27 F.B.; *Norender* v. *Dwarkalal*, I L.R., 3 Cal., 397 P.C.; *Thakur Das* v. *Muhammad*, (1906) P L.R. No 74.

(2) *Madhopersad* v. *Gajudhar*, I.L.R., 11 Cal., 111 P.C.; *Sitla Baksh* v. *Lalta Prasad*, I.L.R., 8 All., 388; *Ajaib Nath* v. *Mathura*, I.L.R., 11 All., 164; *Norender Narain* v. *Dwarka Lal*, I.L.R., 3 Cal., 397 P.C.

(3) *Bulauda* v. *Diwanu*, 14 I.C. 332 (333); *Bhero* v. *Mona*, *ib.*, 783 (784).

(4) *Abbas Aly* v. *Nund Coomar*, 7 W.R., 123.

(5) *Tarachand* v. *Chiman*, 12 I.C. 530 (531).

(6) *Har Gopal* v. *Bhagwan*, (1907) P.R. No. 70; *Sant Singh* v. *Jiwan Mal*, (1906) P.R. No. 119.

(7) *Bhagirati* v *Nathmal*, (1907) P.R. No. 105.

(8) *Tarachand* v. *Chiman*, 12 I C. 530.

(9) *Barkat* v. *Ali*, (1913) P.R. No 91.

(10) *Thakkur Dass* v. *Muhammad*, (1906) P.L R, No. 74.

(11) *Kubra Bibi* v. *Wajid Khan*, I.L.R., 16 All., 95 observed on *per* Stanley, C. J., in *Bhagwat* v. *Baldeo*, I. L. R., 29 All., 145.

(12) *Bhagwat* v. *Baldeo*, I. L. R., 29 All., 145.

(13) *Hurlal* v. *Manickpal*, 3 N.W. P. H. C. R., 176; *Hanuman* v. *Bhairon*, I. L. R., 12 All., 189.

(14) *Doma* v. *Nathai*, I. L. R., 13 Cal., 50.

(15) *Basdeo* v. *Matadin*, I. L. R., 4 All., 276.

(16) S. 8, Beng Reg. XVI of 1806; *Rasmuni* v. *Prankishen*, 4 M. I. A., 392.

(17) *Surjan Singh* v. *Jagan Nath*, I.L.R., 2 All., 313.

notice itself must have reached the hands or come to the knowledge of the mortgagor. (1) But while personal service was to be striven for, it could be dispensed with, if it could be clearly proved that despite efforts made for that purpose personal service was impracticable. (2) For example, the notice might have been affixed if the mortgagor was absent from home. (3) A notice for the minor mortgagor might be served on his certificated or natural guardian, (4) or in the event of his death on his representative, (5) which included a person who possessed an interest in the equity of redemption at the date of the notice. (6) The mortgagee must prove service by affirmative evidence if it is denied by the mortgagor. (7) A notice served on the Lambardar alone who had executed the mortgage both for himself and as agent of the other co-sharers, was considered insufficient, as it was necessary that the co-sharers should also have had notice of the proceedings. (8) Where there were several mortgagors, service of notice upon all was essential. (9)

Other procedure under the Regulations.

1230. A mortgagee seeking to foreclose was bound to proceed in accordance with the Regulations. (10) Its redemption might however, be made as in an ordinary mortgage. Ordinarily, the mortgagee was bound to institute proceedings for foreclosure within twelve years, but if there be "good and sufficient cause," as the pendency of litigation as to the ownership of the equity of redemption, between the heirs of the mortgagor and a party claiming as purchaser, that limit could be extended. (11) The mortgagee was entitled to dispute the title of a party who claimed as purchaser from the mortgagor, and he was not estopped from urging the plea, merely because he had served the notice of foreclosure on him as the occupant of the mortgaged property. (12) The right of the mortgagee to petition for foreclosure did not arise until the period stipulated in the proviso for redemption had expired. That period could not be affected, or altered by a contract in the deed of mortgage, making, without reference to redemption, the whole principal lent due upon failure to pay interest at a certain time. In a mortgage by conditional sale in the English form the proviso for redemption was that on payment of the principal lent with interest, in three years from the date of the mortgage, the land should be reconveyed to the mortgagor. The deed also provided that upon any default in payment of the instalment half-yearly, the whole principal and interest should become due. Upon such default being made, the mortgagee filed his petition under section 8, for foreclosure, before the three years had passed; and payment not having been made during the year of grace, the mortgagor's objection was disregarded by the Court, and the conditional sale was treated by the mortgagee as having become conclusive. But the Privy Council ultimately held that the covenant accelerating, for other purposes, the time at

(1) *Eusuf Ali* v. *Azmutoonissa*, (1864). W. R., 49; *Bank of Hindustan* v. *Shoroshideala*, I.L.R., 2 Cal., 311.

(2) *Mudho* v. *Mahtab*, 3 N.W.P.H.C.R. 325.

(3) *Soorjoo Kant* v. *Kristo*, 14 W.R., 423.

(4) *Dabee Pershad* v. *Man Khan*, 2 N.W. P.H.C.R., 444; *Bajirao* v. *Gulab*, 8 N. L. R. 136 (139).

(5) *Rasmonee* v. *Prankissen*, 7 W.R., 66 P. C. (s. c.) Sub nom *Ras Muni* v. *Prankishen*, 4 M.I.A., 392; *Ram Chunder* v. *Janob Ali*, 17 W.R., 230.

(6) *Bhimraj* v. *Mt. Rabi*, 2 Nag. L. R., 113.

(7) *Sookhmun* v. *Chooramun*, 1 Agra 172; *Tazun* v. *Shib Chunder*, 19 W. R., 170; *Sitla Baksh* v. *Lalta Prasad*, I.L.R., 8 All., 388.

(8) *Punchum* v. *Mungle*, 2 Agra (Pt. 2), 207.

(9) *Norendra Narain* v. *Dwarkalal*. I.L.R., 3 Cal., 397 P.C.; *Madhopersad* v. *Gajudar*, I. L. R., 11 Cal., 111 P. C.

(10) S. 14, Beng. Reg. III of 1793, s. 3, Reg. II of 1803, ss. 7, 8, Reg. XVII of 1806; *Prannath* v. *Rookea*, 7 M. I. A., 323.

(11) S. 14, Beng. Reg. III of 1793, (Limitation).

(12) *Prannath* v. *Rookea*, 7 M. I. R., 323.

which the principal should become due, making no provision for the payment of the principal by the mortgagor in order to prevent foreclosure, nor referring to the proviso for redemption, could not be taken into account in determining what was to be regarded as the "stipulated" period which remained. This term meant the stipulated period for redemption, *i.e.*, the full term on the expiry of which the mortgage-money is payable. So, if the petition had been prematurely filed, section 8 of the Regulation had not been called into operation and the right to redeem remained. (1) But a conditional sale could, by agreement and acts of the parties become absolute without formal proceedings taken under the Regulation.(2) But if he had to sue on the agreement, he could not sue for possession without the summary process of foreclosure, which being an incident attached to a conditional sale by the Regulation must have been duly complied with.(3) If he proceeded under the Regulations, the title became absolute on the expiry of the year of grace, and he was then entitled to claim mesne profits from that date without bringing a suit for possession.(4) But in another case his title was held to be incomplete till it was confirmed by a regular suit. (5) In any case, the mortgagee could not enter upon possession without taking proceedings prescribed by the Regulations, and if he did so, the mortgagor, and those claiming through him, had a right to eject him as a trespasser. (6) A parol agreement that a land made over to the creditor, on condition that if the debt was not repaid in three months the land should absolutely belong to the creditor, was held to be outside the scope of the Regulation which contemplated a deed, and it was therefore sufficient to make the creditor an absolute owner on default of payment within the stipulated period. (7)

Extension of time.

1231. The term of grace, under the Regulation, might have been extended by agreement, on non-compliance with which the mortgagee could revert to the foreclosure proceedings before instituted. (8) But under the Regulations, as under the law as at present administered, the ostensible vendee under a bond of conditional sale held the land only as security for the money lent, (9) and the mortgagee could not improve his position without recourse to the law which, while safeguarding his money, also took into regard the right of the mortgagor. (10) If then the mortgagee had circumvented the mortgagor by obtaining an unfair advantage over him, the Court would readily deprive him of the fruit of his fraud, even though he may have had apparently acquired an indefeasible

(1) *Kishori Mohun Roy* v. *Ganga Bahu*, I.L.R., 23 Cal., 288 P.C.; *Sant Sing* v. *Jawan Mal*, (1906) P.R. No. 119; *Har Gopal* v. *Bhagwan*, (1907) P.R., No 70.

(2) *Goordyal* v. *Hunskoonwer*, 2 Agra. 176; *Rughonath* v. *Ram Gopal*, 5 N.W.P., H.C.R. 29; *Mallikarjunudu* v. *Mallikarjunudu*, I. L. R., 8 Mad., 185; *Runjeet* v. *Shureefoonissa*, 10 W.R., 478.

(3) *Ghosee Lal* v. *Govind Lal*, 3 Agra, 184; *Imdad Husain* v. *Mannu Lal*, I.L.R., 3 All., 509.

(4) *Khoobchand* v. *Leela Dhur*, 3 Agra, 103; *Jecrakhun* v. *Bookun Singh*, *ib*, 358; *Tawakkul Rai* v. *Lachman Rai*, I.L.R, 6 All., 344; *Lotf Hossein* v. *Abdool*, 8 W.R., 476; *Suroop Chunder* v. *Mohendra*, 22 W.R, 539; *Bulanda* v. *Duvain*, 14 I.C. 332 (333); *Bhero* v. *Mona*, *ib*, 783 (784).

(5) *Baisuddin* v *Khoda Newav*, 12 C.L.R., 479, C.F.; *Hub Ali* v. *Wazirunnissa*, I.L.R., 28 All., 476 (508), P.C.

(6) *Hub Ali* v. *Wazirunnissa*, I L.R., 28 All., 496 (508) P.C.

(7) *Gobar Dhan* v. *Gokal Das*, I.L.R., 2 All., 633. As to the meaning of "Stipulated period" as used in s. 8, Reg. II of 1806, see *Kubra Bibi* v. *Wajid Khan*, I.L.R., 16 All., 59.

(8) *Lall Dhur* v. *Gunput*, 1 N.W.P.H.C.R., 81; *Dhonda* v. *Megho Rai*, I.L.R., 4 All., 332; *Goonomonee* v. *Parbutty*, 10 W.R., 326.

(9) *Sham Narain* v. *Raghsobur*, I.L.R., 3 Cal., 508.

(10) See s. 60, *post*.

title.(1) Even apart from fraud, the rights of the mortgagor were so far jealously guarded under the Regulations, that if the mortgagee applied for foreclosure without previously demanding from the mortgagor payment of the mortgage-debt, the Court dismissed the suit.(2) And similarly the Court had to distinctly notify to the mortgagor that if he shall not redeem the property mortgaged in the manner provided for in section 7 of the Regulation, within one year from the date of notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive.(3) So again, if the mortgagee failed to furnish the mortgagor or his legal representative with a copy of his application to foreclose, he was held, not to be in a position to foreclose, and the whole of the foreclosure-proceedings were set aside as vitiated thereby. (4) The notice should have been served on the person really interested in protecting the estate. (5) Such persons are the second mortgagee, (6) and the purchaser of the equity of redemption, (7) unless his purchase was made after the institution of the suit,(8) or after notice to the mortgagor had been given.(9) An attaching-creditor was held entitled to no such notice.(10) But an auction-purchaser in execution of a money-decree obtained previous to the mortgage was entitled to due notice of foreclosure-proceedings instituted subsequently to the sale, but before the confirmation thereof.(11) An assignee of a fractional interest in the mortgaged property in this respect stood upon the same footing as an assignee of the entire property.(12) But the holder of a *maurusi mokurari* patta could not be regarded in the light of the mortgagor's representative within the meaning of section 8 of the Regulation which regulate the service of notice.(13) Where a mortgage was jointly held by two mortgagees, and the equity of redemption subsequently became vested solely in one of them, notice need only relate to the part unredeemed.(14) If a notice was once duly given, it was immaterial as to how and when the second notice given by way of precaution was served. (15) Indeed, no second notice was required to be given even after the mortgagor was allowed an extension of time. (16)

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(1) *Nazir Ali* v. *Ojoodhyaram*, 10 M. I. A. 540, in which the mortgagee in possession fraudulently allowed the Government revenue to fall into arrears with a view to buying it in for himself, which he did, but the mortgagor was allowed to redeem many years after. As to limitation, the case was decided with reference to s. 24, Act I of 1845.

(2) *Behari Lal* v. *Beni Lal*, I.L.R., 3 All. 408 ; *Karan Singh* v. *Mohan Lal*, I. L. R., 5 All., 9 ; *Gonesh* v. *Shodanund*, I. L. R., 12 Cal., 138.

(3) *Bheekun* v. *Bechun*, 3 N. W. P. H. C. R., 35.

(4) *Santee Ram* v. *Modhoo*, 20 W. R., 363 ; *Khukroo* v. *Jhoomuck*, 15 W. R., 263 ; *Sochet Singh* v. *Dial Singh*, (1907) P. R., No. 46.

(5) *Kalee Koomar* v. *Pran Kishoree*, 22 W. R., 168.

(6) *Nudyar* v. *Roop Dass*, 22 W. R., 475 ; *Quære* in *Kalee Kishore* v. *Tara Pershad*, 5 W. R., 1.

(7) *Mohun Lall* v. *Golak Chunder*, 10 M. I. A., 1 ; *Golam* v. *Jogan Singh*, 10 W. R., 86 ; *Madhub* v. *Jhoonuck Lall*, 12 W. R., 105 ; *Tazun* v. *Shib Chunder*, 19 W. R., 170 ; *Mitterjeet* v. *Mookhlal*, 25 W. R., 139 ; *Bhimoomutty* v. *Premchand*, 28 W. R., 96 ; *Durgaj Singh* v. *Debi Singh*, I L. R., 1 All., 499.

(8) *Ooroopersaud* v. *Bippopersaud*, 2 Hay, 152 ; *Kurmofoo'* v. *Bissessur*, Marsh, 337 S. C. ; sub-nom *Bissessur* v. *Kurmfool*, 2 Hay, 40 ; *Kishen* v. *Belasoo*. 3 W. R., 230 ; *Bissonath* v. *Brojonath*, 6 W. R., 230 in some of these cases notice to a purchaser was held to be always necessary.

(9) *Achumbit* v *Nund Ram*, 11 W. R., 554 ; *Jayram* v. *Krishnan*, 3 Agra, 307.

(10) *Radhey* v. *Bujha*, I. L. R., 3 All., 143.

(11) *Rameshwar* v. *Mewar*, I. L. R., 11 Cal., 341.

(12) *Ganga* v. *Bani Madhub*, 11 W. R., 540 ; *Sheogolam* v. *Ramroop*, 23 W. R., 25.

(13) *Dooiga* v. *Luchmun*, 17 W. R., 272 ; *Sripoti* v. *Mohip Narain*, I. L. R., 9 Cal., 643.

(14) *Hunoomanpersaud* v. *Kalcepersaud*, (1864), W. R , 285.

(15) *Zemin Ali* v. *Hossein Ali*, 2 Agra, 187.

(16) *Bazloor* v. *Abdullah*, 10 W.R., 359; *Brijo Mohun* v. *Radha*; 20 W.R., 176.

Waiver of irregularity.

1232. An irregularity in the formal service of the notice could be cured by waiver or estoppel against the mortgagor, as where the mortgagor after receipt of notice unaccompanied by a copy of the mortgagee's petition, as required by section 8 of the Regulation, continued to live in the neighbourhood of the mortgagee who erected buildings on the mortgaged land and used it as his own without objection or claim on the part of the mortgagor. (1) Where, however, the notice of foreclosure prescribed by the Regulations, alleged to have been issued to the mortgagor, was not on the record of the foreclosure proceedings, the non-existence of the notice was held to be a fatal defect and the Court could not, on the strength of the order of the District Judge, which showed that the mortgagor appeared in person before him, and was warned that he would be precluded from raising any objection, if he did not redeem within one year, presume that notice had been issued to the mortgagor, and that it was accompanied by a copy of the mortgagee's, petition for foreclosure and bore the official signature and seal of the Judge: all of which are defects any one of which, as stated before, would be sufficient to vitiate the foreclosure-proceedings.(2)

1233. These Regulations were followed in the United and Central Provinces, and in Oudh, (3) until the passing of this Act and in the Punjaub, (4) where they are still in force. (5) While in Sindh the old law of India according to which at the expiry of the term the contract executed itself, and the transaction ceased and became one of sale. would appear to be still the law in force. (6) The Regulations were not legally extended to the Central Provinces until the passing of Act XX of 1875, but as a matter of fact, their authority was all along recognized, and cases were usually decided in accordance with their tenor. As the Privy Council in one case decided in 1873 observed, "that in a non-regulation province certain discretion is given to Courts to apply the principles which prevail in the Regulation Provinces in the administration of justice according to the rules of equity and good conscience, and that their Lordships were not prepared to say that the discretion exercised in accordance with the Regulations was erroneously exercised." (7)

(2) In Bombay and Madras.

1234. In Bombay and Madras, however, where similar legislation did not exist, the rule prevalent in Bengal prior to the passing of the two Regulations seems to have been followed. (8) But in both the High Courts, the practice "in almost absolute conformity with that administered by the Court of Chancery" (9) was gradually assimilated upon the old procedure. This alteration by judicial decisions of the antecedent law first began in Madras in the year 1858, and was adopted in Bombay in 1864. (10) It was condemned by the Privy Council (11) in 1871, who finally overruled it in 1875.(12) The practice adopted

(1) *Saligram* v *Beharee*, (1864), W.R., 36.

(2) *Sochet Singh* v. *Dial Singh*, (1907) P.R. No. 46.

(3) *Gokuldas* v. *Kriparam*, 13 B.L.R., 205 P.C; *Lakman Devideen* v. *Baju Bai*. 8 C.P.L.R., 113; overruling *Jagannath* v. *Balwant Singh*, 7 C.P L.R., 22: *Parmanand* v. *Wasudeorao*, 7 C.P.L.R., 29.

(4) See *ante*.

(5) The Government of India has, however, recently decided to extend some parts of the Act to the Punjaub also, while the transposition of the processual sections of the Act to the Code of Civil Procedure equally applicable to the Punjaub would seem to further bring that Province within the pale of the Act.

(6) *Framji* v. *Sullemanji*, (1912), 6 S.L.R., 178,

(7) *Gokuldas* v. *Kriparam*, 13 B.L.R., 205 (213), P.C.

(8) See cases cited in *Thumbuswamy* v. *Hossain*. I.L.R., 1 Mad., 1 (20) P.C.

(9) *Thumbuswamy* v. *Hossain Rowthen* I L.R., 1 Mad., 1 (20) P.C.

(10) *Shankarbhai* v. *Kassibhai*, 9 B.H.C.R. 69; *Ramji* v. *Chinta*, *ibid* (R.C.), 199.

(11) *Pathiramier* v. *Venkatarow*, 13 M.I.A., 560; 7 B.L.R, at p. 142.

(12) *Thumbuswamy* v. *Hossain Rowthen*, I.L.R., 1 Mad., 1 P.C.

in Madras then, between, 1858 and 1875, and in Bombay between 1864 and 1875, was identical with that maintained in Bengal under the Regulations.

1235. Madras Cases.—The course of early decisions in Madras may be referred to two definite years which form the land-marks in their history up to 1858. The Sudder Court of Madras appears to have uniformly held that the doctrine of the English law with respect to the equity of redemption, after default of payment of the mortgage-money, was unknown to the ancient law of India prevailing in Madras, and that accordingly in the absence of any Regulation or Act altering such law, the interest of the mortgagor must be deemed to have determined in favour of the mortgagee under a conditional sale made absolute by his failure to redeem at the time therein specified. In other words, the terms of such a contract were to be literally enforced, and the provisions made, as for example, by the Bengal Regulation XVII of 1806 allowing the mortgagor or his representative to redeem at any time before foreclosure, could not be extended to Madras.

(i) Cases down to 1858.

1236. Strictly speaking, this was undoubtedly the only logical view that could be taken in the state of the law then prevalent in that presidency. But its very strictness appears to have reversed the current of the decisions. And this was brought about by the Court importing the English doctrine of the equity of redemption on the ground of its intrinsic justice. "They remark that there is an obvious distinction between a conditional sale with power to redeem, and a mortgage. The parties in the first instance fix a value on the property, and the transaction is a true arrangement for the sale thereof for such consideration. In the latter instance, a sum is borrowed not representing the value of the property, and it may be far within such value, the only care being that the property shall be of such value as will cover the loan by way of security. It is therefore strictly equitable that, on the failure to pay off the loan by the time stipulated, the lender should fall back upon the security, not to absorb the whole, but to take his money out of it. The clause of forfeiture in a mortgage-deed the Court views as introduced *in terrorem*, by way of penalty, and it is not the practice of the Courts of equity to enforce penalties."(1) Thus, then, by letting in the right to redeem even after the stipulated period, the Court now enlarged the rights of the mortgagor, but in doing so, they so far misinterpreted the English doctrine as to treat the stipulation in favour of the mortgagee as a mere penalty, and no provision was thus made for his getting the benefit of it by the machinery of a foreclosure-suit. They apparently comtemplated no remedy against the mortgaged property, but that of sale. This local adaptation of the English equitable doctrine shorn of its benefit to the mortgagee continued to find favour with the judges of the Sudder Court,(2) and on its abolition by those of the High Court.(3) But slight variations more in conformity with the English doctrine became perceptible. For while, in the first case,(4) the Court recognized the mortgagee's right to a decree for foreclosure, which does not appear to have been admitted by the earlier decisions, the second case(5) treated the law as settled in almost absolute conformity with that administered by the Court of Chancery, observing that in India as in England, there may be sales with a condition for

(ii) Cases between 1858—1875.

(1) *Thumbusawmy* v. *Hossain Rowthen*, I. L.R., 1 Mad., 1 (19) P.C.

(2) (1858) S.D.A., Case No. 49 ; (1859) S. D.A., p. 150.

(3) *Venkata* v. *Parvati*, 1 M.H.C.R., 460 ; *Nallana* v. *Palani*, 2 M. H. C. R., 420 *Lakshmi* v. *Krishna*, 7 M H.C.R., 6.

(4) *Venkata* v. *Parvati*, 1 M.H.C.R., 460.

(5) *Nallana* v. *Palani*, 2 M.H.C.R., 420.

repurchase within a fixed time against the breach of which equity will not relieve. On this point they said: "It is the intention of the parties which governs, and that intention may be shown by the deed itself, by other instruments, or even by parol evidence." (1) In the last case, the same view was reiterated, and the security in question was held to be a sale with a condition, for repurchase. (2) So far as these decisions went, they no doubt faithfully followed the English rule, but in doing so they ignored the view of the Privy Council, (3) and the state of the law then current, which did not admit of the application of the equitable doctrine. Their decisions were, moreover, open to three grave objections, since they (*a*) usurped the function of the Legislature, (*b*) allowed parol evidence to prove the intention of the parties which opened a wide field of litigation, and left much to the discretion of the Judge in each particular case, and (*c*) by making no provision for judicial foreclosure they left the mortgagee's rights very much *in nubibus* for at least the sixty years allowed for redemption, (4) during which the mortgaged property could not well be transferred. For "under the law as laid down by them, persons who fifty years before had acquired, as the law then stood, an indefeasible title in lands, which they had ever since held and enjoyed *in optima fide*, became liable to be dispossessed and compelled to account for mesne profits at the suit of the representatives of a mortgagor against whom the sixty years' rule of limitation had not yet run." (5)

Judge - made equity in Madras.

1237. The first onslaught on the doctrine of letting in parol evidence was made by the Indian Evidence Act (6) passed three years before the decision of the Privy Council, and which fact appears to have been overlooked by their Lordships, who however condemned the practice in a language both unequivocal and emphatic. The other two objections were eliminated by the passage of the Act which, while recognizing the equity of redemption—a doctrine already introduced into the country by the *tour de force* of the judges—has safeguarded the interests of the mortgagee by providing for judicial foreclosure. In Madras, it has been observed (7) that a mortgage-deed executed on the 26th June 1882, that is, before the operation of the Act, should be regarded as having been entered into by the parties with reference to the law propounded in the course of Madras decisions commencing in 1858 and ending with 1875, the year in which the Privy Council animadverted upon that course of decisions. One fails to see why a document executed in 1882, albeit a few days prior to the passing of the Act, should be construed with reference to a misinterpretation of law which had prevailed prior to 1875, but which had been in the year authoritatively condemned by the Privy Council. Nor can the Madras precedent be justified by the observation made by Sir James Colville in the course of his judgment delivered for the Privy Council that there would be strong reasons for following the correct rule enunciated by their Lordships in *Pattabhiramier's* case (8) in disposing of a stale claim to redeem, and dispossess a mortgagee who had, before 1858, acquired an absolute title, and which would naturally result in the dismissal of the claim, but that

(1) *Nallana* v. *Palani*, 2 M.H.C.R., 420, following *Alderson* v. *White*, 2 De G. & J., 97.

(2) *Somu* v. *Rangammal*, 7 M. H. C. R., 6 (12).

(3) *Pattabhiramier* v. *Vencatarow*, 13 M.I. A., 560.

(4) See Limitation Act (XIV of 1859), Art. 148 (Act IX of 1871), Art. 148 (Act XV of 1877).

(5) *Thumbusawmy* v. *Hossain Rowthen*, I. L.R., 1 Mad., 1 (22) P.C.

(6) Act I of 1872 (Passed on 15th March 1872). The P.C. decided the last cited case on 28th June, 1875.

(7) *Ramayya* v. *Krishnamma*, I.L.R., 23 Mad., 114 (117, 118).

(8) *Pattabhiramier* v. *Vencatarow*, 13 M.I. A., 560; followed in *Thumbusawmy* v. *Hossain Rowthen*, I.L.R., 1 Mad., 1 P.C.

in a similar case arising out of a security executed since 1858, "there would still be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted." But while thus expressing themselves, the Privy Council were cautious in not absolutely committing themselves to that opinion, for they continued: "Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise." (1) But apart from such caution, it is evident that that high tribunal never countenanced the perpetuation of the mistake after they had once laid it bare, and that they could not have therefore implied that a deed executed after the promulgation of their views should be judged by the law which they had condemned. But in taking this view this decision is not unprecedented, for the words of the Privy Council deciding that mortgages executed subsequent to 1858 shall be treated according to what it considered to be the erroneous course of decisions have been in other cases also interpreted to mean that, "that which had been, though erroneously, supposed to be law in Madras, should be followed as to mortgages after 1858 until the legislature interfered to settle the law" as it did in 1882. Accordingly, in a suit, in 1889, to redeem a mortgage of 1880, which contained a provision that, if the mortgage-money was not paid in March 1882, the mortgaged premises should become the absolute property of the mortgagee, it was held, for the reasons above given, that the plaintiff was entitled to redeem. (2)

1238. Bombay Cases.—A similar alteration by judicial decisions of the antecedent law seems to have been effected in Bombay, though at a later period. In the case of *Shankarbhai* v. *Kassibhai*, (3) Westropp, C.J., reviewed the law and its changes both at Madras and Bombay. He stated that the change in the latter Presidency dates only from 1864, when the case of *Ramji* v. *Chinto*(4) was decided. And the Chief Justice observed: "The recognition of the right to redeem was, having regard to the previous decisions of the Sadar Adaulat, perhaps somewhat a strong measure. It had, however, for a long time previously, been considered a desirable course to adopt, and eminent Judges of the High Court, who had formerly been Judges of the Sadar Adaulat, regretted that their predecessors had, for the most part, enforced the conditions for purchase in *gahan lahan* mortgages, as such a course had been found to promote most oppressive and grasping conduct on the part of money-lenders in the mofussil." (5) "It would be difficult," observed their Lordships of the Privy Council, "to have a more candid admission of the assumption by the Courts of the functions of the Legislature. This case also shows that the Bombay as well as the Madras Court has come to the conclusion that the modern course of decision is to prevail against that of this Committee in *Pattambhiramier's* case." (6) Their Lordships then formally overruled all the previous cases of the Bombay and Madras High Courts, and to the question, whether the Privy Council would follow the rule laid down in *Pattambhiramier's* case or the new course of decisions of the Bombay and Madras High Courts "which appears to them to have been, in its origin, radically unsound," their Lordships observed:—"On a stale claim to redeem a mortgage, and dispossess a mortgagee who had before 1858 acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security, executed since 1858,

(1) *Thumbuswamy* v. *Hossain Rowthen*, I.L.R., 1 Mad., 1 (23), P.C.

(2) *Venkatasubhayya* v *Venkayya*, I.L.R., 15 Mad., 230; following *Ramasami* v. *Samayappanayakan*, I.L.R., 4 Mad., 179; to the same effect in *Neelakandhan* v. *Anantha-krishna*, I.L.R., 30 Mad., 61.

(3) 9 B. H. C R., 69.

(4) 1 B. H. C. R., 199.

(5) 9 B. H. C. R., 72.

(6) *Thumbusawmy* v. *Hossain Rowthen* I.L.R., 1 Mad., 1 (21), P.C.

there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted." (1) Later on their Lordships foreshadowed the line of legislation subsequently adopted. It may then be taken as settled that in the case of mortgages by conditional sale executed before the Act, the relation of the parties will be governed in accordance with the view of the Privy Council above quoted. (2) The Act will, of course, apply to all transactions entered into since its enforcement.

1239. Old Law and Procedure how affected.—The general effect of the passing of the Act on the old law has been elsewhere considered. (§§ 30-39). Its effect upon mortgages by conditional sale and the law to which they had been hitherto subject may be here recapitulated. Now, as regards the *procedure* laid down in the Act, it has been held that it may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided that it be so applied as not to affect *rights* saved by section 2 (*c*) of the Act. (3) The question then resolves itself into one of what are the rights created by the Act and what are mere matters of procedure which would govern all mortgages whether executed before or since the enforcement of the Act. It cannot be denied that the grant of the year of grace allowed by the Regulation is a matter of mere procedure, which it was open to the parties to extend by mutual agreement without prejudice to the proceedings already commenced before the passing of the Act, and which it may be noted are saved by the General Clauses Act. (4) This Act does not affect instruments previously executed. Thus, where a mortgage by conditional sale was executed in 1832, and a suit was instituted thereon in 1883, it was held that the title of the mortgagee became absolute by virtue of the terms of the contract which executed itself on default of payment within the time specified. (5) But in a suit instituted after the passing of the Act the parties would be bound by the *procedure* laid down therein. (6) Now, since the Act as originally enacted, not only laid down certain principles as to the law relating to the transfer of property in land, but also in part prescribed its own procedure, the two must be clearly distinguished. So far as mortgagees are concerned, it appears to be now settled (7) that in cases arising out of transactions entered into before July 1882, the mortgagor is not entitled to a years's notice, or to the benefit of any other rule of the Regulation. All such mortgages must then be dealt with under the provisions of the Act, as for example, sections 67, 86, 87, 88, 89 or 99, all of which sections with the exception of the first have now been repealed from the Act and relegated to the Code of Civil Procedure. (8) In other words, where the mortgage was executed and the due date expired while the Regulation was in force, but no proceedings for foreclosure had been instituted under the Regulation at the time of its repeal, foreclosure could only be sued for under the provisions of the Act. (9) This view is in accordance with section 2 of this Act, and section 6 of the General Clauses Act. (10)

(1) *Thumbusawmy* v. *Hossein Rowthen*, I. L. R., 1 Mad. 1 (23), P. C.

(2) See *Bapurazu* v. *Kamarazu*, I. L. R., 3 Mad., 26; *Ramasamy* v. *Samiyappanayakam*, I. L. R., 4 Mad., 179, F. B.

(3) *Pergash* v. *Mahabir*, I. L. R., 11 Cal., 582.

(4) S. 6. Act I of 1887, Act X of 1897.

(5) *Mallikarjunudu* v. *Mallikarjunudu*, I. L. R., 8 Mad., 185.

(6) *Venkatasami* v. *Subramanya*, I. L. R., 11 Mad., 88; *Shiva Devi* v. *Jaru*, I. L. R., 15 Mad., 290; *Umda* v. *Umrao*, I. L. R., 11 All., 307.

(7) *Ganga Sahai* v. *Kishen Sahai*, I.L.R., 6 All., 262 F. B.; *Bhobo Sundari* v. *Rakhal Chunder*, I. L. R., 12 Cal., 583, F. B.

(8) Act V of 1908.

(9) *Ganga Sahai* v. *Kishen Sahai*, I.L.R., 6 All., 262, F. B.; *Bhobo Sundari* v. *Rakhal Chunder*, I. L. R., 12 Cal., 583 F. B.; *Umesh Chunder* v. *Chunchun*, I. L. R., 15 Cal., 357 (359).

(10) Act I of 1887; Act X of 1897.

Effect of proceedings before the Act.

1240. But proceedings already commenced under the Regulation must be continued and determined under it, and not under the Act which is not retrospective, and cannot affect suits or proceedings commenced before it was enacted. But where the proceedings having terminated in favour of the mortgagee, and the mortgagor obtained a year of grace to redeem expiring on the 10th August 1882, and on the expiration of which the mortgagee brought a suit under section 86, it was held that, although the year of grace had not expired when the Act came into force, and the full and complete right of the mortgagee had not accrued, still he had acquired a right to bring a suit under the provisions of Regulation XVII of 1806, at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year; that such right and liability was one which did not affect procedure merely; and that therefore, the mortgagee was not entitled to sue under the Act. (1) This view was followed in a subsequent case in which the mortgage-deed was executed on the 6th November 1876, and on the 22nd February 1882, the mortgagee served the mortgagor with notice of foreclosure under Regulation XVII of 1806. The mortgage not having been repaid within one year from that date, and the mortgagee having instituted a suit for foreclosure under section 86, it was held that the right having accrued before the Act, the mortgagee was only entitled to foreclosure under the provisions of the Regulation and to no relief under the Act. (2) But while the right to bring a suit is a matter of substantive right, the year of grace allowed by the Regulation (3) is no more than a matter of procedure merely. This period may be extended by the parties *before* the expiration of the time, by mutual agreement, and the mortgagee would not on that account be disentitled to sue under the Regulation. But on the expiration of the period of grace, the mortgagee acquired an *immediate* right to have a decree declaring the property to be his absolutely. It did not become his absolutely without a decree, but his right to such a decree immediately accrued. And even where the mortgagee caused a notice to be served on the mortgagor under the Regulation on the 9th July 1881, and the year of grace consequently expired on the 10th July 1882, the Act having come into force a few days earlier on the 1st July 1882, it was held that although the year of grace had not expired when the Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired a right to bring a suit under the provisions of the Regulation, and that the mortgagor was under a liability to part with the property upon a suit being brought at the expiration of that year, and that, therefore, the procedure of the Regulation should govern the case. (4) The soundness of this view is, however, open to doubt, for it is submitted that the mortgagee does not acquire a right to foreclose till on expiration of the year of grace, during which the mortgagor may at any time redeem, and if this is the case and the right to sue does not commence till the right to redeem has ended, the proceedings are saved, not because the mortgagee has acquired a right to sue, but because the right, though subsequently arising, arises *out of the relation of mortgagee and mortgagor constituted in this case, before the Act came into operation.* (5) Of course, if the notice had expired before the Act came into force, there could be no question, but

(1) *Mohabir* v. *Gungadhur*, I.L.R., 14 Cal. 599.

(2) *Umesh Chunder* v. *Chunchun Ojha*, I.L.R., 15 Cal., 357; *Bashi Chunder* v. *Enayet Ali*, I.L.R., 20 Cal., 296; *Sitla Baksh* v. *Lalta Prasad*, I.L.R., 8 All., 388.

(3) S. 8. Reg. XVII of 1806.

(4) *Mohabir* v. *Gungadhur*, I.L.R., 14 Cal. 599; *Umesh Chunder* v. *Chunchun*, I.L.R., 15 Cal., 357 (362).

(5) See s. 2, cl. (c) *ante* and *Umesh Chunder* v. *Chunchun*, I.L.R., 15 Cal., 357 (362).

that the mortgagee need not have recourse to the Act.(1) On the other hand, since the mortgagor, the movement the period of grace expires, ceases to have any right of redemption,(2) it follows that if *after* the expiration of the year of grace, the mortgagee consents to enlarge time, he does so at his own risk. And since limitation would commence running against him presumably on the expiry of the year, his suit would be barred unless brought within twelve years from that date.(3) And this right, when once extinguished, cannot be revived by the subsequent creation of suits for foreclosure under the Act.(4) And again, where parties are entitled to any right under the Regulation they cannot be allowed to throw it up, and apply to have the benefit of the rights conferred by the Act. And as regards the mortgagor's right to redeem his mortgage by conditional sale before the present Act, it can only be lost when it is proved that there was a previous demand by the mortgagee from the mortgagor of payment of the mortgage-debt, as required by the Regulations. Where, therefore, the mortgagee produced a copy of the proceedings which directed him to bring a suit, it was held that there had not been a sufficient compliance with the Regulation and that, therefore, the mortgagor did not lose his right to redeem.(5)

1241. Proceedings of a ministerial character have the same effect as judicial proceedings. If they have once commenced under the Regulation, they should be continued, and will not be set aside in favour of a new procedure.(6) Thus where a notice had been issued under the Regulation, and its sufficiency was questioned in the mortgagee's suit or possession on the ground that it was not preceded by a preliminary demand upon the mortgagor and that there was no sufficient proof of service of notice, it was held that the objections raised could not be surmounted by treating the suit as one instituted under the Act.(7) And so a suit originally laid under the Regulation was not allowed to be afterwards converted into one under the Act.(8)

1242. Form of Mortgage by Conditional Sale.—It has already been stated that no particular form of words are necessary to constitute a mortgage of any kind. Thus, where the mortgage-deed provided that if the money is not repaid within a stated time, the mortgagee was to take up the management of the property, and also contained the following clause: "We will redeem the mortgaged property on payment of amount due"—it was held that the mortgage was one by conditional sale.(9)

The question whether an instrument operates as a mortgage by conditional sale, or a conditional sale must be determined on a consideration of the whole document, the mere fact that it is designated, the one or the other is not conclusive. (§§ 954—957). The transfer of interest necessary to create a mortgage need not be in express terms. It is sufficient if the instrument taken as a whole has that effect.(10) One essential feature that a mortgage as distinguished from a sale presents is that in the former a certain date of payment is invariably fixed, and it is in this respect that a mortgage is sometimes distinguishable from a conditional sale or a sale with a condition for repurchase. Where, for instance, two contemporaneous deeds were executed, one of which purported to be a deed of

(1) *Bashi Chunder* v. *Enayet Ali*, I.L.R., 20 Cal, 286.

(2) *Bijnath* v. *Narain*, I L.R., 14 Cal., 451.

(3) *Baij Nath* v. *Moheshwari*, I.L R., 14 Cal., 451.

(4) Art. 135, Sch. II of the Limitation Act (XV of 1877); *Srinath Das* v. *Khettar Mohun* I.L.R., 16 Cal., 693, P. C.

(5) *Ib.*, p. 701.

(6) *Badal Ram* v. *Tej Ali*, 4 A.L.J.R 717; *Karan Singh* v. *Mohan Lal* (1868), N.W.-P H.C R., 358.

(7) *Per* Beverley, J., in *Omesh Chunder* v. *Chunchun Ojha*, I.L.R., 15 Cal., 357 (360).

(8) *Sita Baksh* v. *Lalta Prasad*, I.L R., 8 All., 388.

(9) *Motiram* v. *Vithal*, I.L.R., 13 Bom., 90 F. B., see for a similar case *Ammanna* v. *Gurumurthi*, I.L.R., 16 Mad., 64.

(10) *Kola* v. *Vuppala*, I.L.R., 29 Mad., 531.

sale, the other deed providing that on the vendor repaying the purchase-money mentioned in the deed of sale with costs within a fixed period, the vendee would return the land, failing which the vendor would deposit the money in Court, and take possession, it was held that the two deeds could not be construed to constitute a mortgage inasmuch as the essential element of a "certain date" required to be fixed by clause (*c*) of this section was wanting.(1)

1243. The *wajib-ul-arz* of a certain village provided that if any co-sharer was in default in payment of Government revenue, certain persons—co-sharers in the patti and in the village amongst them—might, on discharging the unpaid revenue due by the defaulter, take possession of his share, though without power to partition and without power to transfer or sell. Also that if within twelve years the defaulter or his heir wished to take back the property, he could get it in the month of *Jeth* on payment of the amount of default without interest and without being entitled to a rendition of accounts. The *wajib-ul-arz* went on to provide that after the term of twelve years the heirs of the defaulter should not get the property, but the person who had paid up the arrears of revenue should be the owner. It was held, that notwithstanding the provision last mentioned, the position of the person who had obtained possession under the *wajib-ul-arz* by paying arrears of revenue due by a defaulter was that of a mortgagee under a mortgage by conditional sale as defined in section 58 of the Transfer of Property Act, 1882, and that the defaulter or his representative, in the sense of a suit for foreclosure, had a period of sixty years within which the arrears of revenue might be paid up and the property redeemed. (2) The evidence required to prove a mortgage as against the stranger to the deed must be independent evidence. "Recitals in an instrument may be conclusive, and are always evidence against the parties who make them, but they are not evidence against third parties." (3)

1244. **Limitation.**—The subject of limitation governing a mortgage by conditional sale has been before fully discussed. (4) and is now settled to be twelve years as prescribed in Article 132 of the Indian Limitation Act. (5) In cases arising out of instruments executed since the passing of the Act, the limitation for foreclosure suits acording to the Calcutta High Court was held to be twelve years; (6) according to the other High Courts sixty years. (7) The Punjab Chief Court had followed Calcutta, and the Central Provinces Court had cast in its lot with the majority of the High Courts. (8) This divergence of views led to the enactment of sections 30 and 31 of the present law of limitation, under which the period of limitation for suits instituted in the Presidencies of Madras and Bombay, the United and Central Provinces, Purnea Ajmere-Merwara and in the Sambalpur district, was fixed at sixty years provided the suit was instituted within two years from the date of the passing of the Act (7th August 1908) and suits already dismissed on the authority of the Privy Council precedent (9) were thereby ordered to be restored on application made within six months from the same date (7th August, 1908), and disposed consonantly with the view hitherto-fore prevailing. (10)

(1) *Jai Ram* v. *Makunda*, I.L.R., 26 All., 337.
(2) *Kinuram* v. *Nitye Chand*, 11 C.W.N., 400.
(3) *Manohar* v. *Sumitra*, I.L.R., 17 All., 428.
(4) §§ 1222-1225.
(5) *Vasudeva* v. *Srinivasa*, I.L.R., 30 Mad. 426 P.C.
(6) Art. 132 or 135 as the case may be, see §§ 1222—1225. Art 132 has now been held to apply; *Vasudeva* v. *Srinivasa*, I.L.R., 30 Mad., 426 P. C.
(7) Art. 147, see § 1025 *ante*.
(8) See §§ 1025, 1026 *ante*.
(9) *Vasudeva* v. *Srinivasa*, I.L.R., 30 Mad., 426 P.C.
(10) S. 31 (2) Limitation Act (IX of 1908).

1245. In cases arising out of mortgages executed before 1st July 1882, there was no provision for instituting *suits* for foreclosure in the mofussil [1] of the Presidency of Bengal. [2] Suits instituted under the old Limitation Acts were allowed only the shorter period of limitation, *viz.*, 12 years as provided by section 1, clause 12 of Act XIV of 1859, or by Article 132 or Article 135 or Article 144 [3] of Act IX of 1871. If the mortgagee's remedy has become barred under the older Acts, it cannot be revived under the Act prescribing longer period. Thus, where the mortgagee's remedy to sue was barred before 1st October 1877, when Act XV of 1877 came into force, he could not revive his claim under the latter Act, and since suits for foreclosure were for the first time introduced in the mofussil by this Act, his suit, if barred under the old procedure, could not for the same reason be revived under the new Act. [4] But if his remedy was not barred before the new Act came into force, he would be allowed, subject to the provisions of section 30 of the present Limitation Act, [5] the extended period provided for in Article 147. [6]

1246. Under Article 135 of the Act of 1871, the mortgagor's right to possession was determined after expiration of the year of grace allowed to him, but if the mortgage contained a stipulation that the mortgagee may take possession on default being made, limitation was to commence to run against him from the date of the default. [7] And the extinguishment of the right to sue for possession was held to extinguish also his right to apply for foreclosure. [8] Where the money was stipulated to be paid in four instalments, the plaintiff being at liberty in case of any default, to sue either for the amount of the instalment or for the whole amount due on the bond, limitation was held to commence to run from the date of the first default. [9] Where, however, the liability of the debtor is made dependent on a preceding demand, the cause of action would not accrue as against him till such demand is made. [10]

1247. Collateral Stipulations.—The distinction between a mortgage by conditional sale and a conditional sale or sale with a condition for repurchase has already been the subject of discussion in another place (§§954—957). The two transactions are distinguishable [11] and should be distinguished. (§§ 1188). A stipulation in a mortgage-deed that if the mortgagor redeems the property, the mortgage-right should be extinguished, but that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent is a condition which cannot be enforced in a Court of equity. [12]

(1) Against redemption.

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(1) Mofussil, because suits to foreclose English mortgage were common in the Presidency towns.

(2) *Surnomoyee* v. *Shrinath Das*, I.L.R., 12 Cal., 614; O.A.I.L.R., 16 Cal., 643; *Shyam* v. *Baldeo*, 10 A.L.J. 522 (525).

(3) *Nandlal* v. *Goojar*, 15 I.C. 275; *Tekchand* v. *Sohee* (1906), P.R. No. 65.

(4) *Srinath* v. *Khetter Mohun*, I.L.R., 16 Cal., 3 P.C; *Jagadamba* v. *Ram Chandra*, I.L.R., 31 Cal., 314; *Murat Singh* v. *Ramlal*, 8 C.P.L.R., 83; *Murlidhar* v. *Kanchan*, I.L.R., 11 All., 144, P.C.

(5) Act IX of 1908.

(6) *Jagmohan* v. *Chaitu*, 8 C.P.L.R., 65

(7) *Modun Mohun* v. *Ashad Ally*, I.L.R., 16 Cal., 68; *Murlidhar* v. *Kanchan*, I.L.R., 11 All., 144

(8) *Girwar* v. *Thakur*, I.L.R., 14 Cal., 730 (736) F.B.; *Surnomayee* v. *Shrinath*, I.L.R., 12 Cal., 614.

(9) *Sitab Chand* v. *Hyder Malla*, I.L.R., 24 Cal., 281; *Perumal* v. *Alagirisami*, I.L.R., 20 Mad., 245.

(10) *Hanmantram* v. *Sadhuram*, I.L.R., 8 Bom., 561 (568); *Nettakaruppa* v. *Kumarasami*, I.L.R., 22 Mad., 20.

(11) *Bhagwan Sahai* v *Bhagwan Din*, I.L.R. 12 All., 387 (391) P.C.; *Jhanda Singh* v. *Wahiduddin*, I.L.R., 33 All., 585 (592).

(12) *Mahomed* v. *Jijibhai*, I.L.R., 9 Bom., 524. See fuller discussion under s. 60 *post*.

1248. A mortgage by conditional sale, as such, must possess the characteristics before enumerated. But while such deeds are common, in the present state of Indian conveyancing, it is not unusual to come across hybrid deeds in which additional, sometimes inconsistent clauses as to the mode and manner of repayment are found inserted. Such a deed may constitute an "anomalous mortgage" hereafter defined. When it is not anomalous, the question may be what rights does it create and what liabilities does it impose upon the parties. In a pure mortgage by conditional sale, the mortgagee does not make himself personally liable for the repayment of the loan, and this essential feature it shares with another form of mortgage to be presently considered, *viz.*, an usufructuary mortgage. In this respect, the law as here enacted, has continued to remain unchanged.(1) But it is always open to the mortgagee to obtain an additional stipulation of a personal security, in which case, according to the older cases, he could recover on the personal covenant only on showing good and sufficient cause, his usual remedy being by a suit for possession. In any case he was bound to elect and could not sue both for possession of the property pledged, and for recovery of the money. The law on the subject is now embodied in section 68, under which the subject will be found fully set out.

(2) Personal covenant.

1249. Usufructuary Mortgage.—Another form of security, in which repayment begins as soon as the money is advanced, is that known as the usufructuary mortgage of which the Act specifies three forms, but which may conceivably assume many more forms without forfeiting its character. The delivery of possession to the mortgagee is in this form of security a *sine qua non* which cannot be displaced by the registration of the mortgage-deed or by delivery of possession on a subsequent date. The delivery of possession and enjoyment of the usufruct is an incident of ownership to which the usufructuary mortgagee becomes entitled on the execution of his security. But his possession differs on the one hand from the possession of proprietor (2) and on the other from that of a lessee, since while parting with some of the incidents of ownership temporarily and for a specific object, does not amount to transfer of ownership, the fact, that such transfer is made both by way of security as for the purpose of discharging it, distinguishes such a mortgage both from a sale as well as a lease. Sir Comer Petheram was then clearly wrong when he held that an usufructuary mortgagee being entitled to exclusive possession of the property until the payment of the loan, became "the proprietor of a thing during that time, inasmuch as I understand the proprietor of a thing to be the person entitled to the exclusive possession of it *at the time*,"(3) a view which makes clean sweep of the rights know as *jura in re aliena* which have been recognized by the jurisprudence of all countries.(4) The transfer of possession may be effected by actual delivery or by giving him a right of entry which has the same effect.(5) (§ 970). The possession being for a specific object, the parties may stipulate both as to its extent and duration. For although the definition enacts that in such a mortgage the mortgagor authorizes

Cl. (d).

(1) *Mohanund* v. *Gobindnath* (1842), 7 S. D., 92 ; *Bulram* v. *Huree* (1848), S. D., 42 : *Busraj* v. *Achybur* (1848), N.W.P., S.D A., 209 ; *Oodytnarain* v. *Bhowanee* (1852), *ib.*, 272 ; *Gunesh* v. *Mirza* (1862), *ib.*, 1 ; *Bhugwan* v. *Goburdhan ib.*, 337 ; *Thumbusawmy* v. *Hossein Rowthen*, I.L R., 1 Mad., 1 (15,16) P.C ; *Kuraishi* (*Mt.*) v. *Mumtaz*, 3 I. C. 870 (872). Now see s. 68, *post*.

(2) *Indar Sen* v. *Naubat Singh*, I.L.R., 7 All., 553 (557), F.B.

(3) *Ibid.* This view was reiterated by Richards, J. (Karamat Husain, J., *dissentiente*) in *Nemichand* v. *Ganesh*, 7 A. L. J., 370 (373, 387).

(4) *Cf. Kader Moideen* v *Nepean*, I.L.R., 2 Cal., 882, P.C.

(5) *Motiram* v. *Vitai*, I.L.R., 13 Bom., 90 (100), F.B. ; *Bisheshar* v. *Debi*, 17 I.C., 329 (331, 332).

the mortgagee to retain possession "until payment of the mortgage-money," it is by no means necessary that it should invariably be so, for the parties may agree that possession for a definite term shall be sufficient to liquidate the whole debt or a definite portion thereof,(1) or that without accounting, the mortgagee's possession for a certain time shall have the effect of reducing the mortgage-money in a certain proportion, as that the mortgagee should by twenty-five years' possession be deemed to have received in full both principal and interest, but that, if the mortgagor wished to regain possession of the land within that time, he might do so by repayment of so much of the principal land twenty-five years' interest as might be then due.(2) But a mortgage for a fixed term, as contradistinguished from one given "until payment of the mortgage-money," can hardly be called an usufructuary mortgage, but would rather partake of the character of a mortgage designated "Anomalous."(3) Then, again, possession may be delivered subject to the three conditions as to the appropriation of the usufruct—(*a*) in lieu of interest, (*b*) in payment of the principal, or (*c*) partly in lieu of interest and partly in payment of the principal mis-called "mortgage-money" in the clause (§§1200—1204, 1210). But here again, if the mortgagee is to appropriate only a portion of the usufruct, as where he had agreed to pay over the balance of the profits, if any, left over after paying himself the interest due on the loan, the transaction is not an usufructuary but a simple mortgage.(4) So again, if the mortgagee pays rent to the mortgagor, he could hardly be regarded as an usufructuary mortgagee, although he may nevertheless be an anomalous mortgagee.(5) The covenant that the usufruct shall be appropriated for the purposes specified in the definition need not be express or be in writing, if it is otherwise sufficiently implied. A stipulation that the property was to be reconveyed on payment of the principal sum lent, nothing being said as to interest, would necessarily be construed to imply that the usufruct was intended to be received by the mortgagee in lieu of interest, and therefore the mere fact that the amount of the principal had been received from the usufruct was held to be insufficient to satisfy the mortgage.(6)

Mortgagor not personally liable.

1250. An usufructuary mortgagee, as such cannot sue for foreclosure or sale(7) nor is an usufructuary mortgagor personally liable to repay the loan.(8) The essence of an usufructuary mortgage is that the mortgagee looks to the rents and profits for the satisfaction of his advance, and, inasmuch as no time is fixed for payment, there can be no forfeiture. It is this forfeiture that gives rise to the remedies of foreclosure and sale, and in its absence the mortgagee is not entitled to the remedies that spring out of it. In the absence of an express agreement to pay, an usufructuary mortgagee cannot obtain a personal decree. But where the mortgagee has failed to obtain possession, he is entitled either to sue for possession or for the recovery of his money. Where such a mortgagee is kept

(1) *Bapuji* v. *Sattyabhamabhai*, I.L.R., 6 Bom., 490 (494).

(2) *Ibid.*

(3) *Hikmatulla* v. *Imam Ali*, I. L. R., 12 All., 203; *Visvalinga* v. *Palaniappa*, I.L.R., 21 Mad., 1 (3); *Tukaram* v. *Ramchand* I. L. R., 26 Bom., 252, F. B.

(4) *Yashvant* v. *Vithal*, I. L. R., 21 Bom., 267 (272), but *contra* in (1879), *Venkateshwara* v. *Kesava*, I.L.R., 2 Mad., 187.

(5) In *Venkateshwara* v. *Kesava*, I. L. R., 2 Mad., 187, decided in 1879, the mortgagee paying rent to the mortgagor was held to be an usufructuary mortgagee, but he could scarcely be so called in view of the definition since enacted.

(6) *Bunwareelal* v. *Mahomed*, 2 Hay., 150; *Sadashiv* v. *Vyankatrao*, I. L. R., 20 Bom., 296.

(7) S. 67 (*a*) *post*; *Chathu* v. *Kunjan*, I. L. R., 12 Mad., 109; overruling *Venkatasami* v. *Subramanya*, I L. R., 11 Mad., 88.

(8) *Chathu* v. *Kunjan*, I. L. R., 12 Mad., 109 (112); *Luchmeshar* v. *Dookh Mochan*, I. L. R., 24 Cal., 677.

out of possession by the mortgagor, he is entitled to recover rent and profits received by the mortgagor during that period; but he can only recover profits received within three years of the commencement of his suit which is subject to Article 109 of Schedule II of the Limitation Act. (1)

Novation.

A contract of usufructuary mortgage may, like any other contract, be renewed, but in order that a mortgage should operate by novation, it is necessary that the new mortgage should have been intended to have extinguished the old one. A mere execution of a fresh mortgage-deed is not *per se* a sufficient act pointing to novation, unless the executee implies or leads others to believe that he had abandoned the first mortgage. (2) If the considerations for the two deeds were distinct the two transactions are necessarily separate. (3) Actual possession is not essential to complete the transfer within the meaning of the section. It is sufficient if the right of entry is given to the creditor (4) (§§ 1049, 1050).

Other analogues.

1251. An usufructuary mortgage corresponds with what is known as the *vivum vadium* or the Welsh mortgage in English law, the *Bhoga Bandhukum* of Hindu law, but the resemblance between the former and a pure usufructuary mortgage is more superficial than real, for while in England such a mortgage may be for a fixed term (5) and implies a personal liability,(6) it is a feature in which the Indian form differs from its western prototype. It, however, presents very close analogy to a tenancy by *elegit*, in which as soon as the principal and interest are satisfied, the mortgagor might maintain ejectment unless his claim has in the meantime become barred by limitation. (7) But in so far as no suit for foreclosure(8) or sale (9) can be maintained in a Welsh mortgage, and no time is fixed for redemption (10) it resembles an usufructuary mortgage which also possesses identical attributes. The continuing right of redemption is an inseparable incident of a Welsh as of an usufructuary mortgage.

Welsh mortgages were formerly very common in Ireland, but they have now fallen into disuse.

A *kanom* in so far as it is a mortgage, is a usufructuary mortgage and not a combination of a usufructuary and a simple mortgage; consequently no suit will lie for the recovery of the *kanom* amount. (11) The nature and incidents of this mortgage will be found fully discussed under section 98.

Simple mortgage usufructuary.

1252. An usufructuary mortgage, as such, must conform to the description given of it in clause (*d*) under which the mortgage contains no personal covenant on the part of the mortgagor to pay the mortgage-money. But a personal covenant is not infrequently superadded to such a mortgage, in which case the transaction

(1) Act IX of 1908; *Govindrav* v. *Jiwanji* 2 Bom. L. R., 201.

(2) See s. 101, comm. *post*; *Sheoraj* v. *Harchandi*, 11 A.L.J. 365; *Ram Kishen* v. *Fakirchand*, *ib*,, 386; *Sat Narain* v. *Gangaparshad*, 1 I. C. 117 (118).

(3) *Shankar Sarup* v. *Mejo Mal*, I.L.R. 23 All. 313 (323), P. C.

(4) *Motiram* v. *Vitai*, I.L.R., 13 Bom. 99 (100) F.B.; See *Sheo Ratan* v. *Mahipal*, I.L.R. 7 All. 258 (266).

(5) Robb., Mort. 30.

(6) *King* v. *King*, 3 P. Wms., 361, but in Irish case the mortgagor was held not to be personally liable; *Cassidy* v. *Cassidy*, 24 L. R., Ir., 577. To the same effect *Floyer* v. *Lavington*, 1 P. Wms., 268; *Mellor* v. *Lees*, 2 Atk. 494 (496).

(7) *Per* Lord Hardwicke in *Yates* v. *Hambly*, 2 Atk., 362.

(8) *Teulon* v. *Curtis*, You., 610; L.J., N. S. Ex. Eq., 17.

(9) Robb. Mort. 31; *Mahadaji* v. *Joti*, I.L. R., 17 Bom., 425; *Sadashiv* v. *Vyankatrao*, I.L.R. 20 Bom., 296.

(10) *Hartpole* v. *Walsh*, 5 Bro. P.C., 267 (275).

(11) *Viyathen* v. *Veerarayan*, 9 M.L.J., 108.

ceases to be a pure usufructuary mortgage, becoming what is known as a simple usufructuary mortgage.(1) Such a transaction is not infrequently met with; it is not an anomalous mortgage (2) but is a form of usufructuary mortgage, though it admits of a suit for sale on the strength of the covenant. Such a covenant may be express or implied. but it must be sufficiently specific to be enforceable. Indeed, in the crude and inartistically drawn-up mortgages in India it is seldom that language is precise or free from circumlocution and redundancy. But if the intention be clear the deed must be construed as far as possible in accordance with the covenants contained in them. (3) A deed which, after reciting that the mortgagee had been put in possession of the mortgaged property, and that he was thenceforth authorized to appropriate the profits in lieu of the interest due on the loan during the term of the mortgage, proceeded to add that the mortgagor was entitled to redeem the mortgage after the expiration of seven years, the mortgagee was entitled to demand repayment of the mortgage-money after the expiration of the term, and that if any difficulties or obstructions were placed in the way of the mortgagee, or any disputes or prior liens were found to exist the mortgagee was at liberty to recover the mortgage-money together with costs, damages and interest from the mortgagor and other properties of the mortgagor in the said villages according to the condition of a separate deed of even date. On a question arising as to the admissibility of the contemporaneous deed for the purpose of evidencing intention and as to the nature of the transaction, the Court held that the deeds were intended and ought to be read together, and that with regard to the nature of the transaction it must be held that the mortgage was of a composite character, and that there being a covenant to pay, that covenant could only be enforced by sale of the property and by proceeding on the basis of its being a simple-mortgage-usufructuary.(4) Such mortgages are of frequent occurrence and a good plan to construe them is to resolve the conditions into their elements and then to see into which of the primary form the several covenants fall, and which should be sufficient to determine their character.

Thus while a covenant as to possession and enjoyment of the usufruct would point to an usufructuary mortgage, a covenant that the money may be recovered from the person and property of the mortgagor at the end of a given period would be the covenant characteristic of a simple mortgage, and in which case it is for the mortgagee to choose whether he will sue for sale or for possession.(5) Such a covenant should, however, be unconditional and sufficient to create a personal liability. If the mortgagor promise to indemnify the mortgagee for his subsequent dispossession by him or his heirs and assigns, it is not a covenant to pay the mortgage-money, although in enforcement of the indemnity clause a personal decree may be inevitable. A deed in which possession of the mortgaged property was transferred in lieu of interest, and the mortgagor stipulating to redeem the land in five years by repaying the principal, added: "Should the amount remain unpaid after that date, I will continue the land with you until I pay the amount....Unless I pay the money, I will not disturb(your) possession of the land," is another example of simple usufructuary mortgage in which the component terms are those of a simple and an

(1) *Dattambhat* v. *Krishnabhat*, I.L.R., 34 Bom., 462.

(2) See S. 98, *post*.

(3) *Jafar Husen* v. *Ranjit Singh*, I.L.R., 21 All., 4.

(4) *Jafar Husen* v. *Ranjit Singh*, I.L.R., 21 All., 4; *Jugal Kishore* v. *Ram Sahai*, (1886) A.W.N. 212; *Umrao Begum* v. *Vali-Ullah*, (1888) A.W.N., 171; *Mahadaji* v. *Joti*, I.L.R., 17 Bom., 425; *Dattambhat* v. *Krishnabhat*, I.L.R., 34 Bom., 462; *Fida Ali* v. *Iswailji*, 6 N.L.R. 20 (25); *Ramayya* v. *Guruva*, I.L.R., 14 Mad., 232.

(5) *Pitambar* v. *Madhu*, 6 I.C., 153.

usufructuary mortgage, which entitles the mortgagee to sue for sale in default of payment of principal.(1) A mortgagee who is entitled to possession in lieu of interest and who does not take possession, loses his right to interest and cannot ask that the property be sold for default in payment of interest, the property being security for the principal only. But a covenant by the mortgagor to the effect—"The land. . . we have given into your possession for profit or loss under an agreement for ten years. . . In the year in which we will pay your amount at the harvest time in the month of *margashish* on the expiry of the ten years, we will take the land for the next succeeding crops, precluded suit for sale, inasmuch as the effect of the deed is that the mortgagee shall remain in possession till the mortgagor could pay off the debt.(2) Such a covenant fixes a time before which the mortgagor cannot redeem,(3) but it does not thence follow that it gives the mortgagee right to put the property to sale. Indeed, as regards the rights of the mortgagee there is practically no difference between such a case and one in which the mortgagee is put in possession of the land and is to enjoy the profits in lieu of interest, the mortgagor being at liberty to recover possession in any year on payment of the principal amount.(4)

1253. Of course, as has been already observed, an usufructuary mortgage may be limited as to the time, and the mode and manner of its enjoyment by the mortgagee, who may agree to enjoy its usufruct in lieu of interest only promising to reimburse himself for the principal money advanced out of the surplus, or he may take possession for the term fixed, in which case he will be liable for the risk of seasons and the payment of rent, the mortgagor being entitled to redemption at the end of the term. (5) A mortgagee who has once taken possession of the mortgaged property cannot relinquish possession at his pleasure; having once assumed the responsibilities attaching to a mortgagee in possession, he cannot at his own pleasure get rid of them, and as a general rule the Court will not by appointing a receiver, assist him in doing so. (6)

1254. An usufructuary mortgage is sometimes mistaken for a *zur-i-peshgi* lease, and indeed, sometimes there is only an invisible line to divide them. But since the two essentially differ in their incidents, the distinction wherever it exists must be carefully watched. (§ 1190). Of course in a doubtful case, the lessee would always contend for its being a lease, whereas the lessor would strive to reduce it to a mortgage so as to let in the right of calling for accounts and of redemption which he would not otherwise possess.

1255. Zur-i-peshgi Lease.—A *zur-i-peshgi* lease, or a lease for consideration, is, in form, a lease by the debtor to his creditor on a fixed rent reserved by the lease, which is generally a little over the amount of interest agreed to be paid by the debtor. The surplus, if any, is payable to the debtor and is called *haqq haziree*, or it may be applied towards reduction of the principal. These leases were devised to evade the laws against usury,(7) which limited the maximum rate of interest to 12 per cent. per annum. They generally introduced

(1) *Mahadaji* v. *Joti*, I.L.R., 17 Bom., 425.
(2) *Shaik Idrus* v. *Abdul Rahiman*, I. L. R., 16 Bom., 303.
(3) *Roy Gowree* v. *Bholee*, 17 W. R., 211.
(4) *Sadashiv* v. *Vyankatrao*, I. L. R., 20 Bom., 296.
(5) *Sri Raja Setrucherla* v. *Sri Vairicherla*, I. L. R., 2 Mad., 314; *Bajuji* v. *Satyabhamabai*, I. L. R., 6 Bom., p. 494.
(6) In re *Prytherch*, 42 Ch. D., 590.
(7) These were Reg. XV of 1793; XXXIV of 1803 (Bengal); repealed by Act XXVIII of 1855, from 1st January 1856: XXXIV of 1802 (Madras) repealed by Madras Act II of 1869.

for the first time the payment of rent *in kind*, and thus effectually neutralised the effect of the laws intended to relieve debtors against usurious contracts. But such a transparent device resorted to with the sole purpose of evading the law could not but before long be discovered, and the reported cases show that Courts always leaned against them, by regarding the position of the *zur-i-peshgi* lessee as that of a usufructuary mortgagee, and who was therefore liable to account even in a case where the rent reserved was shown to be a fair one (1); and in which the lessor could claim redemption even before the expiration of the term—if he could satisfy the Court that a sum equivalent to the principal and interest had been received by the lessee. (2) But it would appear that since the repeal of the Regulations, he can no longer redeem before the stipulated period. (3) The lessee as such can in no case bring the property to sale, (4) unless the mortgagor had expressly covenanted otherwise. (5) If he covenants for such a power his lease becomes a regular mortgage. Hence it is clear that the creditor relying solely upon his lease has usually but an imperfect security for his money.

1256. In mortgages of this kind the relationship between mortgagor and mortgagee subsists according to the contract between them. Thus, if the contract amounts simply to saying, "I lend the money and you the land. If either of us wants that which he has lent he shall restore that which was lent to him." "The possession of the mortgagee for 10,000 years upon such a transaction would be perfectly consistent with the continuance of the relationship of mortgagor and mortgagee." (6) The transfer by an occupancy-tenant of his holding to another in consideration of a loan for such time as the loan remains unpaid cannot be regarded as a sub-lease, but it is an usufructuary mortgage, though as such it may be void, and as a sub-lease it may be valid. (7) A *zur-i-peshgi* lease, being in all respects treated as a mortgage, was held to be subject to the control of section 99 of the Act, since repealed and accordingly, it was held that a purchase of the property so leased by the creditor in execution of a decree for rent due by the debtor was not merely irregular but absolutely void. (8)

1257. Ambiguous Deed how construed.—In ascertaining whether a deed, confessedly ambiguous, amounts to an usufructuary mortgage or to a lease in perpetuity, the Court should in the first place look within the four corners of the deed, and ascertain from it what kind of transaction the parties had in view when they entered into it. It should then be ascertained how far the intention as expressed in the deed was modified by the contemporaneous conduct, acts and deeds. (9) (§§336, 338, 1154-1159) In the case of an usufructuary mortgage, where no term is specified, the mortgagor is entitled to re-enter on the property as soon as, on taking an account, he is able to show that the principal and interests have been satisfied. (10)

1258. Assignment of Usufructuary Right.—An usufructuary mortgage is no exception to the rule as to the general law governing the

(1) *Pungun Singh* v. *Amina Khatun*, 6 W. R., 6.

(2) *Khajeh Lootf Ali* v. *Goozraz Thakur*, 11 W. R., 428; *Soorjun* v. *Imam*, 12 W. R., 527.

(3) *Kewal Sahu* v. *Rashnarain*, 13 W. R., 446.

(4) *Chatu* v. *Kunjan*, I. L. R., 12 Mad., 109.

(5) *Ram Baksh* v. *Nohar Pandey*, 1 A. W. N., 63.

(6) *Vanneri* v. *Patanatil*, 2 M. H. C. R., 382.

(7) *Krishna Chandra* v. *Miran*, 3 C. L. J., 222.

(8) *Sheodari* v. *Ram Saran*, I. L. R., 26 Cal., 264.

(9) *Kader Moideen* v. *Nepean*, I. L. R., 21 Cal., 832, P.C.; *Mahomed* v. *Nazar*, I.L.R., 28 Cal., 289; *Abdur* v. *Hafez*, *ib.*, 256.

(10) *Doul Narain* v. *Runjit Singh*, 1 C. L. R., 256.

assignability of property, and a party who pays off a mortgage becomes an usufructuary mortgagee in place of his assignor, and is entitled to remain in possession until the whole debt has been discharged by the usufruct,[1] as of course, he is subject to all the liabilities attaching to the original mortgagee.[2] The transfer of a mortgage without the privity of the mortgagor operates subject to the state of the account between the mortgagor and the mortgagee, and the former is entitled as against the transferee to have credit for all payments made by him to the original mortgagee without notice of the transfer.[3]

Vernacular names for usufructuary mortgage.

1259. An usufructuary mortgage is known as *bhogyam* or *bhogya bandhaka*,[4] and in Madras as *swadhina adamanum* : *kanom*[5] *otti* [6] and *iladarwara* [7] are also mortgages of the same kind and differ but little from each other. To the same class must belong the "Girby mortgage" described in Bengal as a transaction in which in consideration for a sum of money lent to him the obligor allowed the lender the enjoyment of the former's holding agreeing that he should continue in it until the loan was repaid.[8] The word *kanom*, however, does not necessarily import a mortgage.[9]

Joint-mortgagors.

1260. In the case of usufructuary mortgage by several co-mortgagors, when such mortgage is satisfied out of the usufruct, each co-mortgagor is not entitled to recover possession of more than his share of the mortgaged property. Consequently, where in such a case one of several co-mortgagors gets possession of the whole of the mortgaged property he does not occupy the position of a mortgagee to his co-mortgagee, but his possession is adverse to them.[10] A person may give parol evidence to prove that though appearing as a co-obligor, he was in reality a surety,[11] but such evidence is inadmissible according to the view of the Calcutta High Court.[12] (§§ 1157-1164, 1186).

1261. Limitation for Usufructuary Mortgage.—The ordinary period allowed to the mortgagee to bring the property to sale has been already set out (§§1244-1246). The last clause of section 20 of the Limitation Act[13] provides that where mortgaged land is in possession of the mortgagee the receipt of the produce of such land shall be deemed to be a payment for the purpose of that section. This has been ruled to extend the time for suit by a mortgagee to recover a debt secured by an usufructuary mortgagee, and is not intended to override the general provision of law. The clause declares that the produce of the mortgaged land shall be deemed to be a payment *for the purpose of that section* only. But this is the view of law, which, though now taken at Allahabad, is

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(1) *Fyezoollah* v. *Kazim Hossein*, 14 W. R., 29.

(2) *Achumbit* v. *Kesho Lall*, 20 W. R., 128. See Ch. VIII *post*.

(3) *Turner* v. *Smith*, [1901] 1 Ch., 213.

(4) *Ishan Chandra* v. *Sujan*, 7 B.L.R., 14.

(5) *Keshava* v. *Keshava*, I.L.R., 2 Mad , 45; *Sridevi* v. *Virayayan*, I.L.R , 22 Mad., 350; *Ramunni* v. *Brahma*, I.L.R., 15 Mad., 366 (379), dissented from.

(6) *Kumini* v. *Pakram*, 1 M.H.C.R., 261 (distinguishes *otti* from *kanom*); *Ctathu* v. *Soolapani*, 9 I.C., 1010 ; *Kadakam* v. *Otheenan*, 10 I.C., 339 ; *Subramanian* v. *Krishnan*, (1911) M.W.N., 486.

(7) *Perlathil* v. *Mankude*, I.L.R., 4 Mad., 113 ; *Mailarya* v. *Subraya*, 1 M.H.C.R., 81.

(8) *Krishnachandra* v. *Miran*, 3 C.L.J., 222 (223).

(9) *Krishnan* v. *Veloo*, I.L.R., 14 Mad , 301, F.B.

(10) *Gobardhan* v. *Sujan*, I.L.R., 16 All., 264 ; *Fakir Buksh* v. *Sadat Ali*, I.L.R., 7 All., 376.

(11) *Mulchand* v. *Madho Ram*, I.L.R., 10 All., 421; *Shamshul Jahan* v. *Ahmad*, I.L.R., 25 All., 337 ; reversed O. A. in *Ahmad Wali Khan* v. *Shamshul Jahan*, I.L.R., 28 All. 482, P.C., but on a different point.

(12) *Harek Chand* v. *Bishun Chandra* 8 C.W.N., 101.

(13) *Kallu* v. *Halki*, I.L.R., 18 All., 295,

opposed to the two earlier decisions of the same High Court.(1) "Produce of the land" in the section has been held to include its rent.(2)

1262. Usufructuary Mortgage under the Regulations.—Cases now and then still arise where parties seek decision in regard to transactions entered into by them during the currency of the old Regulations.(3) It has been held that, in such cases, the relation between parties will be governed by the Regulations even where the suit is instituted after the coming into operation of the Act.(4) The Bengal Regulations were repealed by Act XVIII of 1855,(5) and the Madras Regulations by Madras Act II of 1869. By Regulation XV of 1793, section 11, the mortgagee in possession "is to be required to deliver in the accounts of his gross receipts from the property mortgaged and also of his expenditure for the management or preservation of it. The mortgagee is to swear, or (if he be of the description of persons whom the Courts are empowered to exempt from taking oaths) to subscribe a solemn declaration, that the accounts which he may deliver in are true and authentic." Under the Regulations, the fact that the mortgagor had given mortgage for a fixed term, did not prevent him from redeeming his property before the expiration of the period,(6) nor did the fixation of the letting rent prevent him from calling for accounts. But the terms of the law were not inflexible, and the Courts were enjoined to accommodate its provisions to the variable and different natures of estates and possession.(7) Thus the mortgagee is to be allowed his own collection-fee and other expenses at from 5 to 10 per cent. on the gross collections.(8) In one case of a mortgage of *malikana* amounting to Rs. 2,221, where the mortgagee was to credit Rs. 1,656, towards interest at 12 per cent. every year, and to take the remainder, Rs. 565, as his own collection-fee and for other expenses, the contract was upheld by the Privy Council on the ground of its reasonability and that no evasion of the law or usurious contract was intended.(9)

1263. Under the Regulations the mortgagee could not, however, claim more interest than 12 per cent. per annum.(10) He was bound to keep the premises in necessary repair out of the surplus, and for which he was allowed the actual cost of expenditure with interest.(11) He could not, however, expend money in making improvements without the consent of the mortgagor.(12) He was liable to pay the Government revenue, and any payment made by him, either to prevent a forfeiture, or sale for non-payment of revenue or rent, was to be credited to him in account.(13) If the mortgagee chose to forego the benefit of receiving the rents and profits, and permitted the mortgagor to take them, it had no effect as between him and the mortgagor; he had still a full right to recover his debt by reason of the mortgage. He was,

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(1) *Parmanand* v. *Sahib Ali*, I.L.R., 11 All., 438, F B.; *Tingari Singh* v. *Bhagwan Singh*, (1889), A.W.N., 187.

(2) See Mitra's Limitation (3rd Ed.), p. 624.

(3) Reg. XV of 1793, Beng. Reg. XXXIV of 1803. Mad. Reg. XXXIV of 1802.

(4) *Samar Ali* v. *Karim-ul-lah*, I.L.R., 8 All., 402; *Sidhessar* v. *Babaji*, I.L.R., 23 Bom., 781.

(5) Which came into force on the 1st January, 1856.

(6) *Toppayya* v. *Venkata*, I.L.R., 6 Mad., 74; but see *Peralathail* v. *Mankude*, I.L. 4 Mad., 113; *Sri Raja Setrucherla* v. *Vairicherla*, I.L.R., 2 Mad., 314.

(7) *Shah Makhun* v. *Sree Kishen Sing*, 12 M.I.A., 157; 11 W.R., 19, P.C.

(8) *Makundlal* v. *Goluk Chunder*, 9 W.R., 572.

(9) *Badri Prasad* v. *Murlidhar*, I.L.R., 2 All., 593, P C

(10) *Shah Makhun* v. *Sree Kishen Sing*, 12 M I.A., 157.

(11) *Jogendra Nath* v. *Raj Narain*, 9 W.R., 488.

(12) *Sandon* v. *Hooper*, L.J., 12 Ch., 309.

(13) *Nurjoon Sahu* v. *Shah Moseeroodeen*, 3 W. R., 26.

however, affected when some subsequent incumbrancer came in, and he had notice of that claim. In that case the rule and law in England would be that if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer.(1) Since the repeal of the laws against usury, the mortgagee may always relieve himself from the liability of accounting by a stipulation with the debtor.

The limitation affecting the mortgagor's suit for accounts and surplus profits has been before set out(2) (§§ 1244-1246).

1264. English Mortgage.—The form of mortgage described as an "English mortgage" is the surviving specimen of *mortuum vadium*, (3) an archaic form of security mentioned by the mediæval lawyers, and which according to one account took its name from the fact that on breach of condition the estate died or became lost to the mortgagor. (4) The term was, according to another writer, used to contrast with the other form of security called *vivum vadium*, (5) in which the repayment having begun out of the usufruct of the land there was every hope of redemption, and which was the very reverse of what might be expected in a *mortuum vadium*, in which the mortgagor lost both the present right to rents and profits as well as the future hope to redeem it. In spite of the growth and development of juristic conceptions, it must be confessed that in respect of these mortgages, the English law has shown but little progress. In India, this form presented closer affinity to a conditional sale as understood in the Regulations, and the two were often dealt with on the same footing. (6) Even now they bear the stamp of their common descent, and only differ in that, while in an English mortgage there is as well a personal covenant, it is usually absent from a mortgage by conditional sale. But an English mortgage by a trustee does not import a personal covenant, (7) and in such a case the only difference between the two is as to the mode and manner of realizing the security, and which, so far as regards this country, form their essential points of divergence. English mortgages have long been common in the Presidency towns and among Europeans in the mofussil and are treated on the same footing as in the English Courts. (8) But similar transactions entered into by Hindus in the mofussil, were formerly treated as mortgages by conditional sale, and therefore governed by the Regulations wherever these happened to be in force.(9) In fact, it has been held, that "the transaction of mortgage effected by a *bye-bil-wafa* was under the Regulations essentially the same in regard to the relation between the mortgagor and the mortgagee as the English mortgage." (10) In an English mortgage, as defined by the Act, there is an absolute conveyance of the property by the mortgagor, subject only to the condition that, on payment of the mortgage-money within a specified time, usually six months, the property shall be conveyed to him.

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(1) *Jagjewan* v. *Ram Das*, 2 M.I.A., 487.

(2) See also *Bibolal* v. *Jamal Ali*, 9 W.R. 87; *Nilkant* v *Joynudin*, 7 W.R., 30; *Raghu Nath* v. *Girdhari*, 7 W.R., 244; and on the subject generally see *Shah Latafut Hossein* v *Chowdhry Mahomed Moneim*, 22 W.R., 269; *Rajah Saheb Perladh* v. *Broughton*, 24 W.R., 27.

(3) Or "Dead pledge."

(4) Co. Litt., 239*a* 5 Bac. Alex. *Lit. mortgage* A., Shep. Touchstone, 139, 143.

(5) Or "Living pledge."

(6) *Khelut Chunder* v. *Tarachunder*, 6 W. R., 269, O.A., 4 M.I.A., 144., *Soroshsebala* v *Nundlal*, 5 B. L R., 389; *Manly* v. *Paterson*, I L R., 7 Cal., 394; *Surnomoyee* v. *Srinath*, I L. R., 12 Cal.. 614. O.A., *Srinath* v. *Khetter*, I L.R., 16 Cal, 693. P.C.

(7) *Stroughill* v. *Anstey*, 1 De.G. M. & G.; 635 (642).

(8) *Manly* v. *Paterson*, I. L. R., 7 Cal. at p 398.

(9) *Surnomoyee* v. *Srinath*, I. L. R., 12 Cal., 614.

(10) *Mankee Kooer* v. *Sheikh Munnoo* 14 B. I.R., at p. 318, P.C.; *Pran Nath* v. *Rooked Begum*, 7 M.I.A., 823; *Brajanath* v. *Khailatchandra*, 14 M.I.A., 144.

1265. Essentials of an English Mortgage.—The three essentials of an English mortgage are (*a*) that the mortgagor should bind himself to repay the mortgage-money on a certain day, (*b*) that the property mortgaged should be transferred absolutely to the mortgagee, (*c*) that such absolute transfer should be made subject to a *proviso* that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money, on the day on which the mortgagor bound himself to repay the same. A transfer in these terms: "the mortgagors hereby mortgage and assign to the mortgagee the coffee estate described in the schedule hereto, with the buildings, machinery and all immoveable and moveable property now or which hereafter may be upon the same or used in connection therewith, and with all rights, easements and appurtenances thereto"—is not an English mortgage, (1) since the use of the term "mortgage," precludes the possibility of holding that the transfer was intended to be absolute. It is the characteristic feature of an English mortgage that the operative words should be the same as in an absolute conveyance, and the transfer should be by conveyance, assignment, demise, or otherwise, according to the nature of the property forming the subject of the mortgage. In distinguishing one kind of mortgage from another, form is of the essence of the transaction, and cannot be ignored. (2) But, while there is "ostensible sale," as in a mortgage by conditional sale, *possession* in the one, as in the others, usually remains with the mortgagor, but with this difference, that in an English mortgage this is so only on sufferance, the mortgagor being liable to ejectment at any time by the mortgagee: "His position being that of a person acquainted with the imperfection of his title and entirely of his own choosing seems to us to fall under quite a different principle from that of a tenant-at-will, cultivating on a reasonable expectation of reaping what he has sown, or of a holder whose right is put an end to by a wholly uncertain event." (3) So he is not even entitled to the standing crops and may be ejected at any time without notice. (4) But, where by a clause in the instrument the mortgagor is allowed to remain in possession for a specified period, he cannot, of course, be ejected out of his covenant. (5) A person, therefore, who comes in as a tenant under the mortgagor, is in no better position and is equally liable to be ejected, at the instance of the mortgagee, although the latter may have had notice of it and may even have proposed to maintain him on payment of rent. (6) But in such a case, if the tenant expressly consents to pay rent, his tenancy cannot then be determined. (7) As Bosanquet, J., said: "It is clear there can be no demise without an assent by both parties." (8) And such assent cannot be inferred from the mere fact of the tenant remaining in possession after notice. (9) If the mortgagee takes possession of the property for the purpose of satisfying himself out of its usufruct, but afterwards "chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor" he would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incumbrancer came in, and he had notice of that claim. In that case the rule and law of England would be that, if after notice he permits the mortgagor to receive the

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(1) *Narayana* v. *Venkataramana*, I.L.R., 25 Mad., 220 (225), F.B.

(2) *Narayana* v *Venkataramana*, I.L.R., 25 Mad., 220 (236), F B

(3) *Per* West, J., in *Land Mortgage Bank of India* v. *Vishnu*, I.L.R., 2 Bom., 670 (672).

(4) *Ramalinga* v. *Samiappa*, I. L. R., 13 Mad., 15.

(5) *Moss* v. *Gallimore*, 1 S.L.C. (9th Ed.), 613.

(6) *Ibid.*

(7) *Evan* v *Elliott*, 9 A. & E., 342; *Towerson* v. *Jackson*, [1891] 2 Q B., 484.

(8) *Brown* v. *Storey*, 1 M. & G., 177.

(9) *Per* Kay, L.J., in *Towerson* v. *Jackson*, [1891] 2 Q.B., at p. 488.

rents and profits, he exposes himself to the claim of the second incumbrancer". (1)

Local incidents of English mortgage.

1266. An English mortgage being subject to stringent restrictions, both racial and territorial, is seldom heard of outside the limits prescribed by section 69. Such a mortgage executed in the mofussil would be treated as a mortgage by conditional sale, and one which is a combination of a simple mortgage and a mortgage by conditional sale would be treated as an anomalous mortgage. (2) Indeed, between such and an English mortgage there is very little divergence but the two are enforceable by entirely different procedure. An English mortgage again, closely resembles an absolute sale with a condition of repurchase. But nevertheless they too present some distinctive features to which allusion has been made in another connexion (§§ 954—957).

1267. Equity of Redemption.—Although the mortgagor may have agreed that, on his failure to repay his debt within the stipulated time, he shall be deprived of his right of redemption, still the law gives him what is known as an "equity of redemption," and he can redeem his property at any time allowed by law. (3) This period is, under the present law of Limitation, (4) sixty years. (5) But, while the debtor has this right of redemption, the creditor has also the corresponding right of foreclosure or sale, which he may exercise at any time after the stipulated period. The mortgagor's equity of redemption is not merely a personal right, or a right of action, but is an estate in land (6) and is transferable as such. (7) It has been accordingly held that where, as in an usufructuary mortgage, the mortgagee is placed in actual possession of the property, the mortgagor still retains possession in law of the property, so that his title may be extinguished by adverse possession. (8)

The origin and development of the right of redemption, which, as the term suggests, is a pure creature of equity, will be the subject of a future discussion. (9)

1268. Nature of a Mortgage-suit.—A suit on a mortgage is not a suit for recovery of a "debt" within the meaning ascribed to that term in the Succession Certificate Act,(10) so that no certificate is required to enforce it. (11)

Mortgage when to be by assurance.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered

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(1) *Jugjeewundas* v. *Ramdas*, 2 M.I.A., 487 (500, 501). (The law is the same as to usufructuary mortgagees. See *supra*.)

(2) S. 98, *post*.

(3) S. 60, *post*; *Rose Ammal* v. *Rajarathnam*, I L.R., 23 Mad., 33.

(4) Act IX of 1908.

(5) *Ib.* Art. 148.

(6) *Per* Hardwicke, L., in *Casborne* v. *Scarfet*, 1 Atk., 603; *Cholmondely* v. *Clinton* 2 J. & W., 1, O.A., 4 Bli. 1; *Lalla Kanhoo Lal* v. *Manki*, 6 C.W.N., 601 (610).

(7) *Lewis* v. *Nangle*, 2 Ves., s. 431.

(8) *Lalla Kanhoo Lall* v. *Manki*, 6 C. W. N., 601 (611); dissenting from *Krishna* v. *Keshavan*, I L.R., 20 Mad., 305; distinguishing *Ittoppan* v. *Manavikrama*, I.L.R., 21 Mad., 153 (162).

(9) S. 60, *post*. comm.

(10) Act VII of 1889.

(11) *Roghunath* v. *Poresh Nath*, I. L R., 15 Cal., 54; *Kanchan* v. *Baij Nath*, I L R., 19 Cal, 336; *Mahomed* v. *Abdur Rahim*, I. L R., 26 Cal., 839; *Gopala* v. *Saminathayyan*, I L R., 12 Mad, 255; *contra* in *Fateh Chand* v. *Muhammad*, I L.R., 16 All., 259; *Nanchand* v. *Yenawa*, I.L.R., 28 Bom., 630.

instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

1269. Analogous Law.—This section which is framed in accordance with the Indian Registration Act, [1] section 17, has been extended to all the cantonments in British India.[2] Similar provisions in favour of compulsory registration are made by other sections requiring other transfers to be similarly registered.[3] The second and third paragraphs of the section have been modified by an amending Act, [4] and by the substitution of "a registered instrument" for "an instrument" in the second paragraph, [5] and the words "Rangoon, Moulmein, Bassein, and Akyab," in place of "and Rangoon" in the last paragraph. [6] In the Bill, as originally drafted, the following proviso was proposed to be added, but it was eventually abandoned: "Provided that the Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, direct that all or any mortgages made within the territories under its administration or any part thereof, shall be effected only by such instruments as aforesaid." The last paragraph as amended by the proposed Bill originally also ran thus: "Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon."

1270. The more stringent provisions as to registration are said to have been proposed with a view to overcome the difficulty as to priority occasioned by the competition of an unregistered with a registered instrument. (§ 772). The amendment [7] seeks to cut the Gordian knot in a fashion truly heroic. It is officially vindicated in the following words, which, however, take no note of the hardship, expense and inconvenience, not to speak of the delay, which it has thereby occasioned:—

"Under the Indian Registration Act, 1877, registration is compulsory in the case of certain documents and merely optional in that of others. Documents of the first class are practically of no effect unless registered, but those belonging to the latter are equally effective, whether registered or not, subject to this limitation, that, if unregistered, they are liable to be superseded by subsequent registered documents. Among the documents, the registration of which is optional, are those relating to the transfer of rights in immoveable property of less than Rs. 100 in value, and it is in consequence of the questions that have arisen in connection with this latter class of documents that the present Bill has been prepared. There was at one time a diversity of opinion as to the effect of section 50 of the Registration Act, which postpones all unregistered documents relating

(1) Act III of 1877.
(2) S. 32 (1), Act XIII of 1889.
(3) Ss. 54 (Sales), 107 (Leases), 118 (Exchanges), and 123 (Gifts).
(4) Act VI of 1904, which came into force on 11th March, 1904.
(5) S. 3, Act VI of 1904.
(6) *Ibid*, s. 4.
(7) Which came into force on 11th March, 1904.

to land, of which the registration is optional to a subsequent registered one of the same character. But it has recently been decided by all the Chartered High Courts, as well as by the Chief Court of the Punjab, that the section should be read subject to the equitable doctrine of notice, or, in other words, that an unregistered document should not be postponed to a registered one where it can be shown that the transferee under the latter had notice of the transfer evidenced by the former at the time when the latter was executed. These rulings did not appear to the Government of India to leave the law on a satisfactory footing. They learnt that in England there had been divergence of opinion with regard to the propriety of the recognition of the equitable doctrine of notice in connection with the construction of the English Registry Acts, and that that doctrine had in 1884 been deliberately abolished by Parliament in the case of the Yorkshire Registry, whilst past experience in this country had shown that the application of that doctrine in India was open to very grave objection. The Indian Registration Law prior to Act I of 1843 expressly provided for notice, and, as stated in the preamble to that Act, it was in consequence of the 'forgeries, perjuries, fraudulent concealments and other practices' to which the application of the doctrine gave rise, that that Act, which ignored the doctrine was passed.

"After giving the whole question very careful consideration the Government of India came to the conclusion that, instead of attempting to amend the provisons of the Registration Law, as to priority between registered and unregistered instruments relating to the transfer of land in order to meet the difficulties to which the existing law gives rise, the better course would be so to amend the law on the subject of transfer of immoveable property as to make it impossible for such difficulties to arise in the case of future transfers of such property. It seemed to them that this result could be obtained if the law required all transfers of such property throughout India, when effected by written instruments to be registered. They accordingly asked the opinion of Local Governments, on the following proposals designed to carry out this intention :

(1) that the whole or certain sections of the Transfer of Property Act 1882, should be extended to the parts of British India to which that Act had not yet been extended under the powers conferred by section 1, namely, the Punjab, and Lower Burma outside Rangoon ;

(2) that section 59 of the Act (relating to mortgages) should be amended so as to require all mortgages effected by written instruments to be registered, whatever the amount secured ; and

(3) that section 107 of the Act (relating to leases) should be amended so as to require all instruments of lease to be registered, and all leases made by oral agreement to be accompanied or followed by possession."

1271. With regard to the first point the Government of the Punjab objected strongly to the extension of the Act to that Province, and, as the argument advanced by the Local Government against this proposal seemed to the Government of India to be of much force, this proposal has been abandoned in so far as the Punjab is concerned. The Government of Burma desired (i) to extend the whole of the Act to the towns of Moulmein, Bassein and Akyab, and to include those towns in the list of towns contained in sections 59 and 69 ; (ii) to extend sections 54, 59, 107, 117, 118 and 123 to the whole of Lower Burma with the exception of areas to which the Registration Act does not apply and of specially backward tracts ; and (iii) to take power to extend from time to time any part of the Act which may appear to it to be suitable to any part of the province. The amendments of the Act proposed in clauses 2 and 4 of the

Bill are designed to enable the Local Government to give effect to its wishes in this respect.

"Apart from the Punjab, all Local Governments accepted the second proposal which is given effect to by the amendment of the second paragraph of section 59 of the Act contained in clause 3 of the Bill. The proviso which it is further proposed to add to the same section of the Act is intended to give effect to a suggestion of the Government of Bengal that Local Governments should have power to require mortgages made within their territories even when securing a less sum than Rs. 100, to be effected by registered instrument."

1272. The law for proving documents requiring attestation is laid down in sections 68 to 71 of the Indian Evidence Act.(1) This section is numbered 58 in the Bill and is stated in the marginal note to apply to defeasances. The last paragraph was subsequently added for reasons quoted in the next paragraph.

History of attestation.

1273. The necessity of attestation for the purpose of completing a deed may be traced back to the *brevia testata*, mentioned by the feudal writers which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was originally accomplished without the witnesses being required to sign their names, and which was not always in their power. They only heard the deed read, and the scribe then added their names in the form of memorandum. Such witnesses were at one time associated with the judges of the court baron, hundred, or county court, and joined in the verdict.(2) But this law was abrogated by the Statute of York.(3) With the revival of learning in the beginning of the fifteenth century, the custom of witnesses subscribing their own attestation became more general and thus arose the custom, which was necessary, rather for preserving the evidence, than for constituting the essence of the deed.(4) Similarly, while sealing and delivery have continued to be the indispensable pre-requisites to make a deed operative, it is somewhat doubtful if a signature is regarded as equally necessary.(5)

Previous Law.

1274. This Act has for the first time made writing and registration compulsory in the case of mortgages here described, as there was no previous law enjoining the necessity of writing and registration in similar transactions. The law prior to the present Act was, as remarked before, the Hindu law which permitted a mortgage by mere verbal agreement. There were, no doubt, the provisions of the Indian Registration Act which made registration compulsory if there had been a writing, but even then there was no provision for attestation now made for the first time by this enactment, so that mortgages executed before it need not have been in writing, and if in writing they need not have been attested by any witnesses (6) though the writing, should have been registered in conformity with the provision of the Indian Registration Act.(7).

1275. Principle.—As has been explained in the commentary on section 54, the primary object of these sections was to prevent fraud by giving

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(1) Act I of 1872.
(2) Co. Litt., 6.
(3) 12 Edw. II., St. 1, C. 2.
(4) 2 Black, 307.
(5) Anson's Contracts (9th Ed.), 57.
(6) *Jalikar* v. *Mukunda*, I.L.R., 39 Cal. 227.
(7) Acts XVI of 1864; XX of 1866; VIII of 1871; S. 17, Act III of 1877 re-enacted as Act XVI of 1908.

greater security to titles created thereby, as also to simplify the determination of the question of title even where conflicting claims are made (§ 945).

The policy of this section is thus explained in the third report of the Select Committee:(1) "We agree with the Law Commissioners that the requirements of registration will not only discourage fraud and facilitate investigations of title, but that it will also preclude some difficult questions of priority. A majority of us, however, think that where the principal money secured is less than Rs. 100, the assurance need not be registered, and we have altered the Bill accordingly. Our colleague, Mr. Stokes, dissents from this alteration as, in his opinion, all encumbrances should appear on the register. Those who mortgage their property for small amounts, as a rule, require protection from fraud more than those who mortgage for large amounts, and the changes impending on the working of the law will deprive the requirement of registration of all hardship, even in the pettiest cases."(2) It may be added that Mr. Stokes' views have been since acted upon by the Legislature, which has now made registration compulsory (§§ 1271, 1272).

1276. The effect of the amended section is that all non-possessory mortgages irrespective of value must be registered the only exception being made in the case of an usufructuary mortgage below Rs. 100 in value, or one in which the transfer is accompanied by delivery of possession.

The section has, of course, no application to contracts preceding or relating to mortgages (§§ 1167-1171) and in fact to anything which would not operate as a mortgage of immoveable property (§§ 176-177) of its own force (§§ 176, 177).

Saving clause.

1277. The last paragraph was the subject of much difference of opinion and was at one time deleted from the section.(3) But the Select Committee, who then reconsidered the Bill, took a different view and restored it to its present place. In doing so they said: "A majority of us are of opinion that equitable mortgages by deposit of title-deeds should be valid when they are made in Calcutta, Madras, Bombay, Rangoon and Karachi. The practice of raising money on such securities has long been established in those towns, and any attempt to disturb it would cause much inconvenience. Here, again, Mr. Stokes dissents on the ground (*a*) that such mortgages are opposed to the policy of the registration law; (*b*) that they lead to the evasions of the stamp-duty; (*c*) that they are at variance with the principle of making the system of transfer of immoveable property, as far as possible, a system of public transfer; and (*d*) that when the amount secured is Rs. 100 or upwards, they would be inconsistent with the general rule in section 59,(4) requiring a written instrument."(5) The clause was ultimately adopted, as its omission was from the beginning feared to "inconvenience the mercantile community."(6) In England the doctrine of mortgage by deposit of title-deeds had long been in vogue, and while there too they had to fight their way to recognition, the benevolent action of the Court of Chancery was mainly instrumental in obtaining for them recognition on the ground of commercial expediency. "In commercial transactions," observed Lord Abinger, "it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the

(1) Dated 11th March, 1881.

(2) Cited in *Krishnamma* v. *Suranna*, I L.R., 16 Mad., 148 (167, 168), F.B.

(3) By the Law Commissioners (see their Report, dated 15th November 1879, p. 35).

(4) In the original S. 58, which is now S. 59.

(5) Report, dated 11th March 1881.

(6) See Report of the Select Committee, dated 19th February, 1879, S. 21.

title-deeds and preparing the mortgage. Expediency as well as necessity has contributed to establish the general doctrine, although it may not altogether be in consistency with the Statute."(1)

1278. Meaning of Words.—"*When the principal money secured is one hundred rupees*": What if the mortgage be for the performance of an "engagement, which may give rise to a pecuniary liability," the money value of which is unascertained? In such case it appears, the consideration will have to be reduced to an approximate money value for the purpose of registration. The principal money secured would include also a future advance. The "term principal money" is intended to, but does not mean consideration generally. "*A mortgage can be effected.*" The mortgage is complete if it conforms to the requirements of the preceding section. But in order to make it effectual or operative it must comply with the requirements of this section. If it does not, the mortgage is *ineffective*. "*Signed by the mortgagor:*" Signature includes also a mark with reference to a person who is unable to write his name.(2) "*Delivery of the property*:" For the meaning of this phrase, see section 54 *ante* (§ 970). "*Delivery...with intent to create a security thereon*:" A mortgage created by the delivery of title deeds is an equitable mortgage.

1279. Form of Mortgage.—Section 58 defines a mortgage-deed, and this section lays down that a valid mortgage of the value of Rs. 100 or upwards can only be made by a (i) registered instrument (ii) signed by the mortgagor, and which must be (iii) attested by two or more witnesses. A simple mortgage of whatever value must satisfy these requirements, but in the case of other mortgages an exception is made as in the case of a transfer by sale, *viz.*, where the principal money secured is less than Rs. 100, a mortgage may be effected either by only delivery of possession in which case no assurance is indispensable, or by a registered instrument duly executed or signed by the mortgagor and attested by two or more witnesses, in which case there need not be delivery of possession.

1280. The term "principal money secured" in the first clause is intended to exclude interest in calculating the value of the instrument for the purpose of this section. This clause is so far clearer in this respect than the corresponding clause in the Registration Act, where reference is made to "the *value* of the interest in the property" on the strength of which it was at one time held that, in determining the value of the interest secured by the instrument not only the principal, but also the interest thereon, must be taken into consideration.(3) But this view has now been definitely overruled,(4) and all the High Courts are agreed that for the purpose of registration, only the principal sum, independently of any possible accretions, is to be regarded as the value of the interest.(5) This section, it will be observed, does not take into account any consideration other than money for which a mortgage may be made, but it is apparent that, where the consideration takes some other shape, it must be valued

(1) *Keys* v. *Williams*, 3 Y. & C., 60.

(2) S. 3 (12), General Clauses Act (I of 1897); S. 3 (52), General Clauses Act (X of 1897); S. 3, Indian Registration Act (XVI of 1908).

(3) *Darshan Sing* v. *Hanmanta*, I. L. R., 1 All., 274; *Himmat Sing* v. *Sewa Ram*, I. L.R., 3 All., 157, F.B.

(4) *Habib-ulla* v. *Nakched Rai*, I. L. R., 5 All., 447, F.B.; *Amruti Telin* v. *Govind Rao*, 10 C.P.L.R., 10; overruling *Sardar Babu* v. *Gopal*, 6 C. P. L. R., 75; followed in *Laxman Rao* v. *Kesho*, 4 Nag. L.R., 90.

(5) *Ramdoolary* v. *Thacoor Roy*, I. L. R., 4 Cal., 61; *Korban Ally* v. *Sharoda Proshad*, I. L. R., 10 Cal., 82; *Makhanlal* v. *Bunku*, I. L. R., 19 Cal., 623, F.B.; *Nanabin Lukshman* v. *Anant Babaji*, I.L R., 2 Bom., 353; *Nago Kanaturia* v. *Babaji*, I L.R., 8 Bom., 611; *Narasayya* v. *Guruvappa*, I. L. R., 1 Mad., 378; *Kattamuri* v. *Padalu*, I. L. R., 5 Mad., 119.

for the purpose of registration, naturally in the coin of the realm and the principal money can then be determined.(1)

1281. Valid Registration—A document is deemed to be registered within the meaning of this clause, when it is *duly* registered. (§ 75.) Hence, where the description of the property is misleading and insufficient for the purpose of indentification, it has been held that its registration was invalid.(2) So again a document is not deemed to be duly registered, if the act of registering it has been performed by an officer not duly empowered in that behalf, or the document was admitted to registration beyond time and in violation of the provisions of sections 23 and 34 of the Indian Registration Act, (3) or if it was presented for registration by a person not duly authorized to do it,(4) or if the property is situate in a different district than in which the document was registered. Thus where a document was registered by the Sub-Registrar of Sealdal purporting to be a mortgage-deed of certain property within the Sealdah Registration Office, but in a suit maintained thereon the defendant contended that no such property as was described in the deed ever existed ; and no satisfactory evidence having been given as to its existence, it was held that in the absence of proof that the property lay within the jurisdiction of the Sub-Registrar, its registration was ineffective and that the mortgage-deed as such could not take effect, though the fact of its being registered would enlarge the period of limitation.(5) So property erroneously described as lying within the jurisdiction of a certain kotwali, a sub-district of Bhagalpur and there registered by the Sub-Registrar, was held to be invalid, on it being shown that the property lay in another sub-division, Bankura. although of the same district, and though the Sub-Registrar who had registered it exercised also the power of the District Registrar of Bhagalpur, and to whom in that capacity all the Sub-Registrars of the district were subordinate.(6) The presentation of a document by an agent specially empowered to present it for registration after the death of the persons so empowering being invalid, no effect can be given to the registration so effected.(7) In a Calcutta case before cited it was held that a document shown to have been registered by an officer without jurisdiction, while it cannot affect immoveable property, may still be regarded as registered for the purpose of enlarging limitation. (8) But this is a view which is open to question, for a document cannot be regarded as both registered and not registered at the same time, though it may be for different purposes. Where a document is

(1) *Nago Kanaturia* v, *Babaji*, I. L. R., 8 Bom., 610.

(2) *Baijnath Tewari* v. *Sheo Sahoy Bhagut*, I.L.R , 18 Cal., 557, F.B

(3) *Raya Ragholia* v. *Annapurnabai*, 10 B. H.C.R , 98; *Karim Baksh* v. *Rahim Baksh*, (1900) P. L. R., No. 21; *Maung Kya U.* v. *Sithambaram*, (1907) 4 L. B. R., 84; *contra Ramji* v. *Sayad Wazir Husain*, (1911) 14 O. C., 207 ; 11 I.C., 925, holding that the defect might be cured by S. 37 of the Registration Act. It will be cured if being presented within time, it is admitted after. *Ramji Mal* v. *Wazir Husain*, 11 I C., 925 (926). In *Gopal Chandra* v *Surendra Kumar*, 16 C.W.N.,585, the executant had altered the date before presentation and even then the Court based its judgment more upon this as estoppel against the mortgagor than upon the validity of its Registration, which it is submitted, could not be doubted.

(4) *Mujibun-nissa* v. *Abdur Rahim*, I.L.R., 23 All., 233, P.C.; *Khaliluddin* v. *Banni Bibi*, I.L R., 35 All., 34, F.B., in which the deed was presented by the husband of a *pardanashin*, but who was not but agent. A general agent not entitled to admit deeds to registration is not so authorized. *Jambu Prasad* v. *Aftab*, I. L. R., 34 All., 331. Authority will be assumed if the executant was present. *Karta Kishen* v. *Narnarain*, 10 A.L.J., 510.

(5) *Joginee* v. *Bhoot Nath*, I L.R., 29 Cal., 654 ; S. 33, Indian Registration Act (XVI of 1908).

(6) *Baij Nath* v. *Sheo Sahay*, I. L. R., 18 Cal., 556, F. B. ; *Beni Madhab* v. *Khatir Mondal*, I.L.R. 14 Cal., 449.

(7) *Mujib-un-nissa* v. *Abdur Rahim*, I. L. R., 23 All., 233, P.C.

(8) *Joginee* v. *Bhoot Nath*, I. L. R., 29 Cal., 654 (663).

registered in contravention of the provisions of law it must be regarded as unregistered, and so wholly void or destitute of legal effect under section 17 of the Registration Act.(1) But where a Sub-Registrar in disregard of the provisions of section 35 of the Indian Registration Act, registered a document as against a person denying its execution, his action was held to be *ultra vires*, and the document was not admitted in evidence against the party denying its execution.(2) The effect is the same if the document is admitted to registration contrary to the provisions of a local Act.(3)

1282. A mortgage relating to two properties situate in two different Registration circles was registered in a circle on the basis of the property situated within that circle. It being found that no portion of the mortgaged property was really situate in the circle in which it was registered, the Court held the registration as to the whole inoperative, and that the mortgage, therefore, fell from its effect and could not affect any property comprised therein, though the deed was held to be good as a money-bond.(4)

The sealing of a deed is not even an essential part of the act of Registration, as its omission would be regarded as a mere defect of procedure cured by the provisions of section 87 of the Registration Act. (5) So, of course, will be an error of the Registrar in entering a document in a wrong book.(6) It is not for the Registrar to decide the question of title.(7) Being an executive officer his duties are statutory and confined to ascertain the factum of execution of a document presented before him.(8)

1283. A deed drawn up on plain paper, may, if it satisfies the requirements of a mortgage, be registered on payment of a penalty. A document recited: "I have mortgaged to you this day the above mentioned lands and house and vacant lands for the amount of money mentioned above." It was held to amount to a mortgage, and the fact that it recited that it was only a bargain paper and that a formal mortgage-deed on stamped paper should be duly executed within a stated time, was held not to detract it from its operation as a mortgage-deed.(9) So there is nothing here or in the Indian Registration Act to render illegal the division of what was apparently one mortgage-transaction relative to a loan of Rs. 198 into two mortgages of even date each for Rs. 99 and unregistered.(10) It cannot be said that such deeds evade the provisions of the Registration Act, and even if they do, there is nothing in that Act to make them invalid.

1284. Where a mortgage-deed is *prima facie* duly registered, it is for the mortgagor to show in what respects its registration is defective. If a mortgage relate to two properties and it was registered in the circle in which one of the properties was situate, the burden of proving that the property was not so

(1) *Fazel Sheikh* v. *Keramuddi*, 6 C. W. N., 916.

(2) *Razi-un-Nissa* v. *Sabir Husain*, I. L. R., 26 All., 57.

(3) *E. g.* If a permanent lease is registered contrary to the provisions of s. 85, cl (2) of the Bengal Tenancy Act (*Fazel Sheikh* v. *Keramuddi*, 6 C. W. N., 916), or a document purporting to transfer occupancy land is registered where the admission of such documents to registration is prohibited as it is by the C. P. Tenancy Act, s. 45.

(4) *Jogini Mohan* v. *Bhutnath*, 6 C.W.N., 856; following *Beni Madhab* v. *Khatir Mondul*, I.L.R., 14 Cal., 449; *Baijnath* v. *Sheo Sahay*, I.L.R., 18 Cal., 556, F.B.

(5) *Sitanath* v. *Bissessur*, 6 C.W.N., 528.

(6) *Parashrampaut* v. *Rama*, 11 Bom. L. R., 1321 (1326).

(7) *Broja Gopal* v. *Abmaish*, 5 I. C., 127 (128); *Janki (Mt.)* v. *Bisheshar*, 7 I.C., 614 (616).

(8) Ss. 34, 35, Indian Registration Act (XVI of 1908).

(9) *Moti Chand* v. *Sagan*, 6 Bom. L. R., 690; *Mutha* v. *Venkatachelapati*, I. L. R., 27 Mad., 348.

(10) *Ramji* v. *Chhote Lal*, I. L. R., 29 All. 50.

situate, and that, therefore, its registration was invalid, is on him who takes the plea and which he must discharge with every clearness.(1)

1285. Mortgage must be signed by the Mortgagor.—A mortgage-deed must be signed by the mortgagor. Now, "signature" is not defined in the Act, but since by an amending Act,(2) the provisions of this section are declared to be supplemental to the Registration Act, which defines a signature as including and applying to the affixing of a mark,(3) it is clear that a mortgage-deed may be signed by an illiterate mortgagor by affixing his mark. In the case of an illiterate executant, the practice is to touch the pen with which the scribe makes a mark for him. This view was at one time opposed to an Allahabad decision(4) which has, however, been since overruled.(5) Indeed, the contrary view could not be maintained, for when it is said that the mortgagor shall sign the deed, it is by no means implied that he shall affix his autograph signature or make a mark, which it is conceivable he may be physically incompetent to make for himself. Indeed, apart from any incapacity to sign, the mortgagor, whether literate or illiterate, may employ another to sign for him, and that would be his signature, being made by one who had been constituted (it may be for that limited purpose only) his *alter ego* : *Qui facit per alium facit per se.*(6) Indeed, without such power, which forms the integral part of the larger power of delegation, it would be impossible to carry on the commerce of life. A manual signing is not essential to the validity of a signature. In England, signature on a will by another guiding the testator's hands has been deemed to be sufficient.(7) So also a mark or stamp by a person, whether illiterate or not,(8) initials,(9) or initialled seal have been held to be sufficient authentication.(10) But a plain seal is insufficient,(11) and so a man cannot sign by passing a dry pen over an existing signature.(12) Pencil (13) or stamped printed signature (14) of the real or assumed name of the executant,(15) or only his surname, is sufficiently valid.(16) Even a signature without any name at all, as for example, the words Maharaja Bajpay Sreeman Maharajadhiraj is enough.(17)

What signature includes.

Where the executant's name was written by the scribe, and the executant added "*Likhitan Khode*" (writer's self) it was held to be a sufficient signature of the executant within the meaning of section 19 of the Limitation Act, and so it would be sufficient under this section.(18)

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(1) *Jogini* v. *Bhcot Nath*, I. L. R., 31 Cal., 146, O. A., from I. L. R., 29 Cal., 658.

(2) Act III of 1885.

(3) S. 3. It is now similarly defined by the General Clauses Act (1897), S. 3 (52).

(4) *Moti Begam* v. *Zorawar*, (1899) A. W. N., 196.

(5) *Deo Narain* v. *Kukur Bind*, I. L. R., 24 All., 319, F. B ; followed in *Sasi Bhusan* v. *Chandan Peshkar*, I. L. R., 33 Cal., 861. To the same effect *Shrikisan* v. *Sonta*, 1 Nag. L. R., 14.

(6) " He who acts through another acts through himself, " *i.e.*, is in the same position as if he had himself acted.

(7) *Wilson* v. *Beddard*, 12 Sim., 28.

(8) *Baker* v. *Denning*, 8 A. & E., 94. But in *Sananda* v. *Emp.*, I. L. R., 32 Cal., 550, the thumb-mark by a literate person was held not to amount to a signature within the meaning of S. 3 (52) of the General Clauses Act (X of 1897).

(9) Re *Lewis*, 5 P. D., 116 ; *Re Savory*, 15 Jur., 1042 ; *Mohesh Lall* v. *Bussunt Kumary*, I L. R., 6 Cal., 340 (345).

(10) Re *Emerson*, 9 L. R., Ir., 443.

(11) *Ibid.*

(12) *Casement* v. *Fulton*, 5 Moo. P. C., 130 ; *Kevil* v. *Lyneb*, 8 Eq. Ir., 249.

(13) *Greary* v. *Physics*, 5 B. & C., 234.

(14) *Sanderson* v. *Jackson*, 2 B. & P., 238 ; *Schnuder* v. *Norris*, 2 M. & S., 288 ; *Tourett* v. *Cripps*, 27 W. R. (Eng.), 706 ; *Madabhusi* v. *Singara*, I. L. R., 7 Mad , 55 ; *Ellapa* v. *Annamalai*, *ib.*, 76.

(15) Re *Clarke*, 1 S. & T., 22 ; Re *Douce*, 2 S & T., 593.

(16) *Lobb* v. *Stanley*, 5 Q. B., 574.

(17) *Gunee Biswas* v. *Sree Gopal*, 8 W.R., 395 (397).

(18) *Sadasook* v. *Baikanta*, 1.L.R., 31 Cal., 1043.

1286. Then, again, since all that the mortgagor is required to do is to sign the instrument, it follows that the mortgagor need not subscribe to the document, as is no doubt customary; but it is enough if he signs it in any part of the document, provided that the name be inserted in such a manner as to govern the whole deed.(1) But if the deed is described on several sheets, the executant must, it would appear, sign all,(2) unless the sheets, were at the time of execution so joined together as to form a single continuous whole.(3) A document is a nullity, if the executant of it signed only on the first page, but did not sign on the other pages, having discovered that it was not in accordance with the terms previously agreed upon. Such a document does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands.(4)

1287. So again, if the deed be signed in blank, the deed being afterwards engrossed thereon, the instrument is not wholly void if it appears that the signatory had given authority to engross on the paper. Thus, where a person signed his name on a blank paper with an endorsement in his own handwriting that the "mortgage-bond for Rs. 21,750 on account of *Hundis* executed by me is correct," it was held to be good evidence of the authorization so as to make the subsequently executed deed valid.(5) The question really depends upon the intention of the executant. If he executed the document knowing its contents, but without appreciating its legal effect, he cannot deny its execution. On the other hand, where a contracting party who cannot read, has a contract falsely read over to him, and the contract written differs from that pretended to be read, the signature on the document is of no force, because he never intended to sign, and therefore, in contemplation of law, he, it is said, did not sign the document on which the signature is made.(6) But in such a case the mortgage in form will have complied with the requirements of this action and would, therefore, be *prima facie* a good mortgage, though it would fail for fraud practised on the executant.

1288. In the case of illiterate debtors, sometimes the executant simply touches the pen of the scribe in token of his execution, and while ordinarily the scribe makes some mark for the debtor, as the mark of a plough, a dagger, a pair of scales or draws a circle representing a bangle according to the occupation or sex of the executant, still this is by no means invariably done or regarded as essential, and not a few deeds are executed without any mark of any kind.(7) In such cases the deed should still be regarded as duly signed.(8) With respect to

(1) It was expressly so decided in construing the same word used in S. 4 of the Statute of Frauds (29 Car. II, c 3); *Ogilvie* v. *Foljambe*, 3 Mar., 53; *Lobb* v. *Stanley*, 5 Q.B., 574; *Caton* v. *Caton*, L. R., 2 H. L., 127 (143); *Lemaune* v. *Stanley*, 3 Lev. 1; Freem., 538.

(2) *Right* v. *Price*, 1 Doug., 241.

(3) *Winsor* v. *Price*, 2 B. & B., 650; *Doe d. Williams* v. *Evans*, 1 Cr. & M., 42; under the English Wills Act (1 Vict, c. 26, s. 9) the will must be signed "at the foot or end thereof," but the provision having given rise to some very inconvenient decisions upon the precise situation of the signature, its terms have had to be further explained by 15 & 16 Vict, c. 24, s. 1; which allows signature "if it be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent that the testator intended to assent to the writing."

(4) *Banku Behary* v. *Gobindo*, I.L.R., 30 Cal., 433.

(5) *David Yule* v. *Ram Khelwan*, 6 C.W.N., 329. The question of attestation was, however, overlooked.

(6) *Foster* v. *Mackinnon*, 1 Co. Rep. (Pt. 2), 445; followed in *Dagdu* v. *Bhana*, I.L.R., 28 Bom., 420 (427); *cf. Lakshmi Dass* v. *Roop Laul*, I.L.R., 30 Mad., 169.

(7) *Cf. Hemchand* v. *Vohora* I.L.R., 7 Bom., 515 (516); *Kotappa* v. *Vallur*, I.L.R., 25 Mad., 50 (54); *Seshachela* v. *Varada*, I.L.R., 25 Mad., 55; *Eduljee* v. *Abdulla*, 1 M.I.A., 461.

(8) *Deo Narain* v. *Kukur Bind*, I.L.R., 24 All., 319, F.B.; *Ramcharan* v. *Bhikari*, 3 I.C., 915; *Ram Nath* v. *Sonba*, 16 C.P.L.R., 45.

deeds executed by an illiterate pardanashin, it has been held that it should be read over to the executant, but not fluently without stopping anywhere so that the executant could not grasp its meaning.(1) Pardanashins are generally the objects of special solicitude, and they have been, therefore, classed in a category apart, and the law relating to them follows a special course which has been treated of elsewhere (§ 291).

1289. When a document is intended to be executed by several persons but is executed by only some of them, others refusing to complete it, the question whether it takes effect as against those who have executed it, notwithstanding that the rest have declined to join in its execution, depends upon the intention of the parties.(2) Three undivided brothers in a Hindu family, and the minor son of the eldest brother, were the intended executants of a mortgage-instrument. The eldest brother alone signed for himself and his son. The major portion of the consideration consisted of prior bonds and notes, one of which was executed by all the brothers jointly and the rest were executed by the younger brothers. The eldest brother was nowhere described as the manager. The younger brothers having refused to sign the mortgage, the question arose as to whether it bound the actual executant, but it was held that he could not be so bound, since his execution was made on the faith that the brothers would join, and their refusal put an end to the agreement proposed, but which was never completed. (3)

1290. Who may be an Attesting Witness.—There is nothing to prevent any person from attesting a deed provided that he has attained sufficient maturity of understanding to be able to give evidence. A minor (4) and an illiterate person may validly attest, the latter by affixing his mark or by the customary mode of touching the scribe's pen who then writes his name or makes a mark for him.(5) But several executants, who being collectively classed as the mortgagor, cannot be taken to have attested for one another since the same person cannot be both a party and a witness to the deed. (6) And in this respect the executee cannot be otherwise(7) regarded. The surety, if any, is similarly in point of interest identical with the executant. But a person who is not himself a party to the transaction but is interested in the money is an eligible witness.(8) The evidence of the writer of the deed who has signed his name, though not explicitly as an attesting witness on the margin, and has been present when the deed was executed, is admissible under this section, as of an attesting witness.(9) The question is one of fact rather than one of law. For while he is a competent attestor he is primarily the scribe and the question whether he played the double *role* depends upon what he says and where his signature occurs. It is said that if his signature occurs before the executant's signature it is not that

(1) *Annonda* v. *Bhuban*, I.L.R., 28 Cal., 546 P.C.; *cf. Dagdu* v. *Bhona*, I.L.R., 28 Bom., 420

(2) *Sivasami* v. *Sevugan*, I L.R., 25 Mad, 389.

(3) *Sivasami* v. *Sevugan*, I.L.R, 25 Mad., 389 (393); *Setharam* v. *Vasanta*, I.L.R., 34 Mad., 314 (319).

(4) *Subramaniam* v. *Doraisinga*, 16 I. C., 943 (944).

(5) *Sasibhusan* v. *Chandra*, I. L. R., 33 Cal., 861 (866); *Srikisan* v. *Sonba*, 1 N.L.R., 14 (16); following *Prankrishna* v. *Jadu Nath*, 2 C.W.N., 603.

(6) *Nowab Sorun* v. *Baroda Kant*, 5 I.C. 599; *Peary Mohan* v. *Sreenath*, 7 I.C., 735 (736).

(7) *Debendra* v. *Behari*, 15 I.C., 666.

(8) *Balu* v. *Gopal*, 12 I C., 531.

(9) *Radha Kishen* v. *Fateh Ali*, I.L.R., 20 All, 532; following *Muhammad Ali* v *Jaffar Khan*, (1897) A W.N, 146; *Raj Narain* v. *Abdur Rahim*, 5 C.W.N., 454; followed in *Dinamoyee* v. *Bon Behari*, 7 C.W.N., 166. (Attestation means that what is said to be attested happened in the presence of the attested witness—following *Ford* v. *Kettle*, 9 Q. B.D., 139.)

of an attesting witness ; [1] who must then subscribe this attestation, but for which the section makes no provision. It would seem that if the scribe witnessed the execution he should be considered eligible.[2] And even a person signing the name of the executant, but not as a witness to the deed, has been regarded as an attesting witness.[3] But a narrower view has been taken in some cases in which it has been held that the scribe must not only have witnessed the execution but he should have also attested it as such.[4] Attestation being material to validate a mortgage, the interpolation of a witness's name is a material alteration which vitiates the assurance.[5] In a mortgage-bond not properly attested, the signature of the Sub-Registrar and that of the identifier of the executant, below the registration indorsement recording the admission of execution, cannot take the place of the requisite attestation.[6]

1291. Meaning and Sufficiency of Attestation.—A mortgage-deed must be further attested by at least two witnesses. There is a notable difference between attestation of the *execution* and that of the *instrument*, and the attestation of the one by no means implies attestation of the other. Execution is, after all, not the contract which is contained in the instrument but only evidence of its acceptance. A man may accept a contract without signing it, and he may sign it without accepting it. It is, therefore, the acceptance and not a mere execution of an instrument that the Courts have ultimately to find about, and it is to that end that the evidence of attesting witnesses becomes necessary. A person is estopped but not concluded by his signature. And an attesting witness has, therefore, to see that the terms embodied in the deed are those accepted by the obligor, and of which acceptance his signature is a mere symbol. Attestation, properly speaking, is a solemn declaration, verbal or written, in support of a fact. In the English legal parlance the term is associated with the formula by which the attesting witness declares that the deed was "signed, sealed, and delivered" by the executant in his presence. [7] But this is its acquired local import. The term has, of course, now assumed a variety of meanings. But the words "to attest" in its original etymological sense[8] meant no more than "to witness" or to certify, and in this sense the word is still commonly used. In its general import the term "attestation" means the subscription of a name to a writing as a witness,[9] and in this sense, the term was undoubtedly used here. It will be noticed that the section only speaks of the "instrument" being attested by at least two witnesses, and which suggests that all that the attesting witnesses have to do is to satisfy themselves that its terms were those accepted by the mortgagor, and who is, moreover, as a token of his acceptance, required to sign it. An attesting witness who can speak not only of the debtor's admission of the deed but also of its execution in his presence is commendable, but it does not appear to be an absolute requirement enjoined by the section and the absence of which will impair its validity. But

(1) *Bahadur* v. *Balchand*, 5 N.L.R., 3; *Ajan* v. *Manga*, 6 N L.R., 152 (154).

(2) *Radha Kishen* v. *Fateh Ali*, I L R., 20 All., 532; following *Muhammad* v. *Jafar Khan*, (1897) A.W.N., 146; *Raj Narain* v. *Abdur Rahim*, 5 C W.N., 454.

(3) *Dinamoyee* v. *Bon Behari*, 7 C.W.N., 160.

(4) *Ranu* v. *Lakman Rao*, I L.R., 33 Bom., 44; *Bahri Prasad* v. *Abdul Karim*, 11 A.L.J., 260 (262); following *Burdett* v. *Spiltsbury*, 10 C. & F. 340; followed in *Shamu Patter* v. *Abdul Kadir*, I.L.R., 35 Mad., 607, P.C.

(5) *Mohesh Chunder Kamini* v. *Kumari*, I. L.R., 12 Cal., 313.

(6) *Girindra Nath* v. *Bejoy Gopal*, I.L.R., 26 Cal., 246; distinguishing *Nitya* v. *Nagendra*, I. L.R., 11 Cal., 429.

(7) *Per* Jessel, M.R., in *Ford* v. *Kettle*, 9 Q. B.D., 139 (143). "Of these there is some doubt as to the necessity of signature," Anson's Contracts (9th Ed.), 57.

(8) Lat., *ad testari*, to bear witness, to testify.

(9) Webster's Dictionary.

argument and reason are of no avail against the authority of their Lordships of the Privy Council who have now set the controversy at rest by holding that valid attestation must be of the execution seen by the attestor and not merely of the executant's acknowledgment of his execution.(1)

1292. The meaning of attestation was before the decision of the Privy Council the subject of some conflicting decisions. For while it had been laid down by the Calcutta and Madras High Courts that the term implied that the witnesses were present and *saw* the execution of the instrument by the executant by affixing his signature in their presence after understanding the contents of the document which was previously either read over or explained to him, and that a mortgage was not duly attested if the attesting witnesses were not present to witness the executant affix his signature (2); the High Courts both of Bombay (3) and Allahabad (4) had controverted this view, holding that the attesting witnesses need not be necessarily present to witness the affixation of his signature by the executant. As before remarked, the Privy Council has now decided that the word "attest" as used in this section "could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safeguard which the law clearly intended to impose against the perpetration of frauds."(5) An attesting witness may then be defined to be a person who having been personally present at the execution of a document, so as to see the executant sign his name, has thereafter subscribed thereon, his own name as a memorandum of that fact. (6) Like the executant an attestor need not be literate, and his mark, if made by another with his consent, will suffice.(7) And it will be the merit but is not the qualification of an attesting witness that he should have been present from first to last when the deed was being scribed, or that he should question the executant as to whether he consented to the deed and all its terms. If the executant be a *pardanashin*, he must not, in strictness, be satisfied with the mere emergence of a hand from behind the veil which signs the deed. It may be a bare compliance with the requisites of the rule but by no means sufficient identification of the executant. But it is, of course, by no means essential that the attestor should have personally identified the executant, and *pardanashins* are usually identified by others of their own sex or relations who identify them to the attesting witnesses. There is nothing to prevent an attesting witness from charging for his attestation, and the fact that as reversioner, he received a consideration for giving his consent which he signified by attesting the sale deed executed by a Hindu widow does not render his attestation invalid. (8) The provisions of this section as to attestation are in no way modified by the Dekkhan Agriculturists' Relief Act, (9) so that the attestation of a mortgage by the registering

(1) *Shamu Patter* v. *Abdul Kadir*, I.L.R., 35 Mad., 607 (616), P.C.; overruling *Ganga Dei* v. *Shiam Sunder*, I.L.R. 26 All., 69.

(2) *Girindra Nath* v. *Bejoy Gopal*, I.L.R., 26 Cal., 246; following *Bryan* v. *White*, 2 Rob., 315; cited in *Sharpe* v. *Birch*, 8 Q.B.D., 111 (114); followed in *Abdul* v. *Balimun*, I.L.R., 27 Cal. 190; *Pandurang* v. *Balaji*, 13 C. P. L. R., 42; *Jhama* v. *Deobux*, 2 Nag. L. R., 10; *Shamu Patter* v. *Abdul Kadir Ravuthan*, I.L.R., 31 Mad., 215; affirmed O.A., I.L.R. 35 Mad., 607. P.C.

(3) *Ramji* v. *Bai Parvati*. I.L.R., 27 Bom., 91; *Contra* in *Ranu Shivji* v. *Laxman Rao*, I.L.R., 33 Bom., 44.

(4) *Sheikh Ghazi* v. *Bhawani Prasad*, (1896), A. W. N., 89; *Ganga Dei* v. *Shiam Sunder*, I.L.R., 26 All., 69.

(5) *Shamu Patter* v. *Abdul Kadir*, I.L.R., 35 Mad., 607 (616) P.C.

(6) *Bissonat.* v. *Madhubmonee*, 15 W. R., 511; *Ajali* v. *Mangal*, 6 N.L.R., 152.

(7) *Sarujigar* v. *Baroda Kanta*, I.L.R., 37 Cal., 526 (535); *Harmongal* v. *Ganaur*, 13 C. W.N., 40; *Isri Prasad* v. *Ganga*, 3 I.C., 311 (313).

(8) *Gangappa* v. *Subbu Naidu*, (1909) 6 M.L.T., 260.

(9) Act XVII of 1879, S. 68; *Ranu* v. *Laxman Rao*, I.L.R. 33 Bom., 44.

officer in pursuance of its provisions do not dispense with the necessity of attestation here prescribed. (1)

Attestation of admission condemned.

1293. Apart, however, from its legal aspect the attestation of a document, after it has been signed by the executant, is universally condemned. Thus, in a case, Tyrrel, J., observed: "His attestation such as it was, was limited to this, that the plaintiff told him she had previously executed the deed. What then would be the need for, or likelihood of this *ex post facto* recitation and admission? This is, I think, the first time in many years that I have heard of a marginal witness of this sort being expected or allowed to read a deed to the executant."(2) Similarly in another case their Lordships of the Privy Council said: "The attestation of a stranger who could not have seen her write and who could not have known her voice would have carried the matter very little further."(3) So again, in another case the same high tribunal observed with reference to a case before them: "Of the testimony of the subscribing witnessses it is unnecessary to speak at length. They are either cultivators living at a distance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the dewan makes it, to say the least, extremely doubtful whether they were in fact there; and whether, according to a reprehensible practice not uncommon in India, their names were not afterwards written on the deed."(4)

Deficient attestation.

1294. Two witnesses being essential to the validity of a mortgage, it of course follows that, if the bond is attested by only one witness, it is, as a mortgage, ineffectual.(5) And failing to operate as a mortgage, the deed could not be used as creating a charge.(6) The analogy of a will will not hold good in the case of a mortgage,(7) for in a will attestation, either of the execution or of the admission of execution, is expressly made sufficient for the purpose(8) but a mortgage not properly attested will fail of its effect (9) although it may be used to obtain a personal decree against the executant.(10) But it has been held in Madras that such a bond cannot be used in proof of even a personal covenant to pay; (11) but one fails to see the reason of this rule. A person who takes the technical plea as to insufficiency of attestation should be tied down to the specific grounds taken. A mere plea that the mortgage has not been proved according to law is too general.(12)

1295. Does Attestation imply Consent.—The position of the attestor with reference to the deed may at times have to be considered, where the effect of his attestation operating as an estoppel may have some bearing on the validity of the deed or the title it purports to assure or convey.

(1) *Ranu* v. *Laxman Rao*, I.L.R., 33 Bom., 44.

(2) *Mariam Bibi* v. *Sakina*, I.L.R., 14 All, 8 (19).

(3) *Mahomed Hosseini Bibi*, I.L.R., 15 Cal., 684 (695), P.C.

(4) *Grish Chunder* v. *Bhuggobutty*, 14 W. R., 7 (10), P.C.

(5) *Rani Kumari* v. *Raja Srinath*, 1 C.W. N., 81; *Mithiram* v. *Somanatha*, I.L.R., 24 Mad., 397 (399).

(6) *Pran Nath* v. *Jadu Nath*, 32 Cal., 729; *Royeuddi* v. *Kali Nath*, I.L.R., 33 Cal., 985; *Samoo* v. *Abdul Sommad*, I.L.R., 31 Mad., 337; *Narayan* v. *Lakshman Das*, 7 Bom. L.R., 934; *Kemchand* v. *Maloo*, 10 N.L R., 1 (88); see s. 100 comm. *post*. *Gobinda* v. *Dwarka Nath*, 7 C.L.J., 492 (498); *Tofaluddi* v. *Mahar Ali*, I.L.R., 26 Cal., 78, doubted in *Mithiram* v. *Somanatha*, I.L.R., 24 Mad., 397 (399).

(7) *Ibid*; *Rani Kumari* v. *Raja Srinath*, 1 C.W.N., 81 *Tofaluddi* v. *Mahar Ali*, I L.R., 26 Cal., 78.

(8) See S. 50, Indian Succession Act.

(9) *Ibid*.

(10) *Sonatun* v. *Dina Nath*, I.L.R., 26 Cal. 222; *Madras Deposit and Benefit Society* v. *Onnamalai*, I.L.R, 18 Mad., 29 dissented from.

(11) *Madras Deposit and Benefit Society* v. *Onnamalai*, I L R., 18 Mad., 29.

(12) *Cf*. *Nand Kishore* v. *Kanee Raæ*, 6 C. W.N., 395 (397).

In England where the conditions of social life are somewhat different, it has been held that a witness is not fixed with notice of the recitals, much less, deemed to consent thereto, by the fact of mere attestation, and which implies that it is not necessary that the deed should have been read over and explained to the executant in the presence of the attesting witnesses, nor does his subscription to the deed amount to a representation of fact or acquiescence in any representation made by another.(1) This rule has been held to apply to this country where the Courts have equally laid down that a mere attestation of a deed does not necessarily import concurrence, and where attestation, as by a reversioner, is sought to be proved as evidence of his consent, it must be shown by other evidence, as that when becoming an attesting witness he must have fully understood what the transaction was.(2) It is sometimes said that attestation raises a strong presumption that the attestor was aware of the nature of the transaction which he was witnessing.(3) But though this cannot be assumed in every case as a matter of law and irrespective of other circumstances, such as youth (4), language, complexity of the deed and its phraseology, his own education, intelligence, and interest affected thereby, and other circumstances too varied to lead to any generalization. The question appears to be one of fact to be decided upon the circumstances of each case. Consequently, while the Court will pay due regard to the habit of the people of this country who, as a rule, do not feel the same reserve in discussing other people's private affairs with a sangfroid unknown in the West, it will not forget that a representation neither placed in the forefront nor made an essential part of the deed is not necessarily to have attracted the attention of the attestor if it did not then affect his interest. At the same time it must not be forgotten that one recognized mode of recording one's concurrence in this country is by means of attestation, and therefore, where the validity of a deed depends upon the consent of an attesting witness it should be ordinarily presumed from that fact.(5)

1296. Mode of Proof.—The necessity for proof of a mortgage-deed only arises when its execution is challenged. If it is admitted by the party against whom it is sought to be enforced, then there is no necessity to prove it, and in such a case it has been held that its validity cannot be questioned even if it is found to be attested only by a single witness.(6) But it is said that no admission could validate a deed which is invalid by statute, and that the statute being there the Court was bound to take notice of it, in the same way as the Court should take notice of non-compliance with the laws of stamp or registration.(7) The section, was, however, enacted to prevent fraud, on the mortgagor, and there could be no better proof of a mortgage than its admission by the mortgagor himself. This would then seem to be a case covered by sections 58 and 70 of the Indian Evidence Act, and the principle *cessante ratione cessat*

(1) *Per* Lord Kenyon in *Harding* v, *Crethorn* (1793) 1 Esp. 58; 5 R.R. 719; *Sweeting* v. *Asplin*, 7 M and W. 172.

(2) *Chunder Dutt* v. *Bhagwat Narain*, 3 C.W.N., 207; *Rajlukhee Debia* v. *Gookool Chunder*, 12 W.R., 47 P.C; *Matadeen Roy* v. *Musoodun Singh*, 10 W. R., 293; *Ram Chunder* v. *Haridas*, I.L.R., 9 Cal., 463, cited and explained. *Imam Ali* v. *Baijnath* I.L.R, 33 Cal, 613; *Ram Sarup* v. *Kishen Sahai*, (1883) A.W.N., 142.

(3) *Ismail* v. *Jagannath*, 19 I.C., 255.

(4) *Abboy* v. *Attarmoni*, 3 I.C. 415 (416); *Subramaniam* v. *Doraisinga*, 16 I.C. 943 (945).

(5) *Kandasawmy* v. *Rangasawmy*, 23 M. L. J 301 (303); 16 I.C. 30 (33); *Narayana* v. *Rama*, (1913) M.L.T. 89; *Basso*, (*Mt.*) v. *Mir Muhammad*, (1913) P.L.R. 278.

(6) *Nand Kishore* v. *Kaniram*, I. L. R., 29 Cal., 355 (357); *Maung Kan* v. *Myat*, 11 I.C., 854 (851) following *Maung Kat* v. *Maung So* (1897—01) U.B.R., 379 relying on S. 58 of the Indian Evidence Act.

(7) *Pandurang* v. *Balaji*, 14 C.P.L.R. 42 (43); *Jhama* v. *Deobux*, 2 N.L.R. 10 (11).

ipse lex, as well as by the rule that where the purpose of a statute is not one of public concern, but the protection of private rights it may be waived by the person protected.(1)

1297. For the rest section 68 of the Evidence Act (2) prescribe that as document required by law to be attested shall not be used as evidence, until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.(3) If no such attesting witness can be found, and his absence is duly accounted for (4) or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his hand-writing, and that the signature of the person executing the document is in the hand-writing of that person.(5) It will be observed that section 69 of the Indian Evidence Act enacts that in a compulsorily attested deed at least one attesting witness, if available, should be examined to *prove its execution*. It therefore follows that such witness must, in the case of a mortgage prove its execution not only in his own presence but also in that of his co-attestor. Where, therefore, one of the attesting witness to a mortgage was dead, and the other denied all knowledge of it, and there was no other evidence to show that its execution had been attested by two witnesses, it was held to fail as a mortgage.(6) Where a mortgage-deed contained at the foot, the names of three or four persons as witnesses, all of whom were illiterate, and who did not say that their marks had been attached at their desire, the deed was held not properly attested as required by this section.(7) On execution of a deed of mortgage, the names of two out of the four attesting witnesses were written by the scribe, who also signed the document himself. All the witnesses and the scribe were dead when the mortgage deed was sued on, and the Court held it sufficiently proved by proof of the handwriting of the scribe, it being then presumed that the attestation must have been in conformity with the law.(8) A mortgage-deed was executed by a pardanashin lady in the presence of one witness, who though separated from her by a wooden screen swore that he had managed to see the lady sign and affix her thumb impression, but the other attesting witness was not so fortunate, though he too was then standing near by, whereupon the Court observed: "Where ...pardanashin ladies are unable to appear before male witnesses, a document which, by independent testimony is conclusively proved to have been executed by a *pardanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *purdah*, and who before attestation satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze"(9) which, it may be added, is sound sense, but scarcely a strict compliance with the letter of the law. But such a view was inevitable, and other benches of the same Court had previously taken the same view.(10) In these cases a screen had completely separated the witnesses from the executant; and no question of false personation being raised the Court held their attestation as sufficient compliance

(1) *Jortin* v. *The South Eastern Railway*, 6 De G.M. & G. 270; *Landowners, etc. Insurance Co.* v. *Ashford*, 16 Ch. D. 411 (438).
(2) Act I of 1872.
(3) *Tulsi Mahato* v. *Chettoree*, 16 I.C., 379 (380).
(4) *Swamidin* v. *Kaniz*, 11 I.C., 225 (226).
(5) S. 69, Indian Evidence Act.
(6) *Wazir Khan* v. *Ramphal*, 19 I. C., 643.
(7) *Taki Nashya* v. *Puru Muhamad*, 2 C. L.J. 70 *n*.
(8) *Krishna* v. *Bishnath*, I. L. R., 34 All., 615 (616, 617) relying on S. 69 of the Indian Evidence Act.
(9) *Sarut Jigar* v. *Barada Kanta*, I.L.R., 37 Cal., 526 (539).
(10) *Harmongal* v. *Ganaur*, 13 C.W.N., 40; 3 I.C., 209; *Isri Prosad* v. *Rai Gunga Prosad*, 14 C.W.N., 165; 3 I.C., 311.

with the law. So it would seem, that if the attestors and executant sign in the presence of each other, it would be a valid attestation though one of them being blind could not see, provided his position was such that he could have seen if he had his eyesight unimpaired.(1) If the executant happens to have affixed only his mark, the fact that he did so or consented to its making by another, after understanding and admitting its contents, must be proved.(2) If the attesting witness denies or does not recollect the execution of the document, the Evidence Act allows it to be proved by other evidence.(3) And where the execution of a document is admitted, it need not then be proved at all.(4)

1298. Where a mortgage-deed, on the face of it, showed that it was attested by two witnesses, one of whom was the writer, whose denial of execution of the deed by the mortgagor had been found by the Court of Appeal below to be false, and the other witness said that the mortgagor signed in his presence, but he was not able to remember whether the mortgagor signed also in the presence of the writer, and it appeared that the writer's signature preceded that of the other witness, it was held that under the circumstances, it might be fairly presumed that both the persons signed as attesting witnesses after the execution of the document by the defendant.(5) Such a presumption would appear, however, only to arise in cases where the evidence on both sides is evenly balanced, or where there is weak or no evidence at all. Thus, where a document appears to be in proper form duly executed in all respects, the Court would presume that everything was right, and would not tie itself down to accept the evidence of the witnesses to the contrary where there is any doubt about the recollection of the attesting witnesses.(6) Where, however, there is clear evidence on both sides as to the factum of attestation, there is then no room for the presumption "*omnia rite esse acta.*"(7)

1299. The principle of calling attesting witnesses is not that he is the best evidence, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution,(8)—an agreement which may be *waived* for the purpose of the trial, but which cannot be broken.(9) Where a mortgage-bond was attested by three witnesses, but of whom only one was called, and he was not questioned about the other witnesses having attested it, the document was held to be sufficiently proved, but in this case the execution of the deed was not denied, though it was alleged that the execution had been compassed by fraud.(10)

1300. Where the attesting witnesses are dead, or cannot be found, it is necessary to prove their signatures. This may be done by examining a witness acquainted with their handwriting, though this fact need not be previously established to validate his testimony.(11) The admissibility of oral evidence to vary the terms of a written contract being subject to the provisions

(1) *Piercey* Re, 1 Rob., 278; followed in *Sarur Jigar* v. *Barada Kunta*, I. L. R., 37 Cal., 527 (539).

(2) *Foster* v. *Mackinnon*, 1 Co. Rep. (Pt., 2), 445; *Dagdu* v. *Bhana*, I.L.R., 28 Bom., 420 (427).

(3) Indian Evidence Act (I of 1872), S. 71.

(4) *Ibid*, S. 70.

(5) *Jogendra* v. *Nitai Churn*, 7 C. W. N., 384, citing S. 114 of the Evidence Act in support of the presumption which embodies the rule expressed in the maxim "*omnia præsumuntur rite est solemniter esse acta donee probetur in contrarium :*" (All things are presumed to have been rightly and duly performed until the contrary is established.)

(6) *Wright* v. *Sanderson*, L. R., 9 P. D., 149; *Lloyd* v. *Roberts*. 12 Moo., P. C., 158; *Wyatt* v. *Berry* [1893], P. 5 (9).

(7) *Jhama* v. *Deobux*, 2 Nag. L. R., 10 (16); *Mulchand* v. *Janki*, 2 Nag. L.R., 65.

(8) *Nand Kishore* v. *Kanee Ram*, 6 C.W. N., 395 (396).

(9) *Geralopulo* v. *Wieler*, 10 C.B., (N. S.), 690 (696).

(10) *Whyman* v. *Garth*, L. R., 8 Ex. 803.

(11) *Shankar Rao* v. *Ranji*, I. L.R., 28 Bom., 58.

of section 92 of the Indian Evidence Act, oral evidence is not admissible to shew that one of the executants of a deed had signed it only as a surety, and that his liability was as such and for a limited period.(1)

Consenting third party.

1301. A statement by a person consenting to a mortgage-deed executed by a mortgagor indorsed on the deed to the effect that he was the owner of half of the mortgaged lands, was said to be conclusive as against the mortgagee, but only a piece of evidence to be considered along with the rest of the evidence as against the mortgagor. (2)

1302. Operation of Unattested Mortgage :—It is now settled that a deed purporting to be a mortgage but which fails as such for want of a valid attestation cannot be treated as creating a charge,(3) the question in such cases being what was intended and not what was the effect,(4) though neither this section nor section 100 defining a charge from their terms appear to approach the question from that standpoint. But though such a mortgage may fail to effect even a charge, it is not wholly inoperative, for it is still admissible to prove the personal covenant to pay, if any made therein, since though the deed fails to effect a transfer of an interest in immoveable property by way of mortgage, it cannot be held to have any further effect than to invalidate such intended transfer.(5) And for that purpose it is immaterial whether the deed be registered or unregistered.(6) The question of personal covenant is one of construction, and, as will be seen in the sequel, it is not necessarily an incident of every mortgage.(7) Even when the deed contains no personal covenant, its failure as a mortgage is not fatal to recovery of the sum due thereupon, for in that case the obligee may maintain a suit for compensation within three or six years according as his deed was unregistered or registered.(8)

Personal covenant when unenforceable.

1303. It is not always that a personal covenant to pay is enforceable on the failure of a mortgage for want of registration. In such cases the question is whether the personal covenant is so severable from the mortgage as to form an independent transaction. Thus, if upon a loan of money, it is agreed (*a*) that the loan shall be secured by a bond containing a covenant for repayment of the sum advanced with interest within a certain time; and also (*b*) that certain designated property shall stand hypothecated as collateral security for the re-payment of the loan, it is clear that the two clauses are divisible, and if the second fail for want of registration, the first may still be enforced. (9) But if

(1) *Harak Chand* v. *Bishun Chandra*, 8 C.W.N., 101.

(2) *Madras Deposit and Benefit Society* v. *Oonnamali*, I.L.R., 18 Mad , 29.

(3) S. 58 comm. ; and S. 100 comm. *post*; *Pran Nath* v. *Jadu Nath*, I.L.R., 32 Cal., 729 ; *Rayeuddi* v. *Kali Nath*, I.L.R., 33 Cal., 985 ; *Debindra* v. *Behari*, 16 C.W.N., 1075 ; 15 I.C., 666 ; *Narayan* v. *Lakshmandas*, 7 Bom.L.R , 934 ; *Samoo Patter* v. *Abdul Sammad*, I.L.R., 21 Mad., 337 ; *Contra* in *Neelakantam* v. *Madasamy*, 17 M.L.J., 39 ; *Mithiram* v. *Somanatha*, I.L.R., 24 Mad., 397; distinguished and dissented from, *Khemchand* v. *Mallo*, 10 N.L R., 81.

(4) *Gobinda* v. *Dwarka*, I.L.R., 35 Cal., 837.

(5) *Pulaka* v. *Thiruthipalli*, I.L.R., 32 Mad., 410 (411, 413, 414) F.B.

(6) *Pulaka* v. *Thiruthipalli*, I.L.R., 32 Mad., 410 (414) F.B., overruling *contra* in *Madras Deposit &c., Society* v. *Oonnamali*, I.L.R., 18 Mad., 29; following *Gomoji* v. *Subbarayappa*, I.L.R., 15 Mad , 253 ; *Sada Kavar* v. *Tadepally*, I.L.R., 30 Mad., 284 (288) ; *Ulfatunnissa* v. *Hosain*, I.L.R., 9 Cal., 520 ; *Tafaluddi* v. *Mahar Ali*, I.L.R., 26 Cal., 781; *Sonatun* v. *Dino Nath*, *Ib.*, 222 ; *Kerr* v. *Ruxton*, 4 C.L.J., 510.

(7) S. 67 comm.

(8) S. 65, Indian Contract Act; Art. 115, 116 ; Indian Limitation Act.

(9) *Luchmiput* v. *Khairat Ali*, 4 B. L. R., 18, F.B.; *Krishto Lall* v. *Bonomalee*, I.L.R., 5 Cal., 611 ; *Sadu* v. *Basaviah*, 17 M.L.J.R., 168.

the personal covenant cannot be so disentangled from the mortgage, it cannot be enforced at all and the deed then wholly fails. (1) Nor can the difficulty be overcome by treating the suit as one for damages for breach of the contract, for the contract itself being incapable of proof, no damages can be awarded. (2) By an unregistered instrument *A* stipulated that *B* should enjoy certain land for a term of years in order that a debt and interest might be liquidated by receipt of profits, estimated at a fixed sum, and it was provided that, if *B's* possession was disturbed in the meantime, *A* should pay the balance of the principal then due and interest from the date of the loan. On being ejected *B* sued *A* upon the covenant to pay. But the Court threw out the claim, holding that the covenant was a contract depending upon the principal contract, and that the latter having become invalid, the former also failed. (3)

1304. Admissibility and Proof of Unregistered Mortgage.—A mortgage-deed which fails for non-registration is declared to be ineffectual for the purpose of "affecting any immoveable property comprised therein," and is inadmissible "as evidence of any transaction affecting such property."(4) The disability created by non-registration is then confined to exonerating the immoveable property which would have been otherwise charged. For other purposes, the document may be admissible. But the question of greater moment is, what is its residuary effect upon the contracts of the parties. It is clear that the mortgage as such, wholly fails, if the mortgage-deed is not registered in compliance with the provisions of the section. And failing as a mortgage, the deed cannot be held to create a "charge," for though the registration of a charge is not made obligatory by the section, it amply falls within the ambit of section 17 (*b*) and, equally within the scope of section 49 of the Indian Registration Act. But such a document is admissible in evidence to prove the simple debt or a personal obligation:(5) and indeed, for any purpose for which registration is unnecessary.(6) For example, it is admissible to prove admission on liability of the part of the executant sufficient to prevent a claim from being barred by the law of Limitation.(7) And if the mortgage implied a personal covenant to pay, as in the case of a simple mortgage, an English mortgage or an anomalous mortgage, the unregistered mortgage may be used in evidence to enforce the personal obligation.(8) But since no such obligation is implied in a mortgage by conditional sale or an usufructuary mortgage, as such,(9) it follows that deeds evidencing such mortgages may be rendered wholly inoperative except that they may be admitted in evidence to prove payment of the consideration. This evidence would be material in a suit instituted by the mortgagee for damages for breach

(1) *Krishto Lall* v. *Bonomalee*, I. L. R., 5 Cal., 611; *Martin* v. *Sheo Ram Lal*, I L.R., 4 All., 232.

(2) *Raju* v. *Krishnarav*, I. L. R., 2 Bom., 273 (281); *Gurunath* v. *Chenbasappa*, I. L. R., 18 Bom., 745 (747); *Martin* v. *Sheo Ram Lal*, I. L. R., 4 All., 232; *Venkatarayudu* v. *Papi*, I.L.R., 8 Mad., 182.

(3) *Venkatrarayudu* v. *Papi*, I. L. R., 8 Mad., 182.

(4) S. 49, Indian Registration Act (III of 1877).

(5) *Nilmadhub* v *Fatteh Chand*, 3 B.L.R. (A.C.), 310; *Buttokristo* v. *Khettra*, 6 B. L. R. (A.C.), 69; *Sangappa* v. *Basappa*, 7 B. H.C.R., (A C.), 1; *Eshree* v. *Bindoot Rai*, 3 Agra, 60 F.B.; *Seeta* v *Juggernath*, 3 Agra, 170; *Sheodial* v. *Prag Dat*, I.L.R., 2 All., 229 F.B.; *Nemdhari* v. *Bissessuri*, 2 C.W. N., 591; *Vani* v. *Bani*, I.L.R., 20 Bom., 553; *Sadu* v. *Basaviah*, 17 M.L.J.R., 167; doubting *Madras Deposit &c., Society* v. *Oonnamalai*, I.L.R., 18 Mad., 29; following *Tofaluddi* v. *Mahar Ali*, I. L.R., 26 Cal., 78; *Gulabhai* v. *Shri Datgarpi*, 9 Bom. L.R., 393.

(6) *Lachmipat* v. *Khairat Ali*, 5 B. L. R., 18 F.B.; *Sham Narayan* v. *Khemajit*, 4 B. L.R., 1 F. B.; *Monomothonath* v. *Sreenath*, 20 W.R., 107.

(7) *Mugniram* v. *Gurmukh Roy*, I. L. R., 26 Cal., 334; *Sheo Dial* v. *Prag Dat*, I.L.R., 3 All., 229; *Lachman Singh* v. *Kesri*, I.L.R., 4 All., 3; *Khusalo* v. *Behari*, I.L.R., 3 All., 523.

(8) *Ulfatuunnissa* v. *Hossein Khan*, I.L.R., 9 Cal., 520; *Gomaj* v. *Subbarayappa*, I. L. R., 15 Mad., 253.

(9) S. 67 comm. *post*.

of the contract[1] or for restitution of the benefit received by the mortgagor. In a suit for breach of a covenant to register contained in an unregistered mortgage-deed, the defendant cannot plead the non-registration of the instrument for the purpose of protecting himself. [2] But the plaintiff cannot sue for possession on the basis of such a deed, [3] although it may be used to explain possession already taken, [4] nor can he sue for damages for dispossession, for in order to succeed in such a suit he would have to prove the contract by dint of which he was let into possession. [5] And if in a case it is made to appear that the cause of suit arises upon a document which by law requires registration, but has not in fact been registered, the plaintiff cannot be permitted to establish a claim independently of the document the existence of which is established, [6] unless it is apparent that the document is not the foundation of his suit, [7] or its production becomes immaterial for the admissions made by the adversary,[8] or that it has been superseded by a duly registered deed intended to cure the defect of the earlier unregistered document. The contrary was laid down in a case in which it was said that it was an obvious attempt to defeat the provisions of the registration law.[9] But as the Privy Council observed: "The Registration Act was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances, unless those previous conveyances were registered."[10] Secondary evidence of the contents of an instrument destroyed by accident after its execution, but before its registration, was admitted in a suit to compel the defendant to execute another instrument. [11]

1305. A receipt passed by the mortgagee to the mortgagor and setting forth that on taking account a certain sum was due on account of the mortgage, that a sum was paid on the day of the receipt, and that a further specified sum was to be paid in a month-and-a-half, and that the rents and profits were in future to be taken for the interest on the balance only, was held to be no more than a mere settlement of accounts not intended to modify or supersede the original mortgage-contract, and that, therefore, it did not require registration. [12] Where the transaction is reduced to writing on several papers, whether attached together or detached, all the papers must be registered so as to be admissible in evidence. If, therefore, some of the papers are left unregistered, they cannot be admitted in evidence on the ground that they are parts of the registered document; *a fortiori* where two contemporaneous documents are executed, one purporting to be an absolute sale, and the other purporting to show that the transaction between the parties was in reality a mortgage, they must both be registered to be

(1) *Raja of Venkatagiri* v. *Narayan*, I.L. R., 17 Mad., F. B, 456; *Adakkalam* v. *Theethan*, I.L.R., 12 Mad., 505.

(2) *Sham Narayan* v. *Khimajit*, 4 B.L.R., 1, F.B.

(3) *Krishen Kishore* v. *Mahomed*, Agra (F.B.), 148.

(4) *Gopee Chand* v. *Liakut Hossein*, 25 W. R., 211.

(5) *Balaji* v. *Mt. Banabai*, 1 N.L.R., 47.

(6) *Rampershad* v. *Mewa Kooer*, 2 N. W. P. H. C. R., 12; *Moona* v. *Jey Mungul Singh*, 4 N.W.P.H C.R., 164; *Kaboolun* v. *Shumsheir Ali*, 11 W.R., 16.

(7) *Sawantee* v. *Sewa Ram*, 2 N. W. P. H.C.R., 35.

(8) S. 58, Indian Evidence Act (I of 1872); *Chedambaram* v. *Karunalaya*, M. H. C. R., 342; *Reza Ali* v. *Bhikun Khan*, 7 W.R., 334.

(9) *Mathura Das* v. *Mitchell* I.L.R., 4 All., 206; reversed O.A. *Mitchell* v. *Mathura Das* I.L.R., 8 All., 6, P.C.

(10) *Mitchell* v. *Mathura Das*, I. L. R., 8 All., 6 (12) P.C: To the same effect *Hicks* v. *Powell*, L.R. 4, Ch. 741, in which a later registered deed was given priority over an earlier unregistered deed executed in India, which was further held to be inadmissible in evidence in England. *Cf. Abdul Majid* v. *Muhammad*, I.L R., 13 All., 89.

(11) *Mynakka* v. *Vavana*, 5 M.H.C.R., 123.

(12) *Lakshman* v. *Damodar*, I. L. R., 24 Bom., 609.

admissible in evidence, and if one of them be unregistered, it cannot be admitted to affect the transaction as disclosed by the other registered instruments. (1)

1306. Compromise and Security-deeds.—A deed of compromise, if it has the effect of creating a charge on immoveable property, falls under the provisions of this section. But a compromise-deed must be distinguished from a compromise-decree which does not require to be registered even though it creates a charge on immoveable property. (2) A compromise filed and the terms of which were not embodied in the decree is no exception to the rule, but if the decree referred to or narrated the terms of the compromise it may be used to construe the decree, and they may both be then used without registration. (3) The fact that the decree affected property which was not in controversy in the suit does not make the decree *ultra vires*.(4) Such was the case where upon a suit for recovery of money due on accounts, a compromise was come to, and a petition filed, in accordance with which a decree was passed to the following effect, *viz.*, that the defendants do pay to the plaintiffs a certain sum of money together with interest in instalments, but in default of payment of any two instalments, the whole amount with interest should be realizable at once, and as a security for the decretal amount certain immoveable properties therein specified were declared to be thereby hypothecated till the realization of the money, and till then the defendants were not to create any incumbrance on the same. It was held that as the consideration for the hypothecation was the time allowed for payment of the sum decreed by instalments, and as it was an integral and necessary part of the adjustment of the claim in suit, the hypothecation was properly inserted in the consent-decree and it was not inserted against the provisions of section 375 (now O. 23, r. 3) of the Procedure Code. (5)

A security-bond given by a person under section 545 (now O. 41 r. 5) of the Procedure Code, however, stands on a different footing. It is not a judicial proceeding so as to be exempt from the provisions of this section, but is a mortgage for the due performance of the decree or order as may be ultimately binding upon the executant, and must, as such, be registered under this section.(6)

1307. Stamp.—The stamp-duty payable on a mortgage-deed varies with the nature of the mortgage In the case of a possessory mortgage, that is a mortgage in which possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given, the duty leviable is the same as on a conveyance for a consideration equal to the amount secured by such deed.(7) In cases of non-possessory mortgages, that is, those in which, at the time of execution, possession is not given or agreed to be given, the duty is the same as for a bond.(8) No additional duty is payable whether the contract be by one or more persons, jointly or severally, the fact under the Stamp Act being not whether the deed embodies distinct contracts but whether it

(1) *Mutha* v. *Pyanda*, I.L.R., 27 Mad., 348.
(2) *Gobinda* v. *Dwarka Nath Paul*, 12 C. W.N., 849 (853); *Biraj Mohini* v. *Kedarnath*, 12 C. W.N., 854; *Govinda* v. *Dwarka Nath Paul*, I.L.R., 35 Cal., 837.
(3) *Pranal Anni* v. *Lakshmi Anni*, I.L.R., 22 Mad., 508, P. C.; *Raghubans* v. *Mahabir Singh*, I.L.R., 28 All., 78.
(4) *Jasimuddin* v. *Bhuban*, I.L.R. 34 Cal., 456; *Gupta Narain* v. *Bijoya*, 2 C.W.N., 663; *Purna Chundra* v. *Nil Madhub*, 5 C.W.N., 485; *Govinda* v. *Dwark Nath Pal*, I.L.R., 35 Cal., 837 (842).
(5) *Govinda* v. *Dwarka Nath Paul*, I.L.R., 35 Cal, 837.
(6) *Nagarur* v. *Tangatur*, 1. L. R., 31 Mad., 330.
(7) Art. 40 (*a*), Sch. I, Indian Stamp Act (II of 1899).
(8) *Ibid.* Art. 40 (*b*).

comprises distinct matters.(1) A mortgagor who gives to the mortgagee a power-of-attorney to collect rents of a lease of the property mortgaged or part thereof, is deemed to give possession for the purpose of the stamp duty.(2) A different duty prevails when the security given is by way of further assurance,(3) or the mortgage is of a crop.(4) For convenience of reference the duties are tabulated below:—

Consideration.	(1) Possessory mortgage.	(2) Non-possessory mortgage.	(3) Further Assurance.	(4) MORTGAGE OF A CROP.	
				(a) When loan is repayable within 3 months.	(b) When loan is repayable mroe than 3 months but not more than a year.
(1) Where consideration set forth does not exceed Rs. 10.	0 8 0	0 2 0	0 8 0	0 1 0	0 4 0 P. C., and 4 annas for every Rs. 100 or part thereof.
(2) Where it exceeds 10 but not Rs. 50.		0 4 0			
(3) Where it exceeds 50 but not Rs 100.	1 0 0	0 8 0			
(4) Where it exceeds 100 but not Rs. 200.	2 0 0	1 0 0		0 1 0 For every Rs. 200 or part thereof.	
(5) Additional duty for every Rs. 100 or a part thereof up to Rs. 1,000.	1 0 0	0 8 0			
(6) For sums in excess of Rs, 1,000 for every Rs. 500 or a part thereof.	5 0 0	2 8 0	...	Amended by Act of 1906.	Amended by Act of 1906.
(7) For every Rs. 1,000 or part thereof secured in excess.	...	...	0 8 0		

Novation or further charge.

1308. The stamp-duty payable on a mortgage-deed, the consideration of which is made up of a certain sum paid by the mortgagee and of the consideration of a previously executed mortgage, is calculated on the sum total and not on the consideration then actually passed. Thus, where certain property was mortgaged with possession for Rs. 180 by a deed of mortgage executed in 1895 on a stamp-paper of Rs. 2 as required, and subsequently in 1899 the same property was re-mortgaged to the same mortgagee for Rs. 250 made up of Rs. 180, the consideration of the former deed, and another sum of Rs. 70 due to the mortgagee. This deed being engrossed on a stamp-paper of Re. 1 only, was impounded, and it was held that since the deed was not intended to operate merely as a further charge but as a new mortgage for Rs. 250, in which the previous one merged, it should be stamped for Rs. 250.(5) The point to be borne in mind is that where there has been a novation of contract the stamp should be paid on the sum total of the consideration, but where the subsequent bond operates only as a further charge without affecting the previously executed mortgage, then the duty is payable only on the consideration of the

(1) *Stamp Duty*, In re (1910) P. R., No. 15, F.B.; 5 I.C., 813.
(2) Art. 40 (*b*), Sch. I, Indian Stamp Act (II of 1899),
(3) *Ibid*, Art. 40 (*c*).
(4) *Ibid*. Art. 41.
(5) In re *Megha*, I.L.R., 25 Bom., 370.

newly executed instrument. The Stamp Act allows of certain deductions where the property mortgaged is subsequently sold to the mortgagee,(1) but the property sold must then be the whole of the property mortgaged and not only a portion thereof. (2)

When interest excluded.

1309. The stamp-duty on a non-possessory mortgage is payable on the principal money only and not on the sum made up of both the principal and interest. Thus a deed, the terms of which ran thus: "I have taken from you in cash a loan of Rs. 9-4, to which twelve annas have been added for *kasar* (discount)—total Rs. 10; interest on this sum amounts to Rs. 2-8—total Rs. 12 8," the entire sum being repayable in twenty-five monthly instalments of eight annas each, it was held that since the interest accrued under the bond itself, the stamp should be on Rs. 10 and not Rs. 12-8. In other words, future interest, though it may be added to the principal, does not become part of it for the purpose of stamp-duty.(3)

Mortgagee pays for stamp.

1310. Unless otherwise agreed, the expense of providing the proper stamp for a mortgage-deed is borne by the mortgagor, (4) while who has also to pay for a reconveyance of the same property.(5)

The admissibility of a document unstamped and unregistered depends upon its nature. If it is a receipt of payment under a mortgage, it can be used as evidence of payments as also of appropriation of them, because it makes no variation of the contract itself, but only a modification of the account in consequence of payments.(6) On the other hand, where the document constitutes the contract itself or an integral part thereof, its non-registration is fatal to its admissibility so as to affect any property therein mortgaged, although insufficient stamp-duty paid on a deed does not stand in the way of its reception subject to the levy of a proper penalty.(7)

A registered document cannot be rescinded except by another registered document.(8) Of course, rescission of a document is quite different from its satisfaction as by payment which may be proved by parol. And so it has been conceded that a receipt, even though it may have the effect of extinguishing a mortgage, is admissible in evidence even though unregistered, since it is primarily only evidence of payment.(9)

Unstamped mortgage.

1311. An instrument which should have been stamped according to law but is unstamped is, unless duly stamped, wholly inadmissible in evidence and secondary evidence is not admissible in proof of its execution or its contents even if it be for the purpose of showing the character in which possession was transferred. (10)

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(1) S. 24, Indian Stamp Act (II of 1899).

(2) In re *Nivabai*, I L R., 29 Bom., 208.

(3) *Vithu* v. *Nathu*, 3 Bom. L. R., 133; (1887) B. P. J., 35; *contra* in *Sambhu* v. *Krishna*, I.L.R., 26 Cal., 179, dissented from.

(4) Indian Stamp Act, 1899 (II of 1899), s. 29 (*a*).

(5) *Ibid*, s. 29 (*c*).

(6) *Lakshman* v. *Damodar*, I. L. R., 24 Bom., 609; s. 92, cl. (4) of the Indian Evidence Act (I of 1872) does not apply; *Shidlingapa* v. *Chenbasapa*, I.L.R., 4 Bom., 35; *Satyesh Chunder* v. *Dhunput*, I. L. R.,; 24 Cal., 20; *Obai Goundan* v. *Ramalinga*, I. L.R., 22 Mad., 217; *Jiwan Ali* v. *Basa*, I. L.R., 9 All., 108, F B.

(7) S. 35, Indian Stamp Act (II of 1899).

(8) *Ramayya* v. *Krishnamma*, I. L. R., 28 Mad., 114.

(9) *Appamma* v. *Ramanna*, I. L. R., 28 Mad., 92.

(10) *Chenbasapa* v. *Lakshmana*, I.L.R., 18 Bom., 369; *Thaji* v. *Thirumalaiappa*, 17 M. L.J R., 308.

Registration shifts onus.

1312. Besides the many advantages which registration offers, it has the effect of shifting the burden of proof, for the admission of the receipt of consideration before the Registrar strengthens the presumption as to the receipt of consideration which the mortgagor, if he denies it, must rebut. By merely denying the transaction he does not get rid of this liability, for in the words of the Privy Council: "it is valueless if it can be gone behind in every case by an assertion that that which was stated at the time of the registration was untrue." (1) Moreover, as soon as the deed is registered, it operates as a completed conveyance, without the necessity of formal delivery to the obligee (2) and if therefore afterwards it appears that the mortgagor had placed a portion of the consideration-money with the mortgagee who failed to account for it, it would originate a cause of action against the mortgagee for refund, but would be no ground for rescission of the mortgage. (3)

1313. Alterations vitiating Deeds.—It has been held in a long series of cases that an unauthorised material alteration of a deed after its execution has the effect of vitiating the deed, so that nothing can be recovered thereupon, (4) although the alterations made can be easily detected and may be capable of elimination, the policy of the law being that no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected. (5) The rule however applies only to documents which are not the foundation of a plaintiff's claim, but are merely evidence of it. (6) The question whether an alteration is material is one of law and does not depend upon surrounding circumstances. (7) Alterations in the date, (8) the amount payable, (9) the time and place of payment, (10) the addition of a contracting party, (11) have been all held to be material. So alterations expressing the value to be received on some particular account, (12) or adding or changing the rate of interest, (13) or changing a joint into a joint and several liability, (14) tampering with the signatures, (15) an addition to any

(1) *Ali Khan* v. *Indar Pershad*, I.L.R., 23 All., 950 (954), P.C. Admission of receipt of consideration in the deed will also create a presumption against the obligor and his privies which would be strengthened by the fact stated in the text—*Babbu* v. *Sita Ram*, I.L.R., 38 All 478.

(2) *Ramalinga* v. *Ayyadorai*, I.L.R., 28 Mad. 124 (125); *Ponnayya* v. *Muthu Gaundan*, I.L.R., 17 Mad. 146; *Narain* v. *Dataram*, I.L.R., 8 Cal., 597.

(3) *Sagaji* v. *Namdev*, I.L.R., 23 Bom., 525; *Lakhmichand* v. *Kisan*, 14 C.P.L.R., 57; *Khudia* v. *Mt. Lanki*, 1 Nag. L.R., 146.

(4) *Pigot's case*, 11 Rep., 26*b*, 27*a*; *Aldous* v. *Cornwell*, L.R., 3 Q.B., 573; In re *Howgate* and *Osborn's contract*, [1902] 1 Ch., 451; *Crediton* v. *Exeter*, [1905] 2 Ch. 455; *Atmaram* v. *Umed Ram*, I.L.R., 25 Bom., 616.

(5) *Per* Kenyon, C.J., in *Master* v. *Miller*, 4 T.R., 320.

(6) *Atmaram* v. *Umed Ram*, I.L.R., 25 Bom., 616.

(7) *Pigot's Case*, 11 C.B., 27; *Master* v. *Miller*, 4 T.R., 320; 2 R.R., 299; *Vance* v. *Lowther*, 1 Ex. D., 176; *Davidson* v. *Cooper*, 13 M. & W., 343; *Ganga Ram* v. *Chandan Singh*, I.L.R., 4 All., 62; *Gogun Chunder* v. *Dhuronidhur*, I.L.R., 7 Cal., 616; *Sitaram* v. *Daji*, I.L.R., 7 Bom., 418; *Christacharlu* v. *Karibasayya*, I.L.R., 9 Mad., 399, F.B.

(8) *Vance* v. *Lowther*, 1 Ex. D., 176.

(9) *Leeds Bank* v. *Walker*, 11 Q.B.D., 84.

(10) *Cardwell* v. *Martin*, 9 East., 190; *Walton* v. *Hastings*, 4 Camp., 223; *Cock* v. *Coxwell*, 2 C.M. & R., 291; *Hirschman* v. *Budd*, L.R., 8 Ex., 171; *Hamelin* v. *Bruck*, 19 Q.B., 306.

(11) *Taylor* v. *Moseley*, 6 C. & P., 278; *Mackintosh* v. *Haydon*, Ry. & M., 362; *Calvert* v. *Baker*, 4 M. & W., 417; *Hanbury* v. *Lovett*, 16 W.R. (Eng.), 795.

(12) *Gardner* v. *Walsh*, 24 L.J.Q.B., 285; *Gourchandra* v. *Prosunno Kumar*, I.L.R., 33 Cal., 812; *Gogun Chunder* v. *Dhuronidhur*, I.L.R., 7 Cal., 616; *Karam Ali* v. *Narain Singh*, 2 P.L.R., 107.

(13) *Sutton* v. *Toomer*, 7 B. & C. 416; *Warington* v. *Early*, 2 E. & B., 753; *Roberts* v. *Sioux City and P. R. Co.*, 2 L.R., A. (N.S.), 272.

(14) *Perring* v. *Hone*, 4 Bing., 28.

(15) *Mason* v. *Bradley*, 11 M. & W., 590; *Nicholson* v. *Revill*, 4 A. & E., 675.

matter such as the sum borrowed,(1) or the land mortgaged and specified in the schedule, all fall into the same category. And in fact any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms, or the relation of the parties to it, is a material alteration sufficient to invalidate the instrument. And it is not necessary that the alteration be in part of the contract, for it is sufficient if the document is materially tampered with.(2) Where the name of an executant is fraudulently interpolated in a document, it becomes inoperative not only as against the person whose name has been forged, but also as against the actual executants.(3) (§1315). But the affixing of a stamp on a document subsequently to its execution so as to avoid the payment of a penalty is not such a material alteration so as to render it inadmissible in evidence.(4) So the forged addition of the signature of an attesting witness by the obligee of a bond after its execution, even though such addition was calculated to facilitate the proof of the liability of such attesting witness under the bond, was held not to be a material alteration which disentitled the obligee to sue upon it.(5)

On the other hand, an alteration which is a mere surplusage, as the addition of the words "On demand" to a promissory note,(6) or anything which does not affect the liability of the parties, would be deemed to be immaterial so as not to wholly vitiate the deed.(7) So if the transferee is sufficiently identified, such an addition as filling up a blank left for his Christian name will not affect the deed.(8) So filling in a blank with the proper date does not vitiate a document.(9) Of course, any alteration, howsoever material, may be made with the consent of all parties, if it was to correct a mistake(10) or to carry out the original intention of the parties.(11) But otherwise even the parties cannot alter the deed, since the effect of such alteration is to make the deed evidence of a new contract(12) which would require fresh stamp and registration.

1314. Where a document has been materially altered, no suit will lie thereon. Thus, where in a case a document ran thus: "The sum for which security has to be furnished as said above, is Rs. 2,000. A security should be furnished for this sum of Rs. 2,000 *for the minor only*," and it appeared that the last few words italicized were subsequently added by the mortgagee without the consent of the mortgagor. The Court thereupon held that the document was altered in a material part, and that a suit upon the altered instrument would not lie, but that since the right to bring the properties to sale, which became vested as soon as a valid mortgage was executed might be said to have been the basis of the suit, the suit should be maintained, and the instrument so far as it was unaltered might be received in evidence of the rights of the parties.(13) If a document

(1) *Margal Sen* v. *Shankur Sahai*, I.L R., 25 All., 580, F.B.

(2) *Suffell* v. *Bank of England*, 9 Q B.D., 555; *Lowe* v. *Fox*, 12 App Cas., 206.

(3) *Karam Ali* v. *Narain Singh*, (1901) P.L R. 107.

(4) *Beli Ram* v. *Bhagwandas*, (1901) P.L. R., 40.

(5) *Ramier* v. *Shumurgam*, 2 M L.J. R., 39; *Vasirale* v. *Suryanarayana*, 1 M.L.J. R. 388; *Mohesh Chunder* v. *Kamini*, I. L. R. 12 Cal., 318.

(6) *Aldons* v. *Cornwell*, L.R., 3 Q B., 573.

(7) *Catton* v. *Simpson*, 8 A. & E., 136; *Aldons* v. *Cornwell*. L.R., 3 Q.B., 573.

(8) *Eagleton* v. *Gutteridge*, 11 M. & W., 465.

(9) *Crediton* v. *Exeter*. [1905] 2 Ch., 455; *Keane* v. *Smallbone*. 17 C.B., 179.

(10) *Karshaw* v. *Cox*, 3 Esp., 246; *Byron* v. *Thomson*, 11 A. & E., 31; *Schlfield* v. *Londesborough*, [1894] 2 Q B., 660.

(11) *Carss* v. *Tattersall* 10 L J C.P., 187; *London & Provincial Bank* v *Roberts*, 22 W. R (Eng. 402); *Dodge* v. *Pringle*, 29 L.J. Ex., 115

(12) *Bowman* v. *Nicholl*, 5 T.R., 537.

(13) *Subramania* v. *Krishnayyan*, I.L.R., 23 Mad., 137, F B.; following *Attorney-General* v. *Marquis of Ailesbury*, L.R., 16 Q. B., 432 (441); *Ramasawmy* v. *Chinna*, 3 M. H.C.R., 247; *Christacharlu* v. *Karibasayya*, I.L.R., 9 Mad., 399, F.B.

fails on account of the material alterations made therein, no subsequent ratification can cure it of its defects. (1)

Value of altered deed.

1315. The rule that a material alteration vitiates the document is, however, subject to this limitation, that it does not affect rights and title vested under it. It only ceases to be unenforceable in law as an executory instrument. (2) It ceases to be a sword, but may yet be used as a shield. In other words, although the Court will refuse to enforce the altered instrument, it will not take away what the obligee has already taken thereby. (3) Moreover, it may even be admitted for collateral purposes (4)—in the words of Lord Abinger "as a proof of some right or title created by or resulting from its *having been executed.*" (5) But where a mortgage-deed was altered to bring a claim within limitation, the deed cannot be put in force on the ground that it is evidence to show at least that a certain liability had been incurred. In Madras the Court even went the length of holding that the execution of the instrument created a charge upon the property which the subsequent alterations did not destroy. (6) In laying this down they purported to follow the dictum of Lord Abinger, L. J., but as was pointed out by Parker, J.: "To push the doctrine so far would be practically to nullify in the most important class of cases the equitable doctrine laid down by Lord Abinger, that no man shall be permitted to take the chance of committing a fraud without running the risk of losing by the event when it is detected." (7) But it has been held in Allahabad that such a deed cannot be ignored in a redemption suit by a puisne mortgagee against the prior mortgage under any altered deed, inasmuch as an interest in immovable property having become vested by the operation of the mortgage-bond, it was admissible in evidence on behalf of the mortgagee to show the estate which passed under it, and that, therefore, the puisne mortgagee could not bring the property comprised in it to sale without payment of the amount due thereunder. (8) So in the case of a contract reduced to writing, though writing may become inadmissible on account of material alterations it would not debar the parties from establishing the contract, if they can do so *aliunde*. (9)

Burden of proof.

1316. Where the alteration is manifestly or *prima facie* suspicious, the burden of proof is on the party producing it. (10) But in an ordinary case the presumption is that the alteration was made before execution. (11) In order to have a vitiating effect, an alteration need not be shown to have been made by or with the privity of the

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(1) *Raghanakulu* v. *Sattamma*, 9 M.L.J.R., 104.

(2) *Falmouth* v. *Roberts*, 9 M. & W., 469; *Bolton* v. *Carlisle*, 2 H. Bl., 263; *Roe* v. *Fork*, 6 East, 86; *Doe* v. *Bingham*, 4 B. & Ald, 672; *Davidson* v. *Cooper*, 11 M. & W. 778 (800); *Agricultural Cattle, &c., Co* v. *Fitzgerald*, 16 Q.B., 432.

(3) *Christacharlu* v. *Karibasayya*, I.L.R., 9 Mad., 399. F.B.; *Subramania* v. *Krishna*, I.L.R., 23 Mad., 137; *Mangal Sen* v. *Shankar Sahai*, I.L.R., 25 All., 580 (605), F.B.

(4) *Pitlinson* v. *Luckley*, L.R. 10 Ex., 330; *Stewart* v. *Aston*, 8 Ir. C.L.R., 35; *Reynolds* v. *Hail*, 28 L.J., Ex., 257; *Caldwell* v. *Parker*, 17 W.R. (Eng.), 955.

(5) *Davidson* v. *Cooper*, 11 M. & W., 778 (800).

(6) *Ramasawmi* v. *Bhavani*, 3 M.H.C.R. 247; *Christacharlu* v. *Karibasayya*, I.L.R. 9 Mad., 399, F.B.

(7) *Christacharlu* v. *Karibasayya*, I.L.R., 9 Mad., 399. F.B.; followed *per* Aikman, J., in *Mangal Sen* v. *Shankar Sahai*, I.L.R., 25 All., 580 (611).

(8) *Per* Stanley, C. J., & Banerji, J., in *Mangal Sen* v. *Shankar Sahai*, I.L.R., 25 All., 580 F.B. (*contra per* Aikman, J., *dissentiente*, *ib.*, p. 615).

(9) *Durga Prasad* v. *Bhajan Lall*, I.L.R., 31 Cal., 614. P.C.

(10) *Henman* v. *Dickenson*, 5 Bing., 183; *Bishop* v. *Chambre*, 1 M. & W., 116; *Knight* v. *Clements*, 8 A. & E., 215; *Clifford* v. *Parker*, 2 M. & Gr., 909.

(11) *Doe* v. *Catomore*, 16 Q.B., 745.

party producing or benefiting by it.(1) But an alteration made by the plaintiff mortgagee has the effect of operating as a satisfaction of not only the mortgage but of the debt of which it was a security.(2)

1317. Oral Agreement.—This clause does not apply to an oral agreement made by the parties to a suit, to the effect that a decree be passed creating a charge on immovable property above Rs. 100 in value.(3) And an agreement by a Jenmi in Madras to demise the land to a tenant who proved by oral evidence that he had one year before suit paid to the Jenmi a renewal fee, was held binding, the Jenmi's suit for ejectment being dismissed.(4)

The section, again, has no application to an *agreement* to mortgage, or to documents drawn up in the preliminary stage of the transaction. In considering whether a document purporting to be a preliminary contract was or was not compulsorily registrable, regard must be had to clause (*h*) of section 17 of the Indian Registration Act which exempts from registration a document not itself creating, declaring, assigning limiting or extinguishing any right, title or interest but which merely creates a right to obtain another document. An agreement setting out the terms upon which a mortgage is settled between two persons, would fall within the exception, if the parties contemplated the execution of another formal document.(5) But a document, though it may refer to and contemplate the execution of another document, does not merely, as such, cease to be compulsorily registrable, if on its face it purports to declare certain existing rights.(6)

An unregistered agreement incorporated into a decree ceases to be compulsorily registrable. But if some land thereby affected is excluded from the decree the title as regards this land will stand or fall by the unregistered agreement.(7)

1318. Property secured less than Rs. 100 in Value.—The registration of a deed which does not necessarily create an interest in immovable property of the value of Rs. 100 or upwards was not until recently compulsory under this, or the Registration Act.(8) So a mortgage-bond for Rs.99, repayable in nine months and eleven days, with interest at the rate of 2 per cent. per mensem, was held not to require registration,(9) even though the amount with interest

(1) *Pigot's Case*, 11 Co. 27 (27*a*); *Gardner* v. *Walsh*, 5 E. & B.

(2) *Alderson* v. *Langdale*, 3 B. & Ad , 660 which carried further the doctrine of *Master* v. *Miller*, 4 T.R., 320.

(3) *Appasami* v. *Manikam*, I. L. R , 9 Mad., 103.

(4) *Ittappan* v. *Parangodin*, I. L. R., 21 Mad., 291 ; *Papireddi* v. *Narasareddi*. I.L. R., 16 Mad., 464, dissented from; *Begum* v. *Muhammad Yakub*, I.L.R., 16 All., 344, F.B., followed.

(5) *Jusab* v. *Gul Muhammad*, 12 B.H.C., R., 175; *Chunilal* v. *Bombanji*, I.L.R., 7 Bom., 310 ; *Purmanand* v *Dharsey*, I.L.R , 10 Bom., 101 ; *Hormasji* v. *Keshav*, I.L.R., 18 Bom., 13 ; *Karalia* v. *Mansukhram*, I.L. R., 24 Bom., 400; *Ramtonoo* v. *Gourchander* 3 W.R., 64 : *Shitkishen* v. *Abdool*, 3 W.R., 103 ; *Bunware* v. *Sungum Lal*, 7 W.R., 280 ; *Nuddear* v. *Kishoree Lall*, 7 W. R., 463 ; *Choonee* v. *Chundee*, 14 W. R., 178; on review, *ib.*, p. 334 ; *Meheroonnissa* v. *Abdool*, 17 W. R., 509 ; *Sufdar* v. *Amsad*, I.L.R., 7 Cal., 708 ; *Luchmissur* v. *Dakho*, *ib.*, 708 ; *Lall* v. *Negroo*, *ib.*, 717 ; *Bengal Banking Cor.* v. *Mackertich*, I L.R., 10 Cal., 315 ; *Pertadchunder* v. *Mohendranath*, I.L.R., 17 Cal., 291, P.C. ; *Harnandun* v. *Jawad Ali*, I.L.R., 27 Cal., 468.

(6) *Lakshmamma* v. *Kameshwara*, I.L.R., 13 Mad., 281

(7) *Pranal* v. *Lakshmi*, I.L R., 22 Mad., 508, P.C. ; *Bindesri* v. *Ganga Saran*, I.L.R., 20 All., 171, P.C.

(8) *Sadagopayyangar* v. *Dorasami*, I. L. R., 5 Mad., 214 ; *Ram Doolary* v. *Thacoor Roy*, I.L.R., 4 Cal., 61.

(9) *Narasayya* v. *Guruvappa*, I. L. R., 1 Mad., 378 ; *Kattamuri* v. *Padalu*, I.L.R., 5 Mad., 119 ; *Sadagopayyangar* v. *Dorasami*, *ib.*, 214 ; *Ram Doolary* v. *Thacoor Roy*, I. L. R., 4 Cal., 61 ; *Nana* v. *Anant*, I. L. R., 5 Bom , 353 ; *Nago* v. *Babaji*, I.L.R., 8 Bom., 610 ; *Habib-Ullah* v. *Nakched*, I.L.R., 5 All., 447, F.B ; overruling *Hammat Singh* v *Sewaram*, I. L R., 3 All., 157, F. B. ; *Darshan Singh* v. *Hanwanta*, I. L. R. 1 All., 274 ; *Rajpati* v. *Ram Sukhi*, I. L. R., 2 All., 40 ; *Banno* v. *Pir Muhammad*, *ib.*, 688 ; *Amruti* v. *Govind Rao*, 10 C.P.L.R., 10 ; overruling *Sardar* v. *Gopal*, 6 C.P.L.R., 75.

may have exceeded Rs. 100; nevertheless the security could in such a case be enforced to the full extent of the debt.(1) The principal amount not the total amount made up of the principal and future interest was held to determine the question of registration. If the principal was less than Rs. 100, the document need not have been registered, even though the debt might in future have exceeded that amount, and so a transaction, though of over Rs. 100 in value, may be split up into two contemporaneous deeds, in which case they need not have been registered.(2) But the provisions of this section, as they originally stood, were held to be subject to those of the other Acts. Thus, the contrary having been provided in section 12 of the Bengal Tenancy Act, this section could not validate unregistered mortgages, although of a value less than Rs. 100, since under section 6 of the present Act transfers must be made in accordance with the Act *or any other law* for the time being in force.(3) The effect of the recent amendment is to make registration compulsory in all cases inrespective of value except that in the case of a mortgage other than a simple mortgage, below Rs. 100 in value, the transaction may be completed by delivery of possession of the property.(4) As to priority and what is sufficient delivery, reference must be made to section 54, *ante* (§§970-976).

1319. Assignment of Mortgage.—In India, as in England, a mortgagee may transfer his rights to a third person by way of assignment. But such a transfer must be without prejudice to the rights of the mortgagor.(5) A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention.(6) A transfer of a mortgage to be effectual should be registered at the instance of the assignor.(7) An assignment of a debt is a sufficient consideration for the assignment.(8) As the interest of a non-possessory mortgagee is an intangible thing, an unregistered indorsement of transfer on a mortgage-deed is ineffectual where the consideration is Rs. 100 or more (9) though merely delivery will suffice where the deed is allotted to a co-parcener on a partition or where the right to sue devolves on the assignee by operation of law.(10) But law recognizes equitable rights in certain cases. So a third party paying off the mortgage-debt to the mortgagee, with the mortgagor's knowledge, though not taking a valid assignment of the mortgage is in effect an equitable transferee and has a lien on the mortgaged property.(11) It is, of course, obligatory on the mortgagor to redeem the transferee from the mortgagee before he can obtain possession of the mortgaged property.(12) Since the mortgagee's interest is no longer regarded an actionable claim, (§ 93) notice to the mortgagor is not necessary to validate the assignment of a mortgagee's rights. (13)

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(1) *Korban* v. *Sharoda Prosad*, I.L.R., 10 Cal., 82.

(2) *Ramji Lal* v. *Chhote Lal*, 3 A.L.J.R., 661.

(3) *Shosi Bhusan* v. *Sahadeb*, 3 C. W. N., 499.

(4) See s. 54.

(5) *Chinnayya* v. *Chidambaram*, I. L. R., 2 Mad., 212; *Venkata* v. *Kannam*, I. L. R., 5 Mad., 148; and as to principle see *Mulchand* v. *Lallu*, I.L.R., 8 Bom., 404, F.B.

(6) S. 101, *post*; *Gokulnath* v. *Premlal*, I. L.R., 3 Cal., 307.

(7) *Muthia* v. *Kasivasi*, 12 I.C. 78 (79).

(8) *Yashawant* v. *Gopal*, 2 B.H.C.R., 194 (197).

(9) *Hanif Shah* v. *Murad*, 16 I. C., 125 (126); *Azmab* v. *Sibla Bux*, 9 A. L. J., 766 (768); *Mutsaddi* v. *Muhammad*, 10 A.L.J., 167 (168).

(10) *Chairman, Municipal Council* v. *Susurla*, I.L.R., 31 Mad., 111.

(11) *Maung San* v. *Maung San*, 12 I. C., 805 (806).

(12) *Bogas* v. *Nathabhai*, 13 Bom. L. R., 1057 (1059).

(13) *Maung Kyaw* v. *Ranganathan*, 11 I. C., 778.

The assignee of the mortgagee's rights takes his assignment subject to the rights, equities and liabilities of the assignor. Similarly, an assignee from the mortgagor possesses no rights against the mortgagee which the mortgagor did not possess.(1) So while the legality of consideration cannot be questioned when the assignment of a mortgage is professedly without any consideration, still where it purports to have been made for valuable consideration its validity can be impeached, if the consideration is illegal or immoral, and it makes no difference whether the transaction is executed or executory.(2) In this respect there is no difference between the transfer of a mortgage and the assignment of a chose-in-action which is subject to the provisions of section 132.

1320. Deposit of Title-deed: Equitable Mortgage.—The deposit of title-deeds by the debtor with the creditor creates what is known in the English law as an equitable mortgage, *i.e.*, a mortgage which, for want of a transfer of the legal estate, has only an equitable operation.(3) Such mortgages were prevalent both in the Presidency-towns and the mofussil before the passing of the Act, and there was no difference between the law in the mofussil and that prevalent in the Presidency-towns.(4) And it was held by the Privy Council that, where the *lex loci rei sitæ* did not forbid, and the parties did not contract with reference to any other particular law, and the general law of the place was English, an equitable lien would be created upon land by a deposit of title deeds.(5) But the precise limits within which such a security could arise do not appear to have been invariably observed, for cases are not wanting in which, what would now be a charge or a lien of the vendee was spoken of as his equitable mortgage.(6) The Act now ascribes to the term a 'limited import.' (§§ 974—976) In England lien is regarded as a species of an equitable mortgage,(7) and the term is thus there used in a wider sense than in the Act.

1321. Pre-requisites of an Equitable Mortgage.—There are three essential requisites of an equitable mortgage: (i) debt; (ii) Deposit of the title-deeds; (iii) An intention to create a security thereon. These are also the pre-requisites under the English law.(8)

Deposit of title-deeds.

1322. The doctrine of equitable mortgage by deposit of title-deeds is stated to form a branch of the equitable doctrine of the specific performance of oral contracts relating to land based on part-performance. Hence it has been held that, if the deeds are in the hands of a third person, an oral direction to him by the debtor to hold them for the creditor, orally assented to by the third person, is not sufficient.(9) If some of the title-deeds relating to the property proposed to be

(1) *Kishen Singh* v. *Narindar*, 14 I. C., 516.

(2) *Thasi Mut hukkinnu* v. *Shunmugavelu*, I.L.R., 28 Mad., 413.

(3) Fisher on Mortgage (4th Ed.), S. 49; *Gidhari* v. *Pareshwatti*, 4 C. L. J., 459; *Gurditta* v. *Gulm*, (1907) P W.R No. 511; *L. Periasen* v. *Somasundara*, 14 Bur. L R., 283; *Subramanian* v. *Kumarappa*, 4 L. B. R., 371.

(4) *Himalaya Bank* v. *Quarry*, I. L. R., 17 All., 252; *Khemtal* v. *Herachand* (1818), 2 Borr., 580; *Manekrambhai* v. *Mooli Kutboodeen* (1827), B S D.A., 139; *Kinhai Lal* v. *Nirmal*. (1831) S.D.A., 139; *Muhammad* v. *Salat Jang*, 4 Sel. R., 168; *Lalji* v. *Govindrana*, 6 Sel. R., 165; *Bunsee Dhur* v. *Heera Lall*, 1 N. W. P. H C. R., 166; *Varden Seth* v. *Luckpathy*, 9 M. I. A., 303; *Waghela* v. *Masludin*, 1.L. R., 11 Bom., 551; L. R., 14 I A., 89.

(5) *Varden Seth* v. *Luckpathy*, 9 M. I. A., 307 (324).

(6) *Daval* v. *Jibraj*, I.L.R., 1 Bom., 237; *Varden Seth* v. *Luckpathy*, 9 M.I A, 303.

(7) *Tennart* v. *Trenchand*, L. R, 4 Ch., 537 (542).

(8) *Lacon* v. *Allan*, 3 Dr., 579; *Dixon* v. *Muckleston*, L.R., 8 Ch., 155; *Behram* v. *Sorabji*, I.L R 38 Bom. 372.

(9) *Ex parte Broderick*: In re *Beetham*, 18 Q.B.D., 380, 766.

mortgaged are not available, as if they are lost,(1) or are in the possession of a hostile party, the mortgagor may charge the estate by depositing only such deeds as he may have in his possession. But the deeds which do not relate to the property cannot charge it. If the law had been otherwise, the deposit of deeds would be an idle and meaningless formality which might be dispensed with altogether. The mortgagee has a right to retain the deeds relating to the property mortgaged, and if the mortgagor has by fraud or mistake deposited wrong deeds, the mortgagee may sue for the recovery of the proper deeds upon which he could enforce the lien.(2) So, if the debtor, after depositing his title-deeds, afterwards fraudulently abstract some of them from the creditor which could not be identified, the lien was extended to all the title-deeds belonging to the debtor.(3) If the deeds deposited are different to those referred to in the memorandum, the security will attach to those actually deposited.(4) So again, the security will attach to all the deeds deposited, though the memorandum refers only to some of them.(5)

Meaning of deposit.

1323. The term deposit would seem to imply that the deeds must actually change hands to create a mortgage. Of course, the delivery may be made either to the creditor personally or to his agent, and if the debtor had promised delivery, the Court will compel specific performance by compelling the debtor to deposit the deeds as a security for the advance which the creditor had made.(6) The deposit of title-deeds being regarded as the part-performance of a promise, a mere oral promise to confer any rights on the promisee is insufficient.(7) In England where by operation of the Statute of Frauds(8) all contracts not to be performed within a year must be in writing to be actionable, the deposit of deeds is regarded as a part-performance of the contract, so as to exclude its operation. Actual delivery is only constructively possible where the deeds were already in the possession of the creditor. Thus, deeds deposited for safe custody with a Bank may be so delivered by an order empowering the Bank to treat them as deposit for security.(9) So the creditor being a tenant-in-common with the debtor, being, as such, in possession of the deeds, may be authorized to retain them as a security for the debt. (10) So where title-deeds of land had been deposited by a debtor with the Bank of Bengal and a letter was given authorizing the Bank to sell the land and apply the proceeds in liquidation of a debt then existing and due to the Bank, it was held to create a valid equitable mortgage in favour of the Bank for the money due.(11) So if *A* holds a mortgage of *B's* property which he empowered *C* to redeem, and he thereupon paid off *A* who endorsed full receipt on the mortgage-deed, and at the request of *B* returned it to him with the other title-deeds in his possession, it was held that the fact was enough to create an equitable mortgage in his favour. But perhaps this view is too wide and is only supportable on the fiction of an "implied contract" of the English law, a doctrine which is as novel as it is unknown to Indian jurisprudence. (12)

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(1) *Lacon* v. *Allan*, 3 Drew., 79.
(2) *Miller* v. *Chartered Mercantile Bank*, 6 B L R, 701 (716), a case of fraud.
(3) *Mason* v *Morley*, 34 Beav., 475.
(4) *Ex parte Powell*, 6 Jur. 490.
(5) *Ferris* v. *Mullins*, 2 Sm. & G., 378.
(6) *Currie* v. *Mutuamen*, 3 B. L. R., 126 (31).
(7) *Daw* v. *Perrell*, 33 Beav., 218; *Ex parte Trodrick*, 18 Q B.D., 766 (770).
(8) 29 Car. II. C 3, S. 4.
(9) *Ex parte Wright*, 19 Ves., 255.
(10) *Fenwick* v. *Potts*, 8 De G. M. & G., 506.
(11) *Ibrahim* v. *Cruickshank*, 7 B. L. R., 653.
(12) *Khushal* v. *Punamchand*, I. L. R., 22 Bom., 164 (169).

1324. The second pre-requisite of an equitable mortgage is the intention to create a security thereon. The mere possession of title deeds, coupled with the existence of a debt, does not necessarily lead to a presumption of an equitable mortgage by deposit of title-deeds. It must also be proved that the depositor intended to create a security.(1) Mere possession of the title-deeds is not proof of an intention to deposit them as a security for a debt, unless the circumstances are such as to render any other explanation unreasonable.(2) And so it has been held in India that the mere possession of the title-deeds by the creditor, without evidence of the contract upon which the possession originated, so that a contract may be inferred, will not be enough to create an equitable security.(3) The fact of hypothecation must be proved like any other fact, though the deposit of deeds with the creditor would be a fact from which the Court might draw its own inference.(4) An equitable mortgage created with intent to secure a debt may, if so agreed, cover future advances as well as the existing debt or contemporaneous advances in respect of which it was made.(5) But it will not cover moneys previously advanced and then due,(6) unless there was an agreement, or an intention to secure them appears from the circumstances.(7) A third person making the advance cannot avail himself of the security unless the original creditor was holding in trust for him.(8) A letter of lien over his goods executed by the debtor, promising to execute, whenever called upon to do so, an assignment of his business, has been held to be good under this clause.(9) In order to create an equitable mortgage, it is not necessary that all the title-deeds, or even all the material title-deeds, should be deposited. It is sufficient if the deeds deposited are material evidence of title.(10)

Intention to mortgage material.

1325. Acquiescence in a deposit by the former owner may be equivalent to a re-deposit by the new owner.(11) The documents comprised in the term title-deeds would include all such documents as evidence title to the property. A receipt for purchase-money embodying the terms of the agreement for sale would, in the absence of more formal deeds, serve the purpose.(12) But no charge can be created by a deposit of a certified copy of a deed, which cannot take the place of the original ; (13) but a copy of the Court-rolls may, it would appear, be deposited to create a charge. The certificates of shares, policies of insurance, debenture-stock certificates(14) and other similar deeds or documents, though relating to *moveable* property, may also be deposited so as to create a charge in the same way as in the case of deeds relating to land.(15) In order

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(1) *Jethibai* v. *Pulli Bai*, 14 Bom. L.R. 1020 (1022, 1023).

(2) *Featherstone* v. *Fenwick*, 1 Bro C. C., 270*n*. ; *Hertford* v. *Carpenter*, 1 Br. C.C., 270*n*. ; *Bubbs* v. *Nixon*, 2 Jur. (N.S.), 1059 ; *Ex parte Langston*, 17 Ves., 227.

(3) *Gannat* v *Adarji*, I.L.R., 3 Bom., at p. 329 ; *Jaikha* v. *Haji Adilvyad*, I L R., 10. Bom., 634 ; *Maung Sen* v. *Ma Po*, (1905), Bur. L R., 185.

(4) *Maung Sen* v. *Ma Po* (1905), Bur. L R., 185.

(5) *Himalaya Bank* v *Quarry*, I.L.R., 17 All., 252 ; *Girentro* v. *Kumud Kumari*, I.L. R., 25 Cal., 611 ; *Ex parte Langstone*, 17 Ves., J., 237 ; *Ex parte Kensington*, 2 V & B., 79 ; In re *Beetham*, 18 Q.B.D., p. 380, followed.

(6) *Mountfort* v *Scott*, T. & R., 274.

(7) *Ex parte Furley*, 1 M. De & DeG., 683 ; *Ex parte Smith*, 2 M.D. & DeG., 314.

(8) *Ex parte Whiteh ead*, 19 Ves., 212.

(9) In the matter of *Summers*, I L R., 28 Cal., 592.

(10) Beddows on Mortgage, p. 27 : *Roberts* v. *Croft*, 24 Bing., 223 ; *Lacon* v. *Allan*, 3 Dr. 579.

(11) In re *Wyn Hall &c., Co.*, L.R., 10 Eq., 515 (520).

(12) *Godwin* v. *Woghorn*, 4 L. J. (N. S.), Ch., 172.

(13) *Ex parte Broadbent*, 1 M. & A., 635.

(14) *Robinson* v. *Montgomeryshire Brewery Co* [1896] 2 Ch., 841.

(15) *Ex parte Rodgers*, 2 M D. & D., 544. *Ex parte Moss*, 3 De. G. & S., 599; *Ferris* v. *Mullins*, 2 S. & G., 378 ; *Frances* v. *Clark*, 22 Ch. D., 830; O.A., 26 Ch. D., 257 ; *Nanney* v. *Morgan*, 37 Ch. D., 346 ; *Roots* v. *Williamson*,

to give the creditor an equitable mortgage, it must, however, be shewn that the deposit was made with the *intention* of creating a security thereon.

1326. *Prima facie* the extent of the security intended to be given must be ascertained from an examination of the deeds and the memorandum (if any) accompanying them.(1) Unless anything appears to the contrary, all the deeds deposited will be held to constitute the security.(2) Title-deeds include not only the muniments of title property so called, but also agreements for purchase,(3) receipt of purchase-money(4) and copies of the deeds where the originals are not forthcoming.(5) Where the creditor sues his debtor after his adjudication as insolvent, and the Official Assignee alleges the deposit to have been made before the application, he is required to prove it, the burden of proof being upon him.(6)

1327. Property charged by Deposit of Deeds.—An equitable mortgage created by deposit of title-deeds extends to all the property comprised therein, unless the contrary intention be clearly manifest. Such property passes with all its legal incidents,(7) such as fixtures and all benefits accruing to the lands, including property obtained in substitution for the property mortgaged. Thus, an equitable mortgage operates not only on the interest of the debtor at the time of the deposit, but also on any interest which he may subsequently acquire.(8) So, while the equitable mortgagee of property subsequently sold cannot compete with the purchaser whose right to have the property subsequently conveyed to him is paramount over his right, still the same right attaches to the unpaid purchase-money.(9) So a renewed lease is subject to the same equitable mortgage that affected the original lease.

The contrary intention limiting this right may be inferred from the fact that the creditor had notice of the fact that the deposit was made by a limited owner, as where the deeds deposited showed him to be so. A person who has no interest in the deeds deposited with him confers no right by his deposit by way of security or otherwise.(10)

May relate to any property.

1328. It is not necessary that the property to which the title-deeds relate should be within the limits of one of the towns where such mortgages are allowed;(11) nor again need the deeds be kept within those limits,(12) the only thing essential being that the contract should be there entered into.

1329. An executor may for the purpose of administration make a deposit without the concurrence of his co-executors.(13) A deposit by husband subject

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38 Ch. D., 485; *Societe Generale de Paris* v. *Walker*, 11 App. Cas., 20; *Moore* v. *North Western Bank* [89], 2 Ch., 599; *Powell* v. *London & Provincial Bank* [893], 2 Ch., 555.

(1) *Dow* v. *Tyrrel*, 33 Beng., 218; *Ex parte Kensington* 2 V. & B., at p. 83.

(2) *Ferris* v. *Mullins*, 2 Sm. & G., 378.

(3) *Ex parte Warner*, 19 Ves., 202.

(4) *Goldwin* v. *Waghorn*, 4 L.J. (N.S.). Ch., 172.

(5) *Ex parte Broadbent*, 1 M. & A., 625

(6) *Miller* v. *Madho Das*, I.L.R., 19 All., 76, P.C.

(7) As to which see s. 8; *Ex parte Bisdee*, 1 M. D. & D. G., 338; *Ex parte Farley*, ib., 658; *Ex parte Ashbury*, L.R., 4 Ch., 630; *Meux* v. *Jacobs*, L.R., 7 H.L., 481.

(8) Ss. 70, 71: In re *Sutty*, 60 L.T., 160.

(9) *Rayne* v. *Baker*, 1 Giff., 241; *Flinn* v. *Pounsam* (1889), W.N., 52.

(10) See s. 55 *ante*.

(11) *Madho Das* v. *Ram Kishen*, I.L.R., 14 All., 248; *Miller* v. *Madho Das*, I.L.R., 19 All., 76 (93) P.C.; *Srinath Roy* v. *Gokdhur Das*, I.L.R., 24 Cal., 348; *Gokul Das (Raja)* v. *The Eastern Mortgage and Agency Co.*, 10 C.W.N., 276; *Valiappa* v. *Kutha*, 11 I.C., 721 (722, 723).

(12) *Miller* v. *Madho Das*, I.L.R., 19 All., 76 (93) P.C.

(13) *Ex parte Sheffield Union Banking Co.* 13 L.T. (N.S.), 477.

to the English law, of his wife's mortgage over which he had *jus mariti*, the power of alienation, to secure a debt of his own, was held to be good against the wife surviving, as an alienation *pro tanto*.(1)

There is nothing in the Presidency Banks Act(2) to disentitle the Presidency Banks from advancing money on an equitable mortgage of immoveable property.(3) The words of section 37 of the same Act, however, restrict the directors though not the banks. But while the directors will be liable for breach of the provisions of the section as between the Bank and themselves, it does not enable the mortgagor to repudiate the obligation on that account, and the Official Assignee stands on no higher ground.(4)

Sub-mortgage.

1330. An equitable mortgage may be sub-mortgaged by depositing the deeds with the third person, without a deposit of the memorandum which accompanied the original security.(5) The sub-mortgagee can only recover the amount due on the original security, on payment of which he must re-deliver the title-deeds to the mortgagor.

1331. Conditional Mortgage.—The deposit of deeds may be made subject to a condition that they were to be treated as a security upon the conditions contained in the memorandum of deposit.(6) Thus if the depositor says, "In consideration of your lending my brother *F B*, £1,000 for seven days from this date, I deposit the several documents mentioned in the schedule," the making of the advance instantly is a condition precedent to the equity attaching to the deposit, and which cannot be deemed to have been complied with by the creditor allowing *F B*, during the next seven days, to overdraw his account to the extent of £810 15*s*. 2*d*.(7)

1332. No Writing Required.—An equitable deposit may, both according to the English(8) and Indian law,(9) be made without any writing made and if made in writing it does not require registration.(10) But if the deposit is accompanied by a memorandum stating the circumstances under which the deposit is made, it cannot be contradicted by oral evidence.(11) The memorandum usually accompanies the deposit, and the Privy Council doubted whether it could be the practice in Calcutta to take a mortgage by deposit of title-deeds without a memorandum in writing,(12) which, in England, the mortgagee is entitled to receive signed by the debtor specifying the terms on which the deposit was made.(13) If the deposit is stated to be for the purpose of securing one sum, it may be extended to cover other sums by a subsequent oral agreement.(14)

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(1) *Bates* v. *Dandy*, 2 Atk., 207.

(2) Act XI of 1876

(3) *Turner* v. *Bank of Bombay*, I. L. R., 25 Bom., 52.

(4) *Ibid.*

(5) *Ex parte Smith*, 2 M. & D., 587.

(6) *Per* Lord Romilly, M R, in *Burton* v. *Gray*, L.R., 8 Ch., 935, *note*; *Brandts, Sons & Co* v. *Dunlop Rubber Co.*, [1905] A. C., 454 (460, 461).

(7) *Per* Mellish, L. J., in *Burton* v. *Gray*, L.R, 8 Ch., 932 (937).

(8) *Shaw* v. *Foster*, L.R., 7 H.L., 321.

(9) *Ketarnath* v *Shamlall*, 11 B. L. R., 405; *Juvudas* v. *Framji*, 7 B. H. C. R., 62; *Oo Noung* v. *Moung*, I. L. R., 13 Cal., 324; *Himalaya Bank* v. *Quarry*, I. L. R., 17 All., 252.

(10) *Gokuldas* v *Eastern Mortgage Co.*, I. L R, 33 Cal., 410 (422).

(11) S 92, Indian Evidence Act; *Ex parte Kensington*, 2 V. & B. 79; *Shaw* v. *Foster*, L R., 5 H. L., 321; *Ex parte Coombe*, 17 Ves, 369; *Ex parte Langston ib.*, 2 7; *Ex parte Whitbread*, 19 Ves., 209; *Ede* v. *Knowles* 2 Y. & C, Ch., 172

(12) *Miller* v. *Madho Das*, I.L.R., 19 All., 76 (88 89), P C

(13) *Swarle* v. *Whayman*, 20 Beav., 607.

(14) *Ex parte Coombe*, 17 Ves., 369; and see cases cited, *ante*.

1333. A memorandum recording the deposit and the purpose for which it was made does not require registration, for such a document does not create any interest in immoveable property, since the mortgage is complete independently of it.(1) But this is only where the contract is made expressly by parol.(2) Hence if the memorandum contains a contract of mortgage and is made the basis of the suit, it will not be admitted if it is not registered.(3) But a mere contract to grant a mortgage is no more compulsorily registrable than a mere contract for sale but, if the creditor relies upon it as constituting a mortgage, and effect cannot be given to it without treating it for all practical purposes as the assignment, it would not be received in evidence for want of registration, and since parol evidence is inadmissible under section 91 of the Evidence Act, the facts to which the document relates cannot at all be legally proved.(4) Of course, the fact that this section saves such mortgages from its operation leaves the provisions of the Indian Registration Act still intact, and the question of registration must then be approached in the light of that enactment, which lays down a universal rule that all non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property shall be registered.(5) The question of registration is then one of construction. If the memorandum is so worded as to be or is virtually the contract itself, it will indubitably come within the clause and require registration.(6) Thus where the title-deeds were deposited with a letter which explained the object of the deposit to be by way of security for a debt which fell due on that date, and without which the object of the deposit could not be explained, the letter being the only repository of the agreement, it was held to require registration.(7) On the other hand, when once a mortgage by deposit is completed, a subsequent document purporting to contain an admission merely of the mortgage-transaction would not require registration.(8) So, again, where at the time of the deposit there was no antecedent or existing debt, nor was any oral agreement made that the title-deeds should stand as a security for future advances, and it appeared that the advance had been made upon the security of a legal mortgage about to be executed, but which remained unregistered, it was held that the mortgagee could not set up an equitable mortgage, inasmuch as without the mortgage-deed the deposit could not be explained and it was inadmissible for want of registration.(9) So, again, where the intention from its inception was to effect a legal mortgage, the creditor could not fall back upon the deposit of the title-deeds as creating an equitable mortgage.(10)

1334. The question of registration falls into the background if the title-deeds are deposited with the declared intention to secure an antecedent debt, or a present advance, or under such circumstances that the law will imply that

(1) *Oo Noung* v. *Moung*, I.L.R., 13 Cal., 322; *Kedarnath* v. *Shamlall*, 11 B.L.R., 405 (412); *Gokul Das* v. *Eastern Mortgage Co.*, I.L.R., 33 Cal., 410 (422).

(2) *Dwarkanath* v. *Sarat Kumar*, 7 B.L.R., 55.

(3) *Kedarnath* v. *Shamlall*, 11 B.L.R., 405 (414).

(4) *Gunput* v. *Adarjee*, I.L.R., 3 Bom., 312 (329); *Ex parte Mackay*, L.R., 8 Ch., 643.

(5) S. 17 (*b*), Indian Registration Act (III of 1877).

(6) *Kedarnath* v. *Shamlall*, 11 B.L.R., 405; *Oo Noung* v. *Moung Htoon*, I.L.R., 13 Cal., 322.

(7) *Dwarkanath* v. *Sarat Kumari*, 7 B.L.R., 55; *Gunput* v. *Adarjee*, I.L.R., 3 Bom., 312; *Palaneappa* v. *Shoodar Rai*, 11 Bur.L.R., 197; following *Murugappa* v. *Nagappa*, Bur Unrep. No. 308 of 1902.

(8) *Gokul Das (Raja)* v. *The Eastern Mortgage and Agency Co.*, I.L.R., 33 Cal., 413 (420, 421); citing *Kedar Nath* v. *Sham Lall*, 20 W.R., 150; *Dwarkanath* v. *Sarat Kumari*, 7 B.L.R., 55.

(9) *Jaithi* v. *Haji Abdul*, I.L.R., 10 Bom. 634 (646).

(10) *Madras Deposit, &c., Society* v. *Oonnamalai*, I.L.R., 18 Mad., 29 (30).

they are so deposited, it being then immaterial if the depositor of the deeds executes a legal mortgage or other document of charges, which for want of registration cannot be given in evidence, since it cannot destroy or impair the prior valid equitable charge.(1) So, again, where there is a debt in existence, and the title-deeds are deposited by the debtor with the creditor to secure the debt, an equitable mortgage is at once created, and it is so even though the deeds are deposited for the express purpose of having a legal mortgage prepared.(2) And the law would appear to be the same when title-deeds are deposited under an oral agreement to cover present and future advances. As each advance is made, it becomes a charge upon the land comprised in the title-deed, from the force of the prior oral agreement that it shall be so.(3) In all such cases, the question whether the memorandum accompanying the deposit is or is not registered is immaterial, for it is admissible as a piece of evidence, as a record of certain facts,(4) as the proposal to mortgage(5) or the fact of the deposit,(6) or other collateral facts not intended to be the embodiments in writing of the transaction.(7) Where the writing, however, contains any part of the contract, and is thrown out for want of registration, its terms then cannot be otherwise proved.(8) Again, since the Registration Act refers only to *instruments* and not to *transactions*, its effect is that while neither writing nor registration is obligatory to create an equitable mortgage, registration becomes a matter of legal obligation, if it is created by an *instrument* embodying the contract.(9) But a memorandum given after the equitable mortgage was complete could not be said to embody the contract. Thus, where the debtor having deposited certain title-deeds with the creditor as security for the repayment of a sum of money lent him by the creditor at the time the deposit was made, and on the evening, by way of further security, he executed a promissory note and endorsed thereon the following memorandum: "For the repayment of the loan of Rs. 1,200 and the interest due thereon of the written note of hand, I hereby deposit with the creditor, as a collateral security by way of equitable mortgage, title-deeds of my property," the Court held the writing to be accessory to the contract of which registration was not compulsory.(10) A letter reciting a fact *ex post facto* does not become the repository of the contract so as to exclude extraneous evidence.(11)

1335. It is unnecessary to note that since the Indian Registration Act applies both to the Presidency and other exempted towns mentioned in the section, as well as to the mofussil, the foregoing observations apply equally to

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(1) *Jivandas* v. *Framji*, 7 B H.C.R., 45; *Jaitha* v. *Haji Abdul*, I.L.R., 10 Bom., 634 (644).

(2) *Dayal* v. *Jivraj*, I L.R., 1 Bom., 287; explained *per* Farran. J., in *Jaitha* v. *Haji Abdul*, I.L R., 10 Bom., 634 (644).

(3) *Jivandas* v. *Framji*, 7 B.H C.R., 45 *Kedarnath* v *Shamlal*, 11 B.L.R., 405; *Ex parte Langston*, 17 Ves., 227; *Ex parte Whitbread*, 19 Ves., 209; *Ex parte Kensington*; V. & B., 79; followed in *Jaitha* v. *Haji, Abdul* I.L.R., 10 Bom., 634 (644).

(4) *North Central Wagon Co.* v *Manchester, &c., Ry. Co.*, 35 Ch. D., 191 C A., 13 App. Cas., 554; *Newlove* v. *Shrewsbury*, 21 Q B. D., 41.

(5) *Agra Bank* v. *Barry*, L.R., 7 H.L., 135.

(6) *Kedarnath* v. *Shamlal*, 11 B.L.R., 405.

(7) *Newlove* v. *Shrewsbury*, 21 Q.B D., 41 (46).

(8) S. 92, Indian Evidence Act (I of 1872); *Saw* v. *Foster*, L R., 5 H L., 321 (341); *Jaitha* v. *Haji Abdul*, I.L.R., 10 Bom., 634 (645); *Cf* maxim "*expressio facit cessare tacitum*," (what is expressed, makes what is silent to cease).

(9) *Cf.* Bowen, L J., in *North Central Wagon Co* v. *Manchester, &c., Ry. Co.*, 35 Ch D., 191. It should be noted that, while the Indian Registration Act relates to *instruments* the present Act deals with transfers, and has thus a wider scope; but *contra* in *Somu* v *Rangammal*, 7 H M. C R., 13.

(10) *Kedarnath* v. *Shamlal*, 11 B. L. R., 405; followed in *Oo Noung* v. *Moung Htoon*, I.L R., 13 Cal., 322.

(11) *Oo Noung* v. *Moung Htoon*, I.L.R., 13 Cal., 322; *Chamanbu* v. *Multanchand*, I.L.R., 20 Bom., 562.

both. But since in the unexempted area a mortgage affecting immoveable property can only be made in the manner laid down in this section, it follows that an equitable mortgage of immoveable property must be registered. But since the section does not affect *moveable* property, there is no legal impediment to the making of such mortgages without a registered instrument.

The memorandum accompanying the deposit may be so worded as to be in itself a promissory note so as to be negotiable in spite of the collateral security afforded by the deposit of deeds. Thus, where an instrument signed and bearing an one-anna stamp was in the following terms:—"On deposit of title-deeds named herein below for value received by me I promise to pay three months after date Rs. 160 to *A B* or order," the instrument was so construed, it being held that all the elements of a promissory note being present in the document its operation could not be restrained by the collateral security of the deeds.(1)

Priority.

1336. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England. Consequently, a claim for priority by a subsequent legal mortgagee over a prior equitable mortgagee could only be sustained under section 48 of the Indian Registration Act. Now since such a mortgage is not a mere "oral agreement" within the meaning of that section, it follows that the holder of a registered mortgage has no priority over an equitable mortgagee (2 by virtue of that section. Since a mortgage by deposit is in fact a completed transfer and not merely "a declaration or agreement" within the meaning of that section,(3) a purchaser of the estate is subject to an equitable mortgage, if he had notice of it. If the first purchaser takes without notice, subsequent purchasers from him will take free from the incumbrance even though they may have had notice of it. "The *bona fide* purchaser of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the meditated fraud. If the estate becomes re-vested in him, the original equity will attach to it in his hands."(4) (§§ 768, 769.)

1337. Equitable Mortgagee's Remedy.—The Act is silent as to the relief afforded to an equitable mortgagee. In England the remedy of an equitable mortgagee, where there is no memorandum to execute a legal mortgage, is foreclosure,(5) and where there is a memorandum, either sale or foreclosure may be asked for.(6) It seems that in India such mortgages were before the Act dealt with like simple mortgages.(7) And so in a Calcutta case it was observed that, "according to the practice of the Court, the appropriate

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(1 *Ramachandra* v. *Sedha*, I.L.R., 17 Mad. 85; *Wise* v. *Charlton*, 4 Ad. & E., 790.

(2) *Webb* v. *Macpherson* I.L.R., 31 Cal., 57 (72) P.C.; followed in *Gokul Dass* v. *Eastern Mortgage Co.*, I.L.R. 33 Cal. 410 (421, 422).

(3) See *Coggin* v. *Pigose* I.L.R., 11 Cal., 158; followed in *Gokul Dass* (*Raja*) v. *Eastern Mortgage and Agency Co.*, I.L.R. 33 Cal. 410 (422); Semble in *Miller* v. *Madho Das*, I.L.R., 19 All., 78 P.C.

(4) Kerr on Fraud; cited with approval in *Dayal* v. *Jivraj* I.L.R., 1 Bom., 237 (247); *Le Neve* v. *Le Neve*, 2 W. & T.'s L.C. 28; *Pow Ma* v. *Velliappa*, 14 Bur. L.R. 211.

(5) *James* v. *James*, L.R., 16 Eq., 153; *Birchhouse* v. *Charlton*, 8 Ch. D., 444; *York Union Banking Co* v. *Artley*, 11 Ch. D., 205; *Lees* v. *Fisher*, 22 Ch. D., 293; *Harrold* v. *Plenty* [1905], 2 Ch., 314.

(6) *York Union Banking Co.* v. *Artley*, 11 Ch. D., 205.

(7) *Varden Seth Ram* v. *Luckpathy* 9 M.I.A., 303; *Gunneshwelal* v. *Buldeo Singh*, 1852, S.D.A. (N.W.P.), 450; *Laljee* v. *Govind Ram*, 6 Sch. Rep., 165.

remedy in such a mortgage-suit is a decree for sale."(1) The Madras Court holds the same view.(2) In Bombay, however, following the English practice, a decree for either sale or foreclosure is allowed.(3) But Parsons, J., in delivering judgment observed, that he was deciding the point irrespective of this Act, which had not been then extended to that Presidency.(4) In England the mortgagee is allowed the stipulated rate of interest on the loan and advances, and in the absence of any stipulation as to interest, it is allowed at 4 per cent. (5) Expenses and costs properly incurred as for keeping alive the policy of the debtor(6) by the mortgagee are treated as being in the nature of further advances to which they were added. No interest will, however, be allowed if the payment was delayed owing to the conduct of the mortgage.(7) Since the equitable mortgagee is not entitled to possession, it follows that he is not entitled to take the rents and profits prior to the date of the foreclosure or sale,(8) but if he recovers them from the mortgagor's tenants after notice to them that they were claimed as equitable mortgagee, he cannot be compelled to refund them to the tenants.(9) Moreover, should the equitable mortgagee by any chance obtain lawful possession, then he would be entitled to realize rents and profits from the date of his possession.(10) In other respects his rights and liabilities would, it seems, be those of a mortgagee in possession.(11)

1338. Mortgagor's Rights.—Where there has been an equitable deposit of deeds to secure repayment of a loan, an action of detinue cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by a summary application for the deeds on the terms of substituting for the security a sum of money equal to the amount secured with a proper margin. In cases of legal or equitable mortgage, a tender properly made and improperly rejected is not equivalent to payment.(12) But a deposit made under section 83 will discharge the security whether it is a legal or an equitable mortgage.(13)

1339. Other Kinds of Equitable Mortgages.—Under the English law, equitable mortgages are of three kinds. Of these those made by deposit of title-deeds have been already dealt with. There remain then two other kinds of mortgages, which, according to the English law, also create equitable rights. These are—

(1) Written agreements to execute legal mortgages, or the other two kinds of equitable mortgages.(14)

(2) A mortgage of property, the legal interest in which is outstanding, either in a prior incumbrancer, when it is a mortgage of an equity of redemption, or in a trustee for the mortgagor. These mortgages may be either of realty or personalty, and are subject to the same rules.

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(1) *Srinath* v. *Godadhur*, I L R., 24 Cal., 348 ; *Sreenath* v. *Gobadhar*, 1 C W N., 225 ; *Noung* v. *Moung*, I.L.R., 13 Cal., 322.

(2) *Marcar* v. *Sigg*, I.L.R., 2 Mad., 239 (263).

(3) *Manekji* v. *Rustomji*, I.L R., 14 Bom., 269; *Kushal* v. *Punamchand* I.L R., 22 Bom., 161 (167); *Parbutty* v. *Bholanath*, Fulton, 368.

(4) *Manekji* v. *Rustomji*, I.L.R., 14 Bom., 269.

(5) *Ashton* v. *Dalton*, I.L R., 2 Cal., 565 ; *Kerr's Policy*, L.R., 8 Eq., 331.

(6) *Hodgson* v *Hodgson*, 2 Keen, 704.

(7) *Price* v *Price*, 15 L.J. Ch , 13 ; *Thornton* v. *Court*, 3 DeG. M & G., 293 (301).

(8) *Ex parte Bignold*, 4 L.J. Bank, 58.

(9) *Finch* v. *Tranter*, [1905] 1 K.B., 427 (429).

(10) *Bignold*, *Ex parte*, 4 Deac. & C., 259 ; Re *Gordon*, 61 L.T., 299 ; *Williams*, *Ex parte*, 13 W.R., 564.

(11) Ss. 72, 76, *post*.

(12) *Bank of New South Wales* v. *O'Connor*, 14 App. Cas., 273 ; As to tender generally see s. 60 comm., *post*.

(13) *Cf. Bank of New South Wales* v. *O'Connor*, 14 App. Cas., 273.

(14) Such mortgages were recognized in *Pogose* v. *The Bank of Bengal*, I.L R., 3 Cal., 174 ; *Bengal Banking Corporation* v. *Mackertich*, I. L.R., 10 Cal., 315 (322).

1340. Mortgage of Movables.—Neither this nor the Indian Contract Act makes provision for the mortgage of movables, as distinguished from the pledge in which possession of the subject of security is transferred as a part of the transaction. But mortgages of movables have been recognized from very early times in this country, and it is apprehended that such transactions are still valid, though they may be unaccompanied by possession.(1) A mortgage of future crops is valid, provided the mortgagor has a potential interest in that out of which the property may arise. A person who has an interest present or potential in land may mortgage all the fruit which may grow upon it hereafter.(2) So a grant of the next year's wool of a man's sheep is valid, because he has a potential property in such wool,(3) but a mortgage of the wool by all the sheep which a man ever shall have is void.(4) And so an assignment of a man's stock-in-trade would only pass the property existing at the time of assignment but not his after-acquired property, even though the deed may purport to convey also the latter.(5) An assignment so made is not, however, altogether so far ineffectual, for if it is made for valuable consideration and if the property assigned be capable of identification, the transferor would be bound in equity to make good his contract.(6) And since equity treats as done what is agreed to be done, whenever the property equitably assigned comes into existence, ownership therein passes by force of the contract to the transferee, who thereafter holds it as trustee for the intended assignee.(7) But such a mortgage is merely in the nature of an agreement to mortgage hereafter, when the property comes into existence, and therefore no lien can be declared upon the property by anticipation before it comes into existence. Such transactions are, however, neither within the scope of this nor the Indian Contract Act (8) and there is no other statutory provision to govern them corresponding to the Bills of Sale Acts in England.(9) According to the English law such a mortgage may be effected without writing, and its registration is in no way compulsory.(10)

Rights and Liabilities of Mortgagor.

60. At any time, after the principal money has become payable, the mortgagor has a right on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee, (*a*) to deliver the

Rights of mortgagor to redeem.

(1) *Damodar* v. *Atmaram*, 8 Bom. L. R., 344; *Shrish Chandra* v. *Mungri*, 9 C. W.N., 14.

(2) *Grantham* v. *Howley*, Hob., 132; *Petch* v. *Tutin*, 15 M. & W., 110; *Clements* v. *Mathews*, 11 Q.B D., 808; Will. P.P. (15th Ed.), 91.

(3) *Per* Pollocks, C.B., 15 M. & W., 116.

(4) Will. P.P. (15th Ed.), 91, citing Com. Dig., tit. Grant (D).

(5) *Collyer* v. *Isaacs*, 19 Ch. D., 342; *Joseph* v. *Lyons*, 15 Q.B.D., 280; *Hallas* v. *Robinson*, *ib*, 288.

(6) *Holroyd* v. *Marshall*, 10 H.L.C., 191; *Brown* v. *Bateman*, L.R., 2 C.P., 272; *Blake* v. *Izard*, 16 W. R. (Eng.), 108; *Clements* v. *Mathews*, 11 Q B. D., 808; *Joseph* v. *Lyons*, 15 Q. B. D., 280; *Collyer* v. *Isaacs*, 19 Ch. D., 342; Re *Clarke*, 35 Ch. D., 109; 36 Ch D., 348; *Tailby* v. *Official Receiver*, L.R., 13 App. Cas., 523.

(7) *Langton* v. *Horton*, 1 Hare, 549; *Holroyd* v. *Marshall*, H.L.C., 191; *Brown* v. *Bateman*, I.L.R., 2 C.R., 272; *Blake* v. *Izard*, 16 W.R. (Eng.), 108; *Clements* v. *Mathews*, 11 Q.B D., 808; *Tailby* v. *Official Receiver*, L..R, 13 App. Cas., 523.

(8) *Misri Lal* v. *Mozar Hossein*, I. L. R., 13 Cal., 262; *Kera Koose* v. *Brooks*, 8 M. I. A., 339; *Baldeo Parshad* v. *A B. Miller*, I. L.R., 31 Cal., 667 (676); *Jadowji* v. *Jetha Shamji*, I. L. R, 4 Bom., 333; *Vilji* v. *Bharmal*, I.L.R., 21 Bom., 287; *Siva* v. *Bishen Das*, 2 C.P.L.R, 193; *Raghunath* v. *Moti*, 10 C.P.L.R. 87; *Palaniappa* v. *Lakshmana*, I L R, 16 Mad., 429 (434); *Nanhaji* v. *Chimna*, 7 N. L. R., 72; *Narodugula* v. *Kottaya* 21 M.L.J., 413 (414); 9 I.C., 255.

(9) *Flory* v. *Denny*, 7 Ex, 581.

(10) *Kaker Prasad* v. *Chandan*, I.L.R., 10 All. 20.

mortgage-deed, if any, to the mortgagor, (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to him, or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of mortgagor.

Redemption of portion of mortgaged property.

1341. Analogous Law.—This section must be read with section 83, *post*, which enables a mortgagor to deposit the amount due in Court. The mortgagor's rights are dealt with in sections 60 to 64, and his liabilities in sections 65 and 66, the corresponding rights and liabilities of the mortgagee being dealt with in the following sections. The marginal note (1) appended to the corresponding section 59 in the Bill justifies it on the strength of the antecedent authorities.

1342. The right of the mortgagor to redeem is what is known in the English law as "equity of redemption"—a term which pre-supposes the distinction between the legal and an equitable estate observed in the English law, and of which the Act does well to sail clear. In the Civil Law the debtor was allowed

(1) (Against para. 1.)—Bill III, s. 23, *Kamini* v. *Ramlochan*, 5 B. L. R., 450; *Chandra Kumar* v. *Iswar Chandra*, 6 B. L. R., 561; *Nallana* v. *Palani*, 2 M. H. C. R., 420; *Samathal* v. *Mathoosri*, 7 M H. C. R., 395; in Central Provinces, *Gokuldas* v. *Kriparam*, 13 B. L. R., 205, P. C.; *Aspal Singh* v. *Sheodursun*, (1868) 3 Agra, 20; *Sakharam* v. *Vithu*, 2 Bom., 237 (2nd Ed., 225); no redemption before expiration of period named. Redemption after fixed time has expired; *Shankar Bhai* v. *Kassibhai*, 9 B. H. C. R., 69. See *Pattabhiramier* v. *Vencata*, 7 B. L. R., 136, P. C. (Para. 2). *Ranu* v. *Ramabai*, 6 B. H. C. R. (A. C.), 265; *Ganesh Kooer* v. *Deedar*, (1872) N. W., 128 [citation in the original incorrect]. (Para. 3) *Mahtab* v. *Misree Lall* (1867), 2 Agra, 88; *Burno* v. *Benode*, 20 W. R., 301; *Imam Ali* v. *Ooorah Singh*, 22 W. R., 262; *Kesree* v. *Roshun Lal*, (1870) 2 N W. P. H. C. R., 4; *Soligram* v. *Barun Rai*, (1872), 4 N. W. P H. C. R., 92; *Natho* v. *Ameerchand*, 15 B.L.R., 303.

to redeem the estate on payment of his debt at any time before the sentence passed, and this right he exercised in spite of a covenant to the contrary expressly made in the deed. The Civil Law always looked at the substance of the transaction, and argued that since by mortgage the property is conveyed by way of security for the loan, the creditor was not entitled to the property, if the debtor could otherwise pay off his debt.

1343. But this view was foreign to the English common law which rigidly enforced the covenant for forfeiture on breach of the condition. Following, however, the principles of the Civil Law, the Court of Equity readily recognized the severity of literally enforcing mortgage-contracts. But while the debtors had the power to strike at the rigour of the law, the Courts of Equity in England possessed no such powers. On the other hand, they professed to follow the law whilst mitigating its evils, and so in England, while holding that on breach of the condition the mortgagee had the *legal* estate, still as it was unreasonable that he should retain for his own benefit what was intended as a mere security, they allowed the mortgagor to redeem on payment of the mortgage-money and costs, notwithstanding the forfeiture at law. And this right which was the creature of equity and the object of its solicitude came to be designated the equity of redemption. Indeed, to the judges of common law, it was an innovation which they struggled hard to oppose, but the Courts of Equity justified its intervention on the ground that the clause as to forfeiture was in the nature of a penalty which should be relieved against.(1)

1344. Principle.—The enactment of this section underlies an equity long recognized as a most valued privilege of the mortgagor, *viz.*, his equity of redemption. As such, it is subject to certain restrictions to which the section here enacted makes no reference. On the other hand, its terms are somewhat too general to admit of too literal a construction. For which doubtless its operation cannot be altogether excluded by contract, it is no authority to the mortgagor to redeem his mortgage irrespective of all his contracts and covenants, some of which the rule recognizes while the rest it condemns. All "acts of the parties" have, therefore, not the effect of defeating redemption which may, for instance, be enforced if those acts have the effect of clogging it by unnecessary and unfair restrictions and penalties. On the other hand, the right is such as might be relinquished by a fair compromise or contract. It is, of course, necessarily subject to "an order of a Court," which implies that it may be lost subject to the procedure hereafter provided. This section defines the mortgagor's right to redeem (§ 1342), which, as the term implies, is in every respect his right which he may enforce and not his disability which he may be compelled to discharge.(2) The provisions of this section are not, like those of section 54, subject to a contract to the contrary. They will, therefore, enable a mortgagor to avoid oppressive and usurious agreements into which he may have been forced to enter. The mortgagee cannot now fetter the mortgagor's equity of redemption by unreasonable or impossible conditions. The object of a mortgage being to secure repayment of the amount secured thereby, law regards conditions other than those essential to ensure its payment as inequitable and therefore void.(3) Thus "equity does not, except under

(1) *Emmannuel College* v. *Evans*, 1 Ch. R., 10.

(2) *Mulla Vittil* v. *Korambath*, 21 M.L.J., 218, F.B.

(3) *Rose Ammal* v. *Rajarathnam*, I. L. R., 23 Mad., 33; *Marquis of Northampton* v. *Salt*, (1892) A. C., 1; *Secy. of State for India* v. *British Empire Ass. Co.*, 67 L.T., 434.

peculiar circumstances, recognize agreements to confine the rights of redemption to any given period, as the life of the mortgagor; or to any specified class of persons, as to the mortgagor alone, or the heirs of his body.(1) In the one case, the right will be opened to the extent allowed by the Statute of Limitations, and, in the other, it will be given to the persons in whom it might ordinarily become vested. In the case first cited, (2) it is laid down as a general rule, by Lord Nottingham on the principle of 'once a mortgage and always a mortgage,' (3) that the security could not be extinguished by any covenant or agreement at the time of making the contract. The rule, as explained by Lord Hardwicke (4) is, that an attempt to fetter the equity of redemption will not avail either by original agreement in the mortgage-deed, or by a separate deed, where there is a design to wrest the estate fraudulently out of the hands of the mortgagor." (5)

1345. The proviso to the section qualifies the right of the mortgagor to redeem only a portion of the mortgaged property. A mortgage is in law indivisible, and the rule is based upon the principle that, if it is allowed to be redeemed in parts, the mortgagee may suffer in the great depreciation resulting in the value of his property, owing to the destruction of its compactness. But where the mortgagee has himself acquired a portion of the property, his security cannot be impaired, if each mortgagor is allowed to redeem his own share only.

It was the settled law under the Regulations that the mortgagor could not redeem before the mortgagee was entitled to foreclose, and that therefore a suit for redemption could not be brought before the time fixed by the mortgage for the payment of the mortgage-money.(6) This rule, common to both the English as well as the Hindu law,(7) was the natural evolution of the doctrine of reciprocity as applied to mortgages. As Lord Kingsdown remarked, "where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem,"(8) or as Westropp, C.J., observed: "The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive."(9) In the English law the mortgagor cannot redeem before the day fixed for payment of the mortgage-money, even on payment of the full amount of principal and interest up to that day. (10) The date for payment is not merely a restriction on the mortgagee's right but a substantive agreement as to the time of payment by which both parties are bound,(11) unless the period fixed is so excessive as virtually to amount to a clog

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(1) *Newcomb* v. *Bonham*, 1 Ves., 8; *Spurgeon* v. *Collier*, 1 Eden. 55.

(2) *Newcomb* v. *Bonham*, 1 Ves., 8; *Trimbak* v. *Sakharam*, I.L.R., 16 Bom., 599.

(3) Which means that an estate could not at one time be a mortgage and at another time cease to be so *by one and the same deed*. *Bapuji* v. *Senavaraji*, I. L. R., 2 Bom., 231 (243).

(4) *Mellor* v. *Lees*, 2 Atk., 495.

(5) Fisher (6th Ed.), §§ 1395, 1396.

(6) *Sakharam* v. *Vithu*, 2 B H.C.R., 232 (2nd Ed., 225); *Mun Peary* v. *Shiva*, 1 Agra, 91; *Vadju* v. *Vadju*, I. L. R., 5 Bom., 22; *Loff Ali* v. *Gujraj*, 11 W. R., 408; *Chandra Kumar* v. *Iswar Chandra*, 14 W. R., 455; *Surjan* v. *Imambandi*, 12 W. R, 527; *Situ* v. *Vasudev*, 11 B. H C. R., 283; *Sreemunt* v. *Krishnanath*, 25 W. R., 10; *Kishory Mohun* v. *Ganga Bahu*, I L.R., 23 Cal., 228, P.C.

(7) Brihaspati (I Cole. Dig.), cv. cxviii; *Anrood* v. *Dummer*, Mor. Dig. (N. S.), 259; cited per Westropp, J., in *Sakharam* v. *Vithu*, 2 B.H.C.R., 225 (230).

(8) *Prannath* v. *Rookea Begum*, 7 M.I.A., 323 (335).

(9) *Vadju* v, *Vadju*, I.L.R., 5 Bom., 22 (24).

(10) *Brown* v. *Cole*, 14 Sim., 427; *Burrough* v. *Cranston*, 2 Ir. Eq. R., 203.

(11) *Day* v. *Day*, 31 Beav., 270.

on redemption.(1) The Court may also allow redemption before the determination of the period, if it be uncertain.(2)

A usufructuary mortgage, as such, may be redeemed at any time, since its nature admits of no day being fixed for payment. The Welsh mortgage (§§ 1144, 1250) may be also similarly redeemed.(3)

The right to redeem may be forfeited by covenants subsequently made, unless they offend against the principles to be presently discussed.

1346. Meaning of Words.—"*Has become payable*:" means recoverable; that is, at any time after the mortgagor is entitled to pay the principal money.(4) But it would be probably more correct to say that the phrase means the time at which payment by the mortgagor becomes *obligatory*, that is, not only the time when he *may* pay but when he *must* pay.(5) As to when the sum becomes legally recoverable, the question will, it is conceived, have to be still decided in each case, as it had to be before the Act.(6) The mortgagor here includes all persons such as his heirs and assignees who are entitled to redeem under section 91. "*At a proper time and place*:" This has nowhere been defined or described in the Act. But there can be no doubt that the term is used in the same sense as in the English law. *Proper time* there means at any time of the day, if the hour is not fixed, otherwise at or about that hour.(7) If the tender so made is refused, it need not be tendered again before the last instant of the day.(8) Mere words in the form of a protest which may accompany a tender will not defeat it when they can reasonably be regarded as idle words. But the payment into Court of the mortgage-money accompanied by a petition disputing the mortgagee's title to foreclose and expressing an intention amounting to a notice to sue the mortgagee to recover back the very money tendered is not a valid tender.(9) The mortgagee is bound to accept a tender by one or more of several mortgagors, and it need not be made conjointly by the whole of the mortgagors, or in their behalf and with their consent.(10) *The place of payment* means the place appointed for payment, and where no such place is agreed upon, a personal tender is generally necessary.(11) Money may also be tendered in any usual place though the place be not named in the deed. "In the case of money charged on land, the place of contract, and the residence of the parties, will be the place for payment. . . But the tenor of the whole instrument will be considered, and where the deed actually fixed Lincoln's Inn Hall as the place for payment of money charged on land in Ireland, the House of Lords disregarded the reservation and held that the owner of the money was not entitled to have it sent to England free of charges and exchange."(12) Where the time for payment falls on a holiday, the mortgagor may deposit the amount in Court

(1) *Cowdry* v. *Day*, 29 L.J., Ch., 39. See Comm., *post*.

(2) *Newcomb* v. *Bonham*, 1 Vern., 8; *Talbot* v. *Braddyl*, 1 Vern., 394; O.A., 2 Vern., 183.

(3) *Talbot* v. *Braddyl*, 1 Vern., 394; *Howell* v. *Price*, Pr. Ch., 423.

(4) *Kanti Ram* v. *Kutubuddin*, I.L.R., 22 Cal., 33 (37).

(5) *Cf.* Lindley, M.R., in *De Braam* v. *Ford*, (1900) 1 Ch., 142; *Husain Begum* v. *Collector of Cawnpur*, 4 A.L.J. R., 375.

(6) *Sri Raja Setrucherla* v. *Sri Raja Vairicherla*, I.L.R., 2 Mad., 311.

(7) *Bernard* v. *Norton*, 10 L.T. (N.S.), 163; *Wade's case*, 5 Rep., 115*b*; Fisher (5th Ed.), §. 1504.

(8) *Ibid.*

(9) *Prannath* v. *Ramruttun*, 4 W.R., 37 P.C.; *Prannath* v. *Rookea Begum*, 7 M I.A., 323; *Makhun Kuar* v. *Jasoda Kuar*, I.L.R., 6 All., 399.

(10) *Contra* in *Ram Baksh* v. *Ramlall*, 21 W.R., 428, is no longer sound.

(11) *Sharpnell* v. *Blake*, 2 Eq. Ca. Abr., 604.

(12) *Lansdowne* v. *Lansdowne*, 2 Bligh, 60; see Colquh., §§ 1527—1834; Fisher, § 1504, pp. 717, 718.

on the next open day.[1] "*Mortgage-money*" means the *whole* of the principal and interest.[2] Cases in which the mortgage-deed stipulates that the mortgagor shall be entitled to redeem on paying the principal money only appears to have been here overlooked. As to what constitutes legal tender, see below.

"*Acknowledgment in writing*:" This may be done either on a separate paper or, as is usual, by making an indorsement to that effect on the back of the deed. The requirement of registration where the mortgage is registered was introduced by the Law Commissioners.[3]

"*Reasonable notice*:" A provision for such a notice is only valid in the two specified cases, *viz.*, (*a*) where the mortgagor does not pay on the due date; (*b*) where no time is definitely fixed for repayment. In England in such cases six months' notice is required. Here, however, a shorter notice would do in certain cases.

"*Redeem, Redemption*:" These words are borrowed from the English law To redeem means to repurchase, and the "right of redemption" formerly meant the right of the mortgagor to buy back the estate which on default was said to belong to the mortgagee. Before the recognition of equitable rights in the Common Law Courts, effected by the Judicature Act, 1873, the estate of the mortgagee became absolute and irredeemable at common law upon the non-payment, but was subject in Courts of Equity to a right called the equity of redemption which arose upon the consideration that the real object of the transaction was the creation of a security for the debt. This equity is now recognised and administered in England, by the Queen's Bench Division of the High Court.

"*Nothing in this section, &c.*:" is based upon the doctrine regarding the indivisibility of a mortgage.

1347. When a Mortgagor may redeem.—This section lays down in general terms the rights of a mortgagor to redeem "at any time after the principal money has become payable." This, of course, assumes that the right is subject to the rule of limitation, and "at any time" must therefore be qualified to mean "at any time" before his right to redeem becomes extinguished by the law of limitation. The next question, one of great importance, and in regard to which there has existed considerable diversity of opinion, is as to when the mortgage-money may be said to become payable, so as to create in the mortgagor a right to redeem his property. The time when the principal money has become payable naturally points to the time when the payment is not only optional to but is obligatory on the mortgagor. It is the time when the mortgagor *must* pay and after which if he does not pay, he may be sued for payment.[4] This still leaves the question whether before the time so fixed the mortgagor is at liberty to redeem the mortgage. In other words,

Covenant for Notice.

(1) *Dabee Rawoot* v. *Heeramun*, 8 W.R., 223.

(2) S. 58 (*a*); *Boodho Singh* v. *Kishen Chunder*, 3 W.R. (Mis. App.), 4; *Hewanchal Singh* v. *Jawahir Singh*, I. L. R., 16 Cal., 307, P.C.

(3) See Report, dated 15th November 79, p. 32.

(4) *Cf Per* Lindley, M. R., in *De Braam* v. *Ford*. [1900] 1 Ch., 142; *Husaini Begum* v. *Collector of Cawnpur*, 4 A. L. J. R., 381 (385); *Husaini Khanam* v. *Husain Khan*, I. L.R, 29 All., 471; O. A. *Bakhtawar Begam* v. *Husaini Khanum*, I.L.R., 36 All., 195, P.C.; *Chengiah* v. *Pichayya*, 17 M.L.J.R., 177.

does the appointment of a day for payment preclude the mortgagor from paying off the mortgage, as it undoubtedly precludes the mortgagee from foreclosing it. On this point it was at one time held that the mortgagor was free to discharge the mortgage-debt at any time, unless the terms of the deed clearly forbid it.(1) But considerable doubt has been cast on this view by a decision of the Privy Council who said that "ordinarily, and in the absence of a special condition entitling the mortgagor to redeem, during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property."(2) In this case the mortgagor had promised to repay the loan "in nine years" and which their Lordships conceded was an ambiguous expression which they did not profess to interpret, but proceeded to throw out the plaintiff's suit on the ground of limitation, adding that the plaintiff's right to possession was barred by his own statement of fact, thus rendering their statement of the law as an *obiter dictum*.(3) The Allahabad Court had no doubt decided the question holding that the use of expressions such as money shall be repaid "within a certain time" was no means indicative of a covenant entitling the mortgagor to redeem *before* expiration of that time. And all that the Privy Council did say about their view is, that if the matter had depended upon the construction of the contract "much might be said in support of the High Court's conclusions." Moreover, if their Lordships' *dictum* be read in connection with the facts of the case, the inclination of their mind was certainly in favour of the view that where payment is promised "in" or "within" a time fixed, the mortgagee can no more compel the mortgagor to repay the loan before that time than the mortgagor can compel the mortgagee to receive it. Of course, where the term is unambiguously expressed as that the amount shall be payable in certain instalments on dates fixed, or that it shall be repaid on or before a given date, then the question should present no difficulty. It is only when doubtful expressions such as "by." "in" or "within" occur, then the question arises whether the covenant should be construed favourably to the mortgagor enabling him to redeem at any time before that date or whether it should not be construed to mean that payment could not as of right be made till its payment could be enforced by the mortgagee. On this point the Courts are by no means unanimous, for while at Calcutta such a covenant would be construed as favouring redemption at any time(4) exactly opposite conclusion is reached by the other Courts,(5) and by the same Courts in different cases.

1348. There can be no doubt that if the parties expressly stipulate that, before the date named in the bond, redemption shall not take place, the mortgagor cannot either pay up or sue to redeem his property before the stipulated time. And this is so, even though the mortgagor tender interest during the whole intervening period.(6) Covenants postponing the period of redemption are supported on the ground that they are advantageous

(1) *Radha Krishna* v. *Madhava*, 17 M. L. J. R., 83.

(2) *Bakhtawar Begum* v. *Husaini Khanum*, I.L.R., 36 All. 195 (199), P. C. O A. affirming on this point *Husaini Khanam* v. *Husain Khan*, I.L.R., 29 All., 471, which was reversed by the Privy Council on the question of limitation.

(3) *Bakhtawar Begum* v. *Husani Khanum*, I.L.R., 36 All., 195 (199, 200), P.C.

(4) *Purnachandra* v. *Peary Mohan*, I.L.R., 39 Cal., 828 (833).

(5) *Tirugnana* v. *Nallatambi*, I. L. R., 16 Mad. at p. 486; *Prannath* v. *Rookea Begum*, 7 M.I.A., 323; *Puran Singh* v. *Kesar Singh*, (1907) P.R , No. 39; *Brown* v. *Cole*, 14 Sim., 427; *Bovill* v. *Eudle*, (1896) 1 Ch., 648.

(6) Fisher on Mortgage, § 1393.

to both the mortgagor and the mortgagee. For in such an arrangement, while the mortgagor is free from the expense and trouble of seeking fresh creditors, the mortgagee is sure of his investment for a fixed period. In cases, however, where there is no stipulation against redemption before a certain period, but only a date is named for repayment, it has been held in some cases that the term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown, in the absence of which the mortgagor may redeem at any time before or at the end of the term.(1) Thus where the mortgage-deed stated :—" We shall pay the principal money in 15 years " (*asl zar-i-rahan arsa pandrah baras men ada karenge*)." it was held by Mahmud, J., that the term being fixed for the convenience of the debtor, could not be insisted upon by the mortgagee. This view is supported by the authority of Pothier who says : " It remains to observe, concerning the effect of a term, that being presumed to be inserted in favour of the debtor, the debtor may very well defend himself from payment before the expiration of the term, but the creditor cannot refuse receiving it if the debtor is willing to pay, at least unless it appears from the circumstances that the term was appointed in favour of the creditor, who is the holder, as well as of the debtor."(2) This view of law is in accord with that taken by the Madras High Court,(3) but is opposed to that of the High Courts of Calcutta (4) and Bombay, (5) and other cases of the Allahabad High Court.(6) In fact the decisions of the Calcutta, Allahabad and Madras Courts are by no means consistent, for in a later Allahabad case where in a usufructuary mortgage of agricultural land it was stipulated that the mortgage might be redeemed by the payment of a certain sum in the *Jeth* of any year, it was held that having regard to the agricultural conditions of the country the time of payment was of the essence of the contract, and that the mortgagor would not be entitled to redeem in any other month.(7) And so in another case, the same Court observed : "Ordinarily a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation."(8) And so in another case decided in Madras, it was held that having regard to sections 60 and 62 of

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(1) *Chengiah* v. *Pichayya*, 17 M. L. J. R., 177 ; *Radha Krishna* v. *Madhava*, 17 M. L. J. R., 83 ; *Bhagwat Das* v. *Parshad Singh*, I.L.R., 10 All., 602 ; but *contra* in *Husein* v. *Husein*, (1907) A.W.N., 133.

(2) On Obligations, Vol. I, p. 132, cited in *Bhagwat Das* v. *Parshad Singh*, I. L. R., 10 All., 602 (606).

(3) *Sri Raja Setrucherla* v. *Sri Raja Vairicherla*, I. L. R., 2 Mad., 314 ; *Marana* v. *Pendyala*, I.L.R., 3 Mad , 230 ; *Rose Ammal* v. *Rajarathnam*, I. L. R., 23 Mad., 33; *Radha Krishna* v. *Madhava*, 17 M. L. J. R., 83 ; *Chengiah* v. *Pichayya*, 17 M. L. J. R., 177.

(4) *Purnachandra* v. *Peary Mohan*, I. L. R., 39 Cal., 528 ; *Ramtarak Roy* v. *Asutosh*, (1911) 8 I.C., 707 (*Per* Caspersz, J.) To the same effect—*Jivan Lall* v. *Dhunde*, 16 C. P. L.R., 59.

(5) *Vadju* v. *Vadju*, I. L. R., 5 Bom., 22 ; *Abdul Hak* v. *Gulam*, I.L.R., 20 Bom., 677 ; followed in *Sari* v. *Motiram*, I. L. R., 22 Bom., 375 ; *Ramchandra* v. *Kondaji*, I.L.R., 22 Bom., 221 ; turned upon the construction of the decree under which the mortgagee was held entitled to retain possession until the expiration of the stipulated period.

(6) *Raghubar Dayal* v. *Budhu Lal*, I. L. R., 8 All., 95 ; *Husaini Begum* v. *Collector of Cawnpur*, I.L R., 28 All., 46; *Paras Singh* v. *Dwarka Singh*, 7 A.L.J., 953 ; *Husaini Khanam* v. *Husain Khan*, I. L. R., 29 All., 471 ; O.A. confirmed on this point but reversed on another point—*Bakhtawar Begum* v. *Husaini Khanum*, I.L.R., 36 All., 195 (199, 200), P.C.

(7) *Bansi and others* v. *Girdhar Lal*, 14 A. W.N., 143 ; *contra* in *Chattarbhuj* v. *Raghubar*, (1901) A.W N., 36.

(8) *Husaini Begum* v. *Collector of Cawnpur*, I.L R., 28 All , 46 ; *Husaini Khanam* v. *Husain Khan*, I L.R., 29 All., 471, following *Brown* v. *Cole*, 14 Sm., 427 ; *Vadju* v. *Vadju*, I.L.R., 5 Bom., 22.

this Act, the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that when a date is fixed for payment of the mortgage-debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time.(1) As a general principle this was conceded by a Bench of the Calcutta High Court, but in its application it came to a different conclusion. In that case the mortgagor had promised to repay the loan "within one year" and the Court held it to favour redemption at any time (2) a view which found support in a decision of the Madras High Court,(3) though another learned Judge of the same Court was inclined the other way (4) and he too was able to rely upon another decision of the same High Court; (5) and, as has been observed before, there are other cases and Courts to favour this view.(6) The contrary view taken in the Central Provinces,(7) that the mortgagor may redeem at any time despite the creation of a term, is in conflict with its earlier decisions.(8) Where, however, the mortgage-deed prescribes no time for repayment, it may be foreclosed or redeemed at any time after the date of the deed.(9)

Dekkhan Relief Act.

1349. In Bombay, in cases governed by the Dekkhan Agriculturists' Relief Act (10) redemption is expressly permitted despite the creation of a term,(11) provided it is in substance a mortgage, by whatever other name it may be called,—whether a lease for 199 years only redeemable "after expiry of the said period," (12) or "a mortgage-deed with possession regarding land."(13)

Where redemption is impossible.

1350. Again, redemption at the mortgagor's option is not possible where the "mortgage-money" cannot be ascertained, as where it is an annuity, of an indemnity to a lessor against the breach of the covenants in a lease, or is a certain sum payable during an uncertain period. As Lord Cranworth, L.C., said: "When a mortgage is made to secure an annuity for the life of another, or to indemnify against contingent charges, or for any other object not capable of immediate pecuniary valuation, redemption is impossible; a security can only be redeemed where the party

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(1) *Tirugnana* v. *Nallatambi*, I.L.R., 16 Mad., 486 (489).

(2) *Purna Chandra* v. *Peary Mohan*, I.L.R. 39 Cal., 828 (833).

(3) *Rose Ammal* v. *Rajarathnam*, I.L.R., 23 Mad., 33.

(4) (*Per* Caspersz, J.) in *Ramtaruk* v. *Asutosh*, (1910) 8 I.C., 707.

(5) *Tirugnana* v. *Nallatambi*, I.L.R., 16 Mad., 486.

(6) *Sakharam* v. *Vithu*, 2 B.H.C.R., 225; *Vaaju* v. *Vadju*, I.L.R. 5 Bom. 22; *Abdul Hak* v. *Gulam*, I. L. R., 20 Bom. 677; *Dorappa* v. *Kundukuri*, 3 M. H C. R., 363; *Mashook* v. *Maram*, 8 H.H.C.R., 31; *Sri Raja Setrucherla* v. *Sri Raja Vairicherla*, I.L.R., 2 Mad., 314; *Marna*, v. *Pendyala*, I.L.R., 3 Mad., 240; *Kanara* v. *Govindam*, 5 M H.C. R., 310; *Rose Ammal* v. *Rajarathnam*, I. L. R., 23 Mad., 33; *Radha Krishna* v. *Madhava*, 17 M. L. J. R 83; *Chengiah* v. *Pichayya*, 17 M.L.J.R., 177; *Vishvendra* v. *Vishnumurti*, 18 M.L.J., 235; *Raghubar Dial* v. *Budhu Lal*, I.L.R., 5 All., 95; *Husaini Begum* v. *Collector of Cawnpur*, I. L. R., 29 All., 46; *Husaini Khanam* v. *Husaini Khan*, I.L.R., 29 All., 471; O.A. (affirmed on this point, but reversed on another point); *Bakhtawar Begam* v. *Husaini Khanum* I.L.R., 36 All., 195 (199, 200), P.C., *Mikhi* v. *Fattu*, (1903) 4 P.L.R., 171.

(7) *Jivan Lal* v. *Dhunde*, 16 C.P.L.R., 59.

(8) *Urjooni* v. *Harbaji*, 1 C.P.L.R., 1; *Bhagwangir* v. *Phagu*, 2 C. P. L. R., 241; *Kalu* v. *Laljee*, 11 C.P.L.R., 103.

(9) *Chengiah* v. *Pichayya*, 17 M L.J.R., 177.

(10) Act XVII of 1879, Ss. 3 (2), 15 (A); set out in *Tukaram* v. *Ramchand*, I.L.R., 26 Bom., 252 (*note*), F.B.

(11) *Balaji* v. *Vithu*, I.L.R., 6 Bom., 734; *Tukaram* v. *Ramchand*, I.L.R., 26 Bom., 252, (259) F.B.; *Mahomed* v. *Bagas*, I.L.R., 32 Bom., 569.

(12) *Mahmad* v. *Bagas*, I.L.R., 32 Bom., 569 (570, 571).

(13) *Tukaram* v. *Ramchand*, I.L.R., 26 Bom., 252 (254, 257), F.B.

redeeming is able to do the thing intended to be secured; and where the thing secured is the payment of an annual or a monthly sum during an uncertain period, no one can say how long the payment may continue, and it is therefore impossible for the party who has given the security to redeem it by an immediate payment of a fixed sum."[1] But his Lordship, nevertheless, permitted redemption calculating the maximum liability of the mortgagor under any circumstances as the sum payable by him.

Meaning of "Payable,"

1351. The conflict of views has originated in the interpretations placed on the language of the section which confers on the mortgagor the right to redeem "at any time after the principal money has become payable," and apart from other considerations, the question is then narrowed down to this: when is the principal money payable? If reference to the Select Committee's report be permissible (§ 9) it would seem that the clause was drafted to stereotype the previous law, which allowed no redemption before expiration of the period named, and to which reference is made in their marginal note appended to the section.[2] Apart however from what was the pre-existing law and the expressed deliberations of the Legislature, the language used appears to be intelligible enough. The term "payable" is no doubt ambiguous in its lexicographical sense as meaning in law either (*a*) that may be discharged or settled by delivery or value, or (*b*) matured now due.[3] But these are by no means the senses in which the term has passed current in the English and Indian Statutes in which the word is commonly used as meaning "due in point of time"—a sense which is preserved in not only this Act but also in the Negotiable Instruments Act[4] where the word is invariably so used,[5] although it is no doubt in places used also in sense (*a*) of the lexicon.[6] In the English settlements the word occurs frequently and has been judicially construed to mean vested.[7] In the Act itself the same phrase occurs again in sections 67, 74 and 83, in which the term is unquestionably used as meaning "when payment is due in point of time." There is no reason to suppose that the same expression when enunciating the correlative rights of the mortgagor should bear a different meaning. On the other hand, a different construction should not be presumed unless it is encouraged by use of a different language. Indeed, to hold with Pothier that the date for repayment is fixed for the sole benefit of the mortgagor does not solve the question, since it may be that the right of redemption has been declared to originate as from that date. Then again, if it be supposed that the mortgagor could pay off at any time, one fails to understand the propriety of the use of the words "*after* the principal money has become payable" which certainly indicates, it is submitted, unmistakably the date fixed for repayment. Of course, whether a mortgage is subject by law to be foreclosed, the title to foreclose may be regarded as in the nature of a limit to the title to redeem.[8] But even then the two rights must be co-extensive and concomitant, and one cannot be let in without letting in the other.[9] In England, there can be no question but that the mortgagor cannot redeem before the day appointed for

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(1) *Fleming* v. *Self*, 3 De G. M. & G., 997 (1024); 43 E.R. 397.

(2) See § 911 under "Analogous Law" *ante*.

(3) Webster.

(4) Act XXVI of 1881.

(5) *Ibid.*, Ss. 9, 19, 24, 62, 66 and 74.

(6) *E.g.*, *ibid.*, in Ss. 54, 68, 69.

(7) *Mocatta* v. *Lindo*, 9 Sim., 56; *Meham* v. *Williams*, 1 Ves. S., 209; In re *Wilmott's Trusts*, L.R., 7 Eq., 532: *Day* v. *Radcliffe*, 3 Ch. D., 654; *Wakefield* v. *Maffet*, 10 App. Cas., 422 (431, 436).

(8) *Per* Lord Kingsdown in *Prannath* v. *Rookea*, 7 M.I.A., 323 (355).

(9) *Cf.* S. 92, Comm.

payment of the money.(1) If this were allowed, it might be attended with extreme inconvenience to mortgagees who generally advance their money as an investment. Indeed, it is there a settled rule of practice that a mortgagor must, after default in payment of the principal money on the appointed day either give the mortgagee six months' notice of his intention to pay off the mortgage, or must pay the mortgagee six months' interest in lieu of notice,(2) unless payment was made at his instance.(3) Of course, such a question can only arise in cases in which the date does not expressly reserve to the mortgagor the right to pay off the debt at any time. Where such a covenant has been made there can be no question but that it may be availed of by the mortgagor. Thus the mortgagor may say, "The first condition is that the term of the mortgage has been settled at eight years; within this term the mortgage may be redeemed upon payment of the entire sum, according to the conditions of the mortgage-bond at the close of the second, fourth or eighth year."(4)

1352. So if the mortgagor stipulate that he would "pay the interest every year, and the principal in ten years"; that "the principal shall be paid at the promised time, and the interest every year"; and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee should be at liberty to realize the debt from the mortgaged and other property, as also the person of the mortgagor, the advance must be construed to be for a period of ten years certain; and that while the mortgagee could not foreclose, the mortgagor on his part was not entitled to redeem before the expiration of that period.(5) So, where the mortgagor promised to repay the debt(6) "in" or "within" ten years, it was held that the mere use of the word "within" was not a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years.(7) Of course, it is competent to the parties to fix any period for discharge of the mortgage. The mortgagor may, for instance, stipulate that if he does not pay interest punctually on the appointed date, the mortgagee shall be at liberty to foreclose, in which case, foreclosure may be sued for on breach of the condition.(8) In a *zur-i-pesghi* lease, possession cannot be recovered before the term fixed by the lease.(9) *Otti* and *kanom* tenures are governed by the same rule.(10) There can be no suit for redemption, unless a time for payment of the principal money has been expressly or impliedly fixed. The mortgagor may sue for possession of his property, but, if it is found, on a taking of accounts, that the mortgage-money has not been repaid from the usufruct, then the suit must be dismissed.(11)

(1) *Brown* v. *Cole*, 14 Sim., 427; followed by Kekewich, J., in *Bodill* v. *Endle*, (1896) 1 Ch., 648 (651, 652).

(2) *Per* Romer, J., in *Smith* v. *Smith*, (1891) 3 Ch., 550 (552). This practice appears to be old and well established, and was recognized in *Sharpnell* v. *Blake*, 2 Eq., Cas., Abr., 603, Pl. 34; 22 E. L. R., 506, 507.

(3) *Letts* v. *Hutchins*, L. R., 13 Eq., 176; explained *per* Romer, J., in *Smith* v. *Smith*, (1891) 3 Ch., 550 (552); and *per* Kekewich, J., in *Bodill* v. *Endle*, (1896) 1 Ch., 648 (660).

(4) *Hewanchal* v. *Jawalier*, I.L.R., 16 Cal., 807, P C.

(5) *Raghubar* v. *Budhu*, I.L.R., 8 All., 95.

(6) *Husaini Begum* v. *Collector of Cawnpur*, 4 A.L.J.R., 375.

(7) *Vadju* v. *Vadju*, I.L.R., 5 Bom., 22; *Sakharam* v. *Vithal*, 2 B.H.C.R. (A.C.), 225; *Lila* v. *Vasudev*, 11 B.H.C.R., 283; *Brown* v. *Cole*, 14 Sim., 427; followed in *Husaini Begum* v. *Collector of Cawnpur*, I.L.R., 28 All., 46; *Husaini Khanam* v. *Husain Khan*, I.L.R., 29 All. 471; O A. (affirmed on this point but reversed on a different point); *Bakhtawar Begam* v. *Husaini Khanum*, I. L. R., 36 All., 195 (199, 200), P.C. *Cf. Prannath* v. *Rookea*, 7 M.I.A., 323 (355); *contra* in *Rose Ammal* v. *Rajarathnam*, I. L. R., 23 Mad, 33.

(8) *Burrows* v. *Molloy*, 2 J. & L., 521, *Williams* v. *Morgan*, (1909) 1 Ch., 804.

(9) *Lo'if Aly* v. *Gujraj*, 11 W. R., 408.

(10) *Edathi* v. *Kopishou*, 1 M.H.C.R., 122; *Keshava* v. *Keshava*, I.L.R., 2 Mad., 45.

(11) *Kalu* v. *Lalji*, 11 C.P.L.R., 103 *Kundan* v. *Thanurlal*, 6 C.P.L.R., 43.

1353. Discharge of Mortgage-debt.—Before the commencement of the right to redeem, the mortgagor must (i) pay or (ii) tender, at a proper (iii) time and (iv) place the mortgage-money, not necessarily to the mortgagee but so as to be effective payment or discharge of the debt.

Payment to mortgagees.

1354. The Act makes no provision for what may be considered as sufficient tender or payment of the debt; but some provision is made in the Indian Contract Act, the rules of which must for the purpose, be regarded as engrafted upon the Act. In the case of an individual mortgagee, the payment must, of course, be made to him or his authorized agent. If the debtor pay to a person alleged to be the mortgagee's agent, but without ascertaining the extent of his authority, the payment is made at his own peril. But if there be several co-mortgagees, is the mortgagor entitled to redeem by making payment to any one of them? In some cases it has been held that such payment is valid, and satisfies the bond and can be successfully pleaded in answer to any suit brought upon it.(1) To hold otherwise, it is said, would be to suppose that, where a contract is made in favour of more than one person, they must be taken to be severally entitled under it for they cannot be severally and jointly entitled.(2) There is nothing in the Act or elsewhere to justify recognition of the rights and liabilities of co-mortgagees *in solidum*, and this is undoubtedly the common law rule in England,(3) although the rule favoured by equity appears to be that one joint-creditor could not pass a receipt on behalf of all.(4) "Though they take a joint security," it was observed by Wills, J., citing from Lord Alvanley, M. R.,(5) "each means to lend his own money and to take back his own." It was conceded that the rule so stated had the effect of only creating a presumption which is liable to be rebutted.(6) As it is, the rule is founded upon the assumption that as a general rule co-creditors must *prima facie* be regarded as tenants-in-common and not as joint tenants both of the debt or of any security held for it.(7) The question whether payment to a co-mortgagee has the effect of discharging the joint-debt is one which depends primarily upon the nature of the obligation created. If the intention of the parties was that each of the persons in whose favour the obligation is created is a creditor for the whole, the payment to one will liberate the debtor against all the creditors; if not, each is a creditor for his own share and cannot give a discharge for the whole obligation. And so it has been held in England that where mortgagees have advanced money on a joint-account, payment to one of them during the lifetime of the others, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest, if any, even though the payee ultimately becomes the survivor in the joint account.(8)

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(1) S. 38, Indian Contract Act (IX of 1872); *Bhup Singh* v. *Zainul-Abdin*, I.L.R., 9 All., 205 (209); *Barbar Naran* v. *Rimana*, I.L.R, 20 Mad., 461; *Ahinsa Bibi* v. *Abdul Kader*, I. L.R., 25 Mad., 26 (32, 33); *Kavichangama* v. *Jattikristnamna*, (1909) 1 I. C. (Mad.), 219; *Sitaram* v. *Sridhar*, I.L.R., 27 Bom., 292 (294), *contra* in *Ramaswamy* v *Muniandy*, 20 M L.J., 709; 5 I.C. (Mad.), 343; *Hosainara Begam* v. *Rahimannessa*, I.L.R., 38 Cal., 342 (349, 350) following the English rule; *Mansur Ali* v. *Mahmudunnissa*, I L.R., 25 All., 155; followed in *Ramchandra* v. *Goswami*, I.L.R., 32 All., 164 (166) followed in *Hans Singh* v. *Chet Singh*, 8 I.C. (Oudh), 416.

(2) *Keighley* v. *Watson*, L.R., 3 Ex., 723.

(3) *Wallace* v. *Kelsal*, 7 M. & W., 264.

(4) *Steeds* v. *Steeds*, 22 Q.B.D., 537 (541); *Powell* v. *Brodhurst*, [1901] 2 Ch., 160.

(5) *Morley* v. *Bird*, 3 Ves, 631.

(6) *Steeds* v. *Steeds*, 22 Q.B.D., 537 (541).

(7) *Petty* v *Styward* Eq., Ca. Abr., 290; *Rigden* v. *Vallier*, 2 Ves., S. 258; *Lake* v. *Craddock*, 1 W. & T., L. C., 208; Pothier's obligations, s. 145; *ib.*, Vol 2, p. 55, pt. 2, Ch. 3, Art. 7; *Kundhiya* v. *Chanaar*, I L.R., 7 All., 313; *Harihar* v. *Bholi Pershad*, 6 C. L J., 383 (395).

(8) *Steeds* v. *Steeds*, 22 Q. B. D., 537; *Powell* v. *Brodhurst*, [1900] 2 Ch., 160.

1355. On this point, the Indian law is stated to be clearly divergent, it being held that when money is advanced to one, by several persons jointly, it regards each of them as authorizing the others by implication, to act on his behalf, and a release or discharge, therefore, of the claim by one is binding upon the others.(1) But this view does not appear to be justified by the Indian Contract Act, and as it is both opposed to precedents and principle it does not seem sound. The opposite view is justified by reference to the last clause of section 38 of the Indian Contract Act according to which "an offer to one of several joint promisees has the same legal consequences as an offer to all of them"; but an offer of performance is not a discharge of obligation, and it, therefore, seems more apposite to refer to section 45 which recognizes the rights of the mortgagee *in solidum*, and it has accordingly been held that in the absence of an express contract to the contrary, or circumstances evidencing implied authority, the payment to one co-mortgagee has not the legal effect of operating as discharge of the entire mortgage.(2)

1356. But in any view, the rule that a mortgagor may validly pay off his debt to any co-creditor is, of course, subject to the just exception, that where such payment is shown to have been fraudulently made, it would not avail the mortgagor.(3) Nor again, has the rule any application where the mortgagee dies and is succeeded by his heirs, who cannot be regarded as joint-promisees, and therefore, no discharge can be obtained by making payment to one of such heirs, since the heirs as a body alone can give a valid discharge, unless, of course, they have constituted one of them as their *karta* or manager.(4) "The right which the several heirs jointly get on the mortgagee's death to enforce the mortgage is a right created by law in consequence of the devolution upon both of the single and indivisible right which the mortgagee had as the sole promisee, and not in consequence of that being "joint-promisees." In the words of Tindal, C. J., in *Declarus* v. *Harwood* (5) several co-heirs constitute one heir and are connected together by unity of interest and unity of title. One of the heirs, therefore, cannot enforce the mortgage without the concurrence of the rest so as to give a valid discharge to the mortgagor and free the mortgaged property from the incumbrance."(6) So again, the case of joint decree-holders is different, though not wholly dissimilar,(7) for while a joint decree-holder may apply for the execution of the whole decree for the benefit of them all, the Court is not bound to grant such an application, and if it grants it, it is enjoined to protect the interests of the other decree-holders who have not joined in the application. And the same principle would seem to govern payments made out of Court, that is to say, if the payment was made to one of

(1) *Barbar Naran* v. *Ramana*, I.L.R., 20 Mad., 460; *Ahinsa Bibi* v. *Abdul Kader*, I.L.R., 25 Mad., 26 (29); *Sitaram* v. *Sridhar*, I.L.R., 27 Bom., 292; *Bhup Singh* v. *Zainul-Abdin*, I.L.R., 9 All., 205 (209); *contra Sadasheo* v. *Mt. Kareeman*, 3 C.P.L.R., 15; *Sambhusa* v. *Gopal*, 1 N.L.R., 24; *Hoosainara* v. *Rahimannessa*, I.L.R., 38 Cal., 342.

(2) *Hoosainara* v. *Rahimannessa*, I.L.R., 38 Cal., 342 (350); *Ramasawmy* v. *Muniandy*, 20 M.L.J., 709; 5 I.C. (Mad.), 348; *Ahinsa Bibi* v. *Abdul Kadar*, I L.R., 25 Mad., 26; *Manzur Ali* v. *Mahmudunissa*, I.L.R., 25 All., 155; *Ramachandra* v. *Goswami*, I L.R., 32 All., 164 (166); followed in *Hans Singh*, v. *Chet Singh*, 8 I.C. (Oudh), 416; *Sadasheo* v. *Mt. Kareeman*, 3C.P.L.R., 15; *Sambhusa* v. *Gopal*, 1 N.L.R. 24.

(3) *Barbar Naran* v. *Ramana*, I.L.R., 20 Mad., 461; *Ibrahim* v. *Rama*, 21 M.L.J., 508; 10 I.C. (Mad.), 874.

(4) *Ahinsa Bibi* v. *Abdul Kader*, I.L.R., 25 Mad., 26 (39); followed in *Sitaram* v. *Sridar*, I L.R, 27 Bom., 292 (294, 295); *Tamman Singh* v. *Lachmin*, I.L.R., 26 All., 318, payment to one of several mortgagees is not a sufficient discharge of the whole debt—*Sambhusa* v. *Goval*, 1 N. L. R., 24.

(5) 10 Bing 526.

(6) *Sita Ram* v. *Shridhar*, I.L.R., 27 Bom, 292 (295).

(7) S. 231 (now O. XXI, r, 20), Civil Procedure Code.

the joint decree-holders for the benefit of them all, the Court will recognize and certify the payment which will in any other case operate only as a discharge of the payee's interest in the decree.(1)

1357. Payment by Instalments.—When a mortgage-deed is payable by instalments it may be a question when the mortgage-money becomes due so as to become payable within the meaning of this section. It may raise a further question whether in a mortgage repayable by instalments, the mortgagee is deemed to waive the penalty consequent upon irregularity in payments if he accepts them when overdue. Thus, for example, if a mortgage is repayable in twelve annual instalments, subject to the proviso that on default being made in payment of a single instalment when due, the mortgagee should be entitled to recover the entire mortgage-money in one sum and which would then become due, is he bound to avail himself of the remedy given to him, and if not will limitation commence to run against him from that date if he does not sue. It is clear from the article as now amended,(2) that the payee may waive his right, in which case limitation runs from the time when a fresh default is made in respect of which there is no such waiver. But mere delay is no bar to a legal remedy unless it amounts to a waiver or abandonment of the right sought to be enforced, or to acquiescence in the act complained of when there is (3) a vested right or interest in any party he cannot waive or abandon that right except by acts which amount to an agreement or license.(4) Mere abstention from prosecuting a legal remedy is not waiver.(5) Acceptance of an overdue instalment is *prima facie* such a waiver,(6) since waiver is implied when a person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is entitled. But since waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, it implies full knowledge of his rights and of the facts which would enable him to take effectual action for the enforcement of such rights.(7) Such inference would, of course, be naturally made in a case where the mortgagee who took the mortgage has received the payment.(8) But if his rights have devolved upon another who may not have been cognizant of the terms of the mortgage, waiver cannot be presumed from the mere acceptance of an overdue instalment. The creditor of an instalment-bond providing for the recovery of the whole amount on failure of an instalment may either waive the condition or put it in force. In the latter case, he is held entitled to recover the whole amount within the limitation prescribed by Art. 116 or 115 of the Limitation Act, according as the bond was or was not registered (9); and Art. 132 if the money is charged on immoveable property. Where the debt was repayable in instalments, a mere acceptance of an overdue instalment does not operate as a waiver, so as to debar the creditor

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(1) *Muthusami* v. *Natesa*, I.L.R., 18 Mad., 464; *Sambhusa* v. *Gopal*, 1 N. L. R., 24 (30); *Lachman* v. *Chaturbhuj*, I.L.R., 28 All., 252.

(2) Art. 75, Sch. II, Limitation Act (IX of 1908); *Ajudhia* v. *Kunjal*, I.L.R., 30 All., 123.

(3) *Peer Mahomed* v. *Mahomed*, I L.R., 29 Bom., 245; *Hazi Mahamed* v. *Narotam*, 9 Bom. L R., 1817; *Ajudhia* v. *Kunjal*, I.L. R., 30 All., 123.

(4) *Ibid.*

(5) *Girindra* v. *Khir Narayan*, I.L.R., 36 Cal., 394; *Gopal* v. *Dhondya*, 8 N.L.R., 44.

(6) *Maharaja of Benares* v. *Nand Ram*, I.L.R., 29 All, 431.

(7) *Dhanukdhri* v. *Nathema*, 11 C. W. N., 848.

(8) *Blennerhassett* v. *Day*, 2 B. & B., 104 (128); *Darnley* v. *London, Chatham & Dover Ry.*, L. R., 2 H. L., 43; *Beauchamp* v. *Winn*, L. R., 6 H. L., 223; *Austin* v. *Chambers*, 6 Cl. & F., 1; *La Banque* v. *La Banque*, 13 Ap. Cas., 111; *Dhanukdhari* v. *Nathema*, 11 C.W.N., 848.

(9) *Rup Narain* v. *Gopi Nath*, 11 C. W. N., 903; but Art. 75 would in such a case appear to be more apposite.

from suing for the full amount, if that was the stipulation.(1) But in Calcutta the acceptance of the amount of an overdue instalment is held to amount to a waiver,(2) and, except in the case of waiver by the creditor of his right to recover the full amount, limitation would run against him from the date of the first default.(3)

1358. But the starting point for limitation in such cases, would, in the absence of waiver, be Art. 75 of the Indian Limitation Act which provides for suits to be instituted within three years, calculated from "when the default is made" the amount being then legally *due* though the creditor may not be *bound* to enforce its payment. For instance, where a mortgage-deed stipulated that the money borrowed should be paid by instalments, and that upon default in the payment of any one instalment, the mortgagee should be at liberty to sue either for that instalment or for whole of the money then remaining unpaid, limitation for recovery of the whole amount would commence to run from the date of the first default, and mere abstention on the part of the creditor from enforcing his remedy would not save limitation which begins to run from the moment the money is first *due*.(4) It seems out of place to cite English precedents in elucidation of an Indian Act, but they also approach the question from the same standpoint. So Lord Denman, C. J., said: "If he (the plaintiff) chose to wait until all the instalments became due, no doubt he might do so; but that which was optional upon the part of the plaintiff, would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had the right to maintain it."(5)

1359. What Amount must be paid.—As regards the amount to be paid, the section provides for payment of the mortgage-money, that is, of the principal and interest due on the mortgage, to which must be added costs and expenses which he is entitled to recover out of the property. But it is clear that in addition to the amount the mortgagee is entitled to add to the principal money,(6) a further charge created by some of the mortgagors on the security of the same property, would also have to be paid.(7)

1360. The last paragraph of this section instances another case in which the price of redemption would be proportionately reduced. Other equities including those mentioned in section 76 might also vary it. But it cannot be varied with the price paid by the purchaser of the mortgagee's rights whether in a voluntary assignment or an involuntary sale. If, therefore, the prior mortgagee being due a sum of money, say Rs. 1,000 on his mortgage, and for its recovery and in execution of his mortgage-decree thus obtained purchased the

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(1) *Gumna* v. *Bhiku*, I. L. R., 1 Bom., 125; *Balaji* v. *Sakharam*, I. L. R., 17 Bom., 555; *Kankuchand* v. *Rustomji*, I. L. R., 20 Bom., 109; *Koshiram* v. *Pande*, I. L. R., 27 Bom., 1; *Mumford* v. *Peal*, I. L. R., 2 All., 857; *Keen* v. *Brisco*, 8 Ch D., 201.

(2) *Cheni* v. *Kadum*, I. L. R., 5 Cal., 97; *Monmohun* v. *Durgachurn*, I. L. R., 15 Cal., 502; *Mohesh Chandra* v. *Prosanna Lal*, I. L. R., 31 Cal., 83 (87); *Jadab Chandra* v. *Bhairab Chandra*, I. L. R., 31 Cal., 297.

(3) *Jadab Chandra* v. *Bhairab Chandra*, I. L. R., 31 Cal, 297.

(4) Art. 132, read with Art, 75, Indian Limitation Act (IX of 1908); *Sitab Chand* v. *Hyder Malla*, I. L R., 24 Cal., 281; *Jadab Chandra* v. *Bhairab*, I. L. R., 31 Cal., 297; *Sadhu Ram* v. *Arthur Bowles*, I.L.R., 8 Bom., 561; *Kankuchand* v. *Rustomji*, I. L. R., 20 Bom., 169; *Maharaja of Benaras* v. *Nand Ram*, I.L.R., 29 All., 431; *Shunarayan* v. *Ram Din*, 11 I.C. (Oudh), 526; *Gopal* v. *Dhondia*, 8 N.L.R., 44; *contra Ajudhia* v. *Kunjal*, I.L.R., 30 All 123.

(5) *Kemp* v. *Garlands*, 4 Q.B. 519; followed in *Reeves* v. *Butcher*, (1891) 2 Q.B., 509.

(6) S. 72.

(7) See s. 79 *post* Comm.; *Bhagwan Dass* v. *Mahomed*, 4 N.W.P.H.C.R., 161.

property himself for say Rs. 100, a subsequent mortgagee seeking to redeem him is under the provisions of this section liable to pay him the mortgage-money actually due irrespective of the price for which he had himself acquired the property.(1)

1361. Appropriation of Payments.—The question of the appropriation of payments generally has been dealt with in sections 59-61 of the Indian Contract Act. (2) Ordinarily, all payments are presumed to have been made in the first place to sink the interest, before any part of the principal is discharged.(3)

Mode of payment.

1362. The payment of money must be in the coin of the realm, unless the mortgagee accepts a negotiable security, a bill of exchange, or indeed, anything in full or partial satisfaction.(4) But acceptance of a bond or a promissory note does not extinguish the original security. It is not payment but promise of a payment or giving an additional security. But if the mortgagee has received the fresh document as cash or in discharge of the original security, it will have that effect. So if he received a bill taking upon himself the risk of its being paid at maturity, the original debt is discharged, though a new one is created. Again, if the creditor only took it as a security, but failed to present it when due, or give notice of its dishonour, the bill becomes money in his hands as between himself and the person from whom he received it, (5) and the debt is then considered as discharged as from the date of the delivery and acceptance of the security. (6) The creditor must then present the bill within a reasonable time for payment, for if he withholds presentment for an unreasonable time, and the banker becomes in the meantime insolvent, the debtor is discharged on account of the laches of the creditor. The question what is a reasonable time, is one of fact and must be determined in each case on its own circumstances, but there may be cases in which even three weeks' delay may be held to be unreasonable. (7)

1363. If at any time the creditor allows a pecuniary claim and a balance is struck, the allowance in account is payment *pro tanto*. (8) A currency note is money and may be given in payment. In one case, a tender was made in County bank notes which the creditor was not bound to accept, but as to which he took no objection, but claimed a larger sum. It was held that he could not subsequently object to the character of the tender, because if he had objected at once on that ground, it would have given the debtor an opportunity of getting other money and making a valid tender, but by not doing so and claiming a larger sum he had deluded the debtor. (9)

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(1) *Dip Narain Singh* v. *Hira Singh*, I.L. R., 19 All. 527 ; *Phulmani* v. *Nageshar*, I.L., R., 33 All. 370 (372). For a further discussion on this subject, see O. 34, r. 1, Comm. *post*.

(2) Act IX of 1872.

(3) Fisher § 1514.

(4) *Sibree* v. *Tripp*, 15 L. J. Ex., 318; *Curlewis* v. *Clark*, 18 L.J., Ex. 144; *Goddard* v. *O'Brien*, 9 Q.B.D., 37 ; *Bidder* v. *Bridges*, 37 Ch. D., 46 ; In re *London & S. S. Bank*, 34 L.J. Ch., 418.

(5) *Peacock* v. *Pursell*, 14 C. B. N. S., 728.

(6) *Sard* v. *Rhodes*, 1 M. & W., 155; *Caine* v. *Coulton*, 32 L. J., Ex., 97.

(7) *Hopkins* v. *Ware*, L. R., 4 Ex., 265. See now as to what is reasonable time, s. 74, Bills of Exchange Act, 1882.

(8) *Callander* v. *Howard*, 19 L. J. C. P.; 312 ; *Holland* v. *Russell*, 30 L. J. Q. B., 313, but in *Perry* v. *Attwood*, 25 L. J. Q. B., 408, it was held that the items allowed must not be all on one side.

(9) *Polglass* v. *Oliver*, 37 R. R., 623 ; *Kishan Prasad* v. *Beni Ram*, I.L.R., 24 All., 85 (89).

Payment by money order.

1364. As to the manner in which the payment should be made, the debtor is bound to comply with the reasonable directions of the creditor. If the mortgagor is directed to remit the amount of the debt by the post, the debtor is discharged by delivering the money at the post-office, enclosed in a cover properly addressed to the creditor at his usual place of business or residence. Another mode of payment is by money-order where the post-office peon delivers it at the creditor's house, but if the creditor was to call for it at the post-office, he is not bound to accept the tender so made. But if the creditor accepts some instalments of money so payable, he could not afterwards refuse to recognize the same mode of transit. And even where he is so entitled, if he temporizes as by stating that he would take the money after enquiry, and then refuses, he refuses at his own peril.(1) The post-office acts as the payer's agent until the payment is made to the payee. It is the same as if the money had been sent by a messenger. The loss in transit then falls on the payer, and the payee cannot be held liable if the money has miscarried or was stolen before delivery.

Presumption of payment.

1365. There are circumstances from which a legal presumption may be made in favour of payment. Such a presumption may legitimately arise if the mortgage-deed is found in the hands of the obligor,(2) or a receipt for the mortgage-money is produced by him, or there has been unaccountable delay warranting presumption of satisfaction(3) or indeed, from any circumstances from which a similar presumption may be legitimately made. A receipt for the last year's or quarter's rent is evidence that all the rents previously accrued have been paid. But such a receipt must be in the handwriting of the payee or of his authorized agent.(4) Payment may again be presumed from circumstances which are inconsistent with the contrary assumption. As a domestic servant who was habitually paid weekly wages may be presumed to have been paid if he was never heard to complain, so a mortgagee may be presumed to have been paid off if he has failed to demand payment for any great lapse of time. Thus if no demand be made for twenty years, payment of a bond is presumed.(5) Indeed, a shorter period would suffice if the presumption is otherwise fortified, as by a settlement of the account in the meantime.(6) On the other hand, the presumption may be rebutted by proof of an intermediate settlement of accounts, admission by the debtor, or of payment of interest within twenty years. Other circumstances may be proved to rebut the presumption, as that the debtor resided abroad during the whole of the time,(7) or was insolvent.(8) This rule has nothing to do with the law of limitation, for while the latter creates a bar, the former is only evidence of it.(9)

1366. Proper Time for Payment.—The proper time for payment is, of course, after the mortgage-money has become payable (§1083). But what is

(1) *Kishan Prasad* v. *Beni Ram*, I.L.R., 24 All., 85.

(2) S. 114, ill. (*i*), Indian Evidence Act (I of 1872); *Chuni Kuar* v. *Udai Ram*, I.L.R., 6 All., 73; *Chockalingam* v. *Mayandi*, I.L.R., 19 Mad., 485 (496); *Ram Coomar* v. *Ram Saye*, 11 W. R., 151.

(3) *Achobandil* v. *Mahabir* I.L.R., 8 All., 641; followed in *Behari* v. *Ram Chandra*, I.L.R., 33 All., 483 (486), in which a delay of 12 years in obtaining possession due under the deed was held to justify a presumption that the mortgage-deed was either, as pleaded, without consideration, or that it had been satisfied.

(4) *Pfiel* v. *Vantenberg*, 2 Camp., 439.

(5) *Oswald* v. *Leigh*, 1 T.R., 270; *Bostock* v. *Hume*, 7 M. & G., 893.

(6) *Colsell* v. *Budd*, 1 Camp., ; I.L.R. 33 All., 483.

(7) *Newman* v. *Newman*, 1 Stark., 101; *Elliott* v. *Elliott*, 1 M. & R., 44.

(8) *Fladong* v. *Winter*, 19 Ves., 196.

(9) *Per* Lord Mansfield in *Oswald* v. *Leigh*, 1 T. R., 272.

here implied is that the payment should be made on the appointed day if previously fixed, otherwise it must be made at a convenient time at which the money might be counted before sunset If a particular hour be appointed, *e.g.*, three o'clock, it is sufficient if the mortgagor or the mortgagee attends the place shortly before four o'clock. (1)

1367. Before recognition of the right of redemption in the mortgagor, when covenants in mortgage-deeds were literally enforced (§ 919) it was customary to specify the place and hour for redemption. But now since payment may be made " at any time " after accrual of the right, the question is shorn of its pristine importance, inasmuch as more than one way is now open to the mortgagor to redeem his property.(2) But still there may be a case when time would be regarded as of the essence of the contract. Thus in a usufructuary mortgage of agricultural land in which it had been stipulated that the mortgage might be redeemed by the payment of a certain sum in the *Jeth* of any year, it was held that, having regard to the agricultural conditions of the country, the time of payment was of the essence of the contract and that the mortgagor would not be entitled to redeem in any other month.(3) "It is necessary for the mortgagee who is liable to be redeemed," observed the Court, " to know before he commences to sow his crops whether he will have to give up possession in that year or not, and that no doubt is the reason for the stipulation that the redemption might take place in *Jeth*."(4)

1368. Place of Payment.—It is a general rule, now commonly recognised that a contractual obligation *prima facie* must be discharged by the debtor going to the creditor and paying him wherever he may happen to be.(5) The only exception allowed to this rule is the creditor's absence from the country, in which case the debtor is exonerated for non-payment during the period of his absence.(6) Payment at the creditor's place of business or residence is only presumed in the absence of an express agreement to the contrary. If the parties have contracted for payment in a particular manner or at a given time or place, effective tender can be made only by complying with the express intention of the parties. But where no place for the performance is prescribed in the agreement, the question may have to be determined by what would be regarded as the intention by necessary implication, or it may be determined by the nature of the act to be done in the performance, or in some cases by positive law. Where the place of performance is not the subject of an express agreement, and even in cases where it is so, it is permissible to look not only to the circumstances existing at the time of the contract, but the conduct of the parties and all other circumstances may be looked at to determine the place of performance.(7) As has been observed by Kay, L. J.: " In construing any contract regard

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(1) *Knox* v. *Simmonds*, 4 Bro. C. C., 433 ; *Bernard* v. *Norton*, 10 L. T. (N. S.), 183.

(2) See S. 83 Comm.

(3) *Bansi* v. *Girdhar*, (1894) A. W. N.. 143 (144).

(4) *Bansi* v. *Girdhar*, (1894) A W.N., 143 (144).

(5) *Poole* v *Tumbridge*, 2 M & W., 223 ; *Robey* v. *Snæfell Mining Co.*, 20 Q.B.D , 152 ; *Gopi Krishna* v. *Nilkomul* 13 B L. R , 461 ; *Hills* v. *Clerk*, 14 B. L. R., 367 ; *Motilal* v. *Surajmal*, 6 Bom. L. R., 1038 ; *Narsingha* v. *Tarachand*, 2 N. L. R., 62 ; *Contra* in Savigny Prev. Inter. (Guthrie) 203—210, according to whom the presumption is in favour of a contract being fulfilled at the domicile of the obligor but which is no longer law. In *Puttappa* v. *Virabhadrappa*, 7 Bom. L. R., 993 (994), it was said that the place must be determined with reference to S. 49 of the Indian Contract Act ; which however does not affect the statement in the text.

(6) *Fessard* v. *Mugnier*, 18 C. B. (N. S.), 286 *The Eider* [1893], p. 119.

(7) *Reynolds* v. *Coleman*, 36 Ch. D., 453 ; *Reid* v. *Stein*, [1892] 1 Q.B., 753; *Bell* v. *Antwerp*, [1891] 1 Q.B., 103.

must be had not only to the words of it, but also to the surrounding circumstances under which it was made, and it is possible that though it may not be stated in terms where the contract is to be performed, yet from the words, taken in connection with the surrounding circumstances, as strong an indication may be found as to the place where it is to be performed as if it had been stated in express terms." (1)

1369. The nature of the act to be done in performance often determines the place of performance, as when the obligation is to work on land, or to build, to improve, or even to let a house. Similarly, in a suit to have a mortgage-deed registered, the cause of action would naturally accrue at the place where the deed could be legally registered.(2) A land executed at Arrah was presumably intended to be payable there rather than at Patna where the creditor began to live subsequently.(3) So again, where the defendant in consideration of the loan paid in Calcutta, agreed to execute a mortgage of properties outside that city, and on his failure to execute the mortgage, the creditor sued for the refund of the money paid out, it was held that the money was repayable in Calcutta where it had been originally paid.(4) A person sent money from Karwar to a firm in Bombay for certain goods, and in case of its inability to supply them, asked it to pay the same to another person there, provided he shipped the goods to him at Karwar, and the firm paid the money under a contract that the goods would be shipped. It was held that on breach of the contract the money was re-payable in Bombay and not at Karwar, as the contract between the payee and the firm acting on behalf of the plaintiff was both entered into and intended to be performed in Bombay.(5) In many cases unmistakeable clue to the real intention of the parties would be found in the ordinary course of commercial relations. Thus where *C* and *L* entered into an agreement at a place in the Saran District, in which the latter resided and carried on business, whereby *C* promised to sell and deliver to *L* at a place in the Saran District certain goods, which *L* promised to pay for on delivery, " by approved draft on Calcutta or Cawnpore (where *C* carried on business) " payable thirty days after the receipt of the goods or by currency notes "; " it was held that the parties intended that payment should be made at Cawnpore, which was the vendor's place of business. (6) So payment to be "made in cash against the receipt of the documents " for coal sold to be delivered at Genoa was similarly construed in the light of the course of business which in the case had been to pay in England. (7) A *hundi* is payable at the place where it is indorsed and not where it is payable. (8) In partnership contracts where the business is carried on substantially in two or more places, money may legitimately be paid in each of those places, (9) unless there be a central place of business where the partnership books were kept, and which the partners would have recourse to for the purpose of ascertaining the state of the transactions between them. (10)

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(1) *Bell* v. *Antwerp*, [1891] 1 Q.B., 103.

(2) *Sami* v. *Gopal*, 7 M.H.C.R., 176.

(3) *Nirban Singh* v. *Kumla Sahoy*, 17 W. R., 345.

(4) *Sreenath* v. *Cally Doss*, I.L.R., 5 Cal., 82; *Deokee Nundun* v. *Oomrao Singh*, 2 Agra, 248; *Chunilal* v. *Mahipatra*, 5 B.H.C.R., (A.C.) 33.

(5) *Dadabhai* v. *Diog*, I.L.R., 18 Bom., 43.

(6) *Llewhellin* v. *Chunni Lall*, I. L. R., 4 All., 423; following *Prem Shook* v. *Bhekhoo* (1868), N. W. P. H. C. R., 242, F. B.; *Gopikrishna* v. *Nilkomul*, 13 B. L. R., 461; *Hills* v. *Clark*, 14 B. L. R., 367.

(7) 40 W. R. (Eng.), 120: *Reid* v. *Stein*, [1892] 1 Q.B., 753; *Thompson* v. *Palmer* [1893], 2 Q. B., 80.

(8) *Suganchand* v. *Mulchand*, 9 B. H. C. R., 270.

(9) *Bavah Meah* v. *Khajee Meah*, 4 M. H. C R., 218.

(10) *Luckmee Chand* v. *Zorawar Mull*, 8 M. I.A., 291; *Jaagna* v. *Ganida* (1897), P.R., No. 62.

1370. In some cases resort must be had to the positive law for the purpose of ascertaining the place of performance. When promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place. (1) And when a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place. (2) If then the mortgagor is in doubt as to the proper place where payment is to be made, he must apply to the mortgagee, whose duty it is to appoint a place for payment. In Indian deeds the mortgagee is usually described as of a certain place, and in the absence of anything to the contrary, this must be presumed to be the place which the mortgagee has designated for receiving payments.

Deposit in Court. (S. 83.)

1371. If the mortgagor prefers it, he may deposit the money in Court, and thereupon the Court is enjoined to proceed as directed in section 83. (3)

1372. Valid Tender.—Tender is not payment but an offer of payment into which it is converted on acceptance, and which if refused leads to the same legal consequence. In order to constitute a valid tender it is then necessary that the money must as a rule be actually produced and offered for payment (4) but this is only a general but not an invariable rule. (5) For, as Lord Ellenborough said: "The actual production of the money due, in moneys numbered, is not necessary if the debtor having it ready to produce and offering to pay it, the creditor dispense with the production of it at the time, or do anything which is equivalent to that."(6) And it has been held that a person is not bound to prove a formal tender, if it appears that it would have been a mere form, as the creditor would have refused to accept the money.(7) It is, however, no tender if a person should merely say, without making any offer of it, that a certain sum had been left with him for payment to the creditor, when he called.(8) So again, a letter from a debtor expressing his readiness to pay the money, and stating that he now tenders it without enclosing the money, is not a valid tender, though the creditor may have so regarded it.(9) In order to constitute a valid tender, while money need not be actually shown to the payee, nor the bag or pocket in which it is contained shaken so that "he may hear the money jingle," and thus be tempted to receive it, as was indeed at one time held,(10) still the money must be available for immediate delivery,(11) since mere readiness to pay is not a tender.(12) Indeed, in the case of reciprocal promises, a tender of money does not

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(1) S. 48, Indian Contract Act (IX of 1872).

(2) *Ib.*, S. 49.

(3) As to the scope of which, see Comm. thereunder.

(4) *Thomas* v. *Evans*, 10 East. 101 ; *Glasscott* v. *Day*, 5 Esp., 48 ; *Huxham* v. *Smith*, 2 Camp., 21 ; *Harendra Nath* v. *Maharani Dasi*, I. L. R., 28 Cal., 557, P. C.

(5) At one time the production of money was the *sine qua non* of a valid tender, for it was said that the creditor might be tempted by the sight of the money to receive it. *Ex parte Danks*, 2 De. G. M. & G., 936.

(6) *Thomas* v. *Evans*, 10 East, 101 (102).

(7) *Hunter* v. *Daniel*, 4 Hare, 420 (433); 67 E. R. 712 (717).

(8) *Hunter* v. *Daniel*, 4 Hare, 102.

(9) *Powney* v. *Blomberg*, 14 Sim., 179 ; *Kamaya* v. *Devopa*, I.L.R., 22 Bom., 440.

(10) *Wade's Case*, 5 Rep., 115 ; *Ex parte Danks*, 2 De. G. M. & G., 936.

(11) *Juggernath* v. *Ram Dyal*, I.L.R., 9 Cal., 791 ; *Pandurang* v. *Dadabhoy*, 4 Bom. L.R., 453 ; *Pestonjee* v. *Hormasje*, 5 Bom. L. R. 387 ; *Shri Ram* v *Madangopal*, I.L.R., 30 Cal., 865 (871), P.C.

(12) *Gretton* v. *Mess*, 7 Ch. D., 839.

imply actual offer of it, but it is enough if it appears that having the money in readiness the tenderer says, "Perform your promise and take away your money." The law of tender, as embodied in section 38 of the Indian Contract Act, is more elastic than the English rule which is exceedingly rigid.(1) All that a valid tender here requires is that there should be a genuine and unconditional offer to pay at a proper place, made by a person in a position to pay.(2) A tender must be of the whole amount due, but if it is made in the belief that it is the whole amount due, it may be good *pro tanto*.(3)

1373. A tender may be made in the currency in which the debt is contracted,(4) but the mortgagor may pay in the coin of the realm,(5) allowing for the difference in value between the currency in which the debt is contracted and that in which it is paid. A tender made in notes of Rs. 1,000 and Rs. 500 is good, and it was not necessary to change the notes unless the offer was accepted on that condition.(6) A tender in counterfeit coin is said to be good if accepted,(7) although the mortgagee may prosecute the mortgagor for cheating.(8) A tender may be made by cheque and is good if accepted, or not objected to on that ground.(9) But a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized.(10)

Tender under protest.

1374. A tender must be unconditional,(11) that is to say, it must not be clogged with conditions and reservations, and made in such terms that the party accepting the tender would be drawn into admission against himself. For example, an offer of money to be accepted as "all that is due." or "in full of all demands," or "as the balance due," or "as a settlement" or with other words to the same effect, is not a valid tender. But a tender under protest, reserving the right of the debtor to dispute the amount due, is not conditional, because the protest merely obviates the effect of payment as an admission, and does not impose any condition on the acceptance.(12)

1375. Effect of Insufficient Tender.—It is the duty of the mortgagee to state the amount at any time due to him, and if he overstates it, he is liable for costs if the mortgagor had tendered the sum actually due, and which would then be a case of proper tender improperly refused. On the other hand, if without demanding an account from the mortgagee the mortgagor makes his own calculation and tenders a sum found insufficient, it will not be a good tender *pro tanto*, unless the mortgagee accepts it as such. It is the mortgagee's right to demand that the tender shall be of the whole sum then due. He is not bound to receive his money by instalments. Any sums paid to him on account of his mortgage short of the

(1) *Per* Wilson, J., in *Kanye Lal* v. *Khettermoney*, 5 C.L.R., 105 (107).

(2) *Ibid.*, p. 107.

(3) *Dixton* v. *Clark*, 5 C.B., 365; *Haji Abdul* v. *Haji Noor Mahomed*, I.L.R., 16 Bom., 141 (149).

(4) *Trimbak* v. *Sakharam*, I.L.R., 16 Bom., 599.

(5) *Trimbak* v. *Sakharam*, I.L.R., 16 Bom., 599 (692).

(6) *Kanye Lal* v. *Khettermoney*, 5 C.L.R., 105 (107); *Alexander* v. *Brown*, 1 C. & P., 288.

(7) Bac., Abr., Tender, B.

(8) Shep., Touch., by Preston, 136*n*.

(9) *Jones* v. *Arthur*, 8 Dowl., P.C., 442; *Blumberg* v. *Life Interests, &c., Corporation*, [1897] 1 Ch., 171; C.A. [1898] 1 Ch., 27.

(10) *Belshaw* v. *Bush*, 22 L.J., (C.P.), 24; *Curiel* v. *Misa*, L.R., 10 Ex., 153 (163); *Kutayan* v. *Palaniappa*, I.L.R., 27 Mad., 540; *Komal Prasad* v. *Savitri*, (1905), A.W.N. 181.

(11) S. 38 (1), Indian Contract Act (IX of 1872).

(12) *Manning* v. *Lunn*, 2 C. & K., 13; *Scott* v. *Uxbridge Ry. Co.*, L.R., 1 C. P., 596; *Sweny* v. *Smith*, L. R., 7 Eq., 324; *Greenwood* v. *Sutcliffe* [1892], 1 Ch., 1; *Jugguttuttee* v. *Madho Singh*, (1855), S.D.A., 54.

mortgage-money will not redeem the property *pro tanto*, and strictly speaking, the mortgagee may treat them as deposits received against the final payment which alone satisfies his demand and entitles the mortgagor to redemption. Somewhat thorny questions may arise in this connection ; for instance the stipulated rate might, if the matter were tried by the Court, be adjudged penal. But is the mortgagee therefore, bound to treat it as such, and omit it from his calculations ? It would seem not. In such cases then the mortgagor cannot make any tender without ascertaining the precise sum due, and which the mortgagee is entitled to demand in accordance with the terms of his mortgage. His refusal to accept less would then be well justified, though the Court may eventually remit any portion of his claim treating it as a penalty, since the section entitles him to be paid his "mortgage-money" which the Act has elsewhere defined to be "the principal money and interest of which payment is secured for the time being"—and which, it is apprehended, must mean the interest contracted for [1] and not only the interest which the Court considers it right to allow.

Who should tender.

1376. A tender must be made by the debtor or in case of joint-debtors by any one of them, [2] and in the case of a mortgage either by the mortgagor or any person entitled to the equity of redemption. [3] And in the case of the death of any of the debtors his representatives, and after the death of the last survivor, the representatives of all jointly are liable to pay, and therefore entitled to make a tender. This is the very reverse of the common English law rule which throws the liability off a joint-contract on the surviving joint-debtor or his representatives, [4] but equity considering the contract for that purpose as joint and several disallows the right of survivorship. [5] And so, while the debtor may discharge his liability by making payment or tender to a joint-creditor co-creditors can only jointly demand payment, [6] and after the death of any of them the representative of such deceased person jointly with the survivor or survivors and after the death of the last survivor, the representatives of all jointly become entitled to demand payment. But, of course, if a co-creditor has renounced his right, as where in a partition a mortgage is allotted to an individual member, the right would then be enforced by him singly. The *jus accrescendi* however prevails in the case of trustees, entitling the surviving trustee to enforce payment, unless the trust-deed declares otherwise. [7] The mortgagor is not bound to pay the executor until he obtains probate. If therefore he had tendered the amount to the executor before probate, but refused to deposit it in the name of two solicitors pending the disposal of his probate application, the tender was held to be good as from the date it was made. [8] A proper tender must be shown to have been made by a proper person to the proper person. [9] A stranger to the mortgage, if not entitled to redeem by virtue of possessing an interest in the equity of redemption is not, except as an agent of the holder of the equity of redemption, entitled to make a good tender since the mortgagee is entitled to hold the property against all but those entitled to redeem his mortgage. So the mortgagee may, it appears, decline to accept tender from a

(1) S. 58 (*a*).
(2) S. 42 Indian Contract Act (IX of 1872).
(3) S. 91 *post*.
(4) *Richards* v. *Heather*, 1 B. & Ald., 29.
(5) "*Jus accrescendi inter mercatores pro-benet ficio commerciæ locum non habet.*" The right of survivorship does not exist among merchants, for the benefit of commerce.—*Webbe* v. *Lester*, 2 B. H. C. R. (A. C.), 152 ; *Kendall* v. *Hamilton*, 4 App. Cas., 504.
(6) S. 45, Indian Contract Act (IX of 1872).
(7) S. 76, Indian Trusts Act (II of 1882).
(8) *Pandurang* v. *Dadabhoy*, 4 Bom. L. R., 453.
(9) *Ram Nath* v. *Gopal Chandra*, 8 C. W. N., 153 (155).

minor son of the original mortgagor since deceased, on the ground that the rights and obligations being reciprocal the mortgagee cannot bind him.(1)

1377. In an old case (2) Phear, J., laid down that a valid tender could only be made by all the mortgagors conjointly, and that the mortgagee was not bound to accept tender from an individual mortgagor, for "the same reason which renders it necessary that all the mortgagors should be made parties to the suit which any one of them may bring for the purpose of redeeming the mortgaged property." But this argument would have been sound if the law had been that all the mortgagors should join as plaintiffs in the suit. The fact that all mortgagors shall be impleaded as parties in a mortgage suit lends no countenance to the reasoning that all co-mortgagors should make a joint offer. On the other hand, any person at all interested in the equity of redemption, and not the whole of it, nor indeed, in the equity extending to the whole of the property is declared entitled to redeem,(3) and consequently, of course to tender the price of redemption. A good tender may be made by the agent or solicitor of the mortgagor (4) to the agent or solicitor of the mortgagee authorized to make and receive payments in respect of the mortgage by their principal, of which the other party to the transaction is entitled to sufficient proof. A general agent of the mortgagee as such is not entitled to render as the power of receiving the money is not incident to the character of the agent.(5)

1378. Clog on Redemption.—The right of redemption here conferred may be delayed and even defeated by the onerous conditions of the mortgage deed intended to make or having the effect of making redemption extremely difficult, costly or impossible. The Courts have, therefore, laid down certain well defined rules beyond which the equity of redemption cannot be fettered, and which are declared void being treated as "Clogs on Redemption."

1379. The mortgagor may, after the mortgage-money has become payable and before his right of redemption is barred, (i) enforce his right to redeem under this section, or (ii) proceed under section 83 by making the deposit in Court, or (iii) he may bring a regular suit for redemption under section 91. All the three courses being at one and the same time open to him, he is at liberty to adopt one or the other, or all of them successively. The first course requires no intervention of the Court. In the second, the Court exercises its benignant summary jurisdiction. The third is a regular suit, but a suit which follows a procedure of its own which calls for some comment.

Right how enforceable.

1380. Suit for Redemption.—It has already been stated that the mortgagor before he can redeem must either (i) pay or tender, (ii) at a proper time and place, (iii) the whole of the mortgage-money including the cost, if any, of repairs and improvement of the property incurred by the mortgagee. (6) The meaning of these terms has also been already explained(7) (§§ 1135—1140). It is not, however, in every case essential for the mortgagor to pay or tender the money before instituting his suit for redemption, for such payment may depend upon the taking of accounts which can only be gone through adequately in Court. Ordinarily, however, the mortgagor should be ready at once with

(1) *Ram Baksh* v. *Ram Lall*, 21 W.R., 428.
(2) *Ibid.*
(3) S. 91 *post.*
(4) *Ward* v. *Carttar*, 35 Beav., 171.
(5) *Burrough* v. *Cranston*, 2 Ir. Eq., R., 203.
(6) *Durga Singh* v. *Naurang Singh*, I. L. R., 17 All., 282; *Joy Govind* v. *Bhundoo Singh*, 17 W.R. 342.
(7) See §§ 924 & 226.

his money, (1) but in practice, suits are never dismissed, if on inquiry a sum larger than that previously tendered is found due. (2) In a redemption-suit the mortgagor must state in his plaint the title upon which he relies and give at least *prima-facie* evidence of his subsisting right to redeem. (3) "But in this as in most other cases, where the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence, and although the burden of proof *prima-facie* in this case in their Lordships' view is upon the plaintiffs, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *prima-facie* at all events, more in his power to give accurate evidence of its contents than in that of the plaintiff." (4) But what the mortgagor has to prove is not a mortgage, but *the* mortgagee upon which he bases his title. (5) But in one case where in a suit for redemption the plaintiff failed to prove the mortgage set up by him, the Court allowed him to redeem a different mortgage under which the defendant claimed to hold. (6) In another case the plaintiff had sued for redemption of a mortgage and possession which he alleged the defendant held as mortgagee. The latter denied the mortgage and accounted for his possession by right of purchase from the plaintiff. The plaintiff's mortgage was found void under section 12 of the Bengal Tenancy Act, the defendant's purchase was not proved, whereupon the Court decreed the claim upon the plaintiff's general title holding that the plaintiff's suit for redemption and possession was in substance a suit for possession of the land. (7) Of course a person entitled to redeem must sue for redemption claiming it as a consequential relief. He cannot be permitted to sue merely for a declaration of his right to redeem, reserving his other available remedies to another suit, (8) which is, of course, different to a suit which the mortgagor may maintain for a declaration of his title as mortgagor, (9) which he may establish by shewing his subsisting interest in the mortgaged property. He may not be able to specify or define his interest therein, but he must at least make out a *prima-facie* case bringing himself within the provisions of section 91. No lapse of time can exonerate him from this liability. On the other hand, where the mortgagee has been in possession for a considerable time, the presumption that he has the title becomes all the stronger, and to rebut which the evidence adduced must be proportionately stronger. (10) As his suit is to redeem, he must admit the title of the mortgagee, and if he institute a suit for setting aside the mortgage, he cannot afterwards convert his suit into one for redemption, (11) at least without the defendant's consent. A

(1) *Barda Kant* v. *Bhagwan*, I. L. R., 1 All., 344.

(2) *Sahib Zadah* v. *Parmeshar*, I. L.R., 1 All., 524.

(3) *Parmanand* v. *Sahib Ali*, I. L. R., 11 All., 438 (448); *Govindrav* v. *Ragho*, I.L.R., 8 Bom., 543 (546); *Kishen Dutt* v. *Norendra*, L.R., 3 I.A., 85.

(4) *Kishen Dutt* v. *Norendra*, L.R., 3 I.A., 85; *Ratan Kuar* v. *Jiwan Singh*, I. L. R., 1 All., 194; *Bhagwan* v. *Mahabir*, I. L. R., 5 All., 184; *Nura Bibi* v. *Jagat Narain*, I. L. R., 8 All., 295; *Balaji* v. *Babu Deoli*, 5 B.H. C.R. (A. C.), 1; *Sevaji* v. *Chinna*, 10 M. I. A., 160.

(5) *Ram Chandra* v. *Balaji*, I. L. R., 9 Bom., 137 (140).

(6) *Kadakamvalli* v. *Makkath*, I.L.R., 30 Mad., 388 (390).

(7) *Ananda* v. *Khudi Ram*, 19 C.L.J., 532.

(8) S. 42. Specific Relief Act; *Lekhraj* v. *Abdul Ghafur*, (1894) A.W.N. 205.

(9) *Bujhawan* v. *Nanha*, (1882) A.W.N., 73; *Ramcharan* v. *Durga Prasad*, (1884) A. W.N, 78; *Nathu Singh* v. *Gumani Singh*, I.L R., 18 All., 320.

(10) *Parmanand* v. *Sahib Ali*, I. L. R., 11 All., 438 (452, 453); cited *Ram Chandra* v. *Balaji*, I. L. R., 9 Bom., 137 (140); *Sheo Ruttun* v. *Doorga* (1874), N. W. P. H. C. R., 36.

(11) *Chandu* v. *Kombi*, I. L. R., 9 Mad., 208; *Lakshman* v. *Hari Denkar*, I. L. R.,

Court can, however, in its discretion, pass a decree for redemption in a case in which the plaintiff only sues in ejectment. (1) And this does not prevent the mortgagor from pleading in the alternative, by questioning the validity of the instrument, and offering to redeem it if it is established. (2) He may, moreover, aver that the mortgage-money has been repaid, and in the alternative, that in the event of the Court finding any sum to be still due under the mortgage, he is prepared to pay such further sum. A mortgagor seeking to redeem must prove how much of the debt and interest has been paid. (3) But if under a mistaken belief that his mortgage has been discharged, he sues for redemption, his suit cannot be defeated, even if it afterwards appears that the mortgage-money has not been paid off. (4) In such a case the decree for redemption will be passed conditional on the mortgagor paying in the amount found due by him, and then it will be the duty of the mortgagor to satisfy the decree subject to the provisions of section 92, even if the decree omits to state the consequence in case of default. (5) In such a case the decree may be executed at any time within the period of limitation prescribed by Article 179 of the Second Schedule of the Limitation Act. (6) A mortgagor who institutes a suit for the redemption of his mortgaged property is entitled to put an alternative claim before the Court. The section, again, raises no bar to a suit for redemption where the mortgage-money has not been paid or tendered. For, as before remarked, it would be impracticable to make such a tender or payment in cases in which there is a dispute as to the amount payable, or in which an account has to be taken, or the person seeking to redeem is other than the mortgagor. (7) It has been before observed that the party suing for redemption must shew his title to redeem; (8) " for the mortgagee is entitled to hold the estate against everybody who has not a paramount title and if possession has been got against him by fraud, pending the suit, the estate must be restored before redemption. If the defendant can make out a case which directly goes to show that the title is in another person than the plaintiff, the latter will not even be suffered to redeem at his peril." (9)

1381. But a mortgagee cannot demand conclusive proof of interest in the mortgaged property as a condition precedent to the right of redemption. A person showing the *prima facie* title to represent the whole estate of the mortgagor can, in the absence of proof of better title, demand a reconveyance from the mortgagee on payment of what is due. (10) And a mortgagor, after he receives the mortgage-money from one of the parties, cannot afterwards refuse to reconvey, on the ground that the suit is defective from want of parties. (11) But, if the

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4 Bom., 584 (588); *Ranee Surnomoyee* v. *Maharaja Sutteeschunder*, 10 M.I.A., 123; S. 53, Civil Procedure Code.

(1) *Parshotam* v. *Rumal*, I.L.R., 20 Bom., 196; *Har Prasad* v. *Phul Chand*, 2 A. L. J. R., 609, and where the mortgagee has entered upon possession but without obtaining foreclosure the mortgagor may eject him—*Hub Ali* v. *Wazirunnissa*, I. L. R., 28 All., 496 (508), P.C.

(2) *Lloyd* v. *Watt*, 1 Ch., 61.

(3) *Kundanmal* v. *Kashibai*, 4 Bom. L. R., 42; following *Shah Mukhan Lal* v. *Sri Kishen*, 12 M.I.A., 157 (192).

(4) *Makundlal* v. *Goluck Chunder*, 9 W.R. 572.

(5) *Wazir* v. *Dhuman Khan*, I. L.R., 16 All., 65; *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40.

(6) *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40; *Bando Bhagat* v. *Shah Mohamed*, I. L. R. 44 All., 350; *Narayan Govind* v. *Anandham*, I.L.R. 16 Bom., 480.

(7) *Butchanna* v. *Varahalu*, I. L.R. 24 Mad., 408 (411).

(8) *Parmanand* v. *Sahib Ali*, I.L.R., 11 All., 438.

(9) Fisher S. 1376; *Krishnaji* v. *Ganesh Bapuji*, I. L. R., 6 Bom., 139; *Pears* v. *Morris*, L.R., 5 Ch., 227.

(10) *James* v. *Bion*, 3 Swans., 234; 2 S. & S., 600; *Pyne* v. *Bowerman*, 3 Swans, 241; *Ram Kristo* v. *Ameeroonissa*, 7 W.R., 314; *Ali Reza* v. *Tarasoonderee*, 2 W. R., 150; *Kuppusami* v. *Papathi*, I.L.R., 21 Mad., 369.

(11) *Pearce* v. *Morris*, 5 Ch. 297; *Hall* v. *Heward*, 32 Ch. D. 430.

payment has been made by a party who holds under an imperfect title from the mortgagor, the mortgagee can call upon him to perfect his title before he would reconvey. The plaintiff may, however, complete his title even after the institution of his suit, and if he can prove a perfect title at the hearing of his case, he should have a decree for redemption. (1) In this respect redemption-suits differ from those in ejectment on the title. (2) Thus, in a case, the plaintiff as purchaser of the equity of redemption sued for redemption, alleging a mortgage, dated A. D. 1849, for Rs. 175, and the defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger sum, upon which, after the evidence was given, but before the judgment was delivered, the plaintiff sought to amend the plaint, it was held that he was entitled to have the question of the other mortgage enquired into. (3) The owner of a share in the equity of redemption need not obtain partition before suing for redemption. He is entitled to redeem the whole mortgage, and the fact that the mortgagee has himself purchased a portion of the equity of redemption does not defeat that right. (4) It was, however, held in a case in Madras that in such a case, there can be no redemption until after ascertainment of the share in a suit for partition. (5) But in order to acquire the right to redeem, all that appears to be necessary is that the party should possess some interest, (6) and not that the *quantum* of the interest be definitely ascertained. It would be, of course, necessary that the nature and extent of the interest be ascertainable but not that it should have been already ascertained. (7)

1382. Quantum of Interest Necessary for Redemption.—The question what interest a person must possess in order to entitle him to redeem the whole mortgaged property, depends for its solution upon not only the extent but the nature of the interest in the property. Thus co-widows under Hindu law inherit jointly their husband's property and *inter se* possess rights of partition, but subject to this, partition between them creates no disposing power so as to defeat the right of survivorship vesting in the co-widow, but as between them, each widow is entitled to take the income of the portion placed in her possession during her life, and to this extent a purchase from her will be protected. If therefore two co-widows jointly mortgage their husband's estate, and in a money-decree obtained against one of them her own interest in the estate is sold and purchased by the mortgagee, the other widow is entitled to redeem only the moiety of the estate during the lifetime of the widow whose interest had passed to the mortgagee. (8) A legitimate son of an illegitimate father cannot redeem a mortgage made by a previous rightful and legitimate owner of the property. (9) In the case of joint-family property, which, though

(1) *Pearce* v. *Morris*, L. R., 5 Ch., 227.

(2) *Krishnaji* v. *Ganesh*, I. L. R., 6 Bom., 139.

(3) *Ibid.*, distinguishing *Harkishan* v. *Bai Ichha*, I. L. R., 4 Bom., 155; *Lalbhai* v. *Naval*, 12 B. H. C. R., 247.

(4) *Chimnaji* v. *Sakharam*, I. L. R., 17 Bom., 365; *Hiru* v. *Bhikaji* (1888), B.P.J., 131; *Unman* v. *Rama*, I. L. R., 8 Mad., 415; *Unicha* v. *Valia*, 4 M.H.C R., 366; but see *Gobindrav* v. *Ragho*, I. L. R., 8 Bom., 543.

(5) *Mora Joshi* v. *Ram Chandra*, I. L. R., 15 Bom., 24; *Bhikaji* v. *Lakshman*, *ib.*, 27 *note*, *cantra* in *Marakar* v. *Punjapatath*, I. L. R., 6 Mad., 61.

(6) *Marakar* v. *Punjapatath*, I. L. R., 6 Mad., 61; followed in *Thillai* v. *Ramanatha*, I. L. R., 20 Mad., 295 (298).

(7) *Bhikaji* v. *Lakshman* (1888) B. P. J., 291; S. C., I. L. R. 15 Bom., 27 *note*; *Naro* v. *Vithalbhat*, I. L. R., 10 Bom., 648. *Alikhan* v. *Mahamadkhan* (1881), B. P. J., 319; *Santaji* v. *Bapaji* (1876), B. P. J. 17; *Mora Joshi* v. *Ram Chandra*, I. L. R., 15 Bom., 27 *note*.

(8) *Ariyaputri* v. *Alamelu*, I. L. R., 11 Mad., 304 (306).

(9) *Balwant Singh* v. *Roshan Singh*, I. L. R., 18 All., 253; O. A. *Roshan Singh* v. *Balwant Singh*, I. L. R., 22 All., 191, P. C., where however this point was not decided.

held in several shares by the several co-parceners, is mortgaged as a whole and redeemable upon payment of the entire sum, each and every one of the mortgagors has the right to redeem the whole estate, seeking his contribution from the rest. The rule is the same as regards all persons, other than the original mortgagors, who have acquired any interest in the land mortgaged by the operation of law, or otherwise in privity of title. (1) One of two co-uralans may bring a suit to redeem a mortgage without averring or proving that the other uralan had been asked to join as a plaintiff in the suit. (2) Where property though held in certain shares by the original mortgagors is undivided family property and is mortgaged as a whole and for an entire sum, the purchaser of a part of the equity of redemption has the right to redeem the whole property, a right which could not be defeated by a purchaser *post litem motam* of a share in the equity of redemption pending the suit, or the partial redemption allowed by a party pending the appeal. (3)

Unregistered mortgage.

1383. Where an unregistered mortgage consolidating two prior mortgages is rejected for want of registration, the mortgagor is still entitled to redeem on the strength of the prior mortgages if they are found to be genuine and valid. (4)

Right barred.

1384. A person disclaiming the right to redeem and claiming the property by a paramount title, thereby causing the dismissal of the suit in which he had an option to redeem, would be precluded from afterwards maintaining another suit for redemption. (5)

A suit for redemption against the mortgagee cannot on his death be continued against his sub-mortgagee, not being his assignee, but the suit will abate under section 368 of the Code of Civil Procedure. (6)

So if the mortgagee mortgages his rights as such, but without assignment the sub-mortgagee cannot bring the property to sale, but can at most obtain a money-decree, and may possibly in execution attach the property. (7)

The persons other than the mortgagor who are entitled to redeem are described in section 91. A mortgagee, covinously obtaining land in substitution for the one originally mortgaged with him, will hold it as trustee for the mortgagor who can redeem it, in the same way as his own land originally mortgaged. (8) And where the mortgaged land was sold at a Government sale for arrears of revenue, it was held that if the sale took place owing to the mortgagee's default, it would not affect the mortgagee's right to redeem it. The general rule, that a government sale for arrears of revenue gives a title against all the world, is subject to the exception that, if it is caused by the default of a mortgagee, it does not take away the mortgagor's right to redeem the mortgage and recover the land. (9)

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(1) *Naro* v. *Vithalbhat*, I.L.R., 10 Bom., 648; *Sakharam* v. *Gopal*, *ib.*, 656 *note*; *Alikhan* v. *Muhamadkhan*, *ib.*. 658 *note*.

(2) *Karattole* v. *Unni Kannan*, I.L.R., 26 Mad., 649 F.B.

(3) *Naro* v. *Vithalbhat*, I.L.R., 10 Bom., 648; *Nilkant* v. *Suresh Chandra*, I.L.R., 12 Cal., 414; P.C.; *Ramachandra* v. *Mahadaji*, I.L.R., 9 Bom., 141

(4) *Arumugam* v. *Periasami*, I. L. R., 19 Mad., 160.

(5) *Nilkant* v. *Suresh Chandra*, I.L.R., 12 Cal., 414 (420), P.C.

(6) *Padgaya* v. *Baji Babaji*, I. L. R., 20 Bom., 549.

(7) *Gunga Prasad* v. *Chunni Lal*, I.L.R., 18 All., 113.

(8) *Babaji* v. *Magniram*, I.L.R., 21 Bom., 396.

(9) *Kalapa* v. *Shivaya*, I. L. R., 20 Bom. 49.

1385. The equitable maxim "*qui prior est tempore potior est jure*" will govern the conflicting claims, if any, arising as between persons who by mortgage, purchase or otherwise become interested in the equity of redemption. (1) Neither by English nor Hindu law is notice of an assignment required to be given to the person in possession. (2)

Priority as between claimants.

1386. Mortgagor's Right on Redemption.—This section prescribes the manner in which redemption may be effected. On performing his part of the duties, the mortgagor may compel the mortgagee to (i) deliver the mortgage-deed, if any, to him, (ii) to deliver possession of the property, if necessary, (iii) to effect reconveyance of it, and (iv) to execute a registered acknowledgment in writing.

1387. The mortgagor is entitled to the return of the mortgage-deed, as it is an evidence of liability against him, and creates a presumption in law in favour of the mortgagee. (3) This right extends to previous mortgages, assignments and reconveyances made between the same parties, or their representatives, before he redeemed mortgage ; (4) and all copies of such deeds, which having been paid for by the mortgagor must be delivered to him on discharge of the security. (5) And if several mortgages upon distinct estates have been transferred by a single deed, one of the mortgagors who comes to redeem singly is entitled to have the deed of transfer delivered to him, upon his covenanting to produce it. (6) Where the mortgagee reconveys only part of the estate, and is entitled to retain the deeds by virtue of his absolute title to the greatest part of the property, he ought also to covenant with the redeeming party for production. (7) If the mortgage-deed is lost, the mortgagor is entitled to an indemnity at the expense of the mortgagee; but if it appear that it is in the possession of a third party, who is holding it adversely to the mortgagee, the Court will direct payment of the mortgage-money into Court for deposit, until it can be secured, (8) the mortgagor being entitled to compensation, though not specially claimed, in every case, where the loss or detention appears, or is shown to be due to the mortgagee's carelessness or fault. (9) In one case £500 was given as compensation for the loss of a deed upon which £9,300 was remaining due. (10) The damages awarded for loss of deeds may be set off against the mortgage-debt. (11) The measure of damages would vary according whether the loss was due to the mortgagee's negligence or misfortune. The mortgagee is not liable for loss of deeds delivered by the mortgagor to the mortgagee's solicitor without his privity. (12) Strictly construed, this section would appear to warrant the redelivery of the mortgage-deed alone, but if the mortgagee was also in possession of other title-deeds relating to the property, he must re-deliver them as well. In this respect sections 86 and 92 (now O. XXI, r. 1, Sch. I, Civil Procedure

Return of the mortgage-deed.

(1) *West London Commercial Bank* v. *Reliance, &c., Society*, 29 Ch. D., 954 (960) ; dissenting from *Bates* v. *Johnson*, Joh., 314 ; in which Wood, V. C., observed that the first mortgagee could elect whether he would allow the second or the third mortgagee to redeem him. See Ss. 74 & 91, and Comm.

(2) *Govindrao* v. *Ravji*, I.L.R., 12 Bom., 33.

(3) Indian Evidence Act (I of 1872), S. 114(*i*) ; *cf. Ningawa* v. *Bharmappa*, I.L.R., 23 Bom., 63 ; *Issan Chunder* v. *Beni Madhub*, I.L.R., 24 Cal., 62.

(4) *Hudson* v. *Malcolm*, 10 W. R. (Eng.), 720.

(5) In re *Wade and Thomas*, 17 Ch. D., 348.

(6) *Capper* v. *Terringson*, 1 Coll., 103.

(7) *Yates* v. *Plumbe*, 2 Sm. & Git., 174, Fisher, S. 2043.

(8) *Schoole* v. *Sale*, 1 Sch., & Lef., 176.

(9) *Ibid.*

(10) *Hornby* v. *Matcham*, 16 Sim., 325.

(11) *Hornby* v. *Matcham*, 16 Sim., 325 ; *Woodman* v. *Higgins*, 14 Jur., 846 ; *Baskett* v. *Skell*, 11 W.R. (Eng.), 1019.

(12) *Rhodes* v. *Moules*, [1895], 1 Ch., 236.

Code) are more accurately worded, inasmuch as they enjoin the return of "all documents in his possession or power relating to the mortgaged property." The mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the mortgagee's solicitor for work done relating to the mortgaged property during the continuance of the mortgage. The general lien of a solicitor is a right derived entirely through the client and cannot go beyond the right of the client himself. The equitable right of the mortgagor to have back from the mortgagee his deeds then prevails against the solicitor's lien claimed in right of the mortgagee.(1) The mortgagor may compel the mortgagee's attorney(2) or solicitor to re-deliver him the deeds.

Recovery of Possession.

1388. Recovery of possession is, of course, only necessary if the mortgagee is as such, in possession of the property. Sections 62 and 63 further provide for the same relief. But the obligation of the mortgagee in possession to restore the estate ceases if he had been himself evicted by title paramount as where in the mortgage of lease-hold property, the landlord re-entered for non-payment of rent by the mortgagee in possession, who however was not bound to pay it, and to whom no negligence could be attributed for non-payment. "The entry of the superior landlord," observed James, V. C., "was the same in effect as if a fire or a flood had come and swept away the property."(3) If the mortgagee has been deprived of the mortgaged property by the default of his mortgagor, the mortgagee does not lose his money, though the mortgagor may lose his property.

That the mortgagor can recover the property only from the mortgagee in possession, is a question which depends not upon the mere fact that the mortgagee is in receipt of the rents and profits of the property, but upon the fact that he had taken out of the mortgagor's hands the power and duty of managing the property and dealing with the tenants.(4)

How much property must be restored.

1389. The mortgagee must deliver the property with all the accessions.(5) Moreover, apart from the natural depreciation or diminution he must not dock out of the property anything for himself. It is the duty of the mortgagee and of those who have held as his assignees to identify fully the property mortgaged, and if he or they fail to do so, they come within the principle that the Court in cases relating to confusion of boundaries proceeds upon the same principle as it does where an agent or bailiff or any other person, who is under an obligation, express or implied, to keep his own property separate from the property of another, mixes them together, for under such circumstances he will have the onus thereof on him of distinguishing his own property, and if he is unable to do so, the other person will be entitled to the whole property.(6) The mortgagee in possession is, except under special circumstances bound to account for and to restore the property in its entirety, and he cannot be heard to say that he does not know what has happened to a portion of the property mortgaged.(7)

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(1) In re *Llewellyn* [1891] 3 Ch., 145 (149), *Blunden* v. *Desert*, 2 D & War., 418; *Pelly* v. *Wathen*, 1 De.M. & G., 23 (27).

(2) *Wakefield* v. *Newborn*, 6 Q B., 276.

(3) In re *Burrell*, L R., 7 Eq., 399 (408).

(4) *Noyes* v. *Pollock*, 32 Ch.D., 53, see S. 76, Comm.

(5) S. 63 *post*.

(6) *Wake* v. *Conyers*, 2 W. & T.L.C., 488; followed in *Ramchandra* v. *Mukund*, 3 Bom. L.R., 152.

(7) *Ramchandra v. Mukund*, 3 Bom.L.R., 152.

And since the mortgagee must not only restore all the property, but must restore it in the same condition in which it was, when he took possession, it follows that if he had during the continuance of his mortgage created an incumbrance or granted a lease, the incumbrance and the lease would *ipso facto* come to an end the moment the mortgage is redeemed. (1)

The subject, so far as it relates to covenants conferring on the mortgagee collateral advantages, has already received extended notice (§§ 1147—1150). In Bombay the Courts have always set their faces against a permanent or a long lease granted by the mortgagor to the mortgagee, even at a fair value. (2) Indeed, the question whether the lease was given at a fair value is in such a case extremely difficult to determine. As Lord Redesdale, L.C., in a case argued: "Suppose the land instead of being worth only £50, the rent at which it was let, was worth £60, and that £60 was offered for it, povided the mortgagee would concur: the lease could not be made without his concurrence; and the mortgagee may say, 'I will give but £50.' and thus, by the power which his situation gives him, he prevails, without using a single word of threat, like the beggar in 'Gil Blas,' who, with his gun at his shoulder, extorted money from the traveller without uttering a word." (3) But a lease granted by the mortgagor could not as such be set aside, even though it may be shown to have been improvidently made, (4) and if the rent be shown to be fair, there is then no reason why the lessee *qua* mortgagee should be placed in a worse position than any other lessee.

In what state should property be restored.

1390. The mortgagee cannot refuse to restore the mortgaged property, merely because being originally *muafi* conditional on the performance of certain services, it was assessed to rent on the mortgagor's failure to perform the services, and which had been for three years paid by the mortgagee to whom the lands were mortgaged on condition that he was to enjoy the usufruct in lieu of interest. "If, in consequence of the plaintiff's failure to perform service, Government forfeited his tenure of the land and granted it to the defendant (mortgagee)..... then no doubt the plaintiff would not own the equity of redemption, but if the Government merely demanded the payment of assessment in lieu of the performance of service, then there would be no change of title, and the plaintiff would have the right to redeem." (5)

A mortgagee in possession is bound to restore the property in at least the same state in which it was at the time he entered into possession. If therefore he brings about forfeiture by his failure to pay rent in pursuance of a compact with the Government who were anxious to acquire that land and who thereupon promised to give him another land in exchange, he cannot take the land so received freed from the equity of redemption, of which he was the trustee for the mortgagor. The right to redeem will then exist, just as much in respect of the property obtained by exchange in the same way as it existed in respect of the property originally mortgaged. (6) By parity of reasoning it has been held that the rule that a Government sale for arrears of revenue gives a title against all the world, is subject to the exception that if it is caused by the default of a mortgage, it does not take away the mortgagor's right to redeem,

(1) *Ram Chand* v. *Raj Hans*, 3 A.L.J.R., 517.
(2) *Subrao* v. *Munjapa*, I.L.R., 16 Bom., 705.
(3) *Webb* v. *Rorke*, 2 Sch. & L., 661 (668).
(4) *Hickes* v. *Cooke*, 4 Dow., 16.
(5) *Bhima* v. *Raghavendracharya*, I.L.R. 24 Bom., 482 (483).
(6) *Babaji* v. *Magniram*, I.L.R., 21 Bom. 396 (499); *Viraragava* v. *Krishnasami*, I.L.R., 6 Mad., 344 (347).

and to recover the land. (1) There can be no question of limitation as between the mortgagor and mortgagee in possession, since a mortgagee in possession cannot by setting up during the continuance of his mortgage acquire any title adverse to that of the mortgagor, by operation of the law of limitation inconsistent with the real legal relation between them, however notoriously he might set up such inconsistent title. (2) Where the mortgagor sued his mortgagee in possession for redemption and obtained a decree allowing redemption on payment of the principal money only without interest, whereupon in April 1857 he deposited the money into the treasury; but did not obtain possession, as the mortgagee had given notice of appeal on the question of interest and afterwards on account of the mutiny, his decree could not be executed: the mortgagor having died in 1869, his son brought another suit for redemption, but that suit was dismissed on the ground that by payment of the mortgage-money in April 1857, the mortgage-lien had come to an end, and that there was nothing to redeem. His younger brother brought another suit for redemption in 1895, and the Privy Council decreed his claim holding that since the money deposited in 1857 was by the *vis major* of the mutiny placed beyond the control of the Court, and as it could not have transferred possession without paying over the money which it was unable to do, the mortgagor's right of redemption could not be said to have become barred by that decree. "The fallacy of the respondent's contention is" their Lordships observed, "to apply rules for the conduct of judicial business in ordinary course to exceptional circumstances such as those occasioned by the mutiny and rebellion in Oudh." They then held that the Court had wrongly refused to decree redemption in 1869, which, however, did not operate as *res judicata* as the plaintiff before their Lordships was not a party to that suit. Finally their Lordships held that though the Government had after restoration of order refused to deliver possession to the mortgagor or to recognise his claim to the property, but had on the other hand granted a *sanad* settling the property on the mortgagee, still their Lordships held that the mortgagee must be deemed to hold as trustee for the mortgagor and so liable to be redeemed by him. (3)

1391. Reconveyance.—The next clause provides for the *re-transfer* of the property, which must not be supposed to apply only to an English mortgage for since a mortgage of any kind is the *transfer* of an interest, (4) one mode of extinguishing that interest is by its re-transfer to the mortgagor, another alternative recognized in the clause being by obtaining an acknowledgment in writing, and registered if the mortgage itself was registered, declaring the extinguishment of the mortgage. But these are by no means the only prescribed modes in which a mortgage may be determined, for it may be put an end to "by act of the parties, or by order of a Court." (5) In India these rights are but seldom asserted by the mortgagor who rests content with the return of his mortgage, and if he has to renew it, the creditor takes care not even to return the spent deed, which he preserves as a piece of evidence in support of the subsequent mortgage. But the advantage of having a re-transfer or a formal acknowledgment is manifest, for it not only removes the cloud upon the mortgagor's title created by the mortgage, but it at the same time furnishes satisfactory evidence of its removal. The mortgagor, who fails to enforce

(1) *Sambhu* v. *Babaji*, (1889), B.P.J., 160; *Kalappa* v. *Shivaya*, I.L.R., 20 Bom., 492 (494); *Nazur Ally* v. *Ojoodhuyaram*, 10 M.I.A. (540), (599).

(2) *Seshamma* v. *Chickaya*, I.L.R., 25 Mad., 507 (511); *Lakshmi* v. *Ramachandra*, 16 M.L.J R., 5.

(3) *Chaudhri Ahmad* v. *Seth Raghubar*, I.L.R., 28 All., 1 (18), P.C.

(4) S. 58, *ante*.

(5) S. 60, para. 2.

his right under the section, abandons a valuable protection given to him by Statute.(1) At the same time, it must not be supposed that if the mortgagor does not obtain a re-transfer or acknowledgment, the mortgage continues to subsist even after payment of the money due thereon, for as soon as the debt is paid, the mortgage which was the security for its payment would cease to exist. But in the case of an English mortgage it has been held in England that the cancellation of a mortgage does not re-vest the estate in the mortgagor, for which purpose a deed must be executed.(2)

1392. This clause is in its entirety taken from the English Conveyancing Act,(3) which has in England effected the same change in the law as this clause has done in India. Before the English Act the mortgagee was not bound to re-transfer the property "to such third persons as he (the mortgagor) may direct," being bound only to reconvey to the owner of the equity of redemption, and which precluded a puisne mortgagee from redeeming adversely to deed without the mortgagor. And a second mortgagee under a covenant not to sue the mortgagor for a certain time, could not during that time as of right redeem the first mortgage. The right of the puisne mortgagee, is now, however, conceded both in England(4) and by the Act(5) in this country. The re-transfer may be effected either by executing an endorsement on the mortgage-deed or by a separate instrument. Re-transfer by indorsement need not state more than that the property is reconveyed in consideration of the money. As such, it need not be registered.(6) It is a form always preferred by conveyancers, both for the sake of its brevity, as well as convenience (7) The mortgagee is not bound to execute a re-transfer with incorrect recitals but he cannot object to execute a deed without any recitals, at all, if it is tendered by all the persons interested in the property.(8) A mortgage was executed by four partners, one of whom subsequently died, leaving his administratrix and heir. Two of the surviving partners then tendered a draft of a reconveyance purporting to convey the land to them, but the Court held that the mortgagee was not bound to execute such a deed containing inaccurate recitals as to the devolution of the title. (9) The mortgagee is bound to convey the property to any person who has the right to redeem. A person having a partial interest in the property giving a right to redeem is entitled to a reconveyance, but it should then reserve the equities of the other persons interested, by stating that the person so redeeming, having only a partial interest, is to hold it subject to the rights of redemption of those who may possess the remaining interest. (10) In allowing redemption the mortgagee must however satisfy himself that he is not dealing with a mere stranger, but with a person having an interest in the property which gives him a right to redeem. (11) The liability of the mortgagee to re-transfer must be discriminated from his concurring with the mortgagor in conveying the property freed from his mortgage. This he may no doubt do if there are no other intermediate mortgagees. But if there exist successive mortgagees, of which the first mortgagee has notice, he cannot concur with the mortgagor in conveying the mortgaged

(1) *Dina Nath* v. *Lachmi Narain*, I.L.R., 25 All., 446 (454).
(2) *Harrison* v. *Owen*, 1 Atk., 520.
(3) S. 15, (1).
(4) S. 15, Conveyancing Act, 1881, S. 12, Conveyancing Act, 1882.
(5) Ss. 74,75,91.
(6) *Gurdial* v. *Jauhri*, I.L.R., 7 All., 820; *Ganga Baksh* v. *Jagannatha*, I.L.R., 27 All., 305.
(7) 2 David. Conv. (4th Ed), pt. 2, pp. 278, 279.
(8) *Per* Cairns, L.C., in *Hartley* v. *Burton*, L R., 3 Ch. 365 (368).
(9) *Hartley* v. *Burton*, L.R. 3 Ch., 365, (366, 368).
(10) *Pearce* v. *Morris*, L.R., 3 Ch., 227 (231).
(11) *Cholmondeley* v. *Clinton*, 2 Jac. & W., 184, cited *per* Lord Hatherley, L.C., in *Pearce* v. *Morris*, L.R. 3 Ch., 227 (230).

property to the prejudice of the subsequent mortgagee of whose interest he had notice.[1] For a like reason the mortgagee cannot exonerate a part of the mortgaged property, if it has the effect of throwing a greater burden upon the remainder in which other persons have since become interested [2] on redemption.

Re-transfer by mortgagee.

1393. The mortgagee must re-transfer the property, and not transfer his mortgage. He must reconvey the property "freed and discharged" from his mortgage-debt. If the mortgagee makes an excessive demand, the mortgagor may pay the claim under protest, and sue him for refund of the excess.[3] If the original deed was registered, the reconveyance will also require registration, and this will always be where the interest effected is of the value of Rs. 100 or upwards. As to the registration of an *acknowledgment*, the clause makes a specific provision which was made at the suggestion of the Law Commissioners, [4] who observed:—"We are of opinion that writing and registration should be compulsory whenever the principal money secured is one hundred rupees and upwards: when the principal is less than that sum, and the property is not delivered, we would also require registration, and in all such cases we think the mortgagor, on payment of the amount remaining due, should be entitled to require the mortgagee to register an acknowledgment that any right in derogation of the interest transferred to him has been extinguished. The requirement of registration will not only discourage fraud and facilitate investigations of title, it will also preclude some difficult questions as to priority." The effect of this clause is to set at rest the conflicting decisions of the High Courts. For instance, it was formerly held by the Madras High Court that such an acknowledgment would not require registration within the meaning of section 17 (*c*) of the Registration Act, since the extinction of mortgage arises not on account of anything done by the mortgagee, but as a legal incident consequent upon the act of payment, which does not operate as a consideration for anything to be done by the person receiving it. No act on the part of the defendant, the person receiving payment, was necessary to replace the plaintiff in possession of the entire interest in the property charged with the debt, for to the act of payment itself the law attaches the incident of extinction of the hypothecation lien. [5] This same view was taken also by the Bombay High Court. [6] The view was, however, controverted [7] by the Allahabad High Court; in which, however, the point did not directly arise.

1394. But while there can be now no doubt that a separate acknowledgment would have to be registered, it may still be a question as to whether an indorsement made on the reverse of the deed to the same effect has need to be registered. There can be no doubt that if the indorsements are to be treated as acknowledgments, their registration would be compulsory. In a case which went up before the Full Bench at Allahabad, it was ruled that where the

(1) *West London Commercial Bank* v. *Reliance, &c., Society*, 28; Ch. D., 187 (194, 195), C.A., 29 Ch. D., 954 (960, 961).

(2) *Noyes* v. *Pollock*, 32 Ch. D., 53 (69); s. 81 and Comm.

(3) *Chapple* v. *Mahon*, Ir. R., 5 Eq., 225.

(4) *Vide* p. 32 of their report, dated 15th March 1879.

(5) *Venkatrama* v. *Chinnathambu*, 7 M. H.C R. 1 (4,5); followed in *Venkayyar* v. *Venkata Subbayyar*, I.L.R., 3 Mad., 53.

(6) *Basawa* v. *Kalkapa*, I L.R., 2 Bom., 489; cited in *Shidlingapa* v. *Chenbasapa*, I. L R., 4 Bom., 235; followed by *Annapa* v. *Ganpati*, I.L.R., 5 Bom., 181; distinguished in *Romapa* v. *Umanna*, I. L. R., 7 Bom., 124; *Mahomad* v. *Ranu*, 9 Bom. L.R., 254.

(7) *Imdad Husain* v. *Tosadduk Husain*, I.L.R., 6 All., 335 (339); see also to the same effect *Dalip Singh* v. *Durga Prasad*, I. L.R., 1 All., 442.

mortgagee makes the indorsements as memoranda, just as any one would in his private memorandum book, they cannot be treated as acknowledgments. "Nor do they if they come within the meaning of acknowledgments, show that they are acknowledgments of the receipt of payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the property in the mortgage." (1) The *ratio decidendi* of this and later cases (2) seems to be that indorsements merely recording the fact of payment or the state of accounts between parties, and not limiting or extinguishing any right in land by *act of the parties* would not require registration, even though the *legal effect* of such indorsements may be to limit or extinguish such right; but if the writing is intended or used for such purpose, it would be inadmissible unless registered. (3) The addition of cl. (*n*) to the Indian Registration Act by the Amending Act VII of 1886, section 4, makes this point now further clear, for it explicitly exempts from compulsory registration "any indorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. A receipt then which does not *purport* to, but has the *effect* of extinguishing the mortgage, would not require registration. If then the language of the receipt does not indicate any intention to extinguish or limit the mortgagor's interest, it does not require registration. (4)

The provision made in the clause for the compulsory registration of an acknowledgment was hardly necessary, since its registration is enjoined by section 17 (*b*) of the Registration Act.

1395. Delivery of Title-deeds.—On paying off the mortgage-money the mortgagor may require the mortgagee to deliver up his title-deeds if any held by him by way of security. The mortgagee is, of course, bound to procure the deeds should he have deposited or pledged them elsewhere. The solicitor's lien on such deeds would determine on payment to the mortgagee of all principal and interest, and he is bound to deliver up to the mortgagor all deeds in his possession or power, although his charges, against which he held them, might remain unpaid. (5) But the solicitor would have his lien upon the title-deeds, as against a subsequent purchaser, or mortgagee from his client for charges due before the sale or mortgage. (6) But the solicitor can claim no lien against a prior mortgage, as where before the lien, the client had already mortgaged the property of which they are the sinews (§ 266), and which would then have to be made over to the prior mortgagee. (7)

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(1) *Jeewan Ali Beg* v. *Basa Mal*, I.L.R., 9 All., 108, F.B.

(2) *Uppalakandi* v. *Kunnam*, I. L. R., 19 Mad., 288; *Gous Mohamed* v. *Khawas Ali*, I.L.R., 23 Cal., 450; *Chamanbu* v. *Multmchand*, I. L. R., 20 Bom., 562; *Vishnu* v. *Yeshwant Rao*, I. L. R., 20 Bom., 387; *Vani* v. *Bani*, I.L.R., 20 Bom., 553.

(3) *Ranggaya* v. *Kameshwara*, I. L. R., 20 Mad., 367; *Seeni Chettiar* v. *Santhanathan*, I. L. R., 20 Mad., 58; *Parashram* v. *Ganpat*, I. L. R., 20 Bom., 533; *Patte Ranchod* v. *Bhikabhai*, I.L.R., 21 Bom., 704; *Uppalakandi* v. *Kunnam Vithal*, I. L. R., 19 Mad., 288. For other cases see *Mahadaji* v. *Vyankaji*, I. L. R., 1 Bom., 197; *Gopal Narayan* v. *Trimbak*, *ib.*, 267; *Baswa* v. *Kalkapa and others*. I. L. R., 2 Bom., 489 (where the receipt was intended to be used to prove extinguishment of the mortgage); *Ramapa* v. *Ummanna*, I. L. R., 7 Bom., 123 (object same as the last); *Fakir* v. *Khotu*, I. L. R., 4 Bom., 590 (where the receipt was sought to be used to establish title to land).

(4) *Uppalakandi* v. *Kunnam*, I. L. R., 19 Mad., 288; *Mahamad* v. *Ranu*, 9 Bom. L. R., 254.

(5) *Davies* v. *Vernon*, 6 Q. B., 443 (447); *Wakefield* v. *Newbon*, 6 Q. B., 276; Re *Llewellyn*, [1891] 3 Ch., 145.

(6) *Blunden* v. *Desart*, 2 Dr. & War., 405 (420, 421-425, 431); *Pelly* v. *Wathen*, 1 De G. M. & G., 16 (28).

(7) *Smith* v. *Chichester*, 2 Dr. & War., 393; *Blunden* v. *Desart*, *ib*, 405; *Pelly* v. *Wathen*, 7 Hare, 351.

1396. Extinguishment of the Right of Redemption.—The right of redemption conferred by this section may be extinguished by (*a*) act of the parties, or (*b*) by order of a Court. As regards the first, it is no doubt generally true, as observed before (§ 1344), that the mortgagor cannot contract himself out of his right to redeem, but there are circumstances in which he is so permitted, although, ordinarily, not at the time of the contract, but *after* it has been entered into.(1) The clause is silent as to the circumstances in which the mortgagor's contract for the abandonment of his right of redemption will be upheld by the Court. But, as before remarked, all such contracts, though they be the acts of parties are not necessarily enforceable, since, such contracts might be too unduly harsh and unconscionable so as to call in the intervention of the Courts. For instance, the Court regards a mortgage, as always a mortgage, with the result that it treats all covenants and contracts conferring collateral advantage on the mortgagee as inconsistent with its purpose, and consequently invalid. But this, of course, assumes that the mortgage is no more than a mortgage. If, therefore, the transaction was of a composite character, then the reason which prevents the mortgagee from obtaining a collateral advantage would cease to apply, since law does not prohibit the mortgagor from making other contracts with his mortgage, nor is he placed under any disability on that account. Being free to contract he is free to make a bad contract for himself, and it is not for the Courts to interfere merely on the ground that he might have done better under the circumstances. To hold otherwise would be to place the contracting parties in perpetual tutelage of the Courts subordinating their own discretion to the discretion of the Courts. Such parental solicitude for the concern of others would be intolerable in any country, though such under-current is sometimes betrayed in the reports of decided cases. But the tendency of the modern Courts is not to interfere lightly with the contracts of men. Nevertheless, the mortgagor's contracts from their nature and history still possess certain special features which have become engrafted on the principle which gave rise to and continues the mortgagor's right known as the equity of redemption. Such are covenants in mortgages which fetter or clog the equity of redemption and which, though assuming many shapes and forms are now subject to certain leading principles to be now considered.

1397. Clog on Redemption.—With the coming into being of the valuable right known as the equity of redemption and the pressure of the usury laws strictly limiting the rate of interest allowable on debts, mortgagees began to devise subterfuges to defeat and destroy it by stipulating for collateral and oppressive bargains, such as long leases at fixed rents, creation of monopolies in favour of the mortgagee or confining the right of redemption to a given

History of the Rule.

(1) The "act of the parties referred to in this proviso must mean an act done *after* the mortgage has been entered into, such as a release after the date of the mortgage of the right to redeem or a sale in pursuance of a power of sale given by the mortgage-deed. Unless this is the proper construction to put on the words, mortgages by conditional sale, where the parties stipulate that on default of payment of the mortgage money on a certain date the sale shall be absolute, would be included in the proviso. But this result could never have been intended, inasmuch as one of the main objects of this Act was to carry out the recommendation of the Privy Council in *Thumbusawmy* v. *Hossain Rowthen* (I.L.R., 1 Mad., at p. 23, P.C.), namely, that an Act should be passed affirming the right of the mortgagor by conditional sale to redeem, until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such foreclosure." (Mr. Ilbert's speech on introducing the Bill on 14th June 1877.) To the same effect in *Parayya* v. *Venkata*, I.L.R., 11 Mad., 403 (404, 405).

period, as the life of the mortgagor[1] or to any specified class of persons, as to the mortgagor alone, or the heirs of his body.[2] The equity Judges treated all such covenants void holding that a mortgage transaction being a security for the debt could not be treated as anything but a security in which the mortgagor had an indefeasible right of redemption, and as to which as far back as 1681 A. D. Lord Nottingham L. C., said "that it was a general rule, once a mortgage, and always a mortgage." [3] But this rule which had then already become well established "appears to own its origin to the influence of the church in the Courts of the early Chancellors. As early as the Council of Lafitau in 1179,[4]...we find that famous Assembly of Ecclesiastics condemning usurers and laying down that when a creditor had been paid his debt he should restore his pledge.[5] It was, therefore, not surprising that the Court of Chancery should at an early date have begun to exercise jurisdiction *in personam* over mortgagees. The jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was, indeed, a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffer was repaid on a date and at a place named, the fee simple should re-vest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffer, notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security".[6] "The equity Judges looked, not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive...It was only a different application of the paramount doctrine to lay it down in the form of a second rule that a mortgagee should not stipulate for a collateral advantage which would make his remuneration for the loan exceed a proper rate of interest.[7] "Acting upon these principles, the Courts have consequently refused to give effect to all such collateral contracts intended to or having the effect of delaying or defeating redemption as fetters or clogs which they treat as absolutely null and void. It will thus be seen that the doctrine was originally designed to prevent the conversion of a mortgage into a purchase and to guard against the oppression of necessitous landowners by mortgagees,[8] and it was founded upon the principle that equity will relieve against a penalty or forfeiture.

Present English rule stated.

1398. The last of the usury laws was repealed in 1854 and the social conditions which gave birth to the protective rule have since changed, [9] but the old rule which had by then become too well established as a branch of equity jurisprudence remained, and as late as 1912 Lord Macnaghten delivering the judgment of

(1) *Newcomb* v. *Bonham*, 1 Vern., 8; *Spurgeon* v. *Collier*, 1 Eden; *Salt* v. *Marquess of Northampton*, (1892) A.C., 1.

(2) *Howard* v. *Harris*, 1 Vern. 32.

(3) *Newcomb* v. *Bonham*, 1 Vern. 8, 23 E. R. 266 (267) *ib.*, p. 422.

(4) Historia Major, 1684 Ed., pp. 114-115.

(5) Chron. Maj. Ed. Luard, 1874 (Rolls Series ii-311).

(6) *Per* Lord Haldane, L.C in *G. & C., Kreglinger* v. *New Patagonia Meat, &c., Co, Ltd.*, (1914) A.C., 25 (35).

(7) *Ib.*, pp. 36, 37.

(8) *Bowen* v. *Edwards*, 1 Rep. Ch., 221; *Willet* v. *Winnell*, 1 Vern., 488; *Gennings* v. *Ward*, 2 Vern., 520; *Vernor* v. *Bethell*, 2 2 Eden., 110.

(9) In India the Usury Laws remained in force from 1793 to 1855 when they were repealed by Act XXVIII of 1855.

the Privy Council said that " it is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. "(1) But in a more recent case these observations were held to state a rule the reason of which had long ceased to exist, and which could no longer be rigidly enforced to the altered conditions of modern society so that the current which has swept away the usury laws has diverted the rule into narrower channels with the result, it may now be stated, that there is now no rule in equity that a mortgagee cannot stipulate in the mortgage deed for a collateral advantage to endure beyond redemption, provided that such collateral advantage is not either (i) unfair and unconscionable, or, (ii) in the nature of a penalty, clogging the equity of redemption, or, (iii) inconsistent with or repugnant to the contractual or equitable right to redeem.(2) And the rule has no application unless (i) the collateral advantage was a part of the contract of mortgage, and not merely an independent contract though relating to the mortgage security, and (ii) the mortgage to which it relates is a mortgage *simpliciter* and not coupled with another transaction, such as, for instance, a family arrangement.(3) " The question is one not of form but of substance, and it can be answered in each case only by looking at all the circumstances, and not by mere reliance on some abstract principle, or upon the dicta which have fallen obiter from Judges in other and different cases... For each case forms a real precedent only in so far as it affirms a principle, the relevancy of which in other cases turns on the true character of the particular transaction, and to that extent on circumstances."(4)

Indian Rule considered.

1399. As regards the modern tendency of the English Courts to enforce contracts according to their true tenor and to recognize that the highest equity is to interfere as little as possible with the freedom of contracts, some discrimination is essential in applying those principles to mortgage transactions in this country where the social conditions are widely divergent and probably more parallel to those which gave birth to the rule and the usury laws. As has been observed before, the rule should not be made to ride roughshod over all transactions, regardless of considerations as to the circumstances attending them, the condition of society, the relative positions of the parties, and the substance of the contract, for which the English Cases offer illuminating guide, but which are otherwise no precedents to be copied. This was the trend of the judgment of the House of Lords in a case last referred to and destined to be a leading case on the subject (5); for Lord Haldane, L.C., referring to them said: "It is consistent with the objects for which they were established that these rules should crystallize into technical language so rigid that the letter can defeat the underlying spirit and purpose. Their application must correspond with the practical necessities of the time."(6)

1400. With these words of preliminary caution an attempt is made in the following cases to set out the leading principle of an equitable rule which being

(1) *Fairclough* v. *Swan Brewery Co.*, 1912 A.C., 565 (570).

(2) *G. & C Krglinger* v. *New Patagonia Meat. &c. Co.*, (1914) A.C. 25 (61).

(3) *Howard* v. *Harris*, 1 Vern. 33 explained *per* Lord Haldane, L. C. in *G. &c. Krglinger* v. *New Patagonia Meat &c. Co.*, [1914] A.C., 25 (36).

(4) *Per* Lord Haldane, L.C., in *G. & C. Krelinger* v. *New Patagonia Meat &c. Co.*, (1914) A C. 25 (39).

(5) *G. & C. Krelinger* v. *New Patagonia Meat &c. Co.*, (1914) A.C. 25.

(6) *Ib.* at pp. 37, 38.

neither rigid nor inflexible; the Judges have moulded in accordance with the exigencies of the time.(1)

In considering the validity of collateral covenants, the Courts discriminate between commercial contracts and those made between private persons.(2) As Lord Macnaghten said: "The directors of a trading company in search of financial assistance are certainly in a very different position from an impecunious landowner in the toils of a crafty moneylender."(3) By an agreement dated the 24th August 1910, a firm of wool-brokers agreed to lend to a company of meat preservers a sum of £ 10,000 at 6 per cent. If the interest was punctually paid the loan was not to be called in until the 30th September 1915, but the company might pay off at any time on giving one calendar month's notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years from the date thereof the company should not sell sheep skins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person and that the company should pay to the lenders a commission on all sheep skins sold by the company to any other person. The loan having been paid off by the company in January 1913 in accordance with the agreement the lenders claimed to exercise their option of pre-emption notwithstanding the payment of the loan, and it was held by the House of Lords that the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining the loan; that it was not a clog on the equity of redemption or repugnant to the right to redeem, and that the lenders were entitled to an injunction restraining the company from selling sheep skins to any person other than the lenders in breach of the agreement. In so holding their Lordships held(4) that the two contracts though made at the same moment and by the same instrument were not in substance a single and undivided contract but two distinct contracts.(5) It was an ordinary commercial contract. In another case decided by the Bombay High Court, the Hope Mills Co. had agreed to pay their mortgagee in possession a certain sum by way of his remuneration for his management, and which was objected to as a clog on redemption, which the court had no difficulty in holding that it was not. In support of their contention the mills relied on a long series of English cases which forbade a mortgagee in possession to charge the mortgagor for any personal service. But most of them were doubtless influenced by the usury laws since repealed, and apart from an artificial rule not sanctioned by the Act(6) the Court was not prepared to enforce it when it was not shown to be either unreasonable or unfair.(7)

1401. The covenants of a deed may be onerous but they could not on that ground alone be avoided as clogs on redemption. So the mortgagee may stipulate for his possession for a number of years certain, say 13,(8) 58(9)

(1) *G. C. Krelinger* v. *New Potagonia Meat etc., Co.*, [1914] A.C. 38.

(2) *Hope Mills* v. *Sir Cawasji*, 13 Bom. L R., 162.

(3) *Samuel* v. *Jarrah Timber, &c., Corporation*, [1904] A.C. 323 (327).

(4) *G. & C. Kreglinger* v. *New Patagonia Meat. &c. Co.*, [1914] A.C. 25 (39).

(5) *Ib.*, p. 41.

(6) See Ss. 72, 76, *post*.

(7) *Hope Mills Co.* v. *Sir Cawasji*, 13 Bom. L.R. 162 (183, 184.)

(8) *Rambatan* v. *Ramkeb*, 10 I. C., (All.) 243.

(9) *Ram Prasad* v. *Jagrup*, 10 A.L.J. 157, referring to *Morgan* v. *Jefreys*, [1914] 1 Ch. 620 without comment, but which was distinguishable on the ground that the mortgagor was a man of no education who mortgaged his newly acquired hotel to an inexperienced mortgagee, a brewer, who stipulated for continuance of the security for 31 years and a further stipulation that the mortgagor should purchase all liquors exclusively from him for a fixed term of 28 years or more if the mortgage-money remained unpaid at the

even 90 (1) and the Court even upheld the covenant to the effect that if the mortgagor failed to redeem on the expiry of 13 years, then the mortgage would hold good for another 13 years before which it could not be redeemed, on the ground that it was neither penal nor a unilateral covenant inasmuch as if the mortgagor could not redeem no more could the mortgagee call in his money. (2) But the case would have been different if the covenant had been that the mortgagee should on redemption continue to hold the land at a fixed rent in perpetuity, and which would then be clearly a clog on redemption. (3)

1402. Covenants clogging Redemption.—A clog on redemption may assume as many forms as the ingenuity of the mortgagee may suggest. In one case it may be a clause for pre-emption ; (§§ 1405—1407) in another case it may be for preferential trade (§ 1405), in a third case it may assume the garb of an independent lease (§§ 1397—1401); in the fourth case it may unduly restrict the right of redemption, confining it to the mortgagor personally : or it may unduly postpone it so as to be beyond the reach of the mortgagor; but the test by which such covenants, whatever may be their form or nature, should be judged, is whether the added clause renders the bargain unconscionable, or was it the result of improper pressure, unfair dealing or undue influence, or had it the effect of rendering redemption prohibitive or penal. In order to see whether a covenant is a clog or not, the transaction must be viewed as a whole, for it cannot be predicated of any class of covenants that it is invariably a clog on redemption, though there are undoubtedly some covenants before noticed that do fall within that category. There is often only a thin invisible line between such covenants as are effectual to bar the right of redemption and those which fetter the right so far as to become obnoxious to law, and are then void. Such covenants are improper if they unduly fetter the mortgagee's right to transfer the property, curtail his enjoyment thereof, or are unnecessarily oppressive or unreasonable. In other words, the mortgagor cannot tie down the mortgagee to covenants which do not substantially impair his security, or confer upon him an advantage which is unconscionable or oppressive. This is a principle embodied in the maxim, " once a mortgage always a mortgage," (4) and which means that a transaction which was a mortgage at its inception, is not permitted to be converted into something else to the detriment of the mortgagor. (5) Where the relationship of mortgagor and mortgagee is once admitted or proved, it is for the mortgagee to show that that relationship had come to an end. Where, however, the mortgagor admits subsequent fresh transactions, and it appears from the Revenue Register, that that transaction was admitted by the mortgagor to be an outright sale, the burden of proof would then be shifted to the mortgagor, who must then show that it was not so. (6) The question whether a covenant is reasonable so as not to go beyond what is necessary for the protection of the covenantee in a given case is one of law and not one of fact. (7) If a stipulation is for the benefit of the mortgagee and is a part of the

scheduled rates—the cumulative effects of all of which were considered.

(1) *Muhomed* v *Muhomed*, (1911) 9 M.L.T. 462 ; 8 I.C. (Mad.) 1068.

(2) *Rambaran* v. *Rankean*, 10 I.C. (All.) 243 (244).

(3) *Sheo Singh* v. *Sib Bahadur*, 6 I.C., All). 707; *Pamtellapati* v. *Samuriapati*, (1911) 21 M L.J. 1010; *Mahomed* v. *Rijbhai*, I.L.R., 9 Bom. 524.

(4) Or, as Lord Davey put it, "once a mortgage, always a mortgage, and nothing but a mortgage." *Noakes & Co.* v. *Rice*, [1902] A.C. 24 ; followed in *Rojmal* v. *Shivaji* I.L.R., 27 Bom. 154.

(5) *Noakes & Co.* v. *Rice*, [1902] A.C., 24 ; followed in *Jarrah Timber, &c., Corporation* v. *Samuel*, [1902] 2 Ch., 479 ; *Rojmal* v. *Shivaji*, I.L R., 27 Bom., 154.

(6) *Ko Po* v. *U Pe*, [1905] Bur.L.R., 37 (39).

(7) *Mitchael* v. *Reynolds*, 1 P. Wms., 181; *Mallan* v. *May*, 1 M. & W., 653; *Tallis* v. *Tallis*, 1 E &B., 391; *Dowden & Pook, Ltd.* v. *Pook*, [1904] 1 K.B., 45 (50, 51).

mortgage-transaction, it is but a part of his security and necessarily comes to an end on the discharge of the loan. On the other hand, if the stipulation confers on the mortgagee a collateral advantage over and above the security for his debt, it would then be a question whether the advantage is a clog or a fair recompense for the risk run by the mortgagee.

1403. The covenants clogging redemption may assume any form, and may be either contemporaneous with the deed in which they are embodied, or they may be subsequently entered into ; as where the mortgagor many years after the execution of a mortgage borrowed money on simple money bonds in which he stipulated that he shall not redeem the mortgage until payment of the amount due on the bonds, but the clause was held to clog redemption and was declared void.(1) In another case a mortgage to secure £3000 advanced by the mortgagees contained a covenant by the mortgagor for payment to the mortgagee of £3570 by eighty-four monthly payments of £42-10*s* each with a proviso that the mortgagee might at any time give the mortgagor fourteen days' notice demanding repayment of the sum of £3000 advanced with interest at 5 per cent ; Melvill, J., held that the proviso enabled the mortgagee by 14 days' notice to require payment of the whole £3000 with interest at 5 per cent. and then to repay the same already paid under the covenant, and that as such it was void as clogging the equity of redemption.(2) The mortgagor is not debarred from redeeming merely because he had ceased to perform certain stipulated services to Government, the result of which was that the usufructuary mortgagee's profits were proportionately reduced owing to his being thereupon obliged to pay the full Government assessment.(3) Similarly, the mortgagor's promise to pay a further sum of money after default has been held to be penal and void.(4) So a stipulation that the mortgagor shall not alienate the property pending the mortgage is a clog on redemption and, therefore, invalid.(5) So is a covenant made by the mortgagor that he would not redeem except "when the entire mortgage money is laid up from the surplus profit," and which is clearly a clog on redemption inasmuch as it was both oppressive and penal.(6) So the clause in the deed that the interest and principal due on a mortgage for a fixed term of 20 years should be paid on expiry of that term, failing which the mortgage was to be converted into a sale was held obnoxious to the same objection.(7) Still more arbitrary is the covenant that the mortgagor shall redeem only when the mortgagee demands his money, and which places his right of redemption at the mercy of the mortgagee.(8) So also is a condition that the mortgagee should remain in permanent possession of the property as a tenant,(9) or that the term of the usufructuary mortgagee fixed in the first instance for twelve years should be renewed again and again every twelve years thereby creating a perpetuity (10) or a vague covenant that redemption should be

(1) *Rajmal* v. *Shivaji*, I. L. R., 27 Bom., 154.

(2) *Bootti* v. *Salvation Army Building Association*, 14 T.L.R. 3.

(3) *Semble* in *Bhima* v. *Raghavendracharya*, I.L.R., 24 Bom. 482.

(4) *Marquis of Northampton* v. *Pollock*, 45 Ch D , 190 (210) ; *Mailaraya* v. *Subbaraya*, 1 M.H C.R., 81.

(5) *Ram Saran* v. *Amrita Kuar*, I. L. R., 3 All., 369 F B.

(6) *Kandhai Singh* v. *Babuain*, (1910) 13 O.C., 128.

(7) *Bishen Singh* v. *Jaimal Singh*, (1900) P.L.R., 128 ; 81.C., 553 ; *Sukhudial* v. *Anant Ram*, (1894) P. R., No. 131 ; *Gopalchand* v. *Mohan Lal*, (1905) P.R. No. 6.

(8) *Narayan* v. *Rawji* (1884), B.P.J., 254 ; *Sari* v *Moti Ram*, (1896) B.P.J. 420.

(9) *Mohamed* v. *Jijibhai*, I. L. R., 9 Bom., 524 ; *Subrao* v. *Manjapa*, I L. R., 16 Bom., 705 ; *Sheo Singh* v. *Sib Bahadur*, 6 I. C., (All.) 707 ; *Pamurlapati* v. *Samuriapati*, (1911) 21 M.L.J., 1910.

(10) *Nelakandhan* v. *Trinilal*, I L. R., 30 Mad., 61.

postponed, till all debts due from the mortgagor are paid off.(1) But such a condition when clearly inserted in the bond would create a right which could be enforced,(2) though there is no doubt that if its effect is to indefinitely postpone redemption, it will not be enforced.(3) Thus, in one case, postponement for thirty years,(4) and in another case for twenty years,(5) was held to be unreasonable. And so where in a possessory mortgage for a fixed term, the mortgagor sought to recover possession on expiration of the period, but was resisted by the mortgagee on the plea that owing to the mortgagor's misrepresentation he had not received the full benefit purported to be given him by the mortgage, and that he had consequently been unable to recoup himself the money he had advanced, it was held that in the absence of any stipulation express or implied in the mortgage-deed depriving him of his right to recover possession, he was entitled to recover it relying on his proprietary right.(6)

1404. A condition by which the mortgagee strives to obtain more than his principal, interest and costs, or gains an undue advantage over his debtor has always been relieved against in equity.(7) Thus, where in an *iladarawara* (8) mortgage, the covenant was that, if the principal were not repaid by a certain day, the mortgage should be redeemed by payment of one *mura* of rice for each rupee of the mortgage-money, which would give the mortgagee at the market rate at the time of the suit treble the amount of the original advance, it was held that the condition was unreasonable and penal and could not be enforced. (9) So also, in another case, where the sub-lessee of a theatre, who had an option to purchase the lease from the lessee on payment of £2,000 within a particular time, arranged with a stranger for a loan of £2,000, and it was agreed between the sub-lessee and his lender, that as soon as the lease-right was acquired, it should be mortgaged to him and a legal mortgage of it executed, providing for, among other things, the payment of the loan with interest at 6 per cent. and a third of the net profits of the theatre and for the payment of the money in twenty quarterly instalments of £100; the mortgage was to secure not only the repayment of the £2,000 with interest, but also the payment of all other moneys payable by the covenant, so that the mortgage was not redeemable on payment of the principal with interest, but must continue to subsist to the very end of the lease, in order to secure the payment of the proportion of the profits. Some of the instalments were in arrear, and the mortgagee gave notice, requiring the payment within three months of the whole amount with interest. He was asked to withdraw the notice, but refused to do so. Subsequently, on payment of the instalments in arrear, the mortgagee offered to withdraw his notice, but now the mortgagor insisted upon paying him the amount due. The money was tendered, but the creditor refused to accept the money. The mortgagor having then instituted a suit to redeem on payment of the amount tendered, it was contended for the defendant that the transaction was in substance a scheme for sharing profits and not really a case of a mortgage, that even if it was a mortgage, and the covenant to pay profits was an illegal restraint imposed upon the equity of redemption, the covenant

(1) *Yashwant* v. *Vithoba*, I.L.R., 12 Bom. (234): explaining *Rama* v. *Martand*, I.L.R., 9 Bom. (236), *note*.

(2) *Per* Sargent, C.J., *Yashwant* v. *Vithoba*, I. L. R., 12 Bom., 231 (234); see *Har Mahadaji* v. *Balambhat*, I. L. R., 9 Bom., 233 (235).

(3) *Courtenay* v. *Wright*, 2 Giff., 337; *Howard* v. *Horris*, 1 Vern., 32.

(4) *Talbat* v. *Braddyl*, 1 Vern., 183.

(5) *Cowdry* v. *Day*, 1 Giff., 316.

(6) *Nidha Sah* v. *Murli Dhar*, I. L. R., 25 All., 115 P.C.

(7) *Tasker* v. *Small*, 3 My. & Cr., 70.

(8) This kind of mortgage occurs in Canara and resembles a Welsh mortgage the mortgagee being in possession and taking the rents and profits in lieu of interest.

(9) *Mayilarayar* v. *Subbaraya*, 1 M.H.C. R., 81.

was invalid only so far as it affected redemption and was valid as a mere money-claim, and that the defendant should be allowed to withdraw his notice. It was, however, decided that the case was substantially one of mortgage, that the agreement to secure the payment of one-third of the profit rental by the mortgagee was an illegal restraint upon the equity of redemption, and on the question of notice, it was held, that on the analogy of a notice to quit, having once given it he could not withdraw it without the consent of the mortgagor.(1) An unauthorized act such as a partition entered into by the mortgagee does not affect the mortgagor's right to redeem ;(2) nor does a clause of conditional sale, (3) or that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent, (4) or that if the mortgage-money is not paid on the due date the mortgagor will sell the property to the mortgagee at a price to be fixed by umpires.(5) But this does not prevent the mortgagor from selling the mortgaged property to the mortgagee subsequently to the mortgage.(6) To the same category, also belong stipulations to pay compound interest (§ 1408).

Covenants for pre-emption and preference.

1405. A covenant giving an option of purchase to the mortgagee may or may not be a clog on redemption, for it depends upon its nature and the conditions subject to which the option is reserved. If it leaves the mortgagor option to redeem or sell as he likes, and the stipulation does not go beyond the covenant that in case of sale the mortgagee should have the refusal. But if the mortgagee wrings out a covenant whereby the mortgagor is tied down to the price at which he is to sell, then the question turns upon whether the collateral advantage stipulated for by the mortgagee is or is not unconscionable or oppressive, though it may not clog the redemption. (7) *Prima facie*, however, the stipulation may be so regarded (8)—not that it is to be so regarded in every case, for the question is one of fact and must be decided in each case according to its own circumstances. (9) If the price named in the deed is a fair market-price at the time the right is sought to be enforced, it will be an element in determining the question of fairness. But a stipulation for pre-emption may be exposed to other objections. To be valid it must co-ordinate with the existence of the mortgage, and must not outlive the security. For if it is to continue even after redemption, it is clearly a clog in so far as the mortgagor does not get back the property in the state it was in at the time of the mortgage. As Rigby, L. J., put it: "The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived, and the right of redemption has been put in force."(10) Thus a covenant that during the

(1) *Stanley* v. *Wilde* [1899], Ch. 747.

(2) *Muzhur Hossein* v. *Hur Pershad*, 15 W. R., 353

(3) *Kanayalal* v. *Pyarelal*, I.L.R., 7 Bom. 139.

(4) *Mahomed* v. *Jijibhai*, I.L.R., 9 Bom., 524.

(5) *Kanaram* v. *Kuttooby*, I.L.R., 21 Mad., 110.

(6) *Kanhayalal* v. *Narrhar*, I.L.R., 27 Bom., 292.

(7) *Biggs* v. *Hodinott* [1898], 2 Ch., 307 ; *Stanley* v. *Wilde* [1899], 2 Ch., 474 : *Bimal Jati* v. *Biranja*, I.L.R., 22 All., 238.

(8) In re *Edward's Estate*, 11 Ir. Ch. R., 367 ; Fishers Mort , (5th Ed.), § 1397 ; *Ramasami* v. *Chinnan*, I.L.R., 24 Mad., 449 (456).

(9) *Per* Romer. L.J., in *Stanley* v. *Wilde* [1899], 2 Ch., 474 (478, 479), In re *Edward's Estate*, 11 Ir. Ch. R., 367 ; Hargreave, J., went too far in laying down that an onerous contract was to be presumed as made under pressure. See *Biggs* v. *Hoddinott* [1898], 2 Ch., 307 (321).

(10) *Rice* v. *Noakes & Co.* [1900], 2 Ch., 445 (457), C. A , reversed on a different point in *Noakes & Co.* v. *Rice* [1902]. A. C., 24.

continuance of the mortgage, whether any money should or should not be owing on the security, the mortgagor shall not use or sell in the house any malt liquors except such as should be purchased of the mortgagee, was a clog on redemption, and the mortgagor was held entitled on payment to have a reconveyance, or at his option, a transfer of the security, free in either case from the "tie." (1) But in another case in which in addition to the redemption being deferred for one and thirty years there was a further provision for continuance of the "tie" for at least 28 years from the date of the loan, and so long after as any money should remain due upon the security, it was pointed out that though such monopoly would be justifiable for a period of five or seven years (2), still when it is extended to a long term of, "say, twenty-eight years" (3), it could not be upheld. So in another case where a loan was made to a company on the term of a letter whereby the borrower agreed to secure repayment of the loan with interest by the transfer of certain debenture stock, and it was stipulated that the lender should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months, and that the advance should become due and repayable with interest at thirty days' notice on either side, the stipulation giving the option of repurchase being stipulated to be enforceable, even after the time fixed for redemption, was held to be a clog on redemption, and, as such, void.(4) The same fate befell a covenant made by a mortgagor of shares in a tea company who agreed to use his best endeavours to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and in the event of any of the company's teas being sold otherwise than through the mortgagee, to pay him the amount of the commission he would have earned if the teas had been sold through him. The mortgage being paid off, the company afterwards changed their broker and they were held to be so entitled. (5)

Does not run with the land.

1406. Again, a covenant for pre-emption does not run with the land. "Being only a species of contract for the sale of immovable property, the contract of pre-emption stands on no higher footing than a contract for the sale of immoveable property, and does not of itself create any interest in or charge on the immovable property which is subject to the right of pre-emption." (6) If it be regarded in any other light, that is, as creating a real right, as, indeed, was held in some cases, then it would be void under the rule against perpetuities,(7) or for remoteness. But it may be available against a transferee without consideration or with notice of the covenant,(8) though a covenantor could not otherwise bind his representatives and assigns even though he may have intended to do so.(9) Such a covenant is then distinguishable from that for renewal in leases, which runs with the land, and which accordingly creates a liability enforceable against the lessor's transferees irrespective of notice.

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(1) *Noakes & Co.* v. *Rice* [1902], 2 A.C. 24.

(2) *Tyran* v. *Smith*, 20 Ch. D. 724 (729); followed in *Biggs* v. *Hoddiott*, [1899] 2 Ch., 307.

(3) *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620; (629) *Attorney General* v. *Bregleton &c., Association*, [1900] 1 Ch 276 (284).

(4) *Samuel* v. *Jarrah Timber, &c., Corporation*, [1902] 2 Ch., 479.

(5) *Bradley* v. *Carritt*, [1903], A. C., 253, reversing [1901], 2 K. B. 550.

(6) *Per* Ayyangar, J., in *Ramasami* v. *Chinnan*, I L. R., 24 Mad., 449 (462); see S. 54 & §§ 678, 979. *ante*.

(7) *Per* Shephard, J., in *Ramasami* v. *Chinnan*, I. L. R., 24 Mad., 449 (457); following *London & S. W. Ry. Co.* v. *Comm*, 20 Ch D., 562; *Trevelyan* v. *Trevelyan*, 53 L.T. (N. S.), 853; *Nobin Chandra* v. *Nabab Ali*, 5 C. W. N., 343.

(8) S. 40, *ante*. *Haris Paik* v. *Jahuruddi*, C. W. N., (575).

(9) *Nobin Chandra* v. *Nabab Ali*, 5 C.W.N., 343 (347).

How enforced.

1407. A covenant for pre-emption may be enforced by either a suit for the specific performance of the contract of pre-emption, or the same right may be set up as an equitable defence to the mortgagor's suit for redemption. (1) In the former case the limitation is that provided by Article 10 of the Limitation Act, which allows one year from the time when the purchaser takes (under the transfer sought to be impeached), physical possession of the whole of the property transferred or re-transferred; or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.(2) The right to enforce a covenant for pre-emption accrues against the mortgagee by conditional sale as soon as his right of property, becomes mature, as when his decree is made absolute.(3) A suit for pre-emption by a co-sharer where the vendee has only obtained formal possession is, however, governed by the six years' rule under Article 120 and not Articles 10 or 144 of the Limitation Act. (4) But should the pre-emptor fail to enforce his right within limitation, his claim though barred is not extinguished, (5) and he would not therefore be precluded from setting up his equity by way of defence. But while he is not so fettered by any positive rule limiting his right, it does not thence follow that he may set up the right by way of defence at any time. For in such a case he may have to be confronted with the pleas of laches, waiver, acquiescence or quiescence or other forms of equitable estoppel.

Commission: bonus: compound interest.

1408. The payment of compound interest is not to be regarded as penal in every case, for where it is stipulated and is not *prima facie* exorbitant or unreasonable, it must be allowed. A contract that redemption shall be subject to the payment of a bonus has been upheld. (6) Thus, in a case (7) the mortgage was stated to be for £1,000 but only £700 out of this were advanced, the rest having been deducted on account of the riskiness of the security. It was held that the whole amount of £1,000 could be recovered on the mortgage. Generally speaking, where advances have been made by a mortgagee to a mortgagor, upon security of a speculative character, such as building estates, the Court will, in taking the account in a redemption-action, allow the mortgagee sums actually deducted by him for commission or bonus at the time of making advances, provided the deductions were made as a part of the mortgage-contract, under a bargain deliberately entered into by the parties, while on equal terms, and knowing perfectly well what they were doing, and without any improper pressure, unfair dealing, or undue influence on the part of the mortgagee, the Court treating the transaction in each case as amounting in fact to the payment of the whole amount of the advance to the mortgagor, and the return of certain part of it to the mortgagee as a consideration for the accommodation. After paying in the money the mortgagor cannot be allowed to turn round and say, "though I have paid you that money and agreed that it should be received by you as a consideration for the advance you have made

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(1) *Ramasami* v. *Chinnan*, I. L. R., 24 Mad., 449 (465).

(2) Art. 10, Sch. II, Indian Limitation Act (XV of 1877). Previously Art. 113 or 114 (Act IX of 1871), (now see Act IX of 1908).

(3) *Ali Abbas* v. *Kalka Prasad*, I. L. R., 13 All., 405 affirmed in *Batul Begum* v. *Mansur Ali*, I. L. R., 24 All., 17 (26) P. C.

(4) *Batul Begum* v. *Mansur Ali*, I. L. R., 24 All., 17 P. C.

(5) *Kanharankuti* v. *Uthotti*, I. L. R., 13 Mad., 490; *Krishna* v. *Kesavan*, I. L. R., 20 Mad., 305 (311); *Ramasami* v. *Chinnan*, I. L. R., 24 Mad., 449 (464, 465).

(6) Fisher, §. 1384; *cf.* the provisions of the Contract Amendment Act, 1899.

(7) *Potter* v. *Edwards*, 26 L. J. Ch., 468.

me, I will strike it out of the mortgage-account. (1) Other instances of loans with a bonus are furnished when debentures are issued at a discount,(2) or when a price for the accommodation of the loan is charged under the name of premium by building societies.(3)

1409. No Clog No Redemption.—It is perhaps unnecessary to state that the rule against clog on redemption only applies to a mortgage. If therefore the transaction was not a mortgage, no covenant could be attacked on the ground of clog though the principle which underlies that rule may equally avail to invalidate it, but its invalidity must then be tested by the general principles upon which contracts generally are voidable. A deposit of shares as security for a loan made on condition that the creditor should have the option of purchasing the shares at a fixed price up to a certain date was held not to amount to a mortgage, and that, therefore, the covenant could not be attacked as a clog on redemption. (4)

No mortgage no clog.

1410. There is nothing against the mortgagee obtaining a collateral advantage for a fresh consideration. (5) It has been held in certain cases that where in bonds executed subsequently to the mortgage, the mortgagor stipulates against redemption, until payment of the bond-debts although the latter debt cannot create a charge on the property, the mortgagor must satisfy it before he can be allowed to redeem.(6) On the other hand, it has been laid down in other cases that such a covenant is a clog on redemption, and cannot be enforced.(7) But the correctness of both these views may well be doubted. For while, on the one hand, if the mortgagor is entitled to redeem on payment of the mortgage-money and costs, he could not be thwarted by any impediments, though of his own creation, unless they can be shown to be necessary for safeguarding the security; so, on the other hand, to hold that in every case such a covenant is a clog would lead to the far-reaching conclusion placing a fetter or clog not so much on redemption, as on the mortgagor's liberty of action. So in a usufructuary mortgage, where it was agreed that the mortgagee should, by remaining in possession for 25 years, satisfy himself both for principal and interest, but that, if the mortgagor wished to regain possession of the land within that time, he might do so by repayment of so much of the principal and twenty-five years' interest as might then be due, the contract was sustained on the ground that the mortgagor having had the option, the covenant was not penal. There was nothing to show that the mortgagee had over-reached his debtor.(8) And there is nothing against the rule if the mortgagor, being unable to discharge his

No clog.

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(1) *Mainland* v. *Upjohn*, 41 Ch. D., 126; *Northampton* v. *Pollock*, [1892] A.C., 1.

(2) In re *Anglo-Danubian Steam Navigation Co.*, L.R., 20 Eq., 339.

(3) Re *Phillips*, 27 Ch. D., 509.

(4) *London and Globe Finance Corporation* v. *Montgomery*, 18 T.L.R. 661.

(5) *Maxwell* v. *Tipping*, [1903] 1 Ir. R. 498.

(6) *Hari* v. *Balambhat*, I.L.R., 9 Bom., 238; *Allukhan* v. *Roshan Khan*, I.L.R., 4 All., 85; dissented from in *Sheo Shankar* v. *Parma Mahton*, I.L.R., 26 All., 559; *Allu Khan* v. *Roshan Khan*, I.L.R., 4 All. 85; *Pancho* v. *Deoraram* 6 I.C., (All.) 165; following *Mhd. Abdul Hamid* v. *Jaivaj*, (1906) A.W.N., 267, followed in *Hargobind* v. *Tula Ram*, 10 I.C., (All.) 222; *Sheo Kumar* v. *Jittu Singh*, 9 I.C., (All.) 52; *Ranjit Khan* v. *Ramdhan Singh*, I.L.R., 31 All., 482; *Brij Lal* v *Bhadani Singh*, I.L.R., 32 All., 651; *Bhi Khan Singh* v. *Shankar*, 6 A.L.J., 255; *Krishnaji* v. *Maheshwar*, I.L.R., 20 Bom., 346; but *contra* in *Rajmal* v. *Shivaji*, I.L.R., 27 Bom., 154; dissented from *Hari* v. *Balambhat*, I.L.R., 9 Bom., 233.

(7) *Sheo Shankar* v. *Parma Mahton*, I.L.R., 26 All., 559.

(8) *Bapuji* v. *Satyabhama*, I.L.R., 26 Bom., 490 (494); *Rugad Singh* v. *Sat Narain*, I.L.R., 27 All., 178.

liabilities, sells or relinquishes his right in favour of his creditor.(1) "The right of redemption will not be defeated, however, if the release, which must be made in writing (2) when the equity is an interest in land (3)was obtained by fraud, or oppression, such as would invalidate a sale between an ordinary vendor and purchaser; or, if by means of the influence given by his position, the mortgagee has obtained the purchase at a nominal or insufficient price, though undervalue alone would not be sufficient to impeach the sale."(4) So, where by an agreement subsequent to the mortgage, the mortgagor agreed in consideration of being given a further time for payment, to give the mortgagee the option within the further time to become a partner with the mortgagor, the mortgagee also agreeing in that event to relieve the mortgagor, absolutely from payment of the mortgage-amount, and the mortgaged property was to be constituted partnership property, and the mortgagee exercised his option to become a partner within the further time, the covenant was enforced.(5) So there could be no question of clog in a mortgage where the mortgagor acknowledged an earlier debt and promised to repay it within a certain time before which he promised not to redeem his present mortgage.(6) So again, there can be no clog where by a clause in the mortgage-deed the mortgagor stipulated that he shall not redeem the mortgage without first paying up rents of the mortgaged property which he held as a tenant of the mortgagee.(7) But the case would probably have been different if the same covenant had been inserted in a separate or subsequent deed.(8) There is nothing in law to prevent the parties to a mortgage from coming to any arrangement after the mortgage qualifying the right to redeem. The plaintiff had mortgaged his village to the defendant in 1846. In 1870 he compromised with the mortgagee on certain terms not alleged to be unfair or extortionate. His successors sued for redemption, but the Court had no difficulty in holding that the compromise had extinguished the plaintiff's right of redemption.(9)

1411. While a contract at the time of the loan for the purchase of the mortgaged property has always been held to be a clog, still if only a day intervenes between the mortgage and the contract to purchase, the contract ceases to be a clog *ipso facto*. (10) The rule was invented probably to obviate the necessity of enquiry and investigation in cases where suspicion may be probable and proof difficult. (11) The foundation of the rule is in the desire of the Court to protect necessitous mortgagors. As Northington: L. C., said: "This Court as a Court of conscience is very jealous of persons taking securities for a loan and converting such securities into purchase. And, therefore, I take it to be an established rule that a mortgagee can never provide, at the time of making the loan, for any event or condition on which the equity of redemption shall be

(1) *Sauhaya Lal* v. *Narhar*, I. L. R., 27 Bom., 297; *Mahomed* v. *Ezekiel*, 7 Bom. L. R., 772.

(2) And in India registered, S. 17 (*b*), Indian Registration Act (III of 1877).

(3) *Massey* v. *Johnson*, L R., 1 Exch., 241.

(4) *Knight* v. *Marjoribanks*, 2 Mac. & G., 10; *Ford* v *Olden*, L R, 3 Eq., 461; *Kevans* v. *Joyce* [1896], 1 Ir. R, 442.

(5) *Reeve* v. *Lisle* [1902]. A. C. 461.

(6) *Hari* v. *Vishnu*, I. L. R., 28 Bom., 349 (360) F.B; *Durga Pershad* v. *Dukhi Roy*, 9 C.W.N., 789.

(7) *Chhatar Mal* v. *Baijnath*, I. L. R., 23 All., 742.

(8) *Sheo Shanker* v. *Parma*, I. L. R., 26 All., 559; distinguished in *Chhatar Mal* v. *Baijnath* I.L R., 28 All., 742.

(9) *Shankar Din* v. *Gokal Prasad*, I.L.R., 34 All. 620 P C.

(10) *Samuel* v. *Jarrah Timber, &c., Co.* [1904], A.C., 323; *British South Africa Co.* v. *De Beers &c Ltd.*, [1910] 2 Ch. 502; C.A. *De Beers &c. Ltd.*, v. *British South Africa Co.* [1912], A C. 52; *Kreglinger* v. *New Patagonia Meat &c. Co.*, [1914] A.C., 25 (44): *Shankar Din* v. *Munshi Gokul Prasad*, I.L.R., 34 All., 620 P.C.

(11) *Per* Lord Macnaghten in *Samuel* v. *Jarrah Timber, &c. Corporation* [1904], A.C. 323 (326).

discharged and the conveyance become absolute. And there is great reason and justice in this rule, for necessitous men are not truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them." (1) But leases between a mortgagor and mortgagee, to last during the pendency of a mortgage, are not bad in themselves, though they like all other transactions between a mortgagor and mortgagee, are looked upon with a certain degree of suspicion. (2)

1412. "Right to redeem" and "Equity of Redemption" distinguished.—The right conferred by the first paragraph of this section on the mortgagor is designated a right to redeem, a departure in nomenclature from that adopted in England where the same right is styled the equity of redemption. This latter term presupposes the existence of a distinction between legal and equitable estates which the dominating influence of equity has carved out of property to suit its own purpose. In the language of English law, on mortgage the legal estate in the property passes at once to the mortgagee, the mortgagor having nothing left but the bare "equity of redemption," a right which though not an estate in the proper legal sense has come to be regarded as such by the Courts of Chancery,(3) (§§ 1342—1344). But in this country the conception of a mortgage is entirely different, inasmuch as the mortgagor still remains the owner of the property after his mortgage, which only creates what may be termed a *jura in re aliena* as limited by his security, and nothing more. To call the mortgagor's estate as his "equity of redemption" would then be here misleading in so far as it implies that the interest of the mortgagor is something less than the interest of an owner.

By act of parties.

1413. Besides the acts of the parties before considered, there are other acts which have the effect of extinguishing the right of redemption. The mortgagor may, for instance, find himself unable to pay off the debt, and thereupon either sell, surrender or release the property in favour of his creditor. (4) Such a transaction once entered into cannot be set aside on the ground of misconception or ignorance. It may, however, be set aside by reason of fraud.(5) Thus, where the mortgagor, on expiry of the term for repayment, executed a *razinama* in favour of the mortgagee, the latter passing a *kabuliat* accepting the land, and subsequently the plaintiff as purchaser of the equity of redemption instituted a suit to redeem the property, it was held that as the *razinama* given by the mortgagor contained no reservation, and as it was accompanied by a transfer of possession, it had the effect of a conveyance of all the mortgagor's right to the mortgagee. It operated to extinguish the equity of redemption notwithstanding any misconception or ignorance on the part of the mortgagor. (6) The breach of a condition in a mortgage-deed to the effect that, on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by acts of the parties within the meaning of this proviso. (7) Where the mortgagor for a fresh

(1) *Vernon* v. *Bethell*, 2 Eden., 113; cited *per* Lord Macnaghten in *Samuel* v. *Jarrah Timber, &c., Co.*, [1904] A.C., 323 (326, 327), affirming [1903], 2 Ch., 1; *Kanhayalal* v. *Narhar*, I.L.R., 27 Bom., 297.

(2) *Mahomed* v. *Ezekiel*, 7 Bom. L.R., 277.

(3) *Paget* v. *Ede*, L.R., 18 Eq., 118; *Lakhmichand* v. *Ganpati*, 14 C.P.L.R., 177; *Webb* v. *Macpherson*, 5 Bom. L.R., 838 (834) P.C.

(4) I.L.R. 34 All., 620 P.C.

(5) *Vishnu* v. *Kashinath*, I.L.R., 11 Bom., 174; *O'Conner* v. *Richards*, 1 San. & S. 252; *Ford* v. *Allen*, L.R., 3 Eq., 461; *Rushbrook* v. *Lawrence*, L.R., 8 Eq., 25; O.A.L.R., 5 Ch., 3; *Melbourne Banking Corp.* v. *Brougham*, 4 App. Cas., 156, 7 App. Cas. 307.

(6) *Vishnu* v. *Kashinath*, I.L.R., 11 Bom., 174.

(7) *Perayya* v. *Venkata*, I.L.R., 11 Mad., 403.

consideration obtains postponement of redemption, the agreement is valid and would be enforced. (1)

1414. The question whether purchase by a mortgagee of the mortgaged property in execution of a stranger's simple money-decree against the mortgagor, has the effect of extinguishing the latter's right to redeem the mortgage, is one which has given rise to some divergence of opinion. It has been held in Madras that in such a case the mortgagee-purchaser does not acquire that property free from the equity of redemption, but is still liable to be redeemed.(2) The reason alleged in support of this view is "the impossibility of a mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed."(3) But to hold that the auction-purchaser of the equity of redemption *qua* a mortgagee of the property acquires nothing at all is a principle which has neither principle nor precedent to support it. Indeed, in the absence of any statutory disability one fails to see why a mortgagee-purchaser of a right in an open sale should be in a worse plight than any other purchaser. It is said that his position as mortgagee gives him an advantage over rival bidders, so that "he must be looked upon as availing himself of his position as mortgagee to obtain an undue advantage over the mortgagor or otherwise to be acting *mala fide* in the eye of the law (whether there be actual fraud or collusion or not)." (4) But it is submitted that in the first place this is an assumption which may or may not be at variance with the nature of the mortgage and the proved facts of each case. And in the second place sale is not a handicap in which all individual advantages must needs be eliminated. Indeed, such a view is clearly opposed to that of the Privy Council who have laid down that a mortgagee-purchaser is, in regard to restrictions upon him, in the same position as any other purchaser.(5) Of course, if the mortgagee has in purchasing the property contravened the provisions of law, as where his purchase was in execution of a money-decree based upon a claim arising out of the transaction itself, and was at one time prohibited by section 99 of the Act, since repealed, there would be reason for this disqualification.(6) And the rule may even be pushed further to the extent of holding that a mortgagee could not be permitted to circumvent his mortgagor by bringing the property to sale under a decree obtained upon a claim even independent of the mortgage.(7) But it would be inequitable to push the doctrine any further. [For a further commentary on this proviso see §§573—577 *ante*; see also section 67 (*d*) and the commentary thereon.]

Extinction by mortgagor's omission.

1415. Though this section speaks of the extinguishment of the right of redemption by *act* of the parties, that term must be understood to have been used in its wider sense as comprising both an act as well as an omission. For instance, the right is clearly subject to the law of limitation, so that if the mortgagor omits to sue within the period of limitation, his right would become extinguished in the same way as if he had renounced it by a deed.

(1) *Krishnaji* v. *Mahesvar*, I. L. R., 20 Bom., 346.

(2) *Erusappa* v. *The Commercial & Land Mortgage Bank*, I.L.R., 23 Mad., 377 (381).

(3) *Martand* v. *Dhondo*, I. L. R., 22 Bom., 624; cited in *Erusappa* v. *The Commercial & Land Mortgage Bank*, I. L. R., 23 Mad., 377 (381).

(4) *Erusappa* v. *The Commercial & Land Mortgage Bank*, I.L.R., 23 Mad., 377 (382).

(5) *Mahabir Pershad* v. *Macnaghten*, I.L.R., 16 Cal., 682 P.C., affirmed in *Mahomed* v. *Savvasi*, I.L.R., 23 Mad., 227 (233), P.C.

(6) *Brajanath* v *Gobindamani*, 4 B.L.R. (O.J.), 83; *Kamini* v. *Ramlochan*, 5 B.L.R., 450; O.A., *Ramlochan* v. *Kamini*, 5 B.L.R., 460; *Neerunjun* v. *Oopendro*, 10 B.L.R., 57; *Bhuggobutty* v. *Shamachurn*, I.L.R., 1 Cal., 337; *Martand* v. *Dhondo*, I.L.R., 22 Bom., 624 (628, 629).

(7) *Martand* v. *Dhondo*, I.L.R., 22 Bom., 624 (629); *Mayan* v. *Pakuran*, I.L.R., 22 Mad., 347 (349).

So again, the right being property would be subject to the general principles governing all other transfers of property, including those based on the doctrine of estoppel. (1) But as between the mortgagor and mortgagee that doctrine should not be pushed to its extreme limit. And so it has been held that no acquiescence apart from a release would suffice to extinguish his title. (2) So again, a mere admission by a mortgagor or an understanding between him and the mortgagee that the latter has become owner cannot destroy the equity of redemption (3) though where a money decree was obtained by the mortgagee against certain coparceners, who were not managers of the family, to which the plaintiffs belonged, but the decree was for a family debt, and the mortgagee-purchaser was wrongly put in possession but which had been not only acquiesced in by the plaintiffs, but the latter showed by their conduct that they were bound by the decree, the court held them bound by their long silence to have waived their right of redemption. (4)

By order of a Court.

1416. After the Court has once adjudicated upon the mortgagor's right to redeem, the question becomes *res judicata* and cannot be re-opened. If then the Court hold that the mortgagor is not for any reason entitled to redeem, he cannot afterwards maintain a suit for redemption. It is immaterial whether the adjudication made is on a suit by the mortgagor or the mortgagee. Thus, where in 1874 the mortgagee had obtaind a decree against the mortgagor for Rs. 40, and in default of payment he was to take possession of the land, until the said sum should be paid. In a suit by the mortgagor to redeem the said land, taken possession of by the mortgagee, in pursuance of the decree, it was held that the mortgagee was not liable to account to the plaintiff for the profits of the land. He was entitled under the former decree to hold possession, until the plaintiff should pay a definite sum, which he had never paid. The defendant held under the said decree a complete title to the land, until such payment was made. (5) A sale of the mortgaged land for arrears of revenue does not deprive the mortgagor of his right to redeem. (6) If the decree simply provides for redemption by the mortgagor, and contains no provision for foreclosure or sale, it may be executed at any time within the limitation prescribed for the execution of decrees, (7) which is usually three years, as provided by Article 179 of Schedule II of the Limitation Act. If the decree limits the time for redemption, the mortgagor cannot apply for the execution of the decree after the time limited. (8) If the mortgagee omits to obtain an order for foreclosure or sale, it has been held that his separate suit would be barred under section 13, Expl. 2 (now section 11, Expl. 4) of the Code of Civil Procedure. (9) Where the mortgagor and mortgagee have agreed to a consent-decree being passed, declaring the mortgagee the absolute owner of properties but providing that the mortgagor should be at liberty to repurchase it at a certain rate within a specified time, which

(1) *E.g.* S. 41 *ante*; *Salamat Ali* v. *Budh Singh*, I.L.R., 1 All., 303 (case of mortgagee.)

(2) *Khairajmal* v. *Daim*, I.L.R., 32 Cal., 296 P.C.

(3) *Hasmanta* v. *Gopal*, 11 Bom. L.R., 1145 (1149); *Ramji* v. *Chinto*, 1 B.H.C.R., 199; *Yellappa* v. *Venkawa*, (1889) B.P.J. 335.

(4) *Hasmanta* v. *Gopal*, 11 Bom. L.R. 1145 (1149). The conduct imputed is not stated, and the question appears to have been decided in the lower Courts as one of adverse possession, see *ib* p. 1147.

(5) *Navlu* v. *Raghu*, I.L.R., 8 Bom., 303.

(6) *Kalappa* v. *Shwaya*, I.L.R., 20 Bom., 492; *Lakshmaya* v. *Yerubandi*, I.L.R., 7 Mad., 111.

(7) *Bandhu* v. *Shah Mohamed*, I.L.R., 14 All., 350; *Rambhat* v. *Raghu*, I.L.R., 16 Bom., 656; *Narayan* v. *Anand Ram*, I.L.R., 16 Bom., 480; *Syed Hussain* v. *Rajagopal*, I.L.R., 30 Mad., 28.

(8) *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40 (F.B.).

(9) *Maloji* v. *Thagaji*, I. L. R., 13 Bom., 567; *Chudasama* v. *Mahani*, I L. R., 16 Bom., 243; *Mahabir* v. *Macnaghten*, I.L.R., 1 Cal., 682, P.C.

he failed to do, but he afterwards sued for redemption, it was held that the suit was barred by section 244 (now section. 47 of Act V of 1908) of the Code, inasmuch as the relationship of the parties as mortgagor and mortgagee ceased as soon as the consent-decree was passed.(1)

Does one suit for redemption bar another ?

1417. If the decree does not provide for foreclosure or sale, and the mortgagor omits to redeem it within the period allowed by limitation, the question may arise (*a*) whether the mortgagor can maintain a *second suit for redemption*, and (*b*) if not, what right does the mortgagee thereby acquire over the property in suit. In England the law is settled that a final decree dismissing an action for the redemption of a legal mortgage, is equivalent to a decree for foreclosure,(2) the only exceptions to this rule being where the suit is for redemption of an equitable mortgage by deposit of title-deeds, (3) or where the dismissal of the suit was for want of prosecution. (4) The reason upon which the English rule is justified, is that the mortgagor is not to harass the mortgagee by instituting more than one suit. (5) But this is certainly not the test of *res judicata* in this country. The exception made in the case of an equitable mortgage by deposit of deeds, is grounded on the reason that the suit being to redeem certain pieces of parchment, the only thing foreclosed would be the right to redeem them. "It may be that the plaintiff would be barred from bringing another bill to redeem those pieces of parchment, but that is all." It cannot foreclose the estate comprised therein. (6) But in India there seems to be some divergence of opinion on the point. In recent cases, however, the Courts have held that a decree for redemption becomes a final decree on the expiry of the time limited thereby, although no order is passed under section 93 (now O. 24, r. 7, Schedule I of the Procedure Code) and hence the mortgagor cannot maintain a subsequent suit for redemption. (7) In a number of cases formerly the contrary view was maintained; (8) that in Bombay the same view seems to have been consistently maintained throughout. (9) So far as this section is concerned there is nothing to prevent the mortgagor maintaining more than one suit for redemption, unless, indeed, the right is extinguished (i) by act of the parties, or (ii) by order of the Court. A decree drawn up in accordance with the direction in section 92 (now O. 24, r. 7, Schedule I of the Procedure Code) would no doubt be an order of a Court excluding a second suit for redemption.(10) The question whether one suit for redemption has the effect of barring another suit for redemption is one which cannot be categorically answered, and indeed which can only be answered with reference to section of the Code of Civil Procedure. In all redemption-suits

(1) *Nowrojee* v. *Bapuji*, 5 Bom L.R., 1036.

(2) *Cholmley* v. *Countess of Oxford*, 2 Atk., 207; followed in *Bishop of Winchester* v. *Paine*, 11 Ves., 194 (199); *Inman* v. *Wearing*, 3 DeG. & S. 734.

(3) *Marshall* v. *Shrewsbury*, L. R., 10 Ch., 250.

(4) *Hansard* v. *Hardy*, 18 Ves., 460.

(5) *Per* James, L. J., in *Marshall* v. *Shrewsbury*, L. R., 10 Ch., 250 (253, 254).

(6) *Per* James, L.J. (Mellish, L.J., concurring) in *Marshall* v. *Shrewsbury*, L. R., 10 Ch., 250 (254).

(7) *Hay* v. *Razi-ud-din*, I. L. R., 19 All., 202; overruled by *Sita Ram* v. *Madho Lal*, I.L.R., 24 All., 44, F. B.; *Ramasami* v. *Sami*, I.L.R., 17 Mad., 96; *Hari Ravji* v. *Shapurji*, I.L.R., 10 Bom., 461, P.C.; *Maloji* v. *Sagaji*, I.L.R., 13 Bom., 567

(8) *Sami Achari* v. *Somasundram*, I. L. R., 6 Mad., 119; *Periandi* v. *Angappa*, I.L. R., 7 Mad., 423; *Karathasami* v. *Jaganath*, I.L.R., 8 Mad., 478; *Ramunni* v. *Brahma Dattan*, I. L. R., 15 Mad., 366; *Mohamed Sami-ud-din* v. *Mannulal*, I. L. R., 11 All., 386.

(9) *Gan Savant* v. *Narayan*, I. L. R., Bom., 467.

(10) *Sita Ram* v. *Madho Lal*, I. L. R., All., 44, F.B.; overruling *Hay* v. *Razi-ud-din*, I.L.R., 19 All., 202.

the issues are not necessarily the same, and all that can be laid down is that when a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore directly and substantially upon that right, and were heard and determined, become *res judicata*, and cannot be re-opened. But unless there has been a determination that the mortgagor has no right to redeem, there would still remain one other issue in a subsequent suit which would not be *res judicata*, and which would have to be heard and determined. (1) [For a further commentary, see Part II of this volume.]

1418. By a Court here is no doubt meant a Court of competent jurisdiction having authority to adjudicate upon the rights and title of the parties. It has been held that a Revenue Court *per se* is not a Court within the contemplation of this clause. No doubt a Revenue Court may be invested with the powers of the Civil Court in which case its order will operate *res judicata*. Thus, in a suit for redemption brought by the mortgagor against his usufructuary mortgagee, it was contended by the latter that the plaintiff's right to redeem was barred on account of the adverse decision passed against him by the Revenue Court under sections 113 and 114 of the North-Western Province Land Revenue Act. On appeal it was held that, since the position given by the section to Revenue Courts is the position of a Court of Civil Judicature of first instance, and since a Revenue Court had held adversely to the plaintiff's claim, he could not maintain a suit for redemption. (2)

1419. Provision for Notice before Redemption.—There is some confusion in the drafting of this clause. As it stands, the words " or no such time has been fixed " are unintelligible. The intention of the clause apparently is that the motgagee shall be entitled to reasonable notice before payment or tender of the mortgage-money, when no time for payment of the principal money has been fixed by the parties, or the mortgage-deed contains a provision that, if the time fixed for such payment has been allowed to pass, the mortgagee shall be entitled to notice before payment. (3) It should be noticed that this clause does not *enjoin* the giving of a notice, but only validates one, if provided for in the deed. In other words, the mortgagee cannot, on the authority of this clause, demand a notice, but he can enforce it if previously agreed to between the parties. No period for notice is fixed by the clause, but the Court would have to judge in each case, if the period stipulated for is reasonable, and not one intended to defeat the provisions of the section as to redemption. The object of the notice being to enable the mortgagee to find a new security for his money, he is entitled only to such notice as will enable him to find a new investment.

1420. Under English law, the mortgagee, is, after default, generally entitled to notice before redemption, the reason stated being that since the mortgagor forfeits the estate in law, by his failure to redeem it on the due date, he has only an equity of redemption left which he cannot enforce without giving the mortgagee a reasonable notice, usually of six months to enable him to find another security. He is now allowed to give either six months' notice, or pay interest for the same period. But if the mortgagee demand his money or take proceedings to realize his security (which amount to a demand), notice will then be unnecesary, (4) whether the period for repayment has accrued or not, (5) the same rule also applying where the mortgagee has taken possession. (6) Where

(1) *Sita Ram* v. *Madho Lal*, I. L. R., 24 All., 44 (51), F.B.

(2) *Har Charan* v. *Har Shankar*, I.L.R., 18 All., 59; appeal from I. L. R., 16 All., 464.

(3) Macpherson's Mortgage (7th Ed.), 660.

(4) *Letts* v. *Hutchins*, L.R., 13 Eq., 176; *Smith* v. *Smith*, [1891], 3 Ch., 550 (552).

(5) *Bovill* v. *Engle* [1899], 1 Ch., 648.

(6) *Ib.* pp. 650, 651.

the mortgagee is entitled to, but does not get notice, it is usual to allow him interest for the period.(1) No notice is required to be given in England in the case of an equitable mortgage, which is presumed to be a mere temporary security; (2) and it is conceived that in India the same principle will govern similar cases.

1421. Limitation for Redemption.—Although the wording of the section would appear to allow of redemption "at any time after the principal money has become payable," it must not be supposed that the section overrides the statutory bar to suits, which allows the mortgagor a period of sixty years to redeem, (3) unless there has been any acknowledgment of the liability in the meantime, in which case limitation would be computed from such acknowledgment, but which however, cannot be inferred from the fact that in a lease granted of a portion of the mortgaged property by the mortgagee to the mortgagor, the former is described as usufructuary mortgagee. Such a description would no doubt estop the mortgagee, if the latter had been trying to impeach the lease on the ground that he was not usufructuary mortgagee, but it creates no estoppel as regards matters outside the lease, which would preclude the mortgagee-lessor from ascertaining his true title. "But it is further contended," observed their Lordships of the Privy Council, "that this description of the lessor amounts to a representation, which he is bound to make good. In order to succeed on this ground the mortgagors must show that the description of the lessor was an essential part of the contract that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself.(4) And unless the lessee could show at least so much, she would have no foundation for contending that her extinct right was revived or re-granted by the terms of the lease."(5) In a joint mortgage in favour of two mortgagees in possession, an acknowledgment of the title by one only of two mortgagees, does not save the mortgagor's right of redemption from being barred by limitation.(6) An application by the successor of an usufructuary mortgagee for mutation of names in the collectorate register as such mortgagee, is only an official proceeding and does not amount to an acknowledgment of title made to the mortgagor so as to keep alive the right of the latter to redeem.(7) When at a period of time within 60 years from the date of the original mortgage, in the course of a conveyance the mortgagee admitted that the mortgaged property was in the ownership of the original mortgagor, that it had been mortgaged, and that the mortgage was at the time subsisting, the admission amounted to an acknowledgment of an existing relation of mortgagor and mortgagee, and a suit to redeem the original mortgage would be in time if instituted any time within 60 years from the date of the admission. (8)

Adverse possession of equity of redemption.

1422. Though, ordinarily the mortgagee's possession being permissive cannot be adverse to the mortgagor, still there is nothing in law to prevent his possession from becoming adverse, nor is there anything in law to prevent the equity of redemption like any other right being acquired or lost by adverse possession. (9) Of course, in a possessory mortgage the equity of

(1) *Bartlett* v. *Franklin*, 15 W.R. (Eng.), 977; *Hutton* v. *Brown* (1881), W.N., 116; *Johnson* v. *Evans* (1889), W.N 95.

(2) *Fitzgerald* v. *Mellersh* [1892], Ch., 385.

(3) Art. 148, Indian Limitation Act (XV of 1877; now Act IX *of* 1908)

(4) *Fatimat ul-Nissa* v. *Sundar Das*, I.L. R., 27 Cal., 1004, P. C.; following *Citizens Bank, Louisiana* v. *First National Bank*, 6 App. Cas., 360.

(5) *Fatimat ul-Nissa* v. *Sundar Das*, I.L. R., 27 Cal., 1004 (1012), P.C.

(6) *Dharma* v. *Balmakund*, I.L.R., 18 All. 458.

(7) *Fatimat-ul-Nissa* v. *Sundar Das*, I.L. R., 27 Cal., 1044, P.C.

(8) *Vithu* v. *Keshav*, 6 Bom. L.R., 38.

(9) *Khairajmal* v. *Daim*, I.L.R., 32 Cal., 296 P.C.; *Kanhoo Lal (Lalla)* v. *Mt. Kanki Bibi*, 3 C.W.N. 601 (606).

redemption is an intangible right of which physical possession is not possible. But in a non-possessory mortgage the mortgagor is the owner and his right of redemption is not merely an "equity" but a right possessed and capable of physical possession. The owner (A) mortgaged with possession his house to one D, in 1845 and four years later died leaving him surviving his daughter, the plaintiff's mother and one N the widow of his deceased adopted son, against whom the mortgagee wrongly sued on his mortgage and obtained a decree for sale, which N satisfied by selling the house to one R who remained in possession from 1856 to 1884, when he sold it to the defendant. In 1881 the plaintiff who was the owner's daughter's son sued both the mortgagee and R for redemption, but R was discharged because he was held not to be a necessary party. He obtained a decree against the mortgagee and in execution was obstructed by R against whose purchaser the defendant, the plaintiff sued for possession, but the Court held that R's possession from 1856 to 1884 had been adverse to the plaintiff whose suit was consequently held barred by time. (1) In another case the Court took the same view when the usufruct of an usufructuary mortgage was wrongfully received by a nephew of the mortgagor to the exclusion of her daughter who was the lawful heir.(2) The mortgagee's possession would be adverse if he continues to maintain it after redemption by the mortgagor, or where he assumes possession after his suit therefor is dismissed. (3) But both the mortgagee and the purchaser from him cannot acquire any title freeing them from their liability to be redeemed so long as that right is not barred by the statutory period of 60 years merely because there has been acquiescence by the mortgagor if it does not amount to a release of the equity of redemption. (4) This was the view of the Privy Council in which the facts stripped of all unnecessary details were as follows: In 1874 and 1878 the plaintiff executed two usufructuary mortgages in favour of the defendant. In 1878 the latter brought the mortgaged properties to sale in execution of his money decree and purchased them *benami* in the name of servants, but he himself continued in possession of the properties. When the plaintiff sued him for redemption the defence was that since the execution sale the defendant's possession *qua* mortgagee had ceased and the circumstances relied on as evidence of adverse possession were that since the date of the execution sale no accounts had been demanded by, or rendered to the mortgagor, who received no subsistence money to which he was entitled under the mortgages, that after the sale the mortgagor left the village, ceased to cultivate the land of which renewed pattas were granted to the nominees of the mortgagee, all of which facts were held to be insufficient to defeat the plaintiff's right of redemption. As Lord referring to the parties observed: "As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. It is almost unnecessary to add that a renewal of the pattas or the making of a new settlement with government in the names of nominees of the mortgagees did not alter the real title to the lands."(5)

1423. Redemption of a Portion of mortgaged Property.—This clause may be compared with section 67 (*a*) with which it must be studied for

(1) *Puttappa* v. *Timmaji*, I.L.R., 14 Bom., 176; following *Nando Coomar* v. *Brojo Bhookun*, 4 Wym. 36; *Cholmwondeby* v. *Canton*, 2 J. & W. 1.

(2) *Kanhoo Lall* (*Lalla*) v. *Mt. Manki*, 6 C. W.N. 601 (612); followed in *Hubdal Khan* v. *Gajadhar*, 25 I.C. (Oudh) 600.

(3) *Zaibunnissa* v. *Parichbat*, 25 I.C. (All. 611.

(4) *Khairaj Mal* v. *Daim*, I.L.R., 32 Cal., 296 P.C.

(5) *Khairaj Mal* v. *Daim*, I.L.R., 32 Cal., 296 (312) P.C.

the purpose of gaining a clearer conception of the subject. The clause lays down both a rule and an exception, the rule being that a mortgage being one and indivisible security for the debt and every part of it, the mortgagor cannot redeem piece-meal, and the exception being that where the mortgagee himself acquires a portion of the mortgaged property, there is then no object served in enforcing the rule. The principle of the rule is that in a mortgage-transaction the creditor values his security as a whole, and, that if the mortgagor is allowed to break in upon its compactness, the mortgagee would suffer in the depreciation which may be caused to it in consequence. Besides, if it were otherwise, it would put the mortgagee to the necessity of having to bring a separate suit against each one of the purchasers of a fragment of the equity of redemption. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be the result. (1) Thus in a case, Subramania Ayyar, J., discussing the principle, said :—" But a mortgage for an entire sum is from its very pupose indivisible : a division of such a mortgage, borrowing the language of a text-writer, is conceivable in theory and may be carried out in practice. But in order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration. (2) This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either partial interest in the subject, can, under the mortgage, get relief, except in consonance with the principle of indivisibility referred to." (3) So, for example, while a Mitakshara son has, as a rule, the right to redeem not only his share in the mortgaged property, but the entire mortgage ; there may be cases when he could not be permitted to do so. Such a case would arise when a suit for redemption brought by the father is dismissed, whereupon the son would be permitted to sue only for the redemption of his own interest on payment of a proportionate amount of the mortgage-money. (4) So again, where a portion of the mortgaged property has passed out of the possession of the mortgagee and has become irrecoverable on account of limitation, the mortgagor would be entitled to redeem the residue on payment only of the proportionate amount charged on the mortgage. (5)

1424. Exceptions to Indivisibility.—This being then the object, it is easy to understand why the rule is liable to the following three exceptions : *viz.*—(i) Where the co-mortgagors have a distinct and separate interest; (ii) where the mortgagee recognises a partition of the mortgaged property among the co-mortgagors ; (iii) where the mortgagee himself acquires a portion of the mortgaged property. The rule as to the indivisibility of a mortgage was recognised in India, even before the Act, (6) and the law does not seem to have been in any way affected by the Act. A mortgage being indivisible, he who desires to redeem it must either redeem the whole or not at all ; or what amount to the same thing, if he only seeks to redeem only a portion of the mortgaged

(1) *Per* Lord Hobhouse in *Nilkant Banerji* v. *Suresh Chandra*, I.L.R., 12 Cal., 414 (423) P.C.

(2) Kelleher on Mortgage in Civil Law, pp. 11, 12.

(3) *Hutahsanan* v. *Parmeshwaran*, I.L.R., 22 Mad., 209 (211, 212).

(4) *Sundar Lal* v. *Chhitar Lal*, I.L.R., 25 All., 215.

(5) *Husaini Begam* v. *Collector of Cawnpur*, 4 A.L.J.R., 375 (391).

(6) *Baul Govind Singh* v. *Rae Ram Kishun Das* (1851), S.D.A., p. 288 ; *Khyalee Ram* v. *Ramdyal* (1853), S.D.A., N.W.P., 473 ; *Shaikh Imam Ali* v. *Oograh Singh*, 22 W.R., 262.

property he may do so, but he is bound to pay the whole of the mortgage-debt. This course may be convenient where the party redeeming is interested in only a part of the property, and is unwilling to assume the management of the entire property.(1) The question has nothing to do with the interest that the redeeming mortgagor may possess in the property, nor is the question dependent upon the indivisible character of the property. It is, however, a question dependent upon the fact that the security being one and single, its disintegration, if permitted, might be disastrous to the interest of the mortgagee. A "mortgagee," observed Morgan, C.J., "is entitled to say to each of several persons who may have succeeded to the mortgagor's interest, that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this, that a mortgagee, who has acquired by purchase a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage-debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden and must discharge it." (2) Being, however, a right of the mortgagee, it may be waived or relinquished by him. (3) It is not, therefore, necessary that all the co-mortgagors must join in redeeming the property. Indeed, if such were the law it would be a clog on redemption more obnoxious than any it strives to displace. (4) In a suit for redemption, however, all persons interested in redemption must be joined as parties, being made defendants, if they do not agree to be added as plaintiffs. (5) This rule is based on the right of the mortgagee to account once only, and which can be done, if the account is taken in the presence of all the parties who could demand an account. (6) Hence, there can ordinarily be only one suit for redemption. Non-joinder of a person interested in redemption is a fatal defect in the suit, for which it is liable to be dismissed, even on an objection taken for the first time in appeal.(7)

1425. The mortgagor who redeems the whole property is entitled to a co-rateable contribution from the other mortgagors, and as a security for which, he is entitled to hold the entire property in charge, until he is in turn redeemed by his co-sharers on payment of their *quota* of the debt, with all incidental expenses and costs. (8) Until then, he is to all intents and purposes in the position of the mortgagee redeemed,(9) and can as validly transfer his interest, as the aggregate group of interests called ownership.(10) the amount paid by him in excess of his share may also be recovered as a debt under section 69 of the

(1) *Venkatacharya* v. *Kotrava*, 3 Bom. L. R., 935 (938); *Naro Hari* v. *Vithalbhat*, I.L. R., 10 Bom., 648 (653); *Mora Joshi* v. *Ramachandra*, I.L.R., 15 Bom., 24; *Kuppusami* v. *Papathi*, I.L.R., 21 Mad., 369.

(2) *Mahtab Singh* v. *Misree Lall*, 2 Agra, 88 (89); *Salig Ram* v. *Barun Rai*, 4 N.W.P., H.C.R., 92; *Dina Nath* v. *Lachmi Naram*, I.L.R., 25 All, 446 (461).

(3) *Razeeoddeen* v. *Jhabboo Singh* (1864), W.R., 75; *Chaudhri Ahmad Baksh* v. *Raghubar* (1905), I.L.R, 27 All., 1 P.C.

(4) The contrary laid down in *Ram Baksh* v. *Ram Lall*, 21 W R., 428, is no longer law.

(5) S. 85, *post*; Now O. 24, r. 1, C.P.C.; *Norender Narain* v. *Dwarklal*, I. L. R., 3 Cal., 397, P.C.; *Jugul Kishore Lal Singh* v. *Kartic Chunder*, I.L.R., 21 Cal., 116; *Fakir Baksh* v. *Sadat Ali*, I L.R., 7 All., 876; *Bhawani Prasad* v. *Kallu*, I.L.R., 17 All., 537, F.B.; *Hira Lal* v. *Kishan Lal*, I.L.R., 19 All., 543; *Naro Hari* v. *Vithalbhat*, I.L. R., 10 Bom., 648; *Timappa* v. *Lakshmamma* I.L.R., 5 Mad., 385: and see cases cited under O. 24, r. 1, Part II, *post*.

(6) *Palk* v. *Clinton*, 12 Ves., 48.

(7) *Gulam Kadir Khan* v. *Mustakim Khan*, I.L.R., 18 All., 109; *Konna* v. *Karunakara*, I.L R., 16 Mad., 328; explained in *Hutahsannan* v. *Parmeshwaran*, I.L R., 22 Mad., 209 (211); following *Pearce* v. *Morris*, 5 Ch. D., 227.

(8) See s. 65 and comm.; *Jagat Narain* v. *Qutab Husain*, I.L.R., 2 All, 807; *Changa Das* v. *Gansing*, I.L.R., 20 Bom., 615.

(9) *Asansah* v. *Vamana* I.L.R., 2 Mad., 223

(10) *Vithal* v. *Visvasrao*, I.L.R., 8 Bom. 497.

Indian Contract Act.(1) If a suit for contribution is brought, it will be subject to the provisions of section 82. A mortgagor is not, it may be stated, entitled to a contribution, if he has paid off a claim already time-barred without raising even a plea as to limitation,(2) unless he can show that the suit had miscarried by no fault of his own, but by a general misapprehension of the rights of the parties.(3) The possession of a mortgagor pending redemption by his co-sharers cannot be regarded as adverse to them. Article 120 of Schedule II of the Limitation Act does not apply to such suits.(4) Of course, there can be no suit for contribution where the plaintiff has suffered the decree to be passed against him by collusion or fraud.(5) A purchaser of a mortgagor's interest, in a portion of the property, is bound by the same rule as the original mortgagor. He cannot redeem the property piece-meal. In short, he is in every respect dealt with in the same way as the original mortgagor, and it does not matter whether he is a purchaser at a Court-sale or a transferee from a transferee.(6)

It is to be noted that the clause does not provide for cases where only *some* of the several mortgagees acquire a portion of the mortgaged property. In such cases the mortgagor has no right to redeem his share of the mortgaged property by payment of a proportionate part of the mortgage-debt.(7) The clause is again applicable only to parties who stand to each other in the relation of a mortgagor and mortgagee.(8)

The three exceptions to which the rule is liable may now be considered:

1426. Where Co-mortgagors have Separate Interests.—

(1) Waiver.

Where, either at the time of the contract or subsequently, the parties enter into a special arrangment, whereby the interest of each mortgagor is separated and defined, the rule as to the indivisibility of a mortgage then becomes inapplicable.(9) It may also happen that the mortgagee may, by his conduct, destroy the original indivisibility of the contract. Where he does so, any mortgagor may redeem his own share, by paying him a proportionate amount, but then he cannot redeem the share of his co-mortgagor against the will of the co-mortgagee.(10) And where the equity of redemption of different plots of land in the possession of a usufructuary mortgagee under one entire contract was sold to two different persons, and the mortgagee had abandoned his possession of one plot and taken a lease from the purchaser of that plot, and thereby destroyed the indivisibility of the original contract, the purchaser of the other plot was held entitled to redeem his land on payment of a proportionate amount of the mortgage-debt.(11) In another case, in 1873, *R* mortgaged to *S* seven parcels of land (items 1—7) for Rs. 300. In 1880, *M*

(1) *Norender Narain* v. *Dwarkalal*, I.L.R., 3 Cal., 397, 408, P.C.; *Moothoranath* v. *Krishto Kumar*, I.L.R., 4 Cal., 369; *Dakhina Mohan* v. *Saroda Mohan*, I.L.R., 21 Cal., 142, P.C.,; *Bama Sundari* v. *Adhar Chunder*, I.L.R., 22 Cal., 28; *Shiamanand* v. *Harlal*, I.L.R., 18 All., 471.

(2) *Fordham* v. *Wallis*, 10 Ha., 217.

(3) Fisher, § 781.

(4) *Ramchand* v. *Sadashiv*, I.L.R., 11 Bom., 122; *Pattabhirammaya* v. *Ramayya*, I.L.R., 10 Mad., 23.

(5) *Vayangara* v. *Pariangot*, I.L.R., 7 Mad., 89; *Gobind Chunder Nundy* v. *Sheogobind Chowdhry*, I.L.R., 24 Cal., 330.

(6) *Kuppusami* v. *Papallu*, I.L.R., 21 Mad., 369.

(7) *Mahtab Rai* v. *Santlal*, I.L.R., 5 All., 276.

(8) *Neelamegan* v. *Govindan*, I.L.R., 14 Mad., 71 (73).

(9) *Hutahsanan* v. *Parmeshwaran*, I.L.R., 22 Mad., 209; *Ram Kristo* v. *Mt. Ameeroonissa*, 7 W.R., 314. Section 28 of the English Conveyancing Act, 1881, enacts that where the amount secured is expressed to be secured in shares or distinct sums, the covenant of the mortgagor shall be with each mortgagee separately in respect of the share or distinct sum secured to him. But the Act recognises no such rule.

(10) *Kuray Mal* v. *Puran Mal*, I.L.R., 2 All., 565.

(11) *Marana* v. *Pendyala*, I. L. R., 3 Mad., 230; but dissented from in *Lachmi Narain* v. *Muhammad Yusuf*, I.L.R., 17 All., 63.

purchased *R's* rights in items 1 and 2. In 1881, *R* redeemed item 5 on payment of Rs. 30 and executed a second mortgage of the rest to *S* for Rs. 200: it was held that the mortgagee, by accepting Rs. 30 as the proportionate amount of the mortgage due on one item of lands had destroyed the indivisibility of the original contract, and that, therefore, the plaintiff was entitled to redeem the two items upon payment of the proportionate amount due thereon. (1) These cases were, however, dissented from by the Allahabad High Court, on the ground that such a view is opposed to public policy and would impose a hardship on mortgagors, "for mortgagees would undoubtedly refuse to receive from mortgagors part payment of a debt on condition of releasing a part of the mortgaged property." (2) It is submitted that the argument is unintelligible, for if the mortgagees would refuse, the mortgagor can move the machinery of law to compel them to allow redemption piece-meal. The learned Judges also do not state how such a course, if allowed under special circumstances, would be opposed to public policy. Indeed, the case seems to have been decided without reference to an earlier case (3) decided by the same Court, in conformity with the decisions in Madras.

1427. Where Severance is effected by Mortgagee's Consent.—

(2) Consent. The second exception to the rule is where mortgaged property is partitioned among the mortgagors by consent of the mortgagee. (4) This exception is provided for in section 67 (*d*). It is by no means necessary that the mortgagee should consent previously to partition. If he recognises and acts upon it by allowing some of the co-sharers to redeem their divided shares, he cannot refuse to settle with the remaining co-sharer by receiving proportionate payment. (5) It is, of course, entirely in the option of the mortgagee to recognise or not a division among the mortgagors, but if once he acquiesces in it, he cannot afterwards refuse to take the legal consequences of his own conduct. (6) Upon the same principle it has been held that a mortgagee who has a security upon two or more properties which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected. In such a case the purchasers of the properties not released are entitled to insist that no more than a proportionate share of the mortgage-debt shall be levied upon the properties in their hands. (7) Apart from consent, however, the mortgagee cannot be compelled to permit redemption piece-meal. If four brothers having each a one-fourth interest in the mortgage join in executing a mortgage, the mere fact that their interests had been defined is no ground for allowing partial redemption. (8) Nor is the right let in by the fact that a part of the property has been sold for arrears of revenue not due to his default. (9) On the other hand, if the mortgagee has even once recognized separation of interests, he could not afterwards claim to re-assert his right on the ground of indivisibility. Again, an arrangement between one or more of

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(1) *Subramanyan* v. *Mandayan*, I. L. R., 9 Mad., 453; but dissented from in *Lachmi Narain* v. *Muhammad Yusuf*, I. L. R., 17 All., 63.

(2) *Luchmi Narain* v. *Muhammad Yusuf*, I.L.R., 17 All., 63 (66).

(3) *Keshavlal* v. *Chunnalal*, (1887), A.W. N., 250.

(4) S. 67 (*d*).

(5) *Lakshuman* v. *Madhav*, I. L. R., 15 Bom., 186 (189); *Mahadaji* v. *Gunpat Shet*, *ib.*, 257 (258); *Bisheshar* v. *Lalk Singh*, 1. L. R., 5 All., 257; *Hakim Lal* v. *Ram Lal*, 5 C. L.J., 46.

(6) *Mahadaji* v. *Gunpat Shet*, I. L. R., 15 Bom., 257: *Venkatachella* v. *Srinivasa*, 15 M. L. J. R., 422; *Hari Kissen* v. *Velait Hossein*, I. L. R., 30 Cal., 755; *Hakimlal* v. *Ramlal*, 5 C.L.J., 46.

(7) See s. 82, comm.; *Hakimlal* v. *Ramlal*, 5 C.L.J., 46.

(8) *Razeecooddeen* v. *Jhubboo* (1864), W.R., 75; *Hurreehur* v. *Dabee*, *ib.*, 260; *Boodhoo* v *Kishen*, 3 W.R. (Misc.), 41.

(9) *Hashim* v. *Anjeet Singh* (1864), W. R., 217.

several mortgagors and the mortgagee whereby the former are released from their liability under the mortgage in consequence of payment of a portion of the debt or otherwise, would not affect the mortgagors who were not parties to the arrangement, if their right as against the co-mortgagors is likely to be in any way prejudiced thereby.(1) Where seven parcels of land were mortgaged, and seven years afterwards a third party purchased the mortgagor's interest in two of the parcels, after which he was allowed to redeem another parcel on payment of Rs. 30, the mortgagee having at the same time taken a fresh mortgage of all the remaining six parcels for Rs. 200 and the second mortgagor then claimed to redeem the two items which he had previously purchased from the original mortgagor, on payment of the proportionate amount of the sum secured by the first mortgage, it was held that he could do so. (2) This view, however, has not been accepted in Allahabad where the contrary has been laid down: "In our opinion it would be contrary to public policy to hold that a mortgagee by allowing a mortgagor to pay off a portion of the mortgage-debt, and so release a portion of the mortgaged property, broke up the mortgage-contract so as to allow the mortgagor or any one else interested to redeem the remainder of the mortgaged property piece-meal. If such were the law, a hardship would be imposed on mortgagors, for mortgagees would undoubtedly refuse to receive from mortgagors part-payment of a debt on condition of releasing a part of the mortgaged property." (3) But the hardship to either party may in such a case be averted by releasing the part on condition that it shall give no right to treat the security as split up. Indeed, if such be the intention of the parties, it is not likely that partial redemption would still be allowed. The mortgagee's failure to implead a necessary party in his suit to enforce the mortgage may have the effect of breaking up the unity of his mortgage. Thus where *B* took a mortgage by conditional sale of a certain village, and *C* then purchased a portion of the same in execution of a money-decree against the mortgagor, of which *B* had notice: *B* then sued on his mortgage without joining *C* and obtained a decree which was made absolute. *C* then sued for redemption of only the portion purchased by him on payment of a proportionate amount of the mortgage-money, and his prayer was allowed. (4)

1428. Severance by Merger.—The rule of law against breaking up the integrity of a mortgage-security being a rule aiming at the protection of the mortgagee, has no application to cases where the mortgagee himself acquires a portion of the mortgaged property. (5) But the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, though there may be circumstances in which it may have the effect of

(3) Merger.

(1) *Venkatachella* v. *Srinivasa*, I. L. R., 28 Mad., 555.

(2) *Subramanyan* v. *Mandayan*, I. L. R., 9 Mad., 453; following *Marana* v. *Pendyala*, I.L.R., 3 Mad., 230.

(3) *Lachmi Narain* v. *Muhammad Yusuf*, I.L.R., 17 All., 63 (66).

(4) *Brij Kishore* v. *Madho Singh*, 3 A. L. J. R., 27.

(5) *Kudhai* v. *Sheo Dayal*, I. L. R., 10 All., 570; *Nilkant* v. *Suresh Chandra*, I.L.R., 12 Cal., 414, P. C.; *Mahtab Singh* v. *Misree Lall* (1876), N.W.P.H.C.R., 88; *Ali Khan* v. *Mohamed* (1881), B.P.J., 319; *Sakharam* v. *Goval* (1883), B. P. J., 51; *Nandkishore* v. *Raja Hariraj Singh*, I. L. R., 20 All., 23 (31, 32), F. B.; *Nawab Azimut Ali* v. *Jowahir Singh*, 13 M. I. A., 404; *Bekon Singh* v. *Deen Dyal*, 24 W. R., 47 (48); *Moro* v. *Balaji*, I. L. R., 13 Bom., 45; followed in *Pirjada* v. *Sha Kalidas*, I. L. R., 21 Bom., 544 (547); *Kesree* v. *Roshun Lal*, 2 N.W.P. H.C.R., 4; *Hutahsanan* v. *Parameshwaran*, I.L.R., 22 Mad., 209.

extinguishing the mortgage.(1) This is a modified application of the doctrine of merger by which the benefit of a security is lost when it merges into another security of a higher nature.(2) Of course, there can be no merger unless the securities are vested in the same person. The equitable principle of the rule may be explained by supposing a mortgage by two co-sharers, one of whom sells his property to the mortgagee. It would be obviously inequitable to compel the remaining co-sharer to bear the whole burden of the debt, and hence he is allowed to redeem on payment of his share. The mortgagee by purchasing a part of the mortgaged property should not place the mortgagor in a worse position than that in which the mortgagor would have been, had any other person purchased the property. Where several properties are mortgaged to secure one debt, such properties are liable to contribute reteably to the debt, the extent of the liability of each property being proportionate to its value at the date of the mortgage.(3) If the mortgagee himself purchases one of the properties liable to contribute rateably to the mortgage-debt, he must bear a rateable share of the debt, and he cannot be allowed to benefit himself, and to prejudice the mortgagor or the owner of the remainder of the property by throwing on it the whole burden of the liability.(4) He must bring into account the value of the property purchased by himself. But being an equity in favour of the mortgagor, it is his duty to use it in defence, and to shew the extent of the reduction in his liability. (5)

1429. It must be observed, however, that the mortgagee does not in every case acquire the property *by purchase*, for he may acquire it by any one of the other modes of transfer recognised by law. The word *acquired* is general enough to include such transfers. And the law regards the other modes of acquisitions, it is conceived, in the same light. Thus where the equity of redemption of different plots of land, in the possession of a usufructuary mortgagee under one entire contract, has been sold to two different persons and the mortgagee had abandoned his possession of one plot, and taken a lease from the purchaser of that plot, thereby destroying the indivisibility of the original contract, the purchaser of the other plot was held entitled to redeem his land on payment of a proportionate amount of the mortgage-debt. (6) In another case the property was foreclosed to the mortgagee who had failed to implead the auction-purchaser of a part of the equity of redemption of whom he had notice, and who thereupon sued for redemption only of the portion purchased by him, which, however, the mortgagee would not allow, but the Court allowed piece-meal redemption on the strength of the concluding words of the section.(7) But whereas in such a case the joint character of a mortgage is broken, the right of a co-mortgagor to redeem the whole mortgage is also thereby terminated. Each co-mortgagor must thenceforward redeem his own separate share. He cannot

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(1) *Nand Kishore* v. *Raja Hariraj Singh*, I.L.R., 20 All., 23 F. B.; overruling *Ahmad* v. *Bakar Husain* (1883), A. W. N., 61, in which purchase of a portion of the mortgaged property by the mortgagee, subject to his mortgage-lien, was held to extinguish the debt *in toto*.

(2) *Bisheshar* v. *Laikh Singh*, I. L. R., 2 All., 257 (258); *Kudhai* v. *Sheo Dayal*, I. L.R., 1 All., 570 (575).

(3) *Himmat* v. *Kader Buksh* (1867), N.W. P. S. D. A., 188; *Mahtab* v. *Misree Lall*, 2 Agra, 88; followed in *Nathoo* v. *Ameerchand*, 24 W.R., 2.

(4) *Bisheshar* v. *Laikh Singh*, I. L. R., 2 All., 257 (258); *Kudhai* v. *Sheo Dayal*, I.L.R., 10 All., 570 (574); following *Banarsi* v. *Maharani Kuar*, I.L.R., 5 All., 27.

(5) *Hirdy Narain* v. *Syed Attaoollah*, I.L. R., 4 Cal., 72 (76).

(6) *Marana* v. *Pendyala*, I. L. R., 3 Mad., 220.

(7) *Brij Kishore* v. *Madho Singh*, 2 A. L. J. R., 752; O. A., 3 A. L. J. R., 27; *Surji Ram* v. *Berhamdeo*, 2 C. L. J., 202; *Hari* v. *Veliat Hossein*, I. L. R., 30 Cal., 755; *Gangadas* v. *Jogendra Nath*, 11 C. W. N. 403.

claim to redeem the shares of the other co-mortgagors against the will of the mortgagee.(1) But he may sue for redemption of all that remained of the property, impleading the other co-mortgagors after hearing whose objections the Court may allow or disallow the claim.(2) Independent suits for redemption brought by co-sharers should be heard together.(3)

Redemption of the mortgagee's share.

1430. Where the mortgagee acquires a portion of the mortgaged property from a co-mortgagor, the other co-sharer cannot redeem the share in the mortgagee's possession against his will. Hence, where two Hindu co-widows mortgaged their estate, and the mortgagee subsequently purchased the equity of redemption of one of them, it was held that the other co-widow could redeem no more than a moiety of the estate during the lifetime of the vendor.(4) In another case, where a mortgagee in possession had acquired a right to a share in the property mortgaged, it was held that he could not be compelled to surrender the mortgaged property on payment of the debt or any part of it on payment of a proportionate amount of the debt, until the mortgagor has, by a proper suit for partition, ascertained definitely the shares of the co-owners.(5) This view has, however, been dissented from in Bombay, where it has been held that in such case the mortgagor would be entitled to redeem the *whole* mortgage, and the fact that the mortgagee has himself purchased a portion of the equity of redemption could not defeat that right.(6) In other words, if the purchaser of an equity of redemption happens to be the mortgagee, he does not acquire an equity superior to that of co-mortgagor, but if so, why should a mortgagee, *qua* a purchaser, be in a worse position than a stranger purchaser? Of course, if the mortgagee had purchased the property by taking advantage of his position as mortgagee, the case would be different, but otherwise, if the purchase is carried out in good faith, there is no reason why the mortgagee-purchaser should not have the same rights as a stranger purchaser. At any rate this is the view now taken in Allahabad,(7) and Oudh(8) though it is not acceptable in Bombay (9) and Calcutta.(10)

1431. In a case the mortgagee sued the original mortgagor who died during the pendency of the suit. The mortgagee thereupon proceeded with the suit without bringing upon the records two of his legal representatives. A decree was passed against such as were impleaded, and in execution the property was sold and purchased by the mortgagee himself. The two persons who had been excluded thereupon sued to redeem their share of the property, and the Court allowed them to redeem it on payment of the amount found due on account of the mortgage-debt in respect of their share up to the date when in execution

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(1) *Azimut Ali* (*Nawab*) v. *Jawahir Singh*, 13 M. I. A., 404 ; *Kuray Mal* v. *Puran Mal*, I. L. R., 2 All., 565 ; *Dina Nath* v. *Luchmi Narain*, I. L. R., 25 All., 446 (463) ; *Kallan Khan* v. *Mardan Khan*, I. L. R., 28 All., 155 ; *Munshi* v. *Daulat*, I. L. R., 29 All., 262 ; *Girish Chunder* v. *Juramoni*, I. L. R., 29 All., 262.

(2) *Ragho* v. *Balkrishna*, I. L. R., 9 Bom 128.

(3) *Wuzurconnessa* v. *Saeedun*, B. L. R., (Sup. Vol.), 613.

(4) *Ariyaputri* v. *Alamelu*, I. L. R., 11 Mad., 304.

(5) *Marakar* v. *Punjapatath*, I. L. R., 6 Mad., 61.

(6) *Mora Joshi* v. *Ramchandra*, I. L. R., 15 Bom., 24 ; *Bhikaji Daji* v. *Lakshman Balal*, B. P. J. (1888), 291, printed in I. L. R., 15 Bom., 27 *note* ; *Naro Hari* v. *Vithalbhat*, I. L. R., 10 Bom., 684 ; distinguishing *Nawab Azimat Ali* v. *Jowahir Singh*, 13 M. I. A , 404.

(7) *Mohamad Abdul* v. *Dilsukh*, 2 A. L. J. R., 210.

(8) *Mustafa Khan* v. *Shadi Lall*, 10 O. C., 81.

(9) *Martand* v. *Dhondo*, I. L. R., 22 Bom., 624.

(10) *Sheodeni* v. *Ram Saran*, I. L. R., 26 Cal., 164.

of the decree, the mortgagee took possession of the mortgaged property, it being held that for the subsequent period, the mortgagee was not entitled to interest, nor the plaintiffs to their share of the mesne profits.(1) In another case *A* was the second mortgagee of a four annas share of a property and redeemed a first mortgage upon a twelve annas share inclusive of his four annas. A subsequent second mortgagee of the eight annas share redeemed the first mortgage upon the whole twelve annas. *A* was held entitled to redeem the four annas upon which he had a second mortgage.(2)

Rateable abatement when made.

1432. In no case does the purchase of a portion of the mortgaged property by the mortgagee extinguish the entire mortgage. This view once taken by the Allahabad High Court,(3) has now been definitely overruled by the Full Bench.(4) Where the mortgagee purchases a portion of the mortgaged property and subsequently seeks to enforce his mortgage, bringing the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him.(5) Where the defendant pleads that his share should be burthened with no more than a proportionate amount of the original mortgage-debt, and claims to redeem such share upon payment of that quota, it is for him to show what that proportion is, and to pay it into Court in the absence of which he cannot be exempted from further liability.(6) Where fragments of the equity of redemption have been sold to different purchasers the proportion of mortgage-charge for which an individual purchaser is liable, cannot be apportioned by taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other parcels who must all be necessarily impleaded in such a suit.(7) [As to the mode of apportionment, see sec. 82, comm.]

Not when purchase made by one of several mortgagees.

1433. The doctrine of rateable reduction does not apply where only one of several mortgagees has purchased the equity of redemption as to a part of the mortgaged property. There is then no merger of the mortgage in the hands of the purchaser, for he is not the sole mortgagee.(8) Where there are several mortgagees, a mortgagee refusing to redeem the entire property may afterwards be precluded from permitting redemption piece-meal. A property belonging to *A* and *B* was mortgaged to *X* in 1879. In 1888 *A* mortgaged his share only to *Y*, and in 1897, *B* similarly mortgaged his share to *Z*. *Y* had redeemed to *X* in 1891. *Z* first sought to redeem *Y* in respect of the share mortgaged to himself, but on *Y*'s objection that the whole property should be redeemed, *Z*'s suit was dismissed, and he subsequently instituted a suit to redeem the whole property and in which he was successful. In a suit by *Y* to redeem *Z* in respect of the share mortgaged to *Y* it was held that as *Z* did not

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(1) *Surya Bibi* v. *Monindra Nath*, 4 C. W. N., 507.

(2) *Jawahir Singh* v. *Baldeo*, 6 C. L. J. 672, P. C.

(3) *Ahmad Wali* v. *Bakar Husain*, (1883), A. W. N., 61.

(4) *Nand Kishore* v. *Raja Hori Rai Singh*, I. L. R., 20 All., 23, F. B.

(5) *Chunnalal* v. *Anandi Lal*, I. L. R., 19 All., 196; *Mhd. Abdul* v. *Dilsukh* (1905), 2 A. L. J. R., 210; *Brij Kishore* v. *Madho Singh*, 2 A. L. J. R., 752; O. A., 3 A. L. J. R., 27; *Chunni Lall Srikishan*, I. L. R., 33 All., 434; *Jugal Kishore* v. *Kedar Nath*, I.L.R., 34 All., 606; *Mir Eusuf Ali* v. *Panchanan*, 15 C. W. N. 800.

(6) *Hirdy Narain* v. *Syed Attaoollah*, I. L. R., 4 Cal., 72.

(7) *Nilkant* v. *Suresh Chandra*, I. L. R., 12 Cal., 414 (422), P. C.; following *Azmat Ali* v. *Jowahir Singh*, 13 M I. A., 404.

(8) *Sobha* v. *Inderjeet*, 5 N. W. P. H. C. R., 148 (150); followed in *Mahtab Rai* v. *Sant Lal*, I. L. R., 5 All., 276.

accept *Y's* offer to redeem the whole property, *Y* was entitled to redeem the share mortgaged to him.(1)

Right to redeem one of two properties separately mortgaged.

61. A mortgagor seeking to redeem any one mortgage, shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Illustration.

A, the owner of farms *Z* and *Y*, mortgages *Z* to B for Rs. 1,000. A afterwards mortgages *Y*, to B for Rs. 1,000, making no stipulation as to any additional charge on *Z*. A may institute a suit for redemption of the mortgage on *Z* alone.

1434. Analogous Law.—This section is borrowed from section 17 of the Conveyancing Act, (2) which very clearly states the law thus :—

"17. (1) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem,

Restriction on consolidation of mortgages.

(2) This section applies only if, and as far as, a contrary intention is not expressed in the mortgage-deeds or one of them.

(3) This section applies only where the mortgages or one of them are or is made after the commencement of this Act". (3)

This section abolishes the consolidation of mortgages, as section 80 abolishes tacking, thus introducing a great change in the law in India in the same way as section 17 of the corresponding English Statute has, by abolishing consolidation, effected a great change in England. The section has suffered verbal changes since its draft stage when it was proposed to be enacted thus : "If the two owners of two or more properties make separate mortgages on them by separate assurances, each mortgage may, in the absence of a contract to the contrary, be dealt with irrespectively of the other, though the mortgages are made in favour of the same mortgagee." (4) The illustration remains intact.

Doctrine of consolidation.

1435. Before the passing of the Act it was a rule in some parts of India(5) that if the mortgagor mortgaged two properties to one person, separately, for distinct debts, or successively to secure the same debt, the mortgagee could insist that one security shall not be redeemed alone. (6) "The principle is that, redemption being an equitable right, the person who redeems must on his part do equity

(1) *Jawahir Sing* v. *Baldeo*, 12 C. W. N., 515, P.C.

(2) 44 & 45 Vict., c. 41.

(3) The Act came into force on the 31st December 1881, *vide* S. 1 (2).

(4) S. 60, Bill 1879.

(5) The English rule in favour of consolidation was followed in Bombay (*Vithal* v. *Daud Hussain*, 6 B. H. C. R., 90), but not in Bengal (*Odoy Churn* v. *Bhujohury*, 11 W. R., 310). In a subsequent case (*Narayan* v. *Pandurung*, I. L. R., 7 Bom., 526), however, the rule was held to be inapplicable to the mofussil of Bombay. The marginal note appended to the Bill refers to *Vithal* v. *Daud* (6 B. H. C. R., 90), as the case which lays down *contra* and which it now overrules.

(6) *Shuttleworth* v. *Laycock*, 1 Vern., 245 ; *Pope* v. *Onslow*, 2 Vern., 285 ; *Cummins* v. *Fletcher*, 14 Ch. D., 699.

towards the mortgagee, and redeem him entirely [1]—not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other." [2] So in an earlier case it was observed by Cotton, L. J.:—"The right to redeem was the creature of equity, and the Court of Equity held that it was inequitable that the mortgagor should take from his creditor the sufficient estate and leave him with an insufficient estate as a security for a different debt, and in granting its own relief it refused to do so except upon the terms of his doing what the Court of Equity thought equitable. [3]...Where a party obtaining relief has not a legal right to any assistance, it imposes this fetter or condition upon him, that he shall not have the assistance without doing that which the Court of Equity, independently of contracts, considers it equitable to enforce against him." [4] "The whole doctrine...arises from the power of the Court of Equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor." [5] The right existed whether the securities were legal or equitable. [6] Judgment-creditors could consolidate. [7]

1436. Consolidation and Tacking distinguished.—Tacking is the union of several debts upon one estate; consolidation is the union of several debts respectively charged on several estates. [8] "In tacking," says Fisher, "the right is to throw several debts (one or more of which are either lent upon inferior securities on the *same* estate, or are mere specialty debts) upon the protection of the legal estate, the dominion over which is the very foundation of the right. But the right which is now to be considered, depends upon the equitable principle, that he who seeks the aid of the Court must do equity himself; and it enables a mortgagee to unite, and to hold united, securities on *different* estates, until payment of the debts charged on both of them—to make one estate liable for a debt specifically charged on another. To give a right to tack, one debt only needs to have been lent on the credit of the estate; it is sufficient that the other be merely a lien upon it; and where the doctrine of circuity applies, even that is unnecessary. But the essence of the other doctrine is, that there shall be several estates, each specifically liable for a particular debt. To the one, notice at the time of advance is fatal; in the other, the right belongs to a mortgagee, who has taken several securities from the same mortgagor, and who, therefore, of necessity, has notice of the first mortgage, when he takes the second." [9]

Thus, on the principle enunciated in section 80, a third mortgagee redeeming the first cannot acquire priority over the second mortgagee as regards *his own* mortgage, and so the second mortgagee, by making subsequent advances to his mortgagor, cannot consolidate the two mortgages so as to obtain priority over the first mortgagee. As the third mortgagee cannot *tack*, so the second mortgagee cannot *consolidate*.

1437. Principle—The principle of consolidation is founded on the principle that a Court of Equity would not assist a mortgagor in redeeming one

(1) *Willie* v. *Lugg*, 2 Eden., 78.
(2) Fisher, § 1210; *Vithal* v. *Daud*, 6 B. H. C. R., 90.
(3) *Cummins* v. *Fletcher*, 14 Ch. D., 699 (712).
(4) *Ibid*, p. 714.
(5) *Per* James, L.J., in *Cummins* v. *Fletcher*, 14 Ch. D., 699 (708).
(6) *Pledge* v. *White* [1866], A. C., 187 (192); *Tweedale* v. *Tweedale*, 23 Beav., 341; *Watts* v. *Symes*, 1 DeG.M. & G., 240; *Cracknall* v. *Janson*, 11 Ch. D., 9.
(7) *Spalding* v. *Thompson*, 26 Beav., 637.
(8) Robb. Mort., 855.
(9) Fisher, § 1210.

of his estates, unless he has paid all that was due, though secured on a different estate. (1)

1438. The principles of tacking and consolidation in England had their origin apparently in Courts of Equity to which mortgagors who wished to redeem were obliged to have recourse, and the principles seem to have been adopted upon the ground that a mortgagor who came into a Court of Equity to obtain relief by redemption of a mortgage, should discharge all the debts due to the mortgagee, and secured to him by mortgages on that or other property of the mortgagor. (2) The principle upon which the doctrine originally rested was perfectly sound, but by a series of so-called logical deductions "the original doctrine of consolidation became so extended as to cause an intolerable grievance to persons dealing with estates in mortgage," (3) and consequently, even before the passing of the Conveyancing Act the application of the doctrine was much curtailed, and had to be hedged round with many restrictions.

1439. The fact that the doctrine conferred a right not only against the mortgagor, or his heir or devisee, but also against a *bona fide* purchaser without notice, must have often led to usurpation of property under the seductive name of equity, and which was probably the last straw calling for the immediate intervention of the Legislature. Consolidation was formerly the rule as it is now the exception, in favour of which the parties must now enter into a contract. Even then, it may not be given effect to, if it has the effect of clogging redemption. It is said that the section abolishes consolidation of mortgages only over different properties, but leaves the doctrine untouched if the several mortgages be in favour of the same person and in respect of the same property. (4) But this view is certainly not warranted by the section, and reference to its illustration, if permissible at all for the right construction of the section(§ 15) does not lead to any other conclusion. (5)

1440. It seems that much more is sought to be implied by the section than its wording would reasonably bear. For instance it was said to imply "as is shown by the illustration, that if the different mortgages are in favour of one and the same person not in respect of different properties but over the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the additional mortgage also," (6) which, it is submitted, it clearly does not, though the view may be otherwise sound enough. (7) The section

(1) *Mills* v. *Jennings*, 13 Ch. D., 639 (646); affirmed in *Jennings* v. *Jordan*, 6 App. Cas., 698.

(2) *Tajjo Bibi* v. *Bhagwan Prasad*, I. L. R., 16 All., 295 (299).

(3) Fisher, § 1211, see *per* Lord Davey in *Pledge* v. *White* [1896], A. C., 187 (192).

(4) *Dorasami* v. *Venkataseshayyar*, [I. L. R., 25 Mad., 108 (115); followed in *Balasubramania* v. *Sivaguru*, 21 M. L. T. 562: 11 I. C. 629 (630).

(5) In *Dorasami* v. *Venkataseshayyar*, [I. L. R., 25 Mad., 108 (115)], White, C. J., and Bhashyam Ayyangar, J., remarked: "But that very section (S. 61) implies, as is shown by the illustration, that if different mortgages are in favour of one and the same person not in respect of different properties, but over the same property, the mortgagor cannot seek to redeem anyone mortgage without redeeming the additional mortgages also." But no such implication can legitimately arise from the illustration, which only exemplifies a typical case without attempting to modify the section by studied implication. Moreover the learned judges have confused tacking with consolidation.

(6) Fisher (6th Ed.) § 1499; *Per* Kellewich J. in *Bovill* v. *Sudle*, [1896] 1 Ch. 648 (650, 651); *Per* Romer J. in *Smith* v. *Smith*, [1891] 3 Ch. 550 (552): "If the mortgagee has himself demanded payment of the debt or has taken any steps to compel payment of it, no notice by the mortgagor, and no payment of interest in lieu of notice, is required."

(7) *Per* Wickens V-C. in *Letts* v. *Hutchin*, LR. 13 Eq. 176: "you have demanded payment by your proceedings; and here is payment: you cannot decline what you have demanded."

does not profess to exhaust all the possible cases of tacking and consolidation, but merely provides against one case beyond which it expresses and implies nothing. Cases not covered by the rule, must then be decided on general principles consonant with the other provisions of the Act and which will have to be presently considered.

1441. Meaning of Words.—"*A mortgagor seeking to redeem.*" What about those entitled to redeem under section 91? It is apprehended that not only the mortgagor but all persons entitled to redeem are entitled to the benefit of this rule, the justice of which was recognized even before the Act. (1) "*In the absence of a contract to the contrary,*" means that parties may by contract withdraw to the transaction from the operation of the rule. Such contract may, it is conceived, be made at any time, provided that it is not made to defeat the rights of a third party. (2) "*Without paying &c.,*" *i.e.*, without redeeming it. "*Or by any person:*" shows that the right is not personal to the mortgagor, but accrues in favour of any one representing him. "*On property other than that comprised in the mortgage which he seeks to redeem:*" This clause is loosely worded, and may, if too strictly construed, mean either (i) that the mortgagor can have the benefit of the section only when the second mortgage is secured by some *other property* than that comprised in the mortgage which he seeks to redeem; or (ii), that he need not redeem the *other mortgage* on the property, &c., which seems clearly to be the intention. (3) "*As hereinafter provided:*" *i.e.*, in sections 83, 84, *post.*

1442. Consolidation by Contract.—There is nothing in this section to prevent the tacking of two or more mortgages in respect of the same property, though such tacking without contract would be obnoxious to the rule against clogging redemption, already set out under the last section. But if there is a contract and it is not of the kind prescribed by it, the mortgagor would be compelled to stand by his contract to redeem two or more mortgages on the same property, or not at all.(4) But since the covenant as to tacking or consolidation is a collateral advantage, which the Courts view askance, the contract must be both express and unequivocal. But while mortgagor is not compelled to redeem the two mortgages on the same property, the mortgagee, would seem as a result of another rule to be considered in the sequel (5) to be obliged to tack them when he has to put them in suit. (6) But in this respect the mortgagee stands in a position of greater advantage, when he holds two or more mortgages relating to different properties, which he is not bound to and under the provisions of this section he is no longer entitled to consolidate. But he may still contract himself out of the disability by entering into a contract with the mortgagor, in which case the rights and liabilities of the parties must be determined with reference to the doctrine. But here again, as already observed, law regards consolidation as inequitable, it will always struggle against it unless

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(1) *Allu Khan* v. *Roshan Khan*, I. L. R., 4 All., 85.

(2) *Hughes* v. *Britannia &c., Building Society*, [1906] 2 Ch. 607; *Freeman* v. *Laing*, [1899] 2 Ch. 355; *Bank of Africa* v. *Salisbury Gold Mining Co.* [1892] A. C. 281; *Rolt* v. *Hopkinson*, 25 Beav., 461; O. A. *Hopinson* v. *Rolt*, 9 H. L. C. 514; *London and County Banking Co.* v. *Ratcliffe*, 6 App., Cas. 722; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29.

(3) The contrary was held in *Bhartu* v. *Dalip*, 3 A. L. J. R., 672, but it *assumes* the first view to be correct.

(4) *Ranjit Khan* v. *Ramdhan Singh*, I. L. R., 31 All., 482 (486); following *Allu Khan* v. *Roshan Khan*, I. L. R., 4 All., 85; *Muhammad* v. *Jairj Mal*, (1906) A. W. N. 207; *Bhikam Singh* v. *Shankar Dayal*, 6 A. L. J. 255; *Dorasami* v. *Venkataseshayyar*, I. L. R., 25 Mad., 108; *Balasubramania* v. *Sivaguru*, 21 M. L. J. 562; 11 I. C. 629.

(5) See s. 85 Comm. *post.*

(6) *Nattu Krishnama* v. *Annangara*, I. L. R., 30 Mad. 353.

the contract is explicit and clear.(1) If two properties are mortgaged by the same deed, but are separately described, and the sums which they secure are specified, and the deed contains separate provisos of redemption, the intention is clearly to treat the two mortgages as distinct, and no intention to consolidate can be inferred from the mere fact that they have been incorporated in the same deed.(2) The owner of two public houses *A* and *B* being leasehold property, mortgaged at first *A* for £1,000, and then *B* to a brewery company. Property *A* was subsequently mortgaged to one Bird. The lease of *A* being nearly out, the company further advanced a sum of £1,000 for its renewal, and thereupon the mortgagor with Bird's consent executed a fresh mortgage for £2,000 which included the sum advanced on the first mortgage and, at the same time, Bird's mortgage was renewed, who, on his part, executed a memorandum giving the company priority for the £2,000 and advances up to £300. The company having assigned both the mortgages to the defendant, Bird sued him to redeem *A*, and the question was whether he could do so without also redeeming *B*, and it was held that though the mortgage of *A* to Bird was in date subsequent to the mortgage of *B*, the intention of the parties was merely to give priority to the company for their £2,300, and not to give them the right to consolidate the mortgages on *A* and *B*.(3) For the purpose of consolidation it is necessary that the mortgagee must hold two or more mortgages from the same mortgagor,(4) but not necessarily in respect of different properties.(5) There can be no consolidation between a mortgage by *A* for his own debt, and mortgage by *A* and *B* for their partnership debt.(6) It is only in the former case that the mortgagor can exercise his election, and the mortgagee can claim to consolidate. Of course, in such a case the mortgagor may transfer his equity of redemption to several persons, but since these only acquire the right, title and interest of the original mortgagor, they are in no better position than the latter; and if the mortgagee could have consolidated against the mortgagor, he cannot be prevented from consolidating against the holders of his equity of redemption. At the same time their right cannot be affected by a mortgage created after the purchase.(7) Thus, where the mortgagor of one property assigned the equity of redemption, and *afterwards* mortgaged another property to the mortgagee of the first, it was held that the assignee of the equity of redemption could redeem the first mortgage which was not affected by a mortgage created subsequently to his purchase. Similarly, it was laid down in one case(8) that there can be no consolidation when two or more mortgages made by the same mortgagor to different mortgagees on different estates become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption *of one of them*, even though both the mortgages were created before the assignment. So the section offers no impediment to the mortgagee enforcing his subsequent security against the same mortgagor if the borrower had agreed that the earlier mortgage was not to be redeemed until the later mortgage is paid off.(9) But if the latter debt be

(1) *Bhartu* v. *Dalip*, 3 A. L. J. R., 672

(2) *Cf. De Caux* v. *Skipper*, 31 Ch. D. 635.

(3) *Bird* v. *Wenn*, 33 Ch. D., 215 (219).

(4) *Ex parte Williams*, 16 Ch. D., 117.

(5) *Dorasami* v. *Venkataseshayyar*, I. L. R., 25 Mad., 108 (115), *Bhartu* v. *Dalip*, 3 A. L. J. R, 672 (674) in which the effect of s. 61 merely was considered.

(6) *Cummins* v. *Fletcher*, 14 Ch. D., 699.

(7) *Jennings* v. *Jordon*, 6 App. Cas., 698; overruling *Tassel* v. *Smith*, 2 DeG. & J., 713; *White* v. *Hillacre*, 3 J. & C., Ex., 597; *Winter* v. *Carr*, [1894], 2 Ch., 32; [1894] 3 Ch., 498; *Pledge* v. *White*, [1896], A. C., 187; *Riley* v. *Hall*, [1898], W. N. 81.

(8) *Harter* v. *Colman*, 19 Ch. D., 630 *White* v. *Hillacre*, 3 J. & C., Ex., 957; followed *Beever* v. *Luck*, 4 Eq., 537 dissented from.

(9) *Durga Pershad* v. *Dukhi Roy*, 9 C. W. N., 789; *Radha Krishna* v. *Sheo Dial* (1905), Oudh Cas., 132.

unsecured, as where the debt is due on a simple money bond, a contract to the same effect would be treated as a clog on redemption and is therefore unenforceable.(1) On the other hand, if the earlier debt was unsecured, a stipulation that it shall take priority over the mortgage-money, cannot be treated as a clog on redemption.(2) Indeed, in such a case the mortgage may be regarded as securing both the sums. So where the property was mortgaged for Rs. 1,500 and the mortgage-deed recited an earlier debt of Rs. 5,000 due on a previous account and provided that if mortgagor did not repay this Rs. 5,000 within two years from the date of the deed, he was not at liberty to redeem the property, unless both the debts of Rs. 1,500 and Rs. 5,000 were paid. The deed was stamped as a mortgage for Rs. 6,500, and the Court held that the deed secured the two sums with this difference that the mortgage as to Rs. 5,000 took effect on expiry of two years from the date of the debt.(3) So in another case the owner executed two mortgages—the first of which was usufructuary, and the second one was simple. In the latter deed he covenanted that he would not be entitled to redeem it before redeeming the prior usufructuary mortgage, and the covenant was held to be enforceable.(4) But in another case where the mortgagor executed two mortgages in the later of which he stipulated that he would not redeem the property unless he paid off the second mortgage, the Court held the covenant as to consolidation not sufficiently clear to admit of its being enforced.(5) In another case two persons mortgaged certain property in 1879. In 1883 one of the mortgagors executed a mortgage comprising in part property subject to the mortgage of 1879 and in part other property in favour of the same mortgagees. This latter mortgage contained a stipulation that the mortgagor would redeem it before redeeming the mortgage of 1879. Certain property comprised in the first mortgage, but not in the second, was sold, and the purchasers sued for redemption of that mortgage alone. The Court held him so entitled on the ground that the covenant merely fixed the order of redemption of the two mortgages and had not necessarily the effect of consolidating them.(6)

1443. The assignee of an equity of redemption takes it subject to all equities which affect the assignor in respect of it *at the date of the assignment*, but the possibility that the mortgage may, by virtue of its subsequent union in the same person with a mortgage of another estate made previously to the assignment, by the same mortgagor to a different mortgagee, become liable to consolidation, is not such an equity. But the case becomes widely different if the mortgagor has by one deed assigned the equity of redemption of *all* the mortgaged properties, although the assignment is made *before* the mortgages become united in title. The reason for this discrimination is stated by Lord Davey to be that "he knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand."(7) In short, in such a case the assignee stands in the position of the mortgagor and is entitled to his right only, and that if the mortgagor could not have redeemed one property without the other, the assignee stood in no better or more favourable position, and was not

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(1) *Durga Pershad* v. *Dukhi Roy*, 9 C. W. N., 789; *Rugad Singh* v. *Narain*, I. L. R., 27 All., 178; *Sheo Shankar* v. *Parma*, I. L. R., 26 All., 559; dissenting from the contrary held in *Allukhan* v. *Roshan Khan*, I. L. R., 4 All., 85.

(2) *Hari* v. *Vishnu*, I. L. R., 28 Bom., 349, F. B.

(3) *Ib.*

(4) *Mhd. Abdul Hamid* v. *Jairaj Mal*, 3 A. L. J. R., 768.

(5) *Bhartu* v. *Dalip*, 3 A. L. J. R., 672.

(6) *Ganga Rai* v. *Kirtarath*, I.L.R. 33 All., 393 (395).

(7) *Pledge* v. *White*, [1896], A. C., 187 (198); affirming *Pledge* v. *Carr*, [1864], 2 Ch., 328, C. A. [1895], 1 Ch., 51.

entitled to redeem one without redeeming the other.(1) But the same result was justified by Stirling, J., by a different process of reasoning: "Being an equitable right," he says, "it follows that the ordinary incidents of equitable rights must attach to it; and one of them is that the assignee of an equitable right stands in no better position than his assignor, assuming always that none of the parties had done anything which would mislead in any way the persons claiming under the assignment, or been guilty of any such conduct as would set up counter-equities, so to speak, against the person claiming the right."(2) Consolidation only applies where default has been made on all the securities, in respect of which it is claimed. There can be no claim for consolidation, if some of the securities are not ripe for payment. (3) Where the property was mortgaged to one *A* and subsequently mortgaged to other persons, of which the first mortgagee *A* had notice, and the latter transferred his mortgage to another mortgagee *B* of a different property from the same mortgagor, it was held that inasmuch as the first mortgagee *A* had notice of the puisne mortgagees, his transferee *B* could not consolidate his own and *A*'s mortgage as against them. (4) So where the owner of leasehold property P mortgaged it to *A* with a covenant that he should not redeem that mortgage without first redeeming all other incumbrances that might be created by him in favour of the same mortgagee, and he then executed another mortgage in respect of another leasehold property Q; a day after which he executed a second mortgage of Q in favour of another, *B*, and of which *A* had notice. *A* then took two other mortgages of different properties. *B* then sued *A* to redeem Q and *A* claimed to consolidate his four mortgages, but the Court held that *A* was only entitled to consolidate the two mortgages taken by him before notice, and that the two other mortgages taken by him after *B*'s mortgage could not be consolidated. (5) It is now settled that mortgagees holding merely equitable interest in the securities can also consolidate. (6) But a mortgagee cannot tack to his debt another mortgage-debt, the property mortgaged to secure which has ceased to exist. (7)

1444. Tacking and Consolidation how combined.—Having regard to the nature of the distinction between tacking and consolidation, the two may be combined in the same case. For there may be not only several mortgages secured by *different* properties of the same mortgagor, but also several mortgages of some one of the same properties. Such a case occurred in which there was (i) a mortgage (apparently with conveyance of the legal estate on two properties); (ii) an assignment of the equity of redemption in the two properties to a second mortgagee; (iii) a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held, *first*, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgagee, and *secondly*, that having done so, he might consolidate his third mortgage (which was on one property only) with the first mortgagee on both estates and hold the two estates as against the second mortgagee until all that was due to him on both securities should be satisfied. (8)

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(1) Cf. *per* Lord Romilly in *Tweedale* v. *Tweedale*, 23 Beav., 341; *Vint* v. *Padget*, 1 Giff., 446; *Selby* v. *Pomfret*, 3 DeF. & J., 595; *Beevor* v. *Luck*, L. R., 4 Eq., 537; *Pledge* v. *White*, [1896], A. C., 187. Cases otherwise conflicting are only reconcilable on the distinction made in the text.

(2) *Bird* v. *Wenn*, 23 Ch. D., 215 (219).

(3) *Cummins* v. *Fletcher*, 14 Ch. D., 699.

(4) *Baker* v. *Gray*, 1 Ch. D., 491.

(5) *Hughes* v. *Britannia Permanent Benefit Building Society*, [1906], 2 Ch., 607.

(6) *Watts* v. *Symes*, 16 Sim., 640; *Cracknall* v. *Jackson*, 11 Ch. D., 1.

(7) *Banner* v. *Berridge*, 18 Ch. D., 254.

(8) *Bovey* v. *Skipwith*, 1 Ch. Ca., 201.

1445. The assignment by the mortgagor of his equity of redemption *after* his bankruptcy does not affect the question, it being settled that a mortgage executed by a bankrupt before his bankruptcy, where the value of the land mortgaged exceeds the sum secured, is upon the bankruptcy of the mortgagor to be considered *tabula in naufragio*, and if the assignees do not immediately redeem any mortgagee of the bankrupt whose security is insufficient, they may take an assignment of the mortgage and consolidate it with the debt due under the mortgage to himself: "The fact of the bankruptcy before the defendants took the transfer made no difference. Any one might seize the plank. The assignees might have got the benefit of it if they had been quick enough; but the defendants were more alert." (1) The effect of this state of law is that mortgagees after the bankruptcy of the mortgagor would be allowed by their own act to vary the rights of themselves and the other creditors of the mortgagor, so as to obtain payment in full of a debt in respect of which, at the time of the bankruptcy, they were only entitled to a dividend along with the general body of unsecured creditors.

Where the mortgagee is entitled to the right, the fact that he has given notice to the mortgagor to pay off only one of the mortgages, will not prevent him from consolidating. (2)

1446. It should be noted that the section prevents consolidation of debts secured on two separate properties. But, as has been observed before, the phrase, "on property other than that comprised," is at first sight susceptible of a double meaning, according as the word "other" is taken to qualify the word "mortgage" or "property" preceding it (§1441). It has been held that the rule would equally apply whether the two mortgages are on the *same* property or on two *separate* properties. (3) And the reason of the rule seems to be clear; for, if the mortgagor is permitted to redeem one debt, the mortgagee has still the same property as his security, and *a fortiori* a better one for the remaining debt. The section is only declaratory of a *right* to redeem singly any one of the two securities and does not take into account whether the securities co-exist or exist apart.

Without consolidation the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, may obtain a decree for sale on each of them in a separate suit. But the mortgagee cannot sell the property twice over, nor can he sell under the second decree subject to the first. If this were allowed, it would let in the very mischief which has been struck at by section 99, even the repeal of which, seems to retain the rule unaffected. The only benefit which such decrees may confer on the mortgagee appears to be that if the plaintiff execute one of those decrees by sale of the property, and there is a surplus arising from the sale, he may probably attach it in execution of the other decree. (4)

When there is no right to consolidate in an action by the mortgagee brought to foreclose two or more mortgages on different properties executed by the same mortgagor, the latter is entitled to redeem any property singly on payment of the debt thereon secured, and only such costs as may rateably be apportioned between the several estates. (5)

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(1) *Selby* v. *Pomsret*, 1 J. & H., 336, O A., 3 DeF. & J., 595; *Neve* v. *Pennell*, 2 H. & K., 170.

(2) *Griffiths* v. *Pound*, 45 Ch. D., 553.

(3) *Tajjo Bibi* v. *Bhagwan Prasad*, I. L. R., 16 All., 295; *Sundar Singh* v. *Bholu*, I. L. R., 20 All, 322, F. B.; but *contra* in *Dorasami* v. *Venkataseshayyar*, I. L. R., 25 Mad., 108 (115).

(4) *Sundar Singh* v. *Bholu*, I. L. R., 20 All., 322, F. B.

(5) *De Caux* v. *Skipper*, 31 Ch. D., 635;

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage the mortgagor has a right to recover possession of the property—

(*a*) Where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(*b*) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

1447. Analogous Law.—This section is but an expansion of section 60 which describes the rights of a mortgagor. The species of mortgage here intended is usufructuary mortgage as defined in sections 58 (*d*) (§ 1249), though the fixation of a term mentioned in clause (*b*) is by no means its essential condition. Strictly speaking, such mortgage is in the nature of an anamolous mortgage though in practice, it is more frequently with one, than the pure usufructuary mortgage defined in section 58 (*d*). (§§ 1252-1263). As it is, the section only refers to two forms of a usufructuary mortgage defined in section 58 (*d*) ignoring the third form included in the definition, *viz.*, where the rents and profits are agreed to be apportioned partly in lieu of interest and partly in lieu of the principal money. It has been, however, applied to a usufructuary mortgage by conditional sale. (1) The wording of the second clause is in other respects defective (§ 1450). The liabilities of a mortgagee in possession are prescribed in section 76 (*d*).

1448. The law now enacted may be regarded as a notable departure from the old practice requiring a mortgagor seeking to redeem to aver in his plaint that the mortgage-money had been tendered or fully realized from the usufruct, or otherwise.(2) If on inquiry it is found that a balance, however small, is still due, the course usually adopted was to dismiss the suit without giving the mortgagor option to make good the deficiency,(3) as by passing a conditional decree allowing redemption on the payment of the balance.(4) But as regards the passing of a conditional decree the Court had latterly modified their practice by decreeing redemption on payment by the mortgagor within a reasonable time to be fixed by them.(5) Indeed, in the case of a usufructuary mortgage,

overruling *Clapham* v. *Andrews*, 27 Ch. D., 679, in which the whole of the costs were made chargeable against each estate, a view which amounts to a consolidation as regards costs, and was, therefore, overruled.

(1) *Kundan* v. *Thakurlal*, 6 C.P.L.R. 43 (46,48).

(2) *Chowbey* v. *Chowdree* (1854), N.W.P.S. D. A., 371; *Jadoobungsee* v. *Moheeput*, (1855), N.W.P. S.D.A., 432; *Nekram* v. *Chynsookh*, (1856), S. D. A. N.W.P., 3; *Mouzzum* v. *Mt. Wajdah*, (1852), S. D. A., 748; *Mukhun Lall* v. *Sreekishen*, 12 M. I. A., 157. (201).

(3) *Zeinut Begum* v. *Bheekun*, (1849), S. D. A., 392; *Sheo Buksh* v. *Ahmad*, (1849), N. W. P. S. D. A., 37; *Mathuram* v. *Dhurm Singh*, (1850), N. W. P. S. D. A., 104; *Muhammad* v. *Mt. Heengun*, (1855), N.W.P.S.D. A., 543; *Khyrati* v. *Mt. Seetoo*, (1851), N.W. P. S. D. A., 221.

(4) *Azimut Ali* v. *Jowahir Singh*, 13 M. I. A., 404 (412); *Kundun Lall* v. *Sustee Koeer*, 8 W. R., 369; *Mt. Motee* v. *Indrajit*, Marsh, 112; *Muhammud* v. *Mt. Heengun*, (1855), N. W. P. S. D. A., 543; *Oomrao* v. *Hashman*, (1860), N. W. P. S. D. A., 84.

(5) *Boistub Dass* v. *Huro Narain*, 17 W. R., 408 (but not in special appeal); *Kailyan Dass* v. *Sheo Nundun*, 18 W. R., 65; *Lutafut Hossain* v. *Mahomed*, 22 W.R., 269; *Perladh*

the mortgagee being in possession is bound to render accounts, and if he fails to do so, the mortgagor would have no redress if he is unable to ascertain before suit what, if any, sum was due by him, and is not entitled to come into Court as soon as he has reason to believe that the debt has been paid off from the usufruct.(1) At any rate, this has always been the practice of the English Courts, which regards the mortgagee as subject to a perpetual account.(2)

1449. Nature of such Suit.—The question whether a suit under the section should be treated a suit for ejectment or redemption, is one upon which the Act is silent. In England, Lord Hardwicke compared the position of a mortgagee, to whom an estate is conveyed until he shall have repaid himself out of the rents and profits, to a tenant by *elegit*, so that as soon as the principal and interest were satisfied, the estate ceased, the mortgagor being then entitled to sue him in ejectment, the mortgagee's possession thenceforward being adverse.(3) Strictly speaking, a suit under this section cannot be regarded as a suit for redemption, for such a suit necessarily involves the enforcement of the right to redeem as defined in section 60, and which confers on the mortgagor larger powers as therein specified. Again, a redemption-suit can only be instituted after "the principal money has become payable" and which implies that a time has been beforehand fixed, whereas clause (*a*) would appear to contemplate a case in which no such time has been fixed, and in which, therefore, no suit for redemption is possible. Similarly, while in such a suit an account has to be gone into and the procedure prescribed in section 92 followed, no account need be gone into in a proceeding under clause (*b*). It is thus clear that the section is intended to provide a summary remedy in cases in which the elaborate procedure of a redemption-suit would be superfluous. A case instituted under this section may then be regarded as an ejectment,(4) and the inquiry to be made must be strictly limited to the points there specified. Of course, such a procedure necessarily does not supersede, but is supplementary to the general provisions contained in section 60. The section confines itself only to the simplest forms of usufructuary mortgages, the other forms involving accounts or more complicated questions being designedly left out to be dealt with in a regular suit. Where the same property is burdened with two or more charges, as where a land was held by *A* in a usufructuary mortgage executed by the plaintiff's father in 1843, and *A* mortgaged the same again to *B* in 1850, who, in 1855, assigned it over to *C*, the plaintiff then sued to recover possession of the land from *A*, *B* and *C*; it was held that so long as a sub-mortgage was outstanding he was only entitled to a decree for redemption and could not obtain a decree for possession.(5)

A suit by a usufructuary mortgagee of an occupancy-holding in the United Provinces for possession must be instituted in the Civil and not in a Revenue Court.(6)

1450. Principle.—The object of this section is said to be to provide a summary remedy in cases in which the elaborate procedure of redemption-suit would be inapplicable.(7) There can be no suit for redemption unless a time

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v. *Broughton*; 24 W. R. 275; *Barada Kant* v. *Bhagwan Das*, I L. R., 1 All., 344.

(1) S. 76 (*g*) *post*; *Sahibzada* v. *Permeshar*, I. L. R., 1 All., 524.

(2) *Yates* v. *Hambly*, 2 Atk., 360 (362).

(3) *Yates* v. *Hambly*, 2 Atk., 360 (362); *Tenlon* v. *Curtis*, Yo., 619.

(4) *Zubeda* v. *Sheocharan*, I. L. R., 22 All., 83 (85).

(5) *Shouri Anna* v. *Anthoni*, 13 M. L. J. R., 375.

(6) *Bindeshri* v. *Sadho Charan*, I. L. R., 26 All., 591.

(7) Macpherson on Mortgage (7th Ed.), p. 662; *Kalu* v. *Lalji*, 11 C. P. L. R., 10 (105).

for payment of the principal money has been expressly or impliedly fixed. Clause (*a*) of section 62 contemplates a case in which no such time for repayment has been fixed, and in which a suit for redemption is, therefore, not possible. The mortgagor may apparently sue for accounts and possession, but if it is found that the mortgage-money has not been repaid from the rents and profits of the property, his suit must be dismissed. Clause (*b*) of the section refers to one form of an usufructuary mortgage closely resembling a Welsh mortgage.(1) In such a case the taking of an account is unnecessary, and the mortgagor, after depositing the principal money in Court, has a right to recover possession. He is not debarred from bringing a regular suit for redemption, but at the same time he is not bound to do so.(2) The section seems to deal specifically with a class of securities generally treated of in section 60 to which the present section must be regarded as generally supplementary.

1451. Meaning of Words.—"*From such rents and profits the interest, &c.:*" Could this mean interest out of the rents and profits, the surplus being appropriated towards the principal?(3) But, if so, why should the mortgagor have to pay "the principal money" and not "or any portion thereof remaining due," before redemption. Reading this section along with section 58(*d*) it would appear that the phrase is used to mean, "to appropriate the rents and profits in lieu of interest," as for instance, in a *zur-i-peshgi* lease. "*Or deposits it in Court:*" Is this anything more than a tender? If so, why was the clause omitted in section 60? If not, it is clearly redundant. "*As hereinafter provided:*" *i.e.*, in sections 83 and 84, *post.*

1452. When and How Possession obtained.—The mortgagor, according to this section, has a right to demand back possession as soon as the mortgage-debt is satisfied out of the rents and profits, where the mortgage-money was agreed to be so satisfied, and where the rents and profits are agreed to be appropriated in lieu of interest on a proper payment or tender of the principal on the expiry of the term prescribed for the payment of the money. This the mortgagor may do by instituting a suit for redemption and calling for accounts which the mortgagee is bound to keep and render to him.(4) Even where the mortgagor does not specifically call for accounts, but only sues for possession or ejectment, "the Court is bound as a Court of Equity, and acting upon the principle that it is always the aim of a Court of Equity, to finally determine as far as possible, all questions concerning the subject of the suit to cause an account to be taken up to the time of the decree, the account so taken being considered binding, and the parties not being at liberty, except under peculiar circumstances to re-open it in another suit.(5) But while the mortgagor can call for accounts, the burden of proving satisfaction of the debt is still on him and not the mortgagee on whom lies the *onus* to prove what, if anything, is due to him.(6) If the amount tendered by the mortgagor is found to have been insufficient, that is no ground for dismissing his suit. For in such a case, the Court can pass a conditional decree fixing a period for the payment of money found to be due on the mortgage.(7) And this can be done

(1) See Fisher, § 10, for its definition, which is the same as given in s. 58 (*d*).

(2) *Kalu* v. *Lalji*, 11 C. P. L R., 103 (105).

(3) S. 76 (*d*).

(4) S. 76 (*g*).

(5) *Kallyan Das* v. *Sheo Nundun*, 18 W. R., 65.

(6) *Shah Makhunlall* v. *Baboo Sree Kishen Singh*, 12 M. I. A., 157; *Kallyan Das* v. *Sheo Nundun*, 18 W. R., 65.

(7) *Shah Lutafut Hossein* v. *Chowdhry Mahomed*, 22 W. R., 209; *Boistub* v. *Huro Narain*, 17 W. R., 408; *Baradakant Rai* v. *Bhagwan Das*, I. L. R., 1 All., 344; *Sahibzada* v. *Parmeshar*, I. L. R., 1 All., 524.

even where the plaintiff has sued for ejectment and not redemption,(1) or even where the suit is instituted by the mortgagee. But a suit for possession based upon an allegation of fraud, and tried out as such, cannot be afterwards in appeal converted into one for redemption.(2)

1453. Where the mortgagee is let into possession by the mortgagor, the former is estopped from denying the title of the latter at the commencement of his possession, though he is not debarred from showing that his title has since determined.(3) On a similar principle, since the mortgagor cannot derogate from his own grant, (4) it follows that where he puts the mortgagee in possession of the property, he cannot recover its possession by pleading the invalidity of his own mortgage, as that the holding he had mortgaged being occupancy was not transferable, without being made to pay up the mortgage-money. In any other view he would be taking the benefit of his own wrong which, no Court will award.(5)

Successive suits for redemption.

1454. A decree in a suit for redemption dismissing the suit on the ground that the mortgage-debt had not been satisfied, does not have the effect of foreclosure or of *res judicata* so as to bar a second suit, for the decree in such a case decides no more than that the suit for redemption was premature.(6) Under the proviso to section 60 the right to redeem continues to subsist in the mortgagor so long as it has not been extinguished by the act of the parties or by the order of a Court. Thus it has been observed by Strachey, C.J. : " The only order which under the Act expressly extinguishes a usufructuary mortgagor's right to redeem, is the order for sale which under sections 92 and 93 may be made in a redemption-suit, though the usufructuary mortgagee could not have sued for sale any more than for foreclosure. If then the usufructuary mortgagee cannot sue for foreclosure, if on default of payment under a decree for redemption, an order for foreclosure is expressly excluded, and if in the case of such default there is no provision for the extinguishment of the right to redeem except on the passing of an order for sale on the mortgagee's application, why should the usufructuary mortgagor's failure to obtain a decree for redemption put the mortgagee in any better position, or give him a right for which he never bargained ?" (7) In England, the law in this respect is dissimilar, for there the dismissal operates as a decree for foreclosure against the mortgagor.(8)

What the mortgagor may obtain.

1455. In a successful redemption-suit the mortgagor need not care to obtain more than the possession of the property, but where the mortgagee allows the mortgagor to redeem out of Court, it is apprehended that the mortgagor is not only entitled to get back possession, but also the mortgage-deed, and obtain a reconveyance as

(1) *Nilakant* v. *Suresh Chunder* (1882), B P. J., 21 P. C. ; *Vasudeo* v. *Narayan*, L. R., 12 I. A., 171 ; *Parshotam* v. *Rumal Zunja*, I. L. R., 20 Bom., 196. (The case of *Chundu* v. *Kombi*, I. L. R , 9 Mad., 208, must be considered as overruled).

(2) *Ram Deo* v. *Indromoni*, 3 C. W. N., 325.

(3) S. 116, Indian Evidence Act ; *Nakchedi* v. *Nakchedi*, I. L. R , 18 All., 329 ; *Balakushaba* v. *Abai Amrita*, 11 Bom. L.R. 1093.

(4) *Bishumbhur* v. *Parshadi*, 10 A.L.J. 112 ; *Hillaya* v. *Narayanappa* 13 Bom. L.R. 1200; *Debendra* v. *Mirza Abdul*, 10 C.L.J. 150 (163) ; *Mohamaya* v. *Haridas*, 19 C.W.N. 208.

(5) *Dirgpal* v. *Surab Upadhia*, 7 I. C. (All) 738 ; Cf. *Fasihuddin* v. *Karamal*, (1888) A. W. N. 128 ; *Laldas* v. *Nagji*, 11 Bom. L. R., 693.

(6) *Doudh Bahadur* v. *Tek Narain*, I. L. R., 21 All., 251 ; cf. *Nawab Azimut Ali* v. *Jawahir Singh*, 12 M. I. A., 404 (412). See, however, the point further discussed under ss. 92, 93, *post*.

(7) *Ibid*, p. 256.

(8) *Inman* v. *Wearing*, 3 DeG. & S., 729 (734) ; *Marshall* v. *Shrewsbury*, L. R., 10 Ch., 250 ; *Collinson* v. *Jeffery* [1896], 1 Ch., 644.

mentioned in section 60. It is said that the relief to which a mortgagor is entitled under this section would not seem to be as extensive as that given him in a redemption-suit, and that under this section the mortgagor is entitled only to possession and nothing more.(1) But there appears to be no reason for making this distinction. Indeed, title-deeds being incidents of ownership may be recovered with the land and in view of O. 2, r. 2 of the Code of Civil Procedure, the mortgagor would have to include in his suit all he is entitled to claim in respect of his mortgage, such as the surplus, profits if any, which he is entitled to claim with possession, and for which another suit would be barred.(2)

Postponement of right.

1456. The question as to when a mortgage is repayable depends upon the construction of the instrument. Generally speaking, a stipulation for the postponement of payment is *prima facie* intended for the benefit of the mortgagor, but the parties may, by the language of their contract, show their intention that redemption should take place only at the end of a given term. When the covenant is to repay a period specified, it must be construed that the mortgagor meant to reserve "within" the liberty of redeeming at his pleasure.(3)

But he may contract himself out of his right to recover possession by entering into a contract either with the mortgagee or a third person to whom he may execute a lease of the property to hold good up to the redemption of the mortgage, in which case, he would necessarily be precluded from enforcing his mortgage rights to possession. And the lease by him as lessor to the mortgagee as his lessee, must then be construed as an independent transaction in the same way as it would have been, had the lessee been a stranger. In such a case the mortgagee being in possession through his tenant, the mortgagor would be deemed to be in possession himself.(4) On his failure to recover rent the mortgagee-lessor cannot throw up the lease and recover on the mortgage. If his rent is in arrears all that he is entitled to do is to sue the mortgagor-lessee for its recovery on the basis of his lease, and in which case he can recover the rent of three years previous to suit.(5) The mortgagee cannot, by setting up a subsequent transaction, deprive the mortgagor of his right of redemption unless it has clearly and necessarily the effect of postponing redemption (§§ 1397-1411). Thus where the mortgagor executed a usufructuary mortgage on the 14th March 1889 for a term of five years, it being redeemable in any subsequent year in the month of Falgun. The rents and profits of the mortgaged property were to be taken in lieu of interest. The next day (15th March) the mortgagor executed a *kabuliat* in favour of the mortgagee acknowledging that he had taken a lease of the mortgaged property on a certain rent for a term ending with September 1890, *i.e.*, a term somewhat less than the mortgage; the rent being made a charge on the subject-matter of the lease. It was contended for the mortgagee that since the mortgagor has failed to pay rent for some years, his suit for redemption was premature; as the two transactions were neither concurrent nor coincident, the Court could not but consider them as separate and independent, and in this view it decreed redemption.(6) So where there is a usufructuary mortgage and a subsequent

(1) Macpherson, Mortgage (7th Ed.), 662.

(2) *Rukhmini Bai* v. *Yenkatesh*, I. L. R., 31 Bom., 527.

(3) *Rose Ammal* v. *Raja Rathnam*, I.L.R., 23 Mad, 33 (36); following *Sri Raja Setrucherla* v. *Sri Raja Vairicherla*, I.L.R., 2 Mad., 314.

(4) *Chimman Lall* v. *Bahadur Singh*, I. L. R., 23 All., 338 (343).

(5) *Chimman Lall* v. *Bahadur Singh*, I. L. R., 23 All., 338 (343); following unrep. case No. 1112 of 1894, printed *ib.*, note 341 (344), dissenting from *Altaf Ali* v. *Lalta Prasad*, I. L. R., 19 All., 496.

(6) *Khuda Baksh* v. *Alimunnissa*, I. L. R., 27 All., 313.

simple mortgage of the same property, there is nothing to prevent the mortgagor from redeeming the one without redeeming the other, unless he is tied to a covenant to redeem both simultaneously.(1)

1457. Suit where No Time fixed.—The first clause seems to contemplate a case in which no time for payment has been fixed.(2) This is a pure usufructuary mortgage of the first kind mentioned in section 58 (*d*). In such a case the mortgagor may bring a suit for possession as soon as he is satisfied that the mortgage-debt has been discharged. For this purpose he can call upon the mortgagee to furnish him with true copies of accounts and of the vouchers by which they are supported.(3) If they show that the mortgage-money has been paid off out of the usufruct, the mortgagor has then no difficulty in obtaining possession, for no question of accounts can then arise. But the mortgagor is not bound to peruse the accounts before suit, especially if he has reason to believe that they are not properly maintained, and, if having applied for them, the mortgagee denies the relationship, or they are not furnished at all or within a reasonable time.(4) These questions, though not affecting the right of the mortgagor to sue for possession, would no doubt affect the question of costs. But if the mortgagor has not previously ascertained the state of his account with the mortgagee, ordinarily his suit for possession will have to be dismissed as premature, if it is found that the mortgagee has not been repaid from the usufruct.(5) But the Court may instead allow the plaintiff to redeem on payment of whatever is found due, if it appears that he had brought his suit in the mistaken belief that the debt was satisfied. The earlier cases commend this practice as the proper one.(6) But such a course is one of doubtful legality. For if a suit for possession be regarded as one for ejectment (§ 1452), it is certain that it could not be converted into one for redemption, which would not only alter its character but may require the addition of parties, and admit additional pleas, possibly involving a new trial.(7) Indeed, such a prayer was negatived by the Privy Council in a colonial appeal from Ceylon, in which the relief was not prayed for and the interest of a third party claiming under the mortgagee had in the meantime interposed.(8) It may then be conceded that if the plaintiff frames his suit offering to redeem on payment of whatever may be found due, the Court would be justified in allowing redemption, if, on the taking of accounts, a balance is found still due to the mortgagee. But, of course, such a suit must then proceed as a redemption-suit in which all persons interested in the mortgage would have to be joined.(9)

Clause (a).

1458. In taking accounts in such cases the mortgagee is not chargeable for non-receipt of profits, which the mortgagor was able to raise. The mortgagee is not an assurer of the continuation of the same rate of profit. As the Privy Council observed: "Much depends in India on personal qualities. The very change of

Mode of taking accounts.

(1) *Tajjo Bibi* v. *Bhagwan Prasad*, I.L. R., 16 All. 295.

(2) *Kalu* v. *Lalji*, 11 C.P.L.R., 103 (105); *Reference under Stamp Act*, I. L. R., 7 Mad., 203 (206), F. B.

(3) S. 76 (*g*).

(4) *Sahibzada* v. *Parmeshar*, I.L.R., 1 All., 524; *Baroda Kant* v. *Bhagwan Das*, *ib.*, 344.

(5) *Kalu* v. *Lalji*, 11 C. P. L. R., 103; *Khyrahee* v. *Mt. Setoo* (1851), S. D. A. N. W.P., 221.

(6) See cases cited, § 980, *supra*.

(7) S. 53, Civil Procedure Code; *Perhlad Sein* v. *Budhoo Sing*, 12 M.I.A., 301 (310); cf. *Saligram* v. *Harcharan*, I.L.R., 12 All., 548; *Shridhar* v. *Narayan*, 11 B. H. C. R., 224; *Narayan* v. *Pandurang*, I. L. R., 7 Bom. 526 (528).

(8) *Marimuttu* v. *Desoysa* [1891], A.C., 69.

(9) *Kasumunnissa* v. *Nilratna*, I.L R., 8 Cal., 79 (87). As to persons interested, see s. 85, *post*.

management and possession may cause a falling-off of receipts. Therefore, an estimate of a preceding rental does not suffice to show actual receipts."(1) The accounts must, however, conform to the standard prescribed in section 76, where the subject should come in for further discussion.

When the right to sue accrues.

1459. The right of the mortgagor to sue accrues when the mortgage-money is paid from the rents and profits of the property. The term "when such money is paid" does not mean paid by the mortgagor, but from the rents and profits.(2) And hence if the mortgagor offers to redeem by the payment of cash, the mortgagee is not bound to accept such payment.(3) The amount which the mortgagee is entitled to receive before relinquishing his possession, is not only the mortgage-money, but also such other sums which he is empowered to add thereto. He is also entitled to charge interest at the contractual rate. Thus where in a usufructuary mortgage there was a provision to the following effect:—"On account of interest of the said sum of money (*i.e.*, Rs. 200 which was the principal) you shall take the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of the document; and if I fail to do so, then at the end of the year, the said amount of interest shall be added to the principal; and for the total amount whatever it will be, I will pay up to the date of payment, interest at the rate of half anna per rupee per mensem;" it was held that the provision as regards the additional payment of interest did not operate as a penalty, and that the intention of the parties as expressed in the contract must be given effect to. The general rule on the subject is thus stated by Jessel, M. R.: "It is of the utmost importance, as regards contracts between adult persons not under disability, and at arms' length, that the Court of law should maintain the performance of the contracts according to the intention of the parties; that they should not over-ride any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves."(4) But, of course if the rate of interest is shown to be exorbitant or unconscionable, the Court is empowered to reduce it. As the Privy Council, quoting from an English precedent,(5) observed: "The point to be considered is, what was a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain, sets it aside."(6) The subject will be found fully discussed under section 86, now Order XXIV, Rule 2, Schedule I of the Procedure Code in the second part relating to procedure.

Clause (b).

1460. Mortgage for a Term.—The second clause refers to the case of a Welsh mortgage, or the first form of a usufructuary mortgage as defined in section 58 (*d*). But here too there are verbal variations which will not bear too close a scrutiny. For the words "to receive the rents and profits" and to "*appropriate* them in lieu of interest" is not in sense identical with *paying himself* from such rents and profits the interest of the principal money. In the former case the

(1) *Shah Makhan Lal* v. *Sree Kishen*, 12 M. I. A., 157 (192, 193). The subject will be set out at length under s. 76, *post*.

(2) *Tirugnana* v. *Nallatambi*, I. L. R., 16 Mad., 486 (489); *Mt. Kundan* v. *Thakurlal*, 6 C. P. L. R., 43; *Kalu* v. *Lalji*, 11 C. P.L.R., 103.

(3) *Tirugnana* v. *Nallatambi*, I.L.R., 16 Mad., 486, and cases therein cited; *Setrucherla* v. *Vairicherla*, I.L.R. 2 Mad., 314.

(4) *Wallis* v. *Smith*, 21 Ch. D., 243; *Deno Nath* v. *Nibaran*, I. L. R., 27 Cal., 421, and see cases under s. 86, *post*.

(5) *Beynon* v. *Cook*, L. R., 10 Ch., 391.

(6) *Kamini Sundari* v. *Kali Prosunno*, I. L. R., 12 Cal., 225 (239), P. C.

interest is the rents and profits whereas in the latter case there may be a balance one way or the other. But this does not appear to be what is intended since possession is to be re-delivered on payment of the principal money, and which implies that, while on the one hand, the rents and profits have gone to extinction of interest, a practice which is common in India,(1) on the other hand, there has remained no surplus which could be appropriated to the reduction of the principal. In the words of section 58 (*d*) the rents and profits are agreed to be appropriated in lieu of interest only. Such then being the case, the section deals only with cases of *some* usufructuary mortgages, leaving out of account those in which the surplus from rents and profits has to be debited against the mortgagee in reduction of the mortgage-money, and which would then involve going into matters inconsistent with its object. But even, if so, the section clearly omits to provide for mortgages made for fixed term after which the mortgagee is to deliver possesion of the property unconditionally, and which present no discriminating features from those the section provides for.

1461. A mortgagee in possession is, in the absence of a contract to the contrary, bound to pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold.(2) Where the parties had previously agreed that as between the parties the annual profits of the mortgaged property shall be taken to be Rs. 65-10-6, and that out of this sum Rs. 23-3 shall be annually paid by the mortgagee as the amount of Government revenue and as interest at 12 per cent. per annum on the principal money, and that the mortgage shall be redeemable on payment of the principal money in a lump sum, the mortgagor was held entitled to take credit for payment of the Government revenue which he had been compelled to pay by reason of the mortgagee's default, and that in the accounting he was entitled to avail himself of annual rests. (3) But in a Calcutta case half-yearly rests were allowed. (4) On the other hand, if the mortgagor has agreed to pay the public charges which the mortgagee has been obliged to pay, he may either recover the amount so paid from the mortgagor by a separate suit, or add it to the mortgage-money. (5) Where, after the execution of a usufructuary mortgage, but in pursuance of an agreement then made the mortgagee leases the property to the mortgagor on a rent equivalent to the interest on the mortgage-money, the arrears of rent must be deemed to be arrears of interest which the mortgagor must pay before redemption. (6)

It may be a question whether the Court has power to compel the mortgagee to render an account where the rents and profits greatly exceeds a reasonable rate of interest. In England, instances are not wanting of such intervention by the Courts in cases decided before the repeal of the usury laws, (7) but the trend of modern decisions is against interference with the

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(1) *Venkatachellum* v. *Tirumala*, 2 M. H. C. R., 289 (290); *Jaijit* v. *Gobind*, I. L. R., 6 All., 303; *Imdad Hasan* v. *Badri Prasad*, I. L. R., 20 All., 401 (406).

(2) S. 76 (*c*), *post*,

(3) *Jaijit Rai* v. *Gobind*, I. L. R., 6 All., 303 (311).

(4) *Doolee Chund* v. *Omda Khanum*, I. L. R., 6 Cal., 377.

(5) S. 72 (*b*) and Comm.; *Imdad Hasan* v. *Badri Prasad*, I. L. R., 20 All., 401.

(6) *Imdad Hasan* v. *Badri Prasad*, I. L. R., 20 All., 401 (407, 408).

(7) *Fulthorpe* v. *Foster*, 1 Vern., 477; *Balfe* v. *Lord*, 2 Dr. & War., 480; *Louquet* v. *Scawen*, 1 Ves., S. 403; *Alderson* v. *White*, 1 DeG., & J., 97. The usury laws were repealed by 17 and 18 Vict., c. 90. For cases under the usury laws see *Hunnoman* v. *Eshree* (1844), S. D. A., N. W. P., 13; *Unroodh* v. *Dunner*, (1845), *ib*, 390; *Ramdas* v. *Byropershad* (1850), *ib*., 456.

deliberate contracts of parties, and apart from coercion or fraud vitiating the whole transaction, it is certain that the Courts will not interfere.(1)

1462. Recovery of Possession in Other Cases.—Apart from the two cases here contemplated, the right to recover possession may also arise in cases where the mortgage is redeemable after a fixed term,(2) and in cases falling into the third class specified in section 58 (*d*), *i.e.*, in which the receipts are agreed to be taken, in lieu of interest and *defined* portions of the principal, when no question of accounts need arise between the parties.(3) In the former case, the mortgagor is entitled to rely on his proprietary right, and in the absence of any stipulation, express or implied, in the mortgage-deed depriving him of the right to recover possession on expiration of the term, he is entitled to recover it, and the mortgagee cannot withhold it on the ground that owing to the misrepresentation of the mortgagor, he had not recouped himself the money he had advanced.(4) The possession of the usufructuary mortgagee is not adverse to the mortgagor, and the latter is not entitled to re-enter merely because the mortgagee is ousted by a third party. It, therefore, follows that in such a case the possession of an intruder may be adverse to the mortgagee, but it is not necessarily adverse to the mortgagor. Where, therefore, one of the purchasers of the equity of redemption ousted the mortgagee and took possession of the entire property which he held for more than twelve years, without denying the mortgagor's title, and the mortgagor had no right to present possession, it was held that though such possession was necessarily adverse to the mortgagee, it was not adverse to the mortgagor, and did not affect his right of redemption.(5)

Accession to mortgaged property.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

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(1) *Narayan* v. *Rungubai*, I. L. R., 5 Bom., 127.

(2) S. 58 (*d*), Comm.; S, 98, Comm.

(3) S. 77, post; *Setrucherla* v. *Tirumala*, I. L. R., 2 Mad., 289.

(4) *Nidha Shah* v. *Murli Dhur*, I. L. R., 25 All., 115, P. C.

(5) *Ismdar* v. *Ahmad Husain*, I. L. R., 30 All., 119; following *Muhammad Husain* v. *Mul Chand*, I. L. R., 27 All., 395; *Vithoba* v. *Gangaram*, 12 B. H. C. R., 180; *Chinto* v. *Janki*, I. L. R., 18 Bom., 51; *Bejoy Chunder* v. *Kally Prosunno*, I. L. R., 4 Cal., 327.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

1463. Analogous Law.—This section accords with the pre-existing law, and the cases to which the Bill refers for its justification. (1) It is involved in the Indian Trusts Act, (2) which enacts as follows:—

Advantage granted by qualified owner.

90. So where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities property contracted, in gaining such advantage.

Illustrations.

(*a*) *A*, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all of those interested in the old lease.

(*b*) A village belongs to a Hindu family. *A*, one of its members, pays *nazrana* to Government, and thereby procures his name to be entered as the *inamdar* of the village. *A* holds the village for the benefit of himself and the other members.

(*c*) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrears with a view to the land being put up for sale, and his becoming himself the purchaser of it. The land is accordingly sold to *B*, subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*.

1464. The mortgagee's right to accession is secured by section 70, while the rules applying to lessee are embodied in section 108 (*h*) and (*i*). The general rule underlying the section is enacted in section 8, where the subject will be found set out in some detail. (§§ 342—362). A general rule might have been more advantageously inserted under section 8. The law of accretions is the theme of elaborate discussion in the Civil Law.(3) The rule is equally applicable to trustees,(4) and should likewise hold good in the case of pledge of movables.(5)

English Law.

1465. The rule is in entire harmony with the English law (6) which was said by the Privy Council to be also agreeable to general equity and good conscience, and, as such, generally applicable to India.(7)

S. 90, Trusts Act distinguished.

1466. It should be noted that the terms of this section are much wider than those of section 90 of the Indian Trusts Act, since while under the latter in order to pass with the *corpus* the accession should have been made by the mortgagee "by availing himself of his position as such," no such condition restricts the

(1) *Bakshiram* v. *Darku*, 10 B. H. C. R., 369; *Sadashiv* v. *Vithal*, 11 B. H.C. R., 32.
(2) Act II of 1882.
(3) See Hunter's Roman Law, 274, Dig. xx, Lit. De Pignoribus, &c., xiii.
(4) *Baigriath* v. *Harikishen*, 6 C.W.N., 372.
(5) *Webster* v. *Power*, L.R., 2 P.C., 69 (80).
(6) *Rakestraw* v. *Brewer*, 2 P. Wm., 511; *Doe* v. *Pott*, 2 Dog., 710, followed in *Kishen Dutt* v. *Mumtaz Ali*, I.L.R., 5 Cal., 198 (210), P.C.
(7) *Kishen Dutt* v. *Mumtaz Ali*, I.L.R., 5 Cal., 198 (210), P.C.: *Sri Balusu Ramlakshman* v. *Collector of Godavari*, I.L.R., 22 Mad., 464, P.C.

operation of the rule as here enacted under which the mortgagor is in all cases entitled to the accession howsoever they may have been acquired by the mortgagee. And this appears to have been the law here independently of the Act. [1] (§§ 1468, 1470).

1467. Principle.—The law of accession may be said to imitate the law of nature [2] which commits the offspring to the care of its parent. An accession being in the nature of an accretion or improvement becomes blended with the property to which it becomes accessory. As remarked before (§ 1463), the principle so stated is thoroughly sound and readily acceptable, and, as such, it has been applied and is applicable to all cases apart from its enactment in the Act. [3] A similar rule enacted in the Roman law was expressed in the maxim—*Accessio cedit principali*, [4] and its other variations, [5] and derivatives. [6] So, if any corporeal substance receive an accession either by natural or artificial means the original owner of the thing was entitled by his right of possession to its possession in its improved state. The section generally enacts this rule, but allows the mortgagee compensation if the accession be proved to be due to his efforts.

1468. Following the civil law the section divides accessions into (*a*) *natural* and (*b*) *acquired*. The mortgagor is entitled to both; but in the case of an acquired accession, he must pay for the expense incurred by the mortgagee in acquiring it. It should be noted that the section makes no exception in favour of accessions made by a mortgagee in possession without availing himself of his position as such. The rule then is wider than that enacted in the Indian Trusts Act. (§ 1466).

1469. Meaning of Words.—"*Accessions*" mean addition or improvement. *In the absence of a contract to the contrary*: "The rule is then subject to an express contract to the contrary, the contract may relate to all accessions or to some only specified, in which case the contract will supersede the rule here enacted *pro tanto*. "*The mortgagor.....shall.....be entitled* as against the mortgagee to *such accession*" That is to say, it is his right to acquire them if he so desires, but he is not bound to acquire them at the instance of the mortgagee. If the latter could sell them compulsorily, then the mortgagor might be improved out of his property. "*Capable of separate possession*:" *i.e.*, which can be separately enjoyed without detriment to the principal.

1470. Mortgagor's right to All Accessions.—As observed before, (§§ 1466—1468) this rule is wider than its analogue enacted in the Indian Trusts Act, since the mortgagee is here enjoined to surrender up all his accession, whether natural or acquired by him at or without expense, and howsoever acquired, provided only that they have been acquired by him "during the continuance of the mortgage." If the accessions were costly he is reimbursed the cost, but he can under no circumstance retain them for himself even though he may be able to

(1) *Kishen Dutt* v. *Mumtaz Ali*, (1879) I.L.R., 5 Cal., 198, P.C.; *Ram Brich* v. *Ambica Prasad*, 17 C.W.N., 586.

(2) *Puff*, *De. Jur. Nat. el Gen.*, L. 4 c. 7.

(3) *Kishen Dutt* v. *Mumtaz Ali*, I.L.R., 5 Cal., 198 (210), P.C.; *Sri Balusu Ramlakshman* v. *Collector of Godavari*, I.L.R., 22 Mad., 464 (409), P.C.

(4) "The increase follows the principal."

(5) "*Accessorius sequitur naturam sui Principalis.*" 3 Inst. 139. (An accessory follows the nature of its principal.) "*Accessorium non ducit sed sequitur suum principali.*"—Co. Litt., 152. (That which is the accessory or incident does not lead but follow its principal.)

(6) "*Partus sequitur ventrem.*" (The offspring follows the mother.) "*Si equam meam equusiuus præquantem fecerit non est tuum sed meumquod natum est.*" (If your horse gets my mare with foal, the foal is not your property, but mine.)

show that he had *not* acquired them *qua* mortgagee but altogether in another capacity." A co-sharer in a mahal mortgaged his share to his other co-sharer who purchased some tenancy lands during the continuance of the mortgage, which the mortgagor claimed as an accession, but which the mortgagee refused because he contended them to have been acquired as a co-sharer, but the Court held that he was liable to give them up, holding that under the terms of this section he was liable to give up all accession to the extent of the mortgagor's share on payment of their cost. (1) The mortgagee cited the *dictum* of the Privy Council (2) who appeared to have left some loop hole to the mortgagee when they observed that " they were not prepared to affirm the broad proposition that every purchase by the mortgagee of a sub-tenure existing at the date of the mortgage must have been taken to have been made for the benefit of the mortgagor," but the Court observed, (3) that nevertheless the Privy Council permitted redemption in the case before them. In doing so their Lordships followed two English precedents in one of which, the mortgagee of an original term in respect of certain chambers in Gray's Inn was granted an extension as a pure personal favour and kindness to a brother Bencher, and which could not have been given to the representatives of the mortgagor who were females ; but still the latter were allowed to redeem on the ground that the additional term came from the old root. (4) Such case is now provided for by the next section which specifically deals with the destination of a renewal.

Acquisition dating continuance of mortgage.

1471. But though accretions may be made in other ways, they are all subject to the same rule. The only limitation placed upon the mortgagor's right of acquisition is that it should have been " received " during " continuance of the mortgage " but it has been held that when the usufructuary mortgagee of a property during the continuance of his mortgage, took a mortgage by conditional sale of the holding of a tenant, and after the expiry of his own mortgage, foreclosed the tenant, his mortgagor was entitled to treat the holding as an accretion and recover possession upon payment of what is due on the usufructuary mortgage and the mortgage by conditional sale.(5) It is also apparent that the mortgagee must have received his accession lawfully. If, for instance, being the mortgagee of one plot, he encroached on an adjoining waste land the mortgagor could not treat it as an accession. (6) It need scarcely be added that both under the rule here enacted as well as on first principles the mortgagor is merely entitled to but is not bound to acquire all accessions to his property.

1472. Natural Accessions.—The first paragraph deals with what may be called *natural accession*, or accession due to nothing done by the mortgagee. Such accessions naturally belong to and follow the property on redemption. The mortgagee is entitled to no compensation, as he incurs no expense in respect of them. They increase the value of his security, (7) and when his debt is discharged, the mortgagor is clearly entitled to them. The rule here laid down is in entire harmony with the Roman law according to which all

(1) *Ram Brich* v. *Ambica Prasad*, 17 C. W. N., 586.

(2) *Kishendatt* v. *Mumtaz Ali*, I. L. R., 5 All., 198 P. C.

(3) *Ram Brich* v. *Ambica Prasad*, 17 C. W. N., 586 (588).

(4) *Rakestraw* v. *Brewes*, 2 P. *Wms*, 511 (513) ; 24 E. R. 839, 840 ; To the same effect *Keech* v, *Sandford*, 2 Eq. Ca. Aler., 741 ; *Taster* v. *Marriot*, Amb. 668 ; *Rawe* v. *Chichester*, A.W.N. 715 ; *Owen* v. *Williams*, Amb. 734 ; *Lee* v. *Lord Vernon*, 7 Bro. P. C. 432 ; *Pickering* v. *Vowles*, 1 Bro. C.C. 197. See S. 64 *post*.

(5) *Ketki* (*Mt.*) v. *Dinabandhu*, 10 C.L.J. 83.

(6) *The Dun* v. *The Zan*, 4 Bur. L. T., 167 ; 11 I. C. 808.

(7) S. 70.

accessions of land to land as, for example by *alluvio*, belong to the owner of the land in accordance with the maxim from Gaius—*superficies solo cedit*,[1] And so in a case it was held by the Privy Council that "most acquisitions by a mortgagor enure for the benefit of the mortgagee; and conversely, that many acquisitions by a mortgagee are, in like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption."[2] Hence where a village was mortgaged without specification of boundaries and subsequently a larger area was demarcated by the survey-officers as forming part of the village, it was held that the mortgagee was, on the one hand, entitled to the extended area as a security, and, on the other hand, subject to its redemption to the same extent by the mortgagor.[3] In another case it was held that a suit for redemption of land, without specification of details, includes a claim for restoration of all accretions and improvements which it may have received while in the hands of the mortgagee; and if the Court omits to adjudicate upon it, the mortgagor is not precluded from bringing a second suit in respect of it.[4]

Accretion.

1473. Accretion of the gradual and imperceptible accumulation of land out of the sea or river generally follows the general rule before discussed. Accretion of land may be due to *alluvion*, or by the washing up of sand or soil so as to form firm ground; or by *dereliction*, as when the sea shrinks below the usual water-mark. If this accretion of land be by small and imperceptible degrees, it belongs to the owner of the land immediately adjacent to it, but if it be sudden and considerable, it belongs to the Crown.[5]

1474. Mortgagee's Possession not adverse.—As the accessions form by the law of nature [6] part of the principal, the mortgagee can no more acquire them adversely than he can the property mortgaged to him. A mortgagee who enters into possession as such, cannot afterwards set up an adverse possession as owner so as to defeat the plaintiff's right to redeem. [7] And even if a stranger trespass upon property in the hands of the mortgagee, his possession will not be adverse, unless he can prove that his possession for twelve years prior to the suit was adverse also to the mortgagor. On the other hand, since the possession of the mortgagee is possession of the mortgagor, it follows that if the latter be a trespasser in respect of the mortgaged property, he may tack the mortgagee's possession to his own and thus acquire an indefeasible title by adverse possession.[8] There may be possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. In such a case a suit by a mortgagor or those claiming under him, will not be barred, although it might be otherwise if it were instituted by the mortgagee.[9]

1475. Acquired Accessions.—The accessions dealt with in the second clause are (i) accessions capable of severance from the principal, and (ii) those incapable of severance. The former *may*, at his option, be acquired by the mortgagor on payment to the mortgagee the expense of acquiring it. If the

(1) "What is on the soil goes with it." Gaius, Bk. 2, s. 73.

(2) *Kishen Dutt Ram* v. *Mumtaz Ali*, I. L. R., 5 Cal., 198 (210). P. C.

(3) *Sadashiv* v. *Vithal*, 11 B. H. C. R., 32.

(4) *Bakshi Ram* v. *Darhu*, 10 B. H. C. R., 365.

(5) 4 Hale *De Jure maris*, 14.

(6) Gaius, Bk. 2, s. 73.

(7) *Ali Mahomed* v. *Lalta Baksh*, I. L. R., 1 All., 658; *Tanji* v. *Nagamma*, 3 M.H.C.R., 137; *Sheshagiri* v. *Girewa*, I. L. R., 15 Bom., 282; *Pandu* v. *Anpurna*, I. L. R., 21 Bom., 793; *Debi Baksh Singh* v. *Tirbhavan Singh*, I. L. R., 19 All., 238.

(8) *Beni Madho* v. *Debi Saran*, 10 I. C. (All.) 545.

(9) *Chinto* v. *Janki*, I. L. R., 18 Bom., 51

mortgagor elects to acquire the accessions, the mortgagee who holds them for his benefit cannot refuse it.(1) Thus, where a mortgagee in possession of cultivated land gave it to his son who converted a portion of it into a grove, it was held that he was not entitled to hold the grove after the mortgage had been extinguished.(2) The question whether the planting of a grove was necessary to save the property from destruction, forfeiture or sale, and whether it separates enjoyment without detriment to the *corpus* was possible are questions of fact,(3) which must be determined having regard to the nature of the property and the terms of its tenure.(4) As a rule a mere usufructuary mortgagee has no right to plant trees in the land held by him under mortgage. Accordingly, he cannot acquire any right to the trees if planted by him on the property he holds as the mortgagee. But if the mortgagee of a share in a joint estate plant trees the right to them vests not in the mortgagor exclusively, but in all the co-parceners irrespective of whether they acquired an interest in the joint estate before or after the mortgage.(5) And, similarly, where the mortgagee purchased certain trees standing on the land mortgaged to him from Government, it was held that the trees by sale became a portion of the mortgaged estate, and were, therefore, redeemable with it on payment of the money laid out in purchasing the trees and other reasonable expenses.(6) A usufructuary mortgagee of a village taking in mortgage a tenancy plot during the continuance of his possession is bound to restore it to the mortgagor on redemption, even though the plot may have been foreclosed to him after redemption, for the right having accrued during the continuance of the mortgage, the foreclosure-decree which gave possession was but a graft upon the parent stock and could not affect the right already vested. Such an acquisition is an accession to the mortgaged property, and consequently, be recoverable on redemption.(7) Of course, in all such cases the mortgagee could not be permitted to do indirectly what he is incompetent to acquire directly, so that the settlement of ryoti land upon his undivided relation would be treated as if the acquisition were his own.(8)

1476. Exceptional Cases.—But in such a case the mortgagee acquires the right because *qua* mortgagee he has the right of vetoing a transfer in favour of a stranger. The case would then fall within the rule enunciated in the Trusts Act. But another question remains. Is the mortgagor also entitled to accessions made by the mortgagee but in a manner by no means connected with his position as mortgagee. The section no doubt confers on the mortgagor an unqualified right. But it may on first sight appear to be inconsistent with the Trusts Act, and the dictum of the Privy Council who have laid down the necessary limitations subject to which the doctrine must be understood. "Their Lordships," they observe, "are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the

(1) S. 90, Indian Trusts Act (II of 1882).

(2) *Madho Ram* v. *Shamshuddin* (1883), A.W.N., 203. The action of the mortgagee was held to *ultra vires*. "Such an act cannot ordinarily be construed as an act done for the due management of estate; and is essentially distinguishable from acts of settling cultivating tenants on the property, or the like arrangements for the right and profitable administration of the estate." But the same view was held *per* Banerji, J., in *Zubeda* v. *Sheocharan*, I. L. R., 22 All., 83 (85), with special reference to the section.

(3) *Kadir Moidin* v. *Nepean*, I. L. R., 25 Cal., 8, P. C.

(4) *Zubeda* v. *Sheocharan*, I.L.R., 22 All., 83 (85).

(5) *Bahadoor Khan* v. *Kara Mull*, 1 Agra, 181.

(6) *Bakshiram* v. *Darku*, 10 B. H. C. R., 369; *Prabhakar* v. *Pandurang*, 12 B.H.C.R., 88.

(7) *Mohanlall* v. *Chaodhri*, 14 C. P. L. R., 169; *Dwarka* v. *Tulsee Ram*, 10 C. P. L. R., 103; *Vencatachariar* v. *Shrinivasa*, (1909) 4 I. C. (Mad). 357.

(8) *Vencatachariar* v. *Shrinivasa*, (1909) 4 I. C. (Mad). 357.

benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole including the sub-tenure, subject to the right of redemption upon equitable terms. It may well be that when the estate mortgaged is a zemindari in Lower Bengal, out of which a *patni* tenure has been granted, or one within the ambit of which there is an ancient *mokurari istimrari* tenure, a mortgagee of the zemindari, though in possession, might purchase with his own funds and keep alive for his own benefit that *patni* or *mokurari*. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may, therefore, be held entitled equally with a stranger "to make it for his own benefit." (1) So while a purchase by a usufructuary mortgagee of a *ryoti* holding would enure for the benefit of the mortgagor the purchase by him of a *malik-makbuza* plot might not so enure. In the one case he purchases as landlord; in the other case he might have purchased it as a stranger. (2) But it has been held at Allahabad that where a mortgagee creates a sub-mortgage, and afterwards acquires by purchase from his mortgagor the equity of redemption in the mortgaged property, such acquisition will enure for the benefit of the sub-mortgagee who could then sue for sale of the property in the same way as if the proprietary interest had been mortgaged to him from the first. (3) In the converse case, it has been laid down in Calcutta that the enlargement of, or the removal of, encumbrances from the estate of a mortgagor effected by himself will generally enure to the benefit of the mortgagee by increasing the value of his security. (4) But these cases were decided without reference to the section or question here raised. So in the case before cited, the mortgagee was held entitled to retain a *patni* tenure which he had purchased with his own funds. But where the mortgagee of a *taluk* in Oudh acquired certain subordinate *birt* tenures, and did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the *taluk*, he was not allowed afterwards to separately enjoy them; but the mortgagor was held entitled to acquire them on paying to the mortgagee the sum expended by him in their purchase. (5) In Bengal the rule has been similarly applied to the mortgagee of a jote. (6)

It may be noted that the mortgagee is only entitled to get back the *expense* incurred by him in acquiring the accessions. He is not entitled to demand their *price* or their estimated value at the market-rate. (7)

1477. Inseparable Acquisitions.—In case of separable acquisitions, the mortgagor can elect to take or refuse to take them. But if he takes them, he is in *every case* liable to pay for the expense incurred by the mortgagee in acquiring them. In the case of *inseparable acquisitions*, however, the mortgagor gets them *ex necessitate rei*, with his property. But he is liable to pay for them only in *certain* cases, that is, if the accessions made were (i) necessary to preserve the property from destruction, forfeiture or sale; or (ii) when they were made with the mortgagor's consent. In such cases the mortgagee is entitled to add the costs incurred thereon to the principal money, the effect of which is to secure it in the same way as the mortgage-

(1) *Kishen Dutt* v. *Mumtaz Ali*, I. L. R., 5 Cal., 198 (204, 205), P. C.

(2) *Mohanlall* v. *Chaodri*, 14 C.P.L.R., 169 (171).

(3) *Ajudhia* v. *Man Singh*, I.L.R., 25 All., 46.

(4) S. 70; *Shyama Churn* v. *Ananda Chandra*, 3 C.W.N., 323 (325); followed in *Ajudhia* v. *Man Singh*, I.L.R., 25 All., 46 (48).

(5) *Kishen Dutt* v. *Mumtaz Ali*, I.L.R., 6 Cal., 198, P.C.

(6) *Baijnath* v. *Harikishen*, 6 C.W.N., 372.

(7) *Kunhi Chundu* v. *Kunhan Nambiar*, I.L.R., 19 Mad., 384.

money. Thus, where the mortgagee rebuilt the mortgaged house destroyed by accidental fire, it was held that the re-payment of the cost of rebuilding the house was a condition precedent to redemption. (1) So also, where the mortgagee, with the consent of the mortgagor, repaired a well rendered useless from natural causes, he was held entitled to charge therefor.(2) But if he excavated a new well, without the consent, express or implied of the mortgagor, payment of compensation must depend upon whether it was necessary to preserve the property from destruction, forfeiture or sale, and as it is not so necessary for an agricultural land, a claim to compensation would seem to be inadmissible. (3) Of course, a mortgagee cannot recover the cost of a building made without the consent of the mortgagor, and in no way necessary for the maintenance or preservation of the property.(4) Instance of where the property is saved from *forfeiture* or *sale* may be found in the demand made for the payment of Government revenue, rates and cesses.(5) Such payments are also secured by the various local Acts. (6) This section, it will be seen, does not empower the mortgagee to charge for expenses incurred in *improving* the property. He is, in fact, entitled to no consideration, for, as mortgagee, the property was not his, and he had no business to improve it.(7) Again, if such a claim were allowed, the mortgagee may "improve" the property out of redemption. Where the mortgagee gets paid for accession, he is bound to make over the profits accruing therefrom to the mortgagor. And where the mortgagor claims profits, he may call upon the mortgagee to furnish him with a copy of his account, and if he does not produce them, the Courts make it a rule to lean against him and to reserve all doubtful points in favour of the mortgagor.(8) It would appear that the mortgagor must claim the accession when he seeks to redeem. His failure to do so may preclude him from maintaining a separate suit for their recovery.(9)

1478. Profits set-off against Interest.—The profits arising from an accession accrues to the mortgagor if he is charged with costs of acquiring them. On the other hand, the mortgagee retains the profits if he cannot charge the mortgagor with the costs of making them. In the case of a usufructuary mortgage, the last paragraph provides for the appropriation of the profits towards the interest of the money expended by the mortgagee in making the accession. It should be noted that while the rest of the section treats of the mortgagee in possession, the last paragraph confers the right of set-off only on the usufructuary mortgagee, a distinction which may be justified on the ground that the terms on which the other mortgagees enter upon

(1) *Sakharam* v. *Amtha Devji*, I. L. R., 14 Bom., 28.

(2) *Durga Singh* v. *Naurang Singh*, I.L.R., 7 All., 282.

(3) *Raja Ram* v. *Vithal*, 10 N.L.R. 166.

(4) *Sammo* v. *Abdul Wahid*, (1883), A. W. N., 208; *Rupan Singh* v. *Champa Lal*, 13 A. L.J. 14; *Arunachella* v. *Sithaya*, I.L.R. 19 Mad., 317.

(5) *Girdhar Lal* v. *Bholanath*, (1883), A. W. N., 238.

(6) *E.g.*, S. 171, Bengal Tenancy Act (VIII of 1885) (rent deemed to be a debt secured by a mortgage of the land); Bombay Land Revenue Code (Bombay Act V of 1879), Ss. 56, 57, 150 and 153; Revenue Sale Law (XI of 1859), S. 61; see *Gossain Chutturbhooj* v. *Ishri Mul*, I. L. R., Cal., 844.

(7) *Bahadoor Khan* v. *Kora Mull*, 1 Agra, 281. In the constitution of Gordian (A. D. 240) the same distinction between *necessariæ* (or, necessary expense) and *utiles impensæ* (or, beneficial expense) was closely observed. A *mala fide* possessor could claim for necessary expenditure; but in regard to beneficial expenditure he was permitted to carry away the improvements only, that is, if he could do so without damaging the property. (Justinian, Bk. 3, Tit. 32, Const. 5, Digest, Bk. 5. Tit. 4, s. 38).

(8) *Goluk Chunder* v. *Mohunlall*, 5 W.R., 271; *Kalyan Das* v. *Sheo Nundun*, 18 W.R., 65 (68.)

(9) *Bakshiram* v. *Darku*, 10 B. H. C. R., 369.

possession are not always the same so as to admit of the right being equitably extended to them.

1479. Compensation for Improvements.—The question whether the mortgagee in possession is in any case entitled to compensation for improvements is one for which the Act makes no provision. But as has been observed by the Privy Council, "it would be contrary to common justice" to deprive the mortgagee of the benefit of the money laid out by him on such improvements as have so far enhanced the value of the property. (1) According to English law, the mortgagee can always claim compensation for *lasting* improvements, by shewing (*a*) that he has expended money, and (*b*) that the work was *prima facie* a lasting or permanent improvement. (2) Of course, this rule is always subject to another, namely, that the improvements must be reasonable, having regard to the nature and value of the property, for otherwise the mortgagee would have the means of "improving" the mortgagor out of his property (3) by making the price of redemption prohibitive to him. Even such improvements effected with the knowledge of the mortgagor cannot be compensated for; on the other hand, the mortgagee would be repaid his outlay on improvements, which are *prima facie* permanently beneficial and reasonable, even though they be effected without notice to the mortgagor. (4) It may, however, be noted that this is a view which was not conceded in the older cases, which allowed for no improvements without the consent or acquiescence of the mortgagor. (5) And this view has been re-echoed with an additional restriction by the Madras High Court, who have held that no such claim could be made merely because the mortgagor had consented to the improvements being made, unless his consent was given under circumstances to make it equivalent to a promise to reimburse the cost to the mortgagee. (6) But even in the absence of any statutory authority to the contrary, this view must be pronounced to be too narrow. Indeed, that acquiescence is enough has been conceded in several cases. (7) It would seem that, in any case, the mortgagee's claim would be less severely scurtinized if the property is sold and has fetched a higher value on account of the improvements, in which case it would be obviouly unjust to allow the mortgagor to pocket the increase without having to pay for it. (8)

Renewal of mortgaged lease.

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

1480. Analogous Law.—As section 63 is supplementary to section 70, so is this section supplementary to section 71. A similar, though somewhat narrower rule is also laid down in section 90 of the Indian Trusts Act, which

(1) *Per* Lord MacNaghten in *Henderson* v. *Astwood*, [1894] A.C., 130 (163), following *Shepard* v. *Jones*, 21 Ch. D, 469.

(2) *Per* Jessel, M.R., in *Shepard* v. *Jones*, 21 Ch. D., 469 (476).

(3) *Sandon* v. *Hooper*, 14 L.J. (Ch.), 120.

(4) *Shepard* v. *Jones*, 21 Ch. D., 469; *Houghton* v. *Sevenquakes Estate Co.* (1884), W.N., 243.

(5) *Sandon* v. *Hooper*, 14 L.J. Ch., 120; *Jortin* v. *South Eastern Ry.*, 6 DeG. M. & G., 270; *Lord Timblesion* v. *Hamill*, 1 Ba. & Be., 385; *Rahmatullah* v. *Yusuf Ali*, 10 A.L. J. 124 (128).

(6) *Arunachella* v. *Sithayi*, I.L.R., 19 Mad, 327 (329): dissented from in *Rahmatullah* v. *Yusuf Ali*, 10 A.L J. 124 (129); see s. 72 (*a*) for further discussion.

(7) *Maniram* v. *Bapu*, (1881) B.P.J., 267; *Sammo* v. *Abdul*, (1883) A.W.N., 208; *Rahmatullah* v. *Yusuf Ali*. 10 A.L.J. 124 (129).

(8) *Shepard* v. *Jones*, 21 Ch. D., 469 (476-478).

is cited at length under the last section. A similar though not the same rule, likewise applicable to trustees, executors, tenants for life and other persons in fiduciary position, has long been in force in England, and which thus bears closer affinity to illustration (*d*) appended to section 3 of the Specific Relief Act,[1] which runs in the following terms:—"*A*, the mortgagee of certain leaseholds, renews the lease in his own name. *A* is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease."

The mortgagee is, however, entitled to recover the costs of the renewal and may add the cost to the principal money,[2] and in which respect the English and the Indian rules coincide.[3] But the English rule is otherwise restricted only to cases in which the mortgagee obtains the renewal behind the back of the mortgagor and to defraud him, and when there was at least some remnant of the old lease upon which the old lease could be engrafted. But the Indian rule is more general and presumes the renewal of the lease by the mortgagee to have been made only for the purpose of keeping alive his security, the mortgagor having then the benefit of the term on payment of the renewal fee and other expenses incurred for the purpose.

1481. Principle.—If the mortgagee obtains renewal, the mortgagor has generally the benefit of the new term, upon redemption; because, as it is said the term comes from the same root, and is subject to the same equity.[4] Of course, the mortgagee acquires the lease with a view to continue his security and as soon as his debt is discharged, he has no further object in keeping it up. Moreover, under section 72 (*e*), he can charge the mortgagor for the renewal, on whose behalf he is presumed to obtain it. The renewal may be regarded in the nature of an acquisition necessary to preserve the property from forfeiture, and which, according to the last section, goes with the *corpus*.[5] But the rule may be justified on the ground that otherwise "hardships might be brought upon the mortgagor by the mortgagee's getting such additional terms more easily as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor."[6] For this reason the Master of the Rolls gave the mortgagor benefit of a renewal granted to the mortgagee as a personal favour.

1482. Meaning of Words.—"*For a term of years*:" *i.e.*, determinable after the stipulated term, that is, the lease is not a permanent one, but is *renewable*. "*Have the benefit*:" *i.e.*, upon payment of the amount expended by the mortgagee for its renewal.[7]

1483. Rights of Parties.—It is an established rule that if one having a particular interest in a leasehold estate, whether he be one of several joint lessees or partners,[8] or a tenant for life under a will or settlement with remainder over[9] or a mortgagee,[10] obtains a renewal of the lease

(1) Act I of 1877.

(2) S. 72 (*e*), *post*.

(3) *Lavon* v. *Mertins*, 3 Atk., 4; *Godfrey* v. *Watson*, 3 Atk., 518; *Manlove* v. *Bale*, 2 Vern., 84; *Wolley* v. *Drag*, 2 Austr., 551.

(4) Fisher, § 684; citing *Rakestraw* v. *Brewer*, 2 P. W., 511; and see *Taster* v. *Marriott*, Amb., 668; *Rawe* v. *Chichester*, *ib.*, 715; *Owen* v. *Williams*, *ib.*, 734; *Lee* v. *Vernon*, 5 Brs., P. C., 10; *Pickering* v. *Vowles*, 1 Bro. C. C., 197; *Rushworth's case*, Freem., 12; *Leigh* v. *Burnett*, 29 Ch. D. 231 (234, 235) in which Pearson, J. said: "The doctrine of this Court has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage," Robb, Mort., 164, 165.

(5) S. 63, para. 2.

(6) *Rakestraw* v. *Brewer*, 2 P. Wms., 510.

(7) S. 72 (*e*).

(8) *Palmer* v. *Young*, 1 Vern., 276; *Keech* v. *Sandford*, 2 Eq. Ca. Ch., 61 (62); *Featherstonhaugh* v. *Fenwick*, 17 Ves., 298; *Bevan* v. *Webb*, (1905) W. N., 58.

(9) *Addis* v. *Clement*, 2 P. Wms., 456 (459).

(10) *Rakestraw* v. *Brewer*, 2 P. Wms., 511.

to himself, he shall be a trustee, after payment of the expense of the renewal with interest, (1) for the benefit of all persons interested in the old lease. (2) Primarily, it is the duty of the mortgagor to renew his lease, which being his property, he is bound to preserve and protect against forfeiture. The renewal must, of course, be in exercise of the covenant for renewal made by the landlord. If the lease was terminable without renewal, it is entirely in the discretion of the landlord to renew the original term on such fresh terms as may be agreed upon. Such a renewal would amount to a novation but would, nevertheless, be subject to the rule.(3) It was expressly so decided in a leading precedent before cited, in which the original term in respect of certain chambers in the Inns of Court was granted to Holford, a member of Gray's Inn, who mortgaged them to Brewer, a Bencher of the same society. The term mortgaged by Holford was for 57 years, being a building term, which was extended for eleven years " and which was distinct from, not interfering with the other term, but independent thereof, and to commence from the expiration of the former, granted by the Bench in pure personal favour and kindness to Mr. Brewer, their brother Bencher : whereas had it been asked for by the plaintiffs, it probably would have been denied, and they being women, were not capable of having chambers by virtue of a new grant." But the Court allowed the plaintiffs to redeem on the ground that the term came from the same root, and was of the same nature, subject to the same equity of redemption.(4) On the other hand, the renewal of the mortgaged lease by the mortgagor does not extinguish the original mortgage, to which it continues to remain subject and which cannot be effected by any intermediate charge created on the property before the renewal of the term.(5) So it has been held that in all cases where a lease is settled on one for life, with remainder over, if the tenant for life obtain a renewal, it shall enure for the benefit of those in remainder. (6) If the lessor is not bound to renew, but does it, it is an engraftment upon the old term (7) and whether the renewal be by the lessee, trustee, mortgagee or other persons interested, it cannot be divested of the trusts and limitations of the original lease, (8) so that the renewal is for the benefit of all the persons interested in the old lease. (9) If then the tenant for life sells the right of renewal, the same equity will attach to the purchase-money. (10) And the rule does not vary because the original lease had expired before the renewal was obtained, (11) or that the new lease was not to commence

(1) *Manlove* v. *Bale*, 2 Vern., 84 ; *Hamilton* v. *Denny*, 1 Ba. & Be., 202.

(2) *Owen* v. *Williams*, Amb.,736;*Lawrence* v. *Naggo*, 1 Eden., 453 ; *Taster* v. *Marriott*, Amb., 668 ; *Raw* v. *Chichester*, Amb., 715 ; (S. C., 2 Dick., 480), *Sub. nom Bromfield* v. *Chichester*); *Stone* v. *Theed*, 2 Bro. C C., 243; *Coppin* v. *Fernyhough*, 2 Bro. C. C., 291 ; *Bowles* v. *Stewart*, 1 Sch. & L., 209 ; *James* v. *Deane*, 11 Ves., 383 ; 15 Ves., 236; *Nesbitt* v. *Tredennick*, 1 Ba. & Be., 46 ; *Winslow* v. *Tighe*, 2 Ba. & Be., 195 ; *Eyre* v. *Dolphin*, 2 Ba. & Be., 298 ; *Stublis* v. *Roth*, 2 Ba. & Be., 548 ; *Randall* v. *Russell*, 3 Mer., 190.

(3) *Rakestraw* v. *Brewer*, 2 P. Wms., 511 (512, 513) ; 24 E. L. R., 839.

(4) *Rakestraw* v. *Brewer*, 2 P. Wms., 511 (513) ; *Keech* v. *Sandford*, 2 Eq. Car. Ab., 741 ; *Taster* v. *Marriott*, Amb., 668 ; *Raw* v. *Chichester*, Amb., 715 ; *Owen* v. *Williams*, Amb., 734 ; *Lee* v. *Lord Vernon*, 7 Bro. P. C., 432 ; *Pickering* v. *Vowles*, 1 Bro. C. C., 197 ; *Kishen Dutt* v. *Mumtaz Ali*, I. L. R., 5 Cal. 198, P. C. But the rule is subject to limitation: *Kinsman* v. *Rouse*, 17 Ch. D., 104 ; *Leigh* v. *Burnett*, 29 Ch. D., 235.

(5) *Leigh* v. *Burnett*, 29 Ch. D., 231 (236).;

(6) *Raw* v. *Chichester*, Amb., 715 ; 27 E.L. R., 463 ; *Owen* v. *Williams*, Amb., 734 (736) ; 27 E. L. R., 474.

(7) *Per* Sir Thomas Sewell, M. R., in *Taster* v. *Marriott*, Amb., 668 (670).

(8) *Raw* v. *Chichester*, Amb., 715 719 in which the older cases are reviewed.

(9) *Per* Apsley, L. C., in *Owen* v. *Williams*, Amb., 734 (736) ; *Randall* v. *Russell*, 3 Mer., 196 ; *Pickering* v. *Vowles*, 1 Bro. C. C., 197 ; *James* v. *Deane*, 11 Ves., 383 (S. C. on rehearing), 15 Ves., 236.

(10) *Owen* v. *Williams*, Amb., 734.

(11) *Pickering* v. *Vowles*, 1 Bro. C. C., 197 ; *Moody* v. *Mathews*, 7 Ves., 185 ; *James* v. *Deane*, 11 Ves., 383 ; 15 Ves., 236.

till after the expiration of the old one,(1) or that the mortgagee having applied for renewal it was refused, whereupon he got a lease to himself.(2) Indeed, if this were permitted there would be a great inlet to fraud. As King, L. C., observed: "If a trustee on refusal to renew might have a lease to himself, few trust-estates would be renewed to *cestui que use*. That the trustee should rather have it run out than to have had the lease to himself. That it may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not the least relaxed, for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que trust*."(3) But this general rule would seem not to extend to purchases of the reversions by trustees of an existing lease.(4) And so if a testator bequeathes a lease of which he is possessed at the time of making his will, and afterwards renews the lease, the legatee is not entitled to the benefit of the new lease.(5)

1484. While the lessor is primarily liable to renew, still the mortgagee cannot compel him to renew and cannot sue him for that purpose.(6) Nor, on the other hand, is it imperative on the mortgagee to obtain a renewal,(7) which is purely discretionary with him, but if he elects to renew it in order to preserve his security, he is entitled to be reimbursed the cost of renewal.(8) The English law is, however, in this respect different.(9) But being not interested in the lease, except in so far as it is a security for his debt, he may renew, but has not the power to release the right of renewal.(10) On the other hand, if the mortgagor purchase the reversion and so merging the term its renewal becomes impossible, the estate as acquired becomes subject to the mortgage.(11) So, again, any surrender by the lessee mortgagor will not extinguish the charge already created by him on the property.(12)

Does the rule embrace all renewals?

1485. It has been observed before that the English rule as to renewals is limited to cases in which the mortgagee has obtained the renewal by taking advantage of his position as such mortgagee (§ 1480). Where therefore the mortgagee obtains a lease on his own account but not so as to gain an advantage in derogation of the rights of the mortgagor, the question may arise as to whether he is still liable to surrender it to his mortgagor on redemption. In a case decided before the Act, the Privy Council observed that "it may well be that, when the estate mortgaged is a zemindari in Lower Bengal, out of which a *patni* tenure had been granted, a mortgagee of the zemindari, though in possession, might purchase with his own funds and keep alive for his own benefit that *patni*. In such cases, the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may, therefore, be held entitled

(1) *Rakestraw* v. *Brewer*, 2 P. Wms., 511; *Taster* v. *Marriott*, Amb., 668.

(2) *Keech* v. *Sandford*, 1 Eq. Ca. Abr., 741 (742); 22 E. L. R., 629.

(3) *Keech* v. *Sandford*, 2 Eq. Ca. Abr., 741; 22 E. L. R., 629; *Bevan* v. *Webb* (1905), W. N., 58.

(4) *Norris* v. *Le Neve*, 3 Atk., 38; *Randall* v. *Russell*, 3 Mat., 190; *Hardman* v. *Johnstone*, *ib.*, 352; *Bevan* v. *Webb* (1905), W.N., 58.

(5) *Carte* v. *Carte*, Amb., 28; *Colegrave* v. *Manley*, 2 Russ. Mer., 238; *Marwood* v. *Turner*, 3 P. Wms., 163; *Abney* v. *Miller*, 2 Atk., 597; *Rudstone* v. *Anderson*, 2 Ves., 418.

(6) *Lacon* v. *Mertins*, 3 Atk., 4; *Manlove* v. *Bale*, 2 Vern, 84.

(7) S. 70, *post*.

(8) S. 72 (*e*), *post*.

(9) 2 Dav. Conv., p. 2 (14th Ed.), page 64; Robb. Mort., 164, 165.

(10) *O'Reilly* v. *Fetherstone*, 4 Bli. (N. S.), 161.

(11) S. 65 & Comm., *Trumper* v. *Trumper*, L. R., 8 Ch., 873.

(12) *Pheasant* v. *Benson*, 14 East., 234 (238); *Do* v. *Pyke*, 5 M. & S., 146; *Clements* v. *Mathews*, 11 Q. B. D., 808 (815).

equally with a stranger, to make it for his own benefit."(1) This case is often cited as an authority for the proposition that the Indian law is in this respect not different to the corresponding English rule to which it appealed for authority. But while their Lordships have no doubt laid down the rule in conformity with the English cases, the case before them was really decided on another ground. The usufructuary mortgagee of the Oudh *taluka*, in respect of which there existed certain subordinate *birt* tenures, having subsequently acquired these *birt* tenures by purchase, did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the *taluk*, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor,(2) but years afterwards the mortgagor's representatives having sued to redeem the *taluk*, they were allowed to redeem the *taluk* with the accretion made to it by merger: "The mortgagee," their Lordships said, "taking advantage of his position of talukdar *de facto*, has so acquired the *birts* and allowed them to merge in the *taluk*. To allow him now to revive these *birts* for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse by reducing the redeemable estate *pro tanto* to a mere right to *malikana*, and possibly rendering the *taluk* no longer worth redemption."(3) This case was admittedly decided upon its individual merits and on the principles of equity and good conscience reflected by the English law. The question, however, still remains whether the section should be read as superseding or subject to the provisions of section 90 of the Indian Trust Act.

S. 90 Trusts Act compared.

1486. There can be no doubt that, under the Indian Trusts Act, the mortgagee forfeits the advantage gained by him only when he gains it *by availing himself of his position as such*, and when the advantage gained is *in derogation of the rights of the other persons*. It may be doubted whether the rule in favour of the mortgagor is intended to prevail in all cases. The provisions of the two enactments are only reconcilable on the assumption that while obtaining a renewal the mortgagee must be presumed to have availed himself of his position as such. Indeed, the earlier cases do proceed on this presumption(4) though in later cases the presumption was taken to be so strong as to do away with the condition altogether. The same result would follow if the renewed term is regarded as an accretion to which the mortgagor, is under the terms of the foregoing rule, declared entitled (5) (§ 1485).

1487. Strictly speaking, mortgagee can scarcely be said to *gain an advantage* by renewal of his lease which places him in no better position than during the continuance of the term. The Privy Council judgment clearly deals with the latter subject, and does not touch on the subject referred to in the section. The case assumed by their Lordships was of the mortgage of a *zemindari*, where the mortgagee takes a *patni* lease for himself, and where there is the possibility of his gaining an advantage over his debtor by availing himself of his position as the lessor for the time being. It appears that this section and section 71 deal with entirely different cases and there is no reason to suppose that the two sections are subject to any qualification, or that they would apply only in cases in which the mortgagee has been guilty of actual or constructive

(1) *Kishen Dutt* v. *Mumtaz Ali*, I. L. R., 5 Cal., 198 (211). P. C.

(2) *Kishen Dutt* v. *Mumtaz Ali*, I. L. R., 5 Cal., 198 (209), P. C.

(3) *Kishen Dutt* v. *Mumtaz Ali*, I. L. R., 5 Cal., 198 (209), P. C., at pp. 209, 210.

(4) *Doe* v. *Pott*, 2 Doug, 710.

(5) *Rakestraw* v. *Brewer*, 2 P. Wm. 511.

fraud, as has been suggested.(1) Of course, the rule would apply with greater force where the new lease has been obtained by any improper practice.(2)

1488. Where the mortgagor gives notice that he would not redeem the lease which the mortgagee keeps up, he is entitled to retain it.(3) On the other hand, the mortgagor has covenanted against the mortgagee acquiring any interest such as the *jote* rights of tenants, his purchase of those rights from tenants would enure for the benefit of the mortgagors.(4) Where the owner of land executed a usufructuary mortgage of his land, both the parties having agreed to keep down a proportionate part of the rent, but default being made the landlord ejected the mortgagor and thereupon settled the land with the mortgagee. The mortgagor then sued him for redemption contending that the new interest acquired by the mortgagee must, having regard to the provisions of this section and of section 90 of the Indian Trusts Act, be held for his benefit, but the Court held that the legal determination of his tenancy puts an end to all rights which he may have had as mortgagor, and though the new tenancy had arisen on the ashes of the old, it was nevertheless a new tenure which the old tenant was not entitled to redeem. (5) On the other hand, it has been held in Bombay that where a year after the usufructuary mortgage of Inam lands they were in 1856 confiscated by Government and the fact was communicated to the mortgagor, but the mortgagee nevertheless continued in possession and continued to pay assessment in respect of the lands to Government for a period of 45 years when the mortgagor sued to redeem them, the Court decreed redemption holding that the resumption had merely the effect of converting the land from a service tenure into land held subject to payment of assessment.(6)

Implied contracts by mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(*b*) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(*d*) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the

(1) Shep. Comm. 4th Ed., p. 227.
(2) *Fitzgerald* v. *Rainsford*, 1 Ba. & Be., 37, *Note*.
(3) Fisher, § 684; *Nesbitt* v. *Tredennick*, 1 Ba. & Be., 29.
(4) *Watson & Co.* v. *Ram Chand*, 1 C. W. N., 174.
(5) *Kehar* v. *Hasan Ali*, 2 A.L.J. 583.
(6) *Gurubasappa* v. *Rango*, I.L.R. 36 Bom. 539.

mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent, or the non-performance, or non-observance of the said conditions and contracts;

(*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on as prior incumbrance.

Nothing in clause (*c*), or in clause (*d*), so far as it relates to the payment of future rent applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest in the mortgagee as such, and may be enforced by every person in whom the interests is, for the whole or any part thereof, from time to time vested.

1489. Analogous Law.—The provisions of this section are similar to those contained in section 55 (1), (2), (3). Such paragraphs in the two sections as bear close resemblance to each other are noticed below. Several of the clauses in both the sections are taken from the Conveyancing Act; [1] this section being adapted from section 7 (*b*), (*c*), (*d*) of the English Act.

Clause (*a*) of this section is in effect the same as cl. 2 of section 55 applying to sales. It is also similarly provided in the Conveyancing Act:—

7. (*c*) "In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):—

"That the person who so conveys, has with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as if so expressed, and in the manner in which it is expressed to be conveyed."[2]

The Bill refers to the undermentioned cases for its authorities. [3] The covenant for title and other covenants here enacted were held to be implied in every mortgage even before the Act. [4]

1490. Principle.—This section like section 55 relating to sales is enacted to operate only when the parties have not entered into a contract to the contrary. It is presumed that if the parties had entered into a contract the conditions would have been those contained in the section.

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(1) 44 & 45 Vict., c., 41.

(2) *Ibid.*

(3) *Dwarka Dass* v. *Ruttun Singh* (1867), N. W. P. H. C. R., 199; for para. (*b*)—*Anundchunder* v. *Soobul Chunder* (1857), S. D. A., 1195; *Purlhad Chunder* v. *Chundee Churn* (1853), S. D. A., 575; for para. (*d*)—"effect of forfeiture of lease" *Mata Pershad* v. *Mt. Bhagmanee* (1869), N. W. P. H. C. R., 128.

(4) *Dwarka* v. *Ruttan* (1867) 2 Agra. 199.

1491. Meaning of Words.—"*In the absence of a contract to the contrary*" means a valid contract [1] though it need not be express. [2] "*The mortgagor shall be deemed to contract*:" The contract is personal to the mortgagor. His assignee is not bound by the same obligation. [3] "*Enable him to defend*:" "To defend," says Macpherson, "is rather a vague expression. It is to be presumed that it is intended that the mortgagor should do everything in his power to enable the mortgagee to defend the mortgagor's title. The mere advance of the money for the costs of defending a suit would not, therefore, be sufficient." [4] "*Public charges*:" such as rent and cesses. "*Pay each prior mortgage*:" This clause seems scarcely necessary. A subsequent mortgagee would even otherwise take subject to prior mortgagees. [5] "It is, of course," says Macpherson, "the duty of the mortgagor to pay the interest and principal due in respect of such prior mortgages. There seems to be no advantage in declaring, as the clause does, that the mortgagor enters into an implied contract with a subsequent mortgagee to do this." "*The benefit of the contracts*:" *i.e.*, the contract shall be deemed not to be personal to the mortgagee but may be enforced by his representatives and assigns. [6]

1492. Statutory Covenants subject to Contract.—Like section 55 which relates to sale of immoveable property this section also yields to a contract express or otherwise implied made to the contrary. Such contracts and covenants will then be subject to the general rules regulating all contracts. In the case of mortgages since the implied statutory covenants here set out presume in favour of the conveyance of all the mortgagor's interest in the property, a contract to the contrary must be to limit that interest, which the mortgagee may take for what may be worth without any assurance on the part of the mortgagor that he will defend the interest conveyed, or that he will undertake the liability mentioned in clauses (*c*) to (*e*).

Covenant for endorsing payments.

1493. The parties may enter into other covenants not comprised in this section, which would be enforceable provided they are not illegal. Thus a covenant that no payment made by the mortgagor shall be allowed, unless it is only endorsed on the deed, or is witnessed by a written acknowledgment, will not be given effect to, for otherwise, it would create an artificial estoppel inconsistent with the rules of equity and evidence which allows parol evidence in proof of payment. But a stipulation by the mortgagor to the effect that all payments made by him should be indorsed by him on the bond, failing which he shall not lay any claim to any payment made except in this way should not be regarded as altogether otiose, for the absence of indorsements when payments are alleged, is a circumstance of some importance, which ought not to be overlooked, though it is by no means conclusive." [7] "It is against good conscience," said Westropp, C.J., "that an obligee should stipulate that, although he may have been paid in part or in full, he should if the evidence of such payments

(1) *Cf. Narayan* v. *Motilal*, I.L.R., 1 Bom. 45 (49).
(2) *Parasurama* v. *Kunhunni*, 4 M.L.T. 497.
(3) *Srinivasa* v. *Gnanaprakasa*, I. L. R., 30 Mad., 67.
(4) Mort. (7th Ed.), p. 665.
(5) S. 48.
(6) *Srinivasa* v. *Gnanaprakasa*, I.L.R., 30 Mad., 67.
(7) *Tarakani* v. *Bissonath* (1853), S. D. A. 544; *Girdharee* v. *Lalloo*, 3 W. R. (Mis.), 23; *Kalee Dass* v. *Tarachand*, 8 W. R., 316; *Sashachellum* v. *Govindappa*, 5 M.H.C.R., 451; *Nugur Mall* v. *Azeemoolah*, 1 N.W.P. H.C.R., 146; *Kashninath* v. *Naria*, Bom. unrep., 438 of 1872, cited and approved in *Naravan* v. *Motilal*, I.L.R., 1 Bom., 45; *contra* in *Bekana* v. *Vasuntum* (1855), M.S. D.A., 49, overruled *Sashachelum* v. *Govindappa*, 5 M.H.C.R., 451, see *Narayan* v. *Moti Lall*, I.L.R., 1 Bom., 44 (49).

were not in writing, be at liberty to treat the payment as a nullity. He would in enforcing such a condition be availing himself of his own negligence or wrong." (1) It was then added that such a condition could only be imposed by the Legislature, as indeed it has done in certain cases, as for example, in O. XXI, r. 2 of the Civil Procedure Code, which does not recognize uncertified adjustment of a decree. (2)

1494. Mortgagee's Title by Estoppel.—In addition to the express contracts and those implied as here enacted the jural relation between mortgagor and mortgagee creates an estoppel similar to that of landlord and tenant precluding the mortgagor from denying the title of the mortgagee. A mortgagor must, from the very nature of the mortgage contract, preserve the property pledged for the purposes of the original security, and is, therefore, estopped independently of covenants of warrantee, from denying the mortgagee's title and the existence of the lien which he has created, or from defeating its enforcement against the property against which it was placed. The Court will not suffer a mortgagor to set up the title of a third person against his mortgagee; for he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to the proper possession.(3) The mortgagor cannot be allowed to say that he had no authority to mortgage(4) or that the property he mortgaged was not transferable (5) or that his mortgage is invalid, because it was effected at a time when the estate was in the course of administration and is liable to be challenged by persons who have subsequently acquired the mortgaged premises from the administrators. Not only the mortgagor but purchasers of his right, title and interest, in the equity of redemption are equally estopped; for although a purchaser of mortgaged premises is not estopped by his mere acceptance of the deed from disputing the validity of the mortgage on the amount due under it on the ground of objections which were open to the mortgagor, yet he is limited to such objections or defences only as could have been pleaded by the mortgagor himself, and he cannot even set up all of these, for he is not permitted to urge defences strictly personal to the mortgagor. And it makes no difference whether the purchaser acquires title, not by a private sale, but at a sale held in execution of a money decree.(6) The rule that the mortgagor cannot set up against his mortgagee the title of a third person has been held applicable where the mortgagee is a trustee, acting in a public capacity and not for his own benefit, though it would be inapplicable where the mortgage is void as contrary to statute (7) of course, since parties must be deemed to have known the law, it follows that if one of them takes a mortgage of property with the knowledge that it is unlawful for the mortgagor to make a mortgage, the plea of estoppel cannot be raised.(8)

1495. Covenant for Title.—This clause closely resembles second clause of section 55, which provides for the covenant for title by the seller. As in the case of a sale, so in the case of a mortgage, the transfer must always be held impliedly to warrant the

Clause (a).

(1) *Narayan* v. *Moti Lall*, I.L.R., 1 Bom., 45 (48).

(2) *Narayan* v. *Moti Lall*, I.L.R., 1 Bom., 45 (48); s. 258, Code of Civil Procedure, 1882; now O. XXI, r. 2, C.P.C., 1908.

(3) *Debendra Nath* v. *Mirza Abdul*, 10 C.L.J. 150 (163).

(4) *Joti Prasad* v. *Aziz Khan*, 6 A.L.J. 5.

(5) *Bishumbhar* v. *Parshadi*, 10 A.L.J. 112.

(6) *Debendra Nath* v. *Mirza Abdul*, 10 C.L.J. 150 (164, 166); *Joti Prasad* v. *Aziz Khan*, 6 A.L.J. 5.

(7) *Mohamaya* v. *Haridas*, 19 C.W.N. 208.

(8) *Kidar Nath* v. *Naipal Singh*, 10 A.L.J. 1306; *Mohori Bibi* v. *Dharmodas*, I.L.R. 30 Cal. 539, P.C.

title of the property sold or mortgaged, and if it be found that the title is defective, the vendee or mortgagee can sue for damages or loss on the breach of implied contract, although there may be no express agreement for title.(1) The covenant implied in clause (*a*) is twofold—*First*, as to the *quantum* of interest mortgaged and *secondly*, as to its transferability by the mortgagor. The "interest which the mortgagor professes to transfer to the mortgagee" must depend upon the description of the property mortgaged. If, as is usually the case, all its attributes and incidents are not exhaustively set out, then the "interest" will have to be construed in the light of section 8 which applies to all transfers including a mortgage. (§§ 344—366). "The combined effect of that section and this clause, is then this, that in the absence of a contract to the contrary, the interest which the mortgagor professes to transfer would then be deemed to be all that the mortgagor has, which he shall be deemed to transfer unreservedly.(2) And since every transfer necessarily implies a covenant that what he transfers is transferable by him, this covenant shall be also read into every mortgage-deed. Where the interest mortgaged is an undivided share, the question whether it is transferable or not will have to be solved with reference to the view of the mortgagor's personal law entitling him to alien a joint co-parcenary interest. (§§ 204, 205). If his alienation is upheld the security will be subject to the right of the other sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.(3) The power to transfer postulates such power at the time of the mortgage. It implies not only that the property is subject to no impediment as to alienability mentioned in section 6 (§§ 183—267), but also that the mortgagor is a person qualified under section 7 to transfer it. (§§ 277—329). The covenant has nothing to do with the qualifications of the mortgagee (§ 271) nor with the ulterior purpose of the mortgage (§§ 865—927).

Notice excludes the Rule.

1496. The section is enacted to be subject to a contract to the contrary. Such contract need not necessarily be express, for it may be implied. Where, therefore, the mortgagee knew all the circumstances as to the *quantum* of interest possessed by the mortgagor and the nature of his interest therein, it was held to be reasonable to infer that there was an understanding between the parties that the mortgagor did not contract in the terms of this section.(4)

1497. The interest of the mortgagee in the mortgaged property cannot be defeated by the fraudulent conduct of the mortgagor. He could not, for instance, surrender his tenancy to the prejudice of the mortgagee,(5) or suffer a collusive judgment to be entered against himself; and the mortgagee has been permitted to enter a *caveat* against grant of a probate of a will although the mortgagor, the heir at law, did not oppose it.(6) It appears that since possession adverse to the mortgagor would be adverse to the mortgagee, it is his duty to prevent a hostile claim from ripening into a prescriptive title,(7) since it is not sufficient that the mortgagor should have a subsisting title at the moment of mortgage, but it is essential that he should continue to preserve his title so as to offer

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(1) *Dwarka Das* v. *Ruttunsingh*, (1867), N.W.P.H.C.R., 199.

(2) *Chiranjee Lal* v. *Bhagvan Singh*, 8 I. C. (All.) 826 (827).

(3) *Bujnath* v. *Ramoodeen*, 21 W. R. 233, P.C. *Baikuntha* v. *Sheikh Nura*, 6 I. C. (Cal.) 196.

(4) *Parasurama* v. *Kunhunni*, 4 M.L.T., 437.

(5) *Shamdas* v. *Batul Bibi*, I.L.R., 24 All., 538 (541).

(6) *Sarbamongla* v. *Sashibhoshan*, I.L.R., 10 Cal., 413; *Kashi* v. *Gopi*, I.L.R., 19 Cal., 48.

(7) *Obiter* in *Nand Kumar* v. *Ajodhya*, 14 C.L.J., 292 (298, 299). But see § 1573 *post*.

sufficient security to the mortgagee. This is implied in the next clause to be presently considered (§§ 1505, 1506).

1498. A covenant in a mortgage-deed has, however, a very much larger scope than a covenant in a sale-deed.(1) A covenant for title implies a covenant for further assurance, which means that any defect in title shall be cured. Such a covenant however, does not, in the absence of anything to the contrary, extend to enlarging the estate conveyed,(2) or to barring or affecting the interest of any other person.(3) In England a legal mortgagee of a freehold estate is entitled to the title-deeds, (4) and a mortgagee of a leasehold estate is similarly entitled to custody of a lease, (5) a right which may be enforced against the holder of the deeds by way of an equitable mortgage. (6)

1499. A covenant for title runs with the land and may be enforced by the mortgagee, his heirs and assigns. During the continuance of the mortgage, a covenant for title has practically little use except that it gives the mortgagee a right to recover his mortgage-money and which is secured to him by another section to be presently considered. (7) The covenant, however, becomes useful after the mortgaged property absolutely passes to the mortgagee after which it has the same use as the covenant contained in cl. 2 of section 55.

1500. Substituted Security.—If the mortgagee is, subsequently to his mortgage, deprived of his security for want of title in the mortgagor, he may either sue him for the recovery of his money, (8) or hold as security any property obtained by the mortgagor in lieu of the one mortgaged to him. (9) A mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, the mortgagee's sole remedy being to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. (10) This view was lucidly expounded by the Privy Council, who said: "Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer, who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers but must pursue his remedy against the lands allotted to his mortgagor, and as against him, would have a charge on the whole of such lands. He would take subject to the pledge in the new form which it had assumed." (11) So far as it goes, the principle so stated is simple and intelligible. But against how much of the property received by substitution, is the mortgagee entitled to proceed. If, suppose, a co-parcener mortgages his interest in the joint property consisting of several villages, say *A*, *B*, *C*, *D*, *E* and *F*. Now if the mortgagor had mortgaged his *entire* interest in *all* of the six villages, it is clear that the mortgaged security would fasten to any village or villages received by

(1) *Per* Kekewich, J., in *Bankes* v. *Small*, 34 Ch. D., 415 (421).

(2) *Bankes* v. *Small*, 34 Ch. D., 415 (420).

(3) *Per* Stuart, V.C., in *Davis* v. *Tollemache*, Jur. (N.S.), 1181 (1185).

(4) *Smith* v. *Chichester*, 4 Ir. Eq., 580.

(5) *Stokes* v. *Stokes* (1886), W. N., 184.

(6) *Smith* v. *Chichester*, 4 Ir. Eq., 580.

(7) S. 68, *post*.

(8) S. 68 (*b*). *Bhola Nath* v. *Hara Mohan*, 7 I.C. (Cal.) 251.

(9) *Bujnath* v. *Ramoodeen*, 21 W. R., 233, P.C., followed in *Hemchunder Ghose* v. *Thako Moni Devi*, I.L.R., 20 Cal., 533; *Lakshman* v. *Gopal*, I.L.R., 23 Bom., 385; *Joy Sankari* v. *Bharat Chandra*, I. L. R., 26 Cal., 434; *Lal Mamud* v. *Arbullah*, 1 C. W. N., 174 (178); *Amolak Ram* v. *Chandan Singh*, I.L.R., 24 All., 483.

(10) *Amolak Ram* v. *Chandan Singh*, I. L. R., 24 All., 483: *Hakim Lal* v. *Ram Lal*, 6 C.L.J., 46; *Muthia Raja* v. *Appala Raja*, 20 M. L. J., 393; *Shahebzada* v. *Robert Savi Hills*, I L R., 35 Cal., 388.

(11) *Bujnath* v. *Ramoodeen*, 21 W. R., 233 (236), P. C.

him in lieu of his share. But there may be cases in which the mortgagor may have mortgaged only a fraction of his share in all of the property, or, his mortgage may not extend to the whole of the property but may relate only to some of his property, or it may again be, that he had only mortgaged only a fraction of his interest in some of the property. In all such cases, it is evident that the substitution could not take place on *all* the property allotted to the mortgagor, but that regard would be had to the *quantum* of interest originally mortgaged and on substitution, the mortgagee could only enforce his security on the proportionate interest of the mortgagor. Suppose, for example, that in the above illustration the mortgage relates only to half the mortgagor's interest in the six villages, which, assume, are all of equal value, and if the mortgagor obtains only *A*, *B*, as his share on partition, it is clear that the mortgagee could not proceed against the whole of *A*, and *B*, for if he were so permitted, he would improve his security by the mere fact of partition by his mortgagor. In such a case, therefore, the substituted security is only half of *A*, *B*. Similarly, in other cases the principle is the same—namely, that by substitution the mortgagee obtains another but not an enlarged security. For this purpose it may be necessary to value the property at the date of partition as the mortgagee was entitled to that security up to that date, and to that extent the mortgagee may claim an interest in the new property allotted to the mortgagor upon partition. But subject to this the mortgagee may enforce his security against any of the new property of his mortgagor.(1) But in order to entitle the mortgagee to fall back upon such property, the mortgagor must have initially at least some interest in the property which he professes to transfer.(2) If, therefore, he mortgages a portion of *his own share* of a joint holding which he had already alienated, he could not be compelled to make his representation good out of the *other half* share, to which he has subsequently succeeded.(3) But if in the above case the mortgagor's own share had afterwards reverted to him, the mortgagee could then have fastened his equity upon that property.

1501. So if the mortgagor profess to transfer property over which he had no title, if he subsequently acquires title therein, the mortgagee can turn to it for the satisfaction of his debt.(4) And when the mortgagor gets into his possession the property which he had mortgaged but was out of possession, he is bound to hold that property subject to the mortgage originally created by him. In such a case it may be said that the subsequently acquired or augmented estate feeds the estoppel.(5) It is the same where the security takes the shape of money, as where the mortgaged property is sold, or is substituted for other similar property. (6) And it does not matter that the original tenure was determined, and the mortgagor has acquired the property under a different title (7) or under different conditions.(8) A zemindar having mortgaged by way of usufructuary mortgage his zemindari together with his *sir* land, lost his zemindari rights and became an ex-proprietary tenant of the *sir*. It was held that the usufructuary mortgage did not become ineffectual but took effect as a mortgage of the ex-proprietary rights.(9) In such a case the mortgagor

(1) *Hakim Lal* v. *Ram Lal*, 6 C.L.J., 46.

(2) *Bijnath* v. *Ramoodeen*, 21 W.R., 233 (235), P.C.

(3) *Babu Rai* v. *Shadiram*, 1 P.L.R., 337.

(4) S. 43, *ante*; *Dooli Chand* v. *Nirban Singh*, 4 C.L.R., 150; *Pranjivan* v *Baju*, I.L.R., 4 Bom., 34 (36); Fisher, § 1636; Story on Bailment, § 363; *Hallett's estate*, In re, 13 Ch. D. 696.

(5) *Dooli Chand* v. *Nirban Singh*, I.L.R., 5 Cal., 253.

(6) S. 29, Land Acquisition Act (Act I of 1894); *Gosto Behary* v. *Shib Nath*, I.L.R. 20 Cal 241; *Tohan Das* v. *Jeso Ram* (1907) P. R. No 17.

(7) *Vishnu* v. *Tabia*, 1 B.H.C.R., 22.

(8) *Lootnarain* v. *Showkeelal*, 2 C.L.R., 382.

(9) *Sham Das* v. *Batul Bibi*, I.L.R., 24 All., 538 (541).

could not even surrender his ex-proprietary interest to the prejudice of the mortgagee.(1) In another case, the owner of a share in 1895 mortgaged it with the *sir* to *B*. In the following year the said share was sold for arrears of revenue and purchased by *A*, but as the cultivating rights in the *sir* were reserved to the owner he became an occupancy-tenant of that land. In 1900, *B* foreclosed his mortgage and obtained possession of the land. *A* thereupon sued to eject *B*, and it was held that the mortgage security became fastened in the ex-proprietary interest which the mortgagor acquired in place of his proprietary interest, and that *A* could not, therefore, on that account eject *B*. But inasmuch as the mortgage in its new form in favour of *B*, should have been, to be valid, sanctioned by *A* (2) who had then become the landlord, the latter was on that ground entitled to eject *B*. (3) But against this view it may be urged that the necessity for the landlord's sanction is not apparent, since the equity which became attached to the land on sale of the share could not be regarded as a new transfer so as to require the landlord's consent.

1502. The principle of substituted security applies not only to the cases before indicated, but also to cases in which the property mortgaged has been sold to satisfy a paramount charge,(4) or where on sale held at the instance of the first mortgagee, there remains a surplus, which may in accordance with the rule be laid claim to by the second mortgagee.(5) Where property is acquired by the mortgagee on the principle of substituted security, he acquires it with any burden to which the property may be subject on the date of substitution. Thus, for instance, if there be a mortgage on property *P*, of 1902, and on partition in 1904, the mortgagor receive property *Q* in lieu of his share subject however to the charge created thereon for the payment of owelty, the mortgagee will obtain property *Q* in lieu of property *P* but subject to the charge thereon for the payment of owelty. In such a case then, the mortgage of 1902 does take effect on property *Q* but only from the date the property is allotted to the mortgagor, and if it was then burdened by a charge created to equalize partition, the charge so created though later in point of date will receive property on the ground that it existed before the substitution. In such a case it is immaterial when the co-sharer took possession of *Q*. This rule however could not obviously apply if the partition was effected unfairly or improperly to defeat the claims of creditors. In all fairness this is all that the creditor is entitled to.(6)

1503. The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract, express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice. While, therefore, the doctrine will be applied, in general, wherever any person other than a mere volunteer pays a debt or demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another, or when one person is compelled for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, will never be permitted where its

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(1) *Badri Prasad* v. *Sheo Dhian*, I.L.R., 18 All., 354; *Sham Das* v. *Batul Bibi*, I.L.R. 24 All., 538.

(2) Under s. 43 of C.P. Tenancy Act, 1883, since repealed.

(3) *Hari Krishna* v. *Jaideb*, 17 C.P.L.R. 33.

(4) *Cf.* ss. 67, 97 *post*.

(5) *Rakhtawar Lal* v. *Baru Mal*, 4 A.L.J. R., 492.

(6) *Sabebradale* v. *Hills*, 12 C.W.N., 373.

application would work injustice to the rights of those having equal or superior equities. (1)

1504. Where the owner executed three consecutive mortgages of his property, the first and the third mortgages being in favour of the same mortgagee, the second mortgage being in favour of another person *B*, and *A* at first enforced only his first mortgage impleading *B* in which he brought the property to sale, the proceeds of which left a surplus after satisfying *A*'s claim which *B* did not claim; and which therefore remained in the hands of the Court. *A* then put in force his third mortgage but *without* impleading *B* and in execution of his decree withdrew the surplus. *B* thereupon sued on his own mortgage claiming the surplus from *A*, resisted his suit on the ground of limitation and section 244 (now s. 47) of the Code. But the latter contention did not prevail, it being held that as the Court had given *B* no decree he could not withdraw the money in execution of *A*'s decree. And as regards limitation it was held that inasmuch as the only right that *B* had to the surplus in the hands of *A* was on the basis of his mortgage as representing his security which became equitably fastened on the surplus sale-proceeds, the limitation allowed was twelve years, and not only six as provided in section 120 of the Limitation Act. (2) Where the mortgagee sues the mortgagor for his mortgage-money, the mortgagor is then personally liable. Ordinarily, the mortgagor is *not* in every case personally bound to satisfy his mortgagee; but if he fails to make good his title to the property mortgaged by him the law fixes upon him personal liability for payment of the debt incurred by him. The subject will be found further discussed under section 68.

1505. Covenant for Defence of Title and quiet Enjoyment—

Clause (b). Secondly, the mortgagor must defend his own title, if he is himself in possession of the property, and secure to his mortgagee quiet possession if he be entitled to possession under the contract, and must help him in defending his possession by coming forward to vindicate his title against all comers. He cannot put his mortgagee in possession and then collude with a stranger in turning him out. In the words of the English Statute, he must allow his mortgagee to "quietly hold, occupy and enjoy or take and have the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate, or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made." (3) Some such rule appears to have been recognized in cases decided long anterior to the Act, (4) and similar provisions are also inserted in section 108 (*c*) to protect the interests of the lessee.

1506. The mortgagor can help the mortgagee in securing him quiet possession by (i) providing him with funds to defend his possession; (5) (ii) helping him with the information and evidence of title necessary to defend it. (6) The obligation on the part of the mortgagor to secure quiet enjoyment

(1) *Bissesswar* v. *Lala Sarnam*, 6 C.L.J. 130 (137, 138); see s. 101 Comm, *post*.

(2) Art. 132, Indian Limitation Act (XV of 1877, now Act IX of 1908); *Behramdeo* v. *Tara Chand*, I.L.R., 33 Cal., 92.

(3) S. 7 (*c*), Conveyancing Act, 1888 (44 & 45 Vict., c. 1).

(4) *Perlad* v. *Chondi* (1853), S.D A., 575; *Anund* v. *Subul* (1857), S.D.A., 1195.

(5) *Damodar* v. *Vaman Rao*, I. L. R., 6 Bom., 435, following English Law.

(6) See s. 72 (*c*).

of the mortgaged property by the mortgagee is one which necessarily springs out of the relation created by the contract, and is implied in section 68, clauses (*b*) and (*c*), which enable the mortgagee to sue for his mortgage-money on his failure to secure quiet possession of the property. In an English mortgage, such a covenant is made to commence, in point of operation, after default in payment of the mortgage-money on the date when it is repayable. But the mortgagee may assert his right to possession at any time and the failure to obtain quiet enjoyment would no doubt precipitate his right to sue on the personal covenant.(1)

It may be a question whether the mortgagee, whose possession is disturbed or whose security is imperilled, must needs seek the remedy here provided before suing for the recovery of his money under section 68, but it can scarcely be so contended, for the provisions of this section confer rights and not any disability on the mortgagee, nor are his rights in any way qualified. The mortgagee is always entitled to be reimbursed the expense incurred in defending his title. (2)

1507. Payment of Public Charges, etc.—The party in possession is *prima facie* liable to pay all public charges in respect of the property. If the mortgagor or any one claiming through him is in possession of the property, the mortgagor must pay such charges. If, on the other hand, the mortgage is in possession, his liability to pay them is declared by section 76 (*c*). The Government demand is the paramount charge on the property which must be met by the party in possession. But there is no obligation on any person in possession to pay the Government charge, it is a contract which the mortgagor alone is entitled to make with the mortgagee. (3) If therefore the mortgagor has parted with his equity of redemption in the property, his liability to pay the public charge still remains. If, therefore, in consequence of the mortgagor's default in paying Government revenue, the property is sold, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery (4) as against other creditors who hold mere money-decrees; the surplus sale-proceeds being taken to represent the mortgaged properties. (5) And while the mortgagee is entitled to be reimbursed the expenditure incurred in paying public charges, the mortgagor is not entitled to a similar consideration for he pays the money in his own interest and not in the interest of the mortgagee. (6) His liability to pay rent would, however, cease with the extinction of his equity of redemption, as by a Court sale. (7) It would appear that the mortgagor is liable to pay public charges in respect of the property, for the period not only during mortgage, but also all arrears accruing due before his contract. The clause, however, has been ambiguously worded, but there can be no doubt that its object being to prevent forfeiture or sale of the property during the period of its mortgage, the payment of arrears is necessarily implied. He is, however, on that account entitled to no

Clause (c).

(1) *Doe* v. *Lightfoot*, 8 M. & W., 553.

(2) *Damodar* v. *Vamanrao*, I.L.R., 9 Bom., 435 (437).

(3) *Srinivasa* v. *Gnanaprakasa*, I. L. R., 30 Mad., 67 (71); distinguished in *Veerappa* v. *Kannappa*, 17 I. C. (Bur.) 878 on the ground that the Madras case was a sale of the equity of redemption whereas the sale in the case was one subject to mortgage, and therefore the purchaser liable to pay the assessed revenue which is (submitted) not intelligible. The other ground, *viz.*, that revenue being a paramount charge is recoverable from all persons in possession is of course unexceptionable.

(4) *Heera Lall* v. *Janookeenath*, 16 W. R., 222.

(5) *Krishtodass* v. *Ram Kant*, I. L. R., 6 Cal., 142.

(6) *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D., 234 (251).

(7) *Balkrishna* v. *Bishwanath*, I. L. R., 19 Bom., 528.

charge on the property. "It would be strange indeed," observed Cotton, L. J., "if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgage. . . . . In my opinion it would be utterly wrong to say that a mortgagor, the owner of the equity of redemption, can under those circumstances defeat the incumbrancers on the estate. Suppose the mortgaged property is a mine, and the owner of the equity of redemption were to spend large sums of money in order to prevent the mine being flooded, or otherwise destroyed, could he have in respect of that expenditure a lien on the estate as against the persons having charges and mortgages on that estate? In my opinion, no." (1) So a mortgagor who has taken out letters of administration necessary to perfect the title to the mortgaged property is not entitled to be paid the cost so incurred out of the mortgaged property. It was argued that such payments were in the nature of salvage but the contention did not prevail. "A mortgagor" remarked Fry, J., "having an equity of redemption, or an ultimate interest in the fund, and improving that fund by the performance of some condition without which he cannot get it, does not, in my opinion, by performing that condition, create a charge in his own favour as against the mortgagee." (2)

1508. Validity of Lease, etc.—In a conveyance by way of a mortgage of lease-hold property, the mortgagor is deemed to contract that all arrears due under the lease have been paid, and that all conditions subject to which it is held duly fulfilled. The mortgagee is not liable to pay rent for the period anterior to his occupation.(3) Hence, where the mortgage is without possession, the mortgagor must pay the rent reserved by the lease and fulfil all other conditions necessary for its continuance, so as not to impair the mortgagee's security. If the mortgagor makes any default to the prejudice of the mortgagee, the latter can maintain a claim for damages.(4) If the mortgagor allows an arrear of rent to fall due, and an ejectment has to be brought by the landlord, the mortgagee may pay the arrear and costs and apply for a receiver;(5) and he is entitled to add to his mortgage-money any advances made by him to the mortgagor for the preservation of the estate.(6)

Clause (d).

1509. But a mortgage with possession of lease-hold property may be made either by assignment or sub-lease of the term.(7) In the former case, the mortgagee will then be himself liable to the lessor in respect of the liabilities attaching to the lease.(8) But in such case the reason for his liability is the privity of estate arising from the vesting of the assignor's interest in the assignee. In other words, the mortgagee becomes liable *qua* assignee of the estate and not *qua* mortgagee. Even in the absence of a formal transfer, the mortgagee would be liable if he is put in possession under circumstances which amount to an assignment of the leasehold interest, or if he has his name entered in the landlord's books as tenant of the property,(9) or has collected rents from the

(1) *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D., 234 (243).

(2) *Saunders* v. *Dunman*, 7 Ch. D., 825 (829), distinguishing *West* v. *Reid*, 2 Hare, 249; *Shearman* v. *British Empire Assurance Co.*, L.R., 14 Eq., 4 (in which the administrator of a mortgagor of a policy of assurance was held entitled to a lien for premiums paid).

(3) *MacNaghten* v. *Lalla Mewa Lall*, 3 C. L.R., 285; *Vithal* v. *Shriram*, I.L.R., 29 Bom., 891.

(4) *Singjee* v. *Tiruvengadam*, I.L.R., 13 Mad., 192.

(5) *Kelly* v. *Staunton*, 1 Hog., 393.

(6) *Burrowes* v. *Molloy*, 4 Ir. Eq., 482.

(7) S. 108 (*j*), *post*.

(8) S. 108; *Kannye Lall* v. *Nistariny*, I. L.R., 10 Cal., 443 (444); *Bhairub Chandra* v. *Lalit Mohan*, I.L.R., 12 Cal., 185 (189); *Kunhanujan* v. *Anjelu*, I.L.R., 17 Mad., 296; *Krishnaji* v. *Ramchandra*, I.L.R., 1 Bom., 70 (73).

(9) *Kannye Lall* v. *Nistariny*, I.L.R., 10 Ca., 443 (444).

subordinate holders.(1) But no tenancy can be inferred from a notice given to the mortgagee, or from the fact that he had in certain events power to lease out the property.(2)

1510. But in England, in an ordinary case of assignment of the whole term for value, both the assignor and the assignee are liable, the former on his covenants, and the latter by virtue of privity of estate, it being immaterial that the assignment was by way of mortgage.(3) Indeed, it has been said that in the latter case the two interests legal and equitable being in two persons, both are on that account liable.(4) Moreover, being the legal owner of the estate he is liable, although he may not have taken actual possession.(5) Mortgagees are therefore seldom willing to undertake such risk, and in practice the forms, most in use, are by sub-lease in favour of the mortgagee at a peppercorn rent, reserving the last day of the original term, the mortgagor covenanting to pay the rent and perform the usual covenants, the other form being a declaration of trust in his favour.(6) The Conveyancing Act, section 7 (*d*), however, does not apply to such demises.

The provisions of this clause are similar to section 7 (*d*) of the English Act.(7)

1511. Subsequent Incumbrancers.—The mortgagor is further deemed to covenant with second or subsequent mortgagees to pay off the prior incumbrance. This covenant is necessary to give some security to the subsequent incumbrancers, for if the mortgagor makes default in this respect, and the subsequent mortgagees are deprived of their security, they can sue him under section 68 for a personal decree, although there was no personal covenant for it. (8) This covenant does not, of course, deprive the subsequent mortgagee of his right to redeem the prior mortgage. (9) Where he seeks to sue for the return of his money, he need not wait for the expiry of the stipulated period. His cause of action accrues as soon as he discovers that on account of a prior incumbrance he is left without a security.(10)

Clause (e).

1512. Exceptional Cases—On this clause Messrs. Shepherd and Brown remark:—"The proviso seems to be superfluous and not very accurately worded; clause (*c*) says nothing of rent, and clause (*d*), so far as rent accruing due after the mortgage is concerned, does not apply where the mortgagee is in possession."(11) But the clause seems to be clear enough and in no way superfluous. In clause (*c*) the term "public charges," includes rent with which the term seems to have been used synonymously, and with regard to clause (*d*) it only emphasises that, after the mortgagee is in possession, the mortgagor shall not be held liable to pay rent. In other words, the clause expressly declares that the mortgagor will not be liable as declared in clauses (*c*) and (*d*) to pay future rent where the mortgage is usufructuary, who is

(1) *MacNaghten* v. *Bheekaree*, 2 C.L.R., 323.

(2) *Madhubmoney* v. *Nundo Lall*, I.L.R., 25 Cal., 338 (347, 348).

(3) In re *Gee*, 24 Q.B.D, 63 (67); *Galbraith* v. *Cooper*, 8 H.L.C., 315 (329, 330).

(4) *Per* Lord Wensleydale in *Galbraith* v. *Cooper*, 8 H.L.C., 315 (335).

(5) *Westerdell* v. *Dale*, 7 T.R., 312; *Turner* v. *Richardson*, 7 East., 340, note; *Mayor of Carlisle* v. *Blamire*, 8 East, 487; *Williams* v. *Bosanquet*, 3 Moo., 500; *Burton* v. *Barclay*, 7 Bing., 745.

(6) *Walters* v. *Northern Mining Co.*, 5 DeG M &G., 629; *Moor* v. *Grey*, 2 DeG & S., 304.

(7) 44 & 45 Vict., c 41.

(8) *Singjee* v. *Tiruvengadam*, I.L.R., 13 Mad., 192 (195).

(9) S. 91 (*a*).

(10) *Radha Churn* v. *Parbutte Churn*, 25 W. R., 51.

(11) Comm. (4th Ed.), p. 231.

presumed to and must pay rent, it being the paramount charge on the property he holds.

1513. Covenants run with the Land.—The last clause simply declares that the rights conferred by the section are not personal to the mortgagee, and will enure to the benefit of the holders of the whole or a part of his interest. Similar provision is made in the case of a sale (1) and leases, (2) and the corresponding clause in the Conveyancing Act runs thus:—"The benefit of a covenant implied, as aforesaid, shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested." (3)

In short, such covenants are deemed to run with the land and may be enforced by any one deriving title under the original mortgagor, including an underlessee with notice, who, though not an assignee, could be bound in equity by a restrictive covenant. (4) But covenants which create only a personal bar to the original covenantee do not run with the land and cannot be enforced against the mortgagee. But the fact that a breach was traceable to and caused by a fraud on the part of the original covenantee is no defence to an action for enforcing a covenant that runs with the land. As Bowen, L. J., put it "the benefit of the covenants runs with the land; but the burden of the fraud does not." (5) (§§ 665, 666).

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

1514. Analogous Law.—This section lays down an equitable rule which has been accepted in the Punjab.(6) A similar rule is enacted in section 18 of the Indian Trusts Act, (7) in the following terms:

Trust to prevent waste.

18. Where the trust is created for the benefit of several persons in succession, and one of them is in possession of the trust-property, if he commits, or threatens to commit any act which is destructive or permanently injuritous thereto, the trustee is bound to take measures to prevent such act.

Section, 108 (*o*) similarly protects the lessor.

1515. The explanation follows an old distinction between land and houses made in England,(8) and which is also reproduced in section 20, clause(*e*) of the

(1) S. 55 (2).
(2) S. 108 (*c*).
(3) 44 & 45 Vict., c. 41; s. 7 (*f*) (6).
(4) *Jahn Brothers, &c., Co.* v. *Holmes* [1900], Ch. 188.
(5) *David* v. *Sabin* [1893], 1 Ch., 523 (541); *per* Smith, L.J., *ib.*, p. 545.
(6) *Mt. Bhagwan Dei* v. *Secretary of State*, (1902), P L. R., 518.
(7) Act II of 1882.
(8) *King* v. *Smith*, 2 Hare, 239; *Usborne* v. *Usborne*, 1 Dick., 75.

Indian Trusts Act.[1] But the English Trustee Act has now discarded this distinction.[2] The section is otherwise in harmony with the English law. The last paragraph of section 68 prescribes a remedy for a case under this section.

The explanation is the same as affixed to section 10 of the Indian Easements Act,[3] and section 6 of the Trusts Act.

1516. Principle.—The mortgagor being the beneficial owner of the property is not liable to the mortgagee for suffering permissive waste, for he may not have the means to prevent the property from deterioration. But he must not commit active waste so as to render the security insufficient. The explanation provides a rule of thumb for determining whether the security is or is not rendered insufficient. The effect of providing a rigid rule for determining the question as to insufficiency of the security is, that acts which would be permissible at the outset would become intolerable as soon as the interest has swelled the mortgage-money to answer the test provided by the explanation. The question of what is permissible waste would then depend not so much upon the acts of the mortgagor as upon the state of the mortgage-account and the value of the property at a given moment. The rule was probably enacted to eliminate as far as possible the elements of uncertainty, but in setting down an arbitrary cast-iron measure the very objection which it was intended to guard against has been preserved with redoubled vigour. For under the law the value of the property at a given moment would have to be determined—a matter by no means susceptible of an easy or precise calculation.

1517. Meaning of Words —*For allowing the property to deteriorate :*" implies passive conduct. He may be liable for causing wanton or malicious deterioration.[4] "*But he must not commit any act, &c.*" Only acts destructive or permanently injurious to the property *and* rendering the property insufficient, are prohibited. Could then the mortgagor convert a mansion into a mill ?[5] "If *consisting of buildings.*" What if it comprises partly buildings and partly land, *e.g.*, an Indigo factory ?

1518. Mortgagor's Liability to preserve Property.—This section casts on the mortgagor in possession of his property subject to a mortgage a duty in respect of it towards the mortgagee, which the latter is in all conscience entitled to, and which is a material part of his contract. As such, he is liable for certain acts and omissions, not incomparable to those of a trustee in relation to the beneficiary.[6] But the analogy must not be pressed too close for while the trustee is in charge of property not his own, the mortgagor is in possession of his own property, and as such competent to exercise rights which as prudent owner he may, though they may have the effect of impairing his mortgagee's security. As such the rule discriminates between his acts and omissions. For while he is not liable for *allowing* it to deteriorate by not preserving the property and thus maintain its value, he is not to *commit* any *act* impairing its value to the mortgagee to the extent stated in the explanation. Now since the mortgage-money in a non-possessory mortgage is never a fixed sum, the allowable acts of the mortgagor must depend upon the state of account at the moment. Thus acts which would pass unchallenged at the outset of the mortgage would become unendurable when the mortgage-money has

(1) Act II of 1882.
(2) Ss 4. 51 & 52 Vict., c. 59 (1888).
(3) Act V of 1882.
(4) *The Bishop of Winchester's Case* 2 Eq. Ca. Abr., 758 ; 22 E. L. R., 643.
(5) *Query* in *Elders* v. *Verden*, 2 Eq. Ca. Abr., 757 ; 22 E.L.R., 642.
(6) Ss. 13, 15 Indian Trusts Act (Act II of 1882).

swollen by accumulated interest. But if at the outset there was no margin in the security taken, then the mortgagor must beware from the very commencement. All the rules implied in the section may then be reduced to the following: (i) whether the security is sufficient or insufficient, the mortgagor is never liable "for *allowing* the property to deteriorate." (ii) And so long as he leaves sufficient security to his mortgagee he is not liable for even *acts* amounting to waste whether ameliorative or destructive. (iii) The nature and quality of the acts are immaterial if the property suffers in value to the mortgagee. (iv) The mortgagee cannot complain unless his security is or is likely to be diminished to the extent stated in the explanation. (v) The rule is necessarily subject to a contract to the contrary, for being enacted in favour of the mortgagee, it is for him to enforce or waive it.

1519. Waste when restrained.—A mortgage implies that the mortgagee looks to his security for the payment of his debt. He is therefore so far interested in the property, and is therefore entitled to see that his security is not impaired on account of the action of the mortgagor, or of any other person to whose rights his own are superior. The mortgagor, being owner of the property, is no doubt entitled to receive rents and profits, and exercise other rights incidental to his ownership.(1) He cannot be restrained from suffering permissive waste of his property. But he must not commit active waste so as to render the security insufficient. He must not, for example, cut down valuable timber,(2) or undermine buildings so as to endanger their stability,(3) or remove valuable fixtures,(4) or impose on the property any easement that may render the security insufficient,(5) or commit any act which is destructive or permanently injurious thereto.(6) He could not, for example, open and work new mines,(7) but if the mines are already open, he may work them and for that purpose open new shafts or pits to follow the same vein, since the working of the mine would be otherwise impracticable.(8) He is not at liberty to remove fixtures from the property mortgaged, inasmuch as being part of the property they pass with it to the mortgagee.(9) But if the mortgagee acquiesces in the removal he could not afterwards object to it.(10) So if the mortgagor, a nurseryman, who in the course of his business, as such, removes trees which had been planted in the soil for the purpose of selling them, the mortgagee cannot object.(11) But if the sale be out of the ordinary way of business the mortgagee may interfere.(12) So, again, the mortgagor cannot be prevented from felling timber unless it would have the effect of diminishing the value of the property so as to render the security of the mortgagee insufficient. So where the mortgagor of a house with a well in its compound, made an express grant of the user of the well to the vendee of the adjoining house sold by him after the mortgage, the mortgagee could not attack the grant without showing that his security had

(1) *Singhai Gopal* v. *Mehtab Bai*, 9 C. P. L. R., 130.

(2) *Ushborne* v. *Ushborne*, Dick., 75.

(3) *Dugale* v. *Robertson*, 3 Jur. (N. S.), 627.

(4) *Gough* v. *Wood* [1894], 1 Q. B., 713; *Huddersfield Banking Co.* v. *Lester* [1895], 2 Ch., 273.

(5) S. 10, Easements Act (V of 1882).

(6) S. 18, Indian Trusts Act (II of 1882).

(7) *Clavering* v. *Clavering*, 2 Eq. Ca. Abr., 590; 22 E L.R., 496.

(8) *Abraham* v. *Bubb*, 2 Eq. Ca. Abr., 757; 22 E.L.R., 642.

(9) *Monti* v. *Barnes* [1901], 1 Q. B., 205; *Huddersfield Banking Co.* v. *Lister and Son* [1895], 2 Ch., 273 (282).

(10) *Gough* v. *Wood* [1894], 1 Q. B., 713; *Cumberland, Union Banking Co.* v. *Maryport &c., Co.* [1892], 1 Ch., 415 explained *Per* Kay, L. J., in *Huddersfield Banking Co.* v. *Lister and Son* [1895], 2 Ch., 273 (286).

(11) *Gough* v. *Wood* [1894], 1 Q. B., 713; *National Mercantile Bank* v. *Hampson*, 5 Q. B. D., 177; *Walker* v. *Clay*, 49 L. J., C. P., 560.

(12) *Taylor* v. *McKeand*, 5 C. P. D., 358.

been thereby rendered insufficient.(1) The mortgagor may, however, even though insolvent, cut underwood at seasonable time and of proper growth.(2) But if it has the effect of diminishing the value of the security below the minimum here prescribed, the mortgagor would be restrained from even cutting wood that is ripe and may deteriorate if left standing.(3) And he has been allowed to lease the property for a term of years, even after the passing of the mortgage-decree, on the ground that the granting of a lease is not an act destructive of or permanently injurious to the security.(4) But it would be otherwise if there was a covenant in the mortgage against such alienation.(5)

Mortgagee's remedy.

1520. If the mortgagor is guilty of committing active waste, thereby diminishing the value of the security, the mortgagee may obtain an injunction restraining him from the acts complained of. In one case, after decree in a foreclosure-suit, the mortgagor in possession, began to commit waste. He was restrained by injunction, though no injunction was prayed by the bill.(6) If the waste has already been committed the mortgagee's remedy would then be a suit for recovery of damages. And if the injury is in the course of commission, he may obtain both an injunction as well as damages. In one case a tenant-in-common with the mortgagor cut down all the trees standing on the mortgaged property while the mortgagee's suit was pending. The mortgage being simple, the mortgagee brought his mortgagor's interest to sale ; and, having failed to realize the full decretal amount, instituted a fresh suit for damages for waste committed by the tenant-in-common during the pendency of his suit against the mortgagor. And his suit was decreed on the ground that he had a right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights his are superior. And as regards limitation, the Court held that inasmuch as it was not the cutting alone but the subsequent appropriation of the woods by the defendant which ought to have been left for the share of the mortgagor that operated to the injury of the mortgagee, time must be counted from the date of actual appropriation.(7)

It is moreover provided by section 68, that in the event of the security being rendered insufficient, as here defined, the mortgagee may require the mortgagor to give him, within a reasonable time, another sufficient security for his debt, and if the mortgagor fails to do so, he may sue him for the mortgage-money.(8) His right to personal recovery is then contingent upon his giving a reasonable notice to replace the security. Other cases in which the mortgagee may obtain redress for the infraction of his right are enumerated, and will be considered in the commentary to section 68.

The question whether the security in a particular case is in such danger of deterioration as to warrant interference on the part of the Court must, of course, be decided according to the evidence and other circumstances in each case. In urgent cases an *ex parte* order of injunction may, however, be obtained.(9) The Court is also empowered to make an order for the detention or preservation of

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(1) *Hampton* v. *Hodges*, 3 Ves. 105.

(2) *Bhagwan Dei* v. *The Secretary of State*, (1902) P.L.R , 518. (The *onus* was, however, wrongly thrown on the mortgagor.)

(3) *Harper* v. *Aplin*, 54 L. T., 383.

(4) *Ramlal* v. *Muhammad Irsad* [1892], A. W.N., 59.

(5) *Chunni* v. *Thakur Das*, I.L.R., 1 All., 126, but see *Radha Pershad* v. *Monohur Das*, I. L. R., 6 Cal., 317.

(6) *Goodman* v. *Kine*, 8 Beav., 379.

(7) *Aiyappa* v. *Kuppusami*, I. L. R., 28, Mad., 208.

(8) S. 68, last para.

(9) S. 492, Civil Procedure Code (Act XIV of 1882). Now see Act V of 1908.

any property in suit, and may, where necessary, appoint a receiver, for its custody or management.(1)

Apart from the section, it appears to be evident that if the mortgagor mischievously or maliciously pulls down houses, or commits other acts destructive of the property and by no means necessary for its enjoyment or improvement, the Court will restrain it on the ground of equity and public good.(2)

Such a case might be conceived of a bankrupt mortgagor who, finding himself unable to redeem the mortgaged property, starts demolishing it, or as much of it as he can.(3) It may be that the mortgage has several years to run before it becomes payable and so while the waste may not offend against the rule which takes only account of the amount for the time being due as against what may become due when the mortgage is payable, it may still reduce the value of the property to make it worthless when the time for the mortgagee to sue for his money arrives.

The position of a mortgagor in possession is not then closely comparable to his *confrere* in England, whose position is compared to that of a tenant-at-sufferance.(4)

1521. A mortgagor in India is entitled to exercise the ordinary rights of ownership, and to receive the rents and profits without having to account for them. His possession is rightful, and he is entitled to remain in possession until ordered to deliver it up by the mortgagee, or a receiver appointed for that purpose. Even then, the latter cannot obtain an account of back rents due from the mortgagor in respect of his possession.(5) He is not liable for permissive waste or acts diminishing the value of the property unless it is shown that the security is insufficient,(6) a term which is thus explained by Wigram, V, C.:—"I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."(7) So far the law of the two countries is closely analagous, but in so far as the section prescribed an inflexible test as a measure of insufficiency the English law may be said to be divergent.

In a question arising under the section, the burden of proof should ordinarily lie on the party impugning the transfer. The mortgagee having the right to transfer, it would lie on him, who pleads his disqualification to assert and prove it. In a Punjaub case(8) the burden of proof was said to lie on the mortgagor, but this view appears to be untenable.

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(1) S. 503, Civil Procedure Code (Act XIV of 1882). (Now Act V of 1908.)

(2) *Abraham* v. *Bubb*, 2 Eq. Ca. Abr., 757; 22 E. L.R., 642.

(3) *Hampton* v. *Hodges*, 8 Ves., 104.

(4) Other analogies are furnished by the heir or executor of a debtor in possession and a judgment-creditor, and by the purchaser who has obtained possession before the payment of the purchase-money and the vendor—*Grockford* v. *Alexander*, 15 Ves., 138; *Casamojor* v. *Strode*, 1 Sim. & St., 381; *Petley* v. *Eastern Counties Ry. Co.*, 2 Sim., 483; *Terkinton* v. *Kearman*, L. & G., 45. *Cf.* S. 55 (1) (*e*), and § 815, *ante*.

(5) *Per* Chitty, J., in *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D., 125 (127). But in the case of a bankrupt mortgagor, a trustee in bankruptcy was restrained from cutting crops and removing crops cut after *demand* of possession by the mortgagee. *Bagnall* v. *Villar*, 12 Ch. D., 812.

(6) *Kekewich* v. *Market*, 3 Mac. & G., 329; *Hippesley* v. *Spencer*, 5 Madd., 422; *Humphreys* v. *Harrison*, 1 J. & W., 581; *Farrant* v. *Lovell*, 3 Atk., 723; *Harper* v. *Aplin*, 54 L. T. (N. S.), 383.

(7) *King* v. *Smith*, 2 Ha. 244. *Cf. Harper* v. *Aplin*, 54 L. T. (N. S.), 383.

(8) *Bhagwan Dei* v. *The Secretary of State*, (1902) P. L. R., 518.

1522. Mortgagor's Leases: In England, the mortgagor was before the Conveyancing Act absolutely debarred from creating any legal interest in the mortgaged land[1] and he could not lease the property for any term however short, unless he was expressly empowered to do so by the mortgage.[2] Any lease granted by the mortgagor otherwise than under an express power was accordingly held void against the mortgagee, and only took effect against the mortgagor by estoppel; but since the lease was regarded as made in derogation of the latter's rights, he has no right to complain if the lessee redeems his mortgage " when it is a mere security for money, and when the money is tendered with interest, then we direct the mortgagee to divest himself of the legal estate and not to insist on such legal rights as he has. Then why is the tenant . . . not to be entitled to redeem, which is the only way of relieving himself from the effect of the mortgage . . . . The interest which he got from the mortgagor, makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to the duration of time."[3] The lessee was, therefore, permitted to redeem the mortgage, and so prevent his ejectment by the mortgagee.

(1) Under Common Law.

1523. But now under the Conveyancing Act, 1881,[4] the mortgagor in possession is expressly empowered to make an agricultural or occupation lease for any term not exceeding twenty-one years, or a building lease up to ninety-years, subject to certain conditions laid down in the Act and which are calculated to protect the mortgagee's rights and to prevent the mortgagor from diminishing his security." Leases made by the mortgagor within the limits prescribed by the Act are thus now valid against the mortgagee,[5] but this statutory right of the mortgagor may be restricted or excluded,[6] or enlarged [7] by agreement between the parties expressed in the mortgage-deed or otherwise in writing, and in practice a stipulation against the exercise of the right by the mortgagor without the consent of the mortgagee is usually inserted. The power to grant a lease does not imply the power to accept a surrender, and a mortgagor in possession granting a lease under his statutory power cannot accept a surrender of the lease without the concurrence of his mortgagee. [8]

(2) Under the Conveyancing Act.

A contract to make or accept a lease under the Statute may be enforced by or against every person on whom the lease if granted would be binding. [9]

1524. It would thus appear that in England the mortgagor's power to lease out property during the continuance of the mortgage is circumscribed by salutary checks for which there is no authority in this country. It has, however, been held in Allahabad[10] that a mortgagor, ordinarily, cannot without the concurrence of his mortgagee execute a lease which would be binding upon the latter. He may execute a lease which may be binding upon himself, and so long as the

Mortgagor's leases in India.

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(1) *Doe d. Lord Down* v. *Thompson*, 9 Q.B., 1037; *Lows* v. *Telford*, 1 App Cas. 414.

(2) Will, R.P. (18th Ed.), 518; Dav. P.C., Vol. II, Pt. II, 339, 335 *n* (4th Ed.).

(3) *Per* Cotton, L.J., in *Taru* v. *Turner*, 39 Ch. D., 456 (465); citing *Keech* v. *Hall*, 1 Doug., 21.

(4) 44 & 45 Vict., c. 41, s. 18.

(5) *Metropolitan, &c., Building Society* v. *Smith*, 22 Q.B.D., 70.

(6) Conveyancing Act, 1881, s. 18, sub-s. 13.

(7) *Ibid*, s. 18, sub-s. 14.

(8) *Robbins* v. *Whyte* [1906], 1 K.B., 125.

(9) Conveyancing Act, 1881, s. 18, sub-s. 12.

(10) *Wazir Ali* v. *Moti Chand*, 2 A.L.J., 294 (296, 297).

mortgagee, does not interfere with the possession of the lessee, so long may the lessee enjoy the benefits of that lease; but ordinarily without the concurrence of the mortgagee, the mortgagor cannot grant a lease so as to be binding upon the lessee. But so stated, the statement is too wide. In the case of an English or possessory mortgage it is perfectly correct to say that the mortgagor can make no lease without the consent of the mortgagee, but in any other case there appears to be no authority for similarly limiting the powers of the mortgagor. On the other hand, being the owner of his own property, he is not only entitled to create leases but may do so irrespective of their effect upon the mortgagee's security, provided only they are not wasteful within the meaning of this section. (1) Of course, the mortgagee cannot complain of a lease which does not affect his security. Where, for instance, the owner mortgaged two plots of *sir* land of which only the proprietary rights could be and were sold to the plaintiff who sued to eject the defendant who had during the pendency of the mortgage suit been given a perpetual lease, the Court threw out the suit holding that as the mortgagee could never obtain physical possession of the land, he could not complain of a lease which did not affect his right to realise rent which was all that he was entitled to under his purchase of the proprietary right. (2)

The distinction which the English law makes between legal and equitable estates and the effect a mortgage has on the mortgagor's estate reducing it into a mere equitable estate, the legal estate passing therewith to the mortgagee, necessarily arrests the mortgagor's power of alienation during the continuance of the mortgage, but in view of the fact that no such distinction is countenanced in Indian law and the mortgagor remains after his mortgage, as he was before the owner of his property, his power to let his property must remain unaffected by his mortgage subject only to the legal restrictions which this section place upon his ordinary powers of alienation.

1525. Express Contract by Mortgagor.—The question how far parties may render the provisions of this section nugatory by entering into an express covenant to the contrary does not call for notice, for the section does not save any contract to the contrary, and would presumably supersede any contract entered into by the parties and inconsistent with its terms. But certain covenants are usually inserted in mortgage-deeds, and the one frequently found inserted is the one against alienation of the property by the mortgagor. Such a covenant may or may not be valid according as it is free from, or infected with the vice of clogging redemption.

1526. Validity of Covenants against Alienation.—But apart from its invalidity for contravening the principles which have been before considered (§§ 388-392), the question still remains how far are such covenants otherwise enforceable. In cases decided before the present enactment such covenants were held to create rights *in rem*, and to be enforceable against subsequent interest-holders, with or without notice. (3) In short, the covenant ran with the land (§ 665).

Thus a stipulation that the mortgagor "shall have no power in any way to alienate the property by sale, gift, *ijara patni* or otherwise, by which loss may be caused to the existing actual assets of the property" was held to be

(1) *Dhiraj Singh* v. *Dina Nath*, 6 N. L. R., 140 (144).
(2) *Ghura* v. *Shitale*, I. L.R., 36 All., 248.
(3) *Heera Lall* v. *Rutchpol*, (1851), S.D.A., N.W.P., 39; *Mitho Bebee* v. *Madho Persaud*, (1852), S D.A., N.-W.P., 614; *Beckwittee* v. *Umesh Chandra*, 3 W.R., 110.

valid and enforceable against a subsequently created *patnidar* who was accordingly evicted. (1) A covenant not to alienate includes transfers of all kinds, as for example, by mortgage, or lease even for a term of years. But it was held not to extend to the creation of agricultural tenancies on rent which was said to be no transfer at all. (2) But such alienations would be undoubtedly transfers within the meaning assigned to that term in the Act, and which comprises not only the conveyance of tangible property but of all interest therein. (3) The creation of an agricultural tenancy is then clearly a transfer of property within the contemplation of the Act which excludes them from its operation, not because agricultural leases are not within its scope but because having regard to the difference in their tenure, incidents and variety they have been dealt with in separate enactments. In another case, the validity of such leases having come up for discussion Mahmud, J., said: "I am quite prepared to hold that any alienation, by the mortgagor, which infringes upon or is capable of doing injury to the rights of the prior mortgagee is not binding upon him, and he may sue to set it aside. But this in my judgment follows more from the rule of law than from any express covenant in the mortgage-deed. The rights of a mortgagee holding a mortgage with covenant or without covenant against alienation cannot be injured by any act of the mortgagor subsequent to the mortgage, and the mere existence of such covenant cannot entitle the mortgagee to claim rights other than those which are necessary (according to the nature of the mortgage) for the maintenance or enforcement of his security for repayment of the mortgage-debt, the sole object of the contract. I am therefore of opinion that transfers made in breach of covenants against alienation—covenants so often introduced in mortgage-deeds, and so often infringed by mortgagors in this country—are valid except in so far as they encroach upon the rights of the mortgagee, and, that, with this reservation, such covenants do not bind the property, so as to prevent the acquisition of a valid title by the alienee." (4) But this proposition is too wide. The rights of the mortgagee may be infringed in a variety of ways. Is he then entitled to recover upon his covenant whenever his rights are infringed? And, indeed, what are the mortgagee's rights"? Do they include a right to enforce such a covenant? This section in some measure provides a solution of the question Instead of rendering all alienations made in derogation of the rights of the mortgagee invalid, it prescribes the limits within which the mortgagor's transfers would be upheld. But at the same time the acts of the mortgagor may render the security insufficient, but not so insufficient as to let in the remedy but dimly foreshadowed by the section. In such a case the mortgagee may protect himself under the provisions of section 68.

1527. That an alienation against covenant when void, is void only as against the covenantee, would appear to be clear from the position the subsequent mortgage acquires under the law, even though his mortgage may be made against the covenant with the first mortgagee, in which case all that the latter can claim is that no right derogatory to his grant shall be recognised. This appears to be the *rationale* of a case decided in Calcutta, in which the

(1) *Brajaraj* v. *Mohamed*, 1 B.L.R., 152, following *Rajnarayan* v. *Shera Meah*, 7 W. R., 67, distinguishing *Erskin* v. *Dhan Krishna*, 8 W.R., 292; *cf.* also *Sheo Prosunno Singh* v. *Brojoo Sahoo*, 7 W.R., 232.

(2) *Chuttermull* v. *Chutter Kishore* (1868), N.-W.P.C.R., 396; *Brajaraj* v. *Mohamed*, 1 B.L.R., 152; *Chunni* v. *Thakur Das*, I.L.R., 1 All., 126 (128, *note*); *Mulchand* v. *Balgobind*, I.L.R., 1 All., 610; *Abadi Begum* v. *Assaram*, I.L.R., 2 All., 162.

(3) S. 5, *Matadin* v. *Kazim Husain*, I.L.R., 1 All., 432 (473), F.B.

(4) *Ali Hasan* v. *Dhirja*, I.L.R., 4 All., 518 (524).

mortgagee-purchaser was held disentitled to oust a *zuripeshgidar* whose lease was made after and in contravention of the covenant "not to grant a *zuripeshgi* lease to any one, or execute any deed in any way by which any difficulty might arise in the realization of the money covered by the deed," and in which case the mortgagee was held entitled only to bring a suit against the *zuripeshgidar* "to have his right declared to sell the property to satisfy his mortgage-debt, so as to give the *zuripeshgidar* an opportunity of redeeming," which, indeed, would have been his course, if the *zuripeshgidar* had been the puisne mortgagee. (1)

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be so sold.

Right to foreclosure or sale.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure.

Nothing in this section shall be deemed—

(*a*) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless

(1) *Radha Pershad* v. *Monohur*, I.L.R., 6 Cal., 317, citing *Emam Momtazooddeen* v. *Rajcoomar*, 23 W.R., 187, F. B.; *Bujnath* v. *Goberdhan*, 24 W. R., 210; *Chiet Narain* v. v. *Gunga Pershaud*, 25 W. R., 216, the facts of which however furnished only a broad analogy. Garth, C. J., in *Radha Persaud* v. *Manohar*, I.L.R., 6 Cal., 317, also laid down that a covenant against alienation by way of sale, gift, etc., created only a personal liability as between the mortgagor and mortgagee, probably intending that the rights acquired against subsequent alienations are those conferred by law and not acquired in virtue of any covenant.

the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

1528. Analogous Law.—In so far as it defines the rights of the mortgagee, this section is the counterpart of section 60 which defines the corresponding rights of the mortgagor. In this part nine sections (67 to 75) deal with the *rights* of a mortgagee, and two sections (76 and 77) with his liabilities. This section generally corresponds with section 19 of the Conveyancing and Law of Property Act. (1) The initial words of the section make it subject to a contract to the contrary.

Section 99 prohibited the sale of the mortgaged property at the instance of the mortgagee for the satisfaction of any claim, whether arising under the mortgage or not, except by instituting a suit under this section. It has, however, been now repealed and after amendment re-enacted as O. 34, r. 14 of the Code of Civil Procedure. A large number of cases had clustered round the repealed and this section, but in view of the amendment, they possess now scarcely any but a historical interest. (2)

1529. Principle.—It has been remarked how before the Regulations the parties to a mortgage were bound by their contract, and on the failure of the mortgagor to pay the amount on the stipulated date, the mortgagee had the right to enter upon the property, which upon breach passed without interference of the Court from the debtor to the creditor; and how the hardship often caused to the mortgagor by the literal enforcement of his contract, was considerably relieved against by the Regulations in certain provinces. (3) But the machinery of the Regulations was found to be too clumsy to deal with the many, often complicated, questions between mortgagor and mortgagee, and the Privy Council had, as regards the Presidencies of Madras and Bombay, already pronounced in favour of legislation. The present section does away with the notice of foreclosure, and simply enacts that upon the failure of the mortgagor to pay him, he may institute a suit and obtain a decree for either foreclosure or sale. In such a suit, of course, all questions between the parties and connected with the mortgage can be raised and finally decided. The mortgagee may, however, contract himself out of his right to sue, and in this respect the section materially differs from section 60, which gives the mortgagor an absolute right to redeem,—any contract to the contrary, notwithstanding. The distinction was necessary, for while the mortgagor deserved protection, the mortgagee did not. The provisions of this section will apply only to mortgages executed after the commencement of the Act. (4) To earlier transactions the law then in force would, however, still have to be applied.

Scope of the section.

1530. The object and scope of this section have been the subject of considerable divergence of opinion between the several High Courts. It has been held by the Calcutta High Court, in cases to which reference has already been made before, (5) that the section refers only to mortgages in which a decree for foreclosure, or in the alternative for sale, can be passed, or in other words to English mortgages. (6) But if this were the intention of the Legislature, it is difficult to see why it

(1) 44 & 45 Vict., c. 41.
(2) See O. 34, r. 14 Comm. *post*.
(3) S. 58, Comm.
(4) 1st July, 1882.
(5) S. 58, Comm.
(6) *Girwar Singh* v. *Thakur Narain*, I. L. R., 14 Cal., 730 (733), F. B.; *Nilcomal* v. *Kamini Koomar*, I. L. R., 20 Cal., 269; *Vasudeva* v. *Srinivasa*, I. L. R., 30 Mad., 426, P.C.

should have made provision for by no means the general class of mortgages commonly made in the country, without making any provision for the kind of mortgages so commonly met with. The language of the section is again opposed to the construction sought to be put upon it. It deals with the rights and liabilities of the mortgagee, which evidently means mortgagee generically, and thus including also the simple mortgagee. The object of the section apparently is to declare the remedies open to a mortgagee, and then to state the kinds of mortgages in which the one or the other remedy cannot be obtained. It cannot be supposed that the two remedies of foreclosure or sale specified in the section, are to be resorted to in the alternative in each case. For such a case even if conceivable, would leave a mortgage by conditional sale in which the mortgagee cannot sue for sale (1) and a simple mortgage, in which the mortgagee cannot sue for foreclosure,(2) wholly unprovided for in the Act.

In justice, however, to the Calcutta High Court, it must be conceded that the question before the learned judges was one of limitation, and that their reference to this section is only casual and forms by no means an integral part of their judgment. If it did, it would have been conclusive, for their Lordships of the Privy Council have held with that Court that the words "foreclosure or sale" as used in Art. 147 of the Limitation Act have only reference to an English mortgage, and do not apply to a mortgage in which the mortgagee's remedy is either by foreclosure or by sale. (3)

1531. Meaning of Words.—"*Mortgage-money has become payable :*" compare section 60, where the words used are "principal money has become payable." But no change of meaning seems to have been intended by the change of expression adopted in the two sections. "*Before a decree for redemption :*" for after the decree, the mortgagee's suit would be *res judicata.* "*Mortgage-money paid or deposited :*" as provided in section 83, or tendered, for tender is equivalent to payment and would at any rate afford an answer to the mortgagee's suit. "*A suit to obtain an order, &c.*" is called a suit for foreclosure, and a decree obtained in the suit is a decree for foreclosure.(4)

1532. Express Contracts barring Statutory Rights.—This section defines the rights of the mortgagee for the realization of his security. His rights are necessarily subject to any contract into which he may enter with the mortgagor abandoning or modifying them. Thus, for instance, it is always open to the mortgagee to relinquish his right absolutely in consideration of receiving some other property, and if he does so, he cannot afterwards fall back upon his mortgage. And in order to constitute novation it is not necessary that there should be a conveyance, all that is necessary being a valid contract.(5) Even a well known custom would be sufficient to override its provisions. Such a custom exist in Malabar where a *kanom* enures for twelve years unless the parties to it have by express contract provided for its redemption at an earlier date.(6) A contract may be either express or implied, or the mortgagee may have by his own conduct rendered himself incapable of resorting to the remedy here prescribed. Where it was shown that a part of the mortgage-money was not paid, and the mortgagor sued for possession of the mortgaged property without offering to pay up the part of the

(1) S. 67 (*a*).
(2) *Ib.*
(3) *Vasudeva* v. *Srinivasa*, I. L. R., 30 Mad., 426, P.C.
(4) S. 86, *post.*
(5) *Velu* v. *Balkrishna*, 12 M.L.J.R., 366.
(6) *Velu* v. *Krishnan*, I.L.R., 26 Mad., 727, F.B.; overruling *Mahomed* v. *Ali Koya*, I. L.R., 12 Mad., 76.

mortgage-money unpaid, the Court dismissed the suit, although the mortgagee applied that the decree be made subject to his paying the amount found as unpaid.(1)

The mortgagee may lose the benefit of his mortgage, if in putting the property to sale he fraudulently conceals his mortgage, (2) or fails to give notice of its existence as required by sections 237 and 287 (*c*) of the Code,(3) unless he can fix the purchaser with notice of his mortgage. (4)

Estoppel.

1533. The mortgagee who has given acquittance for his mortgage cannot afterwards turn round and enforce his security. If the mortgagee has compounded with the mortgagor by receiving a less amount than that due on the mortgage, his security is extinguished notwithstanding that he had been misled as to the mortgagor's liability. A mortgagee may be estopped in a variety of ways, but it is the gist of that doctrine that the mortgagee's representation was an essential part of the contract, that the mortgagor relied on that representation, and that his position was in some way altered by it. (5) Where the usufructuary mortgagee, as such, granted a lease of the mortgaged property to the mortgagor, he could not repudiate that character in a litigation with the mortgagor affecting the lease, but he was not otherwise precluded from asserting his true title, and such admission could not be construed as an acknowledgment of the mortgagor's title so as to save limitation. (6)

1534. After the Mortgage-money has become payable.— The question when the mortgage-money becomes payable has been sufficiently discussed before. (7) In the absence of an express stipulation, the mortgagee is not bound to receive payments in instalments.(8) If the amount be stipulated as payable in instalments, and the mortgagor personally covenants to pay each instalment as it *falls due*, the mortgagee is clearly entitled to sue him for the recovery of each instalment *unpaid* by sale of the mortgaged property and personally from the mortgagor; and this right is not curtailed by the fact that there is a further provision in the mortgage-deed, entitling the mortgagee to take possession of the mortgaged property, if at the end of the date fixed for the last instalment the debt remain wholly unsatisfied.(9) And so where the contract of mortgage provides for the foreclosure of the entire property mortgaged, on failure to pay any one or more instalments, then there is nothing in the law to prevent the mortgagee from enforcing his contract upon a defence being so made, and this is the law both in England (10) and America.(11) So where in a mortgage of lease-holds, there was a proviso for redemption in case the

(1) *Gopi Chand* v. *Sardar Khan*, 1 P. L. R., 401.

(2) *Dhondo* v. *Raoji*, I.L.R., 20 Bom., 290; but see *Husein* v. *Shankargiri*, I.L.R., 23 Bom., 119 (121).

(3) *Dullab Sirkar Krishna*, 3 B.L.R., 407; *Tinappa* v. *Murugappa*, I.L.R., 7 Mad., 107; *Jaganatha* v. *Gangi*, I. L. R., 15 Mad., 303; *Kasturi* v. *Venkatachalapathi*, *ib.*, 412; *Agarchand* v. *Rakhma*, I. L.R., 12 Bom., 678; *Ramchandra* v. *Jairam*, I. L. R., 22 Bom., 686; *Husein* v. *Shankargiri*, I. L. R., 23 Bom., 119.

(4) *Nursingh* v. *Roghoobur*, I.L.R., 10 Cal., 609; *Agarchand* v. *Rakhma*, I. L. R., 12 Bom., 678.

(5) *Citizens' Bank* v. *First National Bank*, 6 App. Cas., 352 (360); followed in *Fatimatulnissa* v. *Sundar Dass*, I. L.R., 27 Cal., 1004, (1012), P.C.

(6) *Fatimatulnissa* v. *Sundar Dass*, I. L. R., 27 Cal., 1004 (1012), P. C.; following *Citizens' Bank* v. *First National Bank*, 6 E. & I. App., 352 (360), in which Lord Selborne, L. C., held the rule to be a very important one, and in accord with s. 115 of the Indian Evidence Act (I of 1872).

(7) S. 60, Comm.

(8) *Behari* v. *Ram Gholam*, I. L. R., 24 All., 481.

(9) *Ramayya* v. *Venkatarama*, 13 M. L. J. R., 2.

(10) Fisher § 1942.

(11) Jones on Mortgage (6 th Ed). § 1459.

principal should be paid at the expiration of five years, with interest half-yearly in the meantime at £ 5 per cent; default having been made in payment of the interest a bill of foreclosure was filed, although the period for payment of the principal had not arrived, it was held that the condition having been broken, the mortgagee was entitled to a decree for foreclosure, notwithstanding he had taken possession of the property, and had realized by sale of a portion of it, more than enough to cover the interest due.(1) Foreclosure for an instalment has, of course, the effect of extinguishing the unpaid balance with the security, but if the decree is satisfied before it is made absolute, then the unpaid balance still remains due, and for which the same property would be still available as a security. The question is one of intention dependant upon the construction of the deed.(2)

1535. An acceptance by the mortgagee of an overdue instalment is not a waiver of the breach so as to disentitle him from calling in the whole principal.(3) Similarly, the payment and receipt of overdue interest does not amount to a waiver.(4) The mortgagee may preclude himself from suing by extending the time of payment. If the mortgagor covenant that on his failure to pay interest for one month at the end of the year after it fell due, the mortgagee may claim the whole amount due on the mortgage, the mortgagee may, on a default being made, avail himself of the benefit of the covenant.(5) So where a mortgagé-deed contained a covenant that the payment of the principal money should not be required by the mortgagee until the expiration of three years from the date of the deed "if in the meantime every half-yearly payment of interest shall be punctually paid," it was held that payment "punctually" meant "payment on the day fixed for payment," and that payment nine days after was not good payment.(6) The mere acceptance of interest after default must not be construed to be a waiver of the mortgagee's right to call in the principal.(7)

1536. It is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver.(8) This is true whether the rights be conventional or decretal.(9) The question is a question of fact and depends upon the circumstances of each case. "I think," remarked Lord Lydhurst, "if money is tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the objection; it must be taken as a regular payment if the person receives it the day after without making any objection."(10) On the

(1) *Edwards* v. *Martin*, 25 L. J. Ch. 284.

(2) *Edwards* v. *Martin*, 25 L.J. Ch. 284; *Kamod Singh* v. *Raja Raghoji*, 15 C.P.L.R., 78 (80).

(3) *Keene* v. *Biscoe*, 8 Ch. D., 201. *Cf. Cowdry* v. *Day*, 1 Giff., 316; *Williams* v. *Sterne*, 5 Q. B. D., 409.

(4) *Mohesh Chandra* v. *Prosanna Lal*, I. L.R., 31 Cal., 83; *Jadab Chandra* v. *Bhairab Chandra*, *ib.*, 297; *Gumna* v. *Bhiku*, I.L.R., 1 Bom., 125; *Balaji* v. *Sakharam*, I. L. R., 17 Bom., 555; *Kankuchand* v. *Rustomji*, I. L. R., 20 Bom., 109; *Kashiram* v. *Pandu*, I. L. R., 27 Bom., 1, F. B.; *Mumford* v. *Peal*, I. L. R., 2 All., 857, *contra* in *Cheni Bash* v. *Kumud*, I. L. R., 5 Cal., 97; *Mon Mohun* v. *Durga Churn*, I. L. R., 15 Cal., 502; *Nanjappa* v. *Nanjappa*, I. L. R., 12 Mad., 161.

(5) *Yeo Htean* v. *Abuzaffar*, 1. L. R., 27 Cal., 938, P. C.

(6) *Leeds and Hanley Theatre* v. *Broadbent* (1898), 1 Ch., 43.

(7) *Keene* v. *Biscoe*, 1 Ch. D., 201 (203).

(8) *Kashiram* v. *Pandu*, I. L. R., 27 Bom., 1, F. B.; distinguishing *Dulsook* v. *Chugon*, I. L. R., 2 Bom., 356; *Balaji* v. *Sakharam*, I. L. R., 17 Bom., 555 (559).

(9) *Kashiram* v. *Pandu*, I. L. R., 27 Bom., 1, F.B.; *Mon Mohun* v. *Durga Churn*, I. L. R., 15 Cal., 502; *Great Eastern Ry.* v. *Goldsmith*, 9 App. Cas., 937 (946); *Norton* v. *Wood*, 1 R. & M., 178; *Thompson* v. *Hudson*, I.L.R., 4 H. L., 1 (17).

(10) *Norton* v. *Wood*, 1 R. & M., 178; followed in *Kashiram* v. *Pandu*, I. L. R., 27 Bom., 1 (10), F. B.

other hand, if the mortgagee has accepted irregular payments without objection, it would be *prima facie* evidence of waiver. (1)

1537. The mortgagee is not debarred from realizing his security by the existence of a condition unless it is a condition precedent. A condition the breach of which may be compensated for by awarding damages would belong to the former category. A condition on the fulfilment of which depends the accrual of the right to payment of the mortgage money is of the latter kind. (2) If the mortgage-money was repayable " on demand " or " when you require," the mortgagee must make a demand before suit,(3) from which limitation would count.(4) In such cases the mortgagee must allow a reasonable time to the mortgagor to enable him to get his money ready.(5) But the question whether a suit to recover the amount would fail on the ground that no previous demand was made depends upon whether the suit is instituted against the principal debtor, or his surety. In a covenant to pay a collateral sum, as by a surety for the principal debtor, a previous request is a condition precedent, and an action brought without it would be premature. But if there is a present debt and a covenant or promise on demand, the demand is not considered a condition precedent to bringing the action.(6) In the case of debenture-holders it has been held that upon the occurrence of the winding up they are entitled to realize their security, notwithstanding that they have made no demand and the day mentioned therein for payment of the capital has not arrived.(7) If the mortgagee has covenanted that he shall not call for his money during a specific time, as during the lifetime of the mortgagor, he cannot sue in the face of his covenant before the given period, and the fact that he has expended money for the protection of the estate does not accelerate his right to realize his security.(8)

1538. Where there is a condition for payment at a time and place certain the condition is not broken by non-payment at the time unless the demand for payment is made at the specified place.(9) Demand may be inferred from circumstances. A customer of a bank assigned to the bank a policy of assurance on his life by way of mortgage for securing the amount owing by him to the bank in account current. The Bank was (*inter alia*) authorized to exercise the power of sale, should default be made in payment of the balance for one month after the account current had been closed. The Bank pressed the mortgagor to reduce the account current and thereupon the latter wrote to the Bank: " There was a meeting of creditors yesterday.....They agreed to accept all the assets I had. Trusting every one will get 20s. in the pound. " It was held that this letter amounted to a closing of the account, inasmuch as it recognized that the relation of banker and customer was at an end and that the transactions

(1) *Sakhawat Husain* v. *Gajadhar*, 3 A. L. J. R., 469.

(2) *Subrahmania* v. *Krishna*, I. L. R., 23 Mad., 137 (144).

(3) *Hanmantram* v. *Bowles*, I. L. R., 8 Bom., 561 (568).

(4) *Nettakaruppa* v. *Kumarasami*, I.L.R., 2 Mad., 20 (22).

(5) *Toms* v. *Wilson*, 4 B. & S., 442; *Moore* v. *Shelley*, 8 App. Cas., 285; *Fitzgerald's Trustee* v. *Mellersh* [1892], 1 Ch., 385 (390); In re *Brown's Estate* [1893], 2 Ch., 300.

(6) *Carter* v. *Ring*, 3 Camp., 459; *Sicklemore* v. *Thisteton*, 6 M. & S., 9; In re *Browns Estate* [1893], 2 Ch., 300 (306).

(7) In re *Panama Co.*, L. R., 5 Ch., 318; *Hodson* v. *Tea Co.*, 14 Ch. D., 859; *Wallace* v. *Universal, &c., Co.* [1894], 2 Ch. 547 (553)

(8) *Ramsbottom* v. *Wallis*, 5 L. J. (N. S). Ch., 92; *Burrowes* v. *Molly*, 2 Jo. & L., at p. 521.

(9) *Thorn* v. *City Rice Mill*, 40 Ch. D., 357 (360); Sbep. Touch, p. 136. In *Robey* v. *Snaefell Mining Co.*, 20 Q. B. D., 152. no place was fixed; *cf. Perumal* v. *Alagirasami*, I. L. R., 20 Mad., 245 (247). See Ss. 46—50, Indian Contract Act (IX of 1872) discussed under s. 60 *ante*.

between the parties must cease. The bank was then justified in realizing their security.(1)

1539. In an English mortgage the mortgagee is held entitled to foreclose if default be made in the fulfilment of even a single condition, even though there may be no covenant to that effect in the mortgage.(2)

1540. Right on partial Failure of Consideration.—It has already been seen (§§ 1200, 1201) that the mortgagee is not debarred from suing out his remedy by reason only of the failure of consideration(3) unless the full payment of consideration was the condition precedent to the transfer taking effect.

1541. Statutory Rights of Mortgagee.—This section empowers the mortgagee to sue either (4) for foreclosure or (5) sale at any time after the mortgage-money has become payable to him. It has already been seen as to when the mortgage-money is said to become payable. There can be no doubt that so far as regards the mortgagee he is not entitled to his money until after expiration of the date fixed for payment by the mortgagor, when the mortgage-money becomes payable without any formal demand made on the part of the mortgagee.(6) After this date the mortgagee is at liberty to enforce his mortgage, provided that the mortgage-money has not been already paid, deposited or tendered, or that the mortgagor has not already obtained a decree for redemption against him, in which case the claim of the mortgagee if not actually decided would become *res judicata*. If, however, the mortgagor pleads tender or deposit he must make out a case of valid tender to the mortgagee, and in the case of a deposit he must establish the service of notice upon him. Thus if in a suit to recover money due on a mortgage, the defendant pleads deposit, and it appears that a notice was issued to the mortgagee under section 83, but not served on him before he filed his suit, the plaintiff would not be debarred by this section from obtaining a decree with costs.(7) Although the section does not speak of *tender* still there can be no doubt that it is also an answer to the mortgagee's suit.(8) But a tender properly made and improperly rejected is not equivalent to payment.(9) Such a tender will only stop the running of interest if the mortgagor has kept the money ready to pay over to the mortgagee.(10) And the question would undoubtedly be material in awarding costs. But the mortgagee can no more be deprived of his right to realize his security than the mortgagor can be allowed to redeem without payment merely because he made

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(1) *Berry* v. *Halifax Commercial Banking Co.*, [1901], 1 Ch., 188.

(2) *Burrowes* v. *Molly*, 2 Jo. & L. at 521; *Edward* v. *Martin*, 25 L. J. (N. S.) Ch. 284.

(3) *Ramkant* v. *Brindaban*, 16 W R. 246.; *Rashiklal* v. *Ram Narain*, 9 A. L. J. 198.

(4) See s. 60, *ante*.

(5) S. 13, Exp. 2, Civil Procedure Code. *Maloji* v. *Sagaji*, I.L R., 13 Bom., 567; *Chudasama* v. *Matiani*, I.L.R., 16 Bom., 243; *Mahabir* v. *Macnaghten*, I.L.R., 16 Cal., 682, P.C.; *Thakur Shankur* v. *Daga Shankar*, 15 I.A., 66 (71).

(6) *Tipparapur* v. *Andugula*, 17 M.L.J. 177; No demand appears to be necessary whether any date is fixed or not. In the latter case the money is payable at any time after the date of execution. But demand, is of course necessary, when the mortgage-money is payable "on demand."—S. 48, Indian Contr. Act; *Toms* v. *Wirlson*, 4 B. & S. 442; *Brightley* v. *Norton*, 32 L.J. Q.B. 38; *Moore* v. *Shelley*, 8 App. Cas. 285; *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385 (390); *Deverges* v. *Sandeman Clark & Co.*, [1901], 1 Ch. 70 C. A. [1902] 1 Ch. 579.

(7) *Sitaramayya* v. *Venkatramanna*, I.L. R., 11 Mad., 371.

(8) *Sharpnell* v. *Blake*, 2 Eq. Cas. Abr., 604; *Harmer* v. *Priestley*, 16 Beav., 569.

(9) *Bank of New South Wales* v. *O'Conner*, 14 App. Cas., 273 (284).

(10) *Gyles* v. *Hall*, 2 P. Wms., 377; followed by the Privy Council in *Bank of New South Wales* v. *O'Conner*, 14 App. Cas., 273.

a tender which was refused.(1) Under this section the mortgagee must obtain a decree for foreclosure or sale of the mortgaged property. If then he sues on his mortgage, and obtains only a money-decree, he cannot sell the mortgaged property in execution of it.(2) But if no objection is raised and the property is sold, the sale is not absolutely void, but only voidable at the option of the mortgagor desiring to redeem.(3) And after it is confirmed and made final by the Court, even the mortgagor cannot re-open it.(4) In a decree for sale it is not enough that the decree provides that "the mortgaged property should remain liable for the satisfaction of the debt" for there must be a specific order for sale; otherwise the mortgagee must institute another suit under this section and obtain an order from Court for sale of the property.(5)

1542. There is, however, nothing objectionable in *attaching* the mortgaged property in execution of such a decree. In section 99 the prohibition was directed against sale and not attachment.(6) And it was immaterial whether the decree was obtained under the mortgage or not, for the prohibition was directed against the *mortgagee* decree-holder and not his decree.(7) The object in enacting this procedure was as stated by Sir Griffith Evans in his speech before the Council, to allow the mortgagor time for redemption, and also to prevent the same property being sold several times over, as it would have to be if the mortgagee is allowed to attach and sell it in execution of his money and mortgage-decrees.(8) The repeal of this section, has the effect of withdrawing this prohibition, and there will be now no impediment in the way of the mortgagee bringing the mortgaged property to sale otherwise than under his mortgage.

It would appear that this section would also apply to cases where the decree creates only a *charge* on the property. Thus where by a consent decree it was ordered that payment of the decretal amount be made by instalments and that the properties set forth in a schedule annexed to the decree stand charged with payment of the said instalments, it was held that the said properties could not be sold in execution of the decree, but a separate suit must be brought under this section.(9) A charge created for maintenance must also be enforced in the same way,(10) unless a receiver is, as one should be, appointed under the decree itself with directions, in case of default of payment, to sell the estate and out of the sale-proceeds to pay the allowance for maintenance.(11) It is competent for the Court to appoint a receiver even in a mortgage-suit.(12)

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(1) *Cf. Per* Lord Macnaghten in a Privy Council case from Victoria in *Bank of New South Wales* v. *O'Conner*, 14 App. Cas., 273 (283, 284); "There is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie." Dr. Stokes' suggestion (1. Anglo-Indian Codes, 780) that a tender is a sufficient answer to the mortgagee's suit is unsupported by principle or precedent.

(2) S. 99; repealed by Act V of 1908.

(3) *Mayan* v. *Pakuran*, 9 M.L.J.R., (1899) 98.

(4) *Durgayya* v. *Anantha*, I.L.R., 14 Mad. 74.

(5) *Jadub Lall* v. *Madhub Lall*, I.L.R., 21 Cal., 34; *Chundra Nath* v. *Burroda Shoondury*, I.L.R., 22 Cal., 813; *Durgayya* v. *Anantha*, I.L.R., 14 Mad., 74; *Sathuvayyan* v. *Muthusami*, I.L.R., 12 Mad., 325; *Kaveri* v. *Ananthayya*, I.L.R., 10 Mad., 129; *Azimullah* v. *Naim-un-Nessa*, I.L.R., 16 All., 415.

(6) See s. 99; *Chundra Nath* v. *Burroda Shoondury*, I.L.R., 22 Cal., 813.

(7) *Jadub Lall* v. *Madhub Lall*, I.L.R., 21 Cal., 34; *Rai Ramani Dasi* v. *Surendra Nath*, 1 C.W.N., p. xx.

(8) S 99, Comm., repealed by Act V of 1908.

(9) *Aubhyossury* v. *Gouri Shunkur*, I.L.R., 22 Cal., 859; followed in *Matangini* v. *Chooneymoney*, I.L.R., 22 Cal., 903; *Ashutosh Bannerji* v. *Luckhimoni*, I. L. R., 19 Cal., 139, F.B.; explained and distinguished.

(10) *Matangini* v. *Chooneymoney*, I. L. R., 22 Cal., 903.

(11) *Hemangini* v. *Kumode*, *Chunder*, I. L. R., 26 Cal, 441; *Chundramoni* v. *Muttylal*, 2 C.W.N., 33 (the practice referred to in Belchambers' Practice is changed by the Act).

(12) *Ghanashyam* v. *Gobinda*, 7 C. W. N., 452; S. 503, Code of Civil Procedure.

A mortgagee holding two mortgages over the same property may bring one suit in respect of them, but if the Court finds it inconvenient to try them together, it may order separate trials under section 45 of the Code. The question whether he is bound to put all his mortgages in one suit is a somewhat difficult one and will be found discussed in the sequel. (1)

1543. Mortgagee's Right: how far limited.—There being only two remedies open to a mortgagee, the next clause proceeds to confine the rights of certain mortgagees to only specified remedies. The effect of this clause is that a simple mortgagee can only sue for sale, a mortgagee by conditional sale for only foreclosure, while a pure usufructuary mortgagee can sue for neither, since his contract is to pay himself only out of the usufruct of the property. It was held in one case, in Madras, that, by the term "foreclosure or sale" the usufructuary mortgagee was not disabled from suing for either, but that he could not sue in the alternative for foreclosure or sale. (2) This view was, however, soon afterwards abandoned in subsequent cases, (3) and it is now agreed that a usufructuary mortgagee, as such, cannot maintain a suit for either foreclosure or sale, unless there is an agreement to repay the principal, in which case the mortgagee may maintain a suit for sale, (4) but then the transaction ceases to be a pure usufructuary mortgage as defined in section 58 (*d*). A covenant to pay does not necessarily imply personal liability, for such a covenant must exist in all mortgages. But if the covenant fixes a date when the mortgagee could demand, and, if necessary, enforce, payment, there would then be a personal obligation upon which the mortgagee may recover. (5) The principle of personal non-liability in the case of usufructuary mortgagee, or a mortgagee by conditional sale has been already discussed before (§§ 1248, 1250). In the words of Pollock, C. B,: "The rule of law as well as of reason and good sense is *expressum facit cessare tacitum*, and where there is an express covenant that the defendant shall out of trust-funds . . . pay the sum advanced, we think it impossible that at the same time he made himself absolutely liable for the payment of it *simpliciter*; and, at all events, to do so would be to create a contract by implication different from and much more onerous than that entered into by the express words used." (6)

Cl. (a).

1544. Remedy of Usufructuary Mortgagee.—A usufructuary mortgage, properly so called, must conform to its definition given in section 58 (*d*). But that term has been used in other sections, somewhat loosely, as for instance, in section 62 (*b*), where the creation of a term is assumed as not inconsistent with that form of security (§ 1460). Its use here, must, however, be understood in the sense of the definition, for only such mortgagee is precluded from maintaining a suit for either foreclosure or for sale—his sole remedy under his contract being to realize his security by possession. But such mortgages though extant are not so common as those in which the mortgagor promises to pay the mortgage-money on or within a given period, or the mortgagee

(1) O. 34, R. 1 p. *Comm., post.*

(2) *Venkatasami* v. *Subramanya*, I. L. R., 11 Mad., 88.

(3) *Chathu* v. *Kunjan*, I. L. R., 12 Mad., 109; *Ramayya* v. *Guruva*, I.L.R., 14 Mad., 232; *Samayya* v. *Nagabugam*, I. L. R., 15 Mad., 174; *Sivakami* v. *Gopala*, I. L. R., 17 Mad., 131, F.B.

(4) *Luchmeshar Singh* v. *Doolkh Mochan*, I.L.R., 24 Cal., 677; *Chatu* v. *Kunjan*, I.L. R., 12 Mad., 109; *Umda* v. *Umra Begum*, I.L.R., 11 All., 367; *Lalai Ram* v. *Anant Ram*, 12 A.W.N., 66; *Sadashiv* v. *Vyenkatrao*, I.L.R., 20 Bom., 296 (Law before the Act was on this point similar); *Gulam* v. *Mohtab* (1873), P R. No. 57: *Madho Prosad* v. *Debi Dial*, 11 A.W.N., 168 (169).

(5) *Cf. Chatu* v. *Kunjan*, I.L.R., 12 Mad., 109.

(6) *Mathew* v. *Blackmore*, 1 H. & N., 762; followed in *Chennapatnam* v. *Tadakamala*, I.L.R., 27 Mad., 86 (92).

stipulates for a term, in which case the transaction assumes the composite character of a simple and usufructuary mortgage and in which the mortgagee's remedies would be those open to the two kinds of mortgages, which would also be the case where the mortgagor fixes a time for repayment, and which being construed to amount to a personal covenant to pay takes the transaction out of the category of a purely usufructuary mortgage.(1)

1545. While, however, the usufructuary mortgagee, as such, cannot maintain a suit for sale, if the mortgagor sues him for redemption the Court may, on default of redemption, on or before the day fixed by the Court, order the sale of the property.(2) The mortgagee may also sue for sale, where possession is given only in lieu of interest, or where the same deed creates both a simple and a usufructuary mortgage, conferring upon the mortgagee the alternative rights of possession and of bringing the mortgaged property to sale.(3) But such a power must clearly appear from the bond, and will be strictly construed.(4) Where a usufructuary mortgage deed provided for payment of interest at a certain rate to be paid out of the rents and profits of the property, adding that if they were insufficient, then the mortgagor should make good the deficiency together with interest thereon at 2 per cent. per annum, it was held that the mortgaged property was security not only for payment of the principal, but also of interest, and that the mere fact that the mortgagor took a personal liability to pay up the interest did not relieve the mortgaged property from liability to satisfy the deficiency.(5) So where in a *zuri-peshgi* lease, for a term of five years, it was provided that the lessee should take the profits of the property in lieu of interest, and that if he were dispossessed, either before or after the expiry of the term, he might sue to recover the principal debt with interest; the instrument did not, however, in so many words provide that, in such case, the money should be recovered from the property. But words denoting that the property was hypothecated ran through the whole instrument. The lessee, having been dispossessed before the expiry of the term, sued to recover the principal debt and interest by the sale of the hypothecated property. It was held that having regard to the fact that the lessee was expressly empowered to recover the principal and interest in the event of his being dispossessed, he could bring the property to sale for the recovery of the amount due to him.(6) But in a later case the mortgagor covenanted: "If the mortgagee come to know of any hypothecation he may at that very time recover his money by suing me personally," whereupon the mortgagee sued for sale of the mortgaged property but the Court refused to pass a decree for sale of the mortgaged property holding that inasmuch as the suit had been brought before the mortgage-money had become payable and the covenant did not warrant such a decree, sale could not be decreed.(7) In a usufructuary mortgage the mortgagor must hold to his covenant of not alienating the property during the period of the mortgage, in such a way as to prejudice the mortgagee. Hence, if he covenants that if the possession of the mortgagee is disturbed, he may sue for the mortgage-debt with interest at 12 per cent., and afterwards sells the property with the result that the mortgagee is dispossessed, the latter is entitled

(1) *Dattamthat* v. *Krishnabhat*, I.L.R., 34 Bom. 462.

(2) S. 92, last para. Now O. XXIV, r. 7, sch. I., C.P.C. (Act V of 1908).

(3) *Jugal Kishore* v. *Ram Sahai*, 6 A.W.N., 212; *Chandar Kumar* v. *Subhkaram Das*, 7 A.W.N., 119; *Umrao* v. *Valiullah*, 8 A.W.N., 171.

(4) *Jhabbu Ram* v. *Girdhari Singh*, I.L.R. 6 All., 298.

(5) *Chintaman* v. *Dulari*, 7 A.L.J. 1087.

(6) *Ram Baksh* v. *Nanar Pandey*, 1 A.W.N., 63; to the same effect *Jafar Husen* v. *Ranjit Singh*, I.L.R., 21 All. 4; *Narpat* v. *Ram Saran*, I.L.R., 30 All. 162.

(7) *Madho Prasad* v. *Debi Dial*, 11 A.W.N., 168 (169).

to recover the mortgage-money with interest at the rate stipulated.(1) But in all such cases, the mortgagee cannot maintain a suit until he is actually dispossessed. The mere sale of the property in execution of a decree against the mortgagor, subject to the mortgagee's right as such, would not entitle the latter to sue for the debt until he is dispossessed.(2 Again, if after the execution of the contract the mortgagor fails to deliver possession, the mortgagee may at his option either sue him for possession, or for recovery of the mortgage-money with interest at the stipulated rate.(3)

1546. In a case of a pure usufructuary mortgage where the suit was for the recovery of the principal and interest by enforcement of the lien, it was held, that although compensation had not been claimed, the suit could not be dismissed on that account, but that the mortgagee should be given compensation, in estimating which the principal mortgage-money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide.(4) And similarly, in another case, it was laid down that where in a usufructuary mortgage the mortgagor fails to deliver possession, and there is no hypothecation of the property, the mere fact that the mortgagee has erroneously brought a suit for the enforcement of the lien, is no reason for throwing out his entire claim and relegate him to a fresh suit, and inasmuch as a case of action was disclosed, whether the suit be regarded as one for compensation in damages for breach of contract or for money had and received, or for money lent, it was equitable and proper that the suit should be determined on its merits.(5) Where the usufructuary mortgagee erroneously sued for money and his suit was consequently dismissed, he was not precluded from bringing a fresh suit for possession of the mortgaged property.(6)

Remedy of a usufructuary mortgagee's creditor.

1547. Since no suit is due from a pure usufructuary mortgagor, it follows that the creditor of such mortgagee could not attach his interest in the mortgage as a "debt" due to him within the meaning of section 268 of the Code of Civil Procedure. If, therefore, instead of proceeding to attach it as immoveable property under section 274, the creditor erroneously attached it under section 268 and brought the property to sale, purchasing it himself, after which he sued the mortgagee's assignee for possession or for sale, but the Court held that since both the attachment and sale were illegal, the purchaser had acquired no right to possession.(7)

Usufructuary mortgage with covenant to pay.

1548. The next section enumerates other circumstances in which the mortgagee may sue for the mortgage-money. But in the case where the mortgagee relies upon a covenant, the question as to his remedy can only be determined, having regard to the terms of the instrument and the provision therein made for default.(8) If, from the terms of the instrument, a covenant to

(1) *Khusahali* v. *Makundi*, 2 A. W. N., 99; *Bishambhar* v. *Drigbijai Singh*, I.L.R., 27 All., 581, P.C.

(2) *Janki Singh* v. *Sheomangal*, 1 A.W.N. 59.

(3) *Laljimal* v. *Mohan Lal*, 1 A. W. N., 71; *Mahesh Singh* v. *Chanharja Singh*, 2 A.W.N., 31; *Baghelin* v. *Mathura Prasad*, 2 A.W.N., 71.

(4) *Mahesh Singh* v. *Chanharja Singh*, 2 A.W.N. 31.

(5) *Sheo Narain* v. *Jaigobind*, 2 A. W. N., 33.

(6) *Veerana* v. *Muthukumara*, I. L. R., 27 Mad., 102.

(7) *Mani Lal* v. *Motibhai*, 13 Bom. L.R., 233. The case would have been different if the previous proceedings had been *inter partes*—*Raja Thakur Batham* v. *Ananta*, 2 C.L.J., 584; *Bharat Singh* v. *Goraub Mal*, (1884) A.W.N., 183.

(8) *Gopal Pandey* v. *Parsotam Dass*, I. L. R., 5 All., 121 (126); *Deoki Nandan* v. *Dhian Singh*, I.L.R., 8 All., 472.

pay can be made out, the fact that the mortgage was called usufructuary will not prevent the mortgagee from suing for sale.(1) Thus in a contract where it was stipulated—"having paid the principal money in the month of *Chait*, 1297, we shall take back the document and the land. In case we fail to repay the principal money on due date, the *subharna* bond shall remain in force:" it was held that there was in this contract no agreement to re-pay the principal money.(2) But where the covenant was followed by these words—"If I fail to pay the mortgage-amount in the said *kalavadi*, then you shall receive the said mortgage-amount in Chittrai *kalavadi*, of whatever year I may pay it, deliver the said lands to my possession, having cleared off the arrears of Government revenue, and also give back the bond," and the plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property, it was held that the bond contained a covenant to pay and that therefore the suit as laid was maintainable.(3) So where a mortgage-deed which was primarily usufructuary provided that, if the mortgagor failed to deliver possession or if the mortgagee was dispossessed from the mortgaged premises, he might recover the amount of the mortgage-debt from the mortgagor and the mortgaged property, it was held that the mortgagee failing to get possession was competent to sue for and obtain a decree for sale of the mortgaged property.(4) Where a mortgage provides that possession of the mortgaged property, if taken by the mortgagee is only to be taken for securing due payment of the interest, the mortgagee paying the balance (if any) of the profit to the mortgagor, the mortgage is not a usufructuary but a simple mortgage, and is governed by the general law applicable to mortgages of this nature. In such a case, although there is no covenant to pay the principal other than that implied in the statement, that the principal has been received, and that the property has been mortgaged for the stipulated term of years and, although there is no express provision that it is to be recovered from the mortgaged property, Regulation V of 1827 gives the mortgagor the right to bring the property to sale, and this section confers upon him the same privilege.(5) Where one mortgage comprising several properties is usufructuary as to some and simple as to the others, the mortgagee cannot split the mortgage, and apply for sale only of the hypothecated properties, but he is then entitled to bring all the properties to sale.(6) But he held two successive mortgages on the same property the first, a usufructuary, and the second a simple one, he was allowed to obtain a decree for sale under the latter mortgage either free of or subject to the usufructuary mortgage. (7)

1549. Remedy of Simple Mortgagee.—The remedy of a simple mortgagee for recovering his money is by bringing the property to sale *through Court*. (8) He cannot sue to obtain possession of the mortgaged property. Where, therefore, he sued on his mortgage for a decree directing the mortgagor to pay the debt and costs and interest until realization of the money by sale of the mortgaged property and other property, but the Court passed an erroneous

(1) *Nanu* v. *Raman*, I. L. R., 16 Mad. 335 (338) : *Dattambhat* v. *Krishnabhat*, I.L. R., 34 Bom., 462.

(2) *Luchmeshar Sing* v. *Dookh Mochan*, I. L. R , 24 Cal., 677; but *contra* in *Madho Persad* v. *Debidyal*, 11 C.W.N., 168.

(3) *Sivakami* v. *Gopala*, I.L.R., 17 Mad., 131, F. B.

(4) *Narpat* v. *Ram Saran*, I.L.R., 30 All., 162 ; following *Jafar Husain* v. *Ranjit Singh*, I.L.R., 21 All. 4.

(5) *Yashwan Narayan* v. *Vithal Divakar*, I.L.R., 21 Bom., 267 ; *Dattambhat* v. *Krishnabhat*, I. L R., 34 Bom., 462.

(6) *Nanu* v. *Raman*, I. L. R., 16 Mad., 335 (338).

(7) *Rengasami* v. *Subbaraya*, I. L. R., 30 Mad., 408 ; *Radhakrishna* v. *Mulku*, I.L. R., 31 Mad., 530.

(8) S. 68, Comm.; *Keshavram* v. *Bhavanji*, 8 B.H.C.R. (A. C.), 142 ; *Papamma* v. *Vira Pratapa*, I.L.R., 19 Mad., 249 (254), P. C.

decree putting the plaintiff in possession of the property on the mortgagor's failure to satisfy the decree within three months. The mortgagor failed to appeal against this decree which thus became final. But fifteen years afterwards he sued the mortgagee for an account alleging that the whole mortgage-debt had been discharged by the rents and profits received by the mortgagee, and that he was entitled to restitution of the property. The decree-holder contended that absolute title had passed to him in virtue of the decree behind which no Court could go. But the Privy Council held that the decree did not work foreclosure, and that the possession obtained thereunder was that of the mortgagee in possession, and as such he was liable to account and must submit to be redeemed. (1) There is no transfer of ownership in a simple mortgage, and long practice, now embodied in the present Act, has settled that the remedy of the mortgagee is a judicial sale. (2) He is, however, entitled to enforce this remedy whether the amount due is only a portion of his mortgage-money or the whole. (3) Where money is lent upon the security of immoveable property of a nature incapable of division, and the mortgagee, on one of the instalments becoming due, has to bring to sale the entire property, he does not thereby lose all lien over the surplus proceeds. And it seems to make no difference that the property is capable of division. (4) Ordinarily, he must sue for sale of the entire property mortgaged; (5) but where the bond gives him a separate lien on each and all of several properties pledged as security, he is free to elect for sale whichever of the properties he thinks most likely to satisfy his claim. (6) A mortgagee may, by permission taken from the Court conducting the sale, (7) himself bid at the sale, and in doing so he does not act as a trustee for the mortgagor since the leave granted to bid puts an end to the disability of the mortgagee to purchase for himself, and places him in the same position as any independent purchaser. He is, of course, bound to give credit to the mortgagor for the actual bid, and must refund to him any surplus moneys remaining in his hands, with interest at the Court-rate, calculated from the date of the completion of the sale. (8) A simple mortgagee does not forfeit his statutory remedy of bringing the property to sale by the mere fact of his stipulating for an additional remedy. Where, for instance, a mortgage bond contained a covenant to the effect that if the whole or a portion of the interest remained unpaid by the due date, the mortgagee should take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage, the profits being credited towards the interest, which if still remaining due shall be made good by the mortgagor personally and from his other properties, it being added that the mortgagor should receive back his properties on payment of the principal and interest, the transaction was held to be a simple mortgage in which the mortgagee was entitled to bring the property to sale. (9)

1550. The order for sale may be obtained by a puisne mortgagee, but the proceeds must be devoted to pay incumbrances in their due order. (10) When a

(1) *Papamma* v. *Vira Pratapa*, I. L. R., 19 Mad., 249 (259), P. C.

(2) *Papamma* v. *Vira Pratapa*, I.L.R., 19 Mad., 249 (252, 254), P. C.

(3) *Ramkant* v. *Brindabun*, 16 W. R., 246.

(4) *Cf. Ramkant* v. *Brindabun*, 16 W.R., 246.

(5) *Chandika Sing* v. *Pokhar Singh*, I.L. R., 2 All., 906.

(6) *Hoolas Kooeree* v. *Sufeehum*, 8 W.R., 379.

(7) S. 294, Civil Procedure Code, now O. XXI, r. 72, C.P.C. (Act V of 1908).

(8) *Mahabir Pershad Singh* v. *Macnaghten*, I.L.R., 16 Cal., 682, P.C.; *Sheonath Doss* v. *Janki Pershad*, I.L.R., 16 Cal., 132; *Gunga Pershad* v. *Jawahir*, I.L.R., 19 Cal., 4.

(9) *Lingam Krishna* v. *Sri Mirza*, 15 C.W. N. 441, P.C; 10 I.C. (Mad). 272. P.C.

(10) *Abdul Rahman* v. *Noor Mahomed*, I.L. R., 16 Bom., 141.

mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor, not being a decree on his mortgage, and purchases such property himself, the whole mortgage is not thereby necessarily extinguished ; (1) but if the mortgagee subsequently seeks to bring the mortgaged property to sale, in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under the former decree.(2) There can be no decree for sale where the thing mortgaged is only the profits and not the land. Such a deed, for instance, in which the mortgagor gives the mortgagee a moiety of the profits of a certain mouzah for a specified period as well as its management subject to his rendering accounts to the mortgagor, could not be construed to constitute a simple mortgage.(3)

1551. Remedy of a Charge-holder.—As a charge creates the same rights as a mortgage, (4) it follows that a charge-holder is equally entitled to maintain a suit for sale under this section.(5)

1552. Remedy of Holder of Security-Deed.—The general nature of a compromise and security-deeds has been already considered. (§ 1307). As they amount to a mortgage within the meaning of section 58, the holder of the security will have to sue under this section for the realization of his security.(6)

1553. Rights of Sub-mortgagee.—Since the sub-mortgagee is a mortgagee within the meaning of this section, and as defined in section 58, he is equally entitled to sue under this section. The nature of his suit and the relief appropriate to his security must, however, depend upon a variety of circumstances which have been already set out elsewhere (§§ 1207—1209). A sub-mortgagee possesses a dual security (*a*) that conferred on him by his deed of assignment, and (*b*) by that conferred on his mortgagor by the deed assigned. He may then either sue to enforce one of the two securities or both.(7) So where the owner executed a usufructuary mortgage in the form of a *zur-i-peshgi* lease, and the mortgagee sub-mortgaged it with other property to the plaintiff who sued both the owner and the mortgagee on the basis of his own sub-mortgage, the Court passed a decree for sale of the property for the *zur-i-peshgi* amount, less any amount that might be recovered by sale of other properties, and less such money as was payable by the mortgagee to the owner as *huq aziri* with liberty to the latter to redeem the leased property by paying off the amount thus found due.(8) But in an ordinary case of a sub-mortgage, the sub-mortgagee is entitled to a decree for sale of the rights of his sub-mortgagor under his own mortgage,(9) and which, of course, remain unaffected by anything done by his sub-mortgagor after notice to the original mortgagor.(10)

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(1) *Umesh Chunder Sircar* v. *Zahur Fatima*, I.L.R , 8 Cal., 164, P.C.

(2) *Sumera Kuar* v. *Bhagwant Singh*, 15 A.W.N., 1 ; *Nandkishore* v. *Raja Hari Raj Singh*, 17 A.W.N., 163 ; *Chunnalal* v. *Anandibat*, I L.R., 19 All., 196.

(3) *Ganga Parsad* v. *Kusyari*, I. L. R., 1 All., 611. [The other moiety was "charged" with the payment of the mortgage-money, a term which would now be construed to entail the same result as a simple mortgage.]

(4) S. 100, *post*.

(5) *Matangini* v. *Chooneymoney*, I.L.R., 22 Cal., 903.

(6) *Nagarur* v. *Tangatur*, I.L.R. 31 Mad., 330 ; *Tokhan Singh* v. *Girwar Singh*. I.L.R., 32 Cal., 494 ; distinguishing *Shyam Sunder* v. *Badpai*, I.L.R., 30 Cal., 1060, on the ground that no interest in land was transferred therein.

(7) *Bansi* v. *Durga*, 9 C.L.J. 429.

(8) *Ib.*

(9) *Alikjan* v. *Rambaran*, 12 C.L.J. 357.

(10) *Narayana* v. *Raghavammal*, 10 M.L.J. 462.

1554. Remedy of Mortgagee by Conditional Sale.—A mortgagee by conditional sale cannot sue for sale of the property mortgaged to him. The only remedy open to him is to obtain a decree for foreclosure, and, if necessary, apply to be put into possession of the property. Under the Regulations the mortgagee was not entitled to possession, until after the expiration of the year of grace, which could have been extended by mutual agreement;[1] and he could not apply for foreclosure until after the expiration of the "stipulated period," *i.e.*, the full term on the expiry of which the mortgage-money was payable.[2] (§§ 1228—1233). After obtaining an order for foreclosure, the mortgagee could sue for possession within twelve years, according to the Calcutta and Madras High Courts, and sixty years according to the other High Courts, calculated from the date of the order, or default, if the bond gave him such a right.[3] The statutory remedy here given cannot be taken away by any enactment by implication, not having the effect of repealing it. So the Privy Council laid down that the statutory provision in the incorporating Act relating to a Colonial Bank that it should hold any security which it had taken "for the purpose of reimbursement only and not for profit" could not take away the power to foreclose expressly attached by statute to the mortgage.[4]

1555. Mortgagee's Conflicting Remedies:— This section enacts a rule applicable merely to simple cases, but in practice questions arise to the solution of which other principles have to be applied. Generally speaking a mortgage admits of the following possible remedies (i) possession for (*a*) a term or (*b*) indefinitely till satisfaction of the mortgage; (ii) sale (*a*) through Court; or (*b*) under Power; (iii) foreclosure and (iv) in cases comprised in cl. (*c*) —the appointment of a Receiver. Now, where the transaction is simple and single, the mortgagee's remedy is either stated in his deed, or it can be inferred from the nature of his security. But where the same mortgagee holds two or more mortgages allowing different remedies either (*a*) on the same property or (*b*) partly on the same and partly on other properties: or (*c*) other mortgagees urge claims in derogation of the stipulated remedies [5]—then it is for the Court to adjust the claims of conflicting equities and suit the remedy to the requirements of the case. In doing so the Court has to keep in view the leading principles here enacted and at the same time give to the mortgagee what is his due. The subject might be still further complicated by some of the multiple mortgages being not yet mature for payment and in which cases the Courts present a want of harmony in their decisions which, though natural, is not always intelligible. For instance, it has been held in Madras that a person, holding two mortgages on the same property the first an usufructuary and the second a simple mortgage, can sue under this section to recover the money on the simple mortgage by bringing the property to sale free of the usufructuary mortgage. The decree in such a case should direct the property to be sold, and the sale proceeds to be applied first in discharge of the usufructuary mortgage and the balance in discharging the second mortgage. The fact that no suit for sale could be brought on the usufructuary mortgage will be no bar to such mortgage being paid out of proceeds derived by the sale of the property on another

(1) *Baijnath Pershad* v. *Moheswari Pershad*, I.L.R., 14 Cal., 451.

(2) *Kubra Bibi* v. *Wajid Khan*, I.L.R., 16 All., 59; *Kishori Mohun Roy* v. *Gunga Babu Debi*, I.L.R., 23 Cal., 228, P.C.

(3) *Modan Mohun Chowdhry* v. *Ashad Ally*, I.L.R., 10 Cal., 68; *Girwar Singh* v. *Thakur Narain Singh*, I.L.R., 14 Cal., 730 (737); *Ali Abbas* v. *Kalkaprasad*, I. L. R., 14 All., 405, F. B.

(4) *Per* Lord Blackburn in *Bank of New South Wales* v. *Campbell*, 11 A. C. 192 (195, 196).

(5) S. 81 Comm. *post.*

mortgage.(1) But this is not conceded in Allahabad where it is held that a usufructuary mortgage can no more bring the property to sale than share in the sale proceeds of the property to which his mortgage relates.(2) Consequently, in Allahabad such a mortgagee can never during the continuance of his simple mortgage, bring the property to sale either subject to his prior usufructuary mortgage, or for the aggregate amount of his mortgages, simple and usufructuary.(3) But in another case the same Court gave a decree for sale subject to the prior usufructuary mortgage (4) and in another case he was given a simple money decree for the amount due under the usufructuary mortgage and a decree for sale on the simple mortgage.(5) In Bombay it is not competent to a holder of two mortgages to maintain a suit for sale on the later mortgage of the property subject to the prior mortgage,(6) while in Allahabad though this is allowed, it is held not competent for a mortgagee to sue for a prior mortgage subject to his own puisne mortgages. (7) This practice is commended in Calcutta,(8) and is not opposed to that obtaining in Madras, (9) other questions still remain, but as they appertain to another branch of the law, they will be considered in their proper place. (10)

1556. No Foreclosure if the Mortgagor is Mortgagee's Trustee.—The rule laid down in cl. (*b*) follows a long course of decisions to that effect in England. If the mortgagor becomes a trustee for the mortgagee, and is allowed to foreclose, where he has the alternative remedy of sale, the mortgagor *qua* trustee will obtain possession of property which will pass out of his hands as its owner. Or, in other words, he will retain the property though under a different title. He will thus be put in a position where his interest will conflict with his duty.(11) Again, the creditor and the debtor being combined in one person, and since it is the interest of the creditor to foreclose, and that of the debtor to redeem, it is deemed equitable that the property be not foreclosed, but sold under the control of the Court. (12) In such a case, "if those who are interested in the estate insist that a trustee ought not to be allowed to bid, the Court will certainly give so much weight to their wishes, as to say that, until all other ways of selling have failed, he shall not be allowed to buy." (13) It would appear that, for the same reason, where the mortgagee becomes a trustee for the mortgagor, he cannot foreclose, although his deed may have given him distinct power to do so. (14) It must be noted that the prohibition applies only to cases where the mortgagee *may* sue for a sale, or in other words, where he has the *alternative*

Cl. (b).

(1) *Rangasami* v. *Subbaroya*, I. L. R. 30 Mad., 408; following *Gobinda* v. *Narain*, I. L. R., 29 Mad., 424; *contra Bhagwan Das* v. *Bhawani*, I.L.R., 26 All. 14; dissented from and followed in *Radhakrishna* v. *Muthusawmy*, I L.R., 31 Mad., 530.

(2) *Bhagwan Das* v. *Bhawani*, I. L. R., 26 All. 14.

(3) *Ib*; *Dorasami* v. *Venketasesayyar*, I. L. R., 25 Mad., 108.

(4) *Ram Sankar Lal* v. *Ganash Prasad*, I.L.R, 29 All. 385; followed in *Radhakriskna* v. *Muttusawmy*, I. L. R.; 31 Mad., 530.

(5) *Azimdad* v. *Ghansam*, 1 A.L.J., 20.

(6) *Keshavram* v. *Ranchhod*, I. L. R., 30 Bom., 156.

(7) *Semble in Godha Sukal* v. *Salaka*, 4 A. L. J, 253.

(8) *Gobinda* v. *Haribhar*, 14 C. W. N. 1053; 13 C. L. J. 21.

(9) *Nattu Krishnama* v. *Annangara*, I. L. R., 30 Mad. 353.

(10) O. XXXIV, r. 1, Comm., *post*.

(11) In re *Bloye's Trust*, 3 H. L. C., 607; *Campbell* v. *Walker*, 5 Ves., 681; *Parkinson* v. *Hanbury*, 2 H. L C., 1; *Lucas* v. *Seale*, 2 Atk., 56; *Sampson* v. *Pattison*, 1 Hare, 533, *Footner* v. *Stergis*, 5 DeG. & S., 736.

(12) *Tennant* v. *Trenchard*, L. R., 4 Ch., 537 (546, 547).

(13) *Per* Lord Hatherly, L. C., in *Tennant* v. *Trenchard*, L. R., 4 Ch., 537 (547).

(14) *Kamini Debi* v. *Ramlochan Sirkar*, 5 B.L.R., 450; *Soweitzer* v. *Mayhew*, 31 Beav. 37; *Hill* v. *Brown*, Dru, 426; *Hamilton* v. *Wright*, 9 Cl. & F., 111; *Attorney-General* v. *Munro*, 2 DeG. & S., 122, 163; *Vint* v. *Padget*, 2 DeG. & J., 611.

remedies by either foreclosure or sale. This being now permitted only where the mortgage is an *English mortgage*, the application of the rule is necessarily limited now to only that class of securities.

1557. Works of Public Utility excepted.—Clause (*c*) is enacted in consonance with the English law, where it is held that a mortgage, which would enable the creditor at his pleasure to enforce the ordinary remedies of a mortgagee against the whole or any particular part of the undertaking of the company, would be inconsistent with the primary object for the attainment of which the powers of the company were granted—as in the case of a railway or tramway company, the object of making and maintaining a great public communication.(1) The object of the section being to prevent inconvenience to the public, all enterprises in which the public are interested are excepted by this clause. Hence, gas and water-works companies would also appear to be within the exception.(2) While, however, the Act declares against the foreclosure or sale of such works, it makes no provision to enable the mortgagee to satisfy his debt. The Select Committee, however, in their first report did not lose sight of this, for they say: "The remedy of such mortgagees will be to obtain a receiver of the profits of the undertaking."(3) This would have been in accordance with the English practice,(4) and it would appear to be the only remedy open to the mortgagee in India and one sanctioned by the Civil Procedure Code.(5) But no receiver can be appointed of a railway which has been commenced but not completed.(6) And a company possessing power of distress may exercise that power against another company, for the exercise of such power is presumably for the purpose of securing public convenience and does not, therefore, affect the main principle.(7)

Cl. (c).

1558. Remedy of Part-mortgagee.—Clause (*d*) is another illustration of the rule as to the indivisibility of a mortgage. It has been laid down in section 60, paragragh 4, that a mortgagor cannot redeem a mortgage piece-meal. Though not exactly the converse of that contained in section 60, this rule lays down that a person holding only a part of the mortgage cannot enforce that part without enforcing the whole. It may be noted that this section does not say if a mortgagor may redeem his mortgage piece-meal. Apart from the clause this is generally the rule,(8) and, as we have seen,(9) the clause enacts only against a co-mortgagee obtaining relief in respect of his interest, except with the mortgagor's consent. The reason for the rule is the same as in the case of co-mortgagors, *viz.*, that(10) the party proceeded against should not be subjected to multifarious proceedings. Moreover, such a course would entail considerable difficulty in appraising the value of the security in parts. Where, upon the death of a sole mortgagee of *zemindari* property, his estate was divided amongst his heirs, one of whom,

Cl. (d).

(1) *Gardner* v. *London Chatham & Dover Ry. Co.*, L. R., 2 Ch., 201; *Marshall* v. *South Stafford Tramways*, L. R. [1895], 2 Ch., 36; *Pegge* v. *Neath Tramways Co.*, L. R. [1895], 2 Ch., 508; *Central Ontario Railway* v. *Trusts and Guarantee Co.* [1905], A. C., 576 (581).

(2) Fisher, § 1009.

(3) Report, 2nd February 1878, § 25.

(4) In re *Henry Bay, &c., Co.*, 19 Ch. D., 42 (46); In re *Exmouth Docks Co.*, L. R., 17 Eq., 181; *Gardner* v. *London Chatham & Dover Ry. Co.*, L R. 2 Ch., 201.

(5) S. 503, Act XIV of 1882; *Jaikissondas* v. *Zenabai*, I.L.R., Bom., 431.

(6) In re *Knott End Ry.* [1901], W.N. 64.

(7) *Pegge* v. *Neath District Tramways Co.*, [1895], 2 Ch., 508 (513).

(8) *Norendro Narain Singh* v. *Dwarka Lal*, I.L.R., 3 Cal., 397 (408), P.C.

(9) S. 60, para. 4, *ante*, Comm.

(10) *Bedar Bakht* v. *Khurram Bakht*, 16 W.R., 315, P.C.

a son, was entitled to fourteen out of thirty-two shares, and who executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage, it was held that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined; that, moreover, he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. (1) And as a co-mortgagor must redeem the entire property, so also must a co-mortgagee sue in respect of the whole property mortgaged, and for the whole mortgage-debt, making the other co-mortgagees defendants, if they refuse to join as plaintiffs in the suit.(2) Such mortgagees will then be precluded from maintaining a separate suit in respect of their shares.(3) All the mortgagors must also be joined in such a suit, even though some of them may have paid a part of the debt.(4) Indeed, it is not competent to the mortgagee to release the share of an individual mortgagor by receiving from him what he may conceive to be his rateable share. Such payments could only properly be treated as made for the whole of the mortgagors and should be carried to the credit of all of them in reduction of the joint debt.(5) On the other hand, if the amounts paid by some of the mortgagors on the severance of their liabilities, have been appropriated towards their respective debts, it is evidence of consent on the part of the mortgagee who could not then sue them conjointly on the basis of his original undivided security.(6) But, if the liability has been separated by mutual consent and the debt has been divided, the original mortgagors need no longer be joined.(7) Where a co-sharer of joint property had mortgaged his share without the knowledge of his co-sharers and there was subsequently a partition-suit, to which, through the fraud of the mortgagor and the mortgagee, the latter was not made a party, the mortgagee was then allowed to proceed for the recovery of his mortgage debt against only that portion of the property which had been allotted to his mortgagor.(8)

1559. Severance of Interests when allowed.—The rule as to the indivisibility of a mortgage is subject to the exception where the severance of interests is affected by the mortgagees with the consent of the mortgagor. The rule being primarily enacted for the benefit of the mortgagor, naturally yields when the mortgagor himself consents to divide his liability. But this is by no means the only disruptive circumstance, for cases are conceivable in which the interests may be necessarily severed. Thus, where the owner mortgaged by conditional sale his two villages to *A* for a certain sum, and subsequently sold one village to him and the other to another person *B*, *A* then foreclosed the mortgage in respect of the village sold to *B* for a proportionate amount of the

(1) *Parsotum Saran* v. *Mulu & others*, I.L.R., 9 All., 68, F. B.; *Laljee* v. *Jangilal*, (1887) A.W.N., 233; *Bishan Dial* v. *Manni Ram*, I.L.R., 1 All., 297; *Bhora* v. *Abilac Roy*, 10 W.R., 476.

(2) *Gobind Ram* v. *Sundar Singh*, (1892) A.W.N., 246; *Atchamma* v. *Subbarayadu*, 15 M.L.T. 496.

(3) *Kanhai Lal* v. *Jwala Dei*, (1896) A. W.N., 153.

(4) *Chandika Singh* v. *Pohar Singh*, I. L.R., 2 All., 906.

(5) *Chandika Singh* v. *Pokhar Singh*, 8I. L.R., 2 All., 906 (908).

(6) *Mahadaji* v. *Ganpatshet*, I.L.R., 15 Bom., 257 (258).

(7) S. 85, Comm., *post*.

(8) *Lakshman* v. *Gopal*, I.L.R., 23 Bom., 385.

mortgage-money, and sued him for possession of the village. It was held that since the mortgage was split up by purchase of one mouzah by the mortgagee himself, the suit as laid was maintainable.(1) So where of two mortgagees, each having an equal share, if one acquires the equity of redemption, the other mortgagee may then foreclose for his share of the debt, making his co-mortgagee a party to the suit, so that the decree passed in his suit may conclude the whole matter and thus avoid multiplicity of suits.(2) The case contemplated in the saving clause may be illustrated by the instance of mortgagors affecting division among themselves and apportioning their liability under the mortgage-debt according to their shares, with the consent or acquiescence of the mortgagees.(3) But other cases are possible in which the severance would be the necessary result, though it is not effected with the consent of the mortgagor. The following is an instance. One Sardar Khan mortgaged a portion of his interest in a village to one *A* in January 1882. He died in 1888 leaving him surviving a brother, two daughters and an illegitimate son. The four sons of the brother took an assignment of the mortgagee, and sued the mortgagor's children thereon, and, inasmuch as they were themselves entitled to certain shares as heirs of the deceased mortgagor, framed their suit as one for recovery of specific shares of mortgage-money from the portions of the property in possession of each of the defendants. They obtained in this suit an *ex parte* decree which, however, was set aside as against one of the daughters on the ground that she was a minor and not properly represented therein, whereupon the plaintiffs instituted a fresh suit against this defendant for the recovery of a share in the mortgage-debt proportionate to her share in the property and the Court held their suit maintainable " in view of the fact that the integrity of the mortgage had been broken up by reason of the plaintiff's having acquired the share of their father.....which was also liable for the mortgage debt." (4)

1560. A mortgagee who has advanced only a part of the consideration is not entitled to possession of a part of the mortgagor's land proportionate to the money advanced, unless the parties have by their subsequent acts and conduct raised the inference that this was intended, and without which the transaction would be regarded as inchoate and incomplete,(5) or rather the mortgagee would be entitled to enforce his security to the extent of the money advanced.(6) (§§ 1200—1204, 1540).

1561. Change of Procedure.—The section having considerably modified the procedure in force before the Act,(7) the question may still arise by what law proceedings arising or commencing under the Regulations should be governed. It has been held by the Calcutta High Court that, in a case arising out of transaction entered into before the Act but instituted after the Act, the rights of the parties will be determined according to the Regulations, which in that respect do not differ from the Act, but in matters of procedure the Act and not the Regulations should be followed.(8) Thus, the year of grace allowed to the

(1) *Bisheshar Singh* v. *Laik Singh*, I.L.R., 5 All., 257 ; distinguishing *Chandika Singh* v. *Pokhar Singh*, I.L.R., 2 All., 906.

(2) *Hunoomanpersaud* v. *Kaleepersaud*, (1864), W.R., 285 (286).

(3) *Mahadaji* v. *Ganpatshet*, I.L.R., 15 Bom., 257 (258).

(4) *Rashidunnissa* v. *Mhd. Ismail Khan*, I.L.R., 34 All., 474 (477. 478), F.B.

(5) *Achumbheet* v. *Bhugwant*, 1 N.W.P. H.C.R., 161 (162).

(6) *Motichand* v. *Sagan*, 6 Bom. L. R., 690; *Bajrangi* v. *Udit Narain*, 10 C.W.N. 932 ; *Rashik Lal* v. *Ram Narain*, 9 A.L.J., 198.

(7) *Raghubar* v. *Jwala Singh*, I.L.R., 25 All., 229 (S. 44 of the Code is inapplicable to such a case—*ib.*, 230) ; following *Chidambara* v. *Ramasami*, I.L.R., 5 Mad., 161 ; *Ambika* v. *Ramudit*, I.L.R., 17 Mad., 274.

(8) *Bhobo Sundari Debi* v. *Rakhal Chunder Bose*, I.L.R., 12 Cal., 583, F.B. ; approving *Ganga Sahai* v. *Keshan Sahai*, I.L.R., 6 All., 262, F. B.

mortgagor is a matter of procedure; (1) but if the proceedings following it commenced before the Act, they were saved by section 6 of the General Clauses Consolidation Act.(2) Hence it follows that a suit under this section, being a matter of procedure to enforce a right, *viz.*, the mortgagee's right of sale, the Act would be applicable in respect of all transactions irrespective of their date. This section must be considered to have definitely overruled a number of cases in which, before the Act, the mortgaged property was held liable to be attached in execution of a money-decree.(3) But the repeal of section 99 by the Code of Civil Procedure (Act V of 1908) will have the effect of reviving the authority of some of these cases, and with it the conflicting claims of creditors and purchasers, which were the natural outcome of allowing the mortgaged property to be attached and sold in execution of money-decrees, and which were considered in several of those cases, though the points therein raised cannot all now arise under the Act, and such as are likely will be found set out under Order XXIV, rule 1 which is equivalent to the section 85, now repealed by the Civil Procedure Code, 1908.

1562. Crown Disability.—It has been held in England that where the Crown succeeds to the estate of the mortgagee, it cannot foreclose, and it can only obtain instead an order for sale of the mortgaged property.(4) So in the case of forfeiture of a felon's estate, sale of his property was directed where foreclosure would have been otherwise the appropriate remedy.(5)

1563. Suits under S. 99.—A large number of cases had clustered round the provisions of section 99 which forbade the mortgagee from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not, except by instituting a suit under this section and which he was allowed to institute despite the prohibition contained in section 43 of the Code of Civil Procedure. The effect of this rule was to close all doors to the mortgagee for sale of mortgaged property except by a suit under this section. Consequently it was held that where the mortgagee even expressly gave up his mortgage lien and obtained merely a money decree, he could not proceed further than attachment of the mortgaged property in execution, except by a suit under this section, in which he was permitted to sue for foreclosure, or sale and thus give the mortgagor the right of redeeming him.(6)

(1) *Baijnath Pershad* v. *Moheshwari Pershad*, I.L.R., 14 Cal., 451.

(2) Act I of 1868; *Umesh Chunder Das* v. *Chunchun Ojha*, I.L.R., 15 Cal., 357.

(3) These cases are:—*Bishwanath* v. *Gossain Dass*, 3 B. L. R., Ap., 140; *Annasvami* v. *Narranaiyan*, 1 M. H. C.R., 114; *Aruth Soar* v. *Jugunnath*, 23 W.R., 460; *Byjnath Singh* v. *Goburdhun Lall*, 24 W. R., 210; *Mohun Bagchi* v. *Grish Chunder*, 1 C.L.R., 152, *Munbasi Koer* v. *Nowrattun Koer*, 8 C. L. R., 428; *Lalla Tilakdhari Lal* v. *Furlong*, 2 B.L.R.,A. C., 230; (s. c.,) *Lalla Tilakdhari Lal* v. *Court of Wards*, 11 W.R., 149; *Juggunnath* v. *Komul Singh*, 3 N.W.P. 123; *Ramessur Pershad* v. *Dowlat Ram*, 19 W.R., 83; *Akhe Ram* v. *Nand Kishore*, I. L.R., 1 All., 236; *Khub Chand* v. *Kalian Das*, *ib.*, 240; *Bulwant Singh* v. *Gokaram Prasad*, *ib*, 433; *Deochand* v. *Telluck Singh*, 14 W.R., 238; *Kokil Singh* v. *Duli Chand*; *Mitterjeet Singh* v. *Dulichand*, 5 C. L. R., 243; *Madhu Singh* v. *Achra Singh*, 9 C L.R., 369; *Narsidas* v. *Joglekar*, I. L. R., 4 Bom., 57; *Hari* v. *Lakshman*, I. L. R., 5 Bom., 614; *Ramnath* v. *Boloram*, I. L. R., 7 Cal., 677; *Jonmenjoy Mullick* v. *Dossmoney Dossee*, I.L. R., 7 Cal., 714; *Kamini Debi* v. *Ramlochan Sirkar*, 5 B. L. R., 450; *Bhuggobutty* v. *Shamacharan*, I.L.R., 1 Cal., 337.

(4) *Prescott* v. *Tyler*, 1 Jur., 470, O. A., 2 Jur., 870; *Rogers* v. *Maule*, 1 Y. & C. C., 4.

(5) *Hancock* v. *Attorney-General*, 33 L. J. Ch, 661; *Bartlett* v. *Rees*, L.R., 12 Eq., 95 (97).

(6) *Saligram* v. *Murlidhur*, I. L. R., 10 C. P.L R. 21; *Rai Ramani* v. *Surendranath*, 1 C. W. N. 80; *Bharat Singh* v. *Goraub Mal*, (1884) A.W N. 183; *Azimullah* v. *Naju-unnissa*, I. L. R., 16 All., 415; *Bholanath* v. *Mhd Sadiq*, I.L.R. 26 All., 223; *Aubboyessury* v. *Gouri Sukkar*, I.L.R., 22 Cal., 859; *Jeera* v. *Srinivasa*, I.L R. 31 Mad., 33; *Veera* v. *Karuppa*, 6 M.L.J., 154; 2 I. C. 980.

Even where the lien is finally abandoned the mortgagor was held entitled to redeem the property.(1) By its amendment the operation of section 99 has been much restricted, and its present scope will be found set out in the commentary on Order XXXIV, rule 14.

Right to sue for mortgage-money.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

(*a*) Where the mortgagor binds himself to repay the same:

(*b*) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor:

(*c*) Where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him, without disturbance by the mortgagor or any other person.

Where, by any cause, other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient, as defined in section sixty-six, the mortgagee may require the mortgagor to give him, within a reasonable time, another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

1564. Analogous Law.—This section marks an important departure from the English rule, where the mortgagor is always personally liable, though he has neither entered into bond nor covenant for payment of the debt.(2) In other words, in England the personal liability of the mortgagor is always *implied*, unless there is an express or implied agreement to give it the character of a specialty debt.(3) In India, under the Act, the covenant for personal liability is *not* implied, but if intended must be expressly made, and then only can it be enforced. In England, the law as to personal liability is now contained in the second clause of section 26 of the Conveyancing Act.(4) With this section may be read section 90, (now Order XXXIV, rule 6 of the Procedure Code and the commentary thereon). The corresponding rule in regard to moveables is enacted in section 176, paragraph 2, of the Indian Contract Act, and which resembles the English law as to realty. Apart from this section, cases may arise where the mortgage being held void, the mortgagor would be liable to refund money received for failure of consideration. This is in accordance with the equitable rule embodied in section 65 of the Indian Contract Act,(5) which enacts that: "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage

(1) *Madho Prasad* v. *Baijnath*, 2 A. L. J., 356.
(2) Fisher, § 805.
(3) *Hart* v. *Eastern Union Railway Co.*, L.R., 7 Ex., 246; 8 *ib.*, 116.
(4) 44 & 45 Vict., c. 41, s. 26.
(5) S. 65, Act IX of 1872; *cf.* also *ib.*, s. 70.

under such agreement or contract, is bound to restore it, or to make compensation for it, to the person from whom he received it." (1)

Previous Law.

1565. The rule here enacted was understood before the Act,(2) with this difference that while under the Act the mortgagee is declared entitled to recover the *whole* of the mortgage-money even on the *partial* failure of his security, in the previous cases the mortgagee was held entitled to recover from the mortgagor only so much of the consideration-money as was in proportion to the land of which he had been deprived.(3) But both under the pre-existing as well as the present law, all that the mortgagee acquires is, according to one view, a right to sue the mortgagor *personally*, but it does not carry with it a right to sue for the sale of the property apart from the covenants and incidents of his mortgage. In other words, the decree which a mortgagee could get and gets only under this section is not a decree for sale of the mortgaged property, but a decree for money.(4) How this money-decree might, in view of section 99, be executed against the mortgaged property is another question upon which exponents of this view do not commit themselves.

The section is permissive and not peremptory,(5) and its provisions are held confined only to a mortgage, being held inapplicable to a charge.(6)

1566. Principle.—The first clause refers merely to the mortgagor's promise to pay, while the subsequent clauses refer merely to certain acts whether of the mortgagor or strangers entailing upon him a similar liability. In these cases personal liability is incurred not because there is a personal covenant but because the mortgagee's security is impaired, he is equitably held entitled to turn to the mortgagor for the satisfaction of his debt either because it is due to his wrongful act or omission, or because it is due to their common misfortune, and in which the mortgagor being the owner and the mortgagee, a mere holder of security the loss must naturally fall on the owner who cannot compel his mortgagee to share in his misfortune. This rule empowers the mortgagee to indemnify himself against any loss that he may otherwise be put to owing to any of the causes enumerated in the section, and before his mortgage-money is due. So far then those causes have the effect of accelerating the cause of action, but the suit is one of the nature of that on the breach of the covenant, and is subject to the limitation prescribed for the enforcement of personal remedies, while so far creating a right in favour of the mortgagee, it has also the effect of creating a disability by limiting his right to sue the mortgagor personally only to a case "where the mortgagor binds himself to repay the same."(7) Except in such a case the mortgagee cannot sue his mortgagor personally, either in addition to, or in substitution for, the remedy he has already under his mortgage. In a simple mortgage personal liability is necessarily covenanted for, and similar covenant is also necessarily implied in the condition for re-purchase in an English mortgage. Thus then the practical effect of the section is to exclude personal liability in only the two remaining mortgages, *viz.*, usufructuary and those by conditional sale. So far the section was designed to prevent grabbing money-lenders from harassing mortgagors by

(1) The four illustrations that follow are here omitted.

(2) *Mirza Akbar Ali* v. *Mt. Ameeroonissa*, 11 W.R., 225.

(3) *Pitambur* v. *Ramsarun*, 25 W. R., 7.

(4) *Mirza Akbar Ali* v. *Mt. Ameeroonissa*, (1869), 11 W. R., 225; *Madho Prasad* v. *Debi Dial*, (1891) A.W.N., 168 (169); *Arunachalam* v. *Ayyavayyan*, I.L.R., 21 Mad., 476, F. B.

(5) *Narain* v. *Shimbhoo*, I L.R., 1 All., 325; *Singa Reddi* v. *Sama Rau*, I. L. R., 17 Mad., 469 (471, 472).

(6) *Fatick Chunder* v. *Foley*, I.L.R., 15 Cal. 492 (495).

(7) S. 68 (*a*).

personal suits, if after, as is always the case, they have taken care to cover their advances by providing themselves with ample security, the property is through no fault of the mortgagor, depreciated or the mortgagee no longer chooses to resort to it. The rule is subject to certain exceptions, the reasons for which are self evident.

1567. Meaning of Words.—"*Right to sue for the mortgage-money*:" *i.e.*, the mortgagor personally, and not for sale of the mortgaged property, by treating the mortgage as a simple mortgage[1]. "*Is deprived of the whole or part of his security*:" The deprivation may not render the security insufficient within the meaning of section 66. Deprivation only alludes to the loss suffered by the mortgagee. If it is wholly or partially *destroyed* the aid of the last clause must then be invoked. "*Without disturbance by the mortgagor or any other person*:" This must mean any other person *having a title* to the property.[2] "*Wrongful act or default of the mortgagor*:" in clause (*b*) means his failure in performing the duty imposed on him by law, as *e.g.*, by section 65 (*a*), (*b*), (*c*), (*d*), (*e*), section 66, &c. "*Any cause other than the wrongful act*:" as by flood, fire or earthquake. The property must be *destroyed* and not lost or damaged or depreciated. Where, therefore, it is taken under the Land Acquisition Act, it does not fall within the section, for it is not then destroyed but has only changed hands. "*The mortgagee may require the mortgagor to give him within a reasonable time another sufficient security*." The words "reasonable time" of course refer to the mortgagor and not the mortgagee. What is a reasonable time must naturally depend upon the circumstances of each case.

1568. Nature of Right arising under the Rule.—The section enables the mortgagee to "sue the mortgagor for the mortgage-money" under the circumstances there enumerated. This remedy is of course alternative, and additional to any to which a mortgagee may be entitled in law or by the terms of his contract.[3] It has been held in Calcutta that the provisions of this section are strictly confined to a mortgagee and cannot be availed of by the holder of a charge, as this section is not referred to in section 100 amongst those equally applicable to a charge.[4]

1569. In England it is a settled rule that the right in the mortgagee to a present realization of his security by sale or foreclosure arises immediately the mortgagor fails to pay interest when due, and, if the property be leasehold, then on his failure to observe the covenants.[5] But this practice goes a good deal further than any view of the law here enacted. In the present state of the authorities it would be well to examine the scheme of the enactment, which, though it sheds no certain light upon the problem, may still render the reading of the section harmoniously consistent with itself. That the right of the mortgagee to recover his mortgage-money is accelerated by the conduct of the mortgagor or the state of his security is clearly enacted by the section, and it is conceded on all hands that the mortgagee may, notwithstanding the provisions of section 67 and the covenant in the deed appointing a future date for payment, sue at once for the return of the money advanced with interest, and that he is not then bound to wait for the expiry of

(1) *Arunachalam* v. *Ayyavayyan*, I.L.R., 21 Mad., 476 (481) F.B.; *Kashi Ram* v. *Sardar Singh*, I.L.R., 28 All. 157.

(2) *Gopalasami* v. *Arunachella*, I.L.R., 15 Mad., 504 (506).

(3) *Sankara* v. *Jagat Narain*, 20 C. 24.

(4) *Fatick Chunder* v. *Foley*, I.L.R., 15 Cal., 492 (495).

(5) *Seaton* v. *Twyford*, L.R., 11 Eq., 591 (598); *Burrowes* v. *Molloy*, 8 Jr. Eq. R. 482; *Edwards* v. *Martin*, 25 L.J. Ch., 284; *Ex parte Bignold*, 3 Deac., 151.

the stipulated period.[1] But is this right confined only to a personal suit against the mortgagor, or is it only a supplementary right conferred on the mortgagee which he may avail himself of, in addition to his other rights on the mortgage? That the right of personal relief in clause (*a*) is supplementary to the other reliefs to which a mortgagee may otherwise be entitled would seem to admit of no question.[2] Why should then the other clauses exclude other concurrent remedies? The section is declaratory of a right and could not without express provision be construed to create any attendant disability. But if this action does not go beyond conferring on the mortgagee a right to sue the mortgagor personally, the latter must appeal to some other authority for the enforcement of his mortgage-rights. Such a right cannot be evolved out of the general rights of contracting parties.[3] So far as regards these rights the mortgagee must then wait for the stipulated period before he can enforce them. A simple money-decree obtained against the mortgagor was when section 99 was a part of the Act often ineffectual, for if the mortgagor was not possessed of other sufficient property besides that mortgaged to satisfy the claim of the mortgagee he had no means of executing his decree.

1570. He could not in the face of section 99 attach and sell the property mortgaged to him, and yet that may have been his only course. In such a case, if he could not bring the property to sale, he would have a poor recompense for the mortgagor's fraud or failure to make good his covenants, and it would have been outrageous to common sense to hold that while the mortgagor deprived the mortgagee of a portion of his security, the latter was, for the time being, deprived of the residue by the intervention of law. But such was really the case between 1882 and 1908 when section 99 prohibited the sale of the mortgaged property by the mortgagee in execution of a money-decree. The repeal of that section by the present Code of Civil Procedure [4] has, however, removed this impediment from the way of the mortgagee making the rule enacted in this section more workable. Of course, where the mortgagee could not have foreclosed or sold the property in mortgage on the original contract, as for example, in the case of a usufructuary mortgage, or a mortgage by conditional-sale, the mere deprivation of a part of the property by the mortgagee would not let in a right otherwise denied to him. Indeed, curiously all the cases in which the right of sale was claimed were cases of usufructuary mortgages in which such a relief would have been inadmissible.[5] This would appear to be the distinguishing feature in those cases which may otherwise be reconciled. It would then seem that a mortgagee who wished to surmount the impediment placed by section 99 in the way of his bringing the mortgaged property to sale would have had to abandon his mortgage lien or be content with such other remedies as might be left to him to satisfy his decree. But this is not now necessary.

(1) *Radha Churn* v. *Parbuttee*, 25 W.R., 51 (52); *Ram Jewan* v. *Jagarnath*, I.L.R., 25 Cal., 450; *Samayya* v. *Nagalingam*, I.L.R., 15 Mad., 174 (178); *Linga Reddi* v. *Sama Rau*, I.L.R., 17 Mad., 469; *Madho Prasad* v. *Debi Dial*, (1891) A.W.N., 168 (169); *Hira Lall* v. *Ghasitu*, I.L.R., 16 All., 318, F.B.; *Venkatrao* v. *Mahabaleshwar*, I. L.R., 26 Bom., 241.

(2) Ss. 58, 67, Comm.

(3) *Cf.* ss. 39, 51—55, Indian Contract Act X of 1872).

(4) Sch. V, Act V of 1908.

(5) *Samayya* v. *Nagalingam*, I.L.R., 15 Mad., 174; *Linga Reddi* v. *Sama Rau*, I.L. R., 17 Mad., 469 (471, 472); *Arunachalam* v. *Ayyavayyan*, I.L.R., 21 Mad., 476, F.B.; *Thabbu Ram* v. *Girdhari*, I.L.R., 6 All., 298; *Hira Lall* v. *Ghasitu*, I.L.R., 16 All., 318, F.B.; *Madho Prasad* v. *Debi Dial* (1891), A.W.N., 168; *Sukhdeo* v. *Sheodial*, (1901) A.W.N., 52; *Ram Jewan* v. *Jagarnath*, I.L.R., 25 Cal., 450; *Venkatrao* v. *Mahabaleshwar*, I.L.R., 26 Bom., 241.

1571. It should be noted that the mortgagee is not to be presumed to abandon his mortgage rights by availing himself of this privilege. It was held in a case arising under Chapter VIII, before its amendment, that a transfer by a usufructuary mortgagee whose mortgagor had failed to give him possession of his rights as such mortgagee, was a transfer of an actionable claim. (1) But in view of the amendment of the law, this view no longer holds good (§ 100).

1572. Mortgagee's Rights against Third Parties.—This section, like the rest of the Act being enacted to define the mutual rights and liabilities of the mortgagor and mortgagee, the rights and liabilities of either in relation to strangers to the contract remain necessarily unaffected: what these rights are must largely depend upon the nature of his security and the invasion of his rights. For example, in a possessory mortgage the mortgagee is, as regards third parties, clothed with all the rights of the owner, and he possesses therefore necessarily larger rights of protection and management (2) than in a non-possessory mortgage in which possession still remains with the mortgagor. Leaving the rights and powers of a mortgagee in possession for a future discussion (3) those of a non-possessory mortgagee may be here stated to be generally limited to the protection and preservation of his security. Hence while a mortgagee in possession would be entitled to eject a trespasser because he has the right to eject any one disturbing his possession, the same right cannot be claimed by a non-possessory mortgagee, since being the mere holder of a security, the possession of a wrong-doer though adverse to the mortgagor is not necessarily adverse to him, at any rate, till his estate falls into possession.(4) But the authorities on this point are by no means unanimous. For it has been held that if such adverse possession had commenced before the execution of the mortgage, its operation would not have been arrested by the grant of the mortgage security, on the ground that the effect of a statute of limitation, in the absence of legislative provision to the contrary, must be determined with reference to the actual state of the title when time began to run, and that, when the time has once commenced to run against the owner, no subsequent alteration in the title will postpone the bar. Now, since the right of the mortgagee to the security subsists only so long as the mortgagor's right to the property subsists, both must equally be in the same position if the interests of the mortgagor and mortgagee are equally invaded by the trespasser.(5) On the other hand, it might be argued that though adverse possession does operate on title, the party complaining of adverse possession must be himself entitled to it (6) and that, therefore, while a mortgagee not entitled to possession *in præsenti* might safeguard his interest by obtaining a declaration, he has no right to eject a trespasser and reinstate his mortgagor in possession, since he cannot do one unless he is entitled to do the other, and which obviously he is not. So again, while the mortgagee has but limited powers to prevent waste by his mortgagor,(7) he is not necessarily restricted to the remedy open to him under section 66, but may obtain damages from the wrong doer if he happens to be a third party. So where the plaintiff held a simple mortgage of certain

(1) *Rani* v. *Ajudhia*, I.L.R., 16 All., 315, F.B.; but *contra* in *Moti Ram* v. *Jethmal*, *ib.*, 313.

(2) Ss. 72 (*a*), 76 (*a*).

(3) Ss. 72 (*a*), 76 (*a*), Comm., *post*.

(4) *Wheeler* v. *Montefiore*, 2 Q. B. 133 explained in *Doe* v. *Day*, *ib.*, 147; *Cooper* v. *Willomatt*, 1 C.B. 672.

(5) *Per* Mookerjee, J. in *Nand Kumar* v. *Ajodhya*, 14 C.L.J. 292 (298), *contra Aimadar* v. *Makhan Lal*, I.L.R. 33 Cal. 1015; following *Heath* v. *Pugh*, 6 Q.B.D. 345, O.A.; 7 App. Cas. 235.

(6) Art. 144, Limitation Act (Act IX of 1908).

(7) S. 66.

wooded lands of which his mortgagor was a tenant-in-common with the defendant, who during the pendency of the plaintiff's suit to which the said defendant was a *pro-forma* party, cut down all the trees and appropriated the same to himself. The plaintiff found the sale proceeds of the mortgaged share insufficient to satisfy his decree and whereupon he sued the defendant for wrongful appropriation of his mortgagor's share of the wood. It was held that the plaintiff's suit was well laid because the mortgagee is from the date of his mortgage entitled to have the mortgaged property secured from deterioration in the hands of the mortgagor, or of any other person to whose rights those of the mortgagee are superior, that he is likewise entitled to restrain the commission of wrongful acts by strangers inasmuch as they injuriously affect his mortgage security.(1) But this statement of the law must be understood as qualified by the facts of the case, in which the mortgagee stood to lose a portion of his mortgage-money on account of the wrongful removal of his mortgagor's co-tenant. But suppose if in this case the co-tenant had committed the wrong before the mortgagee's suit and before there was proof of any actual damage to his security, could he have restrained the wrong doer or sued him for damages on the mere ground that it tended to impair his security ? It is apprehended not, because, for one thing, the damages in such a case would be too remote. The mortgagee has, of course, a direct cause of action, if the hostile act of a stranger involves the denial of his title, though he is not bound to call to account every traducer of his title.

1573. The personal liability of the mortgagor is here declared to arise out of a contract to that effect made between the mortgagor and mortgagee. In the language of the clause, such liability only arises when "the mortgagor *binds* himself" to re-pay the loan. Such binding covenant must then be distinct from the mere contract of mortgage, and it would seem that if it were one of the implied covenants of a mortgage security, then this clause would be unnecessary, and an appropriate clause to that effect would have found place in section 65 which enumerates the mortgagor's implied contracts. Under English law, however, such promise is implied and presumed in law from the fact of accepting the loan.(2) "Every mortgage implies a loan, and every loan implies a debt, for which the borrower is personally liable, though he has neither entered into bond or covenant for payment of it; but the debt is of the nature of simple contract only, unless there be a bond of an express or implied covenant to give it the character of specialty."(3) This view of the law has been followed in several cases of the Indian Courts decided before(4) and since the present enactment,(5) but these latter cases have merely assumed, without reference to this clause or any discussions thereon, the English rule as applicable to this country. It is submitted that the question cannot be categorically answered with reference to English law, where the usual form of mortgage being that known as the English mortgage, a covenant to pay is not only necessarily implied(6) but expressly inserted to effectively safeguard the mortgagor's right of redemption. A similar covenant is, again, necessarily implied in a simple mortgage in the definition of which the Legislature has copied the

(1) *Aiyappa* v. *Kuppusami*, I. L. R., 28 Mad., 208 (209, 210). This was assumed in *Moulvie Omer Kurim* v. *Lala Shewan Lall*, 4 C.L.R. 291.

(2) *Per* Jessel M. R., in *Sutton* v. *Sutton*, 22 Ch. D. 511 (515).

(3) *Fisher*, § 805.

(4) *Kali Pershad* v. *Raye Kishorie*, 19 W. R., 281.

(5) *Musabab Zaman Khan* v. *Inayetullah*, I.L.R., 14 All., 513; *Miller* v. *Rungnath*, I.L. R., 12 Cal., 389; *Parbati* v. *Gobind*, 4 C.L.J., 246 (252); *Bhugwan* v. *Parmeshwari*, 5 C. L. J., 287.

(6) See s. 58 (*c*).

language of this clause, and which it doubtless intended to imply by a binding covenant.(1) In these two forms of securities then the mortgagor by the very nature of his contract binds himself to repay the loan. But equally he does not so bind himself in the other two forms of mortgages, *viz.*, usufructuary and by conditional sale. The fact that the mortgagor promises to pay does not necessarily "bind" him entitling the mortgagee to compel him to pay by suing him for personal recovery, and except in such cases the clause has, of course, no operation. For instance in the mortgagee usufructuary and by conditional sale as defined in section 58 no covenant to pay in this sense is made or even necessarily implied. In a mortgage by conditional sale all that the mortgagor says is that if he pays he will recover his property, but that if he does not, the sale shall become absolute, while in a usufructuary mortgage he does not even make this qualified covenant. It cannot, therefore, be predicated of every mortgage in this country that it necessarily implies a personal covenant to pay, and the question whether the mortgagor makes such a covenant must then be a matter of construction of the contract in each case and not one of presumption to be made in all cases.

Adverting now to the case laid it will be seen that while in several of them the general language of the English cases was cited as equally applicable to this country, still, the cases themselves appear to have been rightly decided, for all of them were cases of simple mortgages,(2) and in most of them the question of personal liability, arose in connection with an application made under section 90.

1574. Covenant to pay when implied.—The correct view then appears to be that the personal obligation to re-pay the debt is not necessarily the incident of every mortgage-contract in India.(3) But such is, indeed, the view of the English law. As observed by Lord Talbot: "Every mortgage implies a debt; every loan a debt; and though there were no covenant or bond, the personal estate of the last owner must remain liable to pay off the mortgage."(4) In other words, a provision in a mortgage-deed that the money will be repaid on a certain date is in itself sufficient to import a covenant for repayment on that day, for the breach of which an action would lie against the mortgagor, the judgment in which action would be satisfied out of his general property.(5) But it is probably no heresy to assert that though this is the view of equity, it is by no means clear that every mortgage necessarily presupposes the existence of a personal obligation. Indeed, it has been held that no such covenant is implied in a Welsh mortgage,(6) and in most copyhold mortgages.(7) So again

Clause (a).

(1) S. 58 (*b*).

(2) *Musahab Zaman Khan* v. *Inayetullah*, I.L.R., 14 All., 513; *Hamiduddin* v. *Kedar Nath*, I.L.R., 20 All., 385; *Wahidunnissa* v. *Gobardhan*, I.L.R., 22 All., 453 (461); *Jangi Singh* v. *Chandar Mal*, I.L.R., 30 All., 388; *Kali Pershad* v. *Raye Kishori*, 19 W.R. 281; *Miller* v. *Runganath*, I. L. R., 12 Cal. 389; *Anglo-Indian Trading Co.* v. *Brierly*, (1910) 8 I. C. (Mad.) 302 (case of a charge) *Parbati* v. *Gobinda*, 4 C. L. J. 246; *Bhugwan* v. *Parmeshwari*, 5 C.L.J. 287; *Ram Kishore* v. *Surajdeo*, 9 C.L.J. 5.

(3) *Cf. Balkishen Dass* v. *Legge*, I. L. R., 22 All., 149, P.C.

(4) *King* v. *King*, 3 P. Wms., 358; *Ancaster* v. *Mayer*, 1 Bro. C.C., 454 (464); *Quarrell* v. *Beckford*, 1 Madd., 278; *Galton* v. *Hancock*, 2 Atk., 427 (435).

(5) *Hart* v. *Eastern Union Railway Co.*, 7 Exch., 246, O.A., 8 Exch., 116; *Yates* v. *Ashton*, 4 Q B., 182; *King* v. *King*, 3 P. Wms, 356; *Goodman* v. *Grierson*, 2 Ba. & Be., 274; *Hopkins* v. *Worcester and Birmingham Canal Proprietors*, L. R., 6 Eq., 573. This view was also taken by a Divisional Bench of the Calcutta High Court in *Bhugwan Das* v. *Parmeshwari* (decided in 1896 but reported in 1907), 5 C. L. J., 287.

(6) *Yates* v. *Hambley*, 2 Atk., 360 (363); *Lawley* v. *Hooper*, 3 Atk., 278 (280).

(7) *Lawley* v. *Hooper*, 3 Atk., 278 (280).

the mortgage of a term for the purpose of raising money for portions usually imports no personal liability upon the borrowing trustees, and generally where the loan is raised for a collateral purpose, no personal covenant can be read into a document as a matter of course. However, the covenant to pay may be regarded as an usual incident of an English mortgage.(1) But is such a covenant the necessary incident of an Indian mortgage? In an Allahabad case the Court following an English precedent, intimated this opinion: "If it be the fact," they said, "we do not say that it is so, that on the true construction of the mortgage, there is no express covenant or provision to pay the mortgage-money otherwise than out of the mortgaged property, *still there is the implied promise to pay*, which if there is nothing in the mortgage from which a contrary intention should be inferred, the law will presume from the fact of the mortgagor's accepting the loan. Where there is in a mortgage nothing to the contrary, the mortgage contains, within itself so to speak, a personal liability to repay the amount advanced."(2) There is, however, no authority for his view in India. On the other hand, the authority of this section is clearly against it.(3) As regards the Allahabad view, it may be remarked in the words of Lord Davey that, although an unqualified admission of a debt no doubt implies a promise to pay it, it is not necessarily so where there is an express promise to pay it in a particular manner, and which must depend on the construction of the instrument in each case.(4)

1575. In order to make out a case for personal relief against the mortgagor the mortgagee must bring his case within this section, apart from which he has no personal remedy against the mortgagor under this section. Of course, it is always competent to a mortgagor to make a covenant to pay the mortgage-money. But such a covenant cannot be read into every mortgage-deed. But in a simple mortgage and an English mortgage such a covenant is necessarily implied. In a simple mortgage, he has to covenant for his personal liability, (5) and such is also the case in an English mortgage,(6) since in the former, according to its definition, "the mortgagor binds himself personally to pay the mortgage-money," and in the latter, he also "binds himself to repay it." On the other hand, it is no essential part of an usufructuary mortgage, or a mortgage by conditional sale. In the former case the mortgagee agrees *to pay himself out of the proceeds*, and the mortgagor cannot be sued personally, (7) nor can the land be sold.(8) And similarly in a mortgage by conditional sale, the mortgagor stipulates that in the event of his being unable to pay off the debt, the mortgagee shall be entitled to foreclose the property, which does not confer on the mortgagee any right to a personal relief.(9)

(1) *Floyer* v. *Lavington*, 1 P. Wms., 268; *Mellor* v. *Lees*, 2 Atk., 494 (496); *King* v. *King*, 3 P. Wms., 358 (360); *Kerr* v. *Ruxton*, 4 C.L.J., 510; followed in *Parbati* v. *Gobinda*, 4 C.L.J., 246.

(2) *Musabab Zaman Khan* v. *Inayat-ullah*, I. L. R., 14 All., 513 (519); citing in support Jessel, M. R., in *Sutton* v. *Sutton*, 22 Ch. D., 15: contra *Ramanand* v. *Nakched*, 8 O. C., 5.

For older cases see *Kali Pershad* v. *Raye Kishorie*, 19 W. R., 281; *Miller* v. *Runga Nath*, I. L. R., 12 Cal., 389, in which the Allahabad view was taken.

(3) *Gopalasami* v. *Arunachella*, I. L. R., 15 Mad., 304.

(4) *Kalka Singh* v. *Paras Ram*, I. L. R., 22 Cal., 434 (444), P.C.

(5) S. 58 (*b*); *Webb* v. *Rinchiden*, 14 W. R., 214; *Nitterjit Singh* v. *Scott*, 17 W.R., 62; *Wahidunnissa* v. *Gobardhan*, I. L. R., 22 All., 453 (461), F.B.; *Abbakke* v. *Kinhiamma*, I. L. R., 29 Mad., 491 (495); *Bhugwan Das* v. *Parmeshwari*, 5 C. L. J., 287, was a case of a simple mortgage, though the Judges laid down the broad principle that the promise to repay would imply a personal obligation unless it is otherwise excluded; *ib.*, p. 289.

(6) S. 58 (*c*), *ante*.

(7) *Mani Lal* v. *Koti Bhai*, 13 Bom. L. R. 233.

(8) *Munnoo Lal* v. *Reet Bhoobun*, 6 W. R., 283. (This case is cited in the Bill in support of C. (*a*).)

(9) *Balkishen* v. *Legge*, I. L. R., 22 All., 149 (159), P.C.

1576. Even a simple mortgage-deed may exclude a personal remedy.(1) The question whether the mortgagee is or is not entitled to sue the mortgagor personally is then a question mainly of construction.(2) No such right of action, if not expressly given by the words of the deed, is to be implied from it.(3) Nor can such promise be inferred from a deed in which the mortgagor after proceeding to describe the property mortgaged continued : " I do hereby promise and give it in writing that I shall without any plea repay the principal with interest within the term of two years," and which after other covenants creating priority concluded thus : "In the event of any breach of contract taking place on my part, the said banker is at liberty to institute a suit within the time fixed in this bond and recover the money." (4) A mere promise to pay within a certain fixed period does not import a personal liability, for such a covenant is entered into every form of mortgage. The crux of the matter is to see, what remedy it provides in case of the mortgagor's non-payment. Thus a stipulation by a mortgagor that, if the money advanced should not be re-paid at a fixed date, the mortgaged property might be sold ; and that if the property were sold for arrears of Government revenue or for other causes, the mortgagee might in such cases recover the money advanced by execution against the person or other property of the mortgagor, contains a personal covenant to pay, but it is contingent on the sale of the property for arrears of Government revenue. If then this contingency does not happen, no personal decree can be obtained.(5) Where a usufructuary mortgage deed provided for the payment of interest at 12 annas per cent. per annum if the rents and profits were not sufficient to pay up the whole amount of interest, it was held that the mortgaged property was security not only for payment of the principal but also of interest, and that the mere fact that the mortgagor took a personal liability to pay up the interest did not relieve the mortgaged property from liability to satisfy the deficiency. (6) So again there was no personal covenant in another mortgage which ran thus : " Since we have received these Rs. 1,200 we will pay away to you from this date the rupees arising from sale every day in the firewood depot mentioned below ..... we will settle account in this manner every month. If we do not give the sale-proceeds according to the terms mentioned above, and if we fail to give according to the *kist* (instalments), you or those who receive your order should collect, on the properties secured in Madras itself, commission at Rs. 20 per mensem and the balance of total arrears of the principal money." (7)

Instances of personal covenants.

1577. But where the bond provided, " if by sale of the above land the money receivable by you be not satisfied with charges, then you will realize the proper amount by selling my other landed properties, to which I will make no objection or excuse," it was held that the covenant was sufficiently personal to entitle the mortgagee to obtain a simple money-decree available against his moveable property only.(8) Where the mortgagor covenanted that if his debt be not paid off by the hypothecated properties, the mortgagee would be able to realize the

(1) *Venkatavarada* v. *Venkata*, 6 W. R., 91 (93), P.C.

(2) *Martin* v. *Pursram*, 2 Agra, 124.

(3) *Venkatavarada* v. *Venkata*, 6 W.R., 91 (93), P.C.

(4) *Narotam* v. *Sheo Pargash*, I. L. R., 10 Cal., 740 (742, 743), P.C.

(5) *Bunseedhur* v. *Sujaat Ali*, I. L. R., 16 Cal., 540 (542); *contra* in *Bhugwan* v. *Parmeswhari*, 5 C. L. J., 287 (289); *Benoy Krishna* v. *Debendra*, 15 C.W.N. 722 ; 9 I.C. 660.

(6) *Chintaman* v. *Dulari*, 7 A.L.J., 1087 ; following *Muhammad Husain* v. *Sheodaraham*, 4 A. L. J. 176 ; distinguishing *Ganga* v. *Lochan*, (1886), 6 A.W.N. 50.

(7) *Singjee* v. *Tiruvengadam*, I.L.R., 13 Mad., 192.

(8) *Jogeshwar Dutt* v. *Nitichand*, 4 B. L. R., Ap., 48.

money by sale of the mortgagor's other properties, it was held that reference to other properties was intended to enlarge the mortgagee's security and not intended to restrict it by prescribing the order in which the two funds were available, and that, therefore, it was open to the mortgagee to proceed against the other properties before exhausting those mortgaged for the satisfaction of his mortgage.(1) So also where the bond contained the following clause: "If I, the mortgagor, fail to pay the amount, then I will put you in possession of the land, and you may enjoy it, and when I have the means, I will redeem the land and pay the debt with interest, and take back the bond."(2) So also where the covenant was followed by these words: "If I fail to pay the mortgage-amount in the said *kalavadi*, then you shall receive the said mortgage-amount in the *chittrai kalavadi* of whatever year I may pay it, deliver the said lands to my possession . . . and also give back the bond."(3) And so also the following:—"If the mortgagee comes to know of any hypothecation, he may, at that very time, recover his money by suing me personally, and, if I wish to pay off the mortgage in part, it shall be impossible."(4) The word *Aangudhar* in a *San*-mortgage has been held to constitute a personal covenant.(5)

1578. A personal covenant need not be express but may be inferred from the context. Indeed, mortgages drawn up in the mofussil, usually by a poorly equipped penny-a-liner, seldom escape circumlocution. Apart, however, from this fruitful cause of variety, the interpretation of deeds from analogy derived from similar documents is at least a dangerous guide. Indeed, as Jessel, M. R., observed: "You have, in fact, no guide whatever; and the result, especially in some cases of wills, has been remarkable. There is, first document *A*, and a judge formed an opinion as to its construction. Then came document *B*, and some other judge has said that it differs very little from document *A*—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document *C*, and the judge then compares it with document *B*, and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner."(6) As an illustration of this tendency may be cited, a case in which the obligor wrote: "My paternal grandfather executed a deed stipulating thereby that you and your descendants would, from generation to generation, get the sum of Rs. 2,400 a year from the *charao* (offerings) of the deity Baidyanath. Agreeably to the terms of the said deed you . . . shall continue to get from year to year the said sum of Rs. 2,400 from me and my representatives."(7) Here it might be urged that the fund, out of which the payment was to be made, being clearly designated, the obligee could not recover it personally from the obligor. But the Court found that the last clause controlled the recital and made the covenant a personal one. But in an Allahabad case where a deed, the terms of which otherwise created a usufructuary mortgage, concluded with a covenant on the part of the mortgagor

(1) *Benoy Krishna* v. *Debendra*, 15 C. W. N., 722; 9 I.C. 660.

(2) *Annasvami* v. *Narranaiyan*, 1 M.H.C. R., 114.

(3) *Sivakami* v. *Savundram*, I. L. R., 1 Mad., 131, F.B.

(4) *Madho Prashad* v. *Debi Dial*, 11 A.W. N., 168.

(5) *Balabhai* v. *Goheraj*, (1895) B. P. J., 310 (The term *Aangudhar* literally means "personal loan").

(6) *Aspden* v. *Seddon*, L. R., 10 Ch., 396 (397, 398), so the same effect in *Emmins* v. *Bradford*, 13 Ch. D., 493; and *In re Tangueray*, 20 Ch. D., 481.

(7) *Girijanund* v. *Sailajanund*, I.L.R., 23 Cal., 645 (665, 666).

to pay the mortgage-debt on demand, the Court held that the mere insertion of the clause unaccompanied by a hypothecation of the property was insufficient to create a personal liability.(1) But the Madras Court has, in cases dissented from in Allahabad, laid down the contrary.(2) But according to the view taken in Allahabad, if to the covenant had been added the words indicating that until payment, the mortgaged property should be liable, then there would have been undoubtedly a personal covenant on the part of the mortgagor upon which he would have been liable.(3) But it is scarcely necessary that these magic should conclude the covenant. For if the mortgagor say "Here is an usufructuary mortgage ; but I promise to pay the mortgage-money," can it be said that the personal covenant is insufficient ?

Implied promise.

1579. A covenant to pay has, however, been held to be implied from the statement that the principal has been received, where no other mode of recovery is expressly stipulated for. If the mortgagor provides for the payment of interest and adds that he would deliver possession of the property to the mortgagor, should his interest remain unpaid at the end of the year, but nothing is stated as to how the principal is to be repaid, the transaction would be construed as a simple mortgage subject to the personal liability of the mortgagor.(4) There can be no implied promise to pay where there is an express promise to pay in a particular manner, and on a certain event happening.

1580. No Promise.—It has been already observed before that a covenant that the mortgagor shall be personally liable to pay the mortgage-money may be presumed in a simple as well as in an English mortgage, (§§ 1214, 1264, 1574-1576) but it cannot be presumed in a usufructuary mortgage, or a mortgage by conditional sale (§§ 1248, 1250). In such cases personal liability must be a matter for express contract. In fact, in any case, there is no room for implied promise when the contract is clear as to the mode and manner of payment. Personal covenant should not be spelt out of equivocal circumstances which may or may not favour a personal liability on the part of the mortgagor. Where two brothers, *A* and *B*, executed a deed of mortgage to *C*, the wife of *D*, and repayable in 17 years, and on the same date *D* took a lease of the same property for a term of 28 years, in which *D* promised to pay the stipulated rent to his wife *C* so long as the mortgage subsisted, after which the rent was to be paid to the lessors. It was also provided in the mortgage-deed that the interest due on the mortgage-money should be paid by *D*, *C* having transferred her mortgage to another, and *D* having failed to pay his rent to the assignee, the latter sued the mortgagors *A* and *B*, for interest. But it was held that the two contemporaneous deeds constituted a tripartite contract, intended to relieve the obligors from any responsibility in respect of interest, and to entitle the obligee to look for liquidation of interest solely to the source pointed out.(5) So where in a contract construed to create a charge, the obligor after setting out the terms of the agreement to finance his manganese business stated that the same shall be paid or deducted from the sale proceeds of the ores, the Court held to exclude an implied personal covenant.(6)

(1) *Kashi Ram* v. *Sardar Singh*, I. L. R., 28 All., 157 ; followed in *Krishna Bhaichand* v. *Hari Janardhan*, 10 Bom. L.R., 615 (617).

(2) *Ramayya* v. *Guruva*, I.L.R., 14 Mad., 232 ; *Sivakami* v. *Gopala*, I. L. R., 17 Mad., 131, F B.

(3) *Jafar Husen* v. *Ranjit Singh*, I. L. R., 21 All., 4.

(4) *Yashvant* v. *Vithal*, I. L. R., 21 Bom., 267 (272).

(5) *Chennapatnam* v. *Tadakamalla*, I.L. R., 27 Mad., 86.

(6) *Anglo Indian Trading Co.* v. *Brierly*, (1910) I.C. (Mad.) 302.

Personal covenant in usufructuary mortgage.

1581. It has already been seen that a usufructuary mortgage as such does not imply a personal covenant to pay (§ 1250). But such a covenant might be superadded to its usual terms when the transaction ceases to be a pure usufructuary mortgage,[1] and in which case the mortgagee would be entitled to sue thereon under clause (*a*). [2] But does the addition of such a covenant convert a usufructuary mortgage into a simple usufructuary mortgage, arming the mortgagee with the right of sale ? In Madras such a covenant is held to have that effect [3] but these cases have been dissented from in Allahabad [4] where it has been held that a mere covenant to pay apart from any intention indicated in the deed to charge the mortgaged property with the payment of the mortgage-debt cannot convert the nature of the security so as to let in the right of sale. Such would be the case if it gave the mortgagee liberty to recover the mortgage-money from the mortgagor and his other properties and that until the payment of the mortgage-debt "the mortgaged property should in every way remain liable for damages, interest and deficiency of profits" [5] the cumulative effect of which circumlocution was held to let in the right of sale.[6] In Madras, sale of the mortgaged property is impliedly authorized in every mortgage in which there is a covenant to pay [7] but there is scarcely any room for implication when in a usufructuary mortgage the mortgagee specifies the mode of its discharge and which is inconsistent with an implied power of sale. In another case referred to and decided by a Full Bench in Madras, the usufructuary mortgagee sued for recovery of the money and for sale of the mortgaged property on the mortgagor's failure to secure possession, and the question was whether on the strength of this section the mortgagee could enforce that right, but the Court held that "the right to sue for sale is not provided for by the contract between the parties and is not to be found in section 68 without doing violence to the language of the section." [8] But the mortgage being usufructuary, it was conceded in the course of argument that the mortgagee could have at the same time sued for recovery of possession—a concession which might have been met at the Bar by a statement that the mortgagee had sued for sale because he could not obtain quiet possession. The Calcutta High Court was also in one case inclined to the same view, and in the circumstances mentioned in the section, held the mortgagee to be entitled to have the money substituted for the property. [9] But a discordant note was struck in a Bombay case, which, though decided without reference to the Act, considered the effect of this section on the rights of the mortgagee who was held entitled to sue for the sale of the property without waiting for the expiration of the term. [10]

(1) *Kashi Ram* v. *Sardar Singh*, I.L.R. 28 All., 157.

(2) *Madho Prasad* v. *Devi Dial*, (1891) 11 A.W.N. 168 ; *Narpat* v. *Ram Saran*, I.L.R. 30 All., 162 ; *Chintaman* v. *Dulari*, I.L.R. 33 All., 107 ; *Prabhakat* v. *Davlatro*, (1876) B. P.J. 120 ; *Balabhai* v. *Gobraj*, (1895) B.P.J. 310 ; *Pargan* v. *Mahatam*, 6 C.L.J. 143.

(3) *Ramayya* v. *Guruva*, I.L.R. 14 Mad., 232 ; *Sivakami* v. *Gopala*, I.L.R., 17 Mad., 131, F.B.; *Kangaya* v. *Kalimuthu*, I.L.R. 27 Mad. 526, F.B.; *Sardar Singh* v. *Collector*, 10 O.C. 14.

(4) *Kashi Ram* v. *Sardar Singh*, I.L.R. 28 All., 157 ; to the same effect *Luchmeshar* v. *Dookh Mochan*, I L.R., 24 Cal. 677.

(5) *Chennapatnam* v. *Tadakumalla*, I.L. R., 27 Mad. 86.

(6) *Jafar Husen* v. *Ranjit Singh*, I.L.R., 21 All., 4: explained in *Kashi Ram* v. *Sardar Singh*, I.L.R., 28 All., 157 (160); *Narpet* v. *Ram Ratan*, 4 A.L J. 130 ; *Narpet* v. *Ram Saran*, I.L.R., 30 All., 162.

(7) S. 58 (*b*) ; *Kangaya* v. *Kalimuthu*, I.L. R., 27 Mad. 526, F.B.

(8) *Arunachalam* v. *Ayyavayyan*, I.L.R., 21 Mad., 476 (481), in which the Allahabad cases are not mentioned. To the same effect *obiter* in *Samayya* v. *Nagalingam*, I.L.R., 15 Mad., 174 (178) ; see also *Veeranna* v. *Muthukumaru*, 13 M.L.J.R., 439.

(9) *Ram Jewan* v. *Jagarnath*, I.L.R., 25 Cal., 450 (454) ; *Pitamber* v. *Ram Sarun*, 25 W.R., 7.

(10) *Venkatrao* v. *Mahabaleshwar*, I.L.R., 26 Bom., 241 (245).

Much could be said in favour of either view, and the question should in the majority of cases be one of construction. (§§ 1576-1579) But still cases must arise when the legal operation of a mere covenant to pay remains the sole question to be considered, and on which there appears to be a sharp conflict between the several Courts.

1582. Remedy on Failure of Consideration.—Though this section enumerates all the cases in which the mortgagee is entitled to sue the mortgagor for the mortgage-money, it does not deal with cases in which the mortgagor would become liable where the mortgage itself is void. In such a case, there being no mortgage, there is no longer any relationship of mortgagor and mortgagee between the parties, and if, therefore, the mortgagor is then liable, it is not *qua* mortgagor but rather as a trustee that he is liable.(1) For instance, where the subject-matter of the mortgage is untransferable the mortgage would be void, but the mortgagor must then pay back to the mortgagee the money the latter had advanced on the security of that mortgage. This liability to restore the benefit he has received under the void mortgage, is a statutory liability which only arises on determination of the nature of the mortgage and it is only from that date, and not from the date of payment or promise, that limitation would commence to run against the mortgagee.(2) In other words, the mortgagee may recover his advances at any time within three years from date of the decree declaring his mortgage void. (3) But such cases must be discriminated from those in which there was no contract at all, in which case there is no equity requiring recognition at the hands of the Court.(4) Where, for example, the mortgagor, being a minor, was incompetent to contract,(5) or where there was a contract made in excess of power or not in accordance with the statutory requirements, there can be no restitutions of benefit received under the contract, because there was no contract at all.(6)

Does not bind assignee.

1583. The covenant to pay does not run with the land, so that the mere fact of the assignment of the equity of redemption will not create a personal liability on the part of the assignee. (7) On the other hand, the mortgagor still continues liable upon his covenant even after he has parted with the equity of redemption. (8) But since the rights and remedies of mortgagor and mortgagee are mutual, it has been held that if the mortgagees enforce the covenant against the mortgagor, a new right to redeem will spring up in his favour, although he may have absolutely assigned his equity of redemption, and which he may exercise against the mortgagee subject to the rights of his assignee.(9) And this right would remain unaffected, even if after the assignment of the equity of redemption the assignee has further charged the property either to the original mortgagee or to some other person. "Such a mortgage creates in the new mortgagee a fresh interest in the equity of redemption, but it does not impose any additional burden or liability on the mortgagor."(10) The mortgagor may exonerate himself from his personal liability by making the assignee assume it with the concurrence of the mortgagee: in short

(1) *Cf.* s. 86, Trusts Act (II of 1882).
(2) Art. 79, Limitation Act; *Bassu Kuar* v. *Dhum Singh*, I.L.R , 11 All., 47 (56, 57), P.C.
(3) *Ib.*, p. 57.
(4) *Mohori Bibee* v. *Dharmodas*, I.L.R., 30 Cal., 539 (548), P.C.
(5) *Ib.*
(6) *Radha Krishna* v. *Municipal Board of Benares*, I.L.R., 27 All., 592.
(7) In re *Errington* [1894], 1 Q.B., 11 (14); *Jamna* v. *Ramantal*, I.L.R., 34 All., 63.
(8) *Kinnaird* v. *Trollope*, 39 Ch. D., 636.
(9) *Palmer* v. *Hendrie*, 27 Beav., 349; 28 Beav., 341; *Walker* v. *Jones*, L.R., 1 P.C. 50 (62); *Pearce* v. *Morris*, L.R , 5 Ch., 277; *Kinnaird* v. *Trollope*, 39 Ch. D., 636 (643, 644),
(10) *Kinnaird* v. *Trollope*, 39 Ch. D., 636 (645).

by entering into a fresh covenant with him. His promise to the mortgagor alone that he would redeem the mortgage, is not sufficient, and the mortgagee cannot enforce it.(1) Even apart from any promise, it is settled that the purchaser of an equity of redemption is liable to pay off the money due upon the mortgage. The grounds of the rule are stated to be that a less price is given for that property because it is subject to the charge, and that the original mortgagor, having parted with his property is less able to pay the debt than before.(2) Here the true reason would seem to be that having purchased the "right to redeem" his right is necessarily coupled with his liability to redeem all prior incumbrances, and that if the mortgagor has to redeem them by virtue of his personal covenants, the assignee must in the absence of a contract indemnify him. (3)

Suit for only interest.

1584. While as a rule the payment of interest is not separately recoverable, it may be so recovered if the covenant is distinct from and independent of the claim of the mortgagee to recover the principal sum.(4) Such covenants are usually inserted in English mortgage-deeds to enable the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter.(5) In such mortgages, the covenant to pay interest is a separate contract from that made to repay the principal sum advanced. Thus the mortgagor may say: "I will continue to pay interest every year. In the year in which interest remains unpaid I will deliver the property into your possession without any objection," whereupon the mortgagee may sue on the covenant and recover his overdue interests as often as default is made in its payment, by sale of the property, and since each breach gives rise to an independent cause of action, his subsequent suit for recovery of the principal and interest is not barred by section 43 of the Code.(6) But if the breach of covenant to pay interest has been otherwise provided for, as where, on default of payment of interest on the due date, interest is agreed to be chargeable on the arrear and at an enhanced rate, the mortgagee cannot maintain a separate suit for the recovery of interest inasmuch as the deed having itself provided the remedy for a breach, no other relief can be regarded as consonant with the intention of the parties. (7)

Limitation for personal recovery.

1585. Where the condition is that, upon the security being exhausted, the mortgagor would be personally liable, the mortgagee is at liberty to seek the alternative relief, in the same suit. (8) But in such a case, the *limitation* being six years, from the date on which the mortgage-money became due, it will be a question whether the personal remedy is within time to be enforceable. (9) It has been distinctly pointed out in the Calcutta case that Article 132 only applies to cases where the claim is to realize money from the sale of the property. The decision of the

(1) *Shiddheshvar* v. *Ramchandrarav*, I.L.R., 6 Bom., 463.

(2) *Tweddell* v. *Tweddell*, 2 Bro. C.C. 101 (152); *Woods* v. *Huntingford*, 3 Ves. 128; *Waring* v. *Wards*, 7 Ves. 332; *Wolmershansen* v. *Gullik*, [1893] 2 Ch. 514; *Mills* v. *United Counties Bank*, [1912] 1 Ch. 231.

(3) *Mills* v. *United Counties Bank*, [1912] 1 Ch. 231 (242,243]; *Ram Barai* v. *Sheodeni*, 16 C.W.N. 1040; 16 I.C. 73.

(4) *Yashvant* v. *Vithal*, I.L.R., 21 Bom., 26 (27).

(5) *Ibid.*

(6) *Ibid.*

(7) *Kannu* v. *Natesa*, I.L.R., 14 Mad., 477 (478).

(8) *Miller* v. *Runganath*, I.L.R., 12 Cal., 389.

(9) *Ib.*, p. 396; *Seshayya* v. *Anamma*, I.L.R., 10 Mad., 100; *Rathnasami* v. *Subramanya*, I.L.R., 11 Mad., 56; in *Bulakhi* v. *Tukarambhat*, I.L.R., 14 Bom., 377, three years were held to be the limitation but the fact that the bond sued upon was *registered* was probably overlooked.

Privy Council [1] to the same effect may now be taken to have finally settled the question, and the rulings to the contrary must, therefore, be considered as overruled. Where the mortgagee failed to enforce his mortgage on the ground that the mortgagor, a Mahomedan female, had not understood that she was incumbering her property to secure her husband's debt, or that the debt incurred by her husband was applied for her benefit, and the mortgagee thereupon instituted another suit which was opposed on the ground of limitation, the Court held that the decree of the Court holding that there was no binding contract enforceable in law brought about a new state of things and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money, and that she became bound to pay that which she had retained in payment of her land, the date of the decree giving the date of the failure of an existing consideration within the meaning of Article 97 of the Indian Limitation Act.[2]

1586. Wrongful Act or Default of the Mortgagor.—Another case for personal liability arises, where the mortgagee's security is either lost or impaired on account of the wrongful act or default of the mortgagor. Where, however, it is lost or impaired, but *not* by his wrongful act, the mortgagee is still entitled, according to the last paragraph, to demand from him a substituted security. But in this case, the mortgagee must not be in *pari delicto*.

Clause (b).

This is, however, a matter for consideration elsewhere. So far as regards the right of the mortgagee to sue his mortgagor in consequence of the deprivation of his security due to the "wrongful act or default of the mortgagor," the Act provides for cases in which his action would necessarily fall within the contemplation of this clause. His failure, for instance, to make good his implied covenants, enumerated in section 65, may let in such a right. Such default would arise when the mortgagor fails to disclose the existence of a prior incumbrance. [3] If, for example, the mortgagor suppressed from his usufructuary mortgagee the fact that there was outstanding against the mortgaged property a decree for sale on a prior mortgage, and which being put in execution was purchased by the mortgagee himself, the latter was held entitled to sue for the mortgage-money on the basis of this clause, it being immaterial that he had himself purchased the property. His right to sue him accrued as soon as the mortgagor failed to secure him quiet possession, and the fact that he was able to retain it by advancing more money could not improve the mortgagor's position. [4] So, again, where the owner after mortgaging it under an unregistered deed, sells it for valuable consideration by registered deed to one who has no notice of the mortgage, the mortgagee cannot but be held to be deprived of his security by the wrongful act of the mortgagor so as to confer on the former the remedy provided by this section. [5]

1587. If the mortgagor suppresses from his creditor the fact that the property given to him is subject to a previous incumbrance, the mortgagee may, without waiting for the expiry of the stipulated period, sue him for the

(1) *Ramdin* v. *Kalka*, I.L.R., 7 All., 502, P.C.

(2) *Jamna Das* v. *Najmunissa*, I.L.R., 28 All., 466; *Bassu Kuar* v. *Dhum Singh*, I. L.R., 11 All., 47, P. C., in which the principle is stated; *cf.* ss. 65, 70, Indian Contract Act (IX of 1872).

(3) *Bholanath* v. *Karba Mohan*, 7 I.C., 251.

(4) *Ahmadullah* v. *Salat Baksh*, I.L.R., 27 All., 488.

(5) *Appasami* v. *Virappa*, I.L.R., 29 Mad., 362; *Sukhdas* v. *Sheodev*, (1901) A. W. N. 52. (Case of two successive usufructuary mortgages—first mortgagee held entitled to sue for mortgage-money).

recovery of his money.[1] Similarly, where the mortgagor, an occupancy-holder, well knowing that he was holding an untransferable estate, mortgaged it, the mortgagee was held entitled to sue for the mortgage-money.[2] A sale or surrender of the mortgaged holding to the landlord under circumstances ordinarily entailing extinguishment of all incumbrances, would not extinguish the mortgagee's lien, if the transfer was collusive or made to defraud him of his right, and in which case the mortgagee may enforce his lien against the land in the hands of the landlord.[3] So, it has been held in Allahabad that an occupancy-tenant cannot relinquish his holding to the prejudice of the usufructuary mortgagee whom he had put in possession.[4] If the mortgagor fails to reconvey the property in his possession, according to the covenant in favour of the mortgagee, the latter is entitled to a money-decree.[5] And since it is the duty of the mortgagor to protect his creditor's security, where a stranger attaches it in execution of a decree against the mortgagor, and the latter unsuccessfully objects, but does not, as he might have done, sue him to establish his right to the property,[6] he has been held personally liable to the mortgagee.[7] And so, where the mortgagor mortgaged ten fields to secure payment of a certain debt, after fifteen years, and it subsequently turned out that he had no title to six of the fields, which belonged to some one else, the mortgagee was held entitled to bring to sale the remaining four mortgaged fields, notwithstanding that the term had not expired.[8] This view was taken in a case which arose before the Act was extended to the Bombay Presidency. Indeed, this view is in accord with the English practice,[9] where it is pointed out that the failure to pay even interest would, in a mortgage prepared in the most ordinary form, release the mortgagee from the necessity of waiting for the expiry of the term before exercising his powers which he possesses as mortgagee. There can be no doubt that a failure on the part of the mortgagor to carry out the terms of the contract opens up to the mortgagee his remedy, the nature of which has already been discussed before (§ 1565). A mortgagor who, after he has granted a usufructuary mortgage of his property, creates another incumbrance of the same description, in consequence of which the second mortgagee ejects his predecessor in possession, the latter has his remedy by a suit under this section.[10] Again, if he fails to pay Government revenue in respect of a portion not mortgaged, and, in consequence, the mortgaged property is sold along with the rest for arrears, the mortgagee can recover his claim against the mortgagor, obtaining at the same time lien over the surplus, if any, from the sale.[11] But before he recovers this money, he must, if in possession, shew that the usufruct of the property, while

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(1) *Radha Churn Saha* v. *Parbuttee Churn Dutt*, 25 W. R., 51; *Syud Sayet Ali* v. *Syud Mahomed*, 7 W. R., 196; *Bhugwan Acharjee* v. *Govind Sahoo*, I.L.R., 9 Cal., 234; *Bhola Nath* v. *Hara Mohan*, (1910) 7 I.C. (Cal). 251; *Ahmadullah* v. *Salar Baksh*, (1905) 2 A.L.J. R., 241 (243).

(2) *Ganesh Singh* v. *Sujhari Kuar*, I.L. R., 10 All., 47.

(3) *Ramsarandass* v. *Rampergash*, I.L.R., 32 Cal., 283.

(4) *Badri* v. *Sheodhian*, I.L.R., 18 All., 354; *Rannu* v. *Rafiuddin*, I.L.R., 27 All., 82.

(5) *Hiralal* v. *Ghasitu*, I.L.R., 16 All., 318, F. B.; *Saravanna* v. *Chinnammal*, I.L.R., 15 Mad., 65.

(6) S. 283, Code of Civil Procedure (Act XIV of 1882; now O. XXI, r. 62 of Act V of 1908).

(7) *Gopalsami* v. *Arunachella*, I.L.R., 15 Mad., 304; *Purlhad Chunder* v. *Chundee Churn*, (1853) S. D. A., p. 575; *Annund Chunder* v. *Soobul Chunder*, (1857) S. D. A., p. 1195; *Bhugwan Acharjee* v. *Govind Sahoo*, I.L.R., 9 Cal., 234.

(8) *Venkatrao* v. *Mahabaleshwar*, I.L.R., 26 Bom., 241.

(9) *Seaton* v. *Twyford*, L.R. 11 Eq, 591.

(10) *Sukhdeo* v. *Sheodial*, (1901) A.W.N., 52; distinguishing *Gopalsami* v. *Arunachella*, I.L.R., 15 Mad., 304; *Jhabbu Ram* v. *Girdhan Singh*, I.L.R., 6 All., 298; *Linga Reddi* v. *Sama Rau*, I.L.R., 17 Mad., 469.

(11) Ss. 72 (*b*), 73, *Jhabbu Ram* v. *Girdhari Singh*, I.L.R., 6 All., 298; *Sawaba Khandapa* v. *Abaji Jotirav*, I.L.R., 11 Bom., 475.

he held the mortgage, has not satisfied his debt.(1) But since in a usufructuary mortgage where the mortgagee is put in possession of the property, the mortgagor does not necessarily covenant against its sale, it follows that if he sells his equity of redemption, and the mortgagee is deprived of possession of a part of the property in consequence, he cannot sue for the mortgage-money.(2) And so, in a case, where the mortgaged premises were attached, in execution of a decree obtained by a third party against the mortgagor, and the mortgagee preferred a claim which was erroneously rejected, the premises were sold, and he was dispossessed, it was held, on a suit by him against the mortgagor for a personal decree, that, since the latter had nothing to do with the erroneous order which the mortgagee did nothing to have it set aside, he could not maintain the suit.(3)

Plea must be raised.

1588. If a suit is brought for money under this section, it is the duty of the mortgagee to specifically plead the circumstances entitling him to obtain a personal decree against the defendant. If he omits to plead, the Court will not, of its own accord, take notice of it. And if, according to his own showing, he is not legally entitled to the remedy claimed by him, the Court will reject his plaint, or dismiss his suit, even though the defendant may not have taken an objection to that effect.(4)

It is immaterial under this clause that the deprivation does not effect any perceptible change in the value of the security. The section would be inequitable if it is construed too literally, but there is apparently no reason why it should not be so construed, although, no doubt, there may be cases in which the loss occasioned is so insignificant as scarcely to call for the intervention of the Court under this section. The rule then to apply would be *De minimis non curat lex.*(5)

Limits of the rule.

1589. It is noticeable that while the next clause visits the mortgagor with the consequences of the acts of "any other person," this clause limits his liability to his own "wrongful act or default." Again, this clause only comes in if the mortgagee is *deprived* of the whole or a part of his security, whereas the next clause protects him if he is only deprived of his right to present enjoyment of the property. The difference between the working of the two clauses may be thus illustrated: If after the creation of a usufructuary mortgage, the mortgagor creates another mortgage of the same character, and the subsequent mortgagee dispossesses the prior mortgagee, the prior mortgagee has his remedy under clause (*c*) for disturbance of possession. If, on the other hand, owing to covenants in the prior mortgage of which he had no notice, the subsequent mortgagee fails to obtain possession, his remedy would lie under clause (*b*).(6) Clause (*b*) would then appear to refer to title, while clause (*c*) only protects the mortgagee's possession. Again, since no mortgagee can take advantage of his own wrong, the rule must be understood to be subject to the broad equity that the mortgagee

(1) *Hurdeo Narain Singh* v. *Fuzla Hossein*, 1 W. R., 270; *Ram Din* v. *Kalka Prosad*, I.L.R., 7 All., 502.

(2) *Lallubhai* v. *Narain*, I.L.R., 6 Bom., 719; *Khanji* v. *Rama*, I.L.R., 10 Bom., 519; *Gokul* v. *Shrimal*, 6 Bom. L.R., 288; *Davani* v. *Ratna Chetti*, I.L.R., 6 Mad., 417.

(3) *Gopalasami* v. *Arunachella*, I.L.R., 15 Mad., 304.

(4) *Jhabbu Ram* v. *Girdhari Singh*, I.L., R., 6 All., 298; *Koobchand* v. *Munohar Lal*, (1863) S.D.A., N.W. P., 272; *Bhowanee* v. *Bisheshar*, (1853) S.D.A.N.W.P., 591.

(5) Cro. Eliz., 353. "Law does not care for (disregards) trifles." "The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim —*De minimis non curat lex.*" *Per* Sir W. Scott in *The Reward*, 2 Dods. Adm. R., 269.

(6) *Radha Churn* v. *Parbutty*, 25 W. R., 51.

must not have contributed to the deprivation of his security.(1) So, where in a usufructuary mortgage, the mortgagee bound himself to repay the money, but there were reciprocal promises, and the mortgagee, by his own default, precluded himself from fulfilling his part of the contract for restoration of the property on satisfaction of the debt, he could not compel the mortgagor to fulfil his promise of payment.(2)

Right when enforceable.

1590. The right of personal recovery conferred by this and the next clause exists independently of, and is not taken away by, any covenant to repay in the mortgage-deed.(3) The mortgagee may, therefore, proceed to enforce his remedy without waiting for the time fixed for repayment. Indeed, were it otherwise, the mortgagee might have to wait till his remedy ceases to be effective. The mortgagor's default has then the effect of accelerating the cause of action upon which the mortgagee may sue both on the mortgage as well as for a personal recovery.

Clause (c).

1591. Disturbance of Possession.—The third clause contemplates a case where the mortgagee, as such, being entitled to possession, as in a usufructuary mortgage, the mortgagor fails to deliver it to him, or, after delivery of possession ejects him, or he is ejected by a stranger. This clause is wide enough to include every instance of failure, whether due to fraud(4) or misfortune of a mortgagor to secure the mortgagee in undisturbed possession, at any time during the period for which he is entitled to remain in possession. The subsequent dispossession of the mortgagee after possession has been once delivered to him, is a failure on the part of the mortgagor to secure him in undisturbed possession.(5) In this view the "any other person" of the clause must not only refer to the person claiming by a title paramount to the mortgagor, but also persons who may be arrant trespassers. In such case it is his duty to apprise the mortgagor of the trespass,(6) and it is then for the latter to eject the trespasser. He is, however, not disqualified from dealing with trespasser himself,—but this is his right and not his duty.(7) If he surrenders possession without protest or after protest which is unavailing because it has not been made in the right way or persisted in appeal, the mortgagor cannot take advantage of it and refuse to assure him quiet possession or pay him adequate compensation for disturbance.(8) The mortgagor is bound to secure to him full, complete and peaceable possession over the mortgaged property, and, if he either by himself or through another disturbs his enjoyment, the mortgagee may avail himself of the statutory protection here afforded, and proceed to recover his money, with interest,(9) from him or his other estate,(10) or he may at his option sue him also for recovery of possession of the property.(11) He is entitled to his

(1) *Sidhee Nuzar Ally* v. *Ojoodhyaram*, 10 M.I.A., 540 (559); *Jamnadas* v. *Baimuli*, (1879) B.P.J., 487; *Sambhu* v. *Babaji*, (1889) B.P.J., 160; *Kalappa* v. *Shivaya*, I. L. R., 20 Bom., 492 (494); *Chitkali* v. *Mathura Lal*, 3 C.L.J., 220.

(2) *Chitkali* v. *Mathura Lal*, 3 C. L. J., 220.

(3) *Appasami* v. *Virappa*, I.L.R., 29 Mad., 362.

(4) *Ahmadullah* v. *Salar Buksh*, I. L. R., 27 All., 488.

(5) *Hiralal* v. *Ghasita*, I. L. R., 16 All., 318 (323); *Pargan* v. *Mahatam*, 6 C. L. J., 314.

(6) *Cf.* s. 108 (*n*) *post*.

(7) S. 72 (*c*) *post*.

(8) *Gaya Pershad* v. *Ganga Bishun*, 6 I., C. (All.) 838.

(9) *Odit Purkash* v. *Martindell*, 4 M. I. A. 444; *Talik Singh* v. *Jalal Singh*, 11 C. L. J. 136.

(10) See *per* Knox, J., in *Hiralal* v. *Ghasitu*, I.L.R., 16 All., 318 (322), F.B.

(11) *Linga Reddi* v. *Shama Rao*, I.L.R., 17 Mad., 469; followed in *Thakun Chowdhury* v. *Manrup*, 16 I. C. (Cal.) 735; *Jussemoodeen* v. *Huro Sundaree*, 19 W. R., 274; *Ishan Chandra* v. *Sujan*, 7 B.L.R., 14.

mortgage-money, notwithstanding any covenant,(1) and to possession by force of it.(2)

1592. The right of the mortgagee to possession must arise under the mortgage. If he has subsequently come in for possession under some other title, the clause can afford him no protection. But if he is entitled to possession in his right as mortgagee, the duty of the mortgagor is two-fold. He must in the first place deliver possession, and in the second place secure its continuance with the mortgagee. The liability of the mortgagor in this respect is one which arises from the very nature of such a mortgage, for the mortgagor in such cases says to the mortgagee, "you give the money and I possession. If you lose it, I shall answer for it." And in this respect the rule here enunciated follows a long course of decisions on the point.(3) The initial duty of the mortgagor to deliver possession may be waived by the mortgagee.(4) But apart from any disability created by the mortgagee on account of his own conduct, he has a right to retain possession for the stipulated term, and the mortgagor is under an obligation to protect it.

Covenant restricted to lawful possession.

1593. The covenant for quiet enjoyment only extends to enjoyment of the property by the tenant so long as it is lawful for him to so enjoy it. It cannot be a contract for the mortgagee's enjoyment of the property contrary to law. Hence, if the occupation of the mortgagee is suddenly disturbed by a Plague Officer acting under authority, he cannot hold the mortgagor liable for a breach of the covenant.(5) Indeed, such an agreement, even if stated in express terms, would clearly be void. It would be equally void if the intention could be implied.(6) The principle here enunciated would equally apply whether the transfer is by way of mortgage or is a demise. So, where in a mortgage by way of lease the condition was that the lease should subsist until the money was repaid, and previous to repayment the mortgagor ejected the mortgagee, it was held that the latter was not bound to sue for possession, but may recover back the money; since the mortgagor, having committed a breach of contract, could not enforce fulfilment from the mortgagee of what was to be performed on his part.(7) The failure of the mortgagee to obtain possession if attributable to the mortgagor's conduct is sufficient to let in his right to sue back for his money. So where a mortgagor at the time

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(1) *Unichaman* v. *Ahmed*, I. L. R., 21 Mad., 242 (243).

(2) *Sankara* v. *Jagat Narain*, 2 O.C. 24.

(3) *Eaun Bibee* v. *Golam Alee*, (1845) S. D. A., 588; *Debmoee* v. *Debnarain*, (1851) S D. A., 750; *Amatool Hossain* v. *Ahmud Alee*, (1852) S D. A., 193; *Anundmaye* v. *Jagocmoni*, (1853) S. D. A., 59; *Madhoo* v. *Doorga*, (1853) S. D. A., 286; *Prem Nath* v. *Kalee Krishun*, (1856) S.D.A., 849; *Ablak* v. *Narain*, (1858) S. D. A., 306; *Solano* v. *Roop Cooar*, (1859) S.D.A., 58; *Doocallubh* v. *Hurro Kishen*, (1959) S. D. A. 322; *Mahomed* v. *Thakurdyal*, 1 W.R., 365; *Mahomed* v. *Obhoy Narain*, 4 W. R. 70; *Bishen Dyal* v. *Huruck Narain*, 24 W. R., 17; *Gholam Ali* v. *Sahib Alum*, (1843-46) N.W.P.S.D.A., 139; *Jankee* v. *Sambhur Singh ib.*, 150; *Het Ram* v. *Ram Sahae*, (1847) N.W.P., S.D.A., 199; *Oodit Purkash* v. *Martindell*, (1849) N.W.P., S.D.A., 54; O.A., 4 M.I.A., 444; *Soudagar* v *Massecta*, (1850) N. W. P., S. D. A., 55; *Jeban* v. *Khorjab*, (1853) N. W. P., S. D. A. 59; *Sheomunnog* v. *Khadim*, (1854) N. W. P., S.D.A., 161; *Matadeen* v. *Hookum Singh*, (1860) N.W.P., S.D.A, 280; *Bolaki* v. *Joykishen*, 7 N.W.P.H.C R., 203; *Ragunath* v. *Thakuri*, I.L.R., 4 All, 16; *Vayalil* v. *Udaya*, 2 M.H.C.R., 365; *Balaji* v. *Dogi*, (1884) B.P.J., 59; *Sawaba* v. *Alejia*, I.L.R., 11 Bom., 475.

(4) *Lachman* v. *Buldeo*, (1883) A.W.N., 91.

(5) *Cf. Merwanji* v. *Syed Sirdar Ali*, I.L. R., 23 Bom., 510 (512, 513).

(6) *Merwanji* v. *Syed Sirdar Ali*, I.L.R., 23 Bom., 510 (512, 531); *Newby* v. *Sharpe*, 8 Ch. D., 32 (48).

(7) *Amatool Syed Ahmad Ali*, (1852) S.D. A., 193; *Anundmayee* v. *Jadoomonee*, (1853) S.D A., 59; *Oodit Purkash* v. *Martindell*, 4 M.I.A., 444.

of making a usufructuary mortgage fraudulently concealed from the mortgagee the existence of a decree for sale of the mortgaged property, the mortgagee was held entitled to sue the mortgagor for the mortgage-money notwithstanding that, at the sale held in execution of the sale decree, he had himself purchased the mortgaged property. In such a case, as Burkitt, J., remarked, "the security the mortgagor gave to the plaintiff was absolutely illusory, and one of which he might have been deprived at any moment unless he chose to advance more money." (1) So where the mortgagor prevented the mortgagee from getting possession, and evaded having his name registered in the Collector's books, the mortgagee was held to be justified in suing for money instead of for possession. (2) But where the dispossession is due to the conduct of a third party, the mortgagee cannot sue the mortgagor for recovery of the mortgage-money, for he has his remedy in a suit for dispossession against the stranger. Even the fact that the stranger rested his claim on an assignment from the mortgagor will not render the latter personally liable, for he had a perfect right to assign his equity of redemption (3) (§ 1267).

The mortgagee's right to relief may sometimes depend upon the nature of possession assured to him. If he had mortgaged to him a share in an undivided village, the mortgagee could not hope to obtain physical possession, although the covenant be that possession of such share should be delivered to the mortgagee. Such possession, however, would be by the enjoyment of profits beyond which the mortgagee cannot claim. (4) But even where the mortgagor had to take no active part in placing his mortgagee in possession of the property, he must not use machinations to prevent the mortgagee obtaining it. (5) The mortgagee would seem to have the same remedy if he is ejected from only a part of the land. (6)

Limits of the rule.

1594. The clause would appear to have no application to an anomalous mortgage as where the mortgagee has the right to remain in possession for a stipulated period, in which case all that he can sue for is damages for the breach of contract by the mortgagor in not delivering possession. (7) Again, the mortgagee cannot sue to recover his money, if only there is deficiency in the assets. (8)

The mortgagee may be precluded by his acquiescence in his dispossession from availing himself of this section. Thus, where in a mortgage of twelve villages it was stipulated (*a*) that the mortgagor shall pay interest at two per cent. until the delivery of possession of the aforesaid villages, and (*b*) that the mortgagee shall remain in their possession until satisfaction of the last pie of the principal and interest, and the possession was granted to the mortgagee, but owing to the grants and settlements made by Government in favour of other persons, the mortgagee lost possession of six of those villages, and of another village in course of a few years, but he took no action to recover

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(1) *Ahmadullah* v. *Salar Baksh*, (1905) 2 A.L.J.R., 241 (243).

(2) *Seetu Sah* v. *Net Singh*, (1853) N.W.P. S.D.A., 286.

(3) *Jhabbu Ram* v. *Girdhari*, I.L.R., 6 All., 300 (302); *Gokul* v. *Shrimal*, 6 Bom. L.R., 288.

(4) *Khushali* v. *Makundi*, (1882) A.W.N. 99.

(5) *Linga Reddi* v. *Sama Rau*, I.L.R., 17 Mad., 469 (471).

(6) *Nash* v. *Palmer*, 5 M. & S., 374 (379, 380); *Fowler* v. *Welsh*, 1 B. & C. 29; Platt on Covenants, p. 312. This view is now embodied in s. 7 (*c*) of the Conveyancing Act.

(7) *Chaplain* v. *Southgate*, I.L.R., 10 Mad. 384; *Hunt* v. *Allen*, Winch., 25.

(8) *Gopalasami* v. *Arunachella*, I.L.R., 15 Mad., 304; *Nakchedi* v. *Ramchariter*, I.L.R., 19 All., 191.

his mortgage-money, but remained satisfied for 31 years with the diminished security and the possession of the remaining villages. It was held that the mortgagee had lost his remedy by acquiescence in his dispossession.(1)

1595. Disturbance by "any other Person."—The question whether the mortgagee is entitled to relief for disturbance *by any other person* with or without title is one which invites comment. As the clause is worded, it would seem to make no difference whether the disturbance is caused by a person with a lawful title, or by one who is a mere trespasser. But the policy of holding the mortgagor liable for the act of a trespasser is not obvious. In England where such covenants are usually inserted in mortgage-deeds, they are understood to have but a limited operation. "The rule has been correctly stated at the bar," observed Lord Ellenborough, "that, where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is because as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts, which the folly or malice of strangers might suggest, and, therefore, the law has properly restrained it, within its reasonable import, that is, to lawful title. It is, however, different where the individual is named, for then the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise."(2) Of course, the covenant may by express words be extended to persons claiming or *pretending to claim* any right, in which case it would be so construed.(3) Following the English rule of construction, this clause has been construed in the limited sense as relating only to persons *with a lawful title*, it being held that the disturbance of the mortgagee's possession by a trespasser does not confer on the mortgagee a right to sue for relief under the section.(4) In this view a usufructuary mortgagee has no personal remedy against the mortgagor if he is ejected by a stranger without any title, and his only course would then seem to be to maintain a suit against the trespasser, or against the mortgagor if he elects to proceed against him on the covenant for title.(5) In the former case, he is entitled to and the costs of the suit to the principal sum advanced;(6) in the latter case his suit may take a precarious turn, if the mortgagor makes good his title. As it is, the clause is inaptly worded, for if it was intended to hold the mortgagor liable only against the *lawful* disturbance of any other person, the omission of the qualifying word, to be found in the corresponding clause of the English Statute, is a serious defect, in the absence of which qualified construction is not strictly warranted by the unqualified language of a Statute.(7) If, however, the interpretation placed upon it by the Courts is correct, the mortgagee, if dispossessed by a trespasser, will, it is apprehended, have no other remedy than a claim for compensation on the covenant for title,(8) or on the mortgagor's failure to defend his title. (9) A similar restriction would seem to be justifiable in interpreting a similar phrase "*without interruption*" used with reference to the covenants by the lessor.(10)

(1) S. 65 (*a*), (*b*).
(2) S. 72 (*c*).
(3) See *Norendra Nath* v. *Kamal Basini*, I.L.R., 23 Cal., 563 (572), P.C.
(4) S. 65 (*a*).
(5) S. 108 (*b*).
(6) S. 108 (*c*).
(7) *Cf. Visvalinga* v. *Palaniappa*, I. L. R., 2 Mad., 1 (3).
(8) *Visvalinga* v. *Palaniappa*, I. L. R., 21 Mad., 1 (3); *Gaya Pershad* v. *Ganga Bishun*, (1910) I.C. (All.) 898.
(9) *Sheo Shunker* v. *Baghee*, (1861) N. W. P., S.D.A., 412.
(10) *Partab Bahadur* v. *Gajadhar*, I. L. R., 24 All., 521 (531, 532), P. C.; *Khuda Baksh* v. *Alimunnissa*, I. L. R., 27 All., 313; *Ganga* v. *Lachman*, I. L. R., 8 All., 194.

1596. Where, however, a mortgagee having obtained possession of all except a small portion of the mortgaged property, instituted a suit for mortgage-money, on the ground that he had not been put in possession of all the property mortgaged, it was held that, as he had agreed to accept the contract, though he did not get possession of the whole property, he could not at one and the same time avail himself of the benefit of the contract and of the remedy provided for its breach.(1) So if the mortgagee, while aware that the property is likely to pass out of hands, takes the precarious security at his own risk, he has received what he bargained for, and cannot complain.(2) In one case, the mortgagor had mortgaged a certain property to *A* and then contracted to sell it to *B* who sued both the mortgagor and *A* for specific performance and obtained a decree, which, however, erroneously directed payment of the price to the mortgagor instead of directing its payment, as it should have done, to *A*. The defect was not remedied and the money was paid, as directed, whereupon *A* sued both the mortgagor and *C* for his money, and it was held that he was entitled to a mortgage-decree against both the mortgagor, and the property in the hands of *B*.(3)

1597. Although the mortgagee may be deprived of a substantial portion of his security, still if he had acquiesced in his diminished security for a considerable period, say, thirty years, he could not thereafter claim interest in lieu of the rents and profits of the property of which he was dispossessed.(4) So where at the time of the mortgage one of the mortgaged villages was the subject of a suit for pre-emption, which being successful, the village passed out of the hands of the mortgagor, but the mortgagee made no effort to obtain any equivalent from the mortgagor, but remained in possession of the rest of the mortgaged property for some years, apparently satisfied with the security, till the mortgagor sued him for redemption. It was held that inasmuch as the mortgagee had for nine years since his dispossession taken no steps to obtain a substitute, or compensation for the lost village, he must be deemed to have acquiesced in its diminution.(5) Where, by the mortgage-deed, the mortgagee is, on the mortgagor's failure to pay interest on a certain date, entitled to possession, and the mortgagor pays neither interest nor delivers possession, the mortgagee is entitled to sue for his money.(6) If the mortgagee, owing to the mortgagor's failure to deliver possession, is not able to realize his interest from the usufruct, and institutes a suit for rent, he may bring another suit for the recovery of principal together with the residue of interest, up to the date of its institution.(7) There is nothing in this clause to limit it to cases in which the mortgagor fails to secure undisturbed possession, to the mortgagee *in the first instance*.(8) The contrary was laid down in an Allahabad case, but in which the decision mainly turned upon the construction of the word *dakhalabi* used in the mortgage, and which was held to exclude a covenant for *continuance* of possession.(9) The clause, as it is worded, is wide enough to include every instance of failure by a

(1) *Partab Bahadur* v. *Gajadhar*, I.L.R., 24 All., 521 (531, 532), P. C.; *Khuda Baksh* v. *Alimunnissa*, I. L. R., 27 All., 313; *Lachman* v. *Baldeo*, (1883) A.W.N., 9.

(2) *Collector* v. *Cavaly Venkata*, 8 M.I.A., 529; *Dhagudo Ramchandra* v. *Balkrishna*, I.L.R., 8 Bom., 190.

(3) *Kandasami* v. *Jagadamba*, 10 M. L. J. R., 353.

(4) *Partab Bahadur* v. *Gajadhar*, I.L.R., 24 All., 521 (531, 532), P. C.; *Khuda Baksh* v. *Alimunnissa*, I.L.R., 27 All., 313 (317).

(5) *Khuda Baksh* v. *Alimunnissa*, I.L. R., 27 All., 313.

(6) *Saravana* v. *Chennammal*, I. L. R., 15 Mad., 65.

(7) *Govinda* v. *Mana*, I. L. R., 14 Mad., 284; *Nanu* v. *Raman*, I. L. R., 16 Mad., 335 (338).

(8) *Hiralal* v. *Ghasitu*, I. L. R., 16 All., 318 F. B. But see *contra per* Mahmud, J., in *Jhabbu Ram* v. *Girdhari*, I. L. R., 6 All., 298 (301).

(9) *Per* Mahmud, J., in *Jhabbu Ram* v. *Girdhari*, I.L.R., 6 All., 298 (300, 301).

mortgagor to secure a mortgagee in undisturbed possession at any time during the period for which the mortgagee was entitled to remain in possession. Hence, where the mortgagee gave the property mortgaged to him on a lease to the mortgagor for a term, with a covenant that he might renew it on compliance with certain conditions, and the latter, on expiry of the lease, did not fulfil the conditions, and refused to give up possession, it was held that the continuance of the mortgagor in possession, without right and against the consent of the mortgagee, entitled the latter to recover his mortgage-money.(1)

1598. Where a mortgage with possession for a term of 15 years contained a stipulation that should there arise any cause which might be considered likely to affect the total or partial loss of the principal mortgage-money and interest, the mortgagee shall have power to realize the entire mortgage-money, it was held that the section did not empower the mortgagee to sue for the mortgage-money from mere caprice or unreasonable apprehension of loss to call in his debt, but as only giving him this right, if anything should arise which in view of reasonably minded men might cause any such loss. Such apprehension would, for instance, be reasonable, if the mortgagee discovers the existence of a prior mortgage (2) Again, the usufructuary mortgagee may recover the mortgage-money by sale of the property, if it was under the terms of the mortgage recoverable "from the mortgaged property."(3) But such a deed is in the nature of a simple mortgage usufructuary (§ 1252).

1599. Provision for Alternative Security.—The last clause provides for cases where the property is destroyed by causes not within the control of either party. In such a case, the owner of the property being the mortgagor, he must bear the consequence of its destruction of depreciation, and must make good to the mortgagee for his lost or impaired security. If he fails to do so within a reasonable time, the mortgagee has a right to sue him for his mortgage-money. But before he can sue for recovery of the mortgage-money, it is in the first place essential that he should give the mortgagor an option of furnishing him with another security, the sufficiency of which would be judged by the standard prescribed in section 66. The mortgagee must give his mortgagor a reasonable time, that is, such time, as, having regard to the extent and nature of the security to be substituted, would be considered sufficient for the purpose by a man of ordinary prudence. It may be assumed that a mortgagee who, taking advantage of the mortgagor's misfortune rushes for his money, would have himself to thank, if his suit is dismissed for non-compliance with the preliminary conditions. Where the destruction of the security is attributed to the wrongful act or default of the mortgagor, the suit would lie under clause (*b*) rendering the procedure of the last clause unnecessary. On the other hand, if the destruction of the property was due to the wrongful act or default of the mortgagee himself, he has then no right to sue: *ex turpi non oritor actio*,(4) but he may on the contrary be still subject to be redeemed. Thus a mortgagee in possession, who, in collusion with the Government, suffered the forfeiture of the property for non-payment of rent and thereby secured another land in exchange, was held still liable to be redeemed out of the property which he had acquired by exchange (5) since the property, whatever

Last clause.

(1) *Per* Banerji, J., in *Hira Lal* v. *Ghasitu*, I.L.R., 16 All., 318, (323, 324), F. B.

(2) *Bhawani* v. *Sheodhal*, I. L. R., 26 All., 479 (482).

(3) *Narpat* v. *Ram Ratan*, 5 A.L.J. 130; *Jafar Husen* v. *Ranjit Singh*, I.L.R. 21 All., 4; explained in *Kashi Ram* v. *Sardar Singh*, I.L.R., 28 All., 157 (160).

(4) "No cause of action can arise out of a wrong."

(5) *Babaji* v. *Magniram*, I.L.R., 21 Bom., 396 (399).

be its form, whether money or land, would be impressed with the trusts and obligations of the original property which it represents. (1) Indeed, it has been held in Bombay that the general rule that a Government sale for arrears of revenue gives a title against all the world, is subject to the exception where the sale is the result of the default of the mortgagee, and which does not pass the property freed from its liability to redemption by the mortgagor.(2) Similarly, it has been held that the sale of mortgaged premises under the Land Acquisition Act, is not a destruction of the security within the meaning of the clause, and does not enable the mortgagee to sue his mortgagor personally. (3) But, in such a case, it is conceived, the mortgagee will be entitled to hold the purchase-money as his substituted security, for, according to the Privy Council the purchase-money is the new form which his original security has taken, and he is, therefore, entitled to retain it. (4) But one co-mortgagee cannot on that account sue another co-mortgagee for the refund of money erroneously paid over to him by the Collector. (5)

1600. The operation of this clause is limited to cases of natural or accidental destruction of the property. Sometimes the deed itself provides for such a contingency, and whenever it is so, its conditions would be necessarily enforced. (6) But in the absence of covenant the clause affords statutory protection to mortgagees bringing their case within its purview. Thus, where a usufructuary mortgagee was deprived of his possession by diluvion (7) or accidental fire, (8) he was held entitled to call for his money. But if on mortgage of a building the mortgagee was by contract under an obligation to rebuild or restore it, his statutory right would then merge in his contractual obligation to repair or restore the property. (9) And so it was held in an early case that a creditor in whose hands a pledge has perished by accident, and without negligence on his part, is entitled to proceed against his debtor for recovery of the debt. The rule of Hindu law (10) in this matter is in accord with that of the English and Roman laws. (11)

It has already been before stated that, where the mortgagor obtains other property in substitution of the one formerly held by him and mortgaged, the mortgagee is entitled to fall back upon the property, so acquired for his security.

1601. Such Suit is not for "Debt".—No succession certificate is necessary in a suit upon a usufructuary mortgage instituted by the heirs of the deceased mortgagee, in a case where they become entitled to a personal decree against the mortgagor on the happening of certain events, as for example, the destruction of the security. (12) But in the above case, if the heirs had sued on

(1) *Viraraghava* v. *Krishnaswami*, I. L. R., 6 Mad., 344 (347); In re *Stewart's Trusts*, 22 L. J. (N. S.), 369.

(2) *Kalappa* v *Shivaya*, I. L. R., 20 Bom., 492 (494); *Sambhu* v. *Babaji*, (1889) B. P.J., 160; *Sidhee Nazar Ali* v. *Ojoodhyaram*, 10 M. I. A., 540 (559).

(3) *Arumugam* v. *Sivagnana*, I. L. R., 13 Mad., 321; *Debendranath* v. *Mirza Abdul*, 10 C.L.J., 150 (177, 178); but see *Basa Mal* v. *Tujammal*, I. L. R., 16 All., 78; *Palaneappa* v; *Mashne*, 14 Bur.L.R. 159.

(4) *Byjnath* v. *Ramoodeen*, 21 W. R., 223; *Hem Chunder* v. *Thaku Moni*, I. L. R., 20 Cal., 533; *Joy Sankari* v. *Bharat Chandra*, I. L. R., 26 Cal., 434 (439).

(5) *Kunj Behari Lal* v. *Parsotam*, I. L. R., 12 All., 137 (139, 140). As to the mortgagee's charge on the proceeds of revenue sale see s. 73. *post*.

(6) *Ganesh* v. *Maya Ram*, (1882) A.W.N., 99.

(7) *Sheo Golam Singh* v. *Dinker Dyal*, 21 W. R., 226; *Bhawani* v. *Jang Bahaaur*, 7 A. L. J., 391.

(8) *Venkateshwara* v. *Kesava*, I. L. R., 2 Mad., 187.

(9) *Venkateshwara* v. *Kesava*, I. L. R., 2 Mad., 187 (192); see s. 108 (*o*) Comm.

(10) Vyavahara Mayuka, Ch. V, s. 11, Cl. 4; Stokes' Hindu Law Book, p. 114. *Cf.* Art. 2131, Code Napoleon.

(11) *Vithoba* v. *Chotalal*, 7 B. H. C. R., 116.

(12) *Umesh Chandra* v. *Mothura Mohan*, I. L. R., 28 Cal., 246 (249).

a cause of action which had accrued during the lifetime of the mortgagee, a succession certificate would have been clearly necessary. (1)

1602. Damages when allowed.—Although the section only speaks of the recovery of mortgage-money, it has been held that interest by way of damages may be awarded under this section.(2) And, in an Allahabad case, where the mortgagor failed to deliver possession, whereupon the mortgagee sued for recovery of principal and interest, but failed to establish the mortgage, the Court treated the suit as one for damages for a breach of contract in writing registered, and awarded the sum claimed regarding the principal sum with interest at the contractual rate as the measure of damages.(3) Such a course is intelligible, for the mortgagee may say " you have got back the land which you gave me as a security for my money and the interest, you must at any rate repay me that money and interest."(4) But the mortgagee cannot have both the interest and mesne profits.(5) So in case of breach of a covenant for title the measure of damages was held to be the original debt.(6)

1603. Limitation.—The limitation for a suit arising under this section is six years, whether the mortgage-deed be(7) or be not registered,(8) calculated from the time when the event contemplated in the section happens,—as when he is deprived of his security, or is deprived of his possession.(9)

Reasonable time.

1604. Under the last clause the security demanded must be furnished within a "reasonable time"; failing which the mortgagee may sue him for the mortgage-money. What is a " reasonable time " must, of course, depend upon the circumstances of each case. But the mortgagee must not construe this phrase too leniently, otherwise he might lose his alternative remedy. Such befell the plaintiff the transferee of a usufructuary mortgage of 12 big has of land by the river Ganges executed in 1888 and of which 11 bighas was submerged in 1899 and the land being wholly submerged in the rains of 1900. The plaintiff demanded a substituted security after the rains of 1899 but took no action for seven years when he sued him for the mortgage-money, but the Court held that he had waited too long, inasmuch as six months was a sufficiently reasonable time which he should have allowed the mortgagor to find another security, and that counting limitation from that date, the plaintiff's suit was barred whether the period be three or six years.(10) Of course, the mortgagee need not allow any time at all if on a demand being made for substituted security, the mortgagor refuses to furnish one, and in which case limitation would begin to run against the mortgagee from the moment of the mortgagor's refusal.(11)

Punjab Limitation.

1605. The provisions of the last clause of this section have been held to be inapplicable to the Punjab by virtue of the special provisions of its own local Limitation Act.(12)

(1) *Umesh Chandra* v. *Mothura Mohun*, I.L.R., Cal., 246 (249).

(2) *Linga* v. *Sama*, I. L. R., 17 Mad., 469.

(3) *Mahesh Singh* v. *Chauharja*, (1882) A. W. N., 31 (32).

(4) *Kherodhur* v. *Doolee Chand*, 19 W.R., 424.

(5) *Ibid.*

(6) *Toppin* v. *Field*, 4 Q. B., 395; but *contra per* Markby, J., in *Sayeb Ali* v. *Mahomed*, 7 W. R.. 196 (197), which was, however, an *obiter dictum*.

(7) Art. 116, Limitation Act (IX of 1908).

(8) Art. 120, Limitation Act (IX of 1908).

(9) *Unichaman* v. *Ahmad*, 1. L. R.; 21 Mad., 242 (243); *Ram Jewan* v. *Jagarnath*, I.L.R., 25 Cal., 450 (454); but in *Syed Hadi* v. *Nural Hasan*, 8 O. C., 166, the limitation is said to be only 3 years under Art. 115.

(10) *Bhawani* v. *Jang Bahadur*, 7 A. L. J., 391.

(11) *Ib.*, p. 393.

(12) S. 9 (2), Punjab Limitation Act (I of 1900), *Nanak Chand* v. *Mehr Jawata*, (1910) P. W. R. 137; *Gopal Das*, v. *Hari Singh*, (1909) P. R. No 88; *Cf.* also Punjab Alienation of Land Act (XIII of 1900); *Dula Singh* v. *Dial Singh*, (1910) P. R. No. 22.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling in default of payment of the mortgage-money, the mortgaged property, or any part thereof without the intervention of the Court, [1] is valid in the following cases and in no others (namely) :—

Power of sale when valid.

(*a*) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette ; [2]

(*b*) where the mortgagee is the Secretary of State for India in Council ;

(*c*) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court, under section fifty-seven, of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in

(1 & 2) The words commencing with "or a member of any other race" up to the end of the paragraph, have been added by the Amending Act III of 1885, s. 5.

trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees' and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette.[1]

1606. Analogous Law.—In this section, again, the rule of English law, has been, as regards the mofussil, departed from. The provisions applicable to the Presidency towns are, however, the same as those contained in the English Act, sections 19—22. [2] The section has changed the law as it was administered before the Act when the mortgagee could exercise the power of sale also in the mofussil, [3] but this was not always conceded. [4]

Before the passing of the Act, the question, as to the power of the mortgagee to sell without the intervention of the Court, was the subject of divergent opinion between the High Courts of Bombay and Calcutta, the former holding that the

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(1) The words commencing with "or a member of any other race" up to the end of the paragraph, have been added by the Amending Act III of 1885, s. 5.

(2) Conveyancing Act, 1881 (44 & 45 Vict., C. 41).

(3) *Pitamber* v. *Banmali*, I.L.R., 2 Bom., 1; *Bhanoomutty* v. *Premchand*, 15 B. L. R., 28. The decisions on this subject are so conflicting that it is impossible to reconcile them. Thus while the power was held to be enforceable in *Sunatun* v. *Koonjo* (Unrep. Cal. case decided 23rd September 1869), it was held to be unenforceable in *Bhuwanee* v. *Joykishen*, (1847) S. D. A., 354; *Dourett* v. *Wise*, 2 I. J., 280 (292), in which Peacock, C. J., took part.

The Judges were *dubitante* in *Bhanoomutty* v. *Premchand*, 15 B. L. R., 28 (31).

The Bombay cases present the same want of harmony. The power was denied in *Keshavrav* v. *Bhavanji*, 8 B.H.C.R. (A.C.), 142. The right was, however, conceded in *Pitamber* v. *Banmali*, I.L.R., 2 Bom., 1; but it was said to be contingent on notice to the mortgagor; the same view being reiterated in *Bholanath* v. *Unodapersad*, 1 Boulnois, 97 (101); *Jagjivan* v. *Shridhar*, I.L.R. 2 Bom., 252 in which Melvill, J., modified his views as expressed in *Keshavrav* v. *Bhavanji*, 8 B H.C. R. (A.C.), 142, though he justified the validity of the power on the ground that the parties must be held to have contracted with reference to the English law. So in Bengal, in *Bhanoomutty* v. *Premchand*, 15 B. L. R., 28, the Court intimated their doubt as to the soundness of the earlier case. The validity of the power of sale was again conceded by the Bombay High Court in *Bulakhi* v. *Tukarambhat*, I.L R., 14 Bom., 380. Thus then the opinion in favour of the validity of such powers may be said to have somewhat crystallized, before the Act restored the earlier law.

(4) *Keshavrav* v. *Bhavanji*, 8 B. H. C. R., (A. C.), 142; *Bhuwanee* v. *Joykishen*, (1847) S. D. A., 354.

power, if given, was valid,(1) and the latter that it was invalid.(2) The Calcutta High Court seems, however, in a later case,(3) to have doubted its former decisions, and in one unreported case the power of sale was recognised.(4) In one case the question went up to the Privy Council, but their Lordships negatived the power of sale, not on the ground that it was invalid, but (being in that case given on default on payment of interest), on the ground that it was of a penal nature.(5) It is conceived that, in dealing with transactions entered into before the Act, the rights of the parties will be determined according to the view taken by these two High Courts, and which seems to incline in favour of the validity of a private sale, when "not exercised in a fraudulent or improper manner."(6) The law as regards moveable property is contained in section 176 of the Indian Contract Act,(7) and it confers upon the pawnor the power to "sell the thing pledged, on giving the pawnor reasonable notice of the sale."

The Code Napoleon absolutely prohibits the power of sale, declaring any stipulation for a power of sale, to be exercised by a mortgagee otherwise than through the Court to be null and void.(8) This rule has been adopted into most of the continental systems.(9) On the other hand, the ancient Hindu Law was only slightly more liberal to the mortgagee. For in the words of Brihaspati: "When the debt is doubled by the interest, and the debtor is either dead or has absconded, the creditor may attach his pledge, or the debtor's chattel, and sell it before witnesses; or having appraised it in an assembly of good men, he may keep it ten days, after which having received the amount of his debt, he must relinquish the balance, if there be any ..... When the pawnor is missing, let the creditor produce his pledge before the King; it may then be sold with his permission."(10)

In England, however, the power of sale has been exercised by the mortgagee from very ancient times. Indeed in this respect, the power of the mortgagee has been much widened with time, so that while originally the power to be exercised must have been conferred by the deed, it is now presumed by force of a statutory enactment, unless it be excluded or limited by the deed. The section is expressly not retrospective, and leaves intact deeds executed anterior to the present enactment.

1607. Trustees' and Mortgagees' Powers Act, 1866.—The last clause declaring sections 6 to 19 of the Trustees' and Mortgagees' Powers Act, 1866, applicable to English mortgages executed between parties who are not Hindus, Muhammadans, etc., refers to the following sections:—

Powers of Mortgagees.

Powers incident to mortgagees.

6. "Where any principal money is secured or charged by deed on any immoveable property, or any interest 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,

(1) *Bholonath* v. *Unodapershad*, 1 Boulnois, 97 (101); *Keshavrav* v. *Bhavanji*, 8 B. H. C. R. (A. C.), 142; *Pitamber* v. *Banmali*, I. L. R., 2 Bom., 1; *Jagjivan* v. *Shridhar Balkrishna*, *ib.*, 252; *Bulakhi* v. *Tukaram*, I. L. R., 14 Bom., 377 (380).

(2) *Bhawanee Churn* v. *Joykishen*, (1847) S. D. A., 354; *Doucett* v. *Wise*, 2 I. J., 280 (292).

(3) *Bhanoomutty* v. *Premchand*, 15 B. L. R., 28; 23 W. R., 96.

(4) *Sonatun* v. *Koonjo*, unreported; cited in *Bhanoomutty* v. *Premchand*, 15 B. L. R. 28; 23 W. R., 96.

(5) *Venkatavarada* v. *Vencata*, 23 W. R., 91, P. C.

(6) *Jagjivan* v. *Shridar Balkrishna*, I. L. R., 2 Bom., 252.

(7) Act IX of 1872.

(8) Arts. 2078, 2090.

(9) Story's Bailments, s. 309.

(10) 1 Cole. Dig., p. 141 (Bk. I, Ch. III, s. 5, cl. 122).

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 :—

1*st*.—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 re-sell the property, from time to time, in like manner :

2*nd*.—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 hereinafter mentioned.

Receipts for purchase-money sufficient discharges.

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.

Notice to be given before sale; but purchaser relieved from inquiry as to circumstances of sale.

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 damnified by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling.

Application of purchase-money.

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.

Conveyance to the purchaser.

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 authorize 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.

Owner of charge may call for title-deeds and conveyance of legal estate.

11. At any time after the power of sale hereby conferred shall have become exerciseable, 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 surrendered 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.

Appointment of Receiver.

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 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.

Receiver deemed to be the agent of mortgagor.

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.

Powers of Receiver.

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.

Receiver may be removed.

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.

Receiver to receive a commission not exceeding five per cent.

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.

Receiver to insure if required.

17. Every Receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, 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.

Application of moneys received by him.

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.

This part to relate to charges by way of mortgage only.

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."

It would appear that the above sections would apply only to cases in which the deed *does not* confer any express power of sale; the section being applicable only to cases in which the deed *does* confer such a power.

1608. Genesis of the Section.—This section was drafted after considerable debate and differences of opinion among members of the Select Committee. "In the Bill, as introduced, powers of sale were subject to certain provisions for the protection of the mortgagor, declared valid in all cases. The Select Committee, to whom the Bill was first referred, disapproved of this provision and made the Bill declare (1) that such powers were invalid, except where the mortgagee was the Government, or the property was situate in the Presidency towns or Rangoon. The Law Commissioners of 1879 modified this section by allowing (2) powers of sale in all cases where the principal money originally secured was Rs. 500 or upwards. Lastly, the Select Committee at first adopted the section as modified by the Law Commissioners, but finally changed their minds, (3) and having formed the opinion that there were certain parts of the country in which the power was liable to be abused re-drafted the section in its

(1) See Bill No. II, s. 39.
(2) See Bill No. IV, s. 69.
(3) See their final Report, dated 24th January 1882, para. 4.

present shape." (1) Mr. (afterwards Sir Courtney) Ilbert in introducing the Amendment Act of 1885 thus observed on the section: "The object of the section was to set at rest, what had been previously a moot question, namely, whether, under the law of British India, a mortgagee could sell under an express power of sale without the intervention of the Courts." (2) There can be no doubt that there was a custom among English people resident in the country, when money was lent on the mortgage of land, to insert in the mortgage-deed a power of sale, authorizing the mortgagee, subject to certain conditions, to sell, without the intervention of a Court, the mortgaged property, if the money was not paid when it became due. But it was felt that a power of this kind, if extended to the mofussil mortgages, might work mischievously, especially in rural India. (3) Accordingly, the Select Committee re-drafted the section in its present shape, (4) and the Amending Act of 1885 added certain words to "make clear what seems, on the whole, to have been the intention of the framers of the section, by declaring the cases in which the power of sale is not to be valid. And, as Mr. Justice Muthusami Ayyar has pointed out, that there are other classes which it is even more necessary to exclude from the operation of the exceptional provisions than Hindus, Muhammadans and Buddhists," (5) words were added empowering Local Governments to exempt also such classes.

1609. Principle.—The power of sale without the concurrence of the mortgagor is incident to all mortgagees in England unless it be excluded or limited by the mortgage-deed. On the other hand, such powers were rarely found inserted in the contracts executed in the mofussil, and even when they were so found, the Courts always presumed against their validity and regarded them as repugnant to the spirit, if not to the letter, of the Regulations, and unsuited to the circumstances of this country. (6) Such a power easily lends itself to abuse, and Melville, J., pronounced his anathema upon it in a case which is referred to in the draft section as its authority. "I am strongly disposed to agree with the Calcutta Judges," he remarked, "as to the impolicy of allowing sales by mortgagees in the mofussil. The mass of mortgages consists of ancestral fields, made by ignorant cultivators to greedy and unscrupulous money-lenders. The great object of the money-lender is to get the land into his own hands, and, when he has succeeded, he is the worst possible landlord, spending nothing on the improvement of his estate, and rack-renting the unfortunate ryot whose proprietary rights have passed from him, but who is willing to slave for the usurer rather than abandon the fields of his fathers. When we stand between two classes such as these, it is the borrower, and not the lender whom we should protect." (7) As the Calcutta Judges said: "This Court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell his debtor's property to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee or some of his connections at an inadequate price, leaving the lender

(1) Macpherson on Mortgage (7th Ed.), p. 672.

(2) Abstract of Proceedings of the G.-G.'s Council, p. 182 (Appendix).

(3) See Mr. Crosthwaite's remarks on the passing of the Act, *Gazette of India*, Extra Suppl., Feb. 7, 1882 (Appendix).

(4) See Mr. Stokes' speech on presenting the final Report, *Gazette of India*, Extra Suppl., Feb. 7, 1882 (Appendix).

(5) Mr. (now Sir Courtney) Ilbert's speech, Proceedings of the G.-G.'s Council, p. 183.

(6) *Bhuwanee* v. *Joykishen*, (1847) S. D. A., 354.

(7) *Keshavrav* v. *Bhavanji*, 8 B. H. C. R. (A. C.), 142 (145).

at liberty still to pursue the borrower for the balance that may remain after the sale,"[1] "We hope," wrote the Law Commissioners, "that the artful contrivances by which land is often acquired much under its value by means of the process of foreclosure may thus be checked, and that sales, being made openly under the supervision of the Courts, will be fairly conducted." The section, as it now stands, generally enacts that no mortgagee can sell property, in virtue of a power conferred on him by the mortgage-deed, without the intervention of the Court, except only in certain cases. These are :—

(*a*) where the mortgage is an English mortgage (*i.e.*, in the ordinary English form), *and* neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, Buddhist, or a member of any other class exempted by the Local Government;

(*b*) where the mortgagee is the Secretary of State in Council;

(*c*) where the mortgaged property or any part of it is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

1610. Meaning of Words.—"*English Mortgage*:" is defined in section 58 (*e*). "*Hindu, Muhammadan, &c.*" converts to Christianity are not therefore within the exemption. "*Secretary of State for India* :" *i.e.*, the Indian Government, which contracts officially on behalf of, and in the name of, the Secretary of State. "*Such a power* :" in clause 2 refers back to the power of sale mentioned in clause 1, and has no reference to the clause that follows it.[2]

1611. Power of Sale.—Whatever may have been the law previously to the Act, there can be no doubt that the rule, as now enacted, invalidates a sale not made through a Court except in the cases here provided. And this is consistent with the language of section 58 (*b*) which empowers the mortgagee to "*cause* the mortgaged property to be sold," and not to sell it himself.[3] But this clause does not empower the mortgagee to sell in every case, for it has been held that, if previously to his sale an order for sale had been made by the Court, he could not then be allowed to sell out of Court under his express power.[4] But the mere commencement of an action for redemption will not stop the sale.[5] It may be, however, stopped by payment into Court of the sum claimed to be due,[6] or even tender of it at the sale.[7] So the mortgagee cannot exercise power of sale after the decree *nisi* for foreclosure is passed.[8] The mortgagee exercising the power of sale under this section must have the power expressly and clearly given to him. It must also be stated if the power will enure for the benefit of those who may represent him upon any change of interest, although this is not necessary in England, where the *statutory* power passes to an assignee of the security by force of section 2 [9] of the Statute: "where both first and second mortgagees have power to sell and to give receipts, which shall discharge the purchaser from suing to the application of the purchase-money, they may concur in a sale, the one giving a receipt only for so much of the purchase-money as will discharge his debt, and the other for the balance."[10]

The mortgagee, it would appear, may, before sale, demand from the mortgagor all deeds and documents in his possession or power, and necessary for the

(1) *Bhuwanee* v. *Joykishen*, (1847) S. D. A., 354 (364).

(2) *Madras Deposit and Benefit Society* v. *Passana*, I. L. R., 11 Mad., 201 (203).

(3) See Comm. under s. 58 (*b*); *Kishanlal* v. *Gangaram*, I.L.R., 31 All., 28; *Mohammad Amin* v. *Jan Patel*, 12 C. P. L. R. 26 (30).

(4) *Re Claire*, 23 Ir. R., 281.

(5) *Adams* v. *Scott*, 7 W. R. (Eng.), 213.

(6) *Whitworth* v. *Rhodes*, 20 L.J., Ch., 105.

(7) *Jenkins* v. *Jones*, 2 Gif., 99. See Fisher, § 936.

(8) *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857.

(9) *M'Carogher* v. *Whieldon*, 34 Beav., 107; Fisher, § 950.

(10) Fisher, § 973.

purpose of inviting purchasers.[1] On the other hand, if he is not himself in possession of the title-deeds relating to the property, having deposited them by way of equitable mortgage, his power of sale is suspended though he does not thereby permanently forfeit it, since it reverts to him as soon as he recovers the deeds.[2]

1612. Express and Statutory Powers.—In England a power of sale formerly had to be expressly conferred by the mortgage-deed. But since the operation of recent statutes conferring the power on mortgagees, express powers have fallen into disuse. But since there is no statutory provision conferring such power upon any class of mortgagees in India, the only power that could be enforced by the Indian mortgagee, is an express power which should have been inserted in the deed. But even as regards express powers, the English and Indian laws present certain divergent features which it should be as well to notice here.

English express powers.

1613. In England, the express power of sale may be conferred by means of a trust for reconveyance on payment of the mortgage-money on the day appointed, and, in default of such payment for sale, or it may simply be a clause in the mortgage-deed empowering the mortgagee to sell the property at any time after default without the intervention of the Court. In either case the mortgagee may exercise the power *without* notice to the mortgagor unless it was necessary under the terms of the deed. (3)

A trust for sale by way of security may be created in a variety of ways, amongst which may be mentioned cases in which the property is conveyed to the use of the mortgagee for a term, with a proviso for redemption, and subject thereto, to the use of trustees in fee upon trust to sell. This form requires the intervention of at least three persons, and to obviate which, a simpler form is to dispense with either the mortgagee or the trustees, and to convey the property to only one or the other in trust to sell if the money is not paid on a given day, adding the clause for redemption. But of these forms, the one conveying the property in trust to the mortgagee has obvious advantages. For while the mortgagee is bound to subserve his own interest, the trustee is bound to attend equally to the interest of the mortgagor. Such a form, however, is seldom likely to be encountered in this country.

As regards the power of sale usually covenanted for in the English form of mortgages, and in which alone it can now be validly exercised, the Indian rule follows only the analogy of the English cases. In England, the power may be exercised by the mortgagee without notice, but the section clearly overrides this practice by making provision for the giving of notice as a *conditio sine qua non*.

1614. English Statutory Powers.—The English Statutes on the power of sale have the effect of enlarging rather than curtailing the rights of the mortgagee. The first Statute, known as Lord Cranworth's Act, (4) confers the power of sale on all mortgagees subject to anything that may have been otherwise stipulated in the deed. Such power may be exercised at any time on expiration of one year from the date when the principal money was payable or if the interest due thereon has remained unpaid for six months. The statutory

(1) *Muthusami* v. *Ayyalu*, 13 M. L. J. R., 367.
(2) *Re Claire*, 23 Ir. R., 281.
(3) *Hawkins* v. *Ramsbottom*, 1 Pri., 138.
(4) 23 & 24 Vict., c. 145.

power of sale is thus expressed in English Conveyancing: "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 re-sell the property from time to time in like manner."(1) This Statute has since been repealed,(2) and superseded by the Conveyancing Act, 1881,(3) under which the power of sale implies—"A power, when mortgage-money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale and to buy in at an auction or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby."(4) The power is limited only to mortgages made by deed and does not extend to equitable mortgages, or mortgages of copyhold estates which are effected not by deed or by entry on the Court-rolls. It would be naturally implied in a contract to execute a legal mortgage with the power of sale. Somewhat similar provisions confined to registered charges with a power of sale are to be found in the Land Transfer Act, 1875.(5)

1615. Who may exercise the Power.—The right to sell under the power of sale in a mortgage-deed depends upon the express terms of the convention. If the power is reserved to the mortgagee alone, his executors, administrators and assigns cannot avail themselves of it.(6) With the statutory powers it is different; for they may be exercised "by any person for the time being entitled to receive and give a discharge for the mortgage-money."(7) But before the statutory expansion of the right, the law rigidly adhered to the contract, and if the deed did not expressly mention the "assigns," no person filling that character could exercise the power.(8) This view was supported on the ground that in such a case the mortgagor may have been unwilling to repose confidence in an unknown and uncertain person.(9) Even the circumstance that the assigns are empowered to give a valid receipt to the purchaser has been held not to be sufficient to confer on them the power of sale. In the case of money advanced by joint-mortgagees, on their joint account, the power conferred on the mortgagor may be exercised by any or all of them, or by the survivors or last survivor of them,(10) unless the deed has provided otherwise.(11) The fact that the mortgagees held on trust would not affect the rule.(12) On the other hand, if

(1) S. 11 (1st); 23 & 24 Vict., c. 145.

(2) By 44 & 45 Vict., c. 41, s. 71; 45 & 46 Vict., c. 38, s. 64.

(3) 44 & 45 Vict., s. 4, c. 71.

(4) S. 19 (1) (i); 44 & 45 Vict., c. 4, s. 71; *cf.* s. 6 of the Trustees' and Mortgagees' Powers Act, 1866, quoted *ante*.

(5) Ss. 27, 68; 38 & 39 Vict., c. 87.

(6) *Bradford* v. *Belfield*, 2 Sim., 264; *Titley* v. *Wolstenholme*, 7 Beav., 425.

(7) S. 21 (4), 44 & 45 Vict., c. 41. A similar clause existed in Lord Cranworth's Act, prior to which, however, the power was limited to the persons named. *Cooke* v. *Crawford*, 13 Sim., 91; *Cole* v. *Wade*, 16 Ves., 27; *Wilson* v. *Bannett*, 5 De G. and S., 475; *Osborne* v. *Rawlett*, 13 Ch. D., 774; In re *Morton and Hellett*, 15 Ch. D., 143 (145); Re *Rumney and Smith*, [1897] 2 Ch., 351.

(8) *Titley* v. *Wolstenholme*, 7 Beav., 425; *Macdonald* v. *Walker*, 14 Beav., 556; *Hall* v. *May*, 3 K. and J., 585; *Ockleston* v. *Heap*, 1 De G. and S., 640; *Ashton* v. *Wood*, 3 Sm. and G., 436, *per* James, L. J., in In re *Morton and Hellett*, 15 Ch. D., 143 (149).

(9) *Per* Jessel, M.R., in In re *Morton and Hellett*, 15 Ch. D., 143 (146).

(10) *Hinde* v. *Poole*, 1 K. & J., 383. This is now provided by the Conveyancing Act, 1881, s. 61, sub-s. (1) (44 and 45 Vict., c. 41).

(11) *Townsends* v. *Wilson*, 1 B. and Ald., 608; *Hall* v. *Dewes*, Jac., 189.

(12) S. 44, Indian Trust Act (II of 1882), s. 24 (1), Trustee Act, 1893 (56 and 57 Vict., c. 53, re-enacting on this point 44 and 45 Vict., c. 41, s. 38).

the mortgage was executed in favour of several mortgagees to secure distinct advances made by them, no individual mortgagee is presumably competent to exercise the power without the co-operation and concurrence of all of them, or, in the event of the death of some of them, of their legal representatives.(1) If two or more properties are jointly mortgaged and some of them only belong to the trust, the trustees may sell their own property unless the joint sale would be more beneficial. But the case, of course, is different if an undivided share of the same property is charged with a trust, in which case the entire property must be sold, because otherwise presumably undivided shares are likely to fetch their proper value.(2) The trustees are not only entitled but may be compelled to join with other persons exercising their power beneficially to the *cestui que trust*.(3) On a parity of reasoning it would seem that when the same property is burdened with several mortgages, all with power of sale, all the mortgagees may concur in exercising the powers.(4) But sale by the second or subsequent mortgagee subject to the rights of the prior mortgagees is valid.(5)

1616. Sale by Agent.—The power given to a mortgagee may be exercised by him through his attorney or agent, unless he is from the terms of the power precluded from exercising it vicariously.(6) Of course, the mortgagor is in no way prejudiced by the mortgagee's appointing an agent to do his work, for as against the mortgagor the mortgagee is himself responsible for its proper conduct, and against him the mortgagor may recover damages if the sale has not been properly conducted.(7) But if the power conferred is in respect of an undertaking of a public nature, it is a special privilege which cannot be exercised through an agent. As Lord Cairns remarked: "When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed, and these duties discharged by the company. They cannot be delegated or transferred."(8) The debenture-holders with a charge on the undertaking before its completion cannot exercise the power which may have the effect of putting a stop to the undertaking altogether.(9) The council or managing body of an institution incorporated by royal charter was authorized to sell, mortgage or dispose of its property with the approbation and concurrence of a general meeting of the proprietors of the corporation. At a general meeting of the proprietors, the council was authorized to mortgage the property with a power of sale, but it was held that the council had no such power.(10) But where shares in a company are mortgaged, and no time is fixed for payment of the mortgage-debt, a mortgagee, who has acquired the legal title to the shares, has, in England, an implied power of sale on the failure of the mortgagor to pay after the lapse of a reasonable time.(11) But the mortgagee in India has no such

(1) *Hinde* v. *Poole*, 1 K. & J., 383.
(2) *Per* Jessel, M. R., In re *Cooper and Allen's Contract*, 4 Ch. D., 802 (816, 817).
(3) In re *Coover and Allen's Contract*, 4 Ch. D., 802, (818); *Rede* v. *Oakes*, 4 D. J. & S., 505.
(4) *McCarogher* v. *Whieldon*, 34 Beav., 107.
(5) *Manser* v. *Dix*, 3 Jur. (N.S.), 252.
(6) *Combe's Case*, 9 Rep., 75; *White* v. *Wilson*, 1 Drew., 304.
(7) Story on Agency, ss. 452, 453.
(8) *Gardner* v. *London, Chatham and Dover Ry.*, L R., 2 Ch., 201; *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch D 399 (406).
(9) *Gardner* v. *London, Chatham and Dover Ry.*, L. R, 2 Ch., 201; *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D., 399 (407).
(10) *Young* v. *Roberts*, 15 Beav., 558; *Boyd* v. *Petrie*, L. R., 7 Ch., 385.
(11) *Curse* v. *Nowell*, 25 L. J., Ch., 709.

implied power, and on those facts, he would have to sue for sale of the property through Court, though his ultimate success to bring the property to sale may depend on other considerations.

1617. Suspension of Power.—The mortgagee's power of sale is suspended after the passing of the decree *nisi* for foreclosure, and before it is made absolute.(1) But it cannot be defeated by the mortgagor by commencing proceedings for redemption,(2) and it is said even after a decree for redemption is obtained.(3) But in view of the doctrine of *lis pendens* this view cannot be sustained in India, and it is submitted that an action for redemption would equally be effective in suspending it. During the pendency of a suit relating to the property, the Court may, however, permit sale of the property, or if after the passing of the preliminary decree the action is indefinitely stayed, as by mutual consent, the power would then revive.(4) A decree for the administration of the trusts of a will or for the execution of the trusts of a settlement also entails a similar disability on the exercise of the power.

1618. Power on Assignment.—The power of sale passes with the assignment of the mortgage as an incident.(5) If the mortgagee sub-mortgages his interest transferring to him his power of sale, the proper person then to exercise the power is the sub-mortgagee and not the original mortgagee. (6) On the other hand, if the mortgagor transfers his interest, the power may be exercised against the transferee. (7)

If the mortgage is assigned with the concurrence of the mortgagor, the fact that the latter had promised to pay a different sum on a different day does not take away the power if it existed originally. (8) The mortgagee of lease-hold property may sell the whole of the original term by under-leasing it. (9)

In England, it was at one time doubted whether the mortgagee could exercise the power of sale without the concurrence of the mortgagor, (10) but it is now agreed that the concurrence of the mortgagor is not required to validate the sale, and that the purchaser cannot refuse to accept the title without his concurrence. (11) But if the property mortgaged be trust-property, there may be cases in which the purchaser may refuse to accept the title without the concurrence of the *cestuis que trust.* (12)

1619. Notice of Sale.—Before exercising the power, the mortgagee is required to give a *notice in writing*(13) to the mortgagor, or to his assignee.(14) But the latter cannot insist upon a notice to himself if a due notice had already been given to the mortgagor prior to the assignment. This provision, as to notice, is taken from section 20 of the English Act, and is made to protect the rights of the mortgagor. In order to be effectual, it must be a notice of the demand the

(1) *Leigh* v *Lloyd*, 35 Beav., 455.
(2) *Clarke* v. *Royal Panopticon*, 27 L. J. Ch , 207.
(3) *De Verges* v *Sandeman, Clark & Co.*, [1901] 1 Ch., 70.
(4) *Stevens* v. *Theatres Ltd.*, [1903] 1 Ch., 857 (860. 861).
(5) *Adams* v. *Scott*, 7 W. R. (Eng.), 213.
(6) *Stevens* v. *Theatres, Ltd.* [1903], 1 Ch.. 857 (861).
(7) *Exchange and Hop Warehouse, Ltd.* v. *Association of Land Financiers*, 34 Ch. D., 195 ; explained *per* Farwell, J., in *Stevens* v. *Theatres, Ltd* , [1903] 1 Ch., 857 (863).
(8) *Young* v. *Roberts*, 15 Beav., 558; *Boyd* v. *Petrie*, L.R., 7 Ch., 385, reversing L. R., 18.
(9) S. 115, *post* ; *Hiatt* v. *Hillman*, 25 L. T. (N.S ,) Eq., 482.
(10) *Croft* v. *Powel*, Com. Rep., 603. (The power is given by Statute now ; see 23 & 24 Vict., c 145, s. 15).
(11) *Clay* v. *Sharpe*, 18 Ves., 346*n.* ; *Corder* v. *Morgan*, *ib.*, 344.
(12) *Sanders* v. *Richards*, 2 Coll., 568.
(13) Similarly by s. 67 of the Conveyancing Act, 1881, the notice must be in writing.
(14) *Muncherji* v. *Noor Mahomedbhoy*, I.L. R., 17 Bom., 711.

extent of which must be specified, so as to enable the mortgagee to see his position clearly. The clause provides that the notice must require payment of the *principal money*, since the second clause provides for recovery of the arrears of interest. The proviso follows the English Statute the provisions of which run thus :—

S. 20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until :—

" (i) Notice requiring payment of the mortgage-money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service ; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due ; or

(iii) There has been a breach of some provision contained in the mortgage-deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed other than and besides a covenant for payment of the mortgage-money or interest thereon."

It should be noticed that the absence of the third clause from the section curtails the exercise of the right by the mortgagee in the case there contemplated. It was not usual to insert a clause to this effect in express powers before the Act, and it is an innovation which has well been left out of the section. The insertion of such a clause in the Act would have led the mortgagee to exercise the power even in case of a trivial breach, on the part of the mortgagor, such for example as his failure to deliver a counterpart of a lease within a month, or his failure to insure against fire, or to keep up a life-policy, (1) or indeed, the infraction of any covenant, howsoever, insignificant or unintentionally embodied in the deed. The second clause is further restrictive of his right. In the first clause the words " principal money " has been substituted for " mortgage-money," apparently because the second clause provided for the recovery of interest. The two clauses then provide for two distinct contingencies. If default is made in payment of the principal, notice must invariably precede the exercise of power. But if it is the interest that is in arrears, no notice is required if it has amounted to at least Rs. 500 and has remained upaid for three months after it became due. The solicitude of the Legislature for insuring the punctual payment of interest, would seem to be justified on the ground, that otherwise there would be no means of recovering interest till the principal had become due.

Service of notice.

1620. Notice may be served either personally upon the mortgagor, or delivered or left at the last place of abode of the mortgagor if his present whereabouts are unknown and cannot be ascertained. In one case where the notice was affixed to the door of the mortgagor, it was held to be sufficient service.(2) Where there are several mortgagors having distinct successive interests as a tenant-for-life and remainderman, it may be well to give notice to each, but this is, of course, by no means indispensable. But where the mortgagor has assigned his interest, of which the mortgagee has notice, notice must be then served on the assignee, unless the assignment was made after a notice on the mortgagor had already been served.(3) If the mortgagee required that notice should be given to the mortgagor, his heirs, or assigns, notice to the minor heir and his guardian would on the death of the mortgagor, be necessary.(4) Although the clause only

(1) S. 18, sub-s. 11, Conveyancing Act.
(2) *Major* v. *Ward*, 5 Hare, 598.
(3) *Muncherji* v. *Noor Muhomedbhoy*, I. L. R., 17 Bom., 711; *Hawkins* v. *Ramsbottom*, 1 Price, 138 ; *Forster* v. *Hoggart*, 15 Q. B., 155 ; *Hoole* v. *Smith*, 17 Ch. D., 434 ; *Selwyn* v. *Garfit*, 38 Ch. D., 273.
(4) *Tracy* v. *Lawrence*, 2 Drew., 403.

provides for a notice of demand, such a notice must contain an expression of the mortgagee's intention to sell the property if default is made in payment for three months after service. But the fact that the sale is not made immediately on expiry of the notice does not make the giving of a fresh notice necessary. Indeed, the mere fact of even a long delay taking place between the maturing of the notice of sale and the actual sale does not make a fresh notice necessary.(1) Although it is incumbent upon the mortgagee to abstain from selling the property for three months after notice, it by no means follows that a sale effected in contravention of the rule is necessariiy invalid.(2) The mortgagor cannot even stop a sale made without notice, his remedy being by an action for damages (3) which may be awarded if the sale had taken place before the time fixed,(4) or without proper notice,(5) or when nothing was due.(6) Where the mortgagee makes the demand through his attorney, he must give the mortgagor a reasonable opportunity to enquire into the authority of the person making the demand.(7) If, therefore, he precipitates the sale while the mortgagor is engaged in such an inquiry, he may be mulcted in substantial damages at the instance of the mortgagor.(8)

But, apart from damages, the mortgagor cannot obtain cancellation of the sale even where there has been a serious irregularity in the notice to sell, if the purchaser has entered and expended money on the property. (9) But if the sale was the result of fraud the case becomes different. But the circumstances in which the mortgagor may successfully impeach the sale are unconnected with notice and will be dealt with in the sequel.

1621. The period of three months allowed by this clause cannot be curtailed by an agreement in the deed.(10) A notice given to the mortgagor before he assigns his interest is sufficient. A subsequent assignee must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he had any authority to interfere.(11) Where, however, the mortgagee is aware of the mortgagor having assigned his interest, his failure to give notice to the assignee would be a breach of duty for which he may be liable to him for damages. (12) Where the mortgagor has waived or consented to dispense with notice, the mortgagee need not give it.(13) And if after notice the mortgagee has orally agreed to abstain from exercising the power for a certain period, he is not bound by a "mere naked promise," unsupported by any consideration, and the mortgagor cannot complain, if in spite of his promise he has sold the property. Section 63 of the Indian Contract Act would not apply to such an agreement.(14) Waiver of notice amounts to consent to dispense with notice, and may be made before or after the sale.(15)

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(1) *Major* v. *Ward*, 5 Hare, 598.
(2) Anon. 6 Mad., 10; *Madras Deposit and Benefit Society* v. *Passanha*, I. L. R., 11 Mad., 201 : *Metters* v. *Brown*, 33 L J. Ch., 97.
(3) *Prichard* v. *Wilson*, 10 Jur. (N. S.), 330; *Madras Deposit and Benefit Society* v. *Passanha*, I. L. R., 11 Mad., 201 ; *Muncherji* v. *Noor Mahomedbhoy*, 1. L R., 17 Bom. 711.
(4) *Brierley* v. *Kendall*, 17 Q. B., 937.
(5) *Selwyn* v. *Garfit*, 38 Ch. D , 273.
(6) *Dicker* v. *Angerstein*, 3 Ch. D., 600.
(7) *Toms* v. *Wilson*, 4 B. & S., 442.
(8) *Moore* v. *Shelley*, 8 App. Cas., 285.
(9) *Muncherji* v. *Noor Mahomedbhoy*, I. L. R., 17 Bom., 711 (717); *Metters* v. *Brown*, 33 L. J. Ch., 97.
(10) *Madras Deposit and Benefit Society* v. *Passanha*, I. L. R., 11 Mad., 201.
(11) *Muncherji* v. *Noor Mahomedbhoy*, I. L. R., 17 Bom . 711.
(12) *Hoole* v. *Smith*, 17 Ch. D., 134.
(13) In re *Thompson and Holt*, 44 Ch. D., 492 (500).
(14) *Trimbak Gangadhar* v. *Bhaqwandas*, I. L. R. 23 Bom., 348 (357); *Williams* v. *Stern*, 5 Q. B. D., 400, followed ; *Davis* v. *Cundasami*, I.L.R., 19 Mad., 398, distinguished.
(15) *Per* Bowen, L. J., in *Selwyn* v. *Garfit*, 38 Ch. D., 248.

The right to notice may be waived by the mortgagor or his assigns,(1) but waiver cannot be inferred from merely lying by: there must be some assent. If, therefore, he was unaware of the sale there can be no waiver, and so, of course, where he had previously assigned his interest in the property.(2) Long delay as of ten years in impeaching an invalid sale may, however, amount to waiver.(3)

1622. Conduct of Sale.—The mortgagee selling under his power of sale is sometimes spoken of as a trustee for the mortgagor. But this is incorrect. He is, no doubt, bound to conduct the sale fairly and with due regard to the interest of the mortgagor, but beyond this he is not liable. "A mortgagee," observed Lindley, L. J., "is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all." (4) A mortgagee exercising his power of sale is not a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale. (5) But on a sale of the mortgaged property under an express or a statutory power, the mortgagee becomes a trustee of the surplus purchase-money after his own claim is satisfied, and he is then liable to the mortgagor or other persons interested in the equity of redemption or subsequent incumbrances, of whom he has notice, to whom he is liable to the extent of the money received if he pays the surplus to the wrong person. (6)

1623. A mortgagee selling under his power may sell either by private treaty or public auction. (7) He is under no obligation to advertise the sale, (8) but he must give reasonable publicity to the conditions of sale, not merely by reading them over at the time of sale, but by circulating them in the auction-room, and widely distributing them among intending bidders before the sale. (9) Nor is he bound to wait till the property fetches a fair price. He must act as if he were a prudent man, but as a prudent man he may subordinate the mortgagor's interest to his own. But he must not look after his own interests alone, nor must he recklessly sacrifice the mortgagor's property.(10) And though the mortgagee is not a trustee for the mortgagor, he is something more than a perfunctory agent and must at least see that in subserving his own interests he does not sacrifice the interest of those equally interested in the property. He must not publish conditions having a depreciatory tendency and likely to shy off intending bidders. A mortgagee in selling the mortgaged property under a

(1) *Selwyn* v. *Garfit*, 38 Ch. D., 273 (283, 284); "Delay is not waiver. Inaction is not waiver though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shewn that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered" *Per* Bowen, L. J., in *Selwyn* v. *Garfit*, 38 Ch. D., 273 (284); In re *Thompson and Holt*, 44 Ch. D., 492 (500).

(2) *Selwyn* v. *Garfit*, 38 Ch. D., 273 (283, 284).

(3) *Nutt* v. *Easton*, [1899] 1 Ch., 873; O. A. [1900] 1 Ch., 29.

(4) *Kennedy* v. *De Trafford*, [1896] 1 Ch., 762 (772); O. A., [1897] A. C., 180; *Nutt* v. *Easton*, [1899] 1 Ch., 873; O. A., [1900] 1 Ch., 29.

(5) *Kirkwood* v. *Thompson*, 2 H. & N., 392; *Locking* v. *Parker*, L. R., 8 Ch.. 30; In re *Alison*, 11 Ch. D., 284.

(6) *Tanner* v *Heard*, 23 Beav., 555; *Matheson* v. *Clarke*, 3 Drew., 3; *Locikng* v. *Parker*, L.R., 8 Ch., 30; In re *Alison*, 11 Ch. D., 284; *Warner* v. *Jacob*, 20 Ch D., 220; *Chartes* v. *Jones*, 35 Ch. D., 25; *Magnus* v. *Queensland Bank*, 37 Ch. D., 466.

(7) 44 & 35 Vict. c.. 41, s. 19 (i).

(8) *Smith* v. *Durrant*, 1 De G. & J., 535; O.A., 9 H.L.C., 192.

(9) *Chabildas* v. *Dayal Mowji*, 6 Bom. L. R., 557 (568); O. A. I. L. R., 31 Bom., 566, P.C.

(10) *Chabildas* v. *Dayal Mowji*, 5 Bom. L. R., 247; O.A., 6 Bom. L. R. 557; O.A.I.L.R., 31 Bom., 566, P.C.

power of sale contained in the mortgage-deed covenanted with the purchaser that "the purchaser shall accept such title as the vendors can give and shall not require the vendors to enter into any covenant except a covenant that they have not incumbered and shall not raise any question or objection to the title and shall be held bound to accept such title as the vendors possess." It was held that the condition was depreciatory, in that its natural tendency would be to deter bidders and lessen the price they would be prepared to pay.(1) So where the trustees say "we are only trustees for sale: we produce you nothing but our deed; you must take whatever title we have at the time; we will give you merely a deed dated about 14 years ago, vesting the property in us as trustees for sale," the condition cannot be regarded as otherwise than depreciatory.(2) Where a condition is calculated to have a depreciatory tendency, it is no answer to say that the bidding was brisk or that the price fetched was the full value. (3) As, speaking of a sale by trustees, James, L.J., remarked: "Then it is said that this condition has not, in effect, depreciated the sale, because it is shewn that the full value has been given for the property. Upon that point there is a large amount of contradictory evidence, some witnesses saying that more would have been given, and others saying that more would not have been given, and that the full price was obtained. That is precisely the thing the Court cannot inquire into. The *cestuis que trust* have a right to have this property sold without anything being done which is calculated to depreciate it; and whether the effect which this condition was calculated to produce was or was not produced, it is impossible for the Court satisfactorily to determine, because the Court cannot know how many people were deterred by such a clause as this from bidding or attending the sale." (4) A depreciatory condition is one which tends to deter persons from bidding or to deter those who bid from bidding up to so high a figure; and a condition which has that tendency has it because it tends to cripple the right of a purchaser and to put a fetter on him. The question is whether the condition would tend to the detriment of the mortgagor or of an absolute owner, or be prudent in an absolute owner. If it would be prudent in an absolute owner, it is not imprudent as affecting a mortgagee. (5)

1624. In England, while a mortgagee may sell the whole or any part of the mortgaged property, he cannot sell, without sanction of the Court.(6) the timber separately upon it;(7) nor can he, unless expressly authorized by the mortgage-deed, sell the surface apart from the minerals.(8) But in no case can he sell machinery apart from the mortgaged buildings. (9) And if he sells only a part of the land he cannot sell with an easement over the land unsold. (10)

The mortgagee may sell subject to his right to rescind if he is unwilling or unable to answer requisitions or objections to title made by the purchaser. (11) The mortgagee may also sell upon the terms that a part of his purchase-money may remain on mortgage. (12) He is further empowered to sell either subject to prior charges or not.(13)

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(1) *Chabildas* v. *Dayal Mowji*, 6 Bom. L.R., 557 (567); O. A. I. L. R., 31 Bom., 566. P C.

(2) *Dance* v. *Goldingham*, L. R., 8 Ch., 902 (910); *Dunn* v. *Flood*, 25 Ch. D., 629; O.A., 28 Ch. D., 586.

(3) *Dance* v. *Goldingham*, L.R., 8 Ch., 902 (910, 911).

(4) *Dance* v. *Goldingham*, L.R , 8 Ch , 902 (910, 911); followed in *Chabildas* v. *Dayal Mowji*, 6 Bom. L.R., 557 (569).

(5) *Falkner* v. *The Equitable Reversionary Society*, 4 Drew., 356.

(6) 22 & 23 Vict., c. 35, s. 13.

(7) *Chalmeley* v. *Paxton*, 3 Bing., 207; 5 Bing., 48.

(8) *Dayrell* v. *Hoare*, 12 A. & E., 356.

(9) In re *Yates*, 38 Ch. D., 112.

(10) *Berkly* v. *Howell*, 29 Beav., 546.

(11) *Falkner* v. *Equitable & Co.*, 4 Drew., 352.

(12) *Thurlow* v. *Mackeson*, L. R., 4 Q. B., 97.

(13) S. 19; 44 & 45 Vict., c. 41; *Manser* v. *Dia*, 8 De G.M. & G., 703.

1625. Of course, the mortgagee, who is the seller, cannot either directly or indirectly purchase the mortgaged property.(1) But the disqualification applies only to the mortgagee exercising the power, so that a second mortgagee may buy from the first.(2) But a co-mortgagee can under no circumstances purchase; but the objection does not extend to a *bona fide* sale by a mortgagee to a company in which he is a share-holder.(3) But otherwise not only the mortgagee, but also his agent and solicitor are disqualified from purchasing the mortgaged property.(4) But there is nothing to prevent the mortgagor or one of several mortgagors from purchasing the property; and a co-mortgagor may purchase without any notice to or consent of his co-mortgagors, provided the sale is made under a proper and *bona fide* exercise of the power. The validity of such a sale is not affected by any fiduciary relation subsisting between the purchasing mortgagor and his co-mortgagors, such as may have arisen from his having as their agent, received the rents, paid thereout the interest on the mortgage, and generally managed the property. (5) A sale to one of the co-mortgagors for a price sufficient to pay off the mortgagee's debt cannot be treated by other co-mortgagors as redemption of the mortgage. (6) A purchase by a mortgagor from a first mortgagee selling under his power does not prejudice the second mortgagee, who will be preferred to incumbrancers of the mortgagor after the purchase. (7)

Mortgagee's expenses.

1626. The mortgagee is entitled to retain out of the sale-proceeds all costs properly incurred in conducting the sale including any attempted or abortive sale.(8)

1627. Limits of Mortgagee's Discretion.—Unless there is any indication of the mode and manner in which the mortgagee should exercise the power, it is competent to him to dispose of the property by either auction or private treaty.(9) In order to make out a case for interference on the part of the mortgagor he would have to shew that the sale was wrongful and not warranted by the conditions of the mortgage-deed. (10) The fact that the mortgagee had agreed that a part of the purchase-money might remain on a mortgage of the property sold, does not vitiate the sale. (11) But if a condition is imposed by the mortgage-deed, the mortgagee must observe it before exercising the power. (12) No power can be exercised till default is made in payment of money when due, superadded to which must be observed the statutory restrictions as to service of notice and the minimum sum in arrear.

The provision as to notice is obligatory, and it has been held that a power to sell without notice is of an oppressive character, and would be relieved against, if the mortgagor is shown or appears to have consented to the transaction under pressure of necessity. (13) "It is not every bargain which necessity may induce one man to offer, that another is at liberty to accept."(14) It

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(1) *Downes* v *Grazebrook*, 3 Mer., 200: In re *Bloye's Trusts*, 1 Mac & G., 488; *Henderson* v. *Astwood*, [1894] A. C., 150.

(2) *Parkinson* v. *Hanbury*, L R., 24 H.L.,1.

(3) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., 359.

(4) *Martinson* v. *Clowes*, 21 Ch. D., 857; *Orme* v. *Wright*, 33 Jur., 19; *Khairajmal* v. *Diam*, 9 C. W. N., 201, P. C.

(5) *Kennedy* v. *De Trafford*, [1896] 1 Ch., 762, C. A. [1897], A. C., 180.

(6) *Kennedy* v *De Trafford*, [1896] 1 Ch. 762 (771).

(7) *Otter* v. *Lord Vaux*, 6 De G.M. & G. 638.

(8) *Cf. Dryden* v. *Frost*, 3 My. & N., 670 (675); *Ellison* v. *Wright*, 3 Russ., 458; *National Provincial Bank* v. *Games*, 31 Ch. D., 582 (592, 593).

(9) *Bronard* v. *Dumaresque*, 3 Moo. P. C. 457

(10) *Davy* v. *Durrant*, 26 L.J. Ch., 830.

(11) *Davy* v. *Durrant*, 26 L. J., Ch. 830.

(12) *Gill* v. *Newton*, 12 Jur. (N. S.), 920.

(13) *Miller* v. *Cook*, L. R., 18 Eq., 641 (646).

(14) *Bowes* v. *Heaps*, 3 V. & B., 117.

is not necessary that the mortgagee should have misled the mortgagor's judgment or tampered with his poverty. (1) But such transactions, if allowed, would enable the mortgagee at any moment to extinguish the right of redemption.(2) A person standing in a position of active confidence, *e.g.*, a client to his solicitor, is still less qualified to obtain the power of sale without notice.(3) But such powers are not *ipso facto* invalid, but require an explanation which would be sufficient if it is shewn that the solicitor-mortgagee had explained the situation to the client in the same way as if he had been borrowing money from a third party.(4) But these precedents of English law are only instructive as furnishing a reason for the statutory rule in favour of notice here enacted, and the requirements of which may now be considered.

Thus then what the statutes have done in England for all mortgagees, must be the subject of an express contract in favour of only certain mortgagees in India. The power of sale is further subject to the provisions of the section out of which parties cannot contract themselves. The English precedents must then be approached with caution, for on this subject the law of the two countries is by no means identical.

1628. Sale for Recovery of Interest.—The second clause conferring on the mortgagee the power of sale on mere default in payment of interest has the effect of overruling a decision of the Privy Council in which an express clause to that effect was held to be penal, and, as such, unenforceable. (5) Like the previous clause this clause is also taken from section 20, sub-section (ii) of the statute, (6) but it has been modified in so far that the amount of the arrears is fixed at Rs. 500, and the period of arrears is raised to three months. In the English Statute the amount is not fixed, while the period fixed is two months. (7) It will be observed that the two clauses being separated distributively by an " or," the mortgagee need not give notice if his debt is of the nature mentioned in this clause, unless there is a stipulation, as is usual, for notice, in which case it must needs be given.(8) The amount of interest due under the mortgage may be out of the principal, interest or costs, or may represent such other sum as the mortgagee is entitled to add to his mortgage-money. (9) The subject has already received attention.

1629. Title of Purchaser on Sale under Power.—The two following paragraphs are taken almost *verbatim* from sections 21 (1), (3) of the Conveyancing Act.(10) The rule is enacted to afford reasonable security to purchasers, who would have had without such protection no safety in purchasing at such sales. Under this clause, the sale cannot be impeached on the ground that no case had arisen to authorize it, as that it was made before the mortgage-money had become due, or after it had been paid off. (11) If a mortgagee exercises his power of sale *bona fide*, for the purpose of realizing his debt and without collusion with the purchaser, the Court will not interfere, even though the sale may be very disadvantageous to the mortgagor, unless the price is so low as to afford in itself evidence of fraud. (12) Even in cases

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(1) *Gwynne* v. *Heaton*, 1 Bro. C. C., 1; *Miller* v. *Cook*, L. R., 18 Eq., 641 (646).
(2) *Miller* v. *Cook*, L. R., 18 Eq., 641 (647).
(3) *Cockburn* v. *Edwards*, 18 Ch. D., 449 (456).
(4) *Pooley's Trustee* v. *Whetham*, 33 Ch. D., 111 (122).
(5) *Venkatavarada* v. *Venkata*, 23 W. R., 91, P. C.
(6) Conveyancing Act, 1881, 43 & 45 Vict., c. 41.
(7) S. 20 (ii).
(8) *Miller* v. *Cook*, L. R., 10 Eq , 641.
(9) See s. 72.
(10) 44 & 45 Vict., c. 41.
(11) *Dicker* v. *Angerstein*, 3 Ch. D., 600.
(12) *Warner* v. *Jacob*, 20 Ch. D., 220 (224).

falling into this category the mortgagor cannot obtain an injunction to stop the sale, (1) unless the mortgage-money is deposited in Court. (2)

1630. The purchaser of property from the mortgagee in exercise of his power of sale does not derive his title under or through him, but rather independently of him as a purchaser. (3) No doubt his title in a sense does descend to him from the mortgagee but since the effect of the sale to him is to override and extinguish the mortgage and convey to him a new and larger estate which the mortgagee did not possess ; it cannot be said that he holds only by derivative title. Again, such a sale is not a "private alienation within" the meaning of section 64 of the Code of Civil Procedure,(4) so as to be void if made after attachment of the property by Court, since an alienation after attachment in pursuance of a power conferred before the attachment does not fall within the scope of that section. (5)

1631. As regards the relation of the purchaser to the mortgagor, it would seem that although in an English mortgage, the mortgagor may be said to be in possession of the mortgagee-property with the permission of the mortgagee, it is clear, that if the mortgagee conveys the property under his power of sale, it cannot ordinarily be said that the mortgagor continues to be in possession with the permission of the mortgagee's purchaser.(6) On the other hand, the mortgagor's possession would from the date of the purchase be regarded as adverse to the purchaser, unless the latter has done some act to indicate that the mortgagor's possession since then has been permissive merely.(7) Indeed, it would be so even in the case of the mortgagee after foreclosure, since in the words of Lord Hardwicke a foreclosure is considered as a new purchase of the land. (8) The purchaser cannot sue to eject the mortgagor in the Court of Small Causes. (9)

1632. A purchaser under a power of sale is relieved from all obligation to make inquiries, unless the circumstances which put in question the propriety of the sale are brought to his knowledge and he purchases with that knowledge, in which case he becomes a party to the transaction which is impeached, (10) and a proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect him if he knew of an irregularity which could not have been waived.(11) A purchaser bidding at a sale held on conditions unusually depreciatory may be presumed to know that the mortgagor may seek to set aside the purchase. A depreciatory condition is one which tends to deter persons from bidding, and those who bid, from raising their bids to ensure sale at a fair

(1) *Whitworth* v. *Rhodes*, 20 L. J. (Ch)., 105.

(2) *Hill* v. *Kirkwood*, 28 W. R. (Eng.), 385.

(3) *Heath* v. *Pugh*, 6 Q. B. D.. 345 (361) O. A., *Pugh* v. *Heath*, 7 App. Cas., 238 ; *Parmanandas* v. *Jamna Bai*, I. L. R., 10 Bom., 49 ; *Chabildas* v. *Dayal Mowji*, I. L. R., 26 Bom. 82 (86, 87).

(4) Act V of 1908 ; s. 276, Act XIV of 1882.

(5) *Delhi & London Bank* v. *Tellary*, 3 Bom. L. R , 892.

(6) *Chabildas* v. *Dayal Mowji*, I. L. R., 26 Bom., 82 (86).

(7) *Heath* v. *Pugh*, 6 Q. B. D., 345 (361) ; O. A. *Pugh* v. *Heath*, 7 App. Cas., 238 ; *Chabildas* v. *Dayal Mowji*, I. L. R., 26 Bom., 82 (87).

(8) *Casborne* v. *Scarfe*, 1 Atk., 603 ; *cf. Blake* v. *Foster*, 2 B. & B., 402 ; *Silberschildt* v. *Schiott*, 2 V. & B., 491 ; *Le Gros* v. *Cockerell*, 5 Sim., 389.

(9) S. 41, Small Cause Courts Act (XV of 1882) ; *Chabildas* v. *Dayal Mowji*, I. L. R., 26 Bom., 82. *A suit for foreclosure is similarly* a suit to recover the land, *Wrixon* v. *Vize*, 3 Dr. & War., 116 (119, 120) ; followed *per* Lord Selborne in *Heath* v. *Pugh*, 6 Q. B. D., 345 (363, 364).

(10) *Jenkins* v. *Jones*, 2 Giff. 99 ; *Chabildas* v. *Dayal Mowji*, 5 Bom.L.R., 247.

(11) *Selwyn* v. *Garfit*, 38 Ch. D., 273 ; *Parkinson* v. *Hanbury*, L.R., 24 H.L., 1.

price.[1] A mortgagee may sell under special conditions even of a stringent character, but they must not be unreasonably depreciatory.[2]

Though a mortgagee selling under the power of sale has not the same full powers over the property as an absolute owner, he is entitled to convey the property to a purchaser with all the legal incidents accompanying the grant, and on a sale of a part of the property comprised in the mortgage, he may give to the purchaser thereof an implied easement of light over the unsold portion.[3]

A mortgagee purporting to sell in exercise of the power can pass no title if he had in fact no power of sale.[4] Even a covenant by the mortgagor that he will join in the sale cannot be enforced by the purchaser, since such a covenant is presumed to be for the benefit of the mortgagee only.[5]

Power improperly exercised.

1633. But where the purchaser buys property with notice of the irregularity, as that the period of three months had not elapsed, he is not protected by the proviso.[6] In one case where the power given to sell was by public auction, and the property was sold by private contract, it was held that "such sale was wrongful and not warranted by the conditions of the mortgage-deed,"[7] but the sale does not appear on that ground to have been set aside. In another case with similar facts it was held that the sale was not invalidated by the want of previous attempt to sell by auction, but was good as regarded both the purchaser and the mortgagee.[8] It is sometimes stated that the mortgagee is for the purposes of the sale a trustee of the mortgagor.[9] But the consensus of opinion is that he is by no means a trustee of the mortgagor, and his position is not even loosely comparable to a trustee. As Lindley, L. J., remarked: "A mortgagee is not a trustee of power of a sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or willfully, or recklessly, to sacrifice the property of the mortgagor; that is all."[10] So in another case the Lords of the Privy Council, citing a learned Judge said, "A mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."[11] In short, the only obligation incumbent upon him is that he should act in good faith, and to determine which regard

(1) *Falkner* v. *Equitable Reversionary Society*, 4 Drew., 356.

(2) *Hobson* v. *Bell*, 2 Beav., 17.

(3) *Born* v. *Turner*, [1900] 2 Ch., 211.

(4) *Doucett* v. *Wise*, 3 W.R., 157.

(5) *Order* v. *Morgan*, 18 Ves., 344 (346n); *Alexander* v. *Crosbie*, 1 J. & L., 666 (670); *Gutteridge* v. *Fleschcr*, 2 L.T. (N.S.), 830.

(6) *Selwyn* v. *Grafit*, 38 Ch. D., 273.

(7) *Bronard* v. *Dumaresque*, 3 Moo. P. C., 457.

(8) *Davy* v. *Durrant*, *Smith* v. *Durrant*, 26 L J. Ch.. 830.

(9) *Per* Jessel, M. R., in In re *Cooper* (*vide* Allen's Contract), 4 Ch. D., 802 (818): "It is not exactly the case of a trustee for sale; it is the case of a mortgagee with power of sale, but a mortgagee, selling, is in effect a trustee with reference to the property comprised in the mortgage." *Per* Lord Eldon in *Downes* v. *Glazebrook*, 3 Mer., 200. But this case only decides that where the mortgage is in the form of a trust for sale, the mortgagee cannot buy—see *per* Stuart, V.C., in *Robertson* v. *Morris*, 1 Giff., 421 (424); *Per* Kay, J., in *Warner* v. *Jacob*, 20 Ch. D., 220 (223).

(10) *Kennedy* v. *De Trafford*, [1896] 1 Ch., 762 (772); affirmed O. A., [1897] A. C., 180; *Nutt* v. *Eaton*, [1899] 1 Ch. 873 (877); O. A., [1900] 1 Ch., 29; *cf. Lalldoss* v. *Jamal Ali*, B L.R., (Sup. Vol.), 901; *Jaijit* v. *Govind*, I.L R., 6 All., 303; *Trimbak* v. *Bhagwan*, I.L.R , 23 Bom., 348.

(11) *Per* Galliber, J., in *Warner* v. *Jacob*, 51 L.J. Ch. 642; *cited* with approval by P. C. in *Haddington Island Quarry Co.* v. *Huson*, [1911] A.C. 722 (729).

must be had to the particular circumstances of each case. But his position is not of a trustee even if the mortgage is in the form of a trust for sale, except as regards the surplus of the purchase-money, if any, remaining in his hands.(1) But his primary right is to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained from the property if the sale had been postponed.(2) He may sell under special conditions even of a stringent character if not unreasonably depreciatory.(3) But a mortgagee with the power of sale must act with the same care and prudence, and use every effort which might be expected of a prudent man(4) to have the sale conducted in a manner so as to fetch the highest price. But he is not bound to do more. As observed before, he need not wait for a more advantageous bargain, nor need he advertise before proceeding to sale.(5) If the mortgagee is guilty of carelessness or unbusinesslike conduct, the sale cannot on that ground alone be set aside, but he may be held liable for damages.(6) The mortgagee may sell the whole or any portion of the mortgaged property, but he cannot sell the surface apart from the minerals, nor timber apart from the land,(7) nor trade-machinery apart from the buildings,(8) nor a portion of the land with an easement over the land unsold.(9)

Mortgagee cannot purchase.

1634. The mortgagee is disqualified from purchasing the property for himself, as it will be a purchase by a trustee of trust-property(10) (§ 1625). This is correct, though the reason given is incorrect and at variance with the reason given by Lord Macnaghten in delivering a judgment of the Privy Council. He said: "A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another,"(11) which only means that a person should not be placed in a position in which his duty may clash with his interest. And from which it follows that the mortgagee cannot even purchase *benami* in the name of another person. If he desires to purchase the property himself, he must waive his power and come before the Court in the simple character of a mortgagee. Even then he cannot bid without the permission of the Court conducting the sale.(12) There is, however, no objection to the second and subsequent mortgagees purchasing the property from the first mortgagee selling under his power of sale.(13) But the Court regards with jealousy all such purchases, and in one case, purchase by the secretary of the mortgagees was set

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(1) *Locking* v. *Parker*, L.R., 8 Ch., 30; In re *Alison*, 11 Ch. D., 284.

(2) *Cholmondeley* v. *Clinton*, 2 Jac. & W. I., 182; *Warner* v. *Jacob*, 20 Ch. D., 220; cited *per* Lindley, L. J., in *Farrar* v. *Farrars*, 40 Ch. D., 395 (411).

(3) *Hobson* v. *Bel*, 2 Beav., 17; *Kershaw* v. *Kalow*, 1 Jur. (N. S.), 974

(4) *Marrio* v. *Anchor Reversionary Co.*, 30 L. J., Ch., 571; *Colson* v. *Williams*, 58 L. J., Ch., 539; *Chabildas* v. *Dayal Mowji*, 5 Bom. L. R., 247 (250); following Gour's Trans. Pro. (1st Ed.) 341; O. A., 6 Bom. L. R., 557; O.A.I.L.R., 31 Bom., 566. P.C., but *Marriot* v. *Anchor Reversionary Co.*, 30 L. J., 571, invests the mortgagee with the fiduciary character which has been shewn to be too narrow.

(5) *Davy* v. *Durrant*, *Smith* v. *Durrant*, 26 L. J., Ch., 830.

(6) *Marriot* v. *Anchor Reversionary Co.*, 30 L. J., Ch., 571.

(7) *Cholmeley* v. *Paxton*, 3 Bing., 207; 5 Bing., 48.

(8) In re *Yates*, 38 Ch. D., 112.

(9) *Selwyn* v. *Garfit*, 38 Ch. D., 573; *Berkley* v. *Howell*, 29 Beav., 346.

(10) *Parkinson* v. *Hanbury*, 13 W. R. (Eng.). 331; *Downes* v. *Grazebrook*, 3 Mer., 200; In re *Bloye's Trusts*, 1 Mac. & G., 488; *Henderson* v. *Astwood*, (1894) A. C., 150 (158).

(11) *Henderson* v. *Astwood*, (1894) A. C., 150 (158).

(12) Re *Hagley*, 3 Dea. & Ch., 504; *Tennant* v. *Trenchard*, 4 Ch., 537.

(13) *Shaw* v. *Bunny*, 34 L.J., Ch., 257; *Kirkwood* v. *Thompson*, 34 L.J., Ch., 305.

aside.(1) Of course, there is nothing against the mortgagee purchasing *with the consent* of the mortgagor, for in such a case the sale will be as good as one made by contract. By such sale, it is said, the mortgagee can acquire an unimpeachable title, owing to the merger of the equity of redemption in his favour.(2) The effect of his purchase is analogous to that of a foreclosure-decree, which, as stated by Lord Selborne, is to vest the ownership of, and beneficial title to the land for the first time in the person who previously was a mere incumbrancer.(3) The disability attaching to the mortgagee also attaches to his agent, manager or other servant who had acted in negotiating the advance and receiving interest on the mortgage.(4)

But sale to one of the mortgagors for his own benefit, without any notice to or consent of his co-mortgagors is permitted even though he may have acted as the mortgagee's agent, to manage the property, received rents, and paid thereout the interest due on the mortgage.(5) In fact such a sale, if made for the mortgage-money due, is only a redemption in disguise, but it is not for that reason that the sale to a mortgagor is upheld, but rather on the ground that a co-debtor is perfectly entitled to get in, for his own benefit, an outstanding incumbrance. He is in no fiduciary relation to his other co-debtors.(6) A second mortgagee may similarly buy from the first mortgagee.(7) A purchase by a mortgagor from the first mortgagee operates only as a redemption of the first mortgage. It cannot prejudice the subsequent incumbrancers.(8) So there can be no objection to sale by a mortgagee to a company of which he is a share-holder.(9)

In fact, the question in such cases is not to whom the purchase was made, but whether the sale was *bona fide* and fair. A collusive sale to whomsoever made would be set aside at the instance of the mortgagor,(10) whereas a sale made to a *bona fide* purchaser without notice of the invalidating elements in the transaction would as a rule pass a good title to him.(11)

1635. Avoidance of Sale.—Of course, a purchaser who buys with knowledge of circumstances sufficient as against a mortgagee to invalidate the sale, becomes a party to the transaction and is not protected even by the proviso that the purchaser need make no inquiry.(12) Hence the purchaser is in England usually protected in express powers by the insertion in the deed of what is called the "purchaser's protection clause," declaring that, upon any sale purporting to be made in pursuance of the power, the purchaser shall not be bound to inquire whether the conditions have been performed or observed.(13) A similar protection is thrown round him by the English Statutes which state the rule in the following terms:—

(1) *Martinson* v. *Clowes*, 21 Ch. D., 857.
(2) *Raja Kishen Dutt* v. *Raja Mumtaz Ali*, I.L.R., 5 Cal., 198 P.C.; *Heath* v. *Pugh*, 6 Q.B.D. at p. 361; O.A., 7 App. Cas., 235.
(3) *Heath* v. *Pugh*, 6 Q.B.D., 345 (361); O.A., 7 App. Cas., 235, followed in *Purmanand* v. *Jamna Bai*, I.L.R., 10 Bom., 49 (56).
(4) *Orme* v. *Wright*, 3 Jur., 19; *Khairaj Mall* v. *Daim*, I.L.R., 32 Cal. 312, P.C., 9 C.W.N., 201, P.C.
(5) *Kennedy* v. *DeTrafford*, (1896) 1 Ch., 762 (770).
(6) *Kennedy* v. *DeTrafford*, [1896] 1 Ch., 762 (773, 774), O.A. (1897), A.C., 180.
(7) *Parkinson* v. *Hanbury*, L.R., 2 H. L., 1.
(8) *Otter* v. *Lord Vaux*, 6 De G.M. & G., 638.
(9) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., 395.
(10) *Robertson* v. *Norris*, 4 Jur. (N.S.), 443.
(11) *Bettyes* v. *Maynard*, 49 L. T., 389; *Dicker* v. *Angerstein*, L.R., 3 Ch. D., 600; *Jenkins* v. *Jones*, 29 L. J., Ch., 493.
(12) *Prichard* v. *Wilson*, 10 Jur. (N. S.), 330; *Muncherji* v. *Noor Mahomedbhoy*, I. L.R., 17 Bom., 711 (717).
(13) *Jenkins* v. *Jones*, 29 L.J., Ch., 493.

S. 21 (2). Where a conveyance is made in professed exercise of the power of sale conferred by the Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."(1)

With reference to this clause which has been embodied in the section, it has been held that it has no application until the conveyance has been obtained; consequently it does not preclude a person who has contracted to purchase from a mortgagee purporting to sell under the power from enquiring whether the vendor was in a position to exercise the power, nor from proving *aliunde*, in answer to an action for specific performance, that the power was improperly exercised.(2)

An additional safeguard is the clause usually inserted in express powers providing that the mortgagee's receipt for the purchase-money shall effectually discharge the purchaser from seeing to the application or being answerable for the loss or misappropriation thereof.(3)

It is not generally the duty of a purchaser to inform a vendor of any of the circumstances which may make it desirable for him to purchase.(4) A person entered into an arrangement with the first mortgagee for the advantageous sale of a part of the mortgaged property, and thereupon he bought up at reduced price, the interest of the second mortgagee, without informing him of the arrangement for sale, and it was held that he was under no obligation to make the disclosure.(5)

In the absence of fraud the mortgagee does not forfeit his power by an abortive attempt to sell the property ostensibly to a third person, but in reality to himself. Such a purchase converts him into a mortgagee in possession, and as such liable to account until the power of sale is validly exercised,(6) and in this case he would be allowed the cost of his improvements, so far as they had enhanced the value of the property.(7)

A *bona fide* purchaser without notice is in England held to get a good title if he had purchased the property from the mortgagee professing to act under the power of sale, but which had however been suspended owing to the pendency of an action on his mortgage, in which a decree *nisi* for foreclosure had been previously passed.(8) But in view of the different rule as to *lis pendens* obtaining in this country the same thing could hardly be said of a purchaser in India.(9)

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(1) 44 & 45 Vict., c. 41, s. 21.

(2) *Life Interest, &c., Corporation* v. *Hand-in-Hand Fire, etc, Society* [1898], 2 Ch., 230.

(3) The same protection is afforded by Lord St. Leonard's Act (22 & 23 Vict., c. 35); Lord Cranworth's Act (23 & 24 Vict., c. 145); The Conveyancing Act, 1881 (44 & 45 Vict., c. 41, s. 22 (1); *Henderson* v. *Astwood*, [1894] A. C., 150 (160).

(4) *Dolman* v. *Nokes*, 22 Beav., 402.

(5) *Ib.*

(6) *Henderson* v. *Astwood*, [1894] A. C., 150 (161); following *Topham* v. *Duke of Portland*, L. R., 5 Ch., 40. Similarly in *Ex parte Badcock Mont*, Mac. 231; *Turner* v. *Trelawney*, 12 Sim., 49; the mortgagee-purchaser was regarded as a trustee of what he purchased; *cf. Farrar* v. *Farrars, Ltd.*, 40 Ch. D., 395 (414).

(7) *Shephard* v. *Jones*, 21 Ch. D., 469; followed in *Henderson* v. *Astwood*, [1894] (A.C.) 150 (163).

(8) *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch., 857 (862).

(9) See s. 52, Comm.

Onus on impeaching sale.

1636. On a sale made under power, the burden of proof lies on him who seeks to impeach it. As Lindley, L. J., observed: "It appears to me that we should be throwing the greatest possible difficulties in the way of mortgagees if we were to say that these mortgagees had done anything wrong or had failed to take any step which was reasonable and proper in such a transaction as this."(1) But the contrary has been laid down in earlier cases.(2) A transaction may appear suspicious, but it is not on that account to be damned as fraudulent.(3) In order to succeed, the mortgagor must act promptly: laches are fatal to his success.(4) The mortgagee of a reversionary interest sold it under the power of sale in January 1888. The reversioner who had notice of the sale took legal advice as to his rights, but took no steps to impeach the sale until December 1897, when he commenced an action to set it aside. In April 1897 the reversion had fallen into possession, and it was held that by reason of his laches the plaintiff could not maintain the action.(5)

1637. Appropriation of Proceeds of Sale.—The directions as to the application of the proceeds of sale, contained in the section are copied from the English Conveyancing Act, (6)—only the section here has been made subject to a contract to the contrary. The proceeds of sale are first to be appropriated to the payment of previous incumbrances, if any, to which the sale is not made subject, and which may be done in the manner directed by section 57. Then the money may be applied by him (i) in payment of the costs and expenses of the sale; (ii) in liquidation of the mortgage-money; (iii) the surplus, if any, being paid over to the mortgagor. In England the mortgagee cannot charge commission for conducting the sale professionally, and the prohibition extends to the partnership of which he may be a member.(7) The mortgagee is not entitled to the surplus, which he is to hold in trust for the mortgagor,(8) to whom he must refund it immediately on completion of the sale, after which the surplus moneys in his hand will carry interest at the Court-rate, assessed in Bombay at six per cent.(9) Being declared to be a trustee for the surplus in his hands, it is the duty of the mortgagee to see that it is paid over to a person legitimately entitled to it. If he pays it to a wrong person, he does not exonerate himself from the liability to pay it to the rightful claimant.(10) So money payable to a trust cannot be paid to one of the three trustees without the consent of the others.(11) So again, where the mortgagee retained in his hands more of the purchase-money than was sufficient to satisfy his own claim, he was held bound to pay it over to the second mortgagee with simple interest at four per cent., even although the second mortgagee had delayed his claim for four years.(12) It is the duty of the mortgagee to pay due regard to the rival claims of persons interested in the equity of redemption, and he is liable if

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(1) *Kennedy* v. *DeTrafford*, [1896] 1 Ch., 762 (773).

(2) *Ex parte Lacey*, 6 Ves., 625; *Farrar* v. *Farrars, Ltd.*, 40 Ch. D., 395 (415).

(3) *Farrar* v. *Farrars, Ltd.*, 40 Ch. D. 395 (414, 415).

(4) *Nutt* v. *Easton*, [1899] 1 Ch., 873, C.A. [1900], 1 Ch., 29.

(5) *Nutt* v. *Easton*, [1900] 1 Ch., 29.

(6) S. 21 (3).

(7) Fisher, § 1790; *Furber* v. *Coble*, 18 Q. B. D., 194 (509); *Kishendatt* v. *Rajah Mumtaz Ali*, I. L. R., 5 Cal., 198 (211), P.C.

(8) *Lall Doss* v. *Jamal Ali*, 9 W. R., 187; *Jaijit Rai* v. *Gobind Tewari*, I. L. R., 6 All., 303; *Jones* v. *Davies*, 8 Ch. D., 205; Re *Haselloot's Estate*, L.R., 13 Eq., 327.

(9) *Abdul Rahman* v. *Noor Mahomed*, I.L. R., 16 Bom. 141.

(10) *Tanner* v. *Heard*, 23 Beav., 555; *Matheson* v. *Clarke*, 3 Drew., 3; *Charles* v. *Jones*, 35 Ch. D., 25; *Magnus* v. *Queensland National Bank*, 37 Ch. D., 466.

(11) *Magnus* v. *Queensland National Bank*, 36 Ch. D., 25; O. A., 37 Ch. D., 466 (472).

(12) *Gley* v. *Read*, 76 L.T., 39.

he overlooks a claim which afterwards turns out to be good. But in case of doubt the mortgagee may retain the money as a stakeholder and refer the parties to the Court for having their respective claims established; or he may himself deposit the surplus in Court for payment to the rightful claimants in which case his further responsibility would therewith terminate.(1) But in any other case it is his duty to set it apart so as to be fruitful for their benefit, and if he fails to do so, he will be charged with interest (in the case at 4 per cent.) from the time of the completion of the sale.(2)

But he cannot be fairly charged with interest if he held the money pending the settlement of dispute as to the rights of the rival claimants: for he would then have to keep it in readiness for payment at any moment.(3) Any person interested in sharing the money may move the Court to compel the mortgagee to have the money paid into Court, and a receiver may be appointed for any portion of the property remaining unsold.(4) Being a trustee of the surplus the mortgagee is bound to furnish a true and faithful account of his own claims and submit them for examination of the persons interested in the surplus proceeds. (5) If he has invested the surplus he must furnish all information as to the investment of the money. (6) The law of limitation does not apply to such money remaining in the hands of the mortgagee. (7)

But the mortgagee is no longer a trustee for the surplus if at the time of the sale the mortgagor's equity of redemption had already become barred. (8)

The sale by a mortgagee in possession of the mortgaged property in exercise of his power of sale, does not of itself entitle the mortgagor to an account with a general rest of the rents and profits as well as of the proceeds of sale, as on the date of the receipt thereof. (9)

Account on sale by mortgagor.

1638. The mortgagee's liability to account does not cease even if the sale was made by the mortgagor with his concurrence. So where the mortgagor of a leasehold house, with the concurrence of the first mortgagee, who had notice of a second equitable mortgagee, sold the property, and the balance of the purchase-money after payment of the first mortgagee, was handed to the mortgagor, and the second mortgagee thereupon sued both the mortgagor and the first mortgagee for the money, it was held that the first mortgagee having joined in a conveyance with notice that part of the purchase-money was so applied in disregard of the claims of the subsequent incumbrancer of whom he had notice, and that he was therefore liable to the same extent as if he had himself received the whole of the purchase-money. (10)

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(1) *Roberts* v. *Ball*, 24 L.J. Ch., 471.

(2) *Quarrell* v. *Beckford*, 1 Madd., 269; *Charles* v. *Jones*, 35 Ch. D., 544; followed in *Haji Abdul Rahman* v. *Noor Mahomed*, I. L. R., 16 Bom., 141 (where the Court-rate, held to be 6 per cent., was allowed).

(3) *Mathison* v. *Clark*, 25 L. J. Ch. 29.

(4) *Southwaite* v. *Ripon*, 8 L.J. Ch., (N.S.), 139.

(5) *Chadwicke* v. *Heatley*, 2 Coll., 137; *Springett* v, *Dashwood*, 2 Giff., 521.

(6) In re *Tilott* [1892], 1 Ch., 86 (88).

(7) S. 10, Indian Limitation Act (XV of 1877); *cf.* *Hari* v. *Balambhat*, I. L. R., 9 Bom., 233; *Daudbhai* v. *Daudbhai*, I. L. R., 14 Bom., 113; *Prabhakar* v. *Pandurang*, 12 B. H. C. R., 86; In re *Mansfield*, 34 Ch. D., 721.

(8) *Thorne* v. *Heath & Marsh*, [1893] 3 Ch., 530; O. A., [1894], 1 Ch., 599; O. A., [1895], A. C. 495. (The case turned upon the construction of s. 8 of the Trustee Act, 1888, 51 & 52 Vict., c. 59), which relate to indemnity for breach of trust by trustee, committed at the instigation of the beneficiary.

(9) *Wrigby* v. *Gill*, [1905] 1 Ch., 241.

(10) *West London Commercial Bank* v. *Reliance &c., Society*, 29 Ch. D., 954 (962).

The case in which the mortgagee himself exercises the power of sale and that in which he concurs in its sale by the mortgagor who but for his concurrence could not sell it, is then not distinguishable. (1)

1639. Excepted Cases. – The next clause exempts powers conferred before this Act. A general exemption to that effect has already been made in section 2 (*c*) *ante*. The section does not prevent the mortgagee enforcing the power of sale in cases not governed by the Act. Thus the pawnee can recover his debt by sale of the pledged goods,(2) and the mortgagor the surplus sale-proceeds, if any, within three years from the date of the loan (3) the pledge itself being enforceable in six years.(4) The mortgage of stocks and other like securities of fluctuating value carry with them a power of sale after failure to pay at the fixed time, and where no time is fixed after the lapse of a reasonable time.(5) The creditor may, however, waive his right and sue for foreclosure and transfer of the stocks in his name.(6)

1640. Jurisdiction.—The provisions of this section have been held to be applicable to Mahim—which being situate within the original Civil Jurisdiction of the Bombay High Court was held to be situate within the town of Bombay within the meaning of the section.(7)

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purpose of the security, be entitled to such accession.

Accession to mortgaged property.

Illustrations.

(*a*) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purpose of his security, *B* is entitled to the increase.

(*b*) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security, *B* is entitled to the house as well as the plot.

1641. Analogous Law.—This section is supplementary to section 63, and is in accordance with a previous ruling of the Privy Council(8) and coincides in principle with what is laid down in the English law. (9) So it was the rule in the Civil law that the pledger could claim every separate thing comprised in the pledge and whatever was added to it by natural accretion. So on a pledge of animals the pledgee was entitled to recover not only the animals pledged, but also their progeny subsequently born.(10)

1642. Principle.—As the accession becomes a part and parcel of the property it follows it in all its incidents. As observed by the Privy Council: "Most acquisitions by the mortgagor enure for the benefit of the mortgagee,

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(1) *Per* Cotton, L. J., in *West London Commercial Bank* v. *Reliance &c., Society*, 29 Ch. D., 954 (961, 962); O. A. from 27 Ch. D., 187 (in which the facts are set out).

(2) S. 176, Indian Contract Act (IX of 1872).

(3) *Saiyid Ali* v. *Debi Prasad*, I. L. R., 24 All., 251; *Ram Chandra* v. *Antaji* (1896), B. P. J., 161; *cf.* Art. 57, Sch. II, Limitation Act (XV of 1877).

(4) Art. 120, Limitation Act (XV of 1877); *Madan Mohan* v. *Kanai Lal*, I. L. R., 17 All., 284.

(5) *Deverges* v. *Sandeman Clark & Co.*, [1901] 1 Ch., 70.

(6) *Harrold* v. *Plenty*, [1901] 2 Ch., 314.

(7) *Trimbak Gangadhar* v. *Bhagwandas*, I. L. R., 23 Bom., 348.

(8) *Kishen Datt* v. *Mumtaz Ali*, I. L. R., 5 Cal., 210, P. C. The marginal note appended to the draft section refers to the case of *Sadashiv* v. *Vithal*, 11 B. H. C. R., 32.

(9) Fisher, §§ 680–684

(10) Dig. XX tit. 1, *De Pignoribus* XII; Story on Bailments, §§ 292, 314.

increasing thereby the value of his security ; and on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property or substitutions for it, and therefore subject to redemption."(1) The rule is obviously one of equity, and would be inapplicable if the terms of the mortgage exclude the accretion.(2)

1643. Meaning of Words.—"*Any accession*:" *i.e.*, natural as in the illustration (*a*) or acquired as in the illustration (*b*). "*For the purposes of the security*:' *i.e.*, he cannot become its owner, but must restore it with the accretion to the mortgagor upon redemption.

1644. What Accessions pass with Mortgage.—An accession to property may be of two kinds, natural or acquired. An alluvial *mahal* is an instance of a natural accession,(3) while renewal of the mortgaged lease,(4) and land or title acquired by surrender,(5) purchase of trees standing on the mortgaged land by the mortgagee(6) afford instances of acquired accessions. An accession of the same kind may be sometimes natural and at other times acquired. This section confers on the mortgagee a right to both for the purpose of his security. The mortgagor may, however, contract himself out of the section. If the mortgagee has incurred any expenditure in either acquiring or maintaining the accession, he is entitled to be reimbursed, and the question may be decided in the redemption-suit or a separate suit.(7) An accession is an accretion to the principal, and its essence is that though an addition, it remains a part of the principal and as soon as it can be severed and separately enjoyed, it ceases to be an accession.

1645. The question whether an accession forms part of the mortgagee's security is one which must be answered with reference to whether it is an accession. If it is an accession it becomes a part of the mortgaged property under the terms of this section. But the question whether it does not form part of the security depends upon the special terms in the mortgage-deed. Thus where the mortgage was of a certain number of branded sheep and herds of cattle on a run, with the issue, increase, and produce thereof, the Privy Council held the security limited to the issue and increase of such specific sheep, and not include any sheep afterwards brought upon the run, though in substitution of those specified in the original mortgage.(8) So mortgage of a lease spoken of as one which might be granted under certain specified regulations would not give an equity to a lien attaching upon a lease derived by some other title.(9) So it has been held in the Punjab that an encroachment made by the mortgagee in possession upon the mortgagor's adjoining land is not otherwise than adverse even though the encroached area be shown as a part of the mortgage-security in the settlement papers, and being adverse, it of course ceases to be an accretion available to the mortgagor on redemption.(10) On the other hand, where a village,

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(1) *Rajah Kishen Datt* v. *Mumtaz Ali*. I. L. R., 5 Cal., 198, P. C.

(2) *Webster* v. *Power*, L. R., 2 P. C., 69 (80) ; *Ganpatji* v. *Saadat Ali*, I. L. R., 2 All., 787.

(3) *Ganpatji* v. *Saadat Ali*, I. L. R., 2 All., 787.

(4) S. 71.

(5) *Doe* v. *Pott*, 2 Dougl., 709.

(6) *Bukshi Ram* v. *Darku Tukaram*, 10 B. H. C. R. 369.

(7) *Bakshi Ram* v. *Darku Tukaram*, 10 B. H. C. R., 369 ; Re *Hill Pottery*, 15 W. R.. (Eng.), 97.

(8) *Webster* v. *Power*, L. R., 2 P. C., 69 (80).

(9) *Webster* v. *Power*, L. R., 2 P. C., 69 (80). But it may be added such a case was not raised in the Court below (see *ib.*, pp. 80, 81).

(10) *Mula Singh* v. *Budh Singh*, 25 I. C., (Punj.) 616.

without specification of boundaries, is mortgaged as a whole, and it subsequently increases or decreases in size through the decision of a survey-officer, it retains its identity, notwithstanding any casual increase or decrease thus occasioned, and is as an aggregate both a security to the mortgagee and subject to redemption by the mortgagor.(1) So again, where during the possession of the usufructuary mortgagee, the latter purchased from the Government some trees standing thereon, the ownership therein coalesced with his right to the occupancy and thenceforth became identical with it. The mortgagor could then redeem the land with the accession so made by the mortgagee, reimbursing him the expense incurred thereon.(2) The mortgage of "the entire taluka *B*," assessed to a certain revenue, was held to comprise an alluvial mahal appertaining to the taluka although it had been separately assessed.(3) The enlargement of, or the removal of incumbrances from the estate of the mortgagor effected by himself generally enure to the benefit of the mortgagee by increasing the value of his security.(4) So where a mortgagee sub-mortgages his rights and afterwards acquires from his mortgagor the equity of redemption in the mortgaged property, such acquisition will enure for the benefit of the sub-mortgagee who will then be entitled to sue for sale of the property in the same way as if the proprietary interest had been mortgaged to him from the first.(5) An accession to property is not to be regarded as though it had been added to the security in the same sense as when a mortgagee takes additional and independent property by way of an additional security for his mortgage-debt. But it is to be regarded as incorporated in the original subject of the security as though it had been in existence at the time when the original security was given, just as young trees growing upon land, which is subject to a mortgage, when they grow into timber, create a valuable accession to the land and therefore to the security, but cannot be regarded in any sense as separate from or independent of the land, upon which they stand.(6) So where after the execution of two simultaneous mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the land, and subsequently executed various mortgages in respect of the several houses, and the decree in the suit by the fourth mortgagee directed that the whole of the property should be sold free of incumbrances, in separate lots, and the sale-proceeds to be distributed among the various mortgagees in accordance with their priorities, and the property more or less pledged by each mortgage and the sale-proceeds were insufficient to pay off the mortgagees, it was held that for the purposes of the security of the two prior mortgagees, the two new houses were accessions to the mortgaged property and became incorporated with the original subject of the security, as though they had been in existence at the time when the original security was given.(7) A mine or quarry opened by the mortgagor on mortgaged land after the mortgage is an accession to which the mortgagee is entitled for the purpose of his security.(8) The good will of a business naturally passes with it as its necessary incident.(9) The owner of business-premises mortgaged them with the machinery and fixture. A railway company gave notice to acquire a part of the premises for their

(1) *Sadashiv* v. *Vithal*, 11 B. H. C. R., 32 (33).

(2) *Bakshi Ram* v. *Darku Tukaram*, 10 B. H. C. R., 369 (371).

(3) *Ganpatji* v. *Saadat Ali*, I. L. R., 2 All., 787 (791, 792).

(4) *Shyama Churn* v. *Ananda Chandra*, 3 C.W.N., 323.

(5) *Ajudhia Prasad* v. *Man Singh*, I. L. R., 25 All., 46.

(6) *Krishna Gopal* v. *Miller*, I. L. R., 29 Cal., 803 (808).

(7) *Krishna Gopal* v. *Miller*, I. L. R., 29 Cal., 803.

(8) *Elias* v. *Snowdon*, 4 App. Cas. 454.

(9) *Chissum* v. *Dewes*, 5 Russ., 29.

railway, but before the price was fixed the mortgagor died, and the mortgagee entered into possession of the property. Subsequently the company paid a sum of £15,950, for the premises, out of which £ 2,800 were awarded for loss of trade profits. This amount was claimed by the executors as belonging to the mortgagor's estate, but it was held that the sum was in the nature of compensation for the value of the goodwill of the business which passed with the premises, and that the mortgagee and not the executors was entitled to it.(1) The enlargement of the lessee's interest in the leasehold after it is mortgaged is again an accession to which the mortgagee may lay claim. So acquisition of the *mokurari* interest by the *shikmi* tenant would also be such an accession.(2)

1646. A bonus declared by a company on its stock in addition to the annual dividend is not in the nature of annual profits, but an accretion of the capital,(3) and would pass by necessary implication with the stock.(4) A bonus is properly a sum arising from the division of some accumulated fund, which has been set apart from the profits of the preceding years.(5) Bonuses are invariably considered as accretions to the capital, and the manner in which they are given makes no difference.(6) An extraordinary division of a sum of money by a bank among the proprietors of its stock beyond the usual dividend was considered as capital.(7) In another case annuities divided among the proprietors of the bank stock *pro rata* were regarded as an accretion to the capital.(8) Sometimes an additional share fully paid up is issued to each existing shareholder.(9)

1647. Trade fixtures affixed(10) or a mine or quarry opened(11) by the mortgagor after the mortgage for the purpose of his trade follow the *corpus*. A mortgagee does not cease to be a mortgagee merely because he is made a landlord by the mortgagor of a leasehold property attorning to him. On the other hand, the attornment is to be regarded as a superadded security and he is not bound to elect between his two positions. He is, therefore, still entitled to the fixtures which the mortgagor may have annexed after the execution of the mortgage.(12) But if the fixtures annexed to the mortgagor's property belong to a third party, the mortgagee cannot take them because they do not belong to the mortgagor. Unless this be so, as Lindley, L. J., observed, "persons dealing *bona fide* with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded."(13) But a fixture annexed on the hire-purchase agreement in writing before the mortgage would pass to the mortgagee without notice of the agreement. But it would seem that if the fixture had been annexed after the mortgage, or the mortgagee had notice of

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(1) *Pile* v. *Pile*, 3 Ch. D., 36.
(2) *Surja Narain* v. *Nanda Lal*, I. L R., 33 Cal., 1212 (1217).
(3) In re *Hodgens*, 11 Ir. Eq. R., 99; *Preston* v. *Melville*, 16 Sim., 163; *Plunket* v. *Mansfield*. 2 J. & L., 344; *Vaughan* v. *Wood*, 1 Myl. & K., 403; *Ryland* v. *Smith*, 1 Myl. & C., 53; *Carver* v. *Bowles*, 9 L. J., Ch., 91 (Bonuses on bank-stock are capital); *Clayton* v. *Gresham*, 10 Ves., 288 (Bonus to proprietors of bank-stock considered as capital).
(4) *Mathews* v. *Maude*, 1 Russ. & M., 397.
(5) *Hallis* v. *Allan*. 12 Jur. (N S.), 638.
(6) *Witts Steere*, 13 Ves., 363.
(7) *Paris* v. *Paris*, 10 Ves., 185.
(8) *Brander* v. *Brander*, 4 Ves., 800; *Mason* v. *Hawkins*, 4 Bro. P. C., 8.
(9) In re *Barton*, L. R., 5 Eq., 238; *Ward* v. *Combe*, 7 Sim., 634.
(10) *Cullwick* v. *Swindall*, L. R., 3 Eq., 249; *Monti* v. *Barnes*, [1901] 1 Q. B., 205.
(11) *Elias* v. *Snowdon*. 4 App. Cas., 454.
(12) In re *Stockton*, 10 Ch. D., 357; *Ex parte Punnett*, 16 Ch. D., 226 (235); *Morton* v. *Woods*, L. R., 3 Q. B., 658; O. A., 4 Q. B., 293.
(13) *Gough* v. *Wood & Co.*, [1894] 1 Q. B., 713 (720); *Hobson* v. *Gorringe*, [1897] 1 Ch., 182.

the agreement [1] he could not then claim it. [2] In any case no fixtures will pass if they were excluded by the terms of the mortgage. [3]

1648. Accessions pass to Puisne Mortgagee :—Accretions enure for the benefit of subsequent mortgagees after redemption of the first mortgage. It should be noted that while the mortgagee is entitled to an accession, if by diluvion or other causes his security is diminished, he can call upon the mortgagor to furnish him with another adequate security. [4] In this respect an equitable mortgagee has the same rights as a legal mortgagee. [5] The plea of *bona fide* purchaser without notice is no defence to the right to accessions. Nor can the mortgagor charge his mortgagee for them. [6] So if a mortgaged house be burnt or pulled down and a new building erected in its place by an assignee of the equity of redemption the mortgagee can enforce his security on the new building. [7] In this case the security may be said to have assumed a new form in which the mortgagee would take it. [8] The mortgagee's right to accession prevails as opposed to the right of the Crown against the mortgagor [9] and the solicitor's lien for costs. [10]

1649. Rule limited by Contract.—The rule here enacted is stated to be subject to a contract to the contrary, such contract may, it is apprehended, be either express or implied. A vatandar mortgaged his Deshgat vatan land to the mortgagee, which the latter knew was appurtenant to his hereditary office and inalienable beyond the life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. The mortgagee claimed to hold the property against the mortgagor's heir, but the Court held that the mortgagee could not claim to hold the security after the mortgagor's death. But in so holding the Court merely adverted to the rule of estoppel enacted in section 43 [11] and made no reference to the wider rule here enacted.

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Renewal of mortgaged lease.

1650. Analogous Law.—This section is a counterpart of section 64, and is enacted in accordance with the English law. If the renewal of a term is regarded as an accession as it is in England, [12] this section might have been more advantageously added as an illustration to the last preceding section. A similar illustration is indeed appended to section 90 of the Indian Trusts Act, [13] and which runs thus :

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(1) *Hobson* v. *Gorringe*, [1897] 1 Ch , 182, discussed in 13 L. Q R., 120.

(2) *Cumberland Union Banking Co.* v. *Maryport Hematite etc., Co.*, [1892] 1 Ch., 415 ; followed in *Gough* v. *Wood*, [1894] 1 Q. B., 713.

(3) S. 8. *ante*. *Southport etc. Co.* v. *Thomson*, 37 Ch. D., 64 ; *Begvie* v. *Fenwick*, L R., 8 Ch.. 1075, *note* ; *Mather* v. *Fraser*, 2 K . & J., 536 ; *Haley* v. *Hammersly*, 30 L. J., Ch., 771.

(4) S. 68, last para.

(5) In re *Lusty*, 60 L. T., 160.

(6) *Leigh* v. *Burnett*, 29 Ch. D., 231.

(7) *Morais* v. *Hafeezun*, (1860) S. D. A., N. W. P., 432.

(8) *Byjnath* v. *Ramoodeen*, 21 W. R., 233, P. C.

(9) *Factor* v. *Philpott*, 12 Price, 197.

(10) *Smith* v. *Chichester*, 2 Dr. & War, 393.

(11) *Gangabai* v. *Baswant*, I.L.R., 34 Bom. 175 (182); see § § 720, 721 *ante*.

(12) *Rakestraw* v. *Brewer*, 2 P. W., 511 ; Fisher, § 684 ; Robb., pp. 164, 175.

(13) Act II of 1882.

(*a*) *A*, the tenant-for-life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease.

1651. Principle.—A renewed lease is a graft upon the old stock and is therefore subject to the same equities both as to foreclosure and redemption.(1) Renewals of leases by trustees, executors and other persons in a fiduciary position follow the same principle.(2)

1652. Meaning of Words.—*Lease for a term of years*:" for if the lease is permanent, it would require no renewal.

1653. Renewed Lease.—As the mortgagor is entitled upon redemption to a renewal obtained by the mortgagee, (3) so is the mortgagee entitled to the renewal obtained by the mortgagor, as security for his mortgage, although the renewal may really be a new lease granted upon determination of the old one, and not in accordance with any covenant for renewal.(4) The rule remains unimpaired though the renewal was obtained after the original term had expired, (5) or though the new lease was not to commence till after the expiration of the old one. (6) A new lease obtained by a mortgagor, even on forfeiture of the original term or by whatever other means, would equally enure for the benefit of the mortgagee for the purpose of his security, although the mortgagor could not have at the time of the mortgage transferred the new lease to the mortgagee as it was not then in existence. (7) Following these principles it has been held at Allahabad that where a zemindar having mortgaged his zemindari together with his *sir* land, lost his zemindari rights and became an ex-proprietary tenant of the *sir*, the mortgage would take effect as a mortgage of the ex-proprietary rights. (8) The question that the new lease given included additional land, or was for varying term, would not affect the question.

1654. But in the absence of any covenant in the mortgage-deed to that effect the mortgagor is under no obligation to renew his expired lease. But his failure to obtain renewal may bring down upon him the penalty of personal liability. (9) Moreover, on his failure to renew, it is competent to the mortgagee to stand in his place, (10) and obtain renewal, and for which he is entitled to be reimbursed the expense in the manner allowed by the next section. (11) But if the mortgagor renders the renewal impossible by purchasing the reversion, the whole of the estate so acquired will become subject to the mortgage.(12)

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(1) Sir William Grant, M. R., in *Moody* v. *Mathews*, 7 Ves., 174 (184), remarked that in equity the renewed lease is considered the same lease.

(2) S. 90, Indian Trusts Act (II of 1882); *Rushworth's case*, Freem. Ch., 13; *Rakestraw* v. *Brewer*, 2 P. Wms. 511; *Halt* v. *Halt*, 1 Ch., Ca., 190; *Reech* v. *Sandford*; Sel. Ca., in Ch., 61; *Tastor* v. *Marriott*, Amb., 668 (670); *Rowe* v. *Chichester*, Amb., 715, in which the earliest cases are reviewed, per L C., p. 719. *Owen* v. *Williams*, Amb., 734 (737); *Pickering* v. *Vowles*, 1 Bro. C. C., 197; *Leigh* v. *Burnett*, 29 Ch. D., 231.

(3) S. 64.

(4) *Vishnu Trimbak* v. *Tattia Vasudev*, 1 B. H. C. R., 22; *Mahomed Assudoollah* v. *Karamuttoollah*, 4 N. W. P., H. C. R., 11.

(5) *Pickering* v. *Vowles*, 1 Bro. C. C., 197; *Moody* v. *Mathews*, 7 Ves., 185; *James* v. *Dean*, 11 Ves., 383; 15 Ves., 336.

(6) *Rakestraw* v *Brewer*, 2 P. Wms., 115; *Taster* v. *Marriott*, Amb., 668 (670); *Ren* v. *Sandford*, 2 Eq., Cas., 741.

(7) *Moody* v. *Mathews*, 7 Ves., 185; *Hughes* v. *Howard*, 25 Beav., 575; *Trumper* v. *Trumper*, L. R., 8 Ch., 870; followed in *Sham Das* v. *Batul Bibi*, I. L. R., 24 All., 538 (540, 541).

(8) *Sham Lal* v. *Batul Bibi*, I L. R., 24 All., 538 (541).

(9) S 68, *ante*.

(10) *Evans* v. *Walshe*, 2 Sch. & Lef., 519; *Revell* v. *Hussey*, 2 Ba. & Be., 280 (286).

(11) S. 72 (*e*).

(12) In re *Lord Ranelagh's Will*, 26 Ch. D., 590 (599).

The mortgagor-lessee must not derogate from his own grant. He could not, for instance, relinquish his tenancy so as to destroy the security of his mortgagee, any more than he could by such relinquishment determine the underlease.(1) Section 115 moreover provides that surrender of the lease by the mortgagor during the period of the mortgage will not prejudice the mortgagee.(2) A similar provision is made in illustration (*a*) of section 90 of the Indian Trusts Act.(3) "The doctrine of this Court," says Pearson, J., "has always been that the mortgagor of a renewable lease can hold a renewal lease only subject to the mortgagee."(4) But the doctrine that the renewed lease is a graft on the original lease so as to become part of it applies only to leases which are renewable by custom or contract. Hence, if a trustee or partner of a lease which is not renewable buys the reversion on the lease, he is, in the absence of fraud, entitled to hold it for his own benefit.(5)

This section like the last may, moreover, be overridden by an express agreement to the contrary.

Rights of mortgagee in possession.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary :

(*a*) for the due management of the property and the collection of the rents and profits thereof ;

(*b*) for its preservation from destruction, forfeiture or sale ;

(*c*) for supporting the mortgagor's title to the property ;

(*d*) for making his own title thereto good against the mortgagor ; and

(*e*) when the mortgaged property is a renewable leasehold, for the renewal of the lease ;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property ; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed

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(1) *Sham Das* v. *Batul Bibi*, I. L. R., 24 All., 538 (541) ; *Badri Prasad* v. *Sheo Dhian*, I. L. R., 18 All., 354.

(2) *Badri* v. *Sheo Dhian*, I. L. R., 18 All., 354 ; *Cf. Great Western Railway Co.* v. *Smith*, 2 Ch. D., at p. 253.

(3) Act II of 1882.

(4) *Leigh* v. *Burnett*, 29 Ch. D., 231 (234, 325).

(5) *Bevan* v. *Webb*, (1905) 1 Ch., 620.

or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure.

1655. Analogous Law.—The law here enunciated generally correspond with the English law noticed below. The penultimate paragraph as to insurance was originally taken from Lord Cranworth's Act. (1) This section defines the *rights* of the mortgagee in possession, as section 76 defines his *liabilities*. A mortgagee in possession may be regarded as "interested" in the payment of money which the mortgagor is bound by law to pay, and his right to be reimbursed by the mortgagor is then declared by section 69 of the Indian Contract Act. (2) But in so far he secures the outlay in the same way as the mortgage-money, this section goes a good deal further than section 69 which confers on him a bare right to reimbursement.

Clauses (*a*) to (*e*) are founded on the pre-existing law and the Bill refers to the earliar cases as their justifying authorities.(3) And since the section merely codifies the pre-existing rules, it has been applied to all mortgages irrespective of their date of execution.(4)

The provisions of this section have been held to be inexhaustive,(5) for it is conceivable that instances may occur which though not falling within its scope may still call for the intervention of the Courts on the ground of justice, equity and good conscience; but such cases must in any case be regarded as exceptional.

1656. Principle.—This section does not imperatively enjoin on the mortgagee to perform the duties therein named, or incur expenditure thereon. No doubt his duties are similar and have been so laid down in section 76. But this section only declares that if the mortgagee incurs expenditure on the objects here specified, he is entitled to tack the amount to his mortgage-money and recover it as a part thereof. The section gives way if the contract between the parties is made otherwise, in the absence of which it is presumed that the expenditure incurred by the mortgagee was incurred on behalf of the mortgagor, who being primarily liable for it, is bound to make it good to the mortgagee.(6) But the mortgagor should not be "improved" out of his estate. The expense must be necessary and incurred strictly on the objects specified. The section

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(1) (1860), 23 & 24 Vict., c. 145, s. 11. (Powers of mortgagees, now replaced by 44 & 45 Vict., c., 41, ss. 19 (ii), 23 (1), (2), (iii). The marginal note refers only to the earlier Statute, and to 2 Davidson's Conveyancing, 606.

(2) Act IX of 1872.

(3) The references marginally noted against Cl. (*a*)—are Macpherson's Mortgage, 109,113; *Ramji* v. *Chinto*, 1 B. H. C. R., 199 (203); *Manchersha* v. *Kamrunisa*, 5 B. H. C. R. (A. C.), 109; *Ragho* v. *Anaji*, *ib.* (A. C.), 116; Cl. (*b*)—*Ameeroollah* v. *Ram Das*, (1867) N. W. P., H. C. R, 187; Cl. (*c*)—*Brojonath* v. *Bhugobutty*, 1 W. R., 133; Cl. (*e*)—*Nugender Chunder* v. *Kaminee*, 11 M. I. A. 241.

(4) *Girdhari Lal* v. *Bholanath*, I. L. R., 10 All., 611 (614); *Bohra Thakur Das* v. *Collector of Aligarh*, I. L. R., 26 All., 593 (597).

(5) *Rakhohari* v. *Biprodas*, I. L. R., 31 Cal., 975 (978).

(6) *Cf.* s. 69, Indian Contract Act (IX of 1872).

being founded upon equitable regard to the interests of the parties does not on the one hand arm the mortgagee with a weapon to frustrate redemption, and on the other deprive him of the expense incurred in preserving the property for the mortgagor. The section, like section 69 of the Contract Act, is based upon the fiction of an implied request by the mortgagor.(1) It only reproduces the rules of equity affecting land which the Courts of Justice in India have uniformly adopted.(2)

1657. Meaning of Words.—"*During the continuance of the mortgage:*" must mean after the contract establishing the relationship of mortgagor and mortgagee between the parties has been entered into and established. "*Mortgagee takes possession*;" *i.e.*, in his right as mortgagee. "*May spend such money as is necessary*:" excludes his charging for his own services. "*Forfeiture or sale*:" sale must be free from incumbrance, but there is no indication of it in the language of the text. "*For supporting* the *mortgagor's title*:" if it is assailed by any adverse claimant.

"*Property by its nature insurable*:" such as godowns, buildings, and other property liable to destruction by fire, etc. Land and other similar property which is only liable to destruction by flood or diluvion do not fall into the clause, as their liability to destruction from those contingencies is too remote to necessitate legislative protection.

1658. When is a Mortgagee in Possession.—The right of the mortgagee to spend money on the objects specified in the section commences the moment he takes possession of the mortgaged property "during the continuance of the mortgage." Strictly construed, this clause would exclude the case of an usufructuary mortgagee, for he does not take possession *during the continuance* of the mortgage, but in its inception. Indeed, his possession must commence before the mortgage itself commences or is completed.(3) But it is scarcely likely that such an important class of mortgagees was intended to be excluded from the benefit of the section.

Obviously, the only mortgagees to whom the rule could apply and has been made applicable are the usufructuary and English mortgagees and those of anomalous character in which there is change of possession. The question whether mortgagee is in possession at any time must depend upon the existence of the mortgage coupled with the fact of his possession. The question whether his possession must be *qua* mortgagee or it may be in any other capacity would appear to be material. For, suppose the mortgagee enters upon possession of the property under an independent lease given to him after the mortgage, are his rights and liabilities to be determined only on the basis of his mortgage? If so, it may be predicated generally of all mortgagees that their other rights howsoever acquired would always coalesce and merge in their security. But there is no authority for such a proposition, and the mortgagee cannot be held liable to account if his possession was in a character altogether different from and unconnected with his mortgage.(4) Thus, if the Collector leased out the property to the mortgagee on his paying up the arrears of revenue which fell due before his mortgage, he could not be held to be liable to account to the mortgagor for the period of his occupation.(5)

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(1) *Ram Tuhal Singh* v. *Bissessur Lall*, L. R., 2 I. A., 134; *Chedilal* v. *Bhagwan Das*, I. L. R., 11 All., 234.

(2) *Girdharlal* v. *Bholanath*, I. L. R., 10 All., 611 (614); *Bohra Thakur Das* v. *Collector of Aligarh*, I. L. R., 26 All., 593 (597).

(3) See s. 58 (*d*) *ante*.

(4) *Page* v. *Linwood*, 4 Cl. & F., 399.

(5) *Karamut Ali* v. *Imdad Ali*, (1852) N. W. P. S. D. A., 7.

Possession as lessee.

1659. Where the mortgagee fills the two characters of mortgagee and lessee, the question whether he was in possession as lessee so as to be free from the liability to account, or as mortgagee, in which case his liability is unquestionable, is one which must in a great measure depend upon the intention of the parties, as gathered from the nature of the two transactions and the surrounding circumstances.(1) If the two deeds cannot be considered apart one from the other, or if there be circumstances to shew that the lease was only a mode adopted for the payment of interest on the mortgage-money, if the lease is terminable with the mortgage and cannot be surrendered so long as the mortgage subsists, if the rent reserved by the lease is calculated with reference to the amount of the mortgage, and is made liable to reduction proportionately to the reduction that might take place in that amount, it cannot be regarded as apart from the mortgage, and the rights and liabilities of the parties will be determined on that footing.(2) So where the amount of the lease was exactly equivalent to the amount of interest payable under the mortgage, and the mortgage-deed contained a covenant that any arrears due by the lessee should be a charge upon the mortgaged property, which was also inserted in the counterpart of the lease, the Court regarded the mortgage and the lease as different parts of the same transaction.(3) A stipulation that a lease should continue until the loan should be repaid, is clearly a mortgage by whatever name it may be called by the parties.(4) *Zurepeshgi* leases are similarly treated, and the liability of the mortgagee to account would ordinarily be presumed. In England it has been laid down that if a prior mortgagee enters into possession of the mortgaged property after the creation of a puisne mortgage, it may be under a lease, he is invariably treated as a mortgagee in possession so as to render him liable to account to the puisne mortgagee.(5) But to convert a lessee into a mortgagee in order to render his possession subservient to the subsequent incumbrancers is hardly consonant with the trend of the English cases, and, indeed, with the strict view equity takes of the responsibilities of a mortgagee in possession. As Rigby, L.J., said, "It follows of course from the almost penal liabilities imposed upon a mortgagee in possession that Courts of Equity were very slow to decide that possession had been taken, and would not do so, unless satisfied that the mortgagee in possession took the possession in his capacity of mortgagee without any reasonable ground for believing himself to hold in any other capacity."(6) The Courts, therefore, favoured any means which will enable the mortgagee to obtain the advantages of possession without its drawbacks.(7) A mortgagee entering into possession as a purchaser or as an agent, trustee or manager of the mortgagor would not seem to be a mortgagee in possession.(8) So Lord Cranworth observed : "I think that it is perfectly clear law, that when a person becomes possessed

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(1) *Jafer Husen* v. *Ranjit Singh*, I. L. R., 21 All., 4 (5); following *Shunker Lall* v. *Poorun Mull*, (1867) N. W. P. H. C. R., 150; *Imdad Hasan* v. *Badri Prasad*, I. L. R., 20 All., 401 (405, 406).

(2) *Imdad Hasan* v. *Badri Prasad*, I. L. R., 20 All., 401 (406, 407).

(3) *Altaf Ali* v. *Lalta Prasad*, I. L. R., 19 All., 496; *Baghelin* v. *Mathura Prasad*, I. L. R., 4 All., 430.

(4) *Athar Ali* v. *Nawazi Lal*, (1859) S. D A., 1181; *Wuzuroonnessa* v. *Saeedun*, B. L. R. (Sup. Vol.), 613 (616), F. B., *Chennapatnam* v. *Tedakamalla*, I. L. R., 27 Mad., 86.

(5) *Gregg* v. *Arnott*, Ll. & G., 246.

(6) *Gaskell* v. *Gosling*, (1896) 1 Q.B., 669 (691); following *Parkinson* v. *Hanbury*, L.R., 2 H.L., 1 [Esher, M.R., & Lopes, L.J., held on the main facts against Rigby, L.J., whose judgment was dissentient, but it does not affect his views on the law].

(7) *Gaskell* v. *Gosling*, (1896) 1 Q.B., 669 (691).

(8) *Lord Kensington* v. *Bouverie*, 7 De G. M. & G., 156; *Parkinson* v. *Hanbury*, L.R., 2 H L., 1 (13,14).

of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear, or very distinctly laid down in the cases, but it seems to me to depend upon this, that the party taking possession must have known that he was in possession as mortgagee. That seems to be essential to the rule."(1) So where possession is taken under a forfeiture and not as mortgagee it does not invest the mortgagee with that character.(2) So where a patentee assigns to each of two persons a moiety of his patent rights, and one of the assignees assigns his share by way of mortgage to the other assignee who works it, he is not liable to account to the other for profits.(3) But where the lease and the mortgage are contemporaneous and interdependant deeds, as where the stipulation is that the rent of the leased property should be appropriated towards interest due on the mortgage the two transactions must be treated as a single transaction giving rise to corresponding rights and liabilities, it being in such a case immaterial that the lease was to the agent or relation of the given mortgagee.(4) A person who enters into possession in one character may change his character afterwards so as to become liable as a mortgagee in possession.(5) So contrariwise, a mortgagee in possession may subsequently cease to be so, but if he fraudulently denies his character as such, he would not afterwards be permitted to re-assert it to his own advantage: "Here you set up a title adverse to the owner; and when a creditor denies his character as such and claims as owner, I cannot allow him to fall back on his original character of creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor." (6) Thus while the mortgagee in possession is not ordinarily chargeable with interest on his receipts,(7) he will forfeit his immunities if he sets up an adverse title.(8) His other rights are set out in this section. But the rule is otherwise if a person has been honestly led into a belief that upon non-payment by the mortgagor of the money at the time fixed, he became the absolute owner of the property,(9) *a fortiori* if the mortgagor abandoned possession without enforcing his right of redemption. (10)

1660. But in an Indian appeal the same tribunal have laid down a different rule. In that case, the Court had made an erroneous decree for possession instead of for judicial sale, and the mortgagee being placed in possession, the case was finally struck off. Eleven years afterwards the mortgagor sued for accounts, and the Privy Council allowed his prayer holding that the decree for possession did not amount to a decree for foreclosure, failing which

(1) *Parkinson* v. *Hanbury*, L.R. 2 H.L., 1 (13, 14).

(2) *Blennerhassett* v. *Day*, 2 Ba. & Be., 104 (125).

(3) *Steers* v. *Rogers*, (1893) A. C., 232 (236, 237).

(4) *Cf. Chennapatnam* v. *Tadakamalla*, I. L.R., 27 Mad. 86.

(5) *Parkinson* v. *Hanbury*, L.R., 2 H.L. I. (14).

(6) *Per* St. Lord Leonards in *the Incorporated Society* v. *Richards*, 1 Dru. & War., 258 (334); *National Bank* v. *United Hand-in-Hand Bank*, 4 App. Cas., 391 (408, 409).

(7) *Nelson* v. *Booth*, 3 De. G. & J., 119.

(8) *Per* Sir James Colville in *National Bank* v. *United Hand-in-Hand Bank*, 4 App. Cas., 391 (409), Privy Council Appeal from Victoria.

(9) *Anand Rav* v. *Ravji*, 2 B.H C.R., 214 (218, 219). (The mortgagee in the case had been misled by the current of decisions to that effect, afterwards reversed by *Ramji* v. *Chinto*, 1 B.H.C.R., 199). *Ramshet* v. *Pindharinath*, 8 B.H.C R., 236 (239); *Smyth* v. *Simpson*, 7 Moo. P.C., 205.

(10) *Smyth* v. *Simpson*, 7 Moo.P.C., 205 (227).

the possession of the decree-holder could only be of a mortgage in possession, and as such he must submit to be redeemed.(1) This case may perhaps be distinguished on the ground that their Lordships based their judgment mainly on the construction of the decree, and that the question, about the *bona fides* of the mortgagee was neither pressed nor decided. In another case the mortgagee's possession was taken as equivalent to interest, and he was relieved from the necessity of having to render an account.(2) It would appear that a purchaser in a mortgage-decree for sale would have to account for the rents and profits, if owing to the non-joinder of a necessary party the sale operates merely as an assignment of the mortgage. The liability of a mortgagee in wrongful possession to account is one which he cannot surmount by pleading his unlawful possession.(3) And it has been held that a mortgagee holding over after the expiration of his lease would be treated as a mortgagee in possession and not as a tenant holding over.(4)

There is a wide distinction between the usufruct collected by a mortgagee in possession, and damages which he may recover for wrongful eviction by the mortgagor.(5) If a mortgagor wrongfully turns a mortgagee out of possession, the mortgagee is entitled to retain any mesne profits which he may recover against the mortgagor and is not bound to account for it.

Immaterial elements.

1661. The question what amounts to a mortgagee's possession still remains. The mere receipt of rents and profits by him is not enough to clothe him with that character.(6) As Cotton, L.J., observed: "In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits, in my opinion it ought to be shown not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate."(7) It is not necessary that the mortgagee should be in actual physical occupation of the property. He may equally effectually be in possession through his agent or receiver.(8) A notice by him to tenants of mortgaged property to pay him rent and restraining the mortgagor from interfering with the estate is a sufficient assumption of possession, where the property is settled on tenants.(9) So it has been observed by the Vice-Chancellor: "A man may have been in possession of an estate without being in the occupation of an acre of it. Any one is in possession of an estate who receives rent from the tenants who do occupy it." (10) And if the possession is his, he cannot shake off his responsibilities by calling himself trustee, manager, agent or receiver (11) of the mortgagor. (12) Nor can he capriciously give up his possession at any moment to rid himself of his responsibilities. (13) On the other hand, if he is

(1) *Raja Rapamma* v. *Vira Protapa*, I.L.R. 19 Mad., 249 (254), P.C; *Shib Dass* v. *Kali Kumar*, I.L.R., 30 Cal., 463; *Nilkant* v. *Joynedin* 7 W.R. 30.

(2) *Umes Chunder* v. *Zahur Fatima*, I.L. R., 18 Cal., 164 (180), P.C.

(3) *Nilkant* v. *Joynedin*, 7 W.R., 30.

(4) *Bishop* v. *Sharp*, 2 Vern., 469.

(5) *Chutterdharee* v. *Ramdoolaree* (1859), S.D.A., 1181; *Wazuroonnessa* v. *Saeedun*, B. L.R., (Sup. Vol.), 613 (617) F.B.

(6) *Stanley* v. *Grundy*, 22 Ch. D., 478; *Noyes* v. *Pollock*, 32 Ch. D., 53; *Parkinson* v. *Hanbury*, L.R., 2 H.L., 1 (16).

(7) *Noyes* v. *Pollock*, 32 Ch. D., 53 (161) *Richards* v. *Overseers of Kidderminster* (1896), 2 Ch., 212 (220).

(8) *Per* North, J., in *Richards* v. *Overseers of Kidderminster* (1896), 2 Ch., 212 (219, 220).

(9) *Simmins* v. *Shirley*, 6 Ch. D., 173.

(10) *Trulock* v. *Robey*, 15 Sim., 265 (273); *Shepard* v. *Jones*, 21 Ch. D., 469 (475).

(11) *Shamal* v. *Lakhimoni*, 6 I.C. (Cal.) 323, (326).

(12) *Lord Trimleston* v. *Hamil*, 1 Ba. & Be., 377.

(13) Re *Prytherch*, 42 Ch. D., 590.

once let into possession by the mortgagor, he cannot as a rule eject him without offering to redeem him.(1) Where a mortgage-deed is silent as to possession, and there is no agreement to the contrary, a mortgagee who takes possession takes also the obligation upon him to account for the rents and profits during the time he is in possession.(2)

1662. Neither the mortgagor nor the mortgagee can get rid of the liabilities attaching to his position by assigning his rights (§ 1513). If the mortgagee was liable to account, his assignee is none the less liable, for he cannot succeed to the rights of his assignor freed from the liabilities subject to which the rights were held.(3)

A mortgagee in possession of only a part of the mortgaged property is not liable to account for the whole. "If there are two independent tenants the mortgagor may take possession of one and not of the other, and the case seems substantially the same where the properties are physically conterminous." (4) So where the mortgagee of land, consisting of copses and of a farm which was let without the shooting or the timber, gave notice to the tenant of the farm to pay the rent to him, it was held that though the mortgagee had become mortgagee in possession of the farm, he had not become mortgagee in possession of the shooting, the copses or the timber so as to be liable to account.(5) The mere fact that the mortgagee had moved to restrain the mortgagor from cutting the timber would not however convert the mortgagee into a mortgagee in possession, for he is entitled to restrain the cutting of timber if it will diminish his security.(6)

A sub-mortgagee of a part of the estate and in possession of the property mortgaged to him would similarly be liable to account only for the property in his possession.(7) But it is conceivable that such possession may work ouster from enjoyment of the rest, and in such case the fact that the mortgagee was only in possession of a part of the property would not relieve him from having to account for the remainder.

1663. Limits of Admissible Expenditure.—The mortgagee in possession is entitled to maintain, as far as possible, the value of his security unimpaired, and he is so far interested in spending money upon it. But since this is primarily the duty of the mortgagor,(8) he is liable to reimburse him the expenditure presumably incurred on his behalf. The mortgagee must, however, keep a clear, full and accurate account of the money spent by him,(9) and his claim, if made in Court, must be supported by at least *prima facie* evidence. Where the expenditure incurred is not unreasonable, it is not necessary that the mortgagor should have had notice of it. It is only when the expenditure is unreasonable, inconsiderable or unusual, that notice to the mortgagor becomes material for the purpose of showing that he had acquiesced in it.(10) It was at one time thought that the mortgagee could not claim for improvements made after the expiry of the day fixed for payment, but under the clause there can be no doubt that the mortgagee will be entitled to his remedy for the expenditure

(1) *Davy* v. *Barker*, 2 Atk., 2; *Postlethwaite* v. *Blythe*, 2 Swan., 256.
(2) *Madari* v. *Baldeo Prasad*, I.L.R., 27 All., 351 (355), F.B
(3) *Hossain* v. *Ramlal*, (1863) S.D.A., N. W.P., 192.
(4) *Per* Fry, J., in *Simmins* v. *Shirley*, 6 Ch. D., 173 (175).
(5) *Simmins* v. *Shirley*, 6 Ch. D., 173; *Soar* v. *Dalby*, 15 Beav., 156.
(6) *Simmins* v. *Shirley*, 6 Ch. D., 173 (175).
(7) *Joyprokash* v. *Ragoobur*, (1865) S.D.A., N.W.P., 59.
(8) See s. 68, last para.
(9) S. 76 (*g*).
(10) *Shepard* v. *Jones*, 21 Ch. D., 469.

incurred by him, during the continuance of the mortgage, that is, until the debt is paid off or extinguished.(1) But it must be remembered that whatever may be the actual expense incurred by him, he is not entitled to be reimbursed more than what was *necessary*, and then, too, it must have been incurred on the objects specified in the clauses. The question whether the expenditure was necessary is one of fact and must be determined according to the circumstances of each case.(2) The object of limiting the mortgagee's right to necessary expense was to prevent him from incurring such expenditure as may cripple the right or power of redemption. As Lord Langdale expressed it, "the mortgagee has no right to lay out money in what he calls improving the property, which may be done in such a way as to make it utterly impossible for the mortgagor with his means ever to redeem. This has been termed *improving a mortgagor out* of his estate." (3) It has, therefore, been expressly provided by the section that the mortgagee may charge for the *preservation* of the property though not for its improvement.(4)

The objects upon which the mortgagee is authorized to incur expense are specified in the sub-clauses.

Cl. (a).

1664. Management of the Property.—The right of the mortgagee in possession to charge for the expense incurred in the management of the property flows out of his liability to manage it as a man of prudence using his best endeavours in realizing the rents and profits thereof. The mortgagee may charge for the expense *incurred* by him in the management of the property, but he could not, it was at one time held, charge for his own time and labour expended thereupon, for to manage the property was said to be his duty, and no one was allowed to have an interest in antagonism to his duty.(5) This rule originated in England before the repeal of the usury law, but notwithstanding its repeal, it has continued to be rigidly adhered to by the Courts,(6) so much so that it refused to allow for his management even though the mortgagor may have agreed to pay for it. But an exception was made in the case of mortgagees who happen to be solicitors and who have since 1895 been exempted from the rule by an Act of Parliament.(7) But the tendency of recent decisions has been to allow the mortgagee reasonable recompense for his management and the only exceptions admitted are those in which the agreement to pay him for his management constitutes a clog on the mortgagor's right of redemption or when it is unconscionable or clearly obtained by undue influence or the abuse of fiduciary relations.(8) It has been consequently held that an agreement to remunerate the mortgagee for his management is valid unless it is objectionable on the grounds before set out.(9)

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(1) *Ramji* v. *Chinto*, 1 B.H.C.R. (A.C.), 199; see *Krishna Pattar* v. *Shrinivasa Pattar*, I.L.R., 20 Mad., 124.

(2) *Kadir Moidin* v. *Nepean*, I.L.R., 26 Cal., 1 (P.C.).

(3) *Sandon* v. *Hooper*, 6 Beav., 246.

(4) *Arunachella* v. *Sithayi*, I.L.R., 19 Mad., 327 (329); *Ameeroollah* v. *Ram Dass*, 2 Agra, 187; *Ragho* v. *Anaji*, 5 B.H.C.R. (A. C.), 116.

(5) *Shipway* v. *Broadwood*, [1899] 1 Q. B. 376; *Bonithon* v. *Hockmore*, 1 Vern., 316; *French* v. *Baron*, 2 Atk., 120; *Godfrey* v. *Watson*, 3 Atk., 517; 26 E.L.R., 1098 (1099); *Mahadev* v. *Ramchandra*, 6 Bom., L. R., 590.

(6) *Broad* v. *Selfe*, 9 Jur. (N. S.), 885; *Barett* v. *Hartley*, L. R., 2 Eq., 795; Re *Wallis*, 25 Q. B. D., 176; *Eyre* v. *Hughes*, 2 Ch. D., 148; Re *Doody*, [1893] 1 Ch., 129; *Kavanagh* v. *Working Man's Society*, [1896] 1 Ir. R., 56.

(7) Mortgagee's Legal Costs Act (1895) (58 & 59 Vict., C. 25).

(8) *Hope Mills* v. *Cawasji*, 13 Bom. L. R. 162 (183, 184).

(9) *Ib.*, p. 184.

And it may be added that this section far from invalidating such contracts allows the mortgagee to "spend such money as is necessary for the due management of the property" and which does not preclude him from paying himself a reasonable sum for his own services. Even when the mortgagee was held not entitled to charge for his own time and labour, he was held not thereby debarred from employing an agent on whose services he naturally incurs expense which he is entitled to debit to the mortgagor.(1) But if the manager is his own son and no salary has been paid to him, he cannot debit it in the accounts, unless he has resided at a distance from his father, in which case his cost of maintenance would have to be allowed on realization of rents.(2) It is customary to allow 10 per cent. on the gross receipts as collection-expense, unless there is evidence of more or less as being the actual expense incurred.(3) This is the normal rate at which even a trespasser may charge for collection, unless the trespass was altogether tortuous and malicious, or continued without any *bona fide* claim of right,(4) and it is clear that in the absence of other evidence a mortgagee in possession would be entitled to charge for collection at the same rate. He may also charge for other expense incident to his management. Thus if he had to pay an outgoing tenant for crops on the ground it would be a legitimate item to charge in his account.(5) Again, the mortgagee may have to sue tenants or others in the ordinary course of his management as for recovery of rent, injunction against commission of waste, trespass and the like, and it cannot be denied that he is entitled to charge for the cost of litigation,(6) and may recover it personally from the mortgagor unless his liability was expressly excluded by the deed. (7) But if the deed provided that the cost of litigation should be deducted from the revenues, the expense cannot be then recovered from the mortgagor personally, for "in the face of the express provision in the deed for one mode of payment it is difficult to imply any other mode."(8) The mortgagee's right to recover the cost of litigation has been denied at Madras at any rate where the suit was for recovery of rents due from tenants settled by the mortgagee, (9) but the authorities(10) upon which this view is based do not support it. Indeed, according to the English practice the mortgagee is invariably

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(1) *Heera Singh* v. *Sahoo Lachman Das*, (1858) S. D. A., N. W. P., 447 (564).

(2) *Kadir Moidin* v. *Nepean*, I.L.R., 26 Cal., 1 P. C.

(3) *Grish Chunder* v. *Shoshi Shikereshawar*, I.L.R., 27 Cal., 951 (969, 970), P. C.; *Roghonath* v. *Lachmi*, 1 Agra, 132; *Mahomed* v. *Noor*, (1862) S. D. A., N. W. P., 200. The contrary was held in *Brojonath* v. *Bhugobutty*, 1 W. R., 133 (134); and in *Mukand Lall* v. *Goluk Chunder*, 9 W. R., 572 (575), in which the Court said: "No item should be allowed to the mortgagee which is not either admitted by the mortgagor, or supported by evidence of some sort. For instance, neither 10 per cent. nor 5 per cent. should be allowed for collection-charges, but only so much as the amount of collection actually amounted to, and if proper vouchers for this are not forthcoming, at least some evidence should be adduced sufficient to lead to a reasonable estimate of what the expenses under this head probably were." But this view is now no longer supported by precedents or practice. Indeed, the contrary has been laid down in numerous cases: *Mojchand* v. *Mt. Deokoonwur*, (1852) S. D. A., N. W. P., 477; *Ranee Sengur* v. *Ranee Rugsel*, (1853) S. D. A., N. W. P., 112; *Heera Singh* v. *Sahoo Luchmun*, (1853) S. D. A., N. W. P., 564; *Hurbuns* v. *Petum Singh*, (1854) S. D. A., N. W. P., 371; *Khyaleeram* v. *Ramdyal*, (1855) S. D. A., N. W. P., 15.

(4) *Altaf Ali* v. *Lalji Mal*, I.L.R., 1 All., 518, F. B.; *Abdul Ghafur* v. *Raja Ram*, I.L.R., 23 All. 252; *Dungar Mal* v. *Jai Ram*, I.L.R., 24 All., 376 (380).

(5) *Oxenham* v. *Ellis*, 18 Beav., 593.

(6) *Saunders* v. *Rao Khooman Singh*, (1853) S. D. A., N. W. P., 692.

(7) *Shri Ganesh* v. *Keshavrav*, I.L.R., 15 Bom., 625 (639).

(8) *Ib.*

(9) *Pokree Saheb* v. *Pokree Beary*, I.L.R., 21 Mad., 32 (33, 34).

(10) *Godfrey* v. *Watson*, 3 Atk., 517; *Parker* v. *Watkins*, John. 133.

allowed all costs properly incurred by him in relation to his security.(1) Of course, costs, which the mortgagee has improperly incurred, as on an unnecessary and harassing litigation, cannot be recovered.

1665. The mortgagee may also charge for the wages of chowkidars, and a certain percentage, ordinarily 5 per cent. for contingencies.(2) It is, however, apprehended that an allowance for contingencies would hardly be now permitted. But the mortgagor could not dispute his *lumbardari haq* usually allowed at the same rate, where the mortgagee is the recorded lumbardar in the Collector's books. But miscellaneous items of expenditure as on *rasad*, *i.e.*, supplies made to official wayfarers, mendicants and the like, are wholly inadmissible.

Where the same establishment has managed properties comprised in different mortgages, the Court will equitably apportion the costs between the several estates, keeping in view the amounts of incumbrances and the difficulties of management. Where the mortgagee appoints an agent, he does so at his own risk, for his liability to account for all rents *paid* to the agent remains the same as if they were paid to him, and the death of the agent and consequent difficulty of proving what the agent received is no answer.(3)

Though this section lays down the rights of the mortgagee in possession it does not affect his liabilities in other respects. If therefore the mortgage was executed by a Hindu widow, the mortgagee in possession may spend money on repairs, but it cannot be recovered from the reversioner succeeded to the estate, if it was made without legal necessity nor can the mortgagee remove the buildings put up by him on the property so mortgaged.(4)

1666. Preservation.—Again, the mortgagee may expend such money as is necessary for the *preservation* of the property from its destruction, forfeiture or sale. Under section 76 it is his duty to manage the property as a person of ordinary prudence would manage it as if it were his own. Under this clause he is entitled to charge for his management. The mortgagee must, however, confine his outlay to preservation only of the property. He should not expend money on its improvements. If, however, there is necessity for incurring extraordinary expenses, he must obtain the mortgagor's consent.(5) But neither notice to nor consent of the mortgagor is necessary if the improvement is reasonable and beneficial. So Jessel, M. R., recapitulating the law on the subject, observed: "The real doctrine as to notice is, that where the mortgagee gives the mortgagor notice of the expenditure, and the mortgagor agrees to it, then of course it is unnecessary for the mortgagee to shew that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as in the view of a Court of law amount to tacit consent, or, as it is sometimes called, 'acquiescence,' that will also put the mortgagee in an equally advantageous position. But if the mortgagor simply does nothing, it appears to me that notice cannot affect the rights of the parties either

Cl. (b).

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(1) *Dryden* v. *Frost*, 3 My. & Cr., 670 (675); *Dettilin* v. *Gale*, 7 Ves., 558 (585); *Ellison* v. *Wright*, 3 Russ., 458; Reviewed *per* Cotton, L. J., in *National Provincial Bank* v. *Games*, 31 Ch. D., 582 (592, 593); *Merriman* v. *Bonner*, 10 Jur. (N.S.), 534.

(2) *Moolchand* v. *Deokoower*, (1852) S. D. A., N. W. P., 477.

(3) *Noyes* v. *Pollock*, 30 Ch. D., 336.

(4) *Vijbhukandas* v. *Dayaram*, 9 Bom. L. R., 1181.

(5) *Shepard* v. *Jones*, 21 Ch. D., 469.

way." (1) Hence mere notice to the mortgagor is not sufficient, for the mortgagor must *consent* to it, which means that he must at least acquiesce in it. The mortgagee will not be allowed to charge for the cost of a gratuitous structure made without the consent of the mortgagor, and in no way necessary for the maintenance or preservation of the mortgaged property.(2) The mortgagee in possession cannot recover expenses not necessary, but incurred in pursuance of some official order, which he was not legally bound to comply with.(3) He may, however, recover expenses incurred in connection with the revenue-survey of the land mortgaged to him.(4) He is bound to keep the mortgaged premises in necessary repair, but in order to preserve the property from destruction, it is necessary that its destruction should be imminent. Thus, where the property consisting of a thatched house was reconstructed and repaired, to prevent it from falling out of repair, and from becoming uninhabitable, the mortgagee was allowed to charge for the same with interest.(5) So also where the mortgagee constructed an embankment,(6) or repaired a well,(7) or rebuilt the house mortgaged to him after it was destroyed by an accidental fire.(8) In the last case, however, the contingency was generally provided for, it being stipulated that if the house should be destroyed by *asmani sultani*, it should be rebuilt by the mortgagor, and on default by him, by the mortgagee.

Improvements.

1667. But apart from convenant, the mortgagee is given some latitude in the matter; for while on one hand, he must do nothing to render redemption impossible, on the other hand, it would be captious to disallow all improvements because they tend to heighten the price of redemption. In England it is acknowledged that the mortgagee may rebuild in an improved manner and more substantially than before, provided that the work is done providently and the character of the buildings is not changed.(9) And so it was held in this country before the Act that the fact that the rebuilding had cost Rs. 8,000 which was double the amount of the price of the original building was no reason for disallowing it.(10) Indeed, Jessel, M.R., regards the practice to be quite settled that if upon the hearing of a redemption-suit the mortgagee, having charged in his pleadings that he has laid out money in lasting improvement produces general evidence of the expenditure and that the works are *prima facie* improvements, it is sufficient for an inquiry. If, moreover, he proves that the expenditure incurred has effected lasting improvements he will be entitled to get the amount.(11) Thus, for instance, if the mortgagee of a brewery laid out money in boring for water he will have in the first place, generally to prove that he had expended a specified sum in boring and that it was *prima facie* an improvement in that it had increased the water-supply.(12) So again, if the improvements have increased the saleable

(1) *Shepard* v. *Jones*, 21 Ch. D. 469 (479); explaining the dictum of Lord Langdale in *Sandon* v. *Hooper*, 6 Beav., 246; followed by P. C. in *Henderson* v. *Astwood*, (1894) A. C., 150 (163).

(2) *Samme* v. *Abdul Wahid*, (1883) A. W. N., 208; *Durga Singh* v. *Namany*, I. L. R., 17 All., 282; *Arunachella* v. *Sithayi*, I.L.R., 19 Mad., 327.

(3) *Ameeroollah* v. *Ram Doss*, 2 Agra 187; *Ragho* v. *Anaji*, 5 B.H.C.R. (A C.), 116.

(4) *Bapusa* v. *Ramji*, 2 B.H.C.R., 220.

(5) *Jogendranath* v. *Raj Narain*, 9 W.R. 488; *Lakshman* v. *Hari Dinkar*, I. L. R., 4 Bom. 584.

(6) *Vithal* v. *Dhondi*, (1884) B.P.J., 44.

(7) *Balaji* v. *Nama*, (1881) B.P.J. 195.

(8) *Sakharam* v. *Amtha*, I.L.R., 14 Bom., 28; see also *Mancharsha* v. *Kamrunissa*, 5 B.H.C.R., (A.C.), 109.

(9) *Jortin* v. *South Eastern Ry.*, 6 De G. M. & G., 270; *Sandon* v. *Hooper*, 14 L.J. Ch., 120.

(10) *Mancharsha* v. *Kamrunissa*, 5 B. H. C. R. (A.C.) 109 (115); *Jogondronath* v. *Raj Narain*, 9 W.R., 488; followed in *Ragho* v. *Anaji*, 5 B.H.C.R., (A.C.), 116; *contra* in *Vrijbhukannas* v. *Gayaram*, I. L. R., 32 Bom., 32.

(11) *Shepard* v. *Jones*, 21 Ch.D., 469 (476).

(12) *Ibid*, p. 477; *Ramji* v. *Chinto*, 1 B. H.C.R., (A.C.), 199 (203); *Ameeroollah* v. *Ram Dass*, 2 Agra, 187.

value of the property, there can be no question but that the mortgagor shall have to pay for it, to the extent to which the selling price has been so increased. (1) So their Lordships of the Privy Council added, following the case last cited:—"It would be contrary to common justice to deprive Davies of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of the premises... It was said that the improvements which Davies made could not have added to the value of the property from Henderson's (2) point of view, having regard to the purpose for which he wanted it. That may be very true, but still Henderson may have had to pay a larger price for the premises because they were fitted with modern improvements, and suited to the ordinary requirements of the trade of the port." (3) So where the mortgagee claimed for improvements which were that he had reconstructed a pucca well, built mud houses for tenants, distributed money among the tenants for manure and oxen, and had given some money as compensation to certain occupancy-tenants in consideration of relinquishment of their occupancy-rights, it was held that the re-construction of the well was the only improvement for which the mortgagee could recover. (4) These cases in no way conflict with the section which only states the cases in which the mortgagee has a *right*, apart from any sanction given by the mortgagor, to spend money on the estate and which will still have to be dealt with on equitable grounds. But in Madras the right of the mortgagee to allowance for improvements is totally denied. (5) A person who has paid Government revenue in order to save the estate from sale would be entitled to recover the amount from him whom he believed to be the mortgagor, if at the time of payment he *bona fide* believed himself to be mortgagee although he may afterwards have failed to establish his mortgage. (6) Where both parties by mutual consent dispense with an account, it was held in a case that the mortgagee was not entitled to credit for costs of repairs, inasmuch as such costs were necessarily incident to the enjoyment of the profits for which he had not been called on to account. (7) Again, if the mortgage-deed appoints a fund for repairs the parties must give effect to it. (8) The mortgagee is not allowed for improvements in mines. (9)

A puisne mortgagee cannot claim for improvements against the prior mortgagee, (10) but if he redeems the first mortgagee, he will then be allowed for repairs and improvements on redemption. (11)

1668. In England, the rule appears to be similar, for there the mortgagee is only allowed to charge for improvements, if reasonable, having regard to the nature and value of the property and if they are of a lasting character. But the mortgagees can always plead in defence that the improvements were unnecessary

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(1) *Per* Jessel, M. R., in *Shepard* v. *Jones*, 21 Ch. D. 469 (478).

(2) Henderson was the subsequent purchaser of the mortgaged property, a wharf at Kingston in Jamaica.

(3) *Henderson* v. *Astwood*, [1894] A. C., 150 (163); following Jessel, M. R., in *Shepard* v. *Jones*, 21 Ch. D., 469.

(4) *Rashidunnissa* v. *Bhup Singh*, 2 A. L. J.R. 24 (S.N.).

(5) *Arunachella* v. *Sithaye*, I. L. R., 19 Mad., 327; *Rangayya* v. *Parthasarathi*, I L.R., 20 Mad. 120; *Krishna* v. *Srinivasa*, I.L.R. 20 Mad. 124.

(6) *Badaum Koowur* v. *Seetul Pershad*, 5 W.R. 126.

(7) *Lakshman* v. *Hari Dinkar*, I L. R., 4 Bom. 584.

(8) *Narayan* v. *Rangubai*, I. L. R. 5 Bom. 127 (129).

(9) *Thorneycroft* v. *Crokett*, 2 H. L. C. 239.

(10) *Per* Fry who held such improvements not to be salvage against the prior incumbrancer in *Landowners, etc. Co.* v. *Ashford*, 16 Ch. D. 411 (433).

(11) *Exton* v. *Greaves*, 1 Vern., 138.

and improper.[1] "In estimating the value of improvements, where there has been rebuilding, it will be ordered[2] that the old buildings be valued as old materials only, if they were incapable of repair otherwise as building standing."[3] The amount legitimately spent by the mortgagee may be recovered from the mortgagor as well as a subsequent incumbrancer suing to redeem him. Thus where the mortgagee of agricultural land with the consent of the mortgagor reconstructed a well on the property which had been rendered useless from natural causes, it was held that he was entitled to recover the amount from subsequent mortgagee suing to redeem him.[4] It would appear that the mortgagee is responsible for the preservation of the property until the mortgagor recovers actual possession of it, being liable for any loss caused to it between the decree and the period of six months allowed for its redemption —even though the loss may not be attributable to neglect on his part.[5]

Salvage lien.

1669. A question that has often arisen in this connection but one upon which the Courts are by no means agreed, is whether a stranger spending money upon preserving the property is entitled to a charge thereon for his money. The subject will be found discussed under section 100.[6]

1670. Forfeiture or Sale.—It is the duty no less than the interest of the mortgagee to preserve the property mortgaged to him from forfeiture or sale.[7] Property is always liable to forfeiture and sale for arrears of Government revenue, and the mortgagee could always recover the amount paid in satisfaction of the public demand, even though he may not have been in possession.[8] Such payments are looked upon as in the nature of salvage-payments and are, therefore, recoverable as a part of the mortgage-money.[9] Even a mortgagee without possession is bound to see that his security is not annihilated by sale of the property for non-payment of the paramount charge, and it has been, therefore, held that irrespective of the nature of the security any mortgagee would be entitled to preserve his security from forfeiture or sale, and may tack his payments to the mortgage-money.[10] Indeed, the Privy Council appear to have gone a good deal further, for their Lordships observe: "Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid."[11] So far as regards his right to recover

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(1) *Powell* v. *Trotter*, De & Sm., 388.
(2) *Robinson* v. *Ridley*, 1 Mad., 2.
(3) Fisher, § 1782.
(4) *Durgh Singh* v. *Naurang Singh*, I.L.R., 17 All., 382.
(5) *Krishna Pattar* v. *Shrinivasa Pattar*, I.L.R., 20 Mad., 124.
(6) See s. 100, comm.
(7) S. 76 (c).
(8) *Nogender Chunder* v. *Kamini Dassee*, 11 M.I.A. 241; *Upendra* v. *Tara*, I.L.R., 30 Cal., 794; *Khobari* v. *Bipra Das*, I.L.R., 31 Cal., 975 (978).
(9) *Lachman Singh* v. *Saligram*, I L.R., 8 All., 384; *Girahar Lal* v. *Bholanath*, I.L.R., 10 All., 611; *Anandi* v. *Dur Najuf*, I.L.R., 13 All., 195; *Nilawa* v. *Krishnappa*, 8 Bom.L.R., 350; *Kamaya* v. *Devapa*, I.L.R. 22 Bom. 440; *Upendra Chundra* v. *Tara Prosanna*, I L.R., 30 Cal., 794; *Rakhobari* v. *Bipra Das*, I.L.R. 31 Cal. 975 (978).
(10) *Nogender Chunder* v. *Kamines Dassee*, 11 M.I.A., 241; *Kinu Ram* v. *Mozoffer Hosain*, I.L.R., 14 Cal., 809 (827,828), (F.B.).
(11) *Per* Lord Romilly in *Nogender Chunder* v. *Kamini Dassee*, 11 M.I.A. 241 (258).

payments made to protect the property from forfeiture or sale, the right of the mortgagee is independent of possession.(1)

1671. But in order to place the mortgagee on the exceptional footing, the payments must have been made to protect the property from forfeiture or sale that may have imperilled his security. As a rule the land-revenue demand is of this character, but road and public work cesses in Bengal fall into a separate category inasmuch as a sale for road and public cesses does not pass more than the right, title and interest of the judgment-debtor. But even if so, the mortgagee may recover such payments personally from the mortgagor,(2) but in that case a separate suit would have to be brought for the purpose. On the other hand, the mortgagee has no right of separate action for the amount so paid, while remaining in possession.(3) He could not claim the amount personally against the mortgagor, but must see himself repaid in the manner directed by the section, unless the mortgagor had accepted personal liability, in which case a suit may be instituted on the covenant.(4) But his statutory remedy and the remedy on the covenant are not concurrent. He has therefore the option of either tacking the amount which he had paid on account of Government revenue to the mortgage-debt, or he may sue on the covenant the mortgagor personally. If, however, he elects the latter course and obtains a decree against the mortgagor, he cannot then claim this amount in the mortgagor's suit for redemption by adding it to his mortgage-money. The debt having become merged in the decree is only payable under the decree.(5) Apart, however, from an express covenant, the mortgagee can only recover the payments by adding them to the principal-money due on the mortgage and recovering them in the same suit with it. If then the mortgagor deposit the mortgage-money in Court under section 83, but not the amount paid by the mortgagee for Goverment revenue, and the latter receives the deposit and relinquishes possession of the property, he cannot afterwards sue for recovery of the payment made to Government by sale of the mortgaged property.(6)

1672. It is not difficult to discern an affinity beween the rule here discussed and the rule which confers a salvage-lien on a person protecting another's property from destruction,—a subject which will call for special notice in the sequel.(7) For the present it is sufficient to state that, so far as the mortgagee is concerned, payment made for rent may be recovered as a part of the mortgage-money, although the same, if paid by any other person, may not create a charge on the property.(8) And so it has been enacted in the Bengal Tenancy

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(1) *Upendra Chandra* v. *Tara Prasanna*, I.L.R., 30 Cal., 794 (799); explaining *Kinu Ram* v. *Mozaffer Hosain*, I.L.R., 14 Cal., 809, F.B; following *Nogender Chunder* v. *Kamini Dossee*, 11 M.I.A., 241; *Leslie* v. *French*, 23 Ch.D., 552; *Perianna* v. *Marudainayagam*, I.L.R., 22 Mad., 332; *Achut Ram Chandra* v. *Hari*, I.L.R, 11 Bom, 313 (319); *Idrus* v. *Vithal* (1879), B.P J., 407.

(2) S. 70, Indian Contract Act (IX of 1872); *Smith* v. *Dinonath*, I.L.R., 12 Cal., 213; *Upendra Chandra* v. *Tara Prasanna*, I. L.R., 30 Cal., 794 (800); *Nikka Mal* v. *Sulaiman*, I.L.R., 2 All., 193; *Lachman* v. *Salig Ram*, I.L.R., 8 All., 384; *Girdhar* v. *Bholanath*, I.L.R., 10 All., 611; *Parsotam* v. *Jaijit Singh*, (1890) A.W.N., 90; *Achut Ramchandra* v. *Hari Kamti*, I.L.R., 11 Bom. 313; *Kamaya* v. *Devapa*, I.L.R., 22 Bom., 440. The previous law was the same. *Bulram* v. *Hurree Churn*, (1848) S D.A., 368.

(3) *Kunhoochurn* v. *Muddun*, (1848) S.D. A., 346; *Mt. Bebee* v. *Hakeem Abool*, (1852) S.D.A., 1063; *Doorga Pershad* v. *Gujadhur*, (1594) S.D.A.,N.-W,P., 378,

(4) *Nikka* v. *Sulaiman*, I.L R., 2 All., 193.

(5) *Imdad Hasan* v. *Badri Prasad*, I.L.R., 20 All., 401 (408, 409).

(6) *Anandi Ram* v. *Dur Najaf Ali*, I.L R, 13 All., 195 (199); *cf. Anon.*, 1 Atk., 102; *Ex parte Fewings*, 25 Ch.D., 338.

(7) S. 100, Comm. *post.*

(8) *Gopinath* v. *Ishur Chandra*, I.L.R., 22 Cal. 800; *Achut Ramchandra* v. *Hari Kamti*, I.L.R., 11 Bom., 313 (319). The question is fully discussed under s. 100.

Act that " when any person having, in a tenure or holding advertised for sale under this chapter, an interest which would be voidable upon the sale, pays into Court the amount requisite to prevent the sale, the amount so paid by him shall be deemed to be a debt bearing interest at twelve per centum per annum, and secured by a mortgage of the tenure or holding to him. " (1) And it is further declared that his mortgage shall take priority to every other charge on the tenure or holding, other than a charge for arrear of rent, in virtue of which he is entitled to take possession of the property until its payment. A similar provision is also made in Madras, with the only difference that the charge " shall take priority over other charges according to the date at which payment was made."(2) In the United Provinces it has been held that the mere non-payment of rent does not occasion forfeiture.(3) But the question to be decided in a case of this kind is whether by paying the rent the mortgagee has saved the property from forfeiture or sale. If he has, he is entitled to reimbursement. And in answering a general question, regard must always be had to the local laws regulating the payment of public charges. Thus, for instance, while non-payment of cesses in Bengal does not entail forfeiture,(4) they follow a different course in Bombay.(5) But even in the latter place the mortgagee cannot debit the mortgagor for sums paid by him for *judi* and local cess due on the mortgagor's land, unless it was included in the mortgage.(6)

1673. Payments made towards Government revenue for the mortgagor have been allowed, although the claim was made for the first time in second appeal.(7) So in another case it was held that the mere fact that the mortgagee had failed to give details of his claim either in the written statement or in the course of the trial is no reason for depriving him of his right, since those details can be gone into after the redemption-decree providing for an account has been passed.(8) But, of course, the same latitude cannot be allowed where the person suing is the mortgagee in which case he must necessarily give details of his claim.

1674. In this connection it is as well to mention that although the sale spoken of in the clause may be any sale even, an execution sale, with the rights of the mortgagee unaffected, still, what is implied is a sale *ejusdem generis* with destruction and forfeiture, that is, one in which the mortgagee's security is likely to be jeopardised. He has no protection in any other case, as his action would then be regarded as officious.(9) If, therefore, the sale would only operate on the equity of redemption, the mortgagee could not add any payments made by him to his security.(10) But inasmuch as the sale of equity of redemption in a usufructuary mortgage is not permitted in Allahabad, it has been there held that a usufructuary mortgagee paying off a decree for sale obtained on a prior mortgage is entitled to say that he had preserved the property from sale, and so retain possession, tacking the amount so paid to his mortgage-money.(11) In a case the

(1) S. 171, Act VIII of 1885.

(2) Mad. Act II of 1864 (Revenue Recovery Act), s. 35.

(3) *Mazhar Rai* v. *Ramgat Singh*, I.L.R., 18 All , 290.

(4) *Upendra Chandra* v. *Tara Prosanna*, I.L.R., 30 Cal., 794 (800).

(5) *Sadanand* v. *Ratanji*, (1886) B.P.J., 68; *Ahmed* v. *Dayabhai*, (1896) B.P.J., 710.

(6) *Narsingrao* v. *Narayanrao*, (1890) B. P.J., 211 ; in which the contrary is said to savour of tacking—a doctrine which has never been favoured in India.

(7) *Balaji* v. *Nana*, (1881) B.P.J., 195.

(8) *Dattaaram* v. *Vinayak*. I.L.R. 38 Bom., 181 (188) ; following *Ex parte Carr*, 11 Ch.D., 62 (66, 67).

(9) *Seetul* v. *Huzaree*, (1845) S.D.A., N.W. P., 196 ; *Lacon* v. *Mertins*, 3 Atk., 1 (4), 26 E.L.R., 805.

(10) *Nursingh* v. *Narayandas* (1890), B.P. J., 211.

(11) *Abdul Qayyum* v. *Sadruddin*, I.L.R., 27 All., 403 ; *Mahomed Husain* v. *Sheodarshan*, 4 A.L.J.R., 176, in which a prior money-decree was held to have been rightly so paid off.

usufructuary mortgagee having paid off the prior sale decree, sought to bring the property to sale in order to recover that amount, retaining his own lien as usufructuary mortgagee. But the Court held that he could only bring the property to sale if he waived his own mortgage, failing which he could only repay himself by tacking the amount of his mortgage-money and remaining in possession till this amount is paid.(1) A mortgagee of immoveable property is entitled to pay the amount of decree and costs in order to get the property released from attachment, even after it is sold to the highest bidder, and even if the mortgage was made after attachment. (2)

1675. A mortgagee is to be allowed all payments in respect of Government revenue made by him while in possession; it being immaterial whether the revenue fell due before or since the execution of his mortgage, since the property is in either case liable to forfeiture.(3) But if he had agreed to bear these charges himself he cannot, of course, debit them to the mortgagor.(4) The mortgagee has the right to pay the revised Government revenue even at the enhanced rate, and his lien for extra assessment remains intact.(5) In this respect the section reproduces the old law which had long since been familiar to this country.(6)

What interest allowed.

1676. The rate of interest allowed on the money so expended is now the subject of statutory provision. Formerly, while the interest was usually allowed, its rate varied according to the discretion of the Court.(7)

The section, however, eliminates such discretionary variations and simply provides that all such payments shall carry interest at the same rate as the principal, and where no such rate is fixed, at 9 per cent. per annum. The interest so allowed is simple interest,(8) and as regards the sum expended on improvements, no interest at all should be allowed.(9) Interest should be calculated as from the time when the expense was incurred.(10)

cl. (c).

1677 For supporting the Mortgagor's Title.—The right of the mortgagee to support his own title and that of the mortgagor to the property is one upon which depends the very existence of his security, and the justice of the rule had been accordingly at all times

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(1) *Abdul Qayyum* v. *Saruddin*, I. L. R., 7 All., 403 (405).

(2) *Thakar Singh* v. *Gurdit Singh*, (1911) P. W. R. 178; *Mulchand v. Govind* I.L.R. 30 Bom. 575.

(3) S. 76 (c), *post*; *Kunhoochurn* v. *Muddun*, (1848) S. D. A., 346; *Mt. Bebee* v. *Hakeem Abcoul*, (1852) S. D. A., 1063; *Kuramut Ali* v. *Imdad Ali*, (1852) S. D. A., N. W. P., 7; *Nurjoon* v. *Shah Moozeeroodeen*, 3 W. R., 6; *Joyprokash* v. *Oorjhan*, *ib.*, 174.

(4) *Hunooman Pershad Pande* v. *Mt. Babooee*, (1853) S. D. A., N. W. P., 225.

(5) *Shaik Idrus* v. *Vithal*, (1879) B. P. J., 407; *Kamaya* v. *Devapa*, I. L. R., 22 Bom., 440 (445, 446); *Thakur Das* v. *Collector of Aligarh*, I. L. R., 28 All., 593.

(6) *Girahar Lal* v. *Bholanath*, I. L. R., 10 All., 611 (614); *Bohra Thakur Das* v. *Collector of Aligarh*, I. L. R., 28 All., 593; *Balaji* v. *Nana*, (1881) B. P. J., 195; *Achut* v. *Hari*, I. L. R., 11 Bom., 313, *Kamaya* v. *Devapa*, I. L. R., 22 Bom., 440 (445), which had to be decided independently of the Act.

(7) In *Kamaya* v. *Devapa*, I. L. R., 22 Bom., 440 (446), interest was allowed at 6 p. c.

(8) *Kishory Mohun Roy* v. *Ganga Babu*, I. L. R., 23 Cal., 228 (237, 247), P. C. In England compound interest may be claimed, if after crediting the rents interest was actually in arrear—*Wrigley* v. *Gill*, (1905) 1 Ch., 241.

(9) *Ibid.*

(10) *Quarrel* v. *Beckford*, 1 Madd., 281; *Eyre* v. *Hughes*, 2 Ch. D., 148 (164).

recognized.(1) Primarily it is the mortgagor's duty to defend his title, failing which he must indemnify him for the expenses properly incurred by the mortgagee in defending it himself.(2) It is not to the point whether the mortgagee is successful in the suit. He is entitled to defend from the attack of a stranger the title of him through whom he holds it.

1678. And if the mortgagor himself attacks his title, he is equally entitled to saddle upon him the expenses of the litigation.(3) Of course, if the mortgagor succeeds in his attack, the mortgage would fail, and the defendant then would no longer be holding the position of the mortgagee or obtained costs to be tacked to his mortgage. The clause only contemplates the case where the mortgagor makes an unsuccessful attempt to assail his title. In England interest on such costs is not allowed.(4) But while the mortgagor is allowed the costs of defending his own title against the mortgagor, he is not entitled to charge for defending his title against the stranger.

cl. (d)—And his own title against the mortgagor.

Of course, if some litigious person chooses to contest the mortgagee's title to the mortgage, that should not affect the parties interested in the equity of redemption.(5) But if the mortgagee has, in an action against the stranger, been given only party and party costs, he is entitled to charge the mortgagor the difference between his party and party costs and solicitor and client costs as charges and expenses.(6) In England, the mortgagee is further entitled to the costs incurred in proceedings to recover the debt from a surety who had only given a promissory note. Such costs being incurred with a view to recovery of the money for which the security was given, and their tendency being to exonerate the mortgaged estate, they are held to be justly chargeable against the mortgaged estate (7) It was argued that in such a case the mortgagee has two distinct positions, that of a simple creditor in respect of the surety and that of a mortgagee in respect of the principal debtor, and that what he had done as a creditor, he could not charge as a mortgagee. But the contention was overruled, Fry, L.J., observing that whether the mortgagee was trying to get his money from the mortgagor, or from a surety, or out of the mortgaged property, he was trying to enforce his rights as mortgagee.(8) Such a claim, however, can scarcely fall within the ambit of clauses (*c*) or (*d*), unless the mortgagee had sued the surety at the request of the mortgagor, in which case there would be an implied promise to pay.(9) Formerly a mortgagee acting as his own solicitor in a suit to defend his own title was, as against the second mortgagee, allowed only his out-of-pocket expenses (10) whether he acted for

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(1) *Godfrey* v. *Watson*, 3 Atk., 517 ; 26 E. L.R., 1099; *Parker* v. *Watkins*. John, 133; *Dryden* v. *Frost*, 4 My. & Cr , 670; *Ellison* v. *Wright*, 3 Russ., 458 ; *Pelly* v. *Wathen*, 1 De. G. M. & G., 16 ; *Ford* v. *Chesterfield*, 21 Beav., 426 ; *Wright* v. *Kirby*, 23 Beav., 463 ; followed *per* Kekewich, J., in *Batten Proffit & Scott* v. *Dartmouth Harbour Commissioners*, 45 Ch. D., 612 (619) ; *Damodar* v. *Vamanrav*, I. L. R., 9 Bom., 435.

(2) See s. 65 (*b*) and comm.; the mortgagee in possession may object to attachment ; *Nga Tok* v. *Subramanian*, 10 I. C. (Bur.) 994.

(3) *Pokree Saheb* v. *Pokry Beary*, I. L R., 21 Mad., 32; following *Godfrey* v. *Watson*, 2 Atk. 517 ; *Parker* v. *Watkins*, John. 133. [The *placitum* of the case is incorrect in the report, that given in 7 M. L. J. R., 238. being the real point decided.] *Subbansu* v. *Yacoob Ali*, 1 C. P. L. R. 66.

(4) *Fardley* v. *Knight*, 41 Ch. D., 537.

(5) *Parker* v. *Watkins*, John. 133 ; *Godfrey* v. *Watson*, 3 Atk., 517 ; *Pokree Saheb* v. *Pokree Beary*, I. L. R., 21 Mad., 32 (34).

(6) *Ramsden* v. *Langley*, 2 Vern., 535 ; In re *Love*. 23 Ch D., 348 (350).

(7) *Ellison* v. *Wright*, 3 Russ., 458 ; followed *per* Cotton, L. J., in *National Provincial Bank* v. *Games*, 31 Ch. D., 582 (593).

(8) *National Provincial Bank* v. *Games*, 31 Ch. D,. 582 (594, 595).

(9) *Barry* v. *Stawell*, 1 De. & Wal., 618.

(10) *Field* v. *Hopkins*, 44 Ch. D., 524 ; Re *Doody*, (1893), 1 Ch , 129 ; *Eyre* v. *Wynn Mackenzie*, (1894) 1 Ch. 218.

himself alone or for himself and a co-mortgagee. But by a Statute passed in 1895 this disability has been now removed.(1)

The costs incurred by the mortgagee cannot, however, be recovered by a separate suit. They are only recoverable as the price of redemption.(2)

1679. Renewal of Lease.—The mortgagee in possession may also charge for the renewal of the lease if it is mortgaged to him. The mortgagor is not bound, however, to renew the lease, nor can he be compelled to do it by the mortgagee.(3) In this respect the law is similar in England, where while the mortgagee cannot compel the mortgagor to renew a lease,(4) he can charge him for its renewal, although there may be no covenant by the mortgagee to that effect.(5)

cl. (e).

1680. He may also charge for the premiums paid in insuring the property from fire. The provisions as to insurance are copied bodily from the Conveyancing Act,(6) according to which the mortgagee is now entitled to be reimbursed the money expended in insuring the property. Before the Act of 1881, the mortgagee, whether in possession or not, was not allowed to charge for insurance, unless it was covenanted in the mortgage.(7) The power to charge is now subject to (i) an agreement to the contrary entered into by the parties. And the rule is inapplicable (ii) where the insurance is kept up by or on behalf of the mortgagor to the extent of the amount up to which the mortgagee is by the Act authorised to insure. If the property insured by the mortgagee is destroyed by fire, and the insurance-money is paid to him, he must apply it in reinstating the property, or if the mortgagor so directs, in reduction or discharge of the mortgage-money; (8) and if the policy has been kept up by the mortgagor and the insurance-money is paid to him, the mortgagee may likewise require so much of the money, as may be necessary, to be applied in reinstating the property.(9) But in England it appears to be held that "without prejudice to any obligation to the contrary imposed by law (10) or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." (11) It is competent to the mortgagor to enter into any other covenant for the reinstatement of the property in the event of its destruction. If he agreed to rebuild or allow the mortgagee to do so at his cost, he will have to pay the cost so incurred on redemption. (12)

Charge for insurance.

1681. Limits of the Rule.—The right conferred on the mortgagee to add the sums expended by him on purposes stated in the section is unqualified, but it may be controlled by covenant. Thus, if the mortgage-deed contain a distinct contract regarding the sums payable to the mortgagee on redemption, he would then be precluded from claiming anything beyond the terms of his contract.(13) Even where there is a contract, other equities may supervene to

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(1) Mortgagee's Legal Costs Act (58 & 59 Vict. c., 29, ss. 2, 3).
(2) *Ex parte Fewings*, 25 Ch. D., 338.
(3) S. 65 (*d*).
(4) *Manlove* v. *Bell*, 3 Vern., 84.
(5) *Lacon* v. *Mertins*, 3 Atk., 1 (4).
(6) 44 & 45 Vict., c. 41. s. 19, cl. (ii); s. 23, cls. (2) (iii).
(7) *Norris* v. *Caledonian Insurance Co.*, L. R., 8 Eq., 127; *Leslie* v. *French*, 23 Ch. D., 552.
(8) S. 76 (*f*).
(9) S. 49 *ante*; s. 23 (3), Conveyancing Act, 1881; *Garden* v. *Ingram*, 23 L. J. Ch., 478.
(10) See 14 Geo. 3, c. 78; 28 & 29 Vict., c. 90, s. 34; *Simpson* v. *Scottish &c., Insurance Co.*, 9 Jur. (N. S.). 711; *Ex parte Goreley*, 10 Jur. (N. S.), 1085.
(11) Fisher, § 1776.
(12) *Sakharamshet* v. *Amtha*, I. L. R., 14 Bom., 28.
(13) *Jawahir Singh* v. *Sardar Kuar*, G. O. C., 10.

override the statutory right of the mortgagee. For instance, where a mortgagor had agreed to recoup the mortgagee, the expense incurred in sinking wells on the property at the time of redemption, and the mortgagee himself afterwards acquired the equity of redemption in a portion of the property irrigated by the wells, the Court held that to allow the mortgagee to recover his outlay on the wells from which he was himself deriving benefit, would be in the highest degree inequitable. "The stipulation in the mortgage-deed" they said, "was made to provide for the mortgagor himself getting possession of the property with the improvements made on it by the mortgagee, and was never framed to meet the contingency of the mortgagee himself acquiring the property." (1)

Charge on proceeds of revenue-sale.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

1682. Analogous Law.—This section may be compared with section 73 of the Code of Civil Procedure in which a similar provision is made for the appropriation of the surplus sale-proceeds of a sale of property subject to a prior mortgage. The marginal note(2) appended against this section in the Bill is inserted to harmonize it with the pre-existing law. Indeed, the section itself is the echo of the headnote of a case(3) in which the same proposition is thus stated: "When mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee and he has a right of action for their recovery." This rule was stated by Norman, C. J., to have been long settled by decisions from the time of the late Sudder Court(4) in consonance with reason and justice. Indeed, the old Sudder case, since followed by the Judges, went further and held that if the surplus is appropriated by the Collector to liquidation of areas due on *other* lands, the sum so appropriated may be recovered by the mortgagee.(5)

1683. The section is inaccurately worded, but it is evidently intended to provide only for cases in which the sale is made *free* from all incumbrances. In any other view the mortgagee would have both the surplus as well as the right to follow the land in the hands of the purchaser and thus confer on the mortgagee an additional security merely because the mortgaged property is brought to sale. A sale for non-payment of rents is usually made free from all liens and incumbrances, but it is by no means invariably so. The rule would apply equally whether the mortgagee is or is not possessory.

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(1) *Bobra Thakur Das* v. *Collector of Aligarh*, I. L. R., 28 All., 593.

(2) *Hurdeo* v. *Fuzla Hossain*, 1 W. R., 270; *Heeralall* v. *Janokeenath*, 16 W. R., 222.

(3) *Heeralall* v. *Janokeenath*, 16 W. R., 222; the headnote of which is again a quotation from an old Sudder Dewany case. *The Collector of Midnapore* v. *Prithibullub*, (1854) S. D. A., 182.

(4) None are cited, but undoubtedly the reference was to *The Collector of Midnapore* v. *Prithibullub*, (1854) S. D. A., 182; *Muddunmohun* v. *Kalikadeen*, (1855) S. D. A., 411; *Shumbhoo Chunder* v. *Mohesh Chunder*, (1859) S. D. A., 622.

(5) *The Collector of Midnapore* v. *Prithibullub*, (1854) S. D. A., 182.

1684. Principle.—Although the rule embodied in the section has been long upheld upon the general grounds of reason and justice, (§ 1682) it may be vindicated from another standpoint. As on the re-allotment of property on partition the mortgagee of a co-sharer's interest takes, not what was originally mortgaged, but what he has received as his share,(1) so in the case of a sale of the property the surplus money may be regarded as the subject of his mortgage in the new form, which it had assumed, and on which will be fastened the same right which he had against the original property. But this metamorphosis is only possible on the assumption that the mortgagee's rights cease to adhere to the original subject of the mortgage, or, in other words, that the property was sold free from existing incumbrances. As observed before, this would appear to be necessarily implied. For the object of the section is, in the words of Trevelyan and Beverley, JJ., "to relieve the mortgagee of the effects of the injury which he would suffer by the property which was a security for his money being sold, and to give him a right over the residue of the sale-proceeds. It is not intended in any way to enlarge the interests of persons purchasing at a sale for arrears of revenue or rent. If that had been the intention, any subsequent provision of law providing that a sale for arrears of revenue or rent could get rid of an incumbrance would be unnecessary. It is, in our opinion, intended to refer to cases where the law has otherwise provided that the effect of a sale for arrears of revenue or rent should nullify a mortgage."(2) And so it was held in an earlier case that the section only applied to cases where the mortgagee was deprived of his substantive security by fact of the sale being free from his incumbrance. Where, therefore, the sale is not held free from it, the mortgagee can, it has been held in some cases, lay no claim to the surplus proceeds, but may enforce his mortgage against the auction-purchaser, (3) though it has been held in another case that the right to surplus proceeds is by way of enlarging the mortgagee's rights which he might otherwise prosecute against the property if his security remains unrealized. (4)

1685. On the other hand, if the sale was brought about by his own conduct he cannot then be allowed to take advantage of his own wrong, and in this case his right to the surplus, if otherwise good, would be passed over. But otherwise the rule here enunciated is a part of the general principle of substituted security to which reference has been made before (§ 1500). So where certain property was sold under a decree on the first mortgage passed in a suit in which the second mortgagee whose mortgage had been matured was impleaded, and the first mortgagee afterwards brought another suit on the third mortgage he had on the property without, however, impleading the second mortgagee, and obtained a decree thereon, in execution of which he withdrew the surplus sale-proceeds, whereupon the second mortgagee put in suit his mortgage claiming *inter alia* the surplus sale-proceeds so withdrawn by the first mortgagee, and the question was whether a suit for recovery of the surplus

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(1) *Byjnath* v. *Ramoodeen*, 21 W. R., 233 (236), P. C.; followed in *Sharat Chunder* v. *Hurgobindo*, I. L. R., 4 Cal., 510; *Hem Chunder* v. *Thakomoni*, I. L. R., 20 Cal., 533; *Joy Sankari* v. *Bharat Chandra*, I. L. R., 26 Cal., 434 (440); which distinguishes *Khan Ali* v. *Pestonji*, 1 C. W. N., 62, which was a case of partition by the Civil Court. *Jogendra Chunder* v. *Fulkumari*, I. L. R., 27 Cal., 77 (83) (right of maintenance how charged on partition).

(2) *Beni Prosad* v. *Rewat Lall*, I. L. R. 24 Cal. 746 (749); *Hemchandra* v. *Tafazzel Hossain*, 8 C. W. N., 332.

(3) *Premchand* v. *Purnima Dasi*, I. L. R., 15 Cal, 546 (552, 553). The same view was taken on the constructionof s. 271, Act VIII of 1859 (Civil Procedure Code), by Sir Barnes Peacock, C. J., & Jackson, J., in *Futeh Alil* v. *Gregory*, 6 W. R. (Mis.c), 13; following *Karoo Lal* v. *Dalaram*, (1859) S. D A., 953.

(4) *Sushilabala* v. *Dinbandhu*, 14 C. W. N. 186; 5 I. C. 70.

already paid to the first mortgagee should be regarded as money charged on immoveable property, so as to give the mortgagee twelve years' limitation under Art. 132 of the Indian Limitation Act, and it was held that the right here enacted is in equity recognized in favour of all subsequent incumbrancers, in respect of the surplus sale-proceeds of properties sold to satisfy the claims of a first mortgagee.(1)

1686. Meaning of Words.—"*Mortgaged property is sold*:" In view of the above (§ 1683) this must be construed to mean that the entire property is sold, and not merely the right, title and interest belonging to the defaulting tenant. It would have been well if the words "free from incumbrance" were added after the words "is sold," to make the sense clear. (§§ 1683, 1687). *After payment of the said arrears*:" including of course the interest, if any, and the cost of realization.

"*Default on his part*:" *i.e.*, non-performance of a legal duty. The sale must be directly traceable to the mortgagee's default.

1687. Mortgagee's Charge on the Surplus.—The scope of this section has been already discussed (§ 1684). It only applies to cases where the sale for default of payment of Government revenue is made free from incumbrance, and then the surplus sale-proceeds may be regarded as the shape into which the mortgagee's security is converted. (2) But the rule need not be confined only to revenue-sales, for it would equally apply where the security is otherwise destroyed as where the property is taken under the provisions of the Land Acquisition Act, in which case also, the mortgagee may lay claim to the compensation-money. (3) But it would appear that this should be done on the Collector's notification (4) inviting claims to compensation-money, and if the mortgagee does not then enforce his claim, he could not afterwards attach the amount of compensation awarded by the Collector to the mortgagor. (5) But the reason for this view is not apparent, for why should the mortgagee forfeit his claim, supposing it to be otherwise good, merely, because he did not make it in response to the notification, of which the mortgagee may have had even no notice. Could indeed the money received as compensation be regarded as otherwise than impressed with the trusts and obligations of the immoveable property which it represents? In England, there is a clear authority to support this view. "I think," said Stuart, V.C., "that where money has been paid into Court by reason of real estate having been taken under the compulsory powers, and remains in Court, it is to be held as money or personal estate in the hands of the Court impressed with the trusts of real estate... The money in Court is to be considered, for the purpose of the question as to who was entitled to it, real estate." (6) And so it has been held in Calcutta that the mortgagee may not only proceed to enforce his charge against the surplus sale-proceeds held in deposit in the Collectorate, but also against the mortgagor's money-creditors who had drawn out the money. (7) Another phase of the same question is presented where the mortgagee in possession in collusion with the

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(1) *Berhamdeo* v. *Tarachand*, I. L. R., 33 Cal., 92.

(2) *Gosto Behary* v. *Shib Nath*, I. L. R., 20 Cal., 241.

(3) *Viraragava* v. *Krishnasami*, I. L. R., 6 Mad., 344 (347).

(4) Under s. 9, Land Acquisition Act (X of 1870). Now see s. 9, Act I of 1894.

(5) *Basa Mal* v. *Tajammal*, I. L. R. 16 All. 78.

(6) In re *Steward's Trusts*, 22 L J. (N. S.), 369; followed in *Viraragava* v. *Krishnasami*, I. L. R., 6 Mad. 344 (347).

(7) *Gosto Behary* v. *Shib Nath*, I. L. R. 20 Cal. 241 (244).

Government allowed the assessment to fall into arrears upon which, according to the pre-arrangement, the Government forfeited the holding and gave the mortgagee another land in exchange, the question then being whether the mortgagor's equity of redemption still subsisted with reference to the property received in exchange. In such a case, it has been held that the land so acquired must be regarded as impressed with the same trusts as attached to the land originally mortgaged. (1) On the other hand, where the mortgagor, by allowing the revenue payable in respect of the mortgaged property to fall into arrears, caused such property to be sold, and it was purchased by the mortgagor *benami* in the name of a third person, the mortgagee was still held entitled to proceed against the property in the hands of the nominal purchaser, notwithstanding such purchase; even though he may have previously, in ignorance of the true nature of the purchase, applied for and obtained payment of the surplus, provided, of course, that the surplus paid had not fully discharged the mortgage. (2) This view is the outcome of the principle that as an incumbrance created by the mortgagor could not defeat the rights of the prior mortgagee, those rights should not be defeated by an incumbrance created by the machination or laches of the mortgagor; in other words, the mortgagor cannot be permitted to compass indirectly what he was precluded from doing directly. But where the mortgagee sells the property mortgaged to him under power while he is a trustee for the surplus sale-proceeds distributable amongst persons interested in the original property, they have no charge on the surplus, and which does not, so far as regards their interest, retain its original identity under altered appearance.(3) And law is so far compassionate to the mortgagor that while as a general rule a Government sale for arrears of revenue gives a title against all the world, a sale brought about by the mortgagee's default leaves unimpaired the mortgagor's right of redemption.(4) If it were otherwise, the mortgagee could have got over the disability attaching to his *status* by purchasing the property *benami* or in the name of a friend.(5)

1688. This section enables the mortgagee to abandon his lien on the mortgaged property, not only in cases in which his incumbrance is annulled, but also in those in which it is in jeopardy. Hence in the case of a rent-sale under the provisions of the Bengal Tenancy Act, with express power to the purchaser to annul all incumbrances so long as such power remains in the purchaser, it is open to the mortgagee to abandon his lien and ask to have it transferred to the surplus sale-proceeds.(6) Indeed, it is not even essential under this section that the sale should confer on the purchaser the power to annul the incumbrance.(7) Where the mortgagee obtains a lien on the surplus-proceeds, his new security is governed by the rule as to the indivisibility of a mortgage and he has, therefore, a claim on the whole and every part of it. If, therefore, any one takes any portion of that money, he does so under the

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(1) *Balkrishna* v. *Madhavrav*, I. L. R., 5 Bom., 73; *Babaji* v. *Magniram*, I. L. R., 21 Bom., 396 (399).

(2) *Gunga Sahai* v. *Tulshi Ram*, I. L. R., 25 All., 371; following *Raghunath* v. *Lalji*, I. L. R. 23 Cal. 397; *Otter* v. *Lord Vaux*, 6 DeG. M. & G, 638.

(3) See s. 69, *ante*. A trust does not always imply a charge. The one appoints a fund, the other creates an interest over a specified property. *King* v. *Denison*, 1 V. & B. 272; Re *Crome*, 59 L. T. (N. S.) 582; O. A., 61 L. T., 814; Lewt's Trusts (10th Ed.), 158, 159, 526.

(4) *Kalappa* v. *Shevaya*, I L.R., 20 Bom., 492 (494); *Sambhu* v. *Babaji*, (1891) B. P. J., 160.

(5) *Genu* v. *Sakharam*, I.L.R., 22 Bom., 271 (275).

(6) *Nim Chand* v. *Ashutosh Dutt*, 9 C. W. N., 117.

(7) *Gobind Sahai* v *Sibdut Ram*, I.L.R. 33 Cal., 878.

liability of being sued in case the mortgagee encounters any difficulty in getting himself paid. No one can be allowed to withdraw from the deposit any portion of the amount on the ground that the balance would be sufficient to satisfy the mortgagee, for if this were allowed, it would diminish his security.(1) The mortgagee, however, cannot withdraw the amount held in deposit, except by bringing a suit to enforce his *charge* created by the section.(2)

Sale free from incumbrance.

1689. Under the Bengal Regulation VIII of 1819 a sale for arrears of rent may be made free from incumbrance.(3) And a similar right to avoid and annul incumbrances including *mokururi* leases is given by section 37 of Act XI of 1859 to an auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar and Orissa.(4) But where the property sold is a share or shares, and, for default of revenue due from a share, either the separate shares or the entire estate is sold, (5) the purchaser does not acquire the property free from incumbrance.(6) A revenue paying estate was mortgaged and subsequently let out in *putni* which was registered under section 40 of Act XI of 1859, and a mortgage decree was made on the mortgage in a suit in which the *putnidar* was made a party, after which the estate was sold for arrears of revenue subject to the *putni* encumbrance. The surplus sale proceeds were withdrawn by the mortgagee, but were not sufficient to discharge the entire debt, whereupon the mortgagee-decree-holder proceeded against the *putni* interest for the balance of his dues and the putnidar contended on the authority of this section that its effect was to transfer the whole of the charge to the sale proceeds leaving the mortgaged property thereafter absolutely free from charge, and that in consequence, the mortgage lien on the property having been transferred to the sale proceeds, the mortgagee had no right to proceed against the *putni* interest existing in that property, but it was held that the rule here enacted was intended to enlarge the mortgagee's rights, and not to restrict them, and that therefore, in withdrawing the surplus proceeds the mortgagee, did not forfeit the other remedies still available to him against the registered encumbrance subject to which the sale was made.(7) Provision is also made in the Madras Act VIII of 1865 for sale of the property free from incumbrance.(8) But the provisions of this section apply equally only to a mortgage which is valid, but is set aside by the sale, as also to one which is invalid against the purchaser, as executed after the default, and which is, therefore, *ipso facto* extinguished by operation of the Revenue Sale Law.(9) In other words, the mortgagee may resort to the sale-proceeds not only where the mortgage is annulled or where it is invalid, but also where it remains unaffected. In all such cases the mortgagee will have his lien over the surplus.

1690. Mortgagee's Default.—The payment of Government revenue is the paramount charge on the land to which it is assessed(10) and the liability

(1) *Gosto Behary* v. *Shib Nath*, I.L.R., 20 Cal., 241 (244).

(2) See s. 67.

(3) S. 11, Reg. VIII of 1819; *Gopendra Chunder* v. *Mokaddam*, I.L.R., 21 Cal., 702: *Gosto Behary* v. *Shib Nath*, I.L.R., 20 Cal., 241.

(4) *Jatra Mohun* v. *Aukhil Chandra*, I.L. R., 24 Cal., 334.

(5) See ss. 13 & 14 of Act II of 1859.

(6) *Afzul Hossain* v. *Rajbuns*, I.L.R., 30. Cal., 1071 ; *Debi Das* v. *Bepro Charan*, I. L. R., 22 Cal., 641.

(7) *Sushilabala* v. *Dinabandhu*, 14 C. W. N. 186; 5 I. C. 70.

(8) See *Padakannaya* v. *Narasimha*, I.L. R., 10 Mad., 266.

(9) *Umatara* v. *Uma Charan*, 3 C.L.J., 52.

(10) *Secretary of State* v. *Bombay Landing, &c., Co.*, 5 B. H. C. R., O. C. 48, 50; *Abdul Gani* v. *Krishnaji*, 10 B. H. C. R., 16; *Gundo* v. *Mardon*, *ib.*, 419; *Ghellabhai* v. *Pranjivan*, 11 B. H. C. R., 218; *Balkrishna* v. *Madhavrav*, I.L.R., 5 Bom., 73.

to pay it generally falls on the party in possession of the mortgaged property, (1) but while it is primarily the duty of the person in possession to pay all Government dues, the other party to a mortgage is not debarred from paying it in default of payment by the other.(2) But this is a right and not his duty, and if, therefore, the mortgagor has brought about the sale owing to his failure to pay he could not oppose the mortgagee's claim to surplus on the ground that he might have paid off the demand and thus averted sale of the property. But if, on the other hand, being liable, or having agreed to pay, he allows the revenue to fall into arrear with the result that the property is sold free from incumbrance, he cannot then lay any claim to the surplus. So far as the Government is concerned, it is entitled to sell the land and to realize its due whoever is the defaulter.(3) If the mortgagee being liable to pay the assessment wilfully or negligently, makes a default causing the land to be sold and which he purchases himself, the mortgagee is in equity a trustee of the land so purchased for the mortgagor, putting moreover an end to his right, if any before existing, to continue in its possession.(4) But where, pending a suit to enforce a mortgage, one of the mortgaged properties, *A*, was sold for arrears of revenue and was purchased by the mortgagee, the latter was held entitled to sell the mortgaged properties other than the property *A*, for satisfaction of the remainder of his claim.(5)

1691. Limitation.—Since the surplus sale proceeds is regarded as representing the immoveable property which has been sold, it has been held that the charge on the money into which the immoveable property is so converted may be enforced within the twelve years allowed for enforcing a charge on immoveable property.(6) In one case the High Court allowed a plaint really for recovery of sale-proceeds, but filed as for mesne-profits to be amended, and the case was sent down to the Court of first instance for trial *de novo*, the plaintiff being, however, mulcted in cost till then incurred by his adversary.(7)

Right of subsequent mortgagee to pay off prior mortgagee.

74. Any second or subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee and such mortgagee is bound to accept such tender and to give receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

1692. Analogous Law.—The provisions of this and section 80 which must be read together, were inserted at the instance of the Law Commissioners.(8)

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(1) S. 65 (*c*), *ante*, and s. 76 (*c*), post.
(2) S. 72 (*d*).
(3) *Balkrishna* v. *Madhavrav*, I.L.R., 5 Bom., 73.
(4) *Balkrishna* v. *Madhavrav*, I.L.R., 5 Bom., 73 (76); *Kalappa* v. *Shivaya*, I.L.R. 20 Bom., 493 (494).
(5) *Hem Chandra* v. *Tafazzel Hossain*, 8 C.W.N., 332.
(6) Art. 132, Sch. II, Limitation Act; *Jogeshur* v. *Ghanashyam*, 5 C.W.N., 356; *Kamala Kant* v. *Abdul Bahul*, I.L.R., 27 Cal., 180 (184); *Umatara* v. *Uma Charan*, 3 C L.J., 52 (56, 57); *Shyam Chand* v. *Land Mortgage Bank*, 12 C.L.R., 440 (443).
(7) *Shyam Chand* v. *Land Mortgage Bank*, 12 C.L.R., 440 (443).
(8) 6th Report (dated 28th May, 1870), p. 12.

The procedure this section prescribes is new and opposed to the pre-existing law, which did not always concede the right of the subsequent mortgagee to redeem. Thus in one case, the Court said "that the parties to a mortgage-contract are mutually bound by their engagements to each other; and as the first mortgagee's contract was with his mortgagor, and with him only, or with his legal representative, in which light the second mortgagee cannot be viewed, it is not competent to any third party to claim, or the Courts to compel a surrender of the tenure in whole or part, for which the first mortgagee is only answerable to the person from whom he received it by payment of the amount of the mortgage-loan. It equally follows that the mortgagor is not at liberty to devolve the right of redemption to a third person, not a legal representative."(1) This is the ancient orthodox view of contract against which the Courts of Equity had for centuries to struggle and to whose influence it owes its withdrawal into obscurity and subsequent supersession (§§ 227—229).

1693. But these *idola* the English Law did not find favour with the High Courts.(2) "The nature of the original transaction," it was said, "was not such as to entitle the lender to say that the borrower was prohibited from dealing in good faith with a third person for the means of discharging the prior incumbrance, and if the new lease was made on the security of the land (whether the security contracted for was like the former, for a term of years, or of higher nature), the transaction conferred such an interest in the land on the lender, as to entitle him to occupy the mortgagor's place for the purpose of maintaining a suit to redeem".(3) But while the right of redemption in the case of other kinds of mortgages became early established, the right to redeem a prior mortgage by conditional sale was but tardily recognized, and which was probably due to the erroneous view which the Courts took of such transactions by treating them as absolute sales to take effect on a certain day subject to their defeasance in the event of payment by the mortgagor in the meantime. The right to redeem, however, became established as soon as the true view of these transactions as being mortgages began to dawn. In England and America, the canon now enacted for has long since been recognized.(4)

Redemption of a prior charge does not work merger of the subsequent interest.(5) The procedure that the subsequent mortgagee must follow in order to enforce his right has to be discussed hereafter.

1694. Principle.—"The right of the *puisne* mortgagee to redeem," says Fisher, "is not like that of the mortgagor or his representatives an absolute right but is only ancillary to his right to work out his remedy against the mortgaged estate by foreclosure; which remedy, being out of the power of the *puisne* mortgagee in the first instance, by reason that the prior incumbrance stands on his way, he is allowed to remove it by redemption." This section declares in favour of the subsequent mortgagee redeeming the incumbrancer next prior to him, and the following section generally expounds the rule condensed in the old maxim "redeem up foreclose down."(6) The rule is the restricted exposition

(1) *Lal Bazkhan* v. *Mohumed*, (1853) S. D. A, N. W. P., 304; to the same effect in *Sutherland* v. *Campbell*, (1853) S. D. A., 859; *Doorgachuran* v. *Burda Soondree*, (1856) S. D. A., 948.

(2) *Kishen Bullubh* v. *Belasoo*, 3 W.R., 230; *Bissonath* v. *Brojonath*, 6 W. R., 230; *Sheo Golam* v. *Ram Roop*, 23 W. R., 25; *Dookhchore* v. *Hidayutoollah*, Agra (F. B.), 7; *Sankana* v. *Virupakshapa*, I.L.R., 7 Bom., 146.

(3) *Dookhchore* v. *Hidayatoollah*, Agra (F. B.), 7 (11).

(4) *Fell* v. *Brown*, 2 Bro. C. C., 276; 4 & 5 Will. III. c. 16, Story's Equity Pleadings, §§ 185, 186.

(5) S. 101, *post*.

(6) Fisher, § 1448.

of a wider equity which invests a subsequent incumbrancer with all the rights of a prior incumbrancer, whom he has paid off.(1)

1695. Meaning of Words.—"*At any time*:" without notice even if one is required to be given, as under section 60. "*Amount became payable*:" The subsequent mortgagee cannot redeem earlier than the mortgagor, who is entitled to pay off only on or after the date fixed for repayment. "*Such amount to the next prior mortgagee*:" *i.e.*, the amount due on the next prior mortgage. Thus, where *B*, *C*, *D*, and *E*, are mortgagees in consecutive order, *E* must first redeem *D*, before he could redeem *C*, and so on. The payment must be of the *whole* amount due, otherwise the right here given cannot be availed of.(2) "*And to give a receipt for such amount*:" But what is the remedy if he refuses to accept money and give a receipt? Money may be deposited in Court under the provisions of section 82, or the tenderer may sue for the enforcement of his right. "*Acquire.....all the rights of the mortgagee as such, &c.*" But he cannot tack his own mortgage to his purchase. Thus the third mortgagee by paying off the first mortgagee cannot acquire priority in respect of *his original* mortgage.

Puisne mortgagee and others interested.

1696. Who may pay:—This section enacts in a much restricted form a rule of universal application according to which a person interested in the discharge of a prior incumbrance is entitled to discharge it, and he becomes thereupon entitled to all the remedies open to him whom he has paid off. This doctrine of subrogation enables only a person with an interest of his own to protect, to pay off a prior incumbrance. A person having no such interest is regarded as a mere volunteer, and he cannot acquire any right by such payment. In this view not only subsequent mortgagees but all other persons enumerated in section 91 and having a right to redeem, are entitled to pay off the prior incumbrance, and they would thereupon acquire the same right as is here conferred on subsequent mortgagees.(3) Besides such persons subrogation is also possible in the case of a person who pays under an assignment or agreement, either express or implied, for subrogation with the debtor or creditor, in which case also, the person paying becomes entitled to the right and remedies of the creditor.(4) Subrogation is thus of two kinds; (*a*) legal and (*b*) conventional; the former takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt or of an heir who pays the debts of the succession. This Act furnishes apt illustrations of the use of such subrogation in the present section as also in sections 94 and 101. In conventional subrogation, the person paying off does so under an express or implied agreement with the debtor or creditor in favour of the right. This section does not deal with conventional subrogation, and it only enacts a narrow rule in favour of subsequent mortgagees. But the provision in favour of subsequent mortgagees would not debar other persons entitled to the right from enforcing it. The provision enabling subsequent mortgagees to redeem raises the question whether the section is confined in its operation to mortgagees pure and simple, or whether it also includes other incumbrancers, such as, for instance, a charge-holder. No doubt a charge-holder is empowered to redeem by another section,

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(1) S. 101, *post*, *Bekon Singh* v. *Deen Dyal* 24 W.R. 47 (48).

(2) *Gurdeo Singh* v. *Chandrikah Singh*, 5 C.L.J., 611 (634).

(3) *Gurdeo Singh* v. *Chandrikah Singh*, 5 C.L.J., 611 (633).

(4) *Gurdeo Singh* v. *Chandrikah Singh*, 5 C.L.J., 611 (632).

but so is also a mortgagee. (1) It is true the section eschews the term redemption, but speaks of only tender which the next prior mortgagee, is enjoined to accept. But is not a tender an act of redemption? It has certainly been so treated in section 60. Reading, however, this section in conjunction with the next section, it would seem that, though a subsequent mortgagee may *redeem* any prior mortgagee, he can pay off according to the procedure here prescribed, only "the amount due on the *next* prior mortgage."

1697. The question what mortgagee is a second or subsequent mortgagee would no doubt ordinarily have to be determined on principles which govern priority. But there may be cases in which some latitude would be allowed in construction. Thus where in execution of a decree for arrears of rent a *raiyati* holding was sold under the Bengal Tenancy Act, (2) and purchased by the landlord, and the plaintiff, a mortgagee of the same holding, whose mortgage had not been duly annulled, (3) sued to enforce the mortgage, it was held that he might be regarded as a second mortgagee, and that as such he had a right to redeem the landlord on payment of the money due under the rent-decree (4) This view proceeds upon the assumption that the landlord purchaser being entitled to keep the rent-charge still alive,(5) should be presumed to have kept it alive, if it would be to his advantage. But this cannot be predicated of all landlord-purchasers, for the question depends upon the circumstances of each case. Apart, however, from such circumstances, if the mortgagee be entitled to redeem on payment only of the rent-decree, what becomes of his purchase-money which he may have paid over and above that sum. A mortgagee subsequently renewing his former security has priority over incumbrances subsequent to the first deed, (6) and must be accordingly redeemed. But in such cases the intention of the parties has to be considered, and if from the language of the instrument or otherwise it appears that the parties intended to extinguish the first mortgage by the execution of the second, their priority cannot be claimed on the strength of the prior instrument.(7) A mortgagee may lose also his priority for reasons given in section 78.

1698. This section, it must be observed, contemplates the existence of two or more mortgages *at one and the same time*, and the independent action of the subsequent mortgage to put an end to the prior mortgage. It does not, therefore, apply to cases where the mortgagor executes two usufructuary mortgages which cannot subsist at the same time, nor to a case where the *same* mortgagee renews his mortgage.(8) In such a case, as has been above observed, the question whether by the execution of a subsequent mortgage, the prior mortgage has been extinguished, is one of intention. And the mere fact that the prior mortgage has been paid off does not decide the question whether or not it has been extinguished. An express declaration of intention will cause either the one result or the other, and in the absence of such expression the intention may be inferred either one way or the other. The payment made by the

(1) S. 91 (*a*).
(2) Act VIII of 1885.
(3) Under s. 167, Bengal Tenancy Act (VIII of 1885).
(4) *Meherunnissa* v. *Sham Sunder*, 6 C. W.N., 884 (835).
(5) S. 101.
(6) *Alangaran* v. *Lakshman*, I. L. R., 20 Mad. 274.
(7) *Koopmia* v. *Chidambaram*, I. L. R., 19 Mad., 405; *Mata Din* v. *Kazim Husain*, I.L.R., 13 All., 432, F.B.; overruled on another point in *Ram Shankar* v. *Ganesh Prasad*, I.L.R. 29 All, 385, F.B. The statement in the sale-deed that it "absolutely discharged the mortgage-debt" would not suffice to effect merger—*Gifford* v. *Fitzhardinge*, [1899] 2 Ch. 32.
(8) *Mohesh Lal* v. *Bowan Das*, I. L. R., 9 Cal., 961, F.B.; *Koopmia* v. *Chidambaram*, I. L. R., 19 Mad., 105; *Seetaram* v. *Lachman*, 12 C.P.L.R., 70. See s. 101, Comm.

second or subsequent mortgagee, must, it is said, be payment on his own account, and not for the mortgagor or on his behalf. If, for example, such a mortgagee pays off the prior mortgage out of the money left with him by the mortgagor for the purpose, his payment would be not as *qua* mortgagee but as agent of the mortgagor, and in which case he could not claim to be subrogated to the rights of the mortgagee so paid off. So where the mortgagor executed two successive mortgages of his property and then sold off his equity of redemption to a third person for a consideration sufficient to pay off the two mortgages and which he left with the purchaser for the purpose, who, however, only paid off the first mortgage and when sued on the second mortgage resisted the claim on the strength of this section and section 101 by holding the first mortgage as a shield against the claim of the second mortgagee, the Court held that since the purchaser had been entrusted with the money for payment of the two mortgages, he could not avail himself of the rights these sections confer on a puisne mortgagee who pays off the prior mortgage with money of his own.(1) But even if so, it should make no difference, since "what he did was to see that money so borrowed was properly applied in clearing off those debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognizant."(2) The question depends upon the real facts and not on the facts as the person who paid off the incumbrance conceived them to be at the time of the payment.(3)

It is again necessary for the enforcement of the right that the payment made must be sufficient to discharge the whole mortgage, for subrogation is by redemption, and unless there is redemption, there can be no subrogation. Indeed, any other view would lead to the anomaly of the same right being present in two or more persons at the same time.(4)

The right of the second mortgagee to redeem the first mortgagee continues even after the decree for foreclosure or sale obtained by the latter, and indeed even after the actual sale to him, until it is confirmed, when the mortgagee becomes the purchaser and can then no longer be redeemed.(5)

Payment by other persons.

1699. As observed before, this section enacts a rule which is unnecessarily limited to second and subsequent mortgagees, since it is subject to certain circumstances, equally applicable to other subsequent incumbrancers(6) and persons entitled to redeem such mortgage.(7) So where *A* sued on his mortgage during the pending of which *B* took another mortgage of the same property to pay off and that mortgage in favour of *C* executed after *A's* mortgage but before his suit, the Court held *B's* mortgage unaffected by the doctrine of *lis pendens* inasmuch as the effect of *B's* mortgage was to secure by subrogation the rights of *C* and thus give him the right to redeem *A* which was allowed.(8) So in accordance with the principle more fully discussed in the sequel(9) where a third party

(1) *Baijnath* v. *Murlidhar*, 4 A. L. J. R., 349; following *Tufail* v. *Bitola*, (1894) A. W. N., 284.

(2) *Syed Wajed Hossein* v. *Hafiz Ahmed*, 17 W.R. 480 (483); *Lajja Ram* v *Gur Baksh*, 11 A.L.J. 345; 18 I.C. 945; *Jamilun-nissa* v. *Pitambar*, 11 A.L.J. 127; 18 I.C. 704; *Subramania* v. *Palaniappa*, 26 M.L.J. 94; *Sohan Lal* v. *Jet Singh*, 16 O.C. 148; 20 I.C. 458.

(3) *Subramania* v. *Palaniappa*, 26 M.L.J. 94; 21 I.C. 978.

(4) *Gurdeo Singh* v. *Chandrikah Singh*, 5 C. L. J., 611 (634); *Hanumanthaiyan* v. *Meentachi*, (1911) 10 M.L.T. 380.

(5) *Harsankar* v. *Sheo Gobind*, I. L.R., 26 Cal, 966.

(6) S. 101. Comm.

(7) S. 91.

(8) *Tara Prosad* v. *Kristo Prosad*, 7 I.C. (Cal). 473. For a proper decree in such case, see *Balasubramanian* v. *Ramasawmi*, (1911) 9 M.L T. 358; 9 I.C. 789.

(9) S. 101, Comm. *post*.

takes a mortgage to pay off a prior mortgage-debt, which is so paid off, the former is entitled to use the latter security for his own benefit. But in order to give him that right, he must take the mortgage at the time of the loan. If he defers it to a subsequent period, his security would be postponed to any intermediate incumbrance created between his payment and subsequent mortgage.(1) Where the deed by which mortgaged properties were sold recited certain mortgages which were paid off out of the purchase money, and the mortgage deeds so paid off were taken possession of and preserved by the purchaser, the Court held that there was a presumption of subrogation of the purchaser to the rights of the mortgagee.(2) So where a debt on a mortgage decree obtained by *N* was paid off by money lent by plaintiff for which the defendant executed a fresh mortgage of the same property reciting therein the necessity for paying off the decretal debt, and which while actually mentioning one of three mesne mortgages falsely stated that the property was otherwise free from encumbrance, it was held that the plaintiff stepped into the shoes of *N* on the principle of subrogation and had priority over the mesne mortgagees.(3) An auction-purchaser paying off a prior mortgagee is equally entitled to step into the shoes of the mortgagee.(4) The principle of subrogation is one based on a presumption of intention which may be supported by circumstances or evidence of assignment or agreement of both. Subrogation by presumed intention confers an equitable right, while subrogation by agreement a legal claim. It is therefore open to a party to base his claim on both intention and agreement.(5)

Defective title no bar.

1700. A person otherwise entitled does not forfeit his right to subrogation by the mere fact that his transfer was afterwards found to be invalid and void. In one case the Court permitted a fraudulent transferee to be subrogated to the rights of the mortgagee whom he had paid off. In that case the owner had mortgaged his land to *B*, and then agreed to sell it to *C* and then to *D* in whose favour he executed a conveyance fraudulently antedating it to defeat his contract with *C*. The latter sued both the owner and *D* for specific performance of his own contract and cancellation of *D's* conveyance which was decreed. After the summons had been served on *D* and while the suit was pending, *D* paid off *B's* mortgage. On his dispossession by *C*, *D* sued both *C* and the owner for recovery of the amount paid by him to *B* and a charge on property in the hands of *C* and which was decreed though the Court held that he had paid off *B* during the pendency of *C's* suit against himself for the purpose of strengthening his own claim and though his title was based on a fraudulent deed, but inasmuch as the payment was not a part of the fraud, it was legal and as such recoverable out of the mortgaged property.(6) In another case affirmed by the Privy Council a Hindu widow had conveyed to a purchaser an absolute estate, whereas she could not legally convey anything beyond her life interest. The purchase was *bona fide* but the purchaser was found to have taken without inquiry into his vendor's title to convey an absolute estate. The purchaser paid Rs. 14,000 due on an existing mortgage on the estate. The reversioner sued him in ejectment, but the Court held him liable to pay the mortgage sale which was a burden upon the estate and decreed to the plaintiff possession subject to

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(1) *Ram Saran* v. *Khakhan*, 15 C.W.N. 312; 8 I.C. 657.

(2) *Prayag Narain* v. *Chedi Rai*, 14 C.W. N. 1093.

(3) *Tara Sundari* v. *Khedan Lal*, 14 C.W. N., 1089.

(4) *Kesri Mal* v. *Mubarak*, 8 A.L.J. 663.

(5) *Tara Sundari* v. *Khedan Lal*, 14 C.W. N., 1089: *Karuppan* v. *Muhammad*, 26 M.L. J. 74.

(6) *Syamalayudu* v. *Subbarayudu*, I.L. R., 21 Mad., 143 (144).

its payment.(1) The same view has been taken in other cases in which, on setting aside the sale, the purchaser was held entitled to be reimbursed the sum paid by him to redeem a prior incumbrance,(2) as a matter of justice, equity and good conscience (3), rateable apportionment being made where the property sought to be recovered is less than that freed from the mortgage.(4)

The principle of subrogation was applied by the House of Lords in a case in which a Building Society had advanced moneys to a minor for purchase of land and completion of her houses thereon, and for which she mortgaged them to the Society, who having afterwards discovered her minority discontinued further advances, took possession of the mortgaged premises and completed them. On attaining her majority the mortgagor sued the Society for a declaration that her mortgage was void and for possession of the property. The Court of Appeal held that the two payments made by the Society (i) for the purchase of land and (ii) construction of houses thereon stood upon a different footing, and that while the Society could recover the sum spent on the purchase of land with interest at 4 per cent. being subrogated to the right of the vendor and to his lien, it could not recover the mortgage money paid to build the houses or anything upon the mortgage as such, because, it was void.(5) It is, of course, no part of the rule that the payment should have been made with the knowledge or consent of the mortgagor, or after any previous intimation to him.(6)

Voluntary payment excluded.

1701. The rule is no doubt the outcome of salvag elien elsewhere considered (7) and its two essential pre-requisites are that (*a*) the payment should be made by one who had or believed himself to have some interest in the property in respect of which the payment is made and (*b*) the amount paid must have been legally due. An officious payment for another does not entitle one to claim reimbursement. For as the Privy Council observed " it is not in every case in which a man has benefited by the money of another that an obligation to repay arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay."(8) This dictum was held to apply to the defendant who had made payments on account of the plaintiff's mortgage but which did not free the property from it.(9) The result would be the same if the prior mortgage was executed by *A* and *B* and then and that mortgage of *A's* share by *A* in favour of *C* who applied the mortgage-money to discharge the joint prior mortgage of *A* and *B* claiming payment by right of subrogation from *B*, who being no party to *C's* mortgage, was *inter alia* held not liable for payment on his account.(10)

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(1) *Syed Mahomed* v. *Shewuk Ram*, 14 W. R., 315 ; O.A. *Moulvie Mohamed* v. *Shewuk Ram*, 22 W.R. 409 (411), P.C.

(2) *Chama* v. *Padala*, I.L.R., 31 Mad. 439 ; *Syud Wajed Hossain* v. *Hafiz Ahmed*, 17 W.R. 480 (483), *contra* held in *Shiam Lal* v. *Ram Piari*, I.L.R., 32 All. 25 is (submitted) unsound.

(3) *Nilo Pandurang* v. *Rama*, I.L.R., 9 Bom., 35 (39) ; I.L.R., 17 Bom., *Narayan* v. *Bapu*, 741 (744) ; *Chama Swami* v. *Padala*, I.L.R., 31 Mad., 439 (441).

(4) *Lomba* v. *Vishvanath*, I.L.R., 18 Bom. 86 (91)

(5) *Muttughain &c. Building Society* v. *Thurstan*, [1903] A.C. 6. affirming [1902] 1 Ch. 1 ; reversing [1901] 1 Ch. 88.

(6) *Butler* v. *Rice*. [1910] 2 Ch. 277 (283).

(7) S. 100, Comm. *post*.

(8) *Ram Tubul Singh* v. *Bisseswar*, 23 W. R., 305 (308).

(9) *Sri Narain* v. *Smith*. 4 C.L.R., 148.

(10) *Chellamcherla* v. *Mummareddi*, 21 M. L.J., 160 ; 9 I.C. 139.

1702. Subrogation of Rights.—A second or subsequent mortgagee redeeming the first mortgagee becomes possessed of the same powers as the first mortgagee. It is not necessary for him to take an assignment of the rights which he acquires from the prior mortgagee, the assignment being implied by law.(1) If then he was a party to a suit by the first mortgagee on his mortgage, he is entitled to step into the shoes of the prior mortgagee, and so to continue the suit, which, so far as regards the prior mortgagee, would have otherwise terminated. It is not necessary for the second mortgagee to institute a separate suit.(2) And similarly, if after the passing of the preliminary decree against the mortgagor, the puisne mortgagee being a party thereto satisfies it, the right which orginally belonged to the plaintiff to have the primary decree effectually worked out by execution passed to the puisne mortgagee although arrayed as a defendant in the suit, who, so far as regards the enforcement of the plaintiff's right, would by his payment step into his shoes and be thus entitled to enforce his mortgage and the rights acquired by paying off the first mortgagee, without being driven to a fresh suit. In short, with the change of interest so caused, the suit continues to be a subsisting suit, in which the Court has still to adjust the rights and liabilities of all parties to the suit in respect of the mortgaged property and in respect of costs: and, if necessary, for that purpose it is competent to making and enforcing an absolute order for foreclosure or sale as the case may demand: "If this is not the effect of the section, and if payment under it terminates a suit, it is obvious that serious loss in costs and time would be incurred by puisne mortgagees, parties to the suit, who might be desirous of enforcing their claims, inasmuch as, in order to redeem or enforce their claims, they would be obliged to institute separate suits, and the costs incurred by them in the earlier suit would be thrown away."(3) So it has been held in Madras that the puisne incumbrancer who pays off a decree on a prior mortgage can enforce his rights only by process of execution and not by suit.(4) And the same course has been generally commended in Bombay.(5) There is nothing in the Court Fees Act or any other Statute which conflicts with this view, and it is a cardinal rule that a benevolent construction cannot be permitted in favour of the Crown of a taxing Statute.(6) Of course, the Court does not relegate parties to institute a new suit, if it would not involve the examination of any fresh facts or the consideration of any further rights.(7)

(1) Puisne mortgagee.

1703. But both the legality as well as the convenience of this procedure would at first sight appear to have been shaken by the criticism of the Privy Council in a case in which the mortgagee had obtained a foreclosure-decree against the mortgagor and the puisne mortgagee, but the decree was awarded only in the form given in section 86. The latter having paid off the decree claimed under this section to have acquired the *status* of the decree-holder, and as such, to a decree-absolute against the mortgagor in the same proceedings. The High Court at Allahabad acceded to these contentions, but on appeal from that Court, the Privy Council overruled them holding that on payment by the

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(1) *Raoji* v. *Narayan*, (1896) B. P. J., 29; *Bisseswur* v. *Sarnam Singh*, 6 C. L. J. 134; *Hari Narain* v. *Shama Sundari*, 11 C. L.J. 551 (554); *Mahomed Ibrahim* v. *Ambika Pershad*, P.R. 39 Cal., 527 P.C.

(2) *Bansidhar* v. *Gaya Prasad*, I. L.R., 24 All., 179 (182).

(3) *Per* Stanley, C J., and Burkitt, J., in *Bansidhar*, v. *Gaya Prasad*, I. L.R., 24 All., 179 (182).

(4) *Bavanna* v. *Balagorivi*, 9 M. L. J. R., 177.

(5) *Hasanbai* v. *Umaji*, I. L. R, 28 Bom., 153 (163).

(6) *Attorney-General* v. *Selborne*, [1902] 1 K.B., 388.

(7) *Cf.* In re *Tyabji*, 7 Bom. L. R., 547.

puisne mortgagee of the decretal amount and its acceptance by the plaintiff-mortgagee had the effect of discharging and satisfying the decree which became spent thereby, and after which no further proceedings in execution could be taken by the Court. "It is true," they said, "that Gaya Prasad (puisne mortgagee) having made that payment (as he had the right to do) acquired under section 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged." (1) As regards convenience their Lordships added: "Even if that were not so, their Lordships fail to see how the respective rights of Gaya Prasad, as owner of the first mortgage and half owner of the second mortgage, and the respondent as owner of the other moiety of the second mortgage, could have been worked out without additions to the decree which the Court in executing the decree had no power to make. They are therefore of opinion that a new decree was required for the purpose, and section 244 (now s. 47) of the Civil Procedure Code was not a bar to the present suit."(2) The Court further added that not only the rights of the defendants, but of the plaintiffs *inter se* could not be worked out in the same suit. This decision is then undoubtedly a fatal blow to the contrary views so far entertained, though it may lack the assurance that their Lordships intended it to have that far-reaching effect. Of course, as their Lordships took pains to point out, their remarks were intended only to apply to the decree before them, and which being a transcript of the form given in section 86, now "does not provide for the exercise by the puisne incumbrancers of their successive rights of redemption or for working out the rights of the parties in the event of any puisne incumbrancer in front of the mortgagor redeeming the mortgaged property so as to make a complete decree." (3) If then the decree is suitably worded it should find room for the application of the principles before discussed. A form of such a decree commended by the Privy Council is given under section 86. Their Lordships' views must then be held to controvert no general principle, but merely to apply to a decree given in the form prescribed by section 86, (now Order 34, rule 2, C. P. C.,) and which is appropriate only when the contest is between the mortgagee and mortgagor. If a puisne incumbrancer be also a party to the suit the Court should formulate its decree on the lines indicated in the form given under that rule, and which on redemption of the prior mortgage by the puisne mortgagee confers upon him the rights contemplated here and in section 83. These rights, however, cannot in view of the Privy Council, be read to them into the decree unless they are expressly protected, nor can the Court give effect in execution.

1704. If a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, he would still be entitled to charge the mortgagor the full amount of the first mortgage in addition to his own.(4) A puisne mortgagee paying off a prior mortgage cannot tack his own mortgage, but is only entitled to enforce the right

(1) *Gopi Narain* v. *Bansidhar*, I. L. R., 27 All., 325 (332), P.C.

(2) *Gopi Narain* v. *Bansidhar*, I. L. R., 27 All., 325 (332), P.C.

(3) *Gopi Narain Bansidhar*, I. L. R., 27 All., 325 (330), P. C. In *Mackintosh* v. *Watkins*, 1 C. L. J., 31, the Court held that the object of making the second mortgagee defendant is that the property may be sold free of his incumbrance, and not to enable him to practically obtain a decree against the principal defendant without bringing a suit properly framed for that purpose. The answer to this is, that the procedure condemned avoides multiplicity of suits against which s. 85 was directed.

(4) *Dobson* v. *Land*, 8 Hare, 220; *White* v. *City of London Brewery Co.*, 39 Ch. D., 559 (564).

he has so acquired apart from any rights he may have of his own, and where the present exercise of those rights conflicts with his newly acquired equity, he may be precluded from enforcing the latter, unless he elects to waive the former. So a usufructuary mortgagee in possession paying off a prior incumbrance cannot bring to sale the property mortgaged to recover the money paid by him without waiving his own lien as usufructuary mortgagee. He might, however, bring the property to sale to recover that amount, if he waived all rights under his usufructuary mortgage, or retain possession until the mortgage-debt and the amount paid by him to the prior mortgagee were satisfied.(1) But, it is said, that since the right acquired under this section is conceded for the protection of the puisne mortgagee, and is in the nature of an accretion to his own mortgage, no suit can be instituted to realize the latter security without joining a claim for the former—the cause of action for the two reliefs being held to be single and disseverable so that if after the claim on the mortgage a separate suit is launched for recovery of the amount claimed under this section, it will be barred by O. 2, r. 2 of the Code of Civil Procedure.(2) But this is scarcely correct, in view of the fact that the right acquired by payment is not an integral part of the contractual right which he, as puisne mortgagee, possesses, and which he is entitled to keep distinct.(3) This section enables the subsequent mortgagee to buy out his predecessors, and the next section declares the rights of the mesne mortgagees, *inter se*. This section does not exhaust the list of persons who may redeem a mortgage. Such a list will be found set out in section 91.

1705. On subrogation to the rights of the prior mortgagee the puisne mortgagee becomes entitled to all the rights and remedies available to the former. He becomes his *alter ego* for the purpose of his claim. As such, he is entitled to recover the interest to which the prior mortgagee was entitled, though, of course, he is equally liable to account for the profits which he may have received if he was in possession. But in ordinary practice the one is set off against the other.(4)

When decree is no bar.

1706. Where there are two successive mortgages on a property and the first mortgagee purchases the mortgagor's equity of redemption, the second mortgagee is entitled to a decree for redemption of the first mortgage. The first mortgagee as purchaser of mortgagor's rights can then bring a suit for redemption of the second mortgagee on payment of the amount of both the mortgages.(5) In other words, the second mortgagee is entitled to redeem the first mortgagee, but without prejudice to the right of the first mortgagee as purchaser of the equity of redemption to redeem to the second mortgage after the second mortgagee has redeemed the first.(6) The right of the second mortgagee to redeem his senior is not necessarily lost by the mere fact of his joinder in the latter's suit unless it is extinguished in the manner stated in section 60. So where a prior mortgagee sued for sale on his mortgage making the subsequent mortgagee a party, and obtained a decree, but did not bring the property to sale, and the puisne mortgagee without redeeming the prior mortgagee in his suit instituted

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(1) *Abdul Qayyum* v. *Sadruddin*, (1905) A. W. N., 11; *Jamna Das* v. *Misri Lal*, I.L. R., 26 All., 504; as to when tacking allowed, see *Nicholas* v. *Ridley*, (1904) 1 Ch. 192.

(2) *Hari Narain* v. *Shama Sundari*, 11 C.L. J. 551 (555); *contra Sundara* v. *Subbiah* 18 I. C. (Mad) 610.

(3) *Sundara* v. *Subbiah*, 18 I.C. (Mad) 610; *Gopi Narain* v. *Babu Bansidhar*, I.L.R. 27 All., 325, P.C.

(4) *Sabnarain* v. *Chowdhuri*, 14 C.L.J. 500 (506).

(5) Mad. C. M. A., No. 39 of 1902.

(6) *Goverdhana* v. *Veerasami*, I. L. R, 26 Mad., 537 (540).

a suit, of his own, it was held that his suit was not *res judicata* and was otherwise maintainable. (1)

1707. So where the owner of land after executing two successive mortgages in favour of the same person *A*, executed a usufructuary mortgage in favour of another person *B*. *A* then sued and obtained a decree on his two mortgages in execution of which he brought the property to sale and it was purchased by *C*, the undivided brother of *A*. *B* was not a party to that suit. *C* then sued the mortgagor as well as *B*, praying against the latter that he may be called upon to pay up the decretal amount, failing which he should be foreclosed. The Court, however, held that *B* should not fare worse by the fact of his not being joined in the previous suit and that it being so, it was still open to *B* to redeem only the first mortgage after which he may enforce his own mortgage. (2) But this by no means follows unless *B* could tack, which, however, the enactment would not permit. (3) Of course, a puisne mortgagee is not bound by a decree obtained by a prior mortgagee in a suit to which the puisne mortgagee was no party, (4) and a purchase of the property by the first mortgagee in execution of his own decree against the mortgagor would only confer on him the estate as it stood at the date of his mortgage, and free from all subsequent incumbrances, subject to the right of the puisne mortgagee to redeem him if he so desired. (5) Where after the decree-absolute for sale had been passed, the mortgagor executed a second mortgage, and the second mortgagee discharged the first mortgage at the mortgagor's request and as his agent, the first decree could not stand in the way of his enforcing his own mortgage, nor can he be, of course, driven to seek his remedy under section 244 of the Code. Indeed, one fails to see how he could possibly resort to the aid of that section, for the prior decree could not be executed after it had been discharged, and the procedure would then be not "cumbrous" as held by the Court, but illegal which the Court do not appear to have noticed. (6)

Revival of the mortgagor's right.

1708. But in such a case is he in his turn liable to be redeemed by the mortgagor? The answer to this question depends upon whether the decree obtained in the absence of the second mortgagee is wholly inoperative, or whether it is only inoperative as against the puisne incumbrancer who should have been, but was not joined. There is no reason why a decree should be held to be ineffective against persons who were parties to the suit and which they had had an opportunity of contesting. Nor is there any reason for reviving the right of redemption in favour of the mortgagor who had been once foreclosed. (7) It is said to be the rule in America that in such a case the mortgagor will acquire a new right of redemption which he may exercise notwithstanding the previous decree for foreclosure. This doctrine of reverter is said to be confined only to mortgages in which the property is foreclosed to the prior mortgagee. But even in such a

(1) *Sahu Shiamsundar* v. *Harnarayan*, 9 I. C. 158.

(2) *Goverdhana* v. *Veerasami*, I. L R., 26 Mad. 537 (539, 540).

(3) S. 80, *post*.

(4) *Sivaraman* v. *Kuppumuthu*, 13 M. L. J. R., 72.

(5) *Mohan* v. *Togu*, I. L. R., 10 Bom., 224; *Desai Lallubhai* v. *Mundas*, I. L. R., 20 Bom., 390; *Venkata* v. *Kannam*, I. L. R., 5 Mad., 184 (188); *Muhammad* v. *Abdulla*, I. L R, 24 Mad., 171 (174, 175); *Goverdhana* v. *Veerasami*, I. L. R., 26 Mad., 537 (539); *Sonba* v. *Lohanoo*, 15 C. P. L. R., 188; *Debendra Narain* v. *Ramtaran*, I. L. R., 30 Cal., 599, F. B., explained in *Hasanbhai* v. *Umaji*, 1. L. R., 28 Bom., 153.

(6) *Tufail Fatma* v. *Bitola*, I. L. R., 27 All., 400.

(7) *Baldeo Singh* v. *Jaggu Ram*, I. L. R., 23 All., 1; *Sonba* v. *Lohanoo*, 15 C. P. L. R., 188.

case there would seem to be no justification for it. On the other hand, it may sometimes even lead to curious results. Suppose, for instance, that *A* mortgages his land by conditional sale successively to *B* and *C*. *B* forecloses without impleading *C*, and takes possession; whereupon *C* brings a suit and redeems *B*. Could *A*, whose rights had, it may be, long since been extinguished, be heard to say that he should be entitled to redeem and placed in possession on the ground that the equity of redemption was again vested in him?

1709. Indeed, if there be a resurrection of his right to redeem as often as the incumbrancers enforce their rights *inter se*, the mortgagor could never be effectually foreclosed until the last mortgage is sued on and finally disposed of. Obviously such a course is impossible in a case where the decree obtained is one for sale.(1) Indeed, the Courts have gone the length of holding that in such cases even the puisne mortgagee has no right to redeem even though the prior mortgagee may have been himself the purchaser of the property.(2) "If the second mortgagee is allowed to redeem the first mortgagee and purchaser by paying him the purchase-money, there would be no one entitled afterwards to redeem the second mortgage. The original mortgagor cannot redeem because as between him and the first mortgagee, he ceases to be the owner by the sale of his whole interest in the property. If the purchaser can redeem the second mortgagee, the latter can have no right to redeem the former."(3) True, but if the purchase is ineffectual against the puisne mortgagee, why should not the latter be entitled to redeem. He would, of course, only redeem the prior mortgage, but the purchaser being the owner of the equity of redemption may then in his turn redeem him. The question depends upon what rights pass to the subsequent mortgagee on his paying off the prior mortgagee. In the words of the section he "acquires all the rights and powers of the prior mortgagee as such," and which it has been held to mean only such rights which the prior mortgagee had with reference to the property redeemed at the time of redemption. "This is evident from the fact that the section confers on the person redeeming the mortgage the rights and powers of the first mortgagee, and, as those rights and powers could not be exercised by the first mortgagee in respect of property other than that on which his mortgage subsisted, it is clear that a second or subsequent mortgagee by redeeming a prior mortgage acquires the prior mortgagee's right in respect of that property only which is redeemed by him."(4) But since the puisne mortgagee acquires no more than the rights and liabilities of the prior mortgagees as such, it follows that the puisne mortgagee when he steps into the shoes of the prior mortgagee may often have to discover that the shoes do not exactly fit him. Thus where suppose *A*. the first mortgagee, holds property *M* and *N*, of which only *N* is for the second time mortgaged to *B*. Both the mortgagees sue without impleading the other mortgagee and obtain decrees for sale in execution of which they themselves become purchasers. *B* then sues *A* for redemption and is allowed on payment of the sum actually due upon the prior mortgage at the date of the sale to the mortgagee. On redemption, *B* acquires certain rights in both the properties *M* and *N*. Of *N* he becomes the proprietor, since he had acquired its equity of redemption by his own purchase, and having paid off the prior mortgage there are no equities

(1) Jones on Mortgage, § 1057.

(2) *Mohan* v. *Togu*, I. L. R., 10 Bom., 224; *Desai Lallubhai* v. *Mundas*, I. L. R., 20 Bom., 390; *Krishnan* v. *Chadayan*, I. L R., 17 Mad., 17 (20); *Baldeo Singh* v. *Jaggu Ram*, I. L. R., 23 All., 1 (3).

(3) *Per* Muttusami Ayyar, J., in *Perumal* v. *Kaveri*, I. L. R., 16 Mad., 121 (126).

(4) *Muhammad* v. *Kalyan Das*, I. L. R., 18 All., 139 (193); *Vencatachella* v. *Panjanadien*, I. L. R., 4 Mad., 213 (214).

outstanding. But as regards properties *M* his position is different. *A* had acquired it no doubt by purchase but not in virtue of his being mortgagee. And since on redemption the puisne mortgagee acquires no more than the rights of the prior mortgagee as such, it follows that he has only acquired over *M* the rights which *A* possessed prior to his purchase. And the mortgagor, therefore, has, it is said, as against *B* once more the right of redeeming that portion of the property which he had not as against *A*.(1) But this is a view which has not been assented to by the other Courts,(2) and as it is, it is not free from difficulties. For it may be contended that since *A* has acquired the equity of redemption, it cannot go back to the mortgagor, and *A* as the holder of it is on his part entitled to redeem *B*, which would, of course, destroy *B's* advantage. However, foreclosure-cases do not present any such difficulty. For a puisne mortgagee redeeming a prior mortgagee, who has foreclosed behind his back, is under no liability to be in his turn redeemed by the original mortgagor.(3)

1710. Price and Conditions of Redemption.—The second or other subsequent mortgagee has, for reasons before stated, the right to redeem the next prior mortgagee as one blocking up his way to foreclosure or sale. He cannot, however, redeem before the time fixed for payment by the mortgagor, but if the mortgagee consents, he may redeem him at any time. Hence, where there exists a prior usufructuary mortgage, a subsequent mortgagee of the same property cannot bring it to sale, until such time as the usufructuary mortgage becomes ripe for redemption.(4) He must, moreover, pay the mortgagee the full amount due on his mortgage, and not merely the price for which he may have acquired the interest.(5) and he must pay compound interest if stipulated for in his mortgage.(6) In other words, the mortgagee cannot be allowed to redeem on more favourable terms than the mortgagor.(7) Hence, he must pay for advances made or expense incurred by the prior mortgagee, and which he is entitled to add to his mortgage-money.(8) If the prior mortgagee was entitled to notice him from the mortgagor before redemption, he is no less entitled to get it from the mortgagee. But the puisne mortgagee is not bound by the account taken in a suit between the mortgagor and first mortgagee, unless as in foreclosure, the decree necessarily decides the rights between the co-defendants.(9) Nor is he bound by the acknowledgment of debt by the mortgagor,(10) or an agreement made subsequently to the mortgage by which the first mortgagee is entitled to capitalize interest if he had notice of subsequent incumbrances.(11) The conversion of interest into principal by agreement between the parties is considered in the light of a further advance, but inasmuch as the first mortgagee could not tack a further loan after notice of a puisne incumbrance,(12)

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(1) *Delhi & London Bank* v. *Bhikari Das*, I.L.R. 24 All., 185 (188).

(2) *Baldeo Singh* v. *Jaggu Ram*, I.L.R., 22 All., 1; *Durga Churn* v. *Chandra Nath*, 4 C. W. N., 541 (542); *Sonba* v. *Lahanoo*, 15 C.P.L.R. 188.

(3) *Sonba* v. *Lahanoo*, 15 C.P.L.R., 188.

(4) *Matadin* v. *Kazim Hossein*, I. L. R., 13 All. 432, F. B.; *Akhara* v. *Subalal*, (1895) A.W.N. 230.

(5) *Dip Narain Singh* v. *Hira Singh*, I. L. R., 19 All., 527; *Phulmani* v. *Nageshar*, I.L.R. 33 All., 370.

(6) *Ganga Pershad* v. *Land Mortgage Bank*, I.L.R., 21 Cal., 366.

(7) *Dadoba* v. *Damodar*, I.L.R., 16 Bom., 486.

(8) *Fulsa* v. *Khubchand*, (1891) A.W.N., 193.

(9) *Needler* v. *Deeble*, 1 Ch. Ca., 299; *Williams* v. *Day*, 2 Ch. Ca., 32; *Raghoba* v. *Madho Rao*, 15 C.P.L.R., 26.

(10) *Chinnery* v. *Evans*, 11 H.L.C., 115 (135).

(11) *Digby* v. *Craggs*, Amb., 612.

(12) *Shaw* v. *Neale*, 6 H.L.C., 581 (608): *Blunden* v. *Desart*, 2 Dru. & War., 405; *Hopkinson* v. *Rolt*, 9 H.L.C., 514; *Williams* v. *Owen*, 13 Sim., 597; *London & County Bank* v. *Ratcliffe*, 6 App. Cas., 722; *Union Bank* v. *National Bank*, 12 App. Cas., 53.

it follows that he could not accomplish the same object in any other manner. But if the further advances were made previously to the second mortgage, or even subsequently to it without notice, they could be legitimately tacked to the original debt in preference to the subsequent mortgagee (1) The puisne mortgagee cannot charge for improvements against the first mortgagee.(2) The puisne mortgagee would, however, be bound by a valid release of a portion of the mortgaged property by the prior mortgagee on receipt of part payment of the mortgage-money. Where a portion of the mortgaged property has been thus released, his rights are to realise the balance due to him by sale of the remainder of the mortgaged property.(3)

A puisne mortgagee under a covenant not to sue the mortgagor for ten years or for a definite period could not during that time compulsorily redeem the first mortgagee.(4) Such a disability is the creature of a contract and may be for a term of years or the life of the mortgagor. (5)

1711. The mortgagor is a necessary party to a suit instituted by a subsequent mortgagee for redemption, (6) and there is nothing in the Act enabling the subsequent mortgagee to redeem so as to acquire a new right over the property without the knowledge or concurrence of the mortgagor. (7)

Receipt.

1712. The *receipt* to be given by the prior mortgagee need not be registered if it is drawn up in consonance with the exemption made in the Indian Registration Act (8). If the mortgagee refuses to give a receipt or accept the tender made, the mortgagee may deposit the money in Court, (9) and bring a suit for redemption. The puisne mortgagee cannot claim delivery of title-deeds.

On the other hand, it was held, in Calcutta in a case decided without reference to the section that where a mortgaged property was sold in execution of a mortgage-decree at the instance of the first mortgagee, and second mortgagee who was no party to the previous suit, brought a suit to enforce his mortgage making the purchaser a party, the property having been sold at the instance of the first mortgagee, the only right which the second mortgagee had was the right to redeem, and the plaintiff without redeeming the first mortgage could not bring the property to sale in satisfaction of his subsequent charge. (10) This view was animadverted upon in the first edition of this work, and it has since been overruled. (11)

1713. The section being permissive the *puisne* incumbrancer is not *bound* to redeem the prior mortgagee before enforcing his own. In a Privy Council case upon a claim by a puisne mortgagee to redeem prior incumbrances, and in the alternative, for a decree ordering a sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in

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(1) *Brace* v. *Duchess of Marlborough*, 2 P. Wms., 491 (494).

(2) *Landowners, &c., Co.* v. *Ashford*, 16 Ch. D., 412.

(3) *Muhammad* v. *Kalyan Das*, I.L.R., 18 All., 189 (193).

(4) *Ramsbottom* v. *Wallis*, 5 L.J. (N. S.) Ch., 92.

(5) *Burrowes* v. *Molloy*, 2 J. & L., 521.

(6) S. 85; *Koopmia Sahib* v. *Chidambaram*, I.L.R., 19 Mad., 105. He may obtain benefit of a finding as to consideration though he did not himself challenge the issue. *Janki Das* v. *Ahmad Husain*, I L.R., 25 All., 159; *Makund* v. *Bahori Lal*, I L.R., 3 All., 824.

(7) *Perianna* v. *Marudainayagam*, I.L.R., 22 Mad., 332 (335).

(8) S. 17 (*n*) Act III of 1877; S. 17 (xi) Act XVI of 1908; *Hari Narain* v. *Shama Sundari*, 11 C.L J. 551.

(9) S. 83.

(10) *Durga Churn* v. *Chandra Nath*, 4 C.W. N., 541 (542).

(11) *Debendra Narain* v. *Ramtaran*, I. L. R., 30 Cal., 599 (601), F. B.

their due order; and with redemption by the plaintiff of a prior mortgagee, who was to have an option to redeem. (1) Indeed, section 96 (now Order 34, rule 12 of the Code of Civil Procedure), distinctly contemplates the enforcement of puisne incumbrance without paying off the prior incumbrance, for it speaks of the sale of property subject to prior mortgage. Indeed, had the law been otherwise. it is conceivable that it would have operated as a great hardship in cases where the value of the prior security was enormously larger than the amount of the puisne mortgage; whilst in cases where the amount due on the prior mortgage did not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would have been obliged to wait for his money till the prior mortgage became redeemable.(2) It has been, therefore, throughout held that it is within the option of the second mortgagee either to pay off the first mortgage, or to sell the estate subject to the first charge, it being immaterial whether the first mortgagee had since acquired also the right remaining in the owner. (3) This view is not opposed to the cases in which the contrary rule would seem to have been expounded. (4) It is explained that in those cases the first mortgagee had after the execution of the second mortgage purchased the equity of redemption, in which case, the second mortgagee is not entitled to bring to sale the mortgagor's interest, because it no longer exists in the mortgagor, but has already passed into the hands of the first mortgagee. (5) But this distinction hardly suffices to distinguish the cases which seem to regard the second mortgagee as disqualified to bring the property to sale without first redeeming the prior mortgagee, but the cardinal note of those cases was the establishment of the doctrine which is now enacted in section 101.

1714. But the subsequent mortgagee cannot ignore the prior mortgagee, and in Allahabad, the Court has even held that if he ignores the prior incumbrance, his suit will be dismissed and cannot afterwards be amended. (6) Again, the mortgagor is always a necessary party in all such proceedings, (7) and puisne mortgagees cannot redeem adversely a first mortgagee in the absence of the mortgagor, because the decree ought to provide for redemption of the puisne mortgage by the mortgagor.(8) As it has been observed in a Madras case, that there is no provision in the Act to support the proposition that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge or concurrence on the part of the mortgagor, acquire a new right over the mortgaged property. (9) But the mortgagor's concurrence is by no means required for the valid exercise of a statutory right. Moreover, while a

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(1) *Umes Chunder* v. *Zahur Fatima*, I. L. R., 18 Cal., 164, P. C.: to the same effect in *Raghunath* v. *Juravan*, I. L. R., 8 All., 105, F. B.

(2) *Sirbadh Rai* v. *Raghunath*, I. L. R., 7 All., 568 (574, 575).

(3) *Vencatachella* v. *Panjana*, I. L. R., 4 Mad., 213; *Gangadhara* v. *Sivarama*, I. L. R., 8 Mad., 246; *Khubchand* v. *Kaliandas*, I. L. R., 1 All., 240; *Sirbadh Rai* v. *Raghunath*, I. L. R., 7 All. 568 (574, 575); *Raghunath* v. *Juravan*, I. L. R., 8 All., 105, F. B.; *Umes Chunder* v. *Zahur Fatima*, I. L. R., 18 Cal., 164, P. C.; *Kanti Ram* v. *Kutubuddin*, I. L. R., 22 Cal., 33 (43, 44, 45).

(4) *Gaya Prasad* v. *Salik Prasad*, I. L. R., 3 All., 682 (697); *Har Prasad* v. *Bhagwan Das*, I. L. R., 4 All., 196 (198); *Parsi* v. *Girand Singh*, (1885) A. W. N., 155: *Mulchand* v. *Lallu*, I. L. R., 6 Bom., 404 (415), F. B.

(5) *Kanti Ram* v. *Kutubuddin*, I. L. R., 22 Cal., 33 (45).

(6) *Raghunath* v. *Juravan*, I. L. R., 8 All., 105; explained in *Saligram* v. *Hat Charan*, I. L. R., 12 All., 548.

(7) *Palk* v. *Clinton*, 12 Ves., 48 (58); *Farmer* v. *Curties*, 2 Sim., 466; *Ramsbottom* v. *Wallis*, 5 L. J. Ch., 92; *Teevan* v. *Smith*, 20 Ch. D., 724.

(8) *Ramsbottom* v. *Wallis*, 5 L.J. (N. S.), Ch., 92; *Fell* v. *Brown*, 2 Broc. C. C., 276. The same rule is enacted in Conveyancing Act, 1882 (45 & 46 Vict., c. 38), s. 12.

(9) *Perianna* v. *Marudainayagam*, I.L. R., 22 Mad., 332 (334, 335).

puisne mortgagee may not redeem the prior mortgagee behind the back of the mortgagor, he may foreclose the mortgagor in the absence of prior mortgagees. (1)

1715. Paying Mortgagee's shield.—Where the third mortgagee in ignorance of the second mortgage pays off the first mortgagee, in the absence of fraud, he acquires all the rights of the first mortgagee, and which he can use as a shield against the second mortgagee suing to enforce his mortgage. Thus, in a case where *S* mortgaged land to *P*, and *G* subsequently obtained a decree by consent against *S*, creating a charge on the same and other land and registered the decree. *A*, in ignorance of *G's* decree, paid off *P's* mortgage, but took no assignment thereof and took a mortgage from *S* of all the land covered by *G's* decree. In a suit by *G* against *S* and *A* to enforce the payment of his mortgage-debt, it was held that *A* not having had notice of *G's* decree was entitled to stand as first incumbrancer in respect of the money paid to discharge *P's* mortgage, and that even if registration were legal notice, an intention to keep alive *P's* mortgage was to be presumed in favour of *A*. (2) So where *A* mortgaged certain property first to *B* and afterwards to *C* and finally sold it to *D*, who mortgaged it to *E*, who paid off B's mortgages and brought the property to sale in satisfaction of his own mortgage, and it was purchased by *M* ; *C* the second mortgagee then sued for sale on his own mortgage, which *M* resisted on the ground that he was entitled to hold up the mortgages of *B* as a shield against the plaintiff's claim, and the Court upheld his defence. (3) But the doctrine of the shield is only available to one who discharges a mortgage for which he was not primarily liable. A person cannot claim subrogation when he merely performs his own obligation. (4) But this appears to have been misunderstood in some cases in which it has been held that if a person purchased property subject to two prior mortgages, the bulk of the price being reserved by him for their discharge, his payment of the first mortgage would not entitle him to set up that mortgage as a shield against the claim of the second mortgagee inasmuch as his payment was really payment for the mortgagor. (5) But even if so, the purchaser would be none the less entitled to subrogation, since it was not a payment for which he was primarily liable and which, it is submitted, is the true test. (6) This view was taken in a later case in which the plaintiff held a mortgage of 1889, a portion of the consideration of which was in accordance with its terms reserved by him for discharge of two prior mortgages of 1886 and 1887, on the strength of which he claimed priority over the mortgagee of 1888, who contended that the plaintiff's payments were merely as agent of the mortgagor, but the Court held him entitled to priority on the ground that he had discharged the liability for which he was not primarily liable. (7) It is said that as the principle of subrogation by payment to the prior incumbrancer rests upon the presumption of an intention to keep alive the first mortgage as a shield against the puisne incumbrancer, that presumption would

Effect of the third mortgagee redeeming the first.

(1) *Rose* v. *Page*, 2 Sim., 471 ; *Slade* v. *Rigg*, 3 Hare, 35 ; *Richards* v. *Cooper*, 5 Beav., 304.

(2) *Gangadhara* v. *Sivarama*, I.L.R., 8 Mad., 246

(3) *Matiullah* v. *Banwari Lal*, I.L.R., 32 All., 138; following *Kallu* v. *Sant Lal*, (1896) A.W.N. 129 ; *Baldeo* v. *Uman*, I.L.R., 32 All., 1; *Mamraj* v *Ramji*, 7 A.L.J. 15; *contra* *Baijnath* v. *Murlidhar*, (1907) A.W N. 85 distinguished.

(4) *Satnarain* v. *Chowdhari*, 14 C.L.J. 500.

(5) *Baijnath* v. *Murlidhar*, 4 A.L.J., 349 ; *Tufail Fatima* v *Bitolo*, I.L.R., 27 All., 400 ; *Muhammad Sadik* v. *Ghaus Muhammad*, 7 A.L.J. 914, F.B ; 7 I. C. 200 ; *Govindasami* v. *Doraisami*, 20 M.L.T. 380 ; 6 I.C. 781.

(6) *Cf.* S. 69, Indian Contract Act (IX of 1872).

(7) *Gur Narain* v. *Shadi Lal*, 8 A.L.J. 1289 (1291) ; *Jagatdhar* v. *Brown*, I.L.R., 33 Cal., 1133 (1154).

be deemed rebutted when the transaction in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase-money. (1) But the true test is whether he has still use of the shield.(2)

Then again, this section does not apply, when it is clear on the facts that the first mortgage has been satisfied and extinguished on the execution of the second mortgage which alone is outstanding, although the first one was satisfied out of money raised by the second.(3) The puisne mortgagee is bound to join any claim he may have acquired under this section in a suit to enforce his own mortgage; the sums so paid being treated as an addition at accretion to the claim on his mortgage. A separate suit for recovery of this sum after he has sued out his own mortgage would be barred.(4)

1716. This section does not deal with the case of a subsequent mortgage acquiring the mortgagor's interest, in relation to other mortgagees prior or subsequent to him, which has been dealt with in section 101, to which reference must be made for the purpose.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has, as against such prior mortgagee or mortgagees and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

1717. Analogous Law.—This is the legislative exposition of the principle of the old English rule "redeem up, foreclose down," the meaning of which will be presently discussed. The section, as it stands, omits to define the rights of the first mortgagee as against the subsequent mortgagees, but there can be no doubt that he has the same rights. The rights of the mortgagor, so far as regards redemption, foreclosure and sale, are dealt with in section 60 *et seq.*

1718. The following provision, which must be read as a necessary adjunct of the rule was proposed to be inserted in the original Bill, but was omitted by the Select Committee on the ground that its appropriate place was in the Code of Civil Procedure, wherein it has now been inserted in accordance with the suggestion of the Privy Council (5) :—

Right of mesne mortgagee to redeem and foreclose.

O. 34, r. 11.—"Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor."

1719. Principle.—The last section enables the subsequent mortgagees to pay off the first mortgagee, and confers on him his rights and powers which he may exercise *against* the mortgagor. The present section defines what may be the rights of such mesne mortgagees *inter se.* Under the last section the

(1) *Govindasami* v. *Dorasami*, 20 M.L.J. 380; 6 I.C. 781.

(2) S. 101 Comm. *post.*

(3) *Sheo Nandan* v. *Samthu*, 4 I.C. (Oudh) 21; *Koopmia* v. *Chidambaram*, I.L.R., 19 Mad., 105.

(4) *Hari Narain* v. *Shama Sundari*, 11 C. L.J. 551.

(5) *Gopi Narain* v. *Bunsidhar*, I.L.R., 27 All., 325 (330) P.C. commented on under S. 74, *comm.*

second mortgagee is subrogated to the rights of the prior mortgagee by paying off his mortgage. Under the present section the second mortgagee is endowed with all the rights of the mortgagor against the prior mortgagee, while the latter has against the former the same rights which he has as against the mortgagor. Indeed, the latter half of the section is a logical deduction from the rule enunciated in its earlier part. Thus suppose there are three mortgagees *A*, *B* and *C*. As regards the rights possessed by *B*, it depends whether he is arrayed against *A* or *C*. As against *A* he possesses all the rights which the mortgagor may have against him. But for the same reason *C* possesses similar rights as against *B*. Now as the rights and remedies of the mortgagor and mortgagee are correlative and mutual it follows that if *B* and *C* represent the mortgagor as against *B*, the latter may equally enforce his rights as against *C* to the same extent as if he had been the mortgagor; the rule being the same where *A* and *B* are in conflict. The section, however, does not define what may be the rights of the second mortgagee *as against* the mortgagor, (1) which have to be gathered from the other provisions of the Act. (2) Nor does it define the rights of the *first* mortgagee against the second and subsequent mortgagees, and on which the Act as a whole sheds no certain light.

1720. According to this section every person who has a right to redeem a mortgage may redeem any prior mortgagee of the same property and is therefore liable to be redeemed in his turn by the subsequent mortgagee. In redeeming the prior incumbrancers the mortgagee can redeem in the same manner as the mortgagor, who has the last chance to redeem. Then, again, as each subsequent mortgagee has the right to redeem up, *i. e.*, redeem the prior mortgagees, so has each prior mortgagee the right to *foreclose down*, or claim to foreclose (if necessary) all incumbrancers posterior in date to him. Thus where *A* mortgages his property consecutively to *B*, *C*, and *D*; according to the section, *D* can redeem *C*, and *C* can redeem *B*, while *A* can redeem all the three *B*, *C*, *D*. Again, *B* having priority over *C* and *D*, will be entitled to foreclose or bring to sale *A*'s property before *C* or *D*, and if necessary against them. Similarly has *C* the same rights against *D*. All the rights of the parties interested in the mortgage are to be adjudicated in one suit, to which all the successive mortgagees and the mortgagor must, subject to section 85, be made parties.

1721. Meaning of Words.—"*Every second or subsequent mortgagee*:" There is reason for excluding the first mortgagee in the earlier part of the section, for it is in relation to him that the rights of the *puisne* mortgagees are defined, but in the latter half of the section where the rights of the prior mortgagees are defined *as against subsequent* mortgagees, the first mortgagee must not be excluded, as would seem from the literal construction of the section. The parenthetical "if any" mean *if necessary*, for the prior mortgagee entitled to bring the property to sale can have no right against the subsequent mortgagees if the claims of all of them can be satisfied out of the property.

1722. Rights of Mortgagees inter se.—The recognition of the right of the second and subsequent mortgagees is the inevitable consequence of the view law takes of the nature of the equity of redemption, which being regarded as an interest in land as much as land itself, it is competent to the mortgagor to carve out of his estate infinite successive rights of diverse nature which, being the nature of *jura in re aliena*, would not in any way detract from the mortgagor's own position as owner of his property, so long as he has not parted

(1) *Kanti Ram* v. *Kutubudin*, I.L.R., 22 Cal., 33 (38).

(2) *Ibid*, p. 42.

with his equity of redemption. (1) If the owner of land mortgages it to *A*, all that *A* is entitled to is that his security and its subservient rights are not in any way prejudiced. (2) There may exist an intervening interest, provided that it does not hinder or delay the realization of *A's* security. He may then deal with the property in the land just as much as if he had never made a mortgage, and may sell, settle or demise it, or create charge upon it in favour of his wife or children. But in doing so he necessarily gives to each of the persons in whose favour he grants an estate the right to do that which he himself can do, that is to redeem the mortgage. To give anything else would be to give that which would be of no avail to him to whom he makes the grant. It has, therefore, been always held since the doctrine of redemption has been worked out in the Courts of Equity that any person,who is thus entitled to an interest carved out of the property is entitled to redeem, subject of course to priority and any other equities paramount which may affect the estate. (3)

1723. Subsequent Mortgagee v. Prior Mortgagee.—It then follows that a puisne mortgagee possesses rights both under and against the mortgagor. As against the prior mortgagee he possesses the same rights as the mortgagor possessed. But when? Obviously only at the time the right is sought to be exercised. The nature of these rights depends upon the nature of the security, but the principal right of the mortgagor is that of redemption, the corresponding rights of the mortgagee being one of foreclosure or sale. The right of the mortgagor to call for accounts is one which can only arise when the mortgagee is in possession. Such a right may be enforced by the second mortgagee, and the first mortgagee is bound to render an account to the same extent as if the mortgagor had called for them. (4)

1724. Another right which is an incident of the right of sale is that of re-purchase under the Civil Procedure Code, and the scope of which will be discussed in the sequel.(5) As between two or more mortgagees seeking to exercise the mortgagor's rights, priority would determine the preference. (6) The right of the second mortgagee to redeem the prior mortgagee has been the subject of some controversy. And the question is not simplified if the prior mortgagee purchases the equity of redemption behind the back of the puisne mortgagee. The question presents no difficulties where the prior mortgagee is, as such, redeemed, in which case the right of the subsequent mortgagee to redeem him is unquestionable. But where the prior mortgagee acquires the equity of redemption of the mortgagor, the two rights may or may not coalesce and there may or may not be merger; if there is, then the question would present no difficulty, for in that case, having ceased to be the mortgagee he could not be redeemed by the subsequent mortgagee, nor could he exercise his

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(1) *Tarn* v. *Turner*, 39 Ch. D., 456 (460); *Khubchand* v. *Kalian Das*, I.L.R., 1 All., 240 (244) F.B.; *Ali Hasan* v. *Dhirja*, I.L.R., 4 All., 518 (524); *Sirbadh Rai* v. *Ragunath*, I.L.R., 7 All., 568 (574).

(2) *Shridhar* v. *Atmaram*, I.L.R., 7 Bom., 455 (458); *Shridhar* v. *Krishnaji*, I.L.R., 12 Bom., 272 (275).

(3) *Per* Kekewich, J., in *Tarn* v. *Turner*, 39 Ch. D., 456 (460); *Venkata* v. *Kanum*, I.L.R., 5 Mad., 184 (186); *Damodar* v. *Naro*, I.L.R., 6 Bom., 11; *Radhabai* v. *Shamrao*, I.L.R., 8 Bom., 168.

(4) *Mainland* v. *Upjohn*, 41 Ch. D., 126.

(5) Pt. II, O. 34, r. 5, Comm. *post*.

(6) As to which see ss. 48 & 78; it was at one time held that if a second and third mortgagee are both equally desirous of redeeming the first, the first mortgagee has it in his power, if he be so minded to give the preference to which of the two he pleases. (*Per* Wood, V.C., in *Bates* v. *Johnson*, Joh., 314) but this is certainly not now the law in England; *West London Commercial Bank* v. *Reliance, &c., Society.*, 29 Ch. D., 954 (960). Indeed, the view takes no notice of priority on which the right to election depends (*ib.*, p. 960).

rights as a mortgagee as against him.(1) But a question of greater complexity arises where the prior mortgagee has acquired the equity of redemption behind the back of the puisne mortgagee, especially if the acquisition has been made through Court in a suit to which the junior mortgagee should have been but was not made a party. In that case the puisne mortgagee might well urge that a failure on the part of the prior mortgagee to implead him should not enable him to improve his position by depriving the pusine mortgagee of his right of redemption. On the other hand, the prior mortgagee may claim that the effect of his decree is to transfer the equity of redemption, so far as regards the mortgagor, and as the assignee of the equity of redemption, he has the last right of redemption in the same way as if the mortgagor had conveyed him his right of redemption. The soundness of this contention must depend upon the validity and effect of the decree passed behind the back of the puisne incumbrancer, and although cases could be cited in support of either view, (2) the better view appears to be that a puisne mortgagee is not bound to treat a decree, to which he was designedly made no party, as creating any right prejudicial to his claim. Any other view would be subversive of the principles that no party should be damnified by a decree to which he was not a party, and that the prior mortgagee should not profit by his own wrong. But this leaves other questions still undecided : namely, those in which the misjoinder was innocent, as when he had no notice of the puisne mortgage, or where his decree operates as merger extinguishing his prior security. (3) In view of the rule enacted in section 101 the latter question is comparatively simple though distinction between a mortgagee as such, and one whose rights have merged into new and higher rights, appears to have been ignored in several cases where the question as to the rights of such mortgagees has come up for determination. (4) But since there can be no merger unless it is beneficial to the mortgagee, (5) it follows that where a prior mortgagee in execution of his decree on the mortgage purchases the equity of redemption, the subsequent mortgagee cannot compel him to redeem, since the purchaser can still take his stand upon his mortgage. If, however, the subsequent mortgagee was not made a party to the suit on the prior mortgage, all that he can claim under this section is to redeem his prior mortgagee on paying off what is due on the mortgage, and thus obtains possession of the property. (6) This is a right which he may exercise even though the mortgaged property may have been sold to a purchaser. (7) In this respect the law accords with the

(1) *Raghunath* v. *Juravan*, I. L. R., 8 All., 105 ; *Perumal* v. *Kaveri*, I, L. R., 16 Mad., 121 ; *Radhabai* v. *Shamrao*, I. L. R., 8 Bom., 168 ; *Dullabh Das* v. *Lakshman Das*, I, L. R., 10 Bom., 88.

(2) Eq. *Muhammad* v. *Kalyan*, I. L R., 18 All., 189 in which the mortgagee though not joined was held bound by the result of the decree ; *Contra*, *Ram Narain* v. *Bandi Pershad*, I. L. R., 31 Cal., 737 (742) ; See these and other cases discussed under O. 34 r. 1, Comm. *post*.

(3) *Mir Eusuff* v. *Panchanan*, 11 C. L. J. 639 ; 6 I. C., 842, *Nidhi Ram* v. *Sarbesur*, 14 C. W. N. 439 ; 5 I. C. 877 ; *Nulla Vittil* v. *Korambath*, 21 M. L. J. 213, F.B.

(4) See S. 101, Comm.

(5) S 101, *post*, Comm.

(6) *Desai Lallu Bhai* v. *Mundas*, I. L. R., 22 Bom., 390 (392, 393) ; following *Mohun Manor* v. *Togu Oka*, I. L. R., 10 Bom., 224; *Shivram* v. *Genu*, I. L. R., 6 Bom., 515 ; *Narun* v. *Dolataram*, *ib.*, 538 ; *Sankana* v. *Virupakshapa*, I. L. R., 7 Bom., 146 ; *Radhabai* v. *Shamrav*, I.L R., 8 Bom., 168 ; also to the same effct; *Muhammad* v. *Man Singh*, I. L. R., 9 All., 125 ; *Gajadhur* v. *Mul-Chand*, I. L. R., 10 All. 520 ; *Namdar* v. *Karamraji*, I. L. R., 13 All., 315 ; *Dip Narain* v. *Hira Singh*, I. L. R., 19 All., 527 ; *Ganga Prasad* v. *Land Mortgage Bank*, L. R., 21 Cal., 366 (368); O. A. to P. C , the judgment was reversed on another point, *ib*, p. 375; *Debendra Narain* v. *Ramtaran*, I. L. R., 30 Cal., 599 ; F.B. *Sivathi* v. *Ramasubhayar*, I. L R., 41 Mad., 64 ; *Raghoba* v. *Madho Rao*, 15 C. P. L. R., 26.

(7) *Gobind Lal* v. *Ramjanam*, I. L. R., 21 Cal., 70 P. C. ; *Debendra Narain* v. *Ramtaran*, I. L. R., 30 Cal., 599 (605), F.B.

English rule. (1) But this must be taken subject to the rule (although the Bombay cases seem to have overlooked it), that where it appears that there was an intention to merge his security, the prior mortgagee can no longer fall back upon his mortgage. And it has been held that where the owner of an equity of redemption pays off a mortgagee and takes an assignment of the mortgage, and the documents or circumstances shew an intention to keep alive the security, it is not extinguished, but enures for the benefit of the owner of the equity of redemption. (2) This rule is the inevitable consequence of the doctrine that one right does not merge into another unless so intended by the parties. Formerly in similar cases it was said that "a person who borrows money cannot be his own creditor, or set up an incumbrance of his own against his creditor." (3) But this is a legal refinement which has long since ceased to have any value.

1725. A puisne mortgagee redeeming a prior mortgagee who has foreclosed behind his back, is not himself liable to be redeemed by the original mortgagor. (4)

Right to redeem prior mortgage.

1726. The right conferred on the puisne mortgagee to redeem the prior mortgagee is a right, and not an obligation, which he is bound to discharge before pursuing his remedy against the mortgagor. Nor is it his only right against the prior mortgagee. It was however, at one time, held by the majority of the Full Bench of the Allahabad High Court, (5) that the puisne mortgagee could not bring to sale the property mortgaged to him without first redeeming the prior mortgages. Mahmud, J., however, in his dissentient judgment pointed out that the section "falls short of sustaining the proposition that the payment of a prior incumbrance is a condition precedent to the enforcement of a puisne or mesne simple mortgagee or that such puisne or mesne mortgagee is bound to wait for enforcement of his security till the lapse of the term when the prior mortgages become redeemable." (6) This view, which has now received legislative sanction (7) was in full accord with the earlier cases of the same Court (8) and of the leading cases of two other High Courts (9) and it had received sanction from the highest authority of the Privy Council which, in a similar case, upheld the order for sale. (10) It was then settled what has since been expressly enacted that the puisne mortgagee is entitled to bring the property to sale without redeeming but subject to the prior incumbrance. But where the prior mortgagee has acquired the equity of redemption of the mortgagor, it would appear that the second mortgagee is not entitled to bring to sale the mortgagor's interest, *because it no longer* exists in the mortgagor, but has passed into the hands of the first mortgagee who can resist the claim for sale, on the ground

(1) *Godfrey* v. *Chadwell*, 2 Vern., 601; *Marrett* v. *Western*, *ib.*, 663.

(2) *Thorne* v. *Cann*, [1895] A.C., 11; approving *Adams* v. *Angell*, 5 Ch. D., 634.

(3) *Watts* v. *Symes*, 1 De M. & G., 240 (244); *Toulmin* v *Steer*, 3 Mer., 210, reflected on in *Thorne* v. *Cann*, [1895] A. C., 11

(4) O. 34, r. 1, Comm. *post*; *Souba* v. *Luhanoo*, 15 C. P.L. R. 188.

(5) *Matadin* v. *Razim Husain*, I.L.R., 13 All., 432, F.B.; overruled in *Ram Shankar* v. *Ganesh Prasad*, I.L.R. 29 All., 385, F.B; followed in *Lala Ram* v. *Mt. Imami*, 14 O.C. 217; 96 I. C. 403; *Aravamutha* v. *Kumarsamy*, 7 M.L.T. 230.

(6) O. 34, r. 1, Expl.

(7) *Ibid.*, p. 488.

(8) *Chubchand* v. *Kalian Das*, I.L.R., 1 All., 240; *Sirbadh Rai* v. *Raghunath*, I.L.R. 7 All., 568 (574); *Raghunath* v. *Juravan*, I. L.R., 8 All., 105, F.B.

(9) *Vencatachella* v. *Punjana*, I. L. R., 4 Mad., 213; *Gangadhara* v. *Sivarama*, I.L. R., 8 Mad., 246; *Kanti Ram*, v. *Kutubuddin*, I.L.R., 22 Cal., 33; *Surjiram* v. *Brahmadeo*, 1 C. L. J., 377 (350).

(10) *Umes Chunder* v. *Zahur Fatima*, I.L.R. 18 Cal., 164, P.C., referred to in *Kanti Ram* v. *Kutubuddin*, I. L. R., 22 Cal., 33 (44) 45).

of losing his priority. (1) But even in such a case the puisne mortgagee may either claim to enforce his security subject to the first mortgage, (2) or to redeem the prior mortgage and then work out his own remedy. In such a case the puisne mortgagee's suit cannot be treated as a suit for redemption as against the prior mortgagee, and no separate court-fee would be separately leviable for the purpose inasmuch as redemption of the prior mortgage is not a relief he substantially claims in the suit, but is a mode by which to approach his goal. (3) Of course, the money paid by the second mortgagee for redemption of the prior mortgage is subject to the condition that the prior mortgagee is able to give him a valid discharge, from his prior incumbrance failing which he is bound to refund him his money as on a failure of consideration. So where on the creation of two mortgages, *A* and *B*, the latter, the puisne mortgagee sued on his mortgage, and himself purchased the mortgaged property, whereupon *A* sued out his security and proceeded to execution when *B* compromised with *A* whom he paid Rs. 215 on condition that he set the property free from his mortgage. This he was unable to do owing to the objection of a third party interested in the equity of redemption. *A* thereupon proceeded with his own execution and brought the property to sale and it was purchased by a stranger. *B* then naturally sued *A* for the refund of his money and the Court naturally allowed his claim holding that *A* could not execute his own decree and have *B's* money too. (4) The wisdom of exercising the right of the second and subsequent mortgagee to redeem the prior mortgage must in a great measure depend upon whether the latter is entitled to release the property comprised in the redeemer's mortgage which is the primary purpose of such redemption. If, therefore, the properties and parties in the two mortgages are not identical, questions, of apportionment and other equities might arise which may all be adjusted by a single suit or simple redemption. But, on the other hand, he must be careful not to make two suits out of one, otherwise he might find himself confronted by the insuperable bar of *res judicata*. Such was the fate of the plaintiff, one Bhura, who was the second mortgagee of two-thirds share of two co parcenary members of a joint Hindu family whose manager had previously mortgaged the entire property with possession to one Saligram. Bhura sued on his mortgage, joining the three co-parceners and the prior mortgagee Saligram offering to redeem the latter, and praying for sale of the entire property if the prior mortgagee received his mortgage-money otherwise he prayed for sale of only the two-thirds mortgaged to him, if the prior mortgagee accepted only two-thirds of the mortgage-money. Bhura had to settle with the prior mortgagee under the erroneous practice set current by a case (5) which for long dominated the procedure of the Courts subordinate to that High Court, under which a second mortgagee was precluded from bringing the mortgaged property to sale subject to the prior mortgage. The Court gave Bhura a decree for sale of only two-thirds subject to his redeeming Saligram's entire mortgage. Bhura applied and appealed in vain for sale of the excluded one-third share; eventually suing for possession of it on the strength of

(1) *Kanti Ram* v. *Kutubuddin*, I. L. R., 22 Cal., 33 (45); explaining *Gaya Prasad* v. *Salik Prasad*, I. L. R., 3 All., 682; *Har Prasad* v. *Bhagwan Das*, I. L. R., 4 All., 196; *Mulchand* v. *Lallu*, I. L. R., 6 Bom., 404; *Parsi* v. *Girand*, (1885) A. W. N., 155.

(2) *Surjiram* v. *Barhamdeo*, 1 C. L. J. 337 (350, 351).

(3) *Cf. Surjiram* v. *Barhamdeo*, 1 C. L. J., 337; the contrary held in *Ghulazi* v. *Faki Shah*, 17 C. P. L. R., 139 (144, 145), is unsupported by principle or precedent.

(4) *Gulab Rai* v. *Ram Rai*, 10 I.C. (Cal.) 570.

(5) *Mata Din* v. *Kazim Husain*, I. L. R., 13 All. 432, F.B.; overruled in *Ram Shankar* v. *Ganesh Prasad*, I.L.R., 29 All., 385, F.B.

his redemption, but the Court threw out his suit as *res judicata*, which undoubtedly it was in view of the relief asked for and refused in the previous suit. (1) But such a case is not likely to arise again unless the puisne mortgagee puts his head into his own noose by complicating his suit by challenging decision upon diverse claims which he had better let alone till he has settled with his prior mortgagee, or his own mortgagor. If he sues on his own mortgage, it would be impolitic as he is no longer required, to make the prior mortgagee a party defendant, unless he does not mind that he is himself redeemed by his prior mortgagee. A second mortgagee brought a suit on his mortgage making the transferee of the prior mortgagee party to the suit, and obtained a decree for sale, which he proceeded to execute, whereupon the prior mortgagee claimed to redeem him on the ground that he was entitled to save from sale the property which stood as security for his mortgage-debt, and which the Court allowed on the ground that the prior mortgagee was impleaded "in order to give him an opportunity, if he wishes, to pay off the second mortgage, if the mortgagor refuses to pay it off, and so to save the property which stands as security for his mortgage from being sold." (2) But this need not necessarily have been the plaintiff's purpose, while unless the prior mortgage was possessory, the mortgagee is neither entitled nor bound to save the mortgaged property, from a sale in which his prior rights remain undisturbed. Though the legislature has now definitely overruled the view long maintained in Allahabad that a puisne mortgagee could not realize his security in a suit of his own without joining the prior mortgagee whom he is bound to redeem (§ 1726), still that Court even now maintain that should the second mortgagee implead the prior mortgagee in possession he cannot realize his security by sale of the mortgaged property subject to the rights of the first mortgagee, whom he must redeem as a condition precedent to the realization of his own security. (3) The first mortgagee is thus a Tartar whom the puisne mortgagee in Allahabad would do well to leave severely alone, for now that he need not join him at all, if perchance he joins him as a proper though not a necessary party, he won't find it easy to get rid of him without redeeming him *nolens volens*. (4) This would also seem to be the view taken in Madras, in a case decided before the present Procedure Code, though the rule there is not regarded as inflexible and might be departed from on a sufficient cause being shown, the rule being upheld there to avoid multifariousness. (5) It is submitted that the practice if old must now yield to the pressure of the new Code (6).

Limitation.

1727. Since the second and subsequent mortgagee have been here given the same right against their senior mortgagee as the mortgagor, they are necessarily subject to the same period of limitation. So when a property has been sold in execution of a decree obtained on a prior mortgage to which suit the second mortgagee was no party, the time within which the second mortgagee has to sue him for redemption, commences from the due date of the mortgage-debt, and not, from any later date when he may have purchased the property, and the same rule applies to his transferee (7). And as regards the period allowed the Court held his suit to

(1) *Bhura* v. *Ghure*, 8 A.L.J. 352.

(2) *Bhajahari* v. *Gajendra*, I.L.R., 37 Cal. 282.

(3) *Manohar Lal* v. *Ram Babu*, I.L.R., 34 All., 323 (327, 330); *contra Debendra Narain* v. *Ramtaran*, I. L. R., 30 Cal., 599, F. B. dissented from.

(4) *Ibid.*

(5) (1908) *Cangayam* v. *Gomperts*, I.L.R. 31 Mad., 425.

(6) O. 34, r. 1, Comm. *post.*

(7) *Nidhi Ram* v. *Sarbessur*, 14 C.W.N. 439; 5 I.C. 877, in which Art. 132 and not Art. 134 or 148 of the Limitation Act was held to apply to redemption.

be limited by art. 132, art. 148 (giving sixty years) being inapplicable: "The omission of the prior mortgagee to include the second mortgagee in his suit has been held by this Court not to deprive the second mortgagee of his right to redeem the prior mortgage, but it cannot be held that this interpretation of the law, which is intended merely to save his right as second mortgagee, gives him any additional right, or extends the period during which, under the law, he can sue to enforce his rights. The right to redeem was held not to be lost. It was not held, and, in our opinion, it was not intended to be held, that a fresh period to enforce his right to redeem under his mortgage was given to him from the date of the purchase." But it is submitted that apart from "fresh period" the second mortgagee had the limitation prescribed by art. 148, and that the limitation could not be whittled down by the mere fact that the right of redemption here allowed to the puisne mortgagee has for its underlying purpose the realization of his own security.(1)

1728. Prior Mortgagee v. Subsequent Mortgagee.—In a competition between successive mortgagees the question of priority will in the first instance be determined with reference to the rule enacted in section 48 (§§ 758-778) subject to the rules enacted in sections 78 and 101. Generally speaking, priority counts as from the date of execution, and where the mortgagee takes another deed in renewal of his former mortgage, he does not necessarily forfeit his prority on that account.(2) The fact that he had obtained a decree on his mortgage, or had obtained a lease in substitution of his mortgage would not suffice to extinguish his priority.(3) The rights of the prior mortgagee against the subsequent mortgagee are so far as regards possession (4) foreclosure and sale, declared to be identical with those which he has acquired against the mortgagor. In cases where the security is ample or the subsequent mortgagee exercises his option to pay him off, such rights would not be called into requisition. But where the prior mortgagee has had to enforce his security to the detriment of the subsequent mortgagee, the exact nature of his rights should be clearly ascertained. In the first place the prior mortgagee cannot enforce all his rights against the subsequent mortgagee, which he can enforce against the mortgagor, for they are declared to be only "so far as regards redemption, foreclosure and sale of the mortgaged property." Thus then, if the mortgagor has entered into a personal covenant to pay, the prior mortgagee could not enforce the covenant against the subsequent mortgagee. The utmost then that the second or subsequent mortgagee can do is to forego his security and suffer the prior mortgagee to foreclose or sell the property mortgaged to him. The puisne mortgagee is thus a necessary party to the prior mortgagee's suit, in which he must be joined. If, however, he fails to implead him and obtains a decree behind his back, the latter is in no way bound by the decree; (5) and he has in such a case a remedy which has already been before set out.

What a prior mortgagee includes.

1729. Position of the Prior Mortgagee Purchaser. On the other hand, if the mortgaged property was sold to a purchaser in execution of a

(1) See the subject further discussed under O. 34, r. 1, Comm. *post*.

(2) S. 101, Comm *post*. *Rahimunnissa* v. *Badri Dass*, I.L.R. 33 All. 368; *Yellapadi* v. *Sriman Madhwa*, 21 M.L.J. 811.

(3) *Kashiya* v. *Chhida Singh*, 7 A.L.J. 984.

(4) "Possession" is omitted from the section, which is otherwise ill-drafted.

(5) O. 34, r. 1, Comm, *post*; *Umes Chunder* v. *Zahur Fatima*, I.L.R., 18 Cal., 164, P.C.; *Govind Lal* v. *Ram Janam*, I L R., 21 Cal., 70, P C.; explained in *Debendra Narain* v. *Ramtaran*, I.L.R., 30 Cal., 599 (605), F. B.; *Mir Eusuff* v. *Panchanan*, 11 C.L J. 639; 6 I.C. 842; *Nidhi Ram* v. *Sarbessur*, 14 C.W. N. 439; 5 I.C. 977; *Mulla Vittil* v. *Korambath*, 21 M.L.J. 213, F.B.; see *ante* under s. 74.

sale-decree to which the subsequent mortgagee was not a party, the former would, so far as regards the latter, stand in the position of the prior mortgagee.(1) Thus, then, while the rights of the prior mortgagee may be unaffected, the persons who may enforce those rights may have changed by the previous litigation. A prior mortgagee who has obtained a decree for sale and purchased himself the mortgaged property acquires the mortgagor's equity of redemption by force of which he may redeem a subsequent mortgagee; (2) so a prior mortgagee who had acquired the equity of redemption of the mortgagor, charged to the extent of a subsequent mortgage, was allowed to redeem him in a suit in which the latter sued to redeem prior incumbrances, so as to make his own charges first on the property.(3) A first mortgagee obtained a mortgage-decree without making the second mortgagee a party to his suit, and in execution thereof purchased the property and obtained possession. The second mortgagee then brought a suit on his mortgage, making the first mortgagee and purchaser a party to his suit and obtained a decree, subject to the rights of the first mortgagee. In execution of this decree he purchased the property, subject to the first mortgagee's right. It was held that the rights of the first mortgagee included the right to retain the possession till he could be redeemed in a proper redemption-suit.(4) The right of the prior mortgagee to redeem the subsequent mortgagee on his acquiring the mortgagor's equity of redemption whether by foreclosure or sale in a suit to which the subsequent mortgagee was not a party has been categorically affirmed in Bombay,(5) while it has been, as categorically denied by the Calcutta and other Courts. (6) But if the Bombay view be correct, the prior mortgagee would steal a march over the subsequent mortgagee by keeping him ignorant of the suit in which he acquires the mortgagor's interest. (§§ *ante*). Moreover while in England a foreclosure is in a sense considered as a new purchase of the land,(7) it is a question whether the same view is countenanced by O. 34, rr. 2 and 3 of the Code of Civil Procedure (8) which, presumably in the event of non-payment of the decretal money, imply the annihilation of the mortgagor's right to redeem and not of its transfer to the mortgagee. Anyway the right is one which the mortgagee may exercise at his option. It has been stated before, that in view of O. 34, r. 1 and the better antecedent opinion a puisne mortgagee is not bound to join the prior mortgagee in a suit to enforce his own mortgage. But the same rule does not hold good in a suit by a prior mortgagee to enforce his own security, since there can be no adjudication of the prior rights without extinguishing those subordinate to them.(9) But where the parties and properties comprised in the two mortgages are not identical, recourse will necessarily be had to the other provisions of the Act to adjust their mutual rights in the same suit by apportionment, marshalling or otherwise. So where *A* was the first mortgagee of a certain house in Calcutta, *B* held a second mortgage over the same property and some other property in

(1) *Radhabhai* v. *Shamrao*, I.L.R., 8 Bom., 188; *Gobind Lal* v. *Ramjanam*, I.L.R., 21 Cal., 7, P.C.; *Debendra Narain* v. *Ramtaran*, I.L.R., 30 Cal., 599 (605), F.B.; *Hasanbhai* v. *Umaji*, I.L.R., 28 Bom., 153 (163).

(2) *Rangasamy* v. *Jethi Badi*, I.L.R., 26 Mad., 484; *Hasanbhai* v. *Umaji*, I.L.R., 28 Bom., 153 (163).

(3) *Umesh Chunder* v. *Zahur Fatima*, I.L.R., 18 Cal., 164, P. C.

(4) *Mahomed Karim* v. *Abdulla*, 10 M.L.J. R., 347.

(5) *Hasanbhai* v. *Umaji*, I.L.R., 28 Bom., 153 (163), relying on s. 91 (*a*) (*q. v.*).

(6) *Debendra Narain* v. *Ram Taran*, I.L.R., 30 Cal. 599 (605) F.B.; *Ram Nath* v. *Brahmamoyi*, 1 C.L.J. 531; *Surja Prosad* v. *Raj Mohan*, 8 C.L.J. 478 (480); *Mulla Vittel* v. *Korambatti*, 21 M.L.J. 213 F.B.; *Lala Ram* v. *Mt. Imami*, 14 O.C. 217; and see O. 34, r. 1, Comm. *post*.

(7) *Cashborne* v. *Scarfe*, 1 Atk. 602; *Heath* v. *Pugh*, 6 Q.B.D., 340 C. A.; *Pugh* v. *Heath* 7 App. Cas, 235 (239).

(8) Act V of 1908.

(9) *Venkatagiri* v. *Sadagopachariar*, 10 I. C. (Mad). 83.

the mofussil. *A* sued on foot of his mortgage impleading *B* who prayed for a decree in his favour for the amount of his claim, and for a direction that, in the event of the Calcutta property proving insufficient to pay the first mortgage and his own, the mofussil property might be sold by the High Court: but the Court held that in *A's* suit *B* could only obtain any surplus sale-proceeds of the property in that suit, and could not obtain any relief respecting the mofussil property.(1) *A* in 1894 mortgaged certain lands and a life policy to a bank to secure present and future advances. Three years later, he mortgaged the same lands, but not the policy to *B* to secure £ 700 and interest. *B* had notice of the prior mortgage to the bank to whom he gave notice of his own mortgage. On that date *A* was indebted to the bank for £ 1963 for which it held *A's* promissory notes which were renewed from time to time up to 1903. After *B's* mortgage *A* had overpaid the bank the sum due to it on the date of *B's* mortgage. In 1904 *A* closed his account with the bank which shewed £ 1654 as due to the bank. *A* died in 1907, when the bank realized the policy money which it claimed to credit against the over-draft of 1904 claiming £ 1963 and interest still charged on the mortgaged land, but the Court held that *B* had the right to compel the bank to discharge *pro tanto* the debt due to them on the date of *B's* mortgage out of the policy money in exoneration of the lands subject to *B's* mortgage, and that B's mortgage had priority as against the lands mortgaged to the bank.(2)

1730. The statement that the prior mortgagee may for the purpose of foreclosure or sale treat a subsequent mortgagee as his own mortgagor, is then too wide; since the subsequent mortgagee also possesses rights of his own which he has to protect in his competition with other incumbrancers whether prior or posterior to himself. Consequently, while the prior mortgagee is entitled to foreclose down his all subsequent mortgagees, he cannot be permitted to do so, if by so doing he would unnecessarily jeopardize the latter's security.(3) In other words, the rights of the prior mortgagee as much as those of the puisne mortgagee are subject to the other rules enacted in the Act, incuding those relating to marshalling and (4)contribution (5)

1731. It has been remarked before that the section leaves out of account the *first* mortgagee, but this is transparently an omission which could not affect his rights. The first mortgagee would then be entitled to the same rights which the section confers on prior mortgagees.

Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(*b*) he must use his best endeavours to collect the rents and profits thereof;

(*c*) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature

(1) *Sarat Chandra* v. *Nahaxiet*, I.L.R. 37 Cal. 907.

(2) *Chufe's Estate* (In re), [1914] 1 Ir.R., 180.

(3) *Gangram* v. *Gemparty*, I.L.R.. 31 Mad. 428.

(4) S. 81.

(5) S. 82.

accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold ;

(*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal money ;

(*e*) he must not commit any act which is destructive or permanently injurious to the property ;

(*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

(*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

(*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after, deducting the expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;

(*i*) where the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

1732. Analogous Law.—This section enacts a rule which is the counterpart of section 72. Its provisions are generally borrowed from the other Acts, and taken as a whole it formulates an equitable rule of law well recognised by the Courts [1] and enacting, as it does, a rule consistent with "justice, equity and good conscience" it is equally applicable to provinces where the Act itself is not in force. [2] The section, of course, provides only a cumulative remedy, and is not intended to operate as a bar to any other remedy which the mortgagee may have under the law.[3]

1733. Clause (*a*) is the same as section 15 of the Trusts Act, [4] and section 151 of the Contract Act.[5] Later clauses expressly lay down and enlarge upon what is generally implied in the first clause. Clause (*b*) is borrowed from the third and fourth clauses of section 23 of the Conveyancing Act [6]; clause (*g*) from section 19 of the Trusts Act, [7] which is analogous to section 213 of the Contract Act, [8] and which lays down the duties of an agent who in this respect closely resembles the mortgagee. [9] Clause (*h*) is more specific than section 60 of the Contract Act. [10] Clause (*i*) is analogous to section 84, and the last clause states succinctly what is contained in section 23 of the Trusts Act. [11] The marginal notes appended to the draft section indicate the source of law here enacted. [12]

An *exception* to clauses (*b*), (*d*), (*g*), and (*h*) is provided by the next section.

Extent of the rule.

1734. The first two clauses impose a duty which the mortgagee must perform notwithstanding any contract with the mortgagor, to the contrary, and except the next two clauses which may be overridden by a contract, the rest of the section similarly imposes an obligation on the mortgagee which he is bound in any case to discharge.

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(1) *Kundunmal* v. *Kashi Bai*, I. L. R., 26 Bom., 363, *Jaijit Rai* v. *Gobind*, I. L. R., 6 All., 303 (309); *cf. Kadir Moidin* v. *Nepean* I.L.R., 26 Cal., 1 (6) P.C.

(2) *Kadir Moidin* v. *Nepean*, I.L.R., 26 Cal., 1 (6), P.C., in which the rule was applied to Lower Burma where the Act itself was not then in force.

(3) *Shivachidambara* v. *Kamakshi*, I.L. R., 33 Mad. 71.

(4) Act II of 1882.

(5) Act IX of 1872.

(6) 44 & 45 Vict., c. 41.

(7) Act II of 1882.

(8) Act IX of 1872.

(9) *Lord Hardwicke* v. *Vernon*, 14 Ves., 510.

(10) Act IX of 1872.

(11) Act II of 1882.

(12) Against cl. (*a*)—*Parbhudas* v. *Dhondu*, 2 B.H.C.R., 222; s. 151, Act IX of 1872; Fisher, § 1530. (*b*)—*Mayer* v. *Murray*, 8 Ch. D., 427; *Choti Lal* v. *Kalka*, (1875) N. W.P, H. C. R., 100. (*c*)—*Raiji* v. *Purushottam*, 2 B.H.C.R., 231; Macph., 113, 119; 4 Y.&.C. Appx., 507; Fisher, § 1530. (*d*)—*Jogendranath* v. *Raj Narain*, 9 W.R., 488., (*f*)—Macph., 118, 119, citing. 7, N.W.P., H. C.R., 436; 9 N.W P., H.C.R., 1; Act I of 1877, s. 54. (*g*) *Makhanlal* v. *Shrikrishna*, 2 B.L.R. 44 (55). P. C.; *Ameerooddeen* v. *Ramchand*, 5 W.R., 53. Macph, 119. (*h*)—(Case cannot be traced), 5 B H.C. R. (A.C.), 196; *Prabhakar* v. *Pandurang*, 12 B.H.C.R., 88; *Radhabinode* v. *Kripamoyee*, 10 B.L.R., 386, P.C.; *Ragho nath* v. *Luchmun*, 1 Agra., 132; *Jaffree Begum* v. *Ujbee*, 3 Agra, 531; when he cultivates; *Raghunath* v. *Baraik Geereedharee*, 7 W. R., 244; *Kaherlapoody* v. *Vutsavoy*, 12 M.I.A., 1. (*i*)—Macph., 159, 160.

1735. Principle.—A mortgagee in possession is in equity considered in some measure in the light of a trustee or bailiff for the mortgagor.(1) Indeed, it has been held that a mortgagee in possession is so strictly a trustee that he is liable even after a transfer, for the rents and profits subsequently accrued, unless the transfer was made by order of the Court in a suit for redemption.(2) Agreeably to this view this section generally provides that the mortgagee in possession should deal with the property in the same manner as would a trustee who is placed in possession of the property of his *cestui que trust*. He is required by the section to take such care of the property entrusted to his possession as a man of ordinary prudence may be expected to take of his own property. It is, of course, difficult to define more precisely the amount of care required of a mortgagee. The question whether in a particular case the mortgagee has or has not taken the care required of him will, in a great measure, depend upon the nature of the property, the intelligence of the class to which the mortgagee belongs, the state of society, the general usages of life, and other circumstances peculiar to each case. But while much may be excused in a man of less than ordinary intelligence, the section lays down certain duties which a mortgagee in possession *must* perform. And if he does not, the last paragraph lays down the remedy the mortgagor has against him.

1736. Meaning of Words. "*During the continuance of the mortgage*:" see under section 72 (§§1658-1662). For other words see *infra* under different clauses.

1737. Possession not as Mortgagee.—The question when the mortgagee takes possession of the mortgaged property so as to render himself liable to perform the duties here prescribed is one which must be answered in the same sense as a similar expression used in section 72 which defines the mortgagee's corresponding rights (§§1658-1662). It may, however, be here added that a mortgagee taking possession of the mortgaged property does not *ipso facto* become liable to account. For if he takes possession in a character adverse to the right of the mortgagor, it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession, or to receive the rents and profits as the bailiff of the mortgagor, or that that relation could properly be imputed to him.(3) So a person who was in possession for more than twelve years as an usufructuary mortgagee under an unregistered instrument, was held to acquire a valid title by adverse possession as such usufructuary mortgagee, and could not be ejected on the ground that he could not prove the mortgage.(4) But a mortgagee in possession under an invalid contract to purchase is held liable as a mortgagee in possession.(5) So in a case decided in 1867, it was held that a person to whom the mortgagee's rights were given, on their being confiscated by Government for rebellion, was not exempt from the liability to account as a mortgagee in possession.(6) Before holding the mortgagee liable the first thing to see is that there exists a valid mortgage, and then that the mortgagee's possession is such as to clothe him with the character of a mortgagee in possession. It is then immaterial that his mortgage was non-possessory and that, therefore, his entry was

(1) *Coppring* v. *Cooke*, 1 Vern., 270; *Bentham* v. *Haincroft*, Pr. Ch., 30; *Parker* v. *Calcroft*, 6 Madd., 11; *Hughes* v. *Williams*, 12 Ves., 493; *Maddocks* v. *Wren*, 2 Ch. R. 109; *National Bank* v. *United Hand-in-Hand Co.*, 4 App. Cas., 391; *Devnarain* v. *Naek Pershad*, 2 N. W. P., H. C. R., 217; Lewin's Trusts (10th Ed.), 203.

(2) *Hall* v. *Heward*, 32 Ch. D., 430.

(3) *Per* Lord Westbury, L.R., 2 H.L., 1 (16).

(4) *Balkristnamma* v. *Vinayaka*, 12 M.L. J.R., 410; following *Nallamuthu* v. *Betha*, I.L.R., 23 Mad., 37.

(5) *Robertson* v. *Norris*, 1 Giff., 421.

(6) *Mahomed* v. *Sookh Dayee*, 2 Agra, 116.

wrongful,(1) for so long as the Courts can ascribe his possession to a possible title, they hold it to be permissive and not wrongful. He is then bound to perform certain duties in connection with the property, notwithstanding that he may have entered into a contract otherwise. Some of these duties he must perform gratuitously; for others he is entitled, under section 72, to charge the mortgagor. In both cases, however, he is bound to perform the duties specified in this section. It is competent to the mortgagor to prove by oral evidence the character of his mortgagee's possession, and the latter cannot urge the bar of section 92 of the Indian Evidence Act in the way of such proof, since any contract under which he assumes possession amounts only to a mode of discharge of the mortgage the terms of which are not thereby varied.(2)

His possession not adverse.

1738. The possession of the mortgagee as such, is, of course, permissive and not adverse to the mortgagor, and so long as he remains a mortgagee he cannot by any act of his render his possession adverse to the mortgagor. So the Privy Council remarked: "As between them (mortgagor and mortgagee) neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."(3) The possession of the mortgagee being that of a trustee a transfer by him would be transfer by a trustee and the transferee would be his agent, so that the mortgagee would still be liable for the act of his agent.(4) The adverse possession of the mortgaged property of a stranger both against the mortgagor and the mortgagee may have the effect of extinguishing the equity of redemption, although as against the mortgagee the period of redemption may still be running. For a trespasser acquires by prescription a title indefeasible in law by all rightful claimants, and the fact that the mortgagee had entered into possession under the mortgage does not affect the question.(5) Nor would the principle *contra non valentem agere nulla currit præscriptio* affect it.(6) Since the mortgagee's possession is not adverse to the mortgagor it follows that possession of the mortgaged property obtained by ouster of a mortgagee in possession, though adverse to the mortgagee, is not necessarily adverse to the mortgagor until redemption, when the mortgagor becomes entitled to immediate possession.(7) Similarly, the possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee who has purchased the property at a sale in execution of a decree obtained on his mortgage, until after the sale which vests ownership in the property in him.(8)

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(1) *Robertson* v. *Norris*, 1 Giff. 421; *Prabhadan* v. *Bhikulal*, 2 N.L.R., 92; *Ramavatar* v. *Tulsi Prosad*, 14 C.L.J. 507 (512).

(2) *Ramavatar* v. *Tulsi Prosad*, 14 C.L.J. 507 (509,510).

(3) *Khairaj Mal* v. *Daim*, I.L.R., 32 Cal., 312, P.C.; *Muzaffar* v. *Parbati*, 4 A.L.J.R., 521 (526).

(4) *Hall* v. *Heward*, 32 Ch.D, 430.

(5) *Kanhoo Lal* v. *Mt. Manki*, 6 C.W.N., 601, following *Putappa* v. *Timmaji*, I.L.R., 14 Bom., 176; *Nand Coomar* v. *Brojo Bhokun*, 4 W.R., 36; *Chinto* v. *Janki*, I.L.R., 18 Bom., 51 (56); *Ammu* v. *Rama*, I.L.R., 2 Mad., 226; *Cholmondely* v. *Chinto*, 2 J. & W. 1, O.A., *ib.*, 4; Bligh's R., 1, *contra* in *Vithoba* v. *Gangaram*, 12 B.H.C.R., 180.

(6) "Prescription does not run against a party under disability or who is unable to act." *Cf.* ss. 7,8, Indian Limitation Act (XV of 1877).

(7) *Bejoy Chunder* v. *Kally Prosunno*, I.L.R., 4 Cal., 327 (329); *Purmananddas* v. *Jamnabai*, I L.R., 10 Bom., 49; *Chinto* v. *Janki*, I.L.R., 18 Bom., 51 (56, 57); *Ammu* v. *Ramakrishna*, I.L.R., Mad., 226; *Mahommed Husain* v. *Mulchand*, I.L.R., 27 All., 395; *Kanhoo Lall* v. *Manki Biti*, 6 C.W.N. 601 (609); *Parbhudas* v. *Bhikulal*, 2 Nag. L. R., 92.

(8) *Pugh* v. *Heath*, 7 App. Cas., 235; *Aimadar* v. *Makhan Lal*, I.L.R., 33 Cal., 1015.

1739. He must manage with ordinary prudence.—The mortgagee in possession is a trustee of the mortgagor with respect to the mortgaged property.(1) As such his liability to manage the mortgaged property is guaged by the conventional standard of a person of ordinary prudence. (2) This standard is, as has been pointed out before, by no means an invariable or an inflexible one (§ 1205). But as it is, it is a fair guide for determining the standard by which the mortgagee's management would be judged. He is bound to comply with all the provisions of the Act, for it is a matter of ordinary prudence that he should regulate his management in accordance with the directions of the law.(3) He is not, however, bound to bring to bear upon his management any special skill or extraordinary care even although he may possess the former, and be capable of using the latter. Thus where a mortgagee in possession of the mortgaged land instead of letting it to ryots and realizing rents in the ordinary way, cultivates it himself, he is not responsible or liable to account for the whole of the profits arising to him by farming the land, but only for such profits as he would have realised had he let it to a tenant, or as the mortgagor would have realized had he so let it. (4) The mortgagee is not bound to cultivate any particular crop, except the ordinary crop which the land is capable of yielding. He may cultivate it as he likes. He is not bound to take any particular trouble to make the most of another man's property. (5) But that does not entitle him to suffer a stranger to deal with the property to the detriment of the mortgagor. (6) Thus, if a stranger is permitted to work mines, the mortgagee in possession would be held accountable for the proceeds. (7) But he is not liable for waste committed by persons without his permission and under the colour of custom. But there is a thin invisible line between such cases and those in which the mortgagee may be expected to intervene. A mortgagee in possession would be liable for gross negligence amounting to wilful default, as for not making use of facts within his knowledge. But he is not bound to engage in, and will not be allowed for speculation and adventure. (8) But at the same time the mortgagor is bound "to afford his advice and aid, for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagor's conduct."(9) Thus, for example, if he knows that the estate is under-let he is bound to give notice to the mortgagee. He cannot lie by, without giving notice, that a greater rent may be made, and come afterwards by way of penal inquiry, to charge the mortgagee with the effect of his own negligence. (10) The mortgagee in possession cannot get rid of his liability by moving the Court to appoint a receiver. (11) The duties of a mortgagee in possession are not light, but he must observe the golden mean in his conduct by abstaining, on the one hand, from committing wilful waste or default, and, on the other hand, from embarking on speculation and adventure. If he is shown to have been negligent he would be accountable not only for

Cl. (a).

(1) *Kallyan Das* v. *Sheonundun*, 18 W.R. 65; *Janki Singh* v *Debi Nandan*, 7 I C. (Cal.), 772 (774); *Venkata* v. *Srinivasa*, (1910) 7 M. L T., 148.

(2) S. 15, Indian Trusts Act (II of 1882).

(3) *Neelam* v. *Vinjamuri*, 23 M.L J. 599.

(4) *Rughunath* v. *Baraik Geereedharee*, 7 W.R. (C.R), 244.

(5) *Girjoji* v. *Keshavrav*, 2 B. H.C.R., 211 (212, 213, note); *Prabhakar* v. *Pandurang*, 12 B H.C R., 88.

(6) *Hood* v. *Easton*, 2 Giff., 692, O. A. (compromised), 2 Jur., 917.

(7) *Anon*, 1 L.J., Ch., 119.

(8) *Hughes* v. *Williams*, 12 Ves., 493 (496).

(9) *Per* Erskine, L. C., in *Hughes* v. *Williams*, 12 Ves., 493 (495).

(10) *Ibid.* p. 495.

(11) *Whitley* v. *Challis*, [1892] 1 Ch.; 64 (73).

what he has received, but for what he might or ought to have received. (1) But the mortgagor must not assume that the mortgagee is bound to show the profits founded upon calculations of the years of his management. A mortgagee is not an assurer of the continuation of the same rate of profits which his mortgagor was able to raise. Much depends in India on personal qualities. The very change of management and possession may cause a falling off of receipts. The mortgagee in possession is, therefore, not liable for the actual profits of the land, but for only so much of it as he had actually cultivated, unless it be proved that but for his gross management or fraud, he might have received more. (2) Therefore an estimate of a preceding rental does not suffice to show actual receipts. (3) A mortgagee is not entitled to go into and out of possession whenever he likes. When he once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and he cannot when he pleases elect to give it up. (4) Where the mortgagee has not been in possession, he cannot, of course, be responsible for bad management. Thus in a case where the mortgagee leased the mortgaged premises to the mortgagor, and the purchaser of the equity of redemption claimed damages for neglecting to keep the house in repair, it was held that the mortgagee not having been in possession was not liable to pay damages. (5) But it would have been otherwise if the mortgagee had been himself in possession (6) or had created an under-tenure. (7)

1740. Collection of Rents and Profits.—The mortgagee being in the position of a trustee, and, as such, bound to manage the property prudently, it follows that he is bound to use his best endeavours in collecting its rents and profits. He is not, however, bound to secure the highest rent apart from other considerations. It is enough if he secures a fair rent, and the mortgagor cannot complain, if knowing that a higher rent can be secured, he keeps silent, and gives no notice of the fact to the mortgagee. (8) As Lord Erskine, L. C., said: "A mortgagee in possession is to take the fair rents and profits, and is not bound to engage in adventures and speculations for the benefit of the mortgagor; but is liable only for wilful default." (9) He is entitled to charge for the expenses of collection reasonably incurred by him, (10) with interest, (11) which in the absence of the evidence would be allowed for at 10 per cent. on the gross collections. (12) (§ 1664). In the absence of any express stipulation to the contrary (13) it is his duty to pay rent for any portion of the land he has occupied as a tenant. (14) At one time, it was held that he was not entitled to receive any remuneration for his own care and pains, (15) even though agreed to be paid by the mortgagor. (16)

cl. (b).

(1) *Chaplin* v. *Young* 33 Beav., 330; *Parkinson* v *Hanbury* L. R., 2 H. L., 1; *Mayor* v. *Murray* 8 Ch D., 424 (427).

(2) *Shah Makhan Lal* v. *Shri Kishen Singh*, 12 M. I. A., 157 (192, 193).

(3) *Shah Makhan Lal* v. *Shri Kishen Singh*, 12 M. I A, 157 (193); *Dada* v. *Dhondo*, (1887) B P. J., 12.

(4) *Pyntherch* v *Williams*, 42 Ch. D., 590 (600); *Yates* v. *Hambly*, 2 Atk., 362.

(5) *Begnar Ali* v. *Nisar Husain*, (1885) A. W. N 262.

(6) *Shiva Devi* v. *Jaru*, I. L. R., 15 Mad., 290.

(7) S. 115, *post*, Comm.

(8) *Hughes* v *Williams*, 12 Ves. 493; *Ram Pratab* v. *Sher Ali*, 3 N. L. R 106.

(9) *Hughes* v. *Williams*, 12 Ves., 493 (495, 496); *Bompas* v. *King*, 33 Ch D. 279; *Wheeley* v. *Challis*, [1892] 1 Ch., 64.

(10) *Brojonath* v. *Sreemutty Bhugobutty*, 1 W. R. 133.

(11) *Jogendranath* v. *Raj Narain*, 9 W. R. 488.

(12) *Raghonath* v. *Luchman*, 1 Agra, 132; *Cf. Altaf Rai* v. *Lalji*, I.L R., 1 All., 18, F. B; *Dungar* v. *Jil Ram*, I. L R., 24 All., 376; *Girish Chunder* v. *Shoshi Shekhareshwar*, I. L. R, 27 Cal., 951 (969, 970), P, C.

(13) *Badri* v. *Murli*, I. L. R., 2 All., 593, P. C.

(14) *Kanaye Lall* v. *Nistariny Dossee*, I. L.R, 10 Cal., 443.

(15) *Bonithon* v. *Hockmore*, 1 Vern., 316.

(16) *French* v. *Baron* 2 Atk., 120; *Carew* v. *Johnstone*, 2 Sch. & Lef., 301.

But this view can no longer be maintained (§1664). It would appear that the mortgagee is entitled to make an allowance for the arrears of rent which in spite of due diligence could not be recovered. (1) It is, however, his duty to see that he receives out of the estate all that the mortgagor ought to have received. It is his duty to see, not only that all assets are realized and brought to account, but that the expenses are regulated with care. (2) If he turns out a tenant or refuses one improperly, he must pay his rent, as for other losses occasioned by his conduct. (3) In the case of an English mortgage, it was said by the Privy Council that "if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor. He would have a full right to recover his debt by means of the mortgage. The only effect would be when some subsequent incumbrancer came in, and he had notice of that claim. In that case the rule and law of England would be that if after notice he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer."(4) This ruling while applicable to English mortgages, where the taking of possession by the mortgagee is optional, would, it is apprehended, hardly apply to other kinds of possessory mortgages.

1741. A mortgagee is not entitled to the rents of the mortgaged property until he makes an actual entry, or gives notice to the tenants to pay the rent to him. (5) Where the mortgagor resides at a distance, and acting upon his agent's advice suffers the mortgaged premises to remain unlet, he cannot be charged for wilful default, but where a tenant is suffered to remain for several years in possession, paying no rent, and none being demanded by the mortgagee, he is liable for wilful default as to such rent. (6) But there can be no wilful default if the mortgagee sued for rent, but having encountered a legal difficulty withdrew the action without abandoning the claim, (7) though in such a case the mortgagee would not be allowed his costs of the action. Again, wilful default cannot be presumed against the mortgagee. It must be pleaded and proved by the mortgagor. (8) The mortgagee has been held to be accountable only for the rent which the property fetched at the time he took possession, (9) but, of course, this is by no means an inflexible rule and, as observed before (§ 1739), the question does not depend upon any artificial rule, but upon what is consonant with reason and probabilities. Indeed, having regard to the different conditions prevailing in this country, it is a question whether the rule could at all apply. One rule, however, which has obtained the consensus of opinions is that the mortgagee is *prima facie* liable to account for all the rents shown in the *jamabandee*, or the recorded rent-roll, it being open to the mortgagee in possession to show that the amounts entered could not with due diligence be collected. (10) But if the mortgage-deed contains directions as to the mode

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(1) See *Choti Lall* v. *Kalka Prasad*, 7 N. W. P., H. C. R., 100 (102).

(2) *Mirza Ali* v. *Tarasonduree*, 2 W. R., 150.

(3) *Anon*, 1 Ver., 45; *Heales* v. *M'Murray*, 23 Beav , 401.

(4) *Jugjeewundass* v. *Ram Das*, 2 M.I.A., 487 (500, 501).

(5) *Ex parte Living*, Re *Tombes*, 2 Mont. & A., 223.

(6) *Brandon* v. *Brandon*, 10 W.R. (Eng.), 287.

(7) *Bukre* v. *O'Connor*, 4 Ir. Ch. R., 418.

(8) *Metcalfe* v. *Campion*, 1 Moll., 238; *Brandon* v. *Brandon*, 10 W.R. (Eng.), 287.

(9) *Brocklock* v. *Barnes*, Sd. Ch. Ca., 53.

(10) *Hurbuns Rae* v. *Petam Singh*, (1854) S D.A., N.W.P., 371; *Deonarain* v. *Nack Pershad*, 2 N.W.P., H.C.R., 217 (220). But it would be different in a suit as between the Lumbardar and the other co-sharers; *Muhammad Inayat* v. *Muhammad Karamutullah*, I.L R., 12 All., 301 (310), F. B. But as regards non-collection the rule is identical, *ib.*, p. 312; *Inayat Husain* v. *Ghulam Ali*, (1867) N.W.P., H.C.R., 276.

of collecting rents, effect would, of course, be given to it according to its true construction. A provision that "after collecting the rent with reference to the rent-roll of the said (mortgaged) villages, the Government revenue shall be paid first of all," would not make the mortgagee responsible for the rent-roll in the *jamabandee* under all circumstances, but only for such sums as were actually received by him, or might have been received by him but for his own neglect or fault.(1) The mortgagee must account for all illegal recoveries if they are shown in the accounts, otherwise the mortgagor cannot compel him to account for them. (2) If the mortgagee let the property reserving any advantage for himself, he would be charged with its letting value. (3) And so it has been held that since the mortgagee is bound to let the mortgaged property for as good a rent as he could reasonably get, he ought to account for the difference between what he did let it for, and what he ought to have let it for. So if the mortgagee remain in possession of any portion of the property ordinarily let out to tenants, he should be debited with a fair occupation rent (4) (§ 1758). Of course, his occupation need not be personal, for it is enough in law if he is in occupation through his servants. (5) Even where the legal relation cannot be established, the mortgagee might still be charged for wilful default.

Mortgagee's power to create tenancies.

1742. In England, apart from the statute (6), the mortgagee had no power to grant a valid lease for years (7) and the same rule will certainly hold good in this country in the case of a non-possessory mortgage. For, indeed, in the mofussil where mortgage in the English form is disallowed, and where, therefore, the rights of a mortgagee are not greater but less than those of the mortgagee in England, the recognition of such power would confer upon him a right wholly inconsistent with the rights of the mortgagor as owner of his property. But the case of the mortgagee in possession is different. For he is not merely the holder of his security, but also its manager, and as such clothed with certain rights of the owner of property in relation to third parties dealing with him. But those rights are necessarily qualified by his precarious interest as mortgagee, for he may be redeemed at any time, and consequently he cannot by his contract give a lease for a period beyond the duration of his own mortgage, and which the lessee is presumed to know. (8) But where by force of certain local land legislation the incidence of permanency becomes fastened on all tenancies for howshortsoever a period created, then the tenant would become a perpetual tenant, and the mortgagor on redemption will be entitled to treat and eject him as a trespasser except as provided in those Acts. (9)

Where mortgagor remains in possession.

1743. If the mortgagee being entitled to possession, allows the mortgagor to receive the rents and profits, he is then no longer liable to account to him, but if he has allowed the mortgagor to collect rents after notice of a puisne incumbrancer, he becomes liable to account to the latter who may call upon him or the mortgagor for an account. So the Privy Council said:

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(1) *Banarsi Prasad* v. *Ram Narain*, I.L.R., 25 All., 287 (294, 295), P.C.

(2) *Nuwul Kishore* v. *Inayat Ali*, (1852) S.D.A., N.W.P., 248.

(3) *White* v. *City of London Brewery Co.*, 39 Ch. D., 559 (564), C.A., 42 Ch. D., 237.

(4) *Prabhakar* v. *Pandurang*, 12 B.H.C.R., 88.

(5) *Per* Jessel, M.R., in *Shepherd* v. *Jones*, 21 Ch. D., 469 (475); *Trulock* v. *Robey*, 15 Sim., 265 (273).

(6) S. 18, Conveyancing Act, 1881.

(7) Fisher § 903.

(8) *Collector* v. *Sarnam*, 8 A.L.J. 802; *Gopal* v. *Bhojraj*, 11 C.P.L.R., 19.

(9) *Collector* v. *Sarnam*, 8 A.L.J, 802 (806).

If an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage. The only effect would be, when some subsequent incumbrancer came in, and he had notice of that claim. In that case the rule and law in England would be that if, after notice he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer; and that is the principle which their Lordships think ought to be applied to the present case." (1) But as remarked before, this dictum would scarcely apply to all possessory mortgages not partaking the characterestics of an English mortgage (§ 1740).

His accountability for illegal collections.

1744. The mortgagee is liable to account for all "profits" whether legally or illegally realized by him. He cannot be heard to say that because the realisation of certain sums was unwarranted and wrongful, therefore, it formed no part of the "rents and profits" which should go into the mortgagor's accounts. It is an advantage which he gains by reason of his position as mortgagee and it is but fair that he should hold it for the benefit of the mortgagor to whom he owes his position. Moreover, it would act as some check upon the mortgagee's levy of illegal (2) exactions.

cl. (c).

1745. Payment of Public Charges.—The third clause formulates a rule of law well recognized by the Courts. (3) In the absence of a contract to the contrary the mortgagee must pay all public charges in respect of the mortgaged property in his possession. The word "and" seems to be have been accidentally omitted in the clause between "Government revenue" and "all other charges, etc.," for, the words "accruing due in respect thereof" evidently refer to the Government revenue and not to the words "arrears of rent" which follow. (4) The liability of the mortgagee under the clause is commensurate with the income of the property. He is not bound to pay public charges out of his pocket. But out of the income of the property he must not only meet current demand, but must also pay any arrears due on account of the property and for which it may be *summarily* sold. His liability to pay any inevitable charge, such as enhanced assessment, stands on the same footing. (5) He is bound to pay it unless the terms of the contract expressly or impliedly threw the burden on the mortgagor. (6) A usufructuary mortgagee in possession covenanting to pay the Government reveuue and to appropriate the balance of profits towards interest on the mortgage-money irrespective of the actual profits in any particular year is not, in the absence of a contract to the contrary, liable as between himself and the mortgagor to pay enhanced revenue if the enhancement is made subsequently to his mortgage. Such enhancement must be paid by the mortgagor. (7) Ordinarily, it is the

(1) *Jugjeewan Dass* v. *Ram Dass*, 2 M. I. A., 487.

(2) *Ramavatar* v. *Tulsi Prosad*, 14 C.L.J. 507 (512 513).

(3) *Williams* v. *Bosanquet*, 1 B &. B., 238; overruling *Eaton* v. *Jaques*, 2 Doug., 455; *Macnaghten* v. *Bheekaree*, 2 C.L.R., 323; *Kanny Lall* v. *Nistarney*, I L.R., 10 Cal. 443; *Jujit Rai* v. *Gobind Tewari*, I.L.R., 6 All., 303 (309); *Kundonmal* v. *Kashibai*, I L.R., 26 Bom., 363 (371, *note*); *Vithal* v. *Shriram*, 7 Bom. L.R., 313.

(4) 1 Stoke's Anglo-Indian Codes, p. 786.

(5) *Sadanand* v. *Ratanji*, (1886) B.P.J. 68.

(6) *Ibid*; *Panigaban* v. *Raman Nair*, 17 M.L.J., 517; *Krishnier* v. *Arropuli*, 14 M. L.J., 488.

(7) *Krishnier* v. *Arrapuli*, 14 M.L.J., 488; *Krishnier* v. *Arrapuli*, 16 M. L. J. 28; *Panigaban* v. *Raman Nair*, 17 M.L. J. 517; *Vidyapurna* v. *Ugganna*, 20 M L.J. 640, 7 I.C 321; *Thippa* v. *Krishnaswami*, (1911) 8 M L.T. 206; 8 I.C. 815; *Panambatta* v. *Kalathinvadkal*, (1914) 16 M.L.T 317, 25 I.C 641; *Kamaya* v *Devaya*, I L.R., 22 Bom., 440; *Hiralall* v. *Ganesh Pershad*, I.L.R., 2 All., 415. O.A. L.R., 5 I.A., pp. 68, 69.

rule, that the person in possession must pay the revenue or rent which is the first charge on the property, and there can be no doubt that he is liable to pay it when his name is registered in the landlord's books as a tenant.(1) In any other case there is no privity of contract between him and his mortgagor's landlord who must, in case of default, recover the rent from his tenant, though as between the mortgagor and the mortgagee, the latter may have agreed to pay the rent due to the lessor.(2) If the mortgagee fails to pay rent for which he has made himself liable, and which the mortgagor pays in order to avert the forfeiture or sale of his property, he may take credit for the amount when the accounts are adjusted, and sue him every year in order to force him to make regular payments.(3) But the liability of the mortgagee to pay land-revenue regularly is one which he owes to no other person except the mortgagor, and from which it follows that a third person who has been obliged to pay it cannot claim to be reimbursed by the mortgagee.(4) Under several local Acts a sale for arrears of Government revenue may be made free from all incumbrances. In such cases, at any rate, it is expedient for the mortgagee to pay up arrears of revenue, since his failure in this respect may involve the loss of, it may be, his only security. He is not, however, bound to pay it, if he has not "the income of the property" in his hands.(5) The only arrear, which according to the clause the mortgagee *must* pay, is that for which the property may be *summarily* sold. This clause was added to meet the case of, and was enacted to apply only to *patni* tenures and saleable undertenures.(6) Where the mortgagee willfully suffers the estate to fall into arrear to Government revenue and collusively causes it to be sold to a *benami* purchaser, on a suit by the mortgagor for recovery of possession charging generally the whole transaction as between the mortgagees, the purchaser, and subsequent alienees to have been collusive and fraudulent, it was held that the mortgagee and others were estopped from relying upon the illegality of their conduct, and that, therefore, the mortgagee couldnot maintain his *benami* purchase against the mortgagor.(7) The mortgagee, it is clear from the following clause, must, out of the income, first pay the Government demand, the residue, if any, being applied to making necessary repairs. If the assessment be reduced, the difference cannot be claimed by the mortgagor, though, of course, this would be necessarily credited in the account.(8) The mortgagor paying the Government revenue payable by the mortgagee cannot, it would seem, recover it from the mortgagee except in a suit for redemption.(9)

1746. The liability of the mortgagee to pay Government and other public charges are subject to "a contract to the contrary." Such a contract may either exclude his liability altogether, or limit it to a stated sum, in which case the mortgagee would not be liable for any enhancement subsequently made in the revenue and other public charges. So where a mortgage deed apportioned the produce of the mortgaged land in specific quantities to interest and revenue, and the latter was subsequently enhanced, it was held that the apportionment constituted a

Cl. (c): contract to the contrary.

(1) *Kannye Lall* v. *Nistarney*, I.L.R., 10 Cal., 443.

(2) *Bonner* v. *Tottenham Building Co.*, [1892] 1 Q.B., 161; *Govind* v. *Shamsaya*, 5 Bom. L.R. 118.

(3) *Jayjit Rai* v. *Govind Tewari*, I.L.R., 6 All., 303 (309, 310); *Zarawar* v. *Gholam*, (1864) 2 S.D.A., N.W.P., 13.

(4) *Bonner* v. *Tottenham, &c., Building Society*, [1899] 1 Q.B., 161.

(5) See s. 65 (c).

(6) Report of the Select Committee, dated 25th February 1879, § 25.

(7) *Sidhee Nuzur Ally* v. *Ojoodhyaram*, 10 M.I.A., 540; *Veerapa* v. *Kannappa*, 17 I.C. (Mad) 878, (a converse case).

(8) *Krishnier* v. *Arappuli*, 14 M. L. J, 488.

(9) *Bhugwan* v. *Jeetmull*, (1858) S. D. A. 795.

contract to the contrary within the meaning of this clause, and that the mortgagee was not bound to pay the amount by which the revenue was subsequently enhanced. (1)

cl. (d).

1747. Necessary Repairs.—It is the duty of the mortgagee to make repairs necessary for the preservation of the property (2) out of any balance that may be left over after the payment of rent and the interest on the principal money which means the principal money secured by the mortgagee. But the mortgagee may make similar repairs with his own money, in which case he is entitled to add the amount so spent to his principal. (3) The rule administered was the same before the Act, (4) and so in England it has been held that a mortgagee in possession is not bound to spend his own money on repairs, and will only be liable for neglect, if he has failed to execute the necessary (5) repairs to the extent of surplus rents and profits in his hands, (6) and from which it follows that he is not bound to execute thorough repairs, or even such as the nature and condition of the property may call for. His duty is measured by the surplus in his hands. He must spend this on repairs, and may, if he so chooses, spend more, but his duty goes no further. While on the one hand, the mortgagee is entitled to take credit for the expense incurred in necessary repairs, the mortgagor is, on the other hand, equally entitled in a suit by the mortgagee to have the amount of the loss occasioned by the latter's failure to make repairs brought into the mortgage-accounts, without having to bring a separate suit. (7) Where both parties willingly dispense with an account, the mortgagee cannot claim for repairs: "If the mortgagees had rendered an account of rents and profits, they would, of course, have been entitled to credit for reasonable costs of repairs; but such costs were necessarily incident to the enjoyment of the profits, for which they have not been called upon to account." (8) It is the paramount duty of the mortgagee to make necessary repairs and he cannot excuse himself on the plea that to do so would diminish his interest or profits. If the mortgagee having had surplus in his hands fails to make necessary repairs the mortgagor may debit him with the estimated loss caused by his failure by way of set-off to the mortgagee's claim. A separate suit is not necessary inasmuch as it is an item in the mortgage-account. (9)

cl. (e).

1748. Waste.—This clause reproduces the words used in section 66 restraining the mortgagor from committing waste (§§ 1518—1527), and the same proviso is inserted in section 108 for restraining the lessee. The rule is one founded on equity and reason and would be applicable to cases not governed by the Act (10) The mortgagee in possession is no more entitled to ruin the property which does not belong to him than the mortgagor is entitled to ruin it from which the mortgagee will suffer.

(1) *Panambatta* v. *Kalathinpadikal* (1914) 16 M.L.T. 317; 25 I. C. 641.

(2) See s.72 (*b*), Comm., §§ 1667, 1670—1676.

(3) S 72 (*b*), Comm., §§ 1666—1669.

(4) *Jogendranath* v. *Rajnarain*, 9 W.R., 488; *Ameeroollah* v. *Ram Dass*, 2 Agra, 187; *Mancharsha* v. *Kamrunisa*, 5 B. H. C. R. (A.C.), 109 (115); *Ragh* v. *Anaji*, *ib*, 116; *Lakshman* v. *Hari Dinkar*, I.L.R., 4 Bom., 585; *Jamal* v. *Mahomed* (1874), B.P.J., 7; *Balaji* v. *Nana* (1881), B.P.J., 195; *Sakharamshet* v. *Amtha*, I.L.R., 14 Bom., 28 (30).

(5) *Godfrey* v. *Watson*, 3 Atk., 518.

(6) *Richards* v. *Morgan*, Coll., 227.

(7) *Shiva Devi* v. *Jaru Heggade*, I.L.R., 15 Mad., 290; *Raghunath* v. *Ashraf Husain*, I.L.R., 2 All., 252, commented upon.

(8) *Per* Melville, J., in *Lakshman* v. *Hari Dinkar*, I.L.R., 4 Bom., 584 (589).

(9) *Shiva Devi* v. *Jaru*, I.L.R., 15 Mad., 290 (291), *contra* in *Raghunath* v. *Ashraf Husain*, I.L.R., 2 All., 252, in which the set-off was disallowed as the sum claimed was not ascertained and both parties did not file the same character.

(10) *Vasudevan* v. *Valia Chathu*, I.L.R., 24 Mad., 47 (56), F.B.; *Krishna Patter* v. *Shrinivasa*, I.L.R., 20 Mad., 124; *Achutan* v. *Narasimham*, I.L.R., 21 Mad., 411.

The clause is intended to apply only to wastes which are destructive or permanently injurious to the property. It does not apply to what is known in England as an *ameliorative waste*, "which consists of an alteration in the character of the property, *e.g.*, by the conversion of warehouse property into residential property."(1) But where the owner of two houses divided by a partition wall, mortgaged them to two different mortgagees after going to the expense of closing the door communicating with the two houses, it was held that neither mortgagees could re-open it, and that if one attempted to open it, the other could restrain him from doing so. "An act like the opening of this door," observed Knox, J., "altering as it does materially the condition of the property, unless it can be clearly shown to be an improvement, is destructive of the property."(2) But the opening of a door can hardly be considered to be destructive of the property, and what seems to have been lost sight of, is that the acts of destructiveness contemplated by the section must be such as to *endanger* the property. The reopening of a door is scarcely destructive of the property, for it can be closed in at any time.(3) In a case decided before the Act, it was held that in a suit by the mortgagee, the mortgagor could claim to set off damages on account of waste committed by the mortgagee,(4) but this view has been held to be no longer correct under the Act. (5) A *kanomdar* in Madras in entitled during the period of his occupation to remove and appropriate to himself any trees that he has himself planted, provided he leaves the land substantially in the same state in which he received it.(6) "It may be doubted," the Court observed, "whether a kanom devise can be regarded as a purely agricultural lease. It always, we believe, in the absence of a contract to the contrary, carries with it the right to erect a dwelling-house and appurtenances on the land, and to plant cocoanut and other trees on any land not devoted to grain cultivation."(7) But the rights of a kanomdar must be distinguished from those of tenants in zamindari tracts who cannot divert land to purposes other than those for which it was let.(8) A mortgagee in possession, as such has no right to create tenancies, permanent or otherwise, and whatever tenures are created by him during his possession would *ipso facto* come to an end when the mortgage is redeemed. (9) For tenants created by the mortgagee acquire no right against the mortgagor, unless the latter had expressly or impliedly (10) authorized the former to create them, and in which case the rights will be deemed to be created by the mortgagee, not as the the mortgagee in possession, but rather as agent of the mortgagor. In any other case the mortgagor may upon redemption treat the mortgagee's tenant as a trespasser, and recover possession (§§ 1742, 1743).

1749. Insurance.—This clause must be taken as supplementary to a similar clause in section 72. Independently of this clause the mortgagee may under section 72 insure the property mortgaged to him (§ 1680), and under this clause where he so insures the

cl. (f).

(1) *Smyth* v. *Carter*, 18 Beav., 78; Snell's Equity, p. 687.

(2) *Lachmi Narain* v. *Jethu Mal*, I. L. R., 16 All., 386.

(3) See cl. (*e*), *cf. Amrit Lal* v. *Lallu Bhai*, (1898) B.P.J., 373.

(4) *Raghunath* v. *Ashraf Husain*, I. L. R., 2 All., 252.

(5) *Venkateshwara* v. *Keshavchetti*, I.L.R., 2 Mad., 187.

(6) *Vasudevan* v. *Valia Chathu*, I. L. R., 24 Mad., 47 (56), F.B.

(7) *Ibid.*

(8) *Ramanadhan* v. *Zamindar of Ramnad*, I. L. R., 16 Mad., 407; *Bhupathi* v. *Rajah Rangayya*, I.L.R., 17 Mad., 54 (58); *Nufar Chandra* v. *Ram Lal*, I.L.R., 22 Cal., 742 (750); *Nuffer Chunder* v. *Nund Lal*, I.L.R., 22 Cal., 751, *note*.

(9) *Sheo Churn* v. *Soorja*, (1852) S. D. A., 1137; *Byjnath* v. *Ramsarup*, 2 S. D. A., N. W.P., 140; *Har Pershad* v. *Oodit Narain*, 1 Agra (Rev.) 60; *Ajoodhya* v. *Girdharee*, 2 N.W.P.,H.C.R. 199; *Ramchand* v. *Roj Hans*, 3 A.L J.R., 517.

(10) 1 Jones' Mortgage (6th Ed.), § 788.

property he is bound to apply any money which he actually receives under the policy, in reinstating it. But if the mortgagor so directs, he may apply it in reduction or discharge of the mortgage-money. And similarly it is provided by section 49 that where the mortgagor has insured the property before the mortgage, the mortgagee may compel him to apply the insurance-money in reinstating the property. In England the law has been the same since the passing of the Conveyancing Act.(1) But before the Act, the mortgagee was not entitled to charge the mortgagor for the insurance, if effected without his privity.(2) But it was otherwise where the mortgagor began the policy and the mortgagee continued it, in which case he was even before the Act entitled to a salvage-lien upon the property for the payments made by him.(3) The correct rule has now been laid down in a case decided after the Act, in which Fry, J.,(4) declared that a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases :—(i) By contract with a beneficial owner of the policy. (ii) By reason of the right of trustees to an indemnity out of their trust-property for money expended by them in its preservation. (iii) By subrogation to this right of trustees of some persons who may at their request have advanced money for the preservation of the property. (iv) By reason of the right vested in mortgagees, or other persons having a charge upon the policy to add to their charge any moneys which have been paid by them to preserve the property.(5) And this is now the law both in England and this country. The mortgagee is not entitled to the benefit of any policy effected by the mortgagor after the mortgage.

1750. Mortgagee's Liability to Account —The mortgagee in possession is, ordinarily, liable to keep and give accounts, but it is a liability which he owes to his mortgagor who may dispense with or waive it, (6) but in order to deprive him of his undoubted statutory right the Court will require strict proof of what should amount to "a contract to the contrary" In all other cases, and generally mortgagees, whether usufructuary(7) or not, (8) and whether of the whole share or of only a fraction, and whether in possession under the contract or a decree of the Court giving effect to it, (9) are all liable to render an account. And mortgagees in constructive possession are equally liable with those in actual possession of the property. (10) Before the Act the mortgagor might by contract have deprived himself of the right to compel the mortgagee in possession to account for the profits, (11) but he can no longer do so now, since his liability is in this respect unqualified. As the mortgagee and his successor is bound to give an account, so is the mortgagor or the purchaser of his equity of redemption entitled to call for it. (12) Where a mortgagee comes to an arrangement with three out of five joint mortgagors by which he consents to take as payment a money-decree against three of them, the amount

cl. (g).

(1) 44 & 45 Vict., c. 41. s. 23 (3), (4).

(2) *Dobson* v. *Land*, L J , 19 Ch (N.S.), 484; *Bellamy* v. *Brickenden*, 2 J. & H., 137.

(3) *Burridge* v. *Row*, 13 L.J. Ch., 173; *West* v. *Rid*, 2 Hare, 249; *Norris* v. *Caledonian Insurance Co.*, L R., 8 Eq , 127.

(4) The judgment was really adopted and delivered by Pearson,J. (see *Leslie* v. *French*) 23 Ch. D., 552 (559).

(5) *Leslie* v. *French*. 23 Ch. D., 552 (560).

(6) *Shafiunnisa* v. *Fozalrah* 7 A L J. 787; 7 I.C. 293; *Ram Pershad* v. *Khem Karan*, 9 I.C (All) 978.

(7) *Jaffree Begum* v. *Ujbee Begum*, 3 Agra, 153.

(8) *Nilkant Sein* v. *Jeenooddeen*, 7 W. R., 30.

(9) *Radhabai* v. *Ramchandra*, I.L.R., 35, Bom. 204.

(10) *Jaffree Begum* v. *Ujbee Begum*, 3 Agra, 153.

(11) *Munnoo Lal* v. *Rent Bhoobun*, 6 W. R., 283; *semble* in *Mahtab Kuar* v. *Collector of Shahjahanpur*, I. L. R. 5 All., 419; but *contra* in *Doorga Dabee* v. *Issur Chunder* 10 W. R., 367; *Punjum Singh* v. *Ameena Khatoon*, 6 W. R . 6.

(12) *Jaffree Begum* v. *Gunga Ram*, 3 Agra, 91.

of the decree must, in taking an account of what is due on the mortgage, be considered as a sum paid in reduction of the liability of the five.(1) Where the rights of the mortgagee pass to the mortgagor in trust, the latter must keep and render accounts to the Court in the same way as any other mortgagee.(2) *Zur-i-peshgi* lessees are mortgagees and therefore liable to give an account (3) But an account from the mortgagee need not be taken on the principle that he should give credit for his receipts, first, in reduction of that debt which was most burdensome to the debtor. And hence the mortgagee holding two mortgages is not obliged to give credit for the debt bearing compound interest before the other, (4) unless he was bound by contract to do so, and which cannot be inferred from a mere reluctance shown by the debtor to agree to pay compound interest before executing the mortgage-bond. (5)

Extent of Liability.

1751. The liability of the mortgagee to keep full and accurate accounts arises from the very nature of his position. The mortgagor having made over to him possession of his property for a specific purpose, the mortgagee is bound to keep an account with a view to show whether the object for which he was put into possession has or has not been fulfilled. The position of the mortgagee in possession being that of a trustee, (6) he is accountable not only for what he has received, but for what he might or ought to have received. (7) The mortgagee may keep an accountant, if he is illiterate or otherwise unable to maintain clear, full and accurate accounts. Under the Regulations of 1793, (8) when the law was in this respect the same, it was held by the Privy Council that in such a case he need not swear as to their accuracy himself, but may prove them through his accountant; (9) the common rule, *qui facit per alium facit per se*, (10) being applicable to a case of this kind. But "where the mortgagee employs an agent to collect the rents, he must account for all the rents received by that agent, and not merely for what the agent has paid to him; and the debt of the agent and consequent difficulty of proving what the agent received is no answer." (11) Where the same mortgagee holds two separate mortgages from the same person the latter is entitled to obtain separate accounts of the two mortgages, although the two accounts may have been included in one suit. (12)

In a suit by a second mortgagee against his mortgagor and a third mortgagee, asking for an account and sale, the Court will direct an account to be taken not only of what was due to the plaintiff, but also of what was due to the third mortgagee. (13)

1752. The accounts to be kept by the mortgagee are independent of those which may be kept by any one else, as for example, the patwari, and

(1) *Ram Kanth Roy* v. *Kalee Mohun*, 22 W. R., 310.

(2) *Monomotho Nath* v. *Greender*, 24 W.R. 366.

(3) *Suyeedun* v. *Zuhoor Hossain*, (1864) W. R., 44; *Ram Pershad* v. *Kishna*, 3 Agra, 146.

(4) *Kadir Moidin* v. *Nepean*, I.L.R., 26 Cal., 1, P.C

(5) *Rameshwar Singh* v. *Hossein Khan*, I. L.R., 26 Cal., 39, P C.

(6) *Kallayan Das* v. *Sheonundun*, 18 W. R., 65

(7) *Chanlin* v. *Young*, 33 Beav., 330; see *supra*; § 1437.

(8) S. 3.

(9) *Shah Makhan Lal* v. *Shri Krishna Singh*, 2 B L.R., 44 (56), P C; *Ram Kissen Singh* v. *Shah Kundun Lall*, W.R. (1864), 177: *Ram Phul* v. *Wahed Ali* 14 W.R., 66; see as to the liability to account *Tufuzzool Hossein* v. *Mahomed Hossain*, 2 Hay, 17; *Bhechuck Singh* v. *Lutchminarain*, 1 Haye 182.

(10) "What is done through another, is as good as done by the man himself."

(11) *Noyes* v. *Pollock*, 30 Ch. D., 336; Fisher, § 1771.

(12) *Ramchandra* v. *Janardan*, I.L.R., 14 Bom., 19.

(13) *Auhindro Bhoosun* v. *Chunnoolall*, I.L. R., 5 Cal., 101.

cannot be dispensed with on the ground that the latter was keeping them. (1) "It is not a sufficient reason for the non-production of the accounts required by law for the defendants to say that, under their particular circumstances, they could not keep them. If, in the course of carrying on their business, defendants, as money-lenders, see fit to secure themselves from loss by taking mortgages of landed property in the manner prescribed by law, and their distance from, or want of knowledge of the locality will not exempt them from liabilities and responsibilities enjoined by law which, by taking a usufructuary mortgage, they have necessarily and voluntarily taken upon themselves." (2) Accounts to be full must be detailed and supported by vouchers and not mere abstracts of the receipts and disbursements. Mere *taujees*, *mehal*, *melanee* papers, *jaidads*, and *jama-wasil-baki* papers are not *per se* such accounts, (3) and to the same category belong *batwara* accounts. (4) An account professing to show the demand and collections from the tenancy for any one year should be supported by detailed accounts showing each item of collection from every individual mentioned in that total sheet. (5) The mortgagee is none the less bound to keep accounts because he holds possession also as a lessee. (6) But he is not liable to account if he has obtained possession through Court until a specific sum is paid to him. (7) The mortgagee is under the clause bound to furnish the mortgagor, on payment of cost, with copies of the accounts and of the vouchers by which they are supported. He is, however, not bound to render him an account whenever he calls for it. But if the mortgagor applies for redemption of a final adjustment, the mortgagee must then explain the accounts to him, whether he took possession with or without his consent. (8) But the mortgagor cannot bring a suit for accounts without suing for redemption. (9) Where the mortgagee's right were confiscated for rebellion and were given to the defendants, the latter were held bound to account for profits in the same way as would be any other mortgagee. (10) In giving accounts the mortgagee is entitled to make all deductions allowed by law, (11) after which if he is found to have overpaid himself, the general practice is to order the payment by him of the balance due to the mortgagor, with interest from the date of the institution of the suit, (12) at the same rate at which it has been allowed to the mortgagee on his mortgage-debt. (13) The mortgagee cannot withdraw from the taking of accounts in his execution-proceedings when those accounts appear to be going against him. (14) If the mortgagor has wrongly acknowledged an amount not due from him the error can be rectified at the time of account taking. (15) If the mortgagee does not render accounts or has not kept them, the Courts will

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(1) *Ram Kissen Sing* v. *Shah Kundan Lall*, (1864), W R (C.R.) 177, (178).

(2) *Ram Kissen Singh* v. *Shah Kundan Lal* (1864); W.R., 177 (179).

(3) *Goluck Chunder* v. *Mohun Loll*, 5 W. R., 271; but see as to *Jama-wasil-bakee* papers *Shah Ameercoddeen* v. *Ramchand*, 5 W.R., 53.

(4) *Ram Kisen Sing* v. *Kundan Lall*, (1864) W.R., 177. Their correctness may be questioned: *Taig Ali* v. *Golali*, 3 Agra 314.

(5) *Ibid*, pp. 178, 179; *Mokund Lall* v. *Goluck Chunder*, 9 W R, 572.

(6) *Hunooman Persaud Pandey* v. *Mt. Baboole*, 6 M.I.A., 393 (422); *Hider Buksh* v. *Hossain Buksh*, 4 W.R., 103; *Fuslool Ruhamun* v. *Ali Kureem*, 5 W.R., 163; *Taaduk Hossain* v. *Beni Singh*, 13 C.L.R., 128.

(7) *Navlu* v. *Raghu*, I.L R., 8 Bom., 303.

(8) *Nilkant Sein* v. *Jeennooddeen*, 7 W.R., 30.

(9) *Kullyan Das* v. *Sheo Nundun*, 18 W.R., 65; *Hari* v. *Lakshman*, I.L.R., 5 Bom., 614; *Shankarapa* v. *Dinapa*, I L.R., 5 Bom., 604.

(10) *Mahomed* v. *Sookh Dayee*, 2 Agra, 116; *Chinnayya* v. *Chidambaram*, I.L.R., 2 Mad. 212.

(11) See s. 72 and s. 76 (*c*), (*d*), (*f*).

(12) *Janoji* v *Janoji*, I.L.R., 7 Bom., 185.

(13) *Bechoo Singh* v. *Roy Sheo Sahoy*, 1 N. W.P.; 56 (Ed. 1873, 111).

(14) *Doolee Chund* v. *Omda*, I.L.R., 6 Cal., 377.

(15) *Seth Gokul Das Gopal Das* v. *Murli*, I.L.R., 3 Cal., 602, P.C.

make every presumption against him, (1) and his misconduct in this respect ought to be taken into consideration upon the question of costs. (2)

Scrutiny of accounts.

1753. But presumptions against mortgagees for non-production of account must have reasonable limits, and not be mere conjectures or based on inexact data. (3) Where accounts are impeached on the ground of fraud, two or three instances of particular items which can be taken as false and fraudulent must be brought to the notice of the Court before it can be called upon to order the accounts to be unravelled from the first. (4) When an account is presented, it is, however, the duty of the Court to examine it, and before arriving at a conclusion as to whether it is such an account as a prudent man ought to keep, he must consider the details and ascertain whether it has been kept on principles which indicate that it is probably correct. (5) Before accepting or rejecting accounts in suits between the mortgagor and mortgagee it is usually necessary to examine them critically. The omission of the mortgagor to assist by criticizing the items may, of course, be taken into consideration. In some cases such omission may be accepted as showing that the account cannot be attacked, or, in other words, are known to be correct. But in other cases it may merely indicate ignorance of the proper course to take or an inability on the part of the client to give suitable instructions to his pleader. No general rule can, of course, be laid down. In the presidency towns the party is expected to show where the accounts are wrong, but the procedure applicable there may not always be equally suitable for the mofussil. But while it is true that no general rule as to the value of accounts can be laid down, still it is clear that in each case all the circumstances must be considered, such as the relative positions of the parties to each other, the trade or calling of the mortgagor, and any other matter likely to be material. Although in a suit by the mortgagor the burden of proof is initially on the mortgagor, who must at least give some evidence of a general character as to the probable profits that the land, if properly managed, ought to yield, still in some cases he may be more or less relieved of his obligation by admissions contained in the defendant's account-books. (6)

1754. It is for the party who put forwards the accounts to explain and support them in such a way as to convince the Court that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. If the Court accepts them as correct, it ought to act on them. If it thinks that they are not correct and ought not to be acted on, then it must do its best to form an estimate of the probable produce on the evidence that is available. Such an estimate, which will of necessity usually be based on average profits, cannot of course be accurate, but if moderate and reasonable, may be adopted on the ground that it is fair to draw inferences against the mortgagee in possession, because, he being the party who alone can know the actual facts, has failed to keep the account in a manner in which the Court can

(1) *Gholam Nuzuf* v. *Emanum*, 9 W.R., 275.

(2) *Kallyan Dass* v. *Sheo Nundun*, 18 W. R., 65.

(3) *Shah Makhan Lall* v. *Shri Kishen Singh*, 12 M.I.A., 157; 11 W.R., 19 P.C.; *Mohun Lall* v. *Goluck Chunder*, 10 M.I.A., 1; 1 W.R., 19, (P.C.).

(4) *Boo Jinat Boo* v. *Sha Nagar*, I. L. R., 11 Bom., 78.

(5) *Kundanmal* v. *Kashi Bai*, I. L. R., 26 Bom., 363 (371).

(6) *Kundanmal* v. *Kashi Bai*, I. L. R., 26 Bom., 363 (372, 373). In *Kallyan Dass* v. *Sheo Nundun*, 18 W. R., 65 (67), however, it was held that the *onus* on the mortgagor is only to prove that the principal sum has been paid or satisfied, it being then on the mortgagee to show, what, if anything, is due to him for interest. A similar view was taken where the suit was originated by the mortgagee; *Prankishore* v. *Chundee Churn*, 19 W. R., 429; *Mujeedunnissa* v. *Dildar Hossain*, 20 W. R., 171 (179).

safely accept them. But before having recourse to an estimate not based on actual figures, a judge of fact must apply his mind carefully to the account which purports to be the account of actual receipts and disbursements, and determine on its inherent appearance of accuracy and probability and any other evidence that may be available whether it is an account which most probably represents correctly what has actually occurred. (1) While then the clause enjoins the keeping of "clear, full and accurate accounts" these terms are not inflexible, and the language of the clause, which applies to the common case, must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession.(2)

1755. So again, while the duty of maintaining and rendering accounts is cast on the mortgagee, he is at liberty, as remarked before, to employ an agent for that purpose. But if, however, the accounts were maintained by himself, it is his duty to go into the witness-box to swear that they are true and authentic. The Court strongly reprobates a practice which seems to have grown up in this country of proving vicariously facts within the knowledge of parties;(3) but if the accounts have been maintained by an agent or a gomashta, it is, of course, not necessary that he should himself depose to their accuracy.(4)

Refusal to account.

1756. A mortgagee cannot, during the continuance of such relation, acquire by the operation of the law of limitation any title inconsistent with that under which he was let into possession, however notoriously and to the knowledge of the mortgagor he may set up a title adverse to the mortgagor;(5) and he cannot be absolved from his liability to account merely because he claims to have ceased to hold the property as mortgagee. If the mortgagee neglects or refuses to keep or render the accounts, it is open to the Court to take the best evidence available and decide upon it, (6) mulcting the contumacious or negligent mortgagee in costs.(7) Every presumption should be made against a mortgagee in possession who admits that he has kept no accounts or insufficient accounts, especially where the mortgagee is aiding his mortgagor in attempts to defeat his judgment-creditor and to oust a *bona fide* purchaser at a judicial sale.(8) But in such case while the Court may well draw adverse presumptions, it would not of itself justify it in accepting without scrutiny evidence that is in a great measure speculative and conjectural,(9) or its taking no accounts at all.(10)

What full accounts must contain.

1757. A full account must set forth what the mortgagee in possession has realized, from what portions of the mortgaged property, in what term or periods—with what loss or gain on the several heads—with what necessary reductions and what

(1) *Kundanmal* v. *Kashibai*, I. L. R., 26 Bom., 363 (370, 371).

(2) *Shah Makhun Lall* v. *Srikishen Singh*, 12 M. I. A., 157 (195).

(3) *Subbaji* v. *Shiddappa*, I. L. R., 26 Bom., 392 (395). The High Court Circular condemning this practice is cited in *in extenso* as a footnote to this case. See pp. 394, 395; to the same effect *Lal Kuwar* v. *Chiranji Lal*, I.L.R 32 All., 104 (108, 109) P.C.

(4) *Shah Makhun Lall* v. *Srikishen*, 12 M. I. A., 157 (196, 197).

(5) *Seshamma* v. *Chickaya*, I. L. R., 25 Mad., 507 (511); *Lakshmi* v. *Ramachandra*, 16 M. L. J., 5; *Mahomed* v. *Ezekiel*, 7 Bom. L R., 772.

(6) *Radha Charan* v. *Rajchandra*, (1858) S. D. A., 727.

(7) *Kullyan* v. *Sheonundun*, 18 W. R., 65, (69).

(8) *Tikaram* v. *Kamrain*, (1876) B. P. J., 191.

(9) *Mohun Lall* v. *Goluck Chunder*, 10 M. I. A., 1 (13); *Shah Makhun Lall* v. *Srikishen*, 12 M. I. A., 157; *Hashum* v. *Ramdharee*, 7 W. R., 821; *Shah Gholam* v. *Emaman*, 9 W R., 275; *Tikaram* v. *Kamrain*, (1876) B. P. J., 191.

(10) *Balakrishna* v. *Balwant*, (1894) B. P. J., 791.

remains then as the net profits which can be taken as actual realizations towards liquidating the sum due under the mortgage.(1)

The account once taken cannot be re-opened by the parties in another suit.(2)

1758. Appropriation of Income.—The next clause lays down the mode of appropriation of income from the mortgaged property, classifying it into (*a*) receipts and (*b*) a fair occupation rent. His receipts are, of course, those of rents and profits collected from tenants and others in possession of the mortgaged property, while "a fair occupation rent" is the sum to which he must debit himself if he was himself in personal possession of the property. The term "fair occupation rent" is taken from the English law(3) and appears in another connexion in defining the liability of the trustee to account for his possession of trust-property wrongfully purchased by him.(4) It, of course, means as the words clearly imply a rent representing the fair letting value of the land,(5) which, if not known, must be ascertained with due regard to the nature and quality of land its capacity and the demand for it, or similar land in its neighbourhood. There will scarcely be any difficulty of ascertaining the fair occupation rent of property which is ordinarily let out to tenants, such as houses, orchards and the like. But in the case of agricultural land subject to assessment a fair rent is always much more, and in several parts of the country, it approximates to half the net produce. Such rent must presumably be assessed upon a calculation that it is let on an annual lease as the mortgagee's accounts have to be made up at the end of each year, and it would not be a prudent act to let out land on long leases when annual leases would be more advantageous to the mortgagor. At the same time the rent must be "fair" that is to say, the fact that the mortgagee, instead of finding another tenant, had cultivated the land himself should not be unduly pressed against him. He was under no disability to cultivate it himself and he should not, therefore, be rack-rented as a constructive wrong-doer. Under this clause the mortgagee after deducting for (**i**) rent, (**ii**) repairs and (**iii**) interest thereon, should appropriate the surplus to payment of (**iv**) interest on his principal money, the balance, if any left over, being paid to himself, (**v**) in reduction or discharge of the "mortgage-money"—which in this connexion means, and should have been stated to be principal money; (**vi**) the residue being paid to the mortgagor. This is the mode of taking accounts *with rests*, and is opposed to the English practice where the usual mode is to set the total amounts of rents and profits received by or found to be chargeable to him (the mortgagee), against the whole amount upon the mortgage-debt; *viz.*, in discharge successively of the interest of the mortgage-debt, and of money advanced for costs and improvements, and

cl. (h).

(1) *Golick Chunder* v. *Mohun Lall*, 5 W. R., 271 (276).

(2) *Kullyan Dass* v. *Sheonundun*, 18 W. R., 65.

(3) Fisher. §§ 1742, 1772.

(4) S. 62, Trusts Act (Act II of 1882); *Kullyan Dass* v. *Sheonundun*, 18 W R., 65.

(5) *Raghunath* v. *Baraik Gereedharee*, 7 W.R, 244; *contra Dadnu* v. *Somnath*, 6 N. L.R., 109 (112) holding that the mortgagee must debit himself with the net cultivating profits is obviously erroneous; since the mortgagee is under no obligation to give his mortgagor the benefit of his capital skill and labour. The practice prior to the Act was somewhat unsettled. In *Prabhakar* v. *Pandurang*, 12 B.H.C.R., 88 (90) in which Westropp, C.J., directed that the mortgagee in possession of cultivatory land might be either debited a fair occupation rent of net profits, because presumably they were about equal and the mortgagee did not object to it; while the Irish Lord Chancellor's dictum in Lord *Trimbleston* v. *Hamill*, (1810) 1 Ba. & Be. 377; 12 R R 38 (42) refers to a receiver becoming a mortgagee who is still accountable as receiver, and the observations must be read as limited to the facts of the case which has never been cited for any other purpose than that here stated. And, as it is, it has the flavour of the usury laws when the mortgagee suffered special disabilities since swept away.

then of the principal of the same money. (1) Under the English law where rests are allowed, they cannot be made annually, (2) but annual rests are sanctioned by the practice of the Courts in this country, (3) while in Ireland rests are made half-yearly. (4)

This clause so far as it provides for the payment of interest "after deducting the expenses mentioned in clauses (*c*) and (*d*)" is inconsistent with clause (*d*) which provides for the payment of interest *before* repairs. The clause as to interest appears to be also superfluous, for if interest has been already paid under clause (*d*), no interest can be paid under the subsequent clause.

1759. It is to be observed that the expenses incurred under clauses (*c*) and (*d*) may be deducted by the mortgagee *before* any receipts are carried to his debit, whereas expenses incurred under section 72 are *added* to the principal money to be paid *with* it. The distinction may be justified by having regard to the option given to the mortgagee under section 72, and which is denied to him under the two clauses of the present section. For the rest, the mode of taking account should follow the same practice as prevailed before the enactment, according to which, the gross receipts are ascertained at the end of the year according to the nature of the mortgaged property. For instance, if it is agricultural property, they are ascertained at the end of the agricultural or revenue year. Beyond mentioning that the appropriations are to be made "from time to time," the clause prescribes no more definite rule. But in a case where accounts were stipulated to be so adjusted, the Court directed annual rests. (5) Of course, the parties may stipulate for six-monthly or even monthly rests. But in the absence of an express contract annual rests are directed as a matter of course (§ 1758).

1760. After deducting from the gross receipts the necessary charges and expenses which the mortgagee is authorized to deduct (§1184), the mortgagee must appropriate the balance to the payment of interest, the surplus being paid towards the principal. If the net receipts are insufficient to pay the accrued interest, it is not competent to the mortgagee to add the balance of unpaid interest to the principal, or, in other words, charge compound interest. (6) Indeed, where compound interest is not expressly payable, it cannot be allowed, and in such a case, it really makes no difference whether the receipts are set off year by year, or the sum of the receipts is deducted from the sum of the amounts due at the end of the account. Where there is an express provision in the deed for payment of compound interest, in arrear, the mortgagee in possession cannot capitalize it if he had enough receipts from the mortgaged property to be available for payment of interest. (7) Where the mortgagee has the option of setting off the receipts against two or more accounts, some of which bear compound interest, the mortgagee is not bound to give credit for his receipts against the debt which is most burdensome to the mortgagor. (8) It will be seen that the mode of payment with rests has the effect of ensuring repayment of the loan in small and uncertain dribblets, and this is the objection raised to this mode of accounting in England.

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(1) *Webb* v. *Rorke*, 2 Sch. & Lef., 661; Fisher, §§ 1793, 1794.

(2) See 15 & 16 Vict., c. 86, s. 54.

(3) *Jaijit Kai* v. *Gobind Tiwari*, I.L.R., 6 All., 303 (310, 311).

(4) *Graham* v. *Walker*, 11 Ir. Eq., 415.

(5) *Radha Benode* v. *Kripamoyee*, 14 M.I. A., 443 (451).

(6) *Radha Benode* v. *Kripamoyee*, 14 M.I. A., 443 (551); *Enait Ali* v. *Kuhur Roy*, 2 W. R., 289 (290); *Chatoorbhooj* v. *Doorga Churn*, 5 W.R., 200; *Raghunath* v. *Lachman*, 1 Agra, 132; *Jaijit* v. *Gobind*, I.L.R., 6 All., 303; *Kadir Moidin* v. *Nepean*, I.L.R., 26 Cal., 1 (7), P C.

(7) *Wrigby* v. *Gill*, [1906] 1 Ch. 165.

(8) *Kadir Moidin* v. *Nepean*, I.L.R., 26 Cal., 1 (7), P.C.

1761. As a rule, the mortgagee is not liable to pay interest on the profits of the property, but if he has realized more than what is required to pay himself off, he will be liable to pay interest on his subsequent receipts if he still continues to be in possession. The question is, however, whether such interest should run from the date of surplus, or from the date of the institution of the mortgagor's suit for redemption. In England, the mortgagee is regarded as a trustee for the balance and on which he is liable to pay interest at the usual Court-rate of 4 per cent., even though there may be doubt as to the persons entitled to receive the money.(1) It is only in very special circumstances that the Court awards interest from the institution of the suit.(2) Otherwise the rule remains even where the mortgagee had honestly paid trust-money to the wrong person.(3) For, as observed by Kay, J., it is at least the duty of the mortgagee to set this money apart in such a way as to be fruitful for the benefit of the persons beneficially entitled to it.(4) This view was followed by Telang, J., in a Bombay case (5) in which he allowed interest at 6 per cent. as from that date, and which he regarded as the established rate in that Court.

1762. Limitation for Recovery of the Surplus.—Limitation begins to run against the mortgagor from the date the mortgage is satisfied. In this view the mortgagee is then no longer a trustee for the mortgagor.(6) His suit for the recovery of the surplus in the hands of the mortgagee, it has been held, must be instituted within three years from the date the mortgagor re-enters on the mortgaged property.(7) A usufructuary mortgagee may, however, set off his claim for rent due from the mortgagor, in the latter's suit for account and possession, notwithstanding that such rent would be barred by limitation.(8)

1763. Effect of Tender by Mortgagor.—Tender or deposit being equivalent to payment, the mortgagee is no more from that date entitled to act as such, and, therefore, cannot be allowed the credit for the expense incurred by him, but must account to the mortgagor for his *gross* receipts without making any deduction.(9) If the money has been deposited in Court, the mortgagee is, however, allowed an extension, his rights ceasing "from the earliest time when he could take such amount out of Court." It would appear from the clause that the mortgagee cannot thenceforward charge even for payments made to preserve the property from "forfeiture or sale" as for example, for the payment of Government revenue or rent. It seems also clear that since the mortgagee is by the clause placed under disability to recover, he cannot do so under section 69 or 70 of the Indian Contract Act. (10) It is usual to allow interest by way of damages on the gross receipts, although the clause does not provide for it. (11) On the other hand, the mortgagee cannot be evicted without being allowed to gather his standing

cl. (i).

(1) Kay, J., in *Charles* v. *Jones*, 35 Ch. D., 544 (549, 550) ; *Quarrell* v. *Beckford*, 1 Mad., 269.

(2) *Per* Lindley, L. J., in In re *Sharp*, [1892] 1 Ch., 154 (169).

(3) Chitty, J., in In re *Hulkes*, 33 Ch. D., 552 ; following *Attorney General* v. *Kohler*, 9 H L.C. 654 ; explained in In re *Sharp*, [1892] 1 Ch., 154 (170).

(4) *Charles* v. *Jones*, 35 Ch. D., 544 (550).

(5) *Haji Abdul* v. *Haji Noor Mahomed*, I.L. R., 16 Bom., 141 (144, 145). In an earlier case, *Janoji* v. *Janoji*, I.L R., 7 Bom., 185 (187), Sargent, C.J., followed the English practice which he said was to allow interest from the date of the institution of the suit. But this view is clearly erroneous, for the English practice is undoubtedly as stated in the text.

(6) S. 3, Limitation Act (XV of 1877, now s. 2 of Act IX of 1908) ; *Baboo Lall* v. *Jamal Ali*, 9 W.R., 187, F B.

(7) Art. 105, Limitation (XV of 1877, now Act IX of 1908) ; *cf. Baboo Lal* v. *Jamal Ali*, 9 W.R., 187, F.B.

(8) *Nursingh* v. *Lukputty*, I.L.R., 5 Cal., 333 ; *Sheo Saran* v. *Mahabir*, I.L.R., 32 Cal. 576.

(9) *Beni Prasad* v. *Narain*, 5 I.C. (All). 529.

(10) Act IX of 1872.

(11) *Cf. Mati Singh* v. *Ramo Hari*, I.L.R., 24 Cal., 699, F.B.

crops, and the decree for redemption should so direct (1) And so in England, the mortgagee is permitted to continue business and use the trade-name of the mortgagor's firm for a reasonable time so as to enable him to dispose of his stock-in-trade as a going concern. (2)

1764 Loss occasioned by the Mortgagee's Default.—The last clause enables the mortgagor to set off any loss suffered by him in the *same* suit, (3) without having to institute a separate suit as would have, but for the clause, been necessary and had to be instituted before the Act. (4)

77. Nothing in section seventy-six, clauses (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of interest.

1765. The present section enacts a rule in conformity with this view which was followed in practice before the Act.(5) Its extension to the cases specified in the section is the necessary consequence of the mortgagee's non-liability, and the provision as to his non-liability for not collecting rents or making repairs was added at the instance of the Indian Law Commissioners. (6)

1766. Analogous Law.—This section sets forth an exception to clauses (*b*), (*d*), (*g*) and (*h*) of the last section. The history of the liability of the mortgagee in possession to account has suffered a varying fortune. Prior to the passing of the usury laws the mortgagee was unfettered in enforcing his contracts. But under the Bengal Regulation (7) the mortgagee could retain his pledge only so long as he had not received thereout his debt with interest at twelve per cent. to ascertain which the mortgagor was always entitled to claim an account, and so even where the *wajib-ul-arz* embodied an agreement to the following effect: "The mortgage is for three years, with this declaration as to the mortgage that the entire profits of the mortgaged property have been assigned in lieu of interest on the mortgage-money, so that up to the term of mortgage, I, the mortgagor, shall have no claim to profits nor the mortgagee to interest," it was held that taken as a whole this document was merely a recital of the mortgage as still subsisting and operative, and that it did not exonerate the mortgagee from his liability to account.(8) A similar view was taken in Madras on the construction of a similar Regulation having effect in that Presidency.(9) Both these Regulations were directed against usury and prevented a usufructuary mortgage from being made the indirect means of securing the equivalent of a higher rate of interest than that allowed by law. Accordingly, a mortgage, whereby land was made over to the mortgagee for cultivation and a grain-rent estimated at a

(1) *Balaji* v. *Tatya* (1887) B.P.J., 114.
(2) *Cook* v. *Thomas*, 24 W.R. (Eng.), 427.
(3) *Shiva* v. *Jaru*, I.L.R., 15 Mad., 290.
(4) See s. 111 of the Code of Civil Procedure (Act XIV of 1882); O. 8. r. 6: Act V of 1908; *Raghunath Das* v. *Ashraf Husain*, I.L.R., 2 All., 252.
(5) *Venkatachellam* v. *Tirumala*, 2 M.H.C. R., 289; *Peralathil* v. *Manakude*, I.L.R., 4 Mad., 113; *Munnoo Lall* v. *Reet Bhoobun*, 6 W.R., 283.
(6) Report, dated 15th November, 1879, § 34.
(7) Reg. XV of 1793, s. 10.
(8) *Mahtab* v. *The Collector*, I.L.R., 5 All., 419.
(9) S. 8, Mad. Reg. XXXIV of 1802; *Peralathail*, v. *Mankude*, I.L.R., 4 Mad., 113.

certain quantity, was to be retained yearly in lieu of interest with a condition that on the expiry of any year the mortgagee might be redeemed and possession recovered on payment of the principal, was held to be one subject to the regulation, and that, therefore, the mortgagee must give an account of the grain-rent, and credit the mortgagor with any surplus which may be found in excess of interest at the rate of 12 per cent.(1) The change of law in force in the Pre-regulation days was thus materially altered by the passing of the Regulations, and the change so effected was thus explained by the Privy Council who said: "as to mortgages executed before the 28th March 1780, the usufruct might be allowed even after the Regulation in lieu of interest up to that date. Then after that date, the dividing point of time, and subsequently to it the character of these mortgages suffered a change. The mortgaged possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest arose where it did not exist before. The reception of the profits in many cases did not constitute the receipt of interest, but was in lieu of any."(2) But a third epoch dawned with the passing of the Interest Act(3) which repealed the usury laws, and provided that "a mortgage or other contract for the loan of money by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties."(4) The effect of this enactment is to sweep away the intermediate change effected by the Regulations and restore the pre-existing law by legalizing all agreements even though they may have the effect of securing to the mortgagee interest at a higher rate than 12 per cent. per annum. The effect of this law being to bind parties strictly by the terms of the express contract, it follows that when the usufruct is to be taken in lieu of interest, the mortgagee is not liable to account, however large may be his receipts. He may, moreover, continue in possession until the principal is repaid to him.(5) If no interest is stipulated, it will be for the Court to decide if any is to be allowed, and, if so, at what rate. If any rate is fixed it will be calculated at that rate. But in the two latter cases the mortgagee will have to account.

1767. Principle.—A mortgage is usufructuary where the mortgagee receives the rents and profits either—(i) in lieu of interest only, or (ii) in payment of the mortgage-money, or (iii) partly in lieu of interest, and partly in payment of the mortgage-money. (6) This section protects the usufructuary mortgagee of only the first kind from the provisions of the last section. It also excepts from the necessity of keeping and rendering accounts usufructuary mortgagees where the usufruct is agreed to be taken in lieu of interest and *defined* portions of the principal, in which case the mortgagor is entitled to credit for the amount agreed to beforehand. And there is no necessity for accounts where the mortgagee

(1) *Tippayya* v. *Venkata*, I.L.R., 6 Mad., 74 (75, 76).

(2) *Shah Makhun Lall* v. *Srikishen*, 12 M. I.A., 190.

(3) Act XXVIII of 1855.

(4) *Ibid*, s. 4; *cf.* ss. 5 & 6. These sections are not retrospective, but so far as they affect contracts entered into since the passing of Act XXVIII of 1855, they repeal the following sections: ss. 4, 6 & 7 to 11 of Beng. Reg. XV of 1793; ss. 3, 5 to 10 of Beng. Reg. XXXIV of 1803, and s. 23, cl. 1 of Beng. Reg. VIII of 1805 so far as it extends the application of the above cited sections of Beng. Reg. XXXIV of 1808, ss. 9 & 11 of Beng. Reg. XIV of 1803, so far as they bear on the subject of the usury; also s. 2 of Beng Reg. XVII of 1806 so far as it bears on the subject, ss. 4 & 6. Similarily, and so far as they bear on the subject, ss. 2, 4 to 6 and 8 of Mad. Reg. XXXIV of 1802, s. 22 of Mad Reg. IV of 1816, s. 14 of Mad. Reg. V of 1816 s. 15 of Mad. Reg VI of 1816, s. 13 of Mad. Reg. VII of 1816, s. 7 of Mad. Reg. II of 1825, so much as it bears on the subject, ss. 10 to 12 of Bom. Reg. V of 1827.

(5) *Munnoo Lall* v. *Reet Bhoobun*, 6 W.R., 283.

(6) S. 58 (*d*).

agrees to allow a definite sum for the occupation, for the transaction is not then distinguishable from a lease in which no accounts are necessary. (1)

In the two cases thus excepted, it will be observed that the mortgagee undertakes to give the mortgagor a definite credit at all hazards, and hence if he does not collect the rents and profits, the mortgagor does not suffer. He is also protected from having to make repairs for obvious reasons, although probably it would be to his interest in many cases to make them.

1768. Mortgagee's Non-liability.—A case for exemption from liability to account would arise wherever there is a contract entitling the mortgagee to appropriate the rents and profits towards payment of a *specified* portion of principal or interest, in which case there is no liability for account because the terms of the contract render it unnecessary. (2) Where a mortgage provides for the mortgagee being put in possession and taking the profits on account of interest, the mortgagor undertaking to pay the deficiency, if the profits be insufficient, the mortgagee is not relieved from accounting for rents and profits. (3) The fact that a mortgagee has not been put into possession to which he was entitled under the mortgage, does not deprive him on taking the accounts between himself and the mortgagor, of his right to be credited with the amount of profits in lieu of interest as provided for by the mortgage. (4) The section makes no provision for a case where the contract is that the profits are to satisfy only a *fraction* of the interest, but this would appear to make no difference if the contract is clear. (5) A mortgagee whose case falls within the exception being not liable to make necessary repairs, is held not to be entitled to be reimbursed his expense, if any, incurred for that purpose, (6) but the soundness of this view is open to grave doubt. (7) At any rate he is entitled to be repaid the expense incurred in protecting the estate, as constructing a new embankment. (8) It may be added that the mortgagee is always liable to perform the other duties enumerated in section 76. He must for instance, continue to pay the Government revenue and prudently manage the property. He must commit no waste, and, in case of its accidental destruction, apply the insurance-money to its reinstatement. And indeed while it is not obligatory on him to attend to its repairs, however necessary, howsoever large may be his profits, still it would be to his own interest to see to the repairs to ensure his continuance of the same enjoyment.

No account if profits vary.

1769. Although the contract for apportionment of the income from the mortgaged property is naturally based on an estimate of the income then received, the mortgagees does not become liable to account if there is a windfall in his income. So where in an usufructuary mortgage of an occupancy holding the mortgagee was to take the profits in lieu of interest, after payment of rent to the zemindar, which he escaped from paying for several years, and whereupon the mortgagor held him liable to him to that extent, but the Court held the mortgagee entitled

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(1) *Peralathail* v. *Mankude*, I. L. R., 4 Mad., 113.

(2) In *Mahadu* v. *Bhagirathibai*, (1877) B. P. J., 169, it was held that accountability in all cases—must be contracted for but see *Babajee* v. *Tatya*, (1889) B.P.J., 18, in which liability to account was presumed. Whatever may have been the antecedent law there is no doubt but that the mortgagee in possession is now *prima facie* accountable unless as provided in this section.

(3) *Babaji* v. *Tatya*, (1889) B.P.J., 18.

(4) *Ramchandra* v. *Ahmed*, (1882) B.P.J., 385.

(5) *Taki* v. *Umabai*, (1884) B.P.J., 9.

(6) *Shafiunnisa* v. *Fazarah*, 7 A.L.J. 787 (789).

(7) See s. 62 (*b*), *ante*.

(8) *Ibid*.

to the benefit[1] as indeed, he would have been made liable if the rent had been enhanced.[2]

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of prior mortgagee.

1770. Analogous Law.—This section is an exception to the general rule enunciated in section 48, and to the equitable maxim—*qui prior est tempore potior est jure.*[3] The same rule is enacted in section 115 of the Indian Evidence Act.[4] The object of the section was to adopt the English doctrine enunciated by Lord Denman in a leading English precedent.[5] Indeed, the section introduces no novel doctrine, but confirms a beadroll of cases whose authority is recognized in the marginal note appended to the draft section.[6]

The rule is one of more general application and has been held to govern leases.[7]

The terms "fraud" (§ 1774) and "misrepresentation" (§ 1777) are here used in the sense defined in Indian Contract Act, [8] while "gross neglect" has already been the subject of comment in another connection (§§ 122, 123, 125).

1771. Principle.—Ordinarily, where in the case of two or more transfers the equities are in all other respects equal, the transfer first in point of time prevails and has preference over the rest. But if the party entitled to this equity is guilty of fraud, misrepresentation or gross neglect and *thereby induces* another to advance money on the security of the mortgaged property, it is but just that he should have priority over the prior mortgagee who has misled him into the contract. The doctrine of the forfeiture of priority as a consequence of laches, acquiescence or fraud is so manifestly agreeable to the dictates of good conscience, that it is difficult to believe that the contrary could ever have been the accepted doctrine, but so in fact it was,[9] though it did not take long before the pernicious rule was exploded.[10]

1772. Meaning of Words.—"*Fraud*" is defined in section 17, and *misrepresentation*" in section 18 of the Indian Contract Act.[11] "*Gross negligence*" is a term used also in connection with the definition of "notice" in section 3 before. (§§ 111, 112) "*Has been induced:*" implies that the subsequent mortgagee

(1) *Fakir Muhammad* v. *Ali Shet Khan*, 10 I.C. (All) 113.

(2) *Thirumathur* v. *Swaminatha*, 16 I.C. (Mad). 184.

(3) "He who is prior in time is stronger in law."

(4) Act I of 1872.

(5) *Pickard* v. *Sears*, 6 A. & E., 469; see Report of the Select Committee, dated 2nd February 1878, § 34.

(6) *Seetaram* v. *Kishun*, 3 Agra, 402 (406); *Jugjeewundas* v. *Ramdas*, 2 M.I.A., 487 (501); *Somasundara* v. *Sakkarai*, 4 M.H.C.R., 369 (373); *Bhurrut Lall* v. *Gopal Sarun*, 11 W. R., 286. As to Hindu mortgagees in possession: *Hari* v. *Mahadaji*, 8 B.H.C.R. (A.C.). 50; *Krishnappa* v. *Bahiru*, 8 B.H.C.R. (A. C), 55; *Itcharam* v. *Raiji*, 11 B.H.C.R., 11. (The rule applicable to Guzerat which otherwise does not follow the Hindu rule).

(7) *Taylor* v. *London & County Banking Co.* [1901], 2 Ch. 231.

(8) Ss. 17, 18, Act IX of 1872 see out *post.*

(9) *Fagg's case*, 1 Eq. Ca. Abr., 354, cited 1 Vern., 52, 53; *Harcourt* v. *Knowel*, 2 Vern., 159; 21 E.L.R., 1098.

(10) *Carter* v. *Carter*, 3 K. & J., 617.

(11) Act IX of 1872.

has been misled by the prior mortgagee. The contract into which the subsequent mortgagee has entered must be occasioned by the misconduct of the prior mortgagee in the manner described. "*Shall be postponed, &c.*," means that the prior mortgagee shall not absolutely forfeit his priority, but only forfeit it, in regard to the mortgagee misled.

1773. When a Case for Priority arises. (1)—The rule as to priority can have application only when the same property is charged with several incumbrances which cannot all be satisfied out of the same property. If the several incumbrances are in all respects equal, the maxim *qui prior est tempore potior est jure* will determine the relative rights of the incumbrancers. If, however, any one of the incumbrancers actually mislead another, either by acts or omissions, he is displaced from his position and ranks after the mortgagee whom he has misled. Cases in which the mortgagee is guilty of "fraud" or "misrepresentation" are not difficult; but where the mortgagee is charged with "gross negligence," questions often of great difficulty arise, and which are none the less complicated by the fact that the law makes no distinction between negligence, however innocent, and negligence which is the result of design.

1774. Priority forfeited by Fraud:—Fraud has been thus defined in the Indian Contract Act:—

17. "Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

Fraud defined.

(1) The suggestion as a fact, of that which is not true, by one who does not believe it to be true;

(2) The active concealment of a fact by one having knowledge or belief of the fact;

(3) A promise made without any intention of performing it;

(4) Any other act fitted to deceive;

(5) Any such act or omission as the law specially declares to be fraudulent.

Explanation. - Mere silence as to facts likely to affect the willingness of a person to enter into a contract, is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech." (2)

1775. There can be no doubt that the term in the Act is used in the sense assigned to it in the above definition.(3) Fraud may then consist as much in the *suppresio veri* as in the *suggestio falsi*. Of course, fraud in law does not imply any moral turpitude, for the principal may be fixed with the fraud of his agent. Fraud is an extrinsic collateral act which not only estops the mortgagee in his relation with the subsequent mortgagee, but vitiates even the most solemn proceedings of the Courts of Justice. It avoids all judicial acts, ecclesiastical or temporal.(4) And this is based upon the principle that a man may not take advantage of his own wrong.(5) And where by the fraud of a third person one of two innocent persons has to suffer loss, he whose conduct has enabled the third person to commit fraud, should clearly bear it.(6) But a person cannot be said to have enabled another to commit fraud, merely because his act facilitated the perpetration of fraud; he must have done some act which *was intended to be acted*

(1) The commentary on the section may profitably be read in continuation of the one on s. 48, *ante*.

(2) S. 17 of Act IX of 1872. The four illustrations appended to the section have been omitted.

(3) See s. 4, *ante*.

(4) *Per* Lord Coke in *The Duchess of Kingston's case*, 2 Sm. L C., 593, 601.

(5) *Abouloff* v. *Oppenhemer*, 10 Q.B.D., 295 (301).

(6) *Lickbarrow* v. *Mason*, 1. R. R., 425; *Henderson & Co.* v. *Williams*, [1895] 1 Q.B. 525.

on by that other person who is affected by it.(1) Before the subsequent mortgagee can, however, claim priority as against the prior mortgagee on the ground of the latter's fraud, he must both allege and prove it, for he is not relieved from this obligation because the defendant has himself told an untrue story.(2) The averment of fraud must be specific, for as Lord Hatherley said:—"that the mere averment of fraud in general terms is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error and establish it by evidence. No body can be expected to meet a case, and still less to dispose of a case summarily upon mere allegations of fraud without a definite character being given to those charges by stating the grounds upon which they rest"(3) (§§ 898-899). Moreover, a charge of fraud must be substantially proved as laid, for when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted therefor.(4) Fraud and collusion must, wherever possible, be proved by evidence and not by mere affidavits (5) (§§ 892-897).

In order to affect a mortgagee with the consequences of the fraud of his agent, it must be shown that the relation subsisted at the time when the fraud was practised, and that the fraud was committed by him while acting within the scope of his authority.(6) It is not necessary to prove any express command of privity of the master,(7) who is presumed to have notice of all facts brought to the knowledge of his agent, which he cannot be allowed to rebut (8) (§§ 160-169).

1776. Where the mortgagee fraudulently conceals the fact that he had himself made a prior advance upon the same property from a subsequent mortgagee, he was held to be disentitled to set up his previous mortgage in opposition to that of the subsequent incumbrancer.(9) So where the prior mortgagee was shown to have consented to a second mortgage which contained a recital that it was free of all prior incumbrances, and received a large portion of the mortgage money, the Privy Council held that it amounted to an inducement to the second mortgagee to advance his money as a first charge on the security of the mortgaged property and that, therefore, the prior mortgagee could not thereafter turn round and claim priority over that charge in favour of his own mortgage subsisting from an earlier date.(10) Where the incumbrance is notified in the proclamation of sale, and the holder of it bids at the sale without announcing his mortgage, he cannot be said to be guilty of fraud so as to deprive him of his lien.(11) But where a decree-holder caused the right, title and interest of the judgment-debtor in a certain property, which had been mortgaged to him by a registered bond, to be sold but without notice of his mortgage, he was not afterwards allowed to set up his lien as against the

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(1) *Farquharson* v. *King & Co.*, [1901] 2 K. B., 697.

(2) *Mahomed Golab* v. *Mahomed Sulliman*, I.L.R., 21 Cal., 612.

(3) *Wallingford* v. *Mutual Society*, 5 App. Cas., 685 (701).

(4) *Abdul Hossein* v. *Turner*, I.L.R., 11 Bom., 620 (643), P.C.; following *Montesquick* v. *Sandys*, 18 Ves., 302 (314)

(5) *Ram Doyal* v. *Ramdas*, 4 C.W.N., 208.

(6) S. 238, Indian Contract Act (IX of 1872.)

(7) *Barwick* v. *English Joint Stock Bank*, 2 Eq., 259 (265).

(8) *Brohmo Dutt* v. *Dhurmo Dass*, I.L.R., 26 Cal., 381 (387). F.B.

(9) *Bhurrut Lall* v. *Gopal Sarun*, 11 W.R., 286.

(10) *Raman Chetty* v. *Steel Brothers*, 15 C. W.N. 813 P.C.; 13 Bom. L.R. 447; 8 A.L.J. 594; 10 I C. 272.

(11) *Bunwari Das* v. *Muhammad*, I.L.R., 9 All., 690; *Mackenzie* v. *British Lien Co.*, 6 App. Cas., 82; *Gherun* v. *Kunj Behari*, I.L.R., 9 All., 413.

purchaser.(1) But this view is opposed to a Bombay case where it was held that the omission to declare the mortgage at the time of the sale could not be treated as an estoppel.(2) But in an earlier case it was held by the same Court that since the mortgagee had, by concealing his lien, induced the purchaser to pay full value of the property, he could not thereafter be allowed to retain his lien,(3) a view which is also supported by the authority of the other High Courts.(4) It has been held that a mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee. Neither does the mere fact that, being aware of the second mortgage, he attests the execution of the mortgage-deed, amount to such conduct, when his knowledge of the contents of the deed is not shown. Where, however, a prior mortgagee attested the execution of the deed mortgaging the property a second time, and, being aware of the contents of the deed, kept silence, and thus led the second mortgagee to think that the property was not incumbered, and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be a conduct which amounted to constructive fraud on the part of the prior mortgagee sufficient to deprive him of the right to priority.(5)

1777. Misrepresentation.—Not only fraud but misrepresentation also entails displacement of priority. This word has been defined in section 18 of the Indian Contract Act(6) in the following terms:—

"Misrepresentation' means and includes—

(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

It will be seen that the term "misrepresentation" so defined is more akin to "gross negligence" (§§ 122, 123, 125) than to fraud with which it is often found coupled in ordinary parlance, but even as between "misrepresentation" and "gross negligence" there is a clear line of demarcation, but which so far as regards its operation on the question of priority, may be disregarded.

The main question, in determining whether estoppel has been occasioned by misrepresentation, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of this estoppel does not depend on the motive, or on the knowledge of the matter, on the part of the person making the representation. It is not even essential that the intention of the person, whose misrepresentation has induced another to act, should have been fraudulent, or that he

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(1) *Dullah Sircar* v. *Krishna Kumar*, 3 B. L.R., 407.

(2) *Dhondo* v. *Raoji*, I.L.R., 20 Bom., 290.

(3) *Agarchand* v. *Rakhma*, I.L.R., 12 Bom., 678.

(4) *Jaganatha* v. *Ganji*, I.L.R., 15 Mad., 302; *Kasturi* v. *Venkatachalapathi*, I.L.R., 15 Mad., 412; *Nursing* v. *Roghobur*, I.L.R., 10 Cal., 609.

(5) *Salamat Ali* v. *Budh Singh*, I.L.R., 1 All., 303; *Joshi* v. *Joshi*, I.L.R., 2 Bom. 650; distinguished in *Ramachandra* v. *Jairam*, I.L.R., 22 Bom. 686.

(6) Act IX of 1872.

should not have been under a mistake or misapprehension himself.(1) It has been held in Bombay that a minor is equally subject to the rule, but it has been held otherwise by a Full Bench of the Calcutta High Court. "To hold," it was said, "that an infant may be estopped in regard to contract by conduct or misrepresentation would be practically to sweep away all the limitations the law has imposed on the capacity to contract."(2) But this is not the view which the English law takes of the conduct of a minor. For, as Lord Mansfield, L. C., said: "When anything in order to a purchase is publicly transacted, and a third person, knowing thereof, and of his own right to the lands intended to be purchased, does not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase: for it was apparent fraud in him not to give notice of his title to the intended purchaser; and in such case, infancy or coverture shall be no excuse; neither is it necessary that such infant or covert be active in promoting the purchase, if it appears that they were so privy to it, that it could not be done without their knowledge."(3)

1778. Gross Negligence.—While "fraud" and "misrepresentation" are defined in the Indian Contract Act, the term "gross neglect" appears to be nowhere defined or described, and, therefore, it must be taken to be here used in the same sense as in ordinary parlance, meaning negligence, lacking even in slight diligence. Rolfe, B., has, however, observed that "gross negligence is only ordinary negligence with a vituperative epithet."(4) But in civil law *lata culpa* or "gross negligence," is clearly looked upon as more heinous than *levis culpa* (ordinary neglect) and *levissima culpa* (slight neglect).(5) Negligence in law, as in ordinary parlance, is used as the opposite of diligence, and the two vary in the inverse ratio. Gross negligence must then be totally devoid of even the slightest diligence. It is in fact positive carelessness of such a nature as is not usually to be found in ordinary men. "Negligence," said Alderson, B., "is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."(6) There is no such thing as an absolute or intrinsic negligence which must always be relative to some circumstances of time, place or person.(7) The section declares that, where the prior mortgagee, through such gross carelessness, induces another person to advance money on the same security, he shall forfeit his priority in opposition to him. Thus where the mortgagee permitted his title-deeds to remain in the possession of the mortgagor, and, on the strength of which he executed a second mortgage, the prior mortgagee was held to be guilty of gross negligence within the meaning of the section, and was, therefore, postponed to the subsequent mortgagee.(8) As Lord Cowper observed: "If a man makes a mortgage and afterwards mortgages the same estate to another and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will, without doubt, in equity postpone

(1) *Sarat Chunder Dey* v. *Gopal Chunder Laha*, I.L.R., 20 Cal., 296, P.C.; *Tinnappa* v. *Murugappa*, I.L.R., 7 Mad., 107.

(2) *B ohmo Dutt* v. *Dharmo Dass Ghose*, I. L.R., 26 Cal., 381 (394), F.B.

(3) *Savage* v. *Foster*, 9 Madd., 38.

(4) *Wilson* v. *Brett*, 11 M. & W., 113. "Laches" has been definied by Ellenborough, C.J., to be "a neglect to do something which by law a man is obliged to do." *Sebag* v. *Abithol*, 4 M. & S., 462; see *per* Abbott, C.J., in *Turner* v. *Hayden*, 4 B. & C., 2

(5) Halifax, Civil Law, 61.

(6) *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch., 784.

(7) *Degg* v. *Midland Railway Co.*, 1 H. & N. 781.

(8) *Madras Building Co.* v. *Rowlandson*, I. L.R., 13 Mad., 383; affirmed in *Shan Maun* v. *Madras Building Co.*, I.L.R., 15 Mad., 268; *Waldron* v. *Sloper*, 1 Drew., 193.

his own mortgage. So, if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first morgage, this is such a misrepresentation as shall forfeit his priority." (1) But it appears from the other leading English cases that in England the rule appears to be to postpone the prior mortgagee only where there is "negligence so gross as to be tantamount to a fraud." (2) So in one case Lord Eldon said that "there must be either direct fraud or negligence amounting to evidence of fraud to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed."(3) And Fry, L. J., after reviewing the leading cases, came to similar conclusions: "That the Court will postpone the prior legal estate to a subsequent equitable estate—(*a*) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title-deeds may be, and in some cases, has been held to be sufficient evidence, where such conduct cannot otherwise be explained; (*b*) where the owner of the legal estate has constituted the mortgagor, his agents, with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."(4)

1779. While the tendency of the English decisions has no doubt been to refuse to postpone the owner of the prior *legal* estate to a subsequent *equitable* incumbrancer, merely on the ground of gross negligence, unaccompanied by any element of fraud, "we are not prepared, however, to hold," observed the Court in Madras, "that the words 'gross neglect,' in section 78 of the Transfer of Property Act, must necessarily be read by the light of the English decisions. On the contrary the language of the section.....seems to us to indicate an intention to make gross neglect of itself, and apart from fraud, a reason for postponement of the prior mortgagee, and this view is strengthened by the use of the word 'misrepresentation' which is not necessarily fraudulent misrepresentation."(5) It appears to have been consistently held in Madras that a prior mortgagee will be postponed, if grossly negligent, although his negligence may not be evidence of designed fraud.(6) In Bombay, on the other hand, the English cases have been followed, and in one case "gross neglect" and "fraud" were interchangeably used.(7) But in England, no doubt where there is a contest between the prior legal and the subsequent equitable incumbrancer, fraud is generally the element in postponing priority; but the same rule does not hold good where the contest is between two equitable claims, in which case mere neglience such as an omission to retain possession or to make inquiries about title-deeds, may be sufficient.(8) Moreover, there are cases in which it has been held that, when a person puts it in

(1) In re *Thatched house*, 1 Eq. Ca. Abr., 322; *Raman Chetty* v. *Steel Brothers*, 15 C. W.N. 813 P C.

(2) *Colyer* v. *Finch*, 5 H.L.C., 905; *Roberts* v. *Croft*, 2 DeG. & J., 13.

(3) *Martinez* v. *Cooper*, 2 Russ., 198 (217); also in *Evans* v. *Bicknell*, V., 6 Ves., 192.

(4) *Northern Fire Insurance Co.* v. *Whipp*, 26 Ch. D., 482 (494.)

(5) *Shan Maun* v. *Madras Building Co.*, I. L.R., 15 Mad., 268 (274); distinguished in *Rangasami* v. *Annamalai*, I.L.R. 31 Mad., 7 (11).

(6) *Somasundara* v. *Sakkarai*, 4 M.H.C.R. 369; *Madras Hindu Union Bank* v. *Venketrangiah*, I L R., 12 Mad, 424; *Damodara* v. *Somasundara*, I.L.R., 12 Mad., 429.

(7) *Balmukun Das* v. *Moti Narayan*, I. L. R., 18 Bom., 444; *Shivram* v. *Saya*, I.L.R., 13 Bom., 229.

(8) *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D., 182 (189); to the same effect, *Lloyds Banking Co.* v. *Jones*, 29 Ch. D, 229; *National Provincial Bank* v. *Jackson*, 33 Ch. D., 1 (13); *Union Bank* v. *Keni*, 39 Ch. D., 238; *Stephen* v. *Green*, [1895] 2 Ch., 148.

the power of another to deceive and raise money, he must take the consequences: he cannot afterwards rely on a particular or a different equity.(1) And so where two ladies, who being prior mortgagees, allowed their brother to have the deeds for the purpose of giving priority to a particular charge, but instead of giving priority to that particular charge only, he borrowed more money, and the question was, whether his sisters were not to be postponed to the persons from whom he borrowed money, it was held that they were, and the decision was confirmed by the Lord Chancellor on appeal.(2) So, also, where the mortgagee of leasehold property lent the lease to the mortgagor for the purpose of raising money upon it, but at the same time told him to inform the person from whom he proposed to borrow the money of his prior charge, and the mortgagor borrowed money from his bankers upon the security of a deposit of the lease without giving them notice of the prior mortgage, it was held that the first mortgage must be postponed to that of the bankers.(3) A prior incumbrancer will be postponed to a later one if the former negligently allowed the title-deeds to remain in possession of the owner and so misled another person into advancing moneys on the security of the title deeds. But where the mortgagor was in possession of the deeds as trustee, or solicitor, there is no negligence in allowing him to be in possession, and the mortgagee will not be postponed by the fraudulent acts of the trustee at any rate so long as he had no reason to suspect any want of good faith on the part of the mortgagee.(4) Negligence in omitting to give notice to all the persons interested may often determine the course of priority. One of the trustees for sale of land having been also a beneficiary entitled to a share of the sale-proceeds, mortgaged his share successively to two persons. The second mortgagee after making due enquiry of the trustees, took the mortgage and gave them notice. The first mortgagee could only rely upon the notice to his mortgagor. It was held that the second mortgagee had priority.(5) Some of these cases may, however, be distinguished on the ground that in them the mortgagee having authorized the mortgagor to raise money upon their security, could not afterwards plead that the mortgagor had exceeded his powers.(6)

1780. The charge of gross negligence if made may be repelled by the prior mortgagee, showing that he was not aware of the deeds being necessary to complete his title, or that he was under a reasonable belief that he was receiving all(7) or that they were made over to the mortgagor upon his reasonable representation,(8) or that he had other reasonable excuse for either not receiving them, or for delivering them to the mortgagor;(9) for mere possession of the deeds apart from the mortgagee's default or negligence will not postpone him.(10) Where equities conflict, the question always is not what circumstances may, as between two equities, give priority to the one over the other, but what circumstences justify the Court in depriving a legal mortgagee of the benefit of the legal estate.(11) The question of

Defences.

(1) *Mc Henry* v. *Davies*, L.R., 10 Eq., 88; followed in *Brocklesby* v. *Temperance Building Society*, [1895] A.C., 173 (180).

(2) *Perry Herrick* v. *Attwood*, 2 DeG. & J., 21.

(3) *Briggs* v. *Jones*, L.R., 10 Eq., 92.

(4) *Taylor* v. *London & County Banking Co.* [1901], 2 Ch., 231.

(5) *Lloyd's Bank* v. *Barson*, [1901] 1 Ch., 865; *Brown* v. *Savage*, 4 Drew., 635.

(6) *Brocklesby* v. *Temperance Building Society* [1895], A.C., 173 (180, 181); *Lloyd's Bank* v. *Bullock*, [1896] 2 Ch., 192.

(7) *Hunt* v. *Elmes*, 2 D. F. & J., 578; *Ratcliffe* v. *Barnard*, L.R., 6 Ch., 652; *Colyer* v. *Finch*, 5 H.L.C., 905.

(8) *Peter* v. *Russell* (or *Thatched House case*), 1 Eq., Ca. Abr., 321; *Martinez* v. *Cooper*, 2 Russ, 198.

(9) *Muthu* v. *Sami*, I.L.R., 8 Mad., 200.

(10) *Somasundara* v. *Sakkarai*, 4 M.H.C.R., 369.

(11) *Northern Fire Insurance Co.* v. *Whipp*, 26 Ch. D., 482 (487); *Kettlewell* v. *Waston*, 21 Ch. D., 685; *Taylor* v. *Russell*, [1892] A.C., 262; *Hopkins* v. *Hemsworth*, [1597], 2 Ch., 347.

priority, therefore, depends upon the circumstances of each case and the conduct of the parties.(1)

1781. Where an enactment has enacted a pecuniary penalty for the non-performance of the statutory duty, the loss of priority should not be superadded to the penalty even in the case of wilful omission, as distinguished from fraud or active concealment. Thus, where the director and manager of a registered company made advances to it on a mortgage which should have been, but was not registered in accordance with the requirements of the Companies Act.(2) The company having gone into liquidation, the question as to priority arose between the mortgagee and the unsecured creditors of the company. Having regard to the tenor of the Companies Act, which simply penalized the directors and officers for non-registration, but did not render the mortgages and charges invalid, it was held that the mere omission of the mortgagee-director to register his incumbrance was not sufficient to postpone him.(3) In this case, however, the registers were only open to inspection by the creditors besides members of the company, and none of the unsecured creditors ever cared to inspect them before making advances. But, if suppose the creditors had inspected the registers before making advances, would the case have been otherwise? The House of Lords advisedly refrained from answering this question, (4) which, however, presents no difficulty in solution. If the omission was designed or fraudulent, or acting on the faith of the registers the creditors had made advances, there can be no doubt but that the order of priority would then be different. Indeed, the earlier cases went the length of holding that a mere omission to register was fatal as regards priority.(5) But these cases obviously went too far and had been dissented from in several subsequent cases (6) until they were finally overruled by the House of Lords.(7)

1782. Again, in order to occasion forfeiture of priority it is not enough that a person should have been negligent, but the negligence must be a breach of duty to the public or to the person affected thereby.(8) For while the prior mortgagee must not be guilty of fraud, misrepresentation or gross negligence, he is not bound to protect the interests of the subsequent mortgagee by giving him notice of his mortgage, where there is no legal obligation upon him to do so.(9) The mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, or to deprive him of any right which he would otherwise have had against the other.(10) Of course, a mortgagee must not conceal his incumbrance if inquiry is made by the person intending to make advances on the property, but at the same time he is not bound to

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(1) *Rice* v. *Rice*, 2 Drew., 13.

(2) 25 & 26 Vict., c. 89. s. 43.

(3) *Wright* v. *Horton*, 12 App. Cas., 371 (376, 367).

(4) See *Per* Lord Watson in *Wright* v. *Horton*, 12 App. Cas., 371 (381).

(5) *Per* Malins in In re *Wynn Hall Coal Co.*, L.R., 10 Eq., 515; *Per* Lord Romilly, M.R., in *ex parte Valpy & Chaplin*, L.R., 7 Ch., 289, *Per* James, Mellish & Baggalay, L. JJ., in In re *Native Iron Ore Co.*, 2 Ch. D., 345.

(6) In re *Borough of Hackney Newspaper Co.*, 3 Ch. D., 669; In re *International, &c., Co.*, 6 Ch. D., 556; In re *South Durham Iron Co.*, 11 Ch. D., 579; *Globe New Patent Iron & Steel Co.*, 48 L.J. (Ch.), 295.

(7) *Wright* v. *Horton*, 12 App. Cas., 371 (383).

(8) *Arnold* v. *The Cheque Bank*, 1 C.P.D., 578

(9) *Joshi* v. *Joshi*, I. L. R., 2 Bom., 650; *Gobind* v *Ravji*, I.L.R., 12 Bom., 33.

(10) *Per* Lindley, L.J., in *Keith* v. *Burrows*, 1 C. P. D., 722 (734), on another point reversed O. A., in 2 C. P. D., 163 (165, 166), which was confirmed in 2nd Appeal in 2 App. Cas., 636 (644). This case was of a mortgage of a ship and the Court laid down that the mortgagee was entitled to freight only from the time he took possession.

disclose his security to all-comers. Under the rules of the Civil Procedure Code, the person applying for execution must disclose to the Court his own lien, if any, upon the property, and if he brings it to sale in execution of a simple money-decree without mentioning his security, the purchaser, if he supposed that he was purchasing the full proprietary title, would acquire it free of the mortgagee's lien.(1) And his possession would be unlike the mortgagor's(2) possession adverse to him.(3) A person acquiring property *benami* is not necessarily negligent, but if the *benamidar* transfer the property to a *bona fide* transferee without notice, the beneficiary is estopped and cannot question his act, for "where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon."(4) In Bombay although possession is not essential to complete a mortgage,(5) still a subsequent mortgagee with immediate possession is entitled to precedence over a prior mortgagee who obtains possession subsequently to him.(6)

(3) Negligence must be the proximate cause.

1783. Thirdly, negligence must be in the transaction itself and the proximate cause of the change of position.(7) A mortgagee may have negligently failed to keep his deeds in proper custody, and if as a consequence they are stolen, and on their security a person innocently makes advances, the prior mortgagee cannot forfeit his priority since the commission of a crime is not the proximate result of negligence in leaving deeds in a place from which they could be stolen.

Of course, negligence cannot be the proximate cause of altering a person's position, where he had made no inquiry at all. Nor is it then material that if he had inquired, a false answer would have been given.(8) A mortgagee who charges another with negligence, must not be himself guilty of contributory negligence. Thus, if on being asked for his deeds, the mortgagor replies that the deeds were deposited at his bankers' for safe custody, but as a matter of fact they had been deposited by way of mortgage, it would be negligent of the mortgagee before advancing money to inquire of the bankers if they had been so deposited.(9) Indeed, a good ground for non-delivery of deeds is not necessarily a good ground for non-production.(10) Law deems all persons circumspect and not too confiding, and the old legal adage embodies a great truth when it declares that "He who trusts most shall suffer most."

(4) Negligence against negligence.

1784. A party himself negligent cannot impute another with the consequence of negligence, or as has been said, that the argument of negligence against negligence, like that of estoppel against estoppel, sets the matter at large.(11) The mortgagee *A* assigned his mortgage to the plaintiff who gave no notice of his assignment to the mortgagor, who paid the mortgage-money to *A's* solicitor, who in this

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(1) Sch. 1, Ord. XXI, Rule 66, Act V of 1908. *Ramchandra* v. *Jairam*, I. L. R., 22 Bom., 686.

(2) *Durga Prasad* v. *Sambhu Nath*, I. L. R., 8 All., 86.

(3) *Anundo Mayee* v. *Dhonendro Chunder*, 14 M.I.A., 101; but see *Manly* v. *Patterson*, I.L.R., 7 Cal., 394 (399).

(4) Story on Agency cited in *Gordon* v. *James*, 30 Ch. D., 249 (258); see s. 41, Comm., §. 488.

(5) *Balakrishna* v. *Vyankatrao*, (1875) B. P. J., 13; *Shivram* v. *Saya*, I. L. R., 13 Bom., 229.

(6) *Naro* v. *Balaji*, (1880) B. P. J., 303; *Anant* v. *Ariun*, ib., 293; *Wamanji* v. *Amba*, (1881) B P.J., 117.

(7) *Arnold* v. *The Cheque Bank*, 1 C.P.D., 578; *Swan* v. *North British Australasian Co.*, L.R 2 Ex., 654.

(8) *Jones* v *Williams*, 24 Beav., 47.

(9) *Per* Jessel, M.R., in *Maxfield* v. *Burton*, L.R., 17 Eq., 15 (19).

(10) *Oliver* v. *Hinton*, [1899] 2 Ch., 264.

(11) Fisher, § 1194 citing Co., Ltd. 352*b*.

transaction had acted both for the assignor and plaintiff assignee, without ascertaining his authority to receive it for *A*. The solicitor misappropriated the money, but prepared a reconveyance which *A* signed without reading it under the impression that it was the deed of assignment of his mortgage to the plaintiff. The plaintiff sued on his assignment and Lord Hatherley, L. C., gave him the decree holding that if the plaintiff gave the defendant no notice of his assignment, the latter had paid the mortgage money to a solicitor without inquiring of his authority and who had in fact none to receive it, and that if both parties were guilty of laches, the defendant was the more so and that therefore law must take its normal course.(1) In another case the plaintiff sold his land to the defendant to whom he delivered possession. He executed a deed of conveyance which together with the title-deeds remained with the common solicitor of both parties. The plaintiff had not been fully paid, but the solicitor credited him in his books with the unpaid purchase-money in anticipation of payment by the defendant. The solicitor having absconded, the plaintiff sued the defendant for the purchase-money and enforcement of his lien, whereupon each party charged the other of laches, the plaintiff charged the defendant for neligence for not taking possession of the title-deeds and conveyance, while the defendant charged the plaintiff for not realizing the payment more promptly, but Sir John Romilly, M. R. held both parties to have confided in their common agent and setting off the laches of one against the other decreed the lien. (2)

1785. The prior mortgagee may be displaced in favour of a subsequent mortgagee on account of his laches in enforcing his security.(3) But mere delay in completing the legal title will not, in the absence of fraud or neligence, prejudice the right.(4) So the mortgagee cannot be postponed in favour of a second mortgagee, merely because he omitted for a period of four years to enforce his right to enter on the property. (5) Mere delay however long in prosecuting one's legal right, can never be a sufficient ground for refusal of a legal remedy any more than for displacing one's priority. (6) Laches means an omission to do something which by law a man is obliged to do. Laches as such may bar a remedy in the discretion of the Court. (7) But to bar a legal remedy, it must amount either to waiver, abandonment or acquiescence which must be proved by plain and unambiguous evidence.(8) No person can suffer on account of laches unless he was bound to act in a particular way but did not, and thereby another stands to lose unless his security is postponed. The owner of a lease-hold premises held by him for a term of 1,000 years charged them with the payment of certain moneys drawn from a bank (*A*) and deposited the lease as security. He then mortgaged the premises by sub-demise, expressly subject to the bank's charge. The latter (*B*) did not give the bank notice of his mortgage. The mortgagor subsequently without the knowledge of *B* paid off *A* obtained the lease from them and deposited it with another bank(*C*) who advanced him money on its security. *C* had no notice of *B's* mortgage. *C* disputed *B's* priority on the ground that in not

(5) Laches in enforcing right.

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(1) *Willington* v. *Tate*, L. R., 4 Ch. 288 (292).

(2) *Wrout* v. *Dawes*, 26 Beav., 369 ; 53 L. R. 678 (682).

(3) *Wigram* v. *Buckley*, [1894] 3 Ch., 483 (495) ; *Searle* v. *Colt*, 1 Y. & C. C., 36, which was, however, a case of limitation and laches.

(4) *Harlock* v. *Prestley*, 2 Sim., 75.

(5) *Bhagabai (Mt)* v. *Zalim Singh*, (1886) C.P.S.C. No. 27.

(6) *Nerbudda Prasad* v. *Gokuldas*, 1 N. L. R. 158.

(7) *Uda Begam* v. *Imamuddin*, I. L. R., 1 All. 82.

(8) *Peer Mahomed* v. *Mahomed*, I.L.R. 29 Bom., 234 ; *Archbold* v. *Scully*, 9 H. L. C., 360 ; Laches apart from limitation is no bar to a legal remedy. *Kissen Gopal* v. *Kally Prosonno*, I.L.R. 33 Cal. 633.

giving *C*, notice of his prior mortgage *B* had been guilty of negligence or want of caution. It was proved that the mortgagor had informed *B's* son of a certain payment made by him to *A* and which it was contended put *B* upon inquiry and which should have led him to infer that the mortgagor might after redeeming *A* create another charge, but the Court held that in relation to *A*, *B* was a second mortgagee and that he was under no legal obligation to give him notice of his mortgage,[1] and, it may be added, that even if *B* were under an obligation to give notice to *A* which he did not, how could it affect his priority over *C*, which the latter claimed. As regards notice the rule as applied to banker and customer is that where a current account is kept by a bank and communicated to the customer, in the absence of any specific appropriation by either party, the payments are appropriated according to the priority in order of the entries on the one side and on the other of the account. Until the account is communicated to the customer the bank continues to have the option of applying the several payments as it thinks fit, but after communication by means of a pass-book or otherwise, the bank cannot resile from the mode of appropriation according to the priority as already stated.[2] It is, of course, absolutely necessary for the application of this doctrine that there should be one unbroken account, and entries made in that account by the person having the right to appropriate the payment to that account.[3] This rule is not the rule of law but rather a presumption of fact, which may be rebutted in any case by showing that it was not the intention of the parties that it should be so applied. *A* mortgaged his business premises, first, in 1893 to *B* to secure an overdraft on his current account limited to £2,500, and, secondly, in 1895 to *C* to secure £5,500 and which was expressed to be subject to *B's* mortgage. A made payments from time to time which if applied according to the rule in *Clayton's case* above set out, would have paid off *B's* mortgage by January 8, 1896. But *B* had forgotten about the notice, and *C* believed that *B's* was a continuing security in priority to his own. *B* never allowed *A* to overdraw beyond the secured amount except temporarily on deposit of fresh security. On several occasions *C* deposited his mortgage with *B* to secure *A's* account. In 1896 and 1897 *A* made several payments towards specific items without any alteration being made in the form of the account as shown by the pass-books. In June 1899, *B* realized his security for a sum just sufficient to pay the amount due to them and retained the proceeds of sale, and in the same year *A* was made bankrupt. *C* at that time made no claim to priority and induced *B* to give up a claim under a collateral guarantee given to *B* at the time of his mortgage, on the representation that the discharge of the mortgage put an end to the guarantee, and thereupon *C* obtained a release of a counter guarantee which he had given to the guarantee. In April 1905 *C* sued *B* for the usual accounts as against the mortgagee in possession, and for a declaration that in taking these accounts *B* was not entitled to charge for advances made to *A* after notice of the mortgage to *C*, which the Court allowed holding that *C* had gained priority on January 8, 1896, when *B's* original advance had been paid off, and that there was nothing in *C's* subsequent conduct to deprive him of it, the fact that all concerned acted in real ignorance of their rights would not deprive *C* of his priority, and that the fact *B* continued to advance money to *A* having forgotten *C's* notice could not confer upon him any priority over *C's* advances made after notice to *B*.[4]

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(1) *Grierson* v. *National Provincial Bank*, [1913] 2 Ch., 18.

(2) *Clayton's case*, 1 Mer. 572.

(3) *Per* Lord Selborne in *Sherry's case*, 2 B & Al. 39.

(4) *Deeley* v. *Lloyd's Bank*, [1912] A.C. 756.

1786. Mistake may sometimes lead to the same result as negligence. Thus, where the owner executed a lease in which he misstated the rent to be 130*l.* instead of 230*l.*, a mortgagee from the lessee without notice of the mistake was held to be liable to no higher rent.[1]

(8) Mistake.

But a mistake which is not past rectification does not deprive a mortgagee of his priority. The owner of a farm (*A*) executed two successive registered mortgages in favour of *B* and *C*. *B* having pressed *A* for payment agreed to sell it to his daughter *D* who consulted a solicitor *E* and who introduced her to *F* who agreed to finance *D* to pay off *B* on the first mortgage of the farm. *E* received the money paid off *B* and obtained from him the title-deeds on *F's* behalf. *A* did not disclose *C's* mortgage either to *F* or his solicitor, who prepared three deeds which were duly executed and registered, one of them was a recoveyance by *B* to *A* and another being a mortgage to *F*. *C* sued *F* claiming priority on the ground that inasmuch as the first mortgage had been satisfied and the property reconveyed to *A* who having conveyed it to *D* who in her turn mortgaged it to *F* after *C's* own mortgage *F* could claim no priority, but the Court held that inasmuch as *F* had agreed only to advance money on the first security of the farm which he would have acquired either by subrogation or proper conveyance if *A* had not suppressed from him the knowledge of *C's* mortgage, and that since *F* could still sue for rectification of the mistake into which he had been misled by the misconduct of *A* he did not forfeit his priority which he would otherwise possess by reason of his having paid off the first charge of B. [2]

1787. The effect of notice on priority has been already considered at length before (§§ 103—170). Indeed, it is in this connection that the doctrine of notice has established its importance in the law of property. When adverse titles are in competition, notice may not only be a good sword, but also a good shield to contending claimants.

(7) Notice.

In the case of an equitable assignment service of notice is the starting point for determining priority. [3] Where the subject of the equitable incumbrance is an expectancy or possibility, notice is necessary, and priority goes according to the date of the receipt of the notice, or as between notices of even date, according to the priority of the date of the charge. [4]

1788. An assignee who has given notice to one only of several trustees, is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice has been given. [5] In other words, in a contest for priority between the assignees of an interest in a trust-fund where one only of several trustees has notice of an assignment and dies, a subsequent assignee who gives notice of his assignment to the then existing trustees is entitled to priority over the prior assignee. [6] But an assignee who has given notice to all the trustees in existence at the time of his assignment is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees. [7]

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(1) *Garrard* v. *Frankel*, 30 Beav., 445.
(2) *Whiteley* v. *Delaney*, [1914] A. C. 132 (146); reversing C. A. *Manks* v. *Whiteley* [1912] 1 Ch. 735.
(3) In re *Lake*, [1903] 1 K.B., 141 (153).
(4) In re *Dallas*, [1904] 2 Ch., 385 (395).
(5) *Freeman* v. *Laing*, [1899] 2 Ch., 355 (358); In re *Phillipps' Trusts*, [1903] 1 Ch., 183 (187).
(6) *Timison* v. *Ramsbottom*, 2 Keen, 35; In re *Phillipps' Trusts*, [1903] 1, Ch., 183.
(7) *Per* Stirling, J., In re *Wasdale*, [1899] 1 Ch., 163.

1789. In a contest between two purchasers of a mortgaged property, priority would be determined according to the date of possession. Thus, where the owner mortgaged his land to *A* in October 1890, and to *B* in 1893, the latter enforced his mortgage in 1895, and in execution of his own decree purchased the mortgaged property and obtained possession in July 1897. Two years later in 1897, *A* sued, and following a similar course, obtained possession in November 1898. *A* then sued *B* for possession, and it was held that as between the two purchasers the question of priority must be determined not by reference to the date of the mortgages, but according to the dates of the sales and recovery of possession. Consequently, as a purchaser *A* could not oust *B*, he being, however, entitled to maintain another suit to enforce such rights as he might have on the strength of his mortgage. (1)

(8) Waiver.

1790. A person may waive or consent to the postponement of his priority. But when a mortgagee consents to postpone his security at the instance of the mortgagor in order to enable him to obtain a further advance from the first mortgagee on the security of the mortgaged property, the Court will infer an implied promise by the mortgagor to indemnify the mortgagee against any resulting loss. (2) If, therefore, the mortgagor becomes bankrupt, and the property is afterwards sold by the first mortgagee, but the proceeds of sale are insufficient to pay the whole amount due to him, though they exceeded the amount of the first mortgage, the second mortgagee would be entitled to prove in the bankruptcy proceedings for the amount which he would have received out of the proceeds of sale if he had not consented to postpone his charge. (3)

1791. Debenture.—Debentures in a company issued subject to "debentures already issued" rank after them, though in fact the first series may have been actually issued after creation of the second. But ordinarily the priority is determined by the date of issue. (4) The issue of debentures is now regulated by the Statute under which the company is formed or incorporated. (5) Some of these enactments declare debentures to rank *pari passu*, but which, however, would be the case if the debentures contain a provision to that effect. But no company can give priority over debentures already issued by it. (6)

1792. Agent's Fraud binds Principal.—The prior mortgage is not only liable to forfeit his priority by reason of his own misrepresentation and fraud, but also on account of the conduct of his agent, such as for example, his solicitor. "Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon." (7) In this respect the law is the same as has been before discussed in connection with the subject of notice. (§§ 169, 170).

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(1) *Akati* v. *Chirayil*, I. L. R., 26 Mad., 486; *cf. Narayan* v. *Nathaji*, I. L. R., 28 Bom., 201.

(2) *Per* Lord Esher, M. R. (Cotton & Lindley, L. JJ., concurring) in *ex parte Ford*, 16 Q.B.D., 305, (307, 308).

(3) *Ex parte Ford*, 16 Q.B.D., 305.

(4) *James* v. *Boythorpe Colliery Co.*, (1890) W.N., 28.

(5) *E. g.* Railway Companies Act, 1867 (30 & 31 Vict., c. 127, s. 23), Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 16, s. 42), Companies Clauses Act, 1863 (26 & 27 Vict., c. 118, s. 24).

(6) *Brunton* v. *Electrical, &c., Corporation*, [1892] 1 Ch., 434.

(7) *Per* Lindley, L.J., quoting Story on Agency in *Gordon* v. *James*, 30 Ch. D., 249 (258).

1793. The section has no application and cannot be used to defeat the rights of a person who has obtained indefeasible title to the property, as by continuous possession or prescription. (1)

Mortgage to secure uncertain amount when maximum is expressed.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made are allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, *B & Co.*, to secure the balance of his account with them to the extent of Rs. 100,000. *A* then mortgages Sultanpur to *C*, to secure Rs. 10,000, *C* having notice of the mortgage to *B & Co.*, and *C* gives notice to *B & Co.* of the second mortgage. At the date of the second mortgage, the balance due to *B & Co.*, does not exceed Rs. 5,000. *B & Co.*, subsequently advance to *A* sums, making the balance of the account against him exceed the sum of Rs. 10,000. *B & Co.*, are entitled to the extent of Rs. 10,000, to priority over *C*.

1794. Analogous Law.—This section has been enacted in accordance with the recommendation of the Law Commissioners (2) who regarded it as "more just" than the English doctrine (3) which is opposed to the present section. As originally drafted, the section was restricted to mortgages made to secure running accounts. The Law Commissioners of 1879, however, enlarged it to mortgages to secure further advances, and the performance of engagements.(4)

As the mortgage must beforehand express "the maximum to be secured thereby" the section is obviously inapplicable to mortgages made to secure a *general balance* of a floating account, without any maximum amount being fixed, and which would be postponed to the second mortgage under the provisions of the next section. There is no pre-existing authority for this section which introduces a novel rule, but which, however, was justified by Lord Cranworth in his dissentient judgment(5) in a leading precedent(6) which has established the contrary doctrine in England. "Mortgages," he observed, "are but contracts; and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. If the law is once laid down and understood, that a person advancing money on a second mortgage, with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of. He is aware when he advances his money, of the imperfect

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(1) *Nallamuttu* v. *Baitha Naickan*, I. L. R., 23 Mad., 37.

(2) 5th Rep., dated 20th May, 1870, § 12.

(3) *Hopkinson* v. *Rolt*, 9 H. L. C., 514; affirming the decision in *Rolt* v. *Hopkinson*; 25 Beav., 461; followed in *London & County Banking Co.* v. *Ratcliffe*, 6 App. Cas., 722; *Bradford Bank* v. *Briggs*, 12 App. Cas., 29; *Burgess* v. *Eve*, 13 Eq, 450; *Union Bank* v. *National Bank*, 12 App. Cas., 53; *Bank of Africa* v. *Salisbury Co.*, [1892] A. C., 281; Re *Keogh*, [1895] 1 Ir. R. 201; *West* v. *Williams*, [1898] 1 Ch., 488; C. A., [1899], 1 Ch. 132; *Deely* v. *Lloyds Bank*, [1912] A.C. 756 reversing [1910] 1 Ch. 648; which see discussed under s. 78.

(4) Rep., dated 15th November, 1879, § 34.

(5) *Hopkinson* v. *Rolt*, 9 H.L.C., 514 (540), 11 E.L R., 829 (840).

(6) *Hopkinson* v. *Rolt*, 9 H.L.C., 514.

nature of his security and acts at his peril."(1) This may be regarded as an expression of opinion vindicating the rule, but it is an opinion which was overruled by the majority of the House of Lords and has never been since acted upon in England.

English law distinguished.

1795. English law enacts a rule under which the first mortgagee cannot take the future advances made by him in pursuance of the covenant made in the original mortgage if the further advances were made by him *with notice* of the second mortgage, even though the second mortgage may have been made with notice of the first mortgage. In other words, English law confers priority upon the prior mortgagee not in virtue of his deed, but with reference to whether he had or had not notice of the subsequent mortgage at the time he made the further advance.

Under the section, however, if the mortgage contains a covenant entitling the mortgagee to tack the subsequent advances up to a maximum stated therein, he is entitled to do so irrespective of any notice which he may receive from the subsequent mortgagee of his mortgage. Thus, suppose *A*, the mortgagor, executes a mortgage to *B* for Rs. 1000, securing the balance of his account with *B* up to that extent. *B* advances Rs. 500 after which *C* takes another mortgage giving notice to *B*. Now under the English law, if, after this notice, *B* pays the other Rs. 500, his subsequent payment will rank after *C's* mortgage. But under the section since *A* has secured Rs. 1,000, *B* can, in spite of notice by *C*, make the subsequent advance of Rs. 500, and which will have priority over *C's* mortgage. The Law Commissioners in their sixth Report justify the departure from the English law as "more just,"(2) but it would appear that, in not a few cases, the rule would be more unjust than just to the mortgagor. For suppose in the above illustration *A* wants his Rs. 500 as a "subsequent advance" from *B*, which the latter refuses (for under the section, the mortgagee is not bound to make the advance) and *A* turns to *C*, who being aware of *B's* assured priority to the extent of Rs. 1,000, may not care to risk his money upon the security of property which may not be worth much more than *B's* incumbrance. But if the English rule had prevailed under similar incumbrances, *C* might have been induced to advance the Rs. 500 which *B* will not lend. The doctrine then amounts to a perpetual curb on the mortgagor's right to incumber the equity of redemption; and as such it is contrary to the general principles of equity that a mortgagee should, by thus taking a security for advances which may never be made, put a pressure on the mortgagor, by taking away his power of raising money from other persons; the first mortgagee being never bound by such a clause to make further advances at the mortgagor's pleasure. (3) This objection to the rule could have been provided against by limiting its operation only to cases where the mortgagee can be compelled to make the subsequent advances up to the maximum fixed, and then the section would have been more in harmony with the English law. (4)

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(1) *Hopkinson* v. *Rolt*, 9 H.L.C., 514 (540). Lord Cranworth held that his views were justified by the authorities of *Gordon* v. *Graham*, 2 Eq. Cas. Abr., 508; *Marsh* v. *Lee*, 1 Ch. Ca., 162; *Johnson* v. *Bourne*, 2 Y & C. C. C., 268. But the reports of these cases are meagre and misreported and were condemned by the majority of the Court in *Hopkinson* v. *Rolt*, 9 H.L.C., 514 (532). See *per* Lord St Leonards in *Blunden* v. *Desert*, 2 Du. & War., 405 (431); *Shaw* v. *Neale*, 6 H. L.C., 581 (597). Anyhow the cases were overruled by the Court in *Hopkinson* v. *Rolt*, 9 H.L.C., 514 (536).

(2) P. 12.

(3) Fisher, §. 1157.

(4) *West* v. *Williams*, [1898] 1 Ch., 488; C.A. [1899], 1 Ch., 132.

1796. Principle.—The principle of the section has been already enunciated before in the words of Lord Cranworth (§1794). The principle of the English rule is, however, more in harmony with reason, and the reasoning upon which it is established may be given in the words of Lord Campbell, L.C., who said: "How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. He has only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security. The benefit of the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another, consistently with the rights of the first mortgagee. Thus far the mortgagor is entitled to do what he pleases with his own. The consequence certainly is, that after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puisne* incumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make further advances to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances, with notice of the first mortgage; for, by the hypothesis, each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse further advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and when this notice comes, the bankers have only to consider as they do, as often as they discount a bill-of-exchange, what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or loss." (1) This doctrine is not excluded by the custom of a trade. (2)

1797. Meaning of Words.—"*If a mortgagee....expresses the maximum to be secured thereby*:" The fixing a maximum limit secured by the mortgage does not necessarily create any obligation on the mortgagee to advance up to that limit. It is merely a security for "future advances" which may or may not be made (§1796). As it is, the section is intended to apply only to cases where *the maximum* is fixed and secured by the mortgage. Hence, where the mortgage is given for an undefined sum, as to secure a general balance of a floating account without the maximum amount being fixed, the section will be clearly inapplicable. "*If made with notice of a prior mortgage*:" For if the subsequent mortgagee has no notice of the prior mortgage he cannot be postponed. (3)

1798. Tacking of further Advances.—The tacking of future advances by prior mortgagee allowed by this section is made subject to two conditions, *viz.*, (i) the mortgage should express the maximum amount of future advances thereby secured, and (ii) the subsequent mortgagee should have taken with notice of the prior mortgage and thus of the covenant as to the future

(1) *Hopkinson* v. *Rolt*, 9 H. L. C., 514 (534, 535).
(2) *Dunn* v. *City of London Brewery Co.*, L.R., 8 Eq., 155.
(3) See s. 48 and Comm.

advances.[1] The maximum amount must be expressly secured, otherwise the rule will not apply ; and if it is so specified, the security will only extend to the extent of the maximum, any sum advanced in excess thereof being entitled to no protection.[2]

1799. The effect of notice on subsequent advances is noteworthy. For while according to the English doctrine the notice of the first mortgage on the part of the second mortgagee is immaterial; what is material being notice by the first mortgagee of the second mortgage; whereas according to the section, the latter is immaterial, the only thing material being notice of the second mortgage by the first mortgagee. Thus then while in England a purchaser of the equity of redemption is not bound to inquire whether any future advances have been made after the mortgagee has notice of the sale, [3] a purchaser in India would find such an inquiry indispensable for the purpose of determining the extent of his own liability. On the 28th September 1900, the owner of certain properties mortgaged them to the plaintiff to secure the due performance by them of their engagement to pay rent in respect of a certain lease granted by the plaintiff to the mortgagor, who thereafter executed another mortgage of the same properties on 12th October 1900, in favour of the defendant. As the mortgagor defaulted in paying rent, the plaintiff sued the mortgagor and the puisne mortgagee on foot of his mortgage which was expressed to be for Rs. 15,539. The puisne mortgagee opposed the plaintiff's claim for priority on the twofold grounds mentioned in the section, *viz.*, (*a*) that the mortgage did not express the maximum amount secured on account of the performance of the engagement and (*b*) he had no notice of the prior mortgage. The Court did not go into the first question but decided with the puisne mortgagee on the second on the ground that since the plaintiff's mortgage was registered on the 11th October, 1900 only a day previous to that of the defendant, the latter could have had no notice of it at any rate when the contract for the loan was completed. [4] They had to decide this question in another case between the same parties in which the mortgagor had taken a lease from the plaintiff of a number of villages for a term of nine years upon an annual rent of Rs. 12,125, and to secure the payment of which he had on the 14th June 1900 executed a mortgage the terms of which were renewed in another mortgage dated 20th April, 1908. Meanwhile on the 12th October, 1900 the mortgagor executed another mortgage in favour of the defendant who resisted the plaintiff's claim for priority on the two grounds already set out. But in this case the Court had to go into the first question whether the deed had expressed the maximum which it held it had on the principle *certum est qui certum reddi potest*, that is to say, though the maximum was not expressly stated, the statement that the security was for punctual payment for nine years of the annual rent of Rs. 12,125 was sufficient compliance with the law.[5] It would thus seem that the maximum might be expressed without the amount being expressly mentioned. Thus in the case last cited the maximum amount secured was Rs. 1,09,125 though it was not expressly so stated.

1800. The covenant as to further advances enures for the benefit of not only the mortgagor, but also his assignees. An advance made *bona fide* even

(1) *Dalip Narain* v. *Chait Narain*, 16 C.L. J., 394 ; *Dalip Narain* v. *Chait Narain*, *ib.*, 401.

(2) See Illus.

(3) *London & County Bank* v. *Ratcliffe*, 6 App. Cas., 722.

(4) *Dalip Narain* v. *Chait Narain*, 16 C. L.J., 394 (399, 400). The report does not set out the terms of the mortgage to enable one to pronounce on the first question.

(5) *Dalip Narain* v. *Chait Narain*, 16 C. L.J., 401 (403).

to a person wrongfully in possession of the equity of redemption, would be allowed to be tacked if the mortgagee had no notice of the bad title.(1) And so advances made even after an act of bankruptcy would be protected if they were made in good faith and without notice.(2) But a further advance made to the mortgagor after he has parted with the equity of redemption cannot be tacked,(3) unless the assignee has been guilty of laches or standing by, as where he allowed the mortgagee to make further advances under the supposition that he was still the owner of the equity of redemption. For instance, if the property was standing in the mortgagor's name in the collector's books, and the assignee allowed it to so remain after the assignment, it would be sufficient to render him liable.(4)

1801. A covenant may fall short of creating a further charge, but it may be still sufficient to prevent the original mortgagor from redeeming without paying further advances.(5) Further advances cannot be tacked against a surety in prejudice of his right on payment of the debt to have a transfer of all the securities.(6) The mortgagee can sue on a mortgage-bond executed to secure future advances even though the sums realized by him exceed the sum secured. Thus if the advance secured is Rs. 10,000, there is nothing against the mortgagee's making future advances not exceeding that sum, and in that case the re-payments would necessarily exceed that amount. (7)

Subsequent advances on the mortgage of moveables.

1802. No provision is made in this Act or the Contract Act with regard to the mortgage of movable property. In England, however, the Bills of Sale Acts provide for such mortgages, and it is apprehended that Indian cases will, therefore, be judged in the light of English cases on the subject, and if subsequent advances are made on the mortgage, the rule in *Hopkinson* v. *Rolt*, (8) and not the section which applies only to moveable property, would appear to be applicable. The hypothecation of future crops is a valid contract to assign the crops when they shall come into existence, but such contract is not enforceable against a transferee without notice of the lien. (9)

Tacking abolished.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the cases provided for by section seventy-nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

1803. Analogous Law.—In England the doctrine of *tacking* was abolished, by the Vendor and Purchaser Act, 1874, section 7, but it has now been

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(1) *Young* v. *Young*, L.R., 3 Eq., 801.
(2) Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 49.
(3) *Bhagwandas* v. *Shamdas*, I.L.R., 23 All., 429.
(4) *Govindrav* v. *Ravji*, I.L.R., 12 Bom., 33 (36).
(5) *Hari* v. *Balambhat*, I.L.R., 9 Bom. 233.
(6) *Forbes* v. *Jackson*, 19 Ch. D., 615; *Newton* v. *Charlton*, 10 Hare, 646, *contra* in *Williams* v. *Owen*, 13 Sim., 597.
(7) *Harendra Lall* v. *Tarini Charan*, I. L. R., 31 Cal., 807.
(8) 9 H.L C., 514; and see *West* v. *Williams*, [1898] 1 Ch., 486; C.A., [1899] 1 Ch., 132.
(9) *Sukhnandan* v. *Sadaram*, 13 C. P. L. R., 43.

again restored by the repeal of that enactment by the Land Transfer Act of 1875,[1] except with regard to lands in Yorkshire, where it has been abolished by the Yorkshire Registries Act, 1884.[2] It does appear that the doctrine was much, if at all, in favour with the Courts of this country even before the Act. In the mofussil the doctrine was certainly never applied.[3] Thus in one case Jackson, J., said: "The special appellant asks us to apply the principle of the English law of mortgage which enables a mortgagee to tack on to the amount of his mortgage, any further liability of the mortgagor to him, a principle which he does not show us, has been ever recognized or adopted in the decision of the Court of this country."[4] In this view the marginal note to the section is incorrect, for if tacking never obtained in India, it cannot be said to have been *abolished* by the section. The correct marginal note would appear to be "Tacking disallowed." The provision was introduced by the Law Commissioners.[5] For the difference between *consolidation* and *tacking*, see the commentary on section 61, and with which this section may be generally compared.

1804. In certain cases decided before the Act, the practice of tacking bonds of subsequent date to the original mortgage rendering it thereby liable for the discharge of the aggregate amount was recognized by the Courts.[6] In such cases the debtor engaged to pay off the subsequent advances before liquidating the mortgage loan, and the property was then held to remain saddled with that liability, and the mortgage could not be separately redeemed. Such indeed is the trend of modern cases (§ 1809), but with this notable difference that while in the earlier cases such covenants were regarded as empowering the mortgagee to tack the two debts and which would necessarily affect mesne incumbrancers, the view now taken is that such a covenant though enforceable only creates a personal equity which cannot affect other incumbrancers. Such a covenant does not then confer the right of tacking in the sense in which that term is used in the legal vocabulary. It is only enforceable against the mortgagor and his representative in title.[7]

1805. Principle.—The doctrine of tacking is altogether contrary to any principle of equity, the essence of which is equality, and it is in fact only founded upon the preference which in England is shown to legal titles. The principle[8] of it is, that where there is a legal title and equity in one man, he shall not be hurt by reason of a mere prior equity in another; and its effect is merely to change the order of priority, and not to alter the mode of discharging the securities by combining the debts, and paying the interest on both in the first instance, instead of the interest and principal of each in succession.[9] The effect of the English doctrine is as against the mortgagor, to prevent him from redeeming

(1) 58 & 59 Vict., c. 87, s. 129.

(2) 47 & 48 Vict., c. 54, ss. 14 & 16.

(3) *Udaya Chandra* v. *Bhajahari*, 2 B. L. R. (App.). 45; 11 W R., 310; *Gour Narain* v *Braja Nath*, 5 B. L. R. (A. C.), 463; 14 W.R. 491; *Goluknath* v. *Lalla Prem Lall*, I L R., 3 Cal., 307; *Rama* v. *Martand*, (1880) B.P J., 201; *Narayan* v. *Pandurang*, I. L. R , 7 Bom., 526; *Hari Mahadaji* v. *Balambhat*, I.L.R., 9 Bom., 233; *Narsingrao* v. *Narayanrao*, (1890) B. P. J., 211; *Sirbadh Rai* v *Raghunath*, I.L.R., 7 All., 568 (573).

(4) *Udaya Chandra* v. *Bhajahari*, 2 B. L. R. (App.), 45; *Sirbadh Rai* v. *Raghunath*, I.L.R 7 All., 568 (573).

(5) Sixth Rep., dated 28th May 1870, § 12.

(6) *Khyratee Ram* v. *Mt. Chenoo*, [1853] S D. A., N.-W.P., 726; *Hanuman Prasad* v *Sheonarayan*, (1860) S. D. A., N.-W.P., 122. The case of *Vithal* v. *Daud Muhammad*, 6 B H.C.R (A.C.), 90, was a case of consolidation since abolished.

(7) *Allu Khan* v. *Roshan Khan*, I L. R., 4 All., 85.

(8) See *Marsh* v. *Lee*, 1 Ch., 162; *Morret* v. *Paske*, 2 Atk., 52; *Worthy* v. *Birkhead*, 2 Ves., 571; *Belchier* v. *Renford*, 5 Bro., P. C., 293; *Rooper* v. *Harrison*, 2 Kay & J, 86.

(9) *Latouche* v. *Dunsany*. 1 Sch. & Lef., 163; *Montgomery* v. *Donohoe*, 5 Ir., Ch., 495.

until all the debts are paid, as against the mortgagee to squeeze out those not possessing legal estates. Thus, suppose *A* mortgages his property to *B*, *C* and *D* in succession. Now, ordinarily *B*, *C* and *D* will rank successively, and *A* can redeem any one mortgage independently of the others. But if *D* acquires *B*'s mortgage, even with the notice of *C*'s incumbrance (1), he can in England *tack* on or join thereto his original mortgage and thus not only for the purpose of *B*'s but his own mortgage acquire priority against *C*, and, on the other hand, compel the mortgagor to redeem his amalgamated mortgage, or not at all. This undeserved priority of *D*'s was characterized by Hale, C. J., (2) as a "plank" gained by the third mortgagee, called a *tabula in naufragio*. (3) The last section gives another instance of the doctrine which has, except for that section, (4) now authoritatively been abolished.

1806. Meaning of Words.—"*Paying off a prior mortgage*:" *i. e.*, redeeming it in exercise of his right under section 75. "*Except in the case provided for by section* 79:" which is an exception to the section.

1807. Tacking when still allowed.—Although tacking, as such is now formally abolished, still it is open to the mortgagor at any time to covenant not to redeem the prior mortgage in favour of the same mortgagee, until payment of the bond-debts, in which case the Courts have held that although the subsequent bonds cannot create a further charge on the property, still the mortgagor could not be allowed to redeem without paying their amounts. (5) If the subsequent bonds provide for an express charge, it is held that "the provisions are satisfied by construing them as intended to make the equity of redemption conditional on the payment of both the debts." (6) But in the absence of any express covenant, no presumption arises in favour of tacking. Where the owner of certain property mortgaged it twice over to the same person in 1861 and 1874, the earlier mortgage being unregistered, he having in the interval in 1873 created another mortgage in favour of another person *B*, who sued and obtained a decree for possession, but being resisted in execution by *A*, sued him for ejectment and possession of the property until he was paid off the amount due on his mortgage, and thereupon *A* claimed priority over *B* by tacking on his two mortgages. But the Court disallowed the contention by holding that the obligation arising out of the successive mortgages should be discharged in the order of their debt, and that consequently *A* could claim to hold the property only till his first mortgage should be paid off. (7) But such a covenant cannot ordinarily be enforced against the mortgagor's assignee, or purchaser for value. But in special circumstances in which the creditor has some equity against the subsequent purchaser, tacking would be permitted, so as to avoid multifariousness. (8) Hence it has been held that the mortgagee may tack his unsecured debt in an administration-suit against the volunteers and the mortgagor's heirs after his

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(1) *Jennings* v. *Jordon*, 6 App. Cas., 698; *Sangster* v. *Cochrane*, 22 Ch. D., 298.

(2) See *Brace* v. *Duchess of Marlborough*, 2 P. Wms., 491; also *Marsh* v. *Lee*, 1 Ch. Cas., 162; *Blackwood* v. *London Chartered Bank*, L.C., 5 P.C., 92 (111).

(3) *I.e.*, "a plank in a wreck."

(4) *Unni* v. *Nagammal*, I. L. R., 18 Mad., 368.

(5) *Hari Mahadoji* v. *Balambhat*, I.L.R., 9 Bom., 233; *Yashwant* v. *Vithoba*, I.L.R., 12 Bom., 231; *Tajjo Bibi* v. *Bhagvan Prasad*, I.L.R., 16 All., 295; see also s. 61 & comm.

(6) *Yashwant* v. *Vithoba*, I.L.R., 12 Bom., 231; followed in *Unni* v. *Nagammal*, I.L.R., 18 Mad, 368 (371).

(7) *Narayan* v. *Pandurang*, I L.R., 7 Bom. 526.

(8) *Unni* v. *Nagammal*, I.L.R., 18 Mad., 368 (373); *Ragho* v. *Balwant*, I.L.R., 7 Bom., 101; but see *Allu Khan* v. *Roshan Khan*, I. L.R., 4 All., 85.

death.[1] For similar reasons in a case where the defendants had executed a mortgage in favour of the plaintiff, and handed him the title-deeds of the mortgaged property, and where he subsequently advanced a further sum to the defendants who agreed that the plaintiff should retain the title-deeds already held by him as a security for the repayment of the further advances, there being no fresh deposit of the deeds, it was held that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advance.[2] But in this case tacking could hardly have been permitted if it had prejudiced a mesne incumbrancer or other mortgagee.[3] A mortgagor who has sold the equity of redemption in property mortgaged by him cannot afterwards charge such property with a further debt, so as to render the purchaser of the equity of redemption liable to pay such debt before he can redeem. In other words, the mortgagor cannot derogate from the title which his vendee had acquired by his purchase. He could not by creating subsequently to that purchase, any further charge or mortgage, impose any additional burden on him.[4] Where priority would defeat the prvision of this section, it cannot be obtained under section 73 (*c*) of the Civil Procedure Code.[5] Of course, there can be no tacking, when all the mortgagors do not join in creating the further charge. If, for example, property is mortgaged by several co-owners jointly, and a further mortgage is made in favour of the mortgagee by one of the mortgagors, the other mortgagors do not become thereby liable to pay the whole or any portion of the further charge when suing for redemption of the original mortgage.[6]

Tacking under ss. 72, 79.

1808. In addition to the cases provided in section 79, the mortgagee can validly tack to his debt the expense incurred by him and specified in section 72, since it is not a subsequent advance made to *the mortgagor* within the contemplation of the section. All these are instances of tacking permitted as between the mortgagor and mortgagee only, and therefore not within the mischief the section was intended to cure.

This section does not exclude the application of the principle laid down by the Privy Council,[7] and which will have to be discussed under section 101.

1809. English Doctrine of Tacking.—The doctrine of tacking is the outcome of the preference shown by the Courts of Equity to legal over equitable estates.[8] In the words of Lord Hardwicke "it could not happen in any other country but this, because the jurisdiction of law and equity is administered in different Courts, and creates different kinds of rights in estates; and therefore, as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity on one side, the Court of Chancery never thought fit that by reason of a prior equity against

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(1) *Ragho* v. *Balwant*, I.L.R., 7 Bom., 101 (103); following *Rolfe* v. *Chester*, 20 Beav., 610.

(2) *Girendra* v. *Kumud Kumari*, I.L.R., 25 Cal., 611; following *Ex parte Kensington*, 2 V & B., 79; In re *Beethan*, 18 Q.B.D., 380.

(3) *Sirbadh Rai* v. *Raghunath*, I.L.R., 7 All., 568 (573).

(4) *Bhagwan Das* v. *Sham Das*, I.L.R., 23 All., 429 (430); distinguishing *Allu Khan* v. *Roshan Khan*, I.L.R., 4 All., 85; in which the liabilities incurred were all anterior to the vendee's purchase.

(5) S. 295 (c) of C.P.C., 1882 (Act XIV of 1882, *Mitthulal* v. *Kishanlal*, I.L.R., 12 All., 546.

(6) *Sarn Das* v. *Attar Bibi*, (1905) P.R., No. 91.

(7) *Gokaldas* v. *Puranmal*, I.L.R., 10 Cal., 1035, P.C.; *Dinobundhu* v. *Jogmaya*, I.L.R., 29 Cal., 154, P.C.; *Girdhar* v. *Ram Autar*, 8 C.W.N., 690.

(8) *Wortby* v. *Birkhead*, 2 Ves., 574.

a man who has a legal title, that man should be hurt, and this by reason of the force which the Court necessarily and rightly allows to the common law and to legal titles; but if this had happened in any other country, it could never have been made a question; for if the law and equity are administered by the same jurisdiction the rule *qui prior est tempore, potior est jure*, must hold." (1) Tacking is then another exception to the rule embodied in section 48, and its application to this country where law and equity are not divorced, would have been obviously out of place. Indeed, the survival of the doctrine after the fusion of the two branches of law in England since the passing of the Judicature Act, (2) is an anomalous relic of a bygone age which would have been, but for the sturdy conservatism of English lawyers, long since swept away. Tacking only affects priority. It does not affect the mortgagor. The principle is confined to this that where all the mortgagees have equally *bona fide* advanced their money, it is considered inequitable to take the legal estate from him who has it, except on payment of all that is due to him. Hence, where the security is deficient, those who have not the legal estate are liable to be squeezed out. The doctrine was thus enunciated by Sir Joseph Jekyll who said: "If a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*." (3) But the doctrine of *tabula in naufragio* cannot be used to get in a legal estate from a bare trustee after receipt of notice of a prior equitable claim. (4) A mortgagor is not a trustee for the mortgagee (5) but he cannot, by taking an assignment of a mortgage, tack against an incumbrance created by himself. (6) In order to enable a person to tack, it is essential that the legal estate and the equitable incumbrance be held by the same person and in the same right. (7) It is sufficient if the rights are substantially the same, as where a man held the one absolutely and the other as trustee, but with the beneficial interest vested in himself. (8) It is immaterial that the legal estate is traced through a deed which discloses conflicting equities. (9) Actual possession of the legal estate is not always necessary, if the right to call for it is clear. (10) The operation of the doctrine is not restrained in a register county by the mere registration of the mesne incumbrance apart from notice. (11)

Tacking is no longer possible after a decree settling priorities, (12) after the fund has become distributable. (13) The right only lasts while the legal estate is retained. (14)

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(1) *Worthy* v. *Birkhead*, 2 Ves., 574.

(2) 36 & 37 Vict., c. 66, s 24, sub-s. 6.

(3) *Brace* v *The Duchess of Marlborough*, 2 P. Wms., 491; *cf per* Lord Selborne, L C., in *Blackwood* v. *London Chartered Bank of Australia*, L.R., 5 P.C. 92 (111).

(4) *Harphan* v. *Shacklock*, 19 Ch. D., 207; *Mumford* v. *Stohwasser*, L R., 18 Eq., 556; *cf. Taylor* v. *Russell*, [1892] A.C., 244.

(5) *Taylor* v. *Russell*, [1892] A C., 244.

(6) *Ladbrook* v. *Passman*, 57 L.J. Ch., 855.

(7) *Morrett* v *Paske*, 2 Atk., 53; *Barnett* v. *Wes on*, 12 Ves., 130.

(8) *Spencer* v. *Pearson*, 24 Beav., 266; *Price* v. *Fastnedge*, Amb., 685.

(9) *Jones* v. *Powler*, 3 Mv & K., 581; *Carter* v. *Carter*, 3 K & J., 617; *Sharples* v. *Adams*, 32 Beav., 213; *Young* v. *Young*, L. R., 3 Eq. 801; *Pilcher* v. *Rawlins*, L.R., 7 Ch., 259; *Maxfield* v. *Burton*, L.R., 17 Eq., 15.

(10) *Maundrell* v. *Maundrell*, 10 Ves, 271; *Ex parte Knott*, 11 Ves., 618; *Bowen* v. *Evans*, 1 J. & L, 264.

(11) *Morecock* v. *Dickson*, Amb., 678; *Calor* v. *Cooley*, Cox, 182.

(12) *Ex parte Knott*, 11 Ves., 619.

(13) *Calisher* v. *Forbes*, L R., 7 Ch., 109.

(14) *Rooper* v. *Harrison*, 2 K. & J., 86.

Marshalling and Contribution.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has no notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Marshalling securities.

1810. Analogous Law.—This section must be read and compared with section 56, *ante*. The principle of marshalling enunciated in the section is the same as in England. In India the principle was in some form universally applied even before the Act;(1) but the section, as now enacted, has introduced a change in the law of marshalling which now only secures this right to the second mortgagee when he has obtained his security without notice of the prior charge. Formerly it was held that a second mortgagee of part of a property included in a previous mortgage could claim the benefit of marshalling even though he had notice of the earlier incumbrance.(2) In the first of these cases Telang and Jardine, JJ., differed as to the materiality of notice; the case was referred to Bayley, Acting Chief Justice, who, agreeing with Telang, J., held on a review of the English law that the doctrine regards it immaterial whether the second mortgagee had notice of the first mortgage, and he accordingly adopted the same rule as one in consonance with equity and good conscience. On the other hand, it was doubted in Calcutta whether the doctrine which interfered with the legal rights of parties could be introduced into India.(3) But the English doctrine was nevertheless followed in several cases.(4)

1811. The English doctrine of marshalling has been correctly stated in the foregoing cases. In short, it is the doctrine enacted in the section with the notable difference that the English law now regards notice as immaterial.(5) But in a case Lord Hardwick, L. C., laid down the rule in which he regarded notice as essential. "Suppose" he said, "a person who has two real estates, mortgages both of them to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Courts, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage in order to make room for the second mortgagee, even though the estates descended to two different persons."(6)

English Law.

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(1) *Bishonath* v. *Kishto Mohun*, 7 W.R., 483; *Gossyen* v. *Luchmee*, 4 C.L.R., 294; *Chunilal* v *Fulchand*, I.L.R., 18 Bom. 160.

(2) *Chunilal* v. *Fulchand*, I.L.R., 18 Bom., 160 (171); *Lakhmidas* v. *Jamnadas*, I.L.R., 22 Bom., 904 (314), F.B.; *Dina* v. *Nathu*, I.L.R., 26 Bom., 538 (542).

(3) *Khetoosee* v. *Banee Madhub*, 12 W.R., 114.

(4) *Mt. Nowa Koomar* v. *Sheikh Abdool*, (1864) W.R., 374; *Toolsee Ram* v. *Munno Lall*, 1 W.R., 353; *Bishonath* v. *Kisto Mohun*, 7 W.R., 483; *Khetoosee* v. *Banee Madhub*, 12 W.R., 114.

(5) *Baldwin* v. *Belchar*, 3 Dr. & War., 176; *Flint* v. *Howard*, [1893] 2 Ch., 57 (73).

(6) *Lanoy* v. *Duke of Athol*, 2 Atk., 444 (446).

1812. The rule as to marshalling bears close affinity to the doctrine of apportionment and contribution. It is probably the logical corollary of the doctrine of subrogation or substitution which obtains in the Roman jurisprudence and which allowed the surety to be subrogated to all the rights and actions of the creditor against the debtor. (1) If, therefore, two creditors held successive mortgages on the same property, the surety would on paying off the prior mortgagee be entitled to cession of the property, and to a subrogation to all the rights and actions of the prior mortgagee. (2) It is thus clear that the second mortgagee would find it to his advantage to pay off the first mortgage, upon which he was allowed to tack his own security on to the prior mortgage. It comes to the same thing if, instead of allowing this, the prior mortgagee, having the option of two funds, is in the first place compelled to apply to the fund which cannot be reached by the subsequent mortgagee.

Origin of the rule.

A full statement of the doctrine would then comprise not only the right of the subsequent mortgagee to compel the prior mortgagee to exonerate the fund which is his only security, but also his right to stand in the place of the prior mortgagee, should he have already obtained satisfaction out of the fund to which alone he could resort. (3)

1813. Principle.—The doctrine of marshalling is founded upon the equitable regard to the derivative interests from the same mortgagor. Thus if two properties, *A* and *B*, are mortgaged to *C*, and one of them, *A*, subsequently mortgaged to *D* *without notice* of the prior mortgage, it is but equitable that *C*, who has two securities, should first try to realize his debt from *B*, thus relieving *A* to bear the burthen of the double incumbrances of *C* and *D*. No question of marshalling can, of course, apply if *D* takes his mortgage with notice of the prior incumbrance, for then he is presumed to look after his interests, and equity cannot assist him after he has had a chance to judge of the bargain. Again, if the security *B* prove insufficient to pay off *C*, the latter can then fall back upon the other security, although by so doing he may totally destroy the security of the subsequent incumbrancer. But this he can do, only when the security charged with one debt has been exhausted. Were it not for this section, in the above illustration, *C* could have at his will defeated *D* by proceeding at first against the property *A*, for, as has been seen before, (4) a mortgage is indivisible and every portion of the property is liable for the entire and every part of the debt. (5) "But it is the ordinary case to say a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only; to the intent that the only fund, to which the other has access, may remain clear to him." (6)

The general principle of marshalling then, is, that where one claimant has two funds to resort to and another has only one, the Court will either compel

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(1) 1 Domat Civ. Law, Bk. III, tit. 1, s. 6, Pothier's Obligation, 275, 280, 281.

(2) Pothier's Obligation, 520. 522, Cod. Bk. 8, tit., 19; Domat Bk. 3, tit. 1. s. 3. This rule, however, does not rest upon the doctrines of tacking or consolidation but upon the principle that nothing which the mortgagor could subsequently do by dealing with the equity of redemption, could interfere with or prejudice his mortgage: *Mutual Life Assurance Society*, v. *Langley*, 32 Ch. D., 460 (466, 467).

(3) *Clifton* v. *Burt*, 1 P. Wms., 679, *per* Lord St. Leonards in *Averall* v. *Wade*, Ll. & G., 255 (268).

(4) See s. 60, last para.

(5) *Timmappa* v. *Lakshmamma*, I.L.R., 5 Mad., 385; see s. 60, last para.

(6) *Per* Eldon, L.C., *Aldrich* v. *Cooper*, 8 Ves., 382 (395), 7 R.R., 96; to the same effect in Re *Athill*, 16 Ch. D., 211; *Webb* v. *Smith*, 30 Ch. D., 292.

the person having the double security, to resort to that fund not liable to the demand of the other, or, if satisfaction has been already obtained by him who has the double security, out of the fund to which alone the other can resort, the Court will allow the latter claimant to stand in the place of the former *pro tanto*. (1)

1814. Meaning of Words.—"*Who has no notice, etc.:*" This is the essential part of the principle. A subsequent mortgagee with notice cannot have the right. In England, according to Kay, L. J., the question of notice is probably immaterial. (2) And in cases decided independently of the Act the same view was taken by the Bombay High Court.(3) "*Debt*" here is used as synonymous with mortgage-money." *So far as such property will extend :*" This is in accordance with the English law, with which the doctrine in other respects also coincides. (4) '*But not so as to prejudice &c:*" *i.e.*, the Court will not marshal if by so doing, the prior incumbrancer will be prejudiced as regards his mortgage, as for example, where the mortgage allows of foreclosure.

1815. Marshalling of Securities.—The doctrine of marshalling is founded upon the general rule of equity that a person having two funds to which he may resort shall not disappoint another person who can resort to only one of the funds.(5) As such, the rule is applicable not only to claims arising under successive incumbrances, but also in the appropriation of particular funds during the life or after the death of a debtor, as in the administration of assets of a deceased person. But the rule is subject to certain limitations which are common to the section and the English law.

1816. In the first place marshalling does not interfere with the rights of the first mortgagee who cannot be restrained from satisfying his debt out of any portion of the property mortgaged to him that is readily available.(6) But this does not mean that the first mortgagee has a right to exhaust a security which is the sole fund for payment of the second mortgagee.(7) Hence the Court will marshal the proceeds arising from several mortgaged estates, so as to prevent the first and second mortgagees of different estates from exhausting the proceeds of one estate upon which alone a third mortgagee had taken a security.(8) So a second mortgagee is entitled to the balance of the money received by the first mortgagee in respect of all the securities realized by him after satisfying his mortgage-debt, and in respect of which he will be deemed to be a trustee for the second motgagee.(9) If the prior mortgagee of several properties, some of which are subject to second mortgage, realizes property which is subject to a second mortgage, and so satisfies his debt, the subsequent mortgagee will be

(1) Must not impair first mortgage.

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(1) Cox's note to *Averall* v. *Wade*, LI. & G., 264 (268).

(2) *Flint* v. *Howard*, [1893] 2 Ch., 57 (73).

(3) *Chunnilal* v. *Fulchand*, I.L.R., 18 Bom., 166; *Lakhmidas* v. *Jamanadas*, I.L.R., 22 Bom., 304; *Dina* v. *Nathu*, I.L.R., 26 Bom., 538; *Nanabhat* v. *Lakshman*, (1877) B.P.J., 83. This case is more fully examined by Bayley, A.C.J., in *Chunnilal* v. *Fulchand* I.L.R., 18 Bom., 160 (172, 174).

(4) *Lanoy* v. *Duke of Athol.*, 2 Atk., 444; *Tidd* v. *Lister*, 10 Hare, 157; Re *Jones*, [1893] 2 Ch., 470.

(5) *Aldrich* v. *Cooper*, 8 Ves., 382; *Dolphin* v. *Aylward*, L.R., 4 H.L., 486; *Webb* v. *Smith*, 30 Ch. D., 192; *Mt. Nowa Koowar* v. *Sheikh Abdool*, (1864) W.R., 374; *Toolsee Ram* v. *Munno Lall*, 1 W.R., 353; *Bisho Nath* v. *Kisto Mohun*, 7 W.R., 483; *Khetoosee* v. *Banee Madhub*, 12 W.R., 114.

(6) *Wallis* v. *Woodyear*, 2 Jur. (N.S.), 179.

(7) *Lawrence* v. *Galsworthy*, 3 Jur. (N.S.) 24.

(8) *Gibson* v. *Seagrim*, 20 Beav., 614.

(9) *South* v. *Bloxam*, 34 L.J. Ch., 369.

entitled to stand in his place as regards the property to which he could have but had not resorted, and thus satisfy his own claim. (1)

Where the executor of a testator is a mortgagee of the real estate, and also a legatee under his will, he is not bound to satisfy the mortgage-debt out of the first sufficient sum of personal assets that comes to his hands, the reason being that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied. (2)

(2) Cannot defeat other subsequent mortgagees.

1817. Again, marshalling was never intended to defeat the rights of the successive incumbrancers, or for that matter of any person having acquired an interest in any one of the properties for valuable consideration. As Kay, L.J., observed: "The right of a subsequent mortgagee of one of the estates to marshal, that is, to throw the prior charge on both estates upon that which is not mortgaged to him, is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal representatives, claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate." (3) Thus, if the owner of two properties, *A* and *B*, makes three mortgages of them, the first and third of *A* and *B*, the second alone of *A*, then, if *A* and *B* are realized, the first mortgage is borne rateably; and if it is wholly exhausted, the second mortgagee has no claim against the third.(4) So if two estates are mortgaged to *A*, and one is afterwards mortgaged to *B*, the remaining estate being then mortgaged to *C*. Here *B* has no equity to throw the whole of *A's* mortgage on *C's* estate, and so destroy *C's* security. And for the same reason *C* cannot marshal. In such a case, *A* must satisfy himself out of the two estates rateably according to the respective values of the two estates, and leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon.(5) But if in the above case *C* takes by his contract only the surplus remaining after paying off the earlier mortgages,(6) or if he takes his security *pendente lite*, or if it is otherwise rendered invalid,(7) then marshalling will take place as between the other incumbrancers without regard to his interests It is competent to the mortgagor, upon making the third mortgage, to frame it in such a way as to give to the third mortgagee only what the mortgagor was entitled to, *i.e.*, the surplus of properties *A* and *B* after payment of the first two mortgages, in which case, the third mortgagee would take nothing until the prior mortgages are satisfied.(8)

Except then in cases where the third mortgage is made subject to the prior mortgages, it follows that the Court will not marshal in favour of a second mortgagee as against a subsequent mortgagee. Hence, if there be three mortgages, *first*, the mortgage of *A* and *B*, *secondly*, a mortgage of *A*, and *thirdly*, a mortgage of *B* alone or of *A* and *B*, the right of marshalling will not be exercised in favour of the second to the prejudice of the third mortgagee, but the first mortgage will be apportioned rateably between the two estates *A* and *B*. (9) But in England

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(1) *Trimmer* v. *Bayne*, 9 Ves., 209 (211); 32 E.L.R., 582; *Webb* v. *Smith*, 30 Ch. D., 192 (202).

(2) *Binns* v. *Nicholls*, L.R., 2 Eq., 256 (261).

(3) *Flint* v. *Howard*, [1893] 2 Ch., 54 (73).

(4) *Barnes* v. *Racaster*, 1 Y. & C. Ch., 401.

(5) *Per* Lord Romilly in *Gibson* v. *Seagrim*, 20 Beav., 614 (619); *Flint* v. *Howard*, [1893] 2 Ch., 54 (73).

(6) In re *Mower's Trusts*, L.R., 18 Eq., 110.

(7) *Going* v. *Farrell*, Beat., 472.

(8) In re *Mower's Trusts*, L.R., 8 Eq., 110 (114).

(9) *Flint* v. *Howard*, [1893] 2 Ch., 54.

where tacking is admissible, the result in such a case would be that the second or the third mortgagee lending his money without notice may squeeze out the puisne mortgagee of the other property, by subsequently purchasing the first mortgage covering both the estates.

(3) Volunteer disqualified.

1818. It being a doctrine of the Court of Equity that it will not interfere on behalf of a volunteer, it follows that the rule has been held not to apply as between volunteers. (1) So volunteers have no right to marshal to the prejudice of a prior settlement. (2) But if the volunteers have intermediate rights, "though you cannot interfere to prevent him who has created the voluntary settlement from displacing them by a sale, because it is a doctrine of the Court of Equity that it will not interfere on behalf of a volunteer, yet at the same time that doctrine is not carried to this extent, that the Court will interfere actively against a volunteer through the medium of a person claiming only through him who created the voluntary settlement." (3) Marshalling may be enforced in favour of an incumbrancer whose charge is merely voluntary. (4)

(4) Where rights different.

1819. The doctrine does not apply where there are different funds as to which different rights exist. Thus if a creditor have a lien on *A* and merely a right of set-off as to another fund *B*, a person having a subsequent charge on *A* cannot compel the creditor to resort in the first instance to *B* by abandoning the higher right which he possesses in *A*.(5) In short, there can be no marshalling unless the creditor has charges upon both funds. So where the mortgagee has both a lien on the property mortgaged as well as a right to sue the mortgagor personally, the mortgagee cannot be compelled to resort to the personal remedy before enforcing the mortgage-lien.(6)

On a similar principle where the properties *P* and *Q* are mortgaged to *A*, and *B* subsequently takes the mortgages of *P* and *C* of *Q*, all that *B* and *C* can claim is that *A* shall resort to both *P* and *Q* rateably for the satisfaction of his debt, so as to leave a sufficient margin to satisfy their own claims.(7)

(5) Equity considered.

1820. Securities are only marshalled where that can be done without injustice to the debtor or the creditor.(8) Marshalling does not compel a mortgagee to split up his claim if he has a right to the specific security; thus if the properties *A* and *B* are mortgaged by conditional sale to a first mortgagee, and *B* is then mortgaged to a second mortgagee, the latter cannot restrain the former from foreclosing *A* and *B*; his only remedy is redemption.(9) So again, a mortgagee by conditional sale cannot be compelled to forego his remedy, which he has in foreclosure of the mortgaged property, merely because that course may impair the security of another incumbrancer.

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(1) *Boazman* v. *Johnston*, 3 Sim., 377.

(2) *Ansley* v. *Newman*, 39 L.J. Ch., 769.

(3) *Per* Lord Hatherley, L. C., in *Dolphin* v. *Aylward*, L.R., 4 H.L., 486 (502).

(4) *Aldridge* v. *Forbes*, 9 L.J. (N S), Ch. 37 [in which the daughter of a mortgagor, entitled under a voluntary settlement to a charge on one of two estates comprised in a mortgage, was held entitled to have the other estate first applied in satisfaction of the mortgage, as against a subsequent mortgagee of the two estates with the notice of charge.

(5) *Per* Prett, M.R., in *Webb* v. *Smith*, 30 Ch. D., 192 (199).

(6) *The Arab*, 5 Jur. (N.S.), 417.

(7) *Moxon* v. *Berkeley Building Society*, 59 L.J., Ch., 524.

(8) *Per* Lord Eldon, L.C., in *Ex parte Kendall*, 17 Ves., 514 (527).

(9) *Averall* v. *Wade*, Ll. & G., 252.

1821. While notice is by no means material in England, in cases arising under the section there can be no marshalling unless the second mortgagee is shown to have taken without notice of the first mortgage. Hence while the Courts in England may order securities to be marshalled in a proper case, though the pleadings do not ask for it,[1] it would be necessary to assert the right under the enactment inasmuch as its admissibility depends upon the proof of notice, the absence of which cannot be presumed. It will be seen from the section that before the principle of marshalling can apply under the Act, it must be shown that the subsequent mortgagee had no *notice* of the prior mortgage, before or at the time of the completion of his mortgage, for an *ex post facto* notice cannot affect his rights.[2] Registration has been considered by some of the High Courts to be equivalent to notice,[3] while the other High Courts regard it as insufficient.[4]

(6) No Notice.

1822. Marshalling may be excluded by contract. The second mortgagee cannot enforce a right which he has abandoned. Such a contract may be inferred from the second mortgage being made subject to the first[5] (§ 1442).

(7) Excluded by contract.

1823. There can be no marshalling unless the two creditors are of the same common debtor.[6] If a joint-debt is due to one creditor by two persons, one of whom also owes debts to another creditor, in such a case, if the former obtains a decree on the joint-debt and the latter obtains a decree against his own several debtors, the subsequent debtor cannot compel the joint-creditor to marshal so as to leave him sufficient funds for the satisfaction of his separate debt. But this rule may be departed from upon some special equity, as in the case of drawer and acceptor, or principal and surety. So Lord Eldon, L. C., said: "If *A* has a right to go upon two funds and *B* upon one, having both the same debtor, *A* shall take payment from that fund, to which he can resort exclusively that, by those means of distribution both may be paid. That takes place, where both are creditors of the same person, and have demands against funds, the property of the same person. But it was never said, that, if I have a demand against *A* and *B*, a creditor of *B* shall compel me to go against *A*, without more; as if *B* himself could insist, that *A* ought to pay in the first instance as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all obligations arising out of those complicated relations may be satisfied. But if I have a demand against both, the creditors of *B* have no right to compel me to seek payment from *A*, if not founded on some equity, giving *B* the right for his own sake, to compel me to seek payment from *A*."[7] In the case from which these observations are extracted there was a partnership of five persons, one of whom died, but the remaining four continued the firm and afterwards became bankrupt, whereupon the creditors of the four partners sued to have their debts paid out of the assets of the deceased partner which would have the effect of increasing their own dividends. But the Lord Chancellor held

(8) Common debtor.

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(1) *Per* Sir W. Grant, M. R., in *Gibbs* v. *Ougier*, 12 Ves., 413 (416, 417); *Vickers* v. *Oliver*, 1 Y. & C. C. C. 221.

(2) *Inderdawan* v. *Gobind Lall*, I. L. R., 23 Cal., 790 (794).

(3) *Lakshman* v. *Dasrat*, I. L. R., 6 Bom., 168, and cases cited under s. 3.

(4) *Inderdawan* v. *Govind Lall*, I. L. R., 23 Cal., 790 (794); *Shan Maun* v. *Madras Building Co.*, I. L. R., 15 Mad., 268.

(5) In re *Mower's Trusts*, L. R., 8 Eq., 110.

(6) *Gopala* v. *Saminathayyan*, I. L. R., 12 Mad., 255.

(7) *Ex parte Kendall*, 17 Ves., 514 (520).

that the creditors must first proceed against the survivors before resorting to the estate of the deceased partner.(1)

(9) Attaching creditor v. Mortgagee.

1824. The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees. (2) But there may be cases in which even an unsecured creditor may successfully marshal. (3) Such a case may arise where through caprice or wantonness the mortgagee resorts to the only fund available to the unsecured creditor. But in the absence of any strong supervening equity a judgment-creditor as such has no right to marshal. In fact a judgment-creditor is no better off than the judgment-debtor, and as the latter cannot marshal, no more can the former.(4) Of course a case falling under section 56 would receive a different treatment, but, as observed before, that section deals only with an innocent purchaser and not one with notice of the mortgage 1130, 1821, 1823).

1825. Extension of the Doctrine to Purchasers.—The doctrine of marshalling is then applicable to a *bona-fide* purchaser for value without notice of a portion of property, the whole of which was subject to a prior incumbrance. (5) In the words of Norman, J., "a subsequent purchaser of one of the estates has just as great an equity as an incumbrancer," (6) and the doctrine has been frequently applied with beneficial effect in partition-suits.(7) But in one case it was held by Edge, C. J., and Banerji, J., that the right of a mortgagee to bring *any portion* of the mortgaged property to sale is not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person. (8) The report of the case, however, does not show if the learned judges had had their attention called to an earlier case of their own Court.(9) And this seems to have been but casually noticed by them. It is true that under the section there is no warrant for extending the doctrine to purchasers, but then why should a *bona fide* purchaser be placed in a worse position as regards his purchase than if he were only a puisne mortgagee! And while it is true, as observed by the Madras High Court, (10) that the mortgagee cannot be deprived of his legal rights still, if his legal rights are modified in favour of a *bona fide* mortgagee without notice, it is scarcely equitable that they should not be modified in favour of an equally honest purchaser. Any how it is conceded that where in execution of a simple money-decree an undivided share in immovable property, a part of which was subject to mortgage, is sold, in the absence of any specific indications to the contrary,

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(1) *Per* Lord Eldon, L. C., in *Ex parte Kendall*, 17 Ves., 514 (523), observing on Lord Thurlow's dictum in *Hoare* v. *Contencin*, 1 Bro. C. C., 27, followed in *Kendall* v. *Hamilton*, 4 App. Cas., 504 (536).

(2) *Kristodass* v. *Ramkant*, I. L. R., 6 Cal., 142 (148); In re *Professional Life Assurance Co.*, L. R., 3 Eq., 668; In re *International Life Assurance Society*, 2 Ch. D., 476.

(3) *Aldridge* v. *Cooper*, 8 Ves., 382.

(4) *Dolphin* v. *Aylward*, L. R., 4 H. L., 486 (505); *Banwari* v. *Mahomed*, I. L. R., 9 All., 690.

(5) *Rodhmal* v. *Ram Harak*, I. L. R., 7 All., 711; followed in *Lakhmidas* v. *Jamnadas*, I. L. R., 22 Bom., 304 (314), F. B.

(6) *Bishonath* v. *Kisto Mohun*, 7 W.R., 483; see also *Tulsee Ram* v. *Munnoo Lall*, 1 W.R. 353; *Nowa Koer* v. *Abdul Rahim* W.R. [1864], 374.

(7) *Per* Telang, J., in *Chunilal* v. *Fulchand*, I.L.R., 18 Bom., 160.

(8) *Bhikari Das* v. *Dalip Singh*, I.L.R., 17 All., 434; following *Lala Dilwar* v. *Dewan Bolakiram*, I.L.R. 11 Cal., 258; followed in *Beni Prosad* v. *Rewat Lall*, I.L.R., 24 Cal., 746 (749, 750); *Indukuri* v. *Yerramilli*, I.L.R., 5 Mad., 387; *Banwari* v. *Muhammed*, I.L.R., 9 All., 690.

(9) *Rodhmal* v. *Ram Harak*, I.L.R., 7 All., 711, *supra*.

(10) *Indukuri* v. *Yerramilli*, I.L.R., 5 Mad., 387.

the presumption would be that the share sold was, as far as might be, the share which was not mortgaged. (1)

Charges and Liens.

1826. Turning next to the extent of the doctrine, it may be noted that the right is one of wider application and is not confined to the domain of mortgage law. (§ 1500). But even considered in its restricted application to cases arising under this section there would seem to be no reason why the principle should not be, as in the English law, applied to charges(2) and liens (3) as distinguished from mortgage spoken of in the section.

A surety of the debtor is entitled, (4) and of the double creditor is subject to the doctrine, (5) nor does the debtor's bankruptcy prevent an application of the rule. (6) Where two properties were mortgaged to *A*, with a covenant by a surety, and one of the properties was mortgaged to *B*, whose funds being exhausted in part-payment for *A*'s debt, and *A's* mortgage having been transferred to the surety on payment by him of the balance, it was held that *B* was entitled to marshal the securities as against the surety. (7) The fact that the first mortgage was of land and moveables and the subsequent mortgage of land only will not matter, if a case for marshalling is otherwise made out. (8)

The right may be availed of not only by the second mortgagee, but also a purchaser at an execution-sale under the second mortgage. (9) The right to marshal is an incident of the interest which the subsequent transferee acquires by purchase. So, where the third mortgagee paid off the first mortgagee, he was held to have been subrogated to his rights by implication of law, no assignment being necessary. (10)

The doctrine cannot be withheld because the property to which the mortgagee has in the first place to apply, has been claimed by a third party as *wakf* property, and that the prior mortgagee would have at least to stand a suit before he could acquire it. (11) But a different rule would appear to prevail in America where the prior mortgagee would not be forced to marshal, if there is any doubt as to the title or sufficiency of the fund, or if it cannot be realized without litigation. And this view would appear to be more in harmony with the spirit of the doctrine than that expressed in Calcutta.

(10) Where security sufficient.

1827. There can be, of course, no question of marshalling where the security is sufficient.

(11) Estoppel.

1828. The right to marshal, like most other equitable rights, may be forfeited by estoppel, as when the mortgagee, has taken an unfair advantage over the mortgagor. (12)

Contribution to mortgage-debt.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the

(1) *Sheonarain* v. *Nur Muhammad*, I.L.R., 29 All., 463.

(2) *In re Westinthus*, 5 B. & Ad., 817.

(3) *Heyman* v. *Dubois*. L.R., 13 Eq., 158 *cf.* ss. 140, 141, Indian Contract Act (IX of 1872).

(4) *Rancliffe (Lord)* v. *Parkyns*, 6 Dowl., 216.

(5) *South* v. *Bloxham*, 34 L.J. Ch., 369.

(6) *Ex parte Alston*, L.R., 4 Ch., 168; *Broadbent* v. *Barlow*, 30 L.J, Ch., 569; *Ex parte Stephenson*, 17 L.J. (N.S.), Bank 5.

(7) *South* v. *Bloxham*, 34 L.J. Ch., 369.

(8) *In re Cornwall*. 6 Ir. Eq. R,, 68.

(9) *Inderdawan* v. *Gobind Lall*, I.L.R. 25 Cal., 790.

(10) *Raoji* v. *Narayan* (1896), B. P. J., 629.

(11) *Inderdawan* v. *Gobind Lall*, I. L. R,, 23 Cal., 790 (795),

(12) *Byjnath* v. *Doolhin*, 24 W. R., 83 (85).

debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in the section applies to a property liable under section eighty-one to the claim of the second mortgagee.

1829. Analogous Law.—The doctrine of equity as to contribution applies only where two properties are equally charged. But in England the doctrine has been expressed in different ways by different judges. In the opinion of Lord Eldon, in order to create a right to contribution, the two properties must be "equally liable."(1) Lord St. Leonards says that there must be a common fund.(2) But it may be provided by appropriate words not only that one security is secondary as between the mortgagors, but that the mortgagee cannot resort to one security until the other is exhausted.(3) This section substantially codifies these views as enunciated in Fisher's Treatise on Mortgage,(4) from which the first paragraph is drawn.(5) The section is "subject to a contract to the contrary," that is, a contract between a mortgagor and mortgagee. An agreement which is binding only as between the mortgagors is not "a contract to the contrary" within the meaning of the section.(6)

The section may profitably be read along with section 95.

1830. Principle.—The doctrine of contribution enunciated in the section is based upon the plainest principles of justice and equity, inasmuch as it enacts that as between persons who may be liable with respect to the same debt, their liability will be only in proportion to the quantum of their interest in the property.(7) "Both in law and equity," said Eyre, C.B., "contribution is bottomed and fixed on general principles of justice and does not spring from contract...and the reason given in the books is *in equali jure*, the law requires equality. One shall not bear the burden in case of the rest."(8) The object of the section is not that the lien of the mortgagee should be split up, but simply to determine the liabilities of the purchasers

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(1) *Bute (Marquise of)* v. *Cunynghame*, 2 Russ., 275 (299).

(2) *Averall* v. *Wade*, Ll. & G., 252.

(3) *Leonino* v. *Leonino*, 10 Ch. D., 460, *per* Chitty, J., in In re *Dunlop*, 21 Ch. D., 583 (588, 592).

(4) Fisher's Mortgage (5th Ed.), § 1327. This source is acknowledged in the Bill. The same rule is set out in I Robb. Mort., 774.

(5) Fisher's Mortgage (5th Ed.) § 1346.

(6) *Ramabhadrachar* v. *Srinivasa*, I.L.R., 24 Mad., 85; *cf.* In re *Athill*, 16 Ch. D., 211; In re *Dunlop*, 21 Ch. D., 583.

(7) "If we take a view," said Eyre, C.B., "of the cases, both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it."—*Dering* v. *Winchelsea*, 1 Cox., 321.

(8) *Swain* v. *Wall*, 1 Ch. R., 149; *cf.* also *Dering* v. *Earl of Winchester*, 3 Bligh., 590.

inter se. (1) There is a close relation between the principle of contribution enunciated in this section and the doctrine of marshalling dealt with in the preceding section. In fact "these rights act reciprocally, and rest upon the principle that a fund, which is equally liable with another to pay the debt, shall not escape, because the creditor has been paid out of that other fund alone; and, on the other hand, that a creditor who has the means of satisfying his debt out of several funds, shall so exercise his right as not to take from another creditor or claimant the fund which forms his only security. (2) In other words, where several estates are liable for the same debt, they are liable to contribute no more than rateably to its discharge.

1831. Meaning of Words.—*Whether of one or several owners, etc.*" The whole paragraph in which this sentence occurs is taken from Fisher's Law of Mortgage. (3) "*In the absence of a contract to the contrary*:" as between the mortgagor and mortgagee and not merely mortgagors *inter se*, the contract may be made at the time of the mortgage or afterwards.(4) "*Nothing in this section etc.*," means that when "marshalling" and "contribution" conflict, the former will prevail.(5) "*Debt*" is in this as in the last section used in the sense of mortgage-money.

1832. General View of the Doctrine.—The three paragraphs into which the section is sub-divided enunciates rules which have to be discriminated. The first paragraph merely declares the manner in which the debt charged on several properties shall be borne by them. The second paragraph then deals with a case in which, the first mortgage having been paid off out of the only property comprised in it, it remains to be determined how the second mortgage-debt is to be borne as between the remainder of that property and another property which is also made security for the second debt. In such a case contribution works, not in favour of the second mortgagee, but in favour of other persons interested in one or other of the two properties comprised in the mortgage. The third and last paragraphs only subordinate this section to the rule of marshalling set out in the preceding section.

1833. Liability to Contribution.—The first paragraph which enunciates the rule of apportionment of a mortgage-debt charged on several estates belonging to one or several owners, is, as before remarked, in harmony with the English law, and may be deduced from what may be regarded as elementary equity. In its practical application, however, it may give rise to questions of some nicety which the bald statement here codified does not do much to solve. Where several parcels of lands are mortgaged conjointly to secure one mortgage, they must each be deemed to bear only a rateable share of the burden. Hence when a mortgagee purchases the equity of redemption in a part of the mortgaged property, his mortgage-debt is satisfied in proportion to the ratio which the value of the property purchased bears to the value of all the properties comprised in the mortgage.(6)

Para. 1.

(1) *Roghu Nath* v. *Harlal*, I L R., 18 Cal., 320; *Chagandar* v. *Gansing*, I.L.R., 20 Bom., 615.

(2) Fisher, § 1346, cited in *Hari Raj Singh* v. *Ahmaduddin*, I.L.R., 19 All., 545 (548); *Shan'o Chandar* v. *Nain Sukh*, I.L.R., 23 All., 355 (358).

(3) See 6th Ed., § 1347.

(4) *Rama* v. *Manak*, 7 Bom.L.R., 191.

(5) *Bartholomew* v. *May*, 1 Atk , 487.

(6) *Mahtab Singh* v. *Misree Lal*, 2 Agra, 88; *Bisheshar Dial* v. *Ram Sarup*, I.L.R., 22 All., 284, F.B.; *Lakhmidas* v. *Jamnadas*, I.L.R., 22 Bom., 304, F.B.; *Fakiraya* v. *Gadigya*, I.L.R., 26 Bom., 88; *Harendra Kumar Guha* v. *Dindayal*, 4 C.L.J., 195; *Muttyal* v. *Nundalal*, 12 C.W.N., 745.

And the case is not different where the purchaser of the interest of one of the several mortgagors subsequently purchases the rights of the mortgage-decree-holder.(1) Where certain properties along with others were subject to two mortgages in favour of the same person, and the mortgagee purchased and obtained possession of such properties in a sale in execution of his decree on the first mortgage, such properties were held liable to contribute to the discharge of the second mortgage-debt, and when a decree was obtained upon the second mortgage and sought to be executed, a deduction was made from the amount of the second decree of the sum payable as such contribution.(2) But the rule has no application to a sale of the mortgaged property made in execution of a decree passed for that purpose, and in which case if the sale fails to satisfy the mortgage-debt, the balance would still be recoverable and there can then be no apportionment.(3) In other words, the position of the mortgagee-purchaser in execution of his own decree for sale is not different to that of a stranger-purchaser, and it is only when he buys in execution of a decree obtained by a third party that his purchase has the effect of proportionately extinguishing his mortgage-debt.(4)

1834. But the rule does not prevent the mortgagee from relinquishing any part of the mortgaged property and continuing his remedy to the remainder unless by doing so he will prejudice the rights of third parties who had since acquired an interest in the unreleased portion of the property.(5)

If the loan was one, it is immaterial that it was made at different times, as indeed, it may well be, in pursuance of a stipulation as to a further advance, or that several properties were on different occasions mortgaged to secure it.(6) Of course, it is always open to the mortgagor to determine beforehand the nature and extent of the burden which the several properties mortgaged by him shall bear, and in which case the devolution of the properties on the same or separate owners will not affect it. Such determination may be made by express contract or by implication.(7) So where a person mortgaged certain estates and for the same consideration promised to charge certain other estates, which he subsequently did, it was held that he must be treated as having raised that sum out of both the lots according to their respective values after deducting the prior incumbrances upon them.(8)

1835. Immaterial Elements.—The fact that the properties belonged to several mortgagors is immaterial so long as the debt is one, nor does the fact that they originally belonged to one owner, but have since the mortgage passed into different hands, affect the question. So if several estates comprised in the same mortgage are devised to several persons, or descend to different heirs, the doctrine would remain unaffected.(9) Indeed, it makes no difference even if some parcels of the mortgaged property are acquired by the mortgagee himself. And since he cannot release a part of the mortgaged property so as to increase the burden of the other fraction in which third persons

(1) *Harendra Kumar Guha* v. *Dindayal*, 4 C.L.J., 195.

(2) *Mahomed Taki* v. *Thomas*, 4 C.L.J., 317.

(3) *Jugal Kishore* v. *Harbans*, 3 A.L.J. R., 791. (794); distinguishing *Bishsehar Dial* v. *Ram Sarup*, I.L.R., 22 All., 284, F.B.

(4) *Jugal Kishore* v. *Harbans*, 3 A. L. J. R., 791 (794).

(5) *Imam Ali* v. *Baij Nath*, I.L.R., 33 Cal., 613 (622); *Surjiram* v. *Barhamdeo*, 1 C.L.J., 337; *Surjiram* v. *Barhamdeo*, 2 C. L.J., 262 *contra* in *Jai Gobind* v. *Jaoram*, (1898) A.W.N. 120; *Sheo Prasad* v. *Behari Lal*, I.L R. 25 All., 79.

(6) *Leonino* v. *Leonino*, 10 Ch. D., 460 (464).

(7) *Leonino* v. *Leonino*, 10 Ch. D., 460 (465); explaining Malins, V. C., in *Lipscombe* v. *Lipscombe*, L. R., 7 Eq., 501.

(8) *Rochefoucauld* v. *Boustead*, [1898] 1 Ch., 550.

(9) *Aldrich* v. *Cooper*, 8 Ves., 390.

have become interested as assignees of the equity of redemption, it follows that his relinquishment of a part may entail similar consequences. On the other hand, a mortgage-debt being one and indivisible and all and every part of the mortgaged property being liable for it, it is within the power of mortgagee to proceed against any portion of the property and the fact that other interests have in the meantime intervened is no reason for modifying his right, unless indeed there is some overpowering equity, such as possessed by persons dealt with in the last section. But apart from such equity, the mortgagee may choose to resort to any property for the purpose of realizing his security, and it is then that the doctrine of contribution would be called into requisition for the purpose of adjusting the rights and liabilities of the debtors *inter se*. For indeed, but for such a rule, the mortgagee would have it within his power to crush or exonerate any parcel of the property mortgaged to him at his option and which may be prompted by caprice or corrupt design. It is for this purpose that the value of the several parcels comprised in a mortgage would be determined by the rule set out in the first paragraph.

Valuation of properties.

1836. The rateable burden which the several properties are to bear would no doubt have to be calculated according to their valuation at the time of the mortgage, the only deduction allowed in assessing their value being the amount due on the prior incumbrances. Ordinarily, the question as to the point of time at which the valuation is to be taken would be immaterial inasmuch as whether they are valued at the time of the mortgage, or of foreclosure, or at the dates of several purchases, the ratio determining the amount of contribution would be the same. But where owing to some abnormal reason the price of certain parcels has suddenly increased or gone down, the question may materially affect the liability of the contributories. According to the Calcutta (1) and Allahabad High Courts (2) the quantum of contribution to which a mortgaged property is liable, should be determined according to its value at the date of the mortgage, and not when it is sold. Any other view might lead to uncertainty and even injustice, as where the property has since been considerably improved at the expense of the owner who would then have to bear proportionately a larger burden which would be inequitable.(3) But in Bombay where the mortgagee purchased a portion of the mortgaged property, its value at the time of the sale was allowed in reduction of the mortgage-debt.(4) But in this case the true value of the property at the time of the mortgage does not appear to have been different, and even if it were so, it might have been urged that the mortgagee purchaser could not be permitted to avail himself of his position to make a bargain for himself to the prejudice of the mortgagor. In a case the Privy Council held that in a suit for contribution in respect of a decree for *mesne profits* under which all the parties to the suit were liable as judgment-debtors, the plaintiff's claim must be determined on the basis of their shares at the time of the decree for *mesne profits* and not on their previous possession.(5) In America opinions are hopelessly divided on the point.(6) But as under

(1) *Jugdeo* v. *Habibulla*, 12 C.W.N., 107.
(2) *Bhagwan Singh* v. *Mazhat Ali*, I.L.R., 36 All., 272.
(3) *Mardan Singh* v. *Sheo Dayal*, I.L.R. 27 All., 549.
(4) *Fakirayya* v. *Gadigayya*, I.L.R., 26 Bom., 88 (98).
(5) *Jotindra* v. *Guru Prosunno*, I.L.R., 31 Cal., 597, P.C.
(6) In some cases valuation at the date of the mortgage is adopted, *Stevens* v. *Cooper*, 1 (N.Y.), Johns, Ch., 425; *Parkman* v. *Welch*, 19 (Mass.) Pick., 231; *Hill* v. *Howell*, 36 (N. J.) Eq., 25, whereas in others valuation at the date of the foreclosure is upheld, whilst in others [*Deckey* v. *Thompson*, 8 (Ky.), B. Mon., 312] valuation at the time of the several purchases [*Bark* v. *Chrisman*, 3 (Ky.), B. Mon., 50] has been commended.

the Act the party paying has a salvage charge on the several contributory parcels which may be brought to sale, it does not appear why their valuation at the time of their exoneration from the charge should not be the basis for calculation. But the value of improvements made by the purchasers would have to be excluded, and in this respect the practice would appear to be uniform in America. The *quantum* of contribution payable by the mortgagee-purchaser is not different from that payable from any other purchaser. He is not liable to pay more, because he happens to be also the mortgagee. Hence a mortgagee purchasing the share of one of his mortgagors is only bound to give credit for that which his vendor would have been liable to pay and not the full value of the property. (1)

Deduction of incumbrance.

1837. As regards the allowable deduction in respect of prior incumbrances, the questions would be what is legally recoverable thereon and what includes a further advance. (2) Where a prior incumbrance in its turn extends to two or more properties, the rule here enunciated would equally apply to it. Thus where the owner of an estate comprising 38 villages had successively mortgaged it to several persons as follows:—(i) Thirty-one villages were mortgaged on the 12th December 1867; (ii) twenty-eight villages were for a second time mortgaged in 1873; (iii) the third mortgage of 1874 was of the entire estate All the mortgages were simple and the decrees obtained on the first two mortgages were satisfied by the sale of only a few villages in each case. The last mortgagee obtained a decree on his mortgage in 1878 after which four of the villages affected by it were brought to sale in execution of a money-decree and purchased by *B*. Similarly, *A* also purchased six odd of the mortgaged villages, a share in another village having similarly fallen to *C*. *A* then brought to sale in execution of his mortgage-decree the four villages which *B* had purchased, and thereupon *B* sued both *A* and *C* for contribution on the ground that his four villages had fetched considerably more than the amount for which they were proportionately liable under the mortgage-decree and that *A* and *C* also possessed villages which were equally liable with his villages under the decree of 1878. *B's* contentions having been upheld, it was held that in calculating the amount to which *B* was entitled by way of contribution, he was bound to take into account the liabilities which existed on most of the villages in respect of which the suit was brought under the two prior mortgages; that the plaintiff was entitled to obtain contribution from those villages only which had not been sold in execution of the decree of 1878; that the unrealized balance of that decree must be regarded as the amount which the villages purchased by the decree-holder himself had contributed to the decree, and further that in determining the amount which *B* could recover regard must be had to the claims for contribution of the owners of such of the other mortgaged villages as had been sold in execution of the decree of 1878, and had like *B's* villages fetched more than their quota of liability for the decree.(3) In short, in calculating the value of each village in such a case, its liability under one or the other or both of the two prior mortgages of 1867 and 1873 would have to be first deducted and then its value considered for the purpose of contribution. (4) Moreover, in determining its value, regard

(1) *Mutty Lall Pal* v. *Nanda Lall Neogy*, 8 C.L.J. 92; following *Matilall* v. *Misree Lall*, 2 Agra 88; *Bisheshur* v. *Ram Sarup*, I.L.R., 22 All., 284, F. B.; *Lakhmi Das* v. *Jamna Dass*, I.L.R., 22 Bom., 304, F B.

(2) S. 79, *ante*; *De Rochefort* v. *Dawes*, L.R., 12 Eq., 540 (544); *Barnewell* v. *Ironmonger*, 9 W.R., (Eng.), 88.

(3) *Hari Raj Singh* v. *Ahmad-ud-din*, I.L.R., 19 All., 545.

(4) *Ib.*, p. 552.

must be had to the real and not the apparent state of things. If, for instance, a larger amount was paid to satisfy a mortgage-debt so as to avert any further sale in execution of the mortgage-decree, that would be regarded as its value for the purpose of calculation. (1) So when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt, that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The result is the same if the purchase by the mortgagee is made under a private contract with the mortgagor and not at auction. (2) A person in possession of a fluctuating share is only entitled to contribution on the basis of the share he was legally entitled to on the date of the accrual of the right. (3)

In computing the value of the properties, the accessions would be regarded as a part of the *corpus*. (4)

The term "incumbrance" here used is wide enough to include a charge or a vendor's lien. (5) A fund with fluctuating income, *e.g.*, mines, was held in a case to be liable to contribute only in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value, but this was a case in which the properties had to contribute towards payment of an annuity. (6)

1838. Where two more properties are mortgaged to secure one debt, one of them having been already mortgaged, and they are subsequently sold, the one who gets the estate bearing the prior incumbrance is entitled to deduct the amount of the mortgage due thereon and then bear rateable share in discharging the latter incumbrance. Thus suppose two estates, *A* and *B*, are mortgaged to *D*, for Rs. 1,000, *B* having been previously mortgaged to *C* for Rs. 200. *A* and *B* are sold to *E* and *F* respectively. *E* and *F* must both discharge the incumbrance of *D*; and must pay off *C* on account of the incumbrance of his property *B*. Ordinarily, assuming that the two properties are of equal value, *E* and *F* would have had to contribute Rs. 500, each. But since *F's* property was previously mortgaged for Rs. 200, he is entitled to deduct that amount from the value of his estate and will be thus liable to pay only Rs. 300, *E* being liable for the balance of Rs. 700. This illustration will hold good as regards also the second paragraph, the difference between the two being that while under the first paragraph, the deduction allowed is the *amount of* any other *incumbrance* to which the estate is subject *at the date of the mortgage*, under the second paragraph the contributory is entitled to deduct the amount of the former *debt paid*. Hence the second paragraph assumes that the first incumbrance has already been discharged and provides for the allowance of the sum actually paid, whereas the first paragraph assumes that the payment has still to be made. In both the paragraphs it is assumed that the two estates descend to two different persons,

Para 2.

(1) *Magniram* v. *Mehdi Hossein*, I. L. R., 31 Cal., 95 (104, 105).

(2) *Bisheshur Dial* v. *Ram Sarup*, I. L. R., 22 All., 284 (290, 293) F. B.; overruling *Sumera* v. *Bhagwant*, (1895) A. W. N., 1; *Chunna Lal* v. *Anandi Lal*, I. L. R., 19 All., 196; *Nand Kishore* v. *Raja Hariraj Singh*, I. L. R., 20 All., 23, F. B.; but see case distinguished in *Jugal Keshore* v. *Harbans*, I. L. R., 28 All., 700 (705).

(3) *Jotindra Mohun* v. *Guru Prosunno*, I. L. R., 31 Cal., 597 (611), P. C.

(4) *Krishna* v. *Gopal*, I.L.R., 29 Cal., 803.

(5) *Barnewell* v. *Ironmonger*, 1 Dr. & S., 242.

(6) *Ley* v. *Ley*, L.R., 6 Eq., 174 (176).

for the rule will not hold good where they come to the same preson. (1) In a suit for the ascertainment of his liability by a co-mortgagor, if it is found that the sum realized by the mortgagee in execution of his decree against him and the other mortgagors is in excess of his proportionate share, he is entitled to recover his share of the excess from the mortgaged property in possession of the mortgagee.(2) And so the purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt in order to save the estate from foreclosure or sale, can claim from each of the other mortgagors a contribution proportionate to his interest in the property, but he cannot claim from the other mortgagors collectively the whole amount paid by him.(3) Where the mortgagee purchases a portion of the property burdened with his own lien, he is bound in a suit to enforce his mortgage to bring into account the value of the property acquired by him,(4) for in such a case the mortgagee, while remaining mortgagee as to the entire property included in his mortgage, becomes also mortgagor as to the part of which he has acquired the equity of redemption.(5) Hence the mortgagee decree-holder is not entitled to take out execution of his decree without crediting towards the decretal amount the sum which represents his share; where he allowed to act otherwise, he would have the advantage of throwing the whole burden of the mortgage-debt on the mortgaged property other than that purchased by himself.(6)

1839. Where the mortgagee himself acquires a portion of the mortgaged property subject to his two anterior mortgages, he cannot foreclose the first mortgage, and then sue the mortgagor upon his second mortgage. Thus in a case where the mortgagor executed two successive mortgages in favour of *B*, and after the latter gave notice under the Regulations to foreclose, a portion of the mortgaged property was sold at an auction-sale to *C*, who thereupon to protect the interests he had bought at the sale, purchased in the name of *D*, a trustee, all the interests of *B* in both mortgages; and after the expiration of the year of grace, filed in the name of himself and *D* a suit to declare his absolute right to the foreclosed properties, and afterwards filed another suit against the mortgagor for a money-decree on the bond in the second mortgage, personal liability having been contracted for, it was held that *C*, being the owner of a portion of the property subject to both mortgages, and as such liable to contribute proportionately to the payment of both, could not foreclose the first mortgage and then sue the mortgagor for the whole debt due upon the second. (7) Where the mortgage included twelve pieces of property upon which the mortgagee obtained his decree, it was held that he could not deliberately abstain without special reason from executing his decree against eleven properties, which still remained in the possession of the mortgagor and execute it against the twelfth property sold in execution of a decree against the mortgagor, and thereby deprive the purchaser of the fruit of his purchase and shield the debtor

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(1) *Stronge* v. *Hawkes*, 4 DeG. M. & G., 186; *Lipscombe* v. *Lipscombe*, L.R., 7 Eq., 501; *De Rocheford* v. *Dawes*, L.R., 12 Eq., 540.

(2) *Bhagirath* v. *Naubat Singh*, I.L.R, 2 All., 115.

(3) *Hira Chand* v. *Abdul*, I. L. R., 1 All., 455; *Jagat Narain* v. *Qutub Husain*, I. L. R., 2 All., 847; *Sirajuddin* v. *Sirojuddin*, 2 A. L. J. R., 698; *Chagan Das* v. *Gan Sing*, 1. L. R., 20 Bom., 615; *Domun Sing* v. *Kasee Ram*, 1 M.I.A., 366.

(4) *Jeetram Dutt* v. *Durga Doss*, 22 W.R., 430; *Kishen Pertab* v. *Lalla Nund*, 25 W.R., 388.

(5) *Moro Raghunath* v. *Balaji*, I. L. R., 13 Bom., 45 (49).

(6) *Hari Raj Singh* v. *Ahmad-ud-din*, I. L.R., 19 All., 645 (554).

(7) *Kali Prosonno* v. *Kamini Soondari*, I. L. R., 4 Cal., 475 (481).

whose property was equally liable. (1) In such a case, the purchaser would be liable for no more than the amount which should be apportioned to such property, and if all the parties are present, the Court will make an enquiry to determine the amount for which the contributory can be held liable.(2) In a similar enquiry, it has been held by the Privy Council that the proportion of the mortgage-charge payable by the purchaser of a fragment of an equity of redemption cannot be ascertained in the absence of the purchasers of other fragments, or by taking an account as between himself and the mortgagee alone.(3) As this section is no authority for allowing redemption of a mortgage piece-meal, it follows that the purchasers of fragments of the property cannot compel the mortgagee to accept their contributions piece-meal. (4) He is entitled to claim the whole amount of his mortgage-money and is not bound to relinquish any portion of his security on a part-payment of his debt. (5) But as between a mortgagor and purchaser the latter is clearly entitled to compel the former to have the charge primarily satisfied out of the other property. (6) The question whether he can compel the mortgagee to first proceed against the other property in the hands of the mortgagor has been already discussed in the last section. (7)

1840. Does Contribution imply Payment of the whole Debt.— Another question upon which the Courts present diversity of views is whether the right to contribution implies the discharge of the whole debt or only payment of a sum in excess of the rateable proportion chargeable on the property of the person claiming contribution. According to the view taken by the majority of the Full Bench in an Allahabad case (8) contribution cannot be claimed unless the whole debt has been discharged by the person claiming contribution, but this view, though shared in some cases in Madras, has since been abandoned.(9) The exponents of either view approach the question from the analogy of co-sureties, it being held on the one hand that inasmuch as there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursements, (10) no different principle should govern the case of co-mortgagors. (11) On the other hand, it has been held that the case of co-sureties stands on a very different footing from co-mortgagors, inasmuch as while the right of contribution in the one case is a personal right, in the other the right claimed is one *in rem*, which gives rise to different considerations. (12) So much may be conceded, but that alone can scarcely suffice to differentiate the principle in the two cases, the effect of which may lead to a denial of the beneficial

(1) *Ram Dhun* v. *Mohesh Chunder*, I. L. R., 9 Cal., 406 (410); *Moro Raghunath* v. *Balaji*, I. L. R., 13 Bom., 45; distinguishing *Gaya Prasad* v. *Salik Prasad*, I. L. R., 3 All., 682; *Lakhmidas* v. *Jamna Das*, I. L. R., 22 Bom., 304 (309), F. B.

(2) *Moro Raghunath* v. *Balaji*, I. L. R., 13 Bom., 45 (49); following *Ram Dhun* v. *Mohesh Chunder*, I. L. R., 9 Cal., 406.

(3) *Nalkant* v. *Suresh Chunder*, 12 I. A. 171.

(4) *Raghunath* v. *Harlal* I. L. R., 18 Cal., 320; *Kuppusami* v. *Papathi*, I. L. R., 21 Mad., 369; *Chagan Das* v. *Gan Sing*, I. L. R., 20 Bom., 615.

(5) *Timmappa* v. *Lakshmamma*, I. L. R., 5 Mad., 385; *Kuppusami* v. *Papathi*, I. L. R., 14 Mad., 369.

(6) S. 56.

(7) See s. 81 & Comm.

(8) *Ibn Hasan* v *Brij Bhukan*, I.L R., 26 All., 407. F B

(9) *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R. 26 Mad., 686 (716), F.B.; *contra* in *Sesha Ayyar* v. *Krishna*, I.L R., 24 Mad., 96; *Pattabhiramayya* v. *Ramayya*, I. L.R., 20 Mad., 23.

(10) *Davis* v. *Humphreys*, 6 M. & W., 153; *Craythorne* v *Swinburn*, 14 Ves., 160.

(11) *Per* Banerji, J., *dissentinti* in *Ibn Hasan* v. *Brijbhukan*, I.L.R., 26 All., 407 (437, 438, 439). F.B.; *Bagirath* v. *Naubat Singh*, I. L R., 2 All., 115; *Ibn Husain* v. *Ram Dai*, I.L R., 12 All., 110; *Hari Raj Singh* v. *Ahmaduddin* I.L.R., 19 All., 545; *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R., 26 Mad., 686, F.B.

(12) *Ibn Hasan* v. *Brijbhukan*, I.L.R., 26 All., 407 (427, 428), F.B.

operation of the equity until the whole debt is paid, which may be beyond the power or the means of the person claiming contribution. No doubt this view may involve multiplicity of suits, but such inconvenience cannot suspend the operations of the rule, and, as was observed in an Allahabad case, " convenience is not always a good reason for laying down a proposition of law." (1)

Contribution on compulsory sale.

1841. Another question upon which the decisions of the Courts present the same want of harmony is as regards the extension of the doctrine to a forced sale. In Madras the right cannot be claimed in respect of a payment levied by legal process, (2) and a similar view was propounded in a case in Allahabad. (3) But there appears to be no distinction in principle between a case in which payment has been made to avert a legal process, and a case in which payment has been enforced by sale of the property of the claimant for contribution. In both cases his claim is based upon the ground that his property has contributed more than what it was liable for and that the defendant has benefited thereby. Such a right has been recognized in several cases. (4)

1842. Recovery of Contribution.—The contribution may be recovered either by a suit or in an enquiry directed by the Court as stated above. The claimant is not bound to join all the contributories, (5) though, as a matter of convenience, all might be made parties to the suit. (6) Under the section, it will be seen that the liability to contribute attaches to *properties* and may, therefore, be enforced even if they change hands *pendente lite*. (7) It must be observed that the section being subject to a contract to the contrary, no suit for contribution can be maintained if the plaintiff is precluded by contract from maintaining it. Hence, if it was agreed that one of the two properties was to be a primary security, and the other a secondary (8) or ancillary security, not to be resorted to until the primary security was exhausted, the legal consequence would follow that the first property, that is, the property the subject of the primary security, would have to bear the whole burden of the mortgage before the other can be resorted to. (9) The expression " in the absence of a contract to the contrary " must, however, be understood to mean an agreement between a mortgagor and mortgagee, as distinguished from an agreement which is binding only as between the mortgagors and which is not " a contract to the contrary " within the meaning of this section. (10) Such a contract may be made either at the time of the mortgage or afterwards. (11) As Lord St. Leonards in a

(1) *Lalji* v. *Nand Kishore*, I.L.R., 19 All., 332; followed *per* Banerji, J., in *Ibn Hasan* v. *Brijbhukan*, I L.R., 26 All, 407 (441) F.B.

(2) *Sesha Ayyar* v. *Krishna*, I.L.R., 24 Mad.; 96.

(3) *Ahmaduddin* v. *Banke Rai* (unrep.) All., No. 382 of 1883 (facts set out *per* Stanley, C.J., in *Ibn Hasan* v. *Brijbhukan*, I.L.R., 26 All., pp. 421 422).

(4) *Ramabhadrachar* v. *Srinivasa*, I.L.R., 24 Mad., 85; *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R., 26 Mad., 686, F.B.; *Baij Nath* v. *Naubat Singh*, I.L.R., 2 All., 115; *Ibn Husain* v. *Ram Dai*, I.L.R., 12 All., 110; *Bald o Sahai* v. *Raij Nath*, I.L.R. 13 All., 371; *Hari Raj Singh* v *Ahmaduddin* I.L.R., 19 All, 545; but see *Ibn Hasan* v. *Brijbhukan*, I.L R., 26 All., 407 (423), F B.; *Sesha Ayyar* v. *Krishna*, I.L.R., 24 Mad., 96.

(5) *Rajaput Rai* v. *Mahomed Ali*, 5 N.W. P.H.C R, 315.

(6) *Ib.*; *Tavasi* v. *Palani*, 3 M. H. C. R., 187; *Khema Debia* v. *Kumola Kant*, 10 B. L. R., 259 *note*; *Eglington* v. *Koylashnath*, 1864 W. R., 303; *Ibn Husain* v. *Ram Dai*, I. L. R., 12 All, 110.

(7) *Baldeo Sahai* v. *Baijnath*, I. L. R., 13 All., 371.

(8) The term " collateral security " is defined in In re *Athil*, 16 Ch. D; 211 (223), to mean *additional security*, and would be misused in this country unless the mortgage provides another primary, *i. e.*, personal security.

(9) *Per* Jessel, M. R., In re *Athil*, 16 Ch. D., 211 (220)

(10) *Ramabhadrachar* v. *Srinivasa*, I.L. R., 24 Mad., 85; In re *Athil*, 16 Ch. D., 211; In re *Dunlop*, 21 Ch. D., 583.

(11) *Rama* v. *Manak*, 7 Bom. L. R., 191.

case said, that to bring about apportionment you must be satisfied that the two properties were made a common fund. (1) The doctrine of equity as to contribution applies only where two properties are *equally charged*. If the incumbrance creates a primary charge, and the property included therein is primarily liable in exoneration of other property which is only subject to a general lien, the former cannot obtain contribution from the latter. (2) So where, although all the properties may have originally been equally liable, if a mortgage-decree has thrown the incidence of the debt primarily on only some of the properties, the rule then can have no application. (3)

No contribution on void contracts

1843. There can be no claim for contribution in respect of illegal or void contracts. Thus, for instance, no suit for contribution will lie in respect of losses in joint betting on horses. (4) A person paying barred debts cannot obtain contribution, and it is the same if the claimant has omitted to plead limitation in the suit giving rise to his right, for the party against whom it is claimed might have on that ground repelled the demand against them. (5) But it is otherwise where the purchaser of a part of the mortgaged property satisfies the mortgage-debt with a view to save the whole property from sale, and thereby saves a portion of it purchased by the defendant. Here, although the mortgagee by not impleading the defendant in his suit upon the mortgage-bond had put it out of his power to proceed at law by another suit on the basis of the same bond against the property in the defendant's possession, still he was held liable to pay a fair contribution agreeably " in substance to reason and equity." (6) But as observed by the Privy Council, " It is not in every case in which a man has been benefited by the money of other, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debt. Still less will the action lie when the money has been paid, against the will of the person for whose use it is supposed to have been paid. (7) Nor can the case of *A* be better because he made the payment not *ex mere motu* but in the course of a transaction, which, in one event, would have turned out highly profitable to himself and extremely detrimental to the person whose debts the money went to to pay." (8)

1844. Mode of Recovery.—A claim for contribution cannot be joined with one on mortgage. Thus where several items of property were mortgaged to *A*, and some of these together with some of others were mortgaged to *B*, and in execution of *A's* decree, one property which was subject to both the mortgages, was sold and purchased by *B*, and the latter then brought a suit for contribution under the section in respect of the properties subject to the first mortgage, and also for a mortgage-decree against the property subject to his mortgage, it was held that the two suits were misjoined. (9) The right of a plaintiff to obtain contribution should not be defeated if he is entitled to it under the general law,

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(1) *Averall* v. *Wade*, Sl. & G., 252, cited in In re *Dunlop*, 21 Ch. D., 581 (590).

(2) *Marquis of Bute* v. *Cunningham*, 2 Russ., 275 (299); In re *Dunlop*, 21 Ch. D. 581 (592).

(3) *Satya Kripal* v. *Gopi Kishore*, 6 C. W. N., 583 (585).

(4) *Saffrey* v. *Mayer*, [1901] 1 Q. B., 11.

(5) *Fordham* v. *Wallis*, 10 Ha., 217.

(6) *Jagat Narain* v. *Qutub Husain*, I. L. R., 2 All., 807.

(7) *Stokes* v. *Lewis*, 1 T.R., 20.

(8) *Ram Tuhul* v. *Biseswar*, 15 B. L. R., 208 (219), P.C.

(9) *Sesha Ayyar* v. *Krishniengar*, I. L. R., 24 Mad., 96.

though he claimed it under a specific agreement which was found to be invalid.[1] A claim for contribution may be allowed in the mortgagee's suit for sale, if claimed by co-defendants who are owners of the equity of redemption in different portions of the mortgaged property, but no right operating prejudicially on the rights of the prior or other mortgagees not parties to the suit can be adjusted. [2]

The right to contribution begins as soon as a person has made any payment in excess of his share, and he need not wait till he makes the whole payment, if he means or is able to do so [3] It has been accordingly held in Madras that each time an amount is paid by or levied from a person in excess of his share, he has a right of suit for contribution in respect of such payments; he really unites several causes of action in one and the same suit under O. II, r. 3 of the Civil Procedure Code, and the Law of Limitation under Article 99 will apply separately to each of such causes of action from the date of the respective payments, and the claim for contribution in respect of such payments as were made more than three years before date of suit, would be barred by limitation. Of course the plaintiff must include in the suit the whole of his claim for contribution in respect of all the payments made by him prior to the date of the suit. [4]

The limitation in such suits is twelve years from the date of the confirmation of the sale, as provided in Article 132 and not by Article 99 or Article 120 of Schedule II of the Limitation Act. [5]

1845. Marshalling v. Contribution.—The effect of this proviso is to declare that where the two rights clash, marshalling shall prevail. Collision between the two rights is possible, as in a case where the owner of two properties, *A* and *B*, mortgages them separately to *C* and *D*, and again both together to *E*, afterwards mortgaging *A* to *F*. Here according to the last section *F* has the right of insisting on *D* to resort first for satisfaction to the property *B*, which is only subject to two mortgages, but at the same time under this section, the two properties, *A* and *B*, must contribute rateably, which might have the effect of considerably reducing *F*'s security.[6] The proviso, therefore, enacts that in such a case, the right of contribution will give way to the other right to which the former is made subject in conformity with the English law, where also, the right of contribution is prevented by the right of marshalling from being applied against an estate which is liable to other creditors of the debtor.[7] If, however, in the above case, *F* has only a residuary interest in the property, he cannot claim to marshal, and the section will then apply. "And if one of several estates is charged with the payment of debts to which it is subject, it will not be liable to contribute with the other estates to the general charge.[8]

Proviso.

1846. A claim for contribution can only be made (*a*) when the several properties are liable to one common demand and (*b*) when they are equally liable. Thus where *A* and *B* each holding the first mortgage of two properties *P* and *Q* consented to give priority to a subsequent mortgage *C* of both the properties *P* and *Q*, and *C*

Common fund essential.

(1) *Periya* v. *Venkatachellum*, 15 M. L. J. R., 24.

(2) *Ibn Hasan* v. *Brijbhukan*, I. L. R., 26 All., 406 (432), F.B.

(3) *Davies* v. *Humphreys*, 6 M. & W., 153.

(4) *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R. 26 Mad. 686 (716).

(5) Act XV of 1877; Now Act IX of 1908; *Ibn Husain* v. *Ram Dai*, I.L.R. 12 All., 110.

(6) Para. 1.

(7) Fisher, § 1349; *Bartholomew* v. *May*, 1 Atk., 487.

(8) *Wisden* v. *Wisden*, 2 S. & G., 396; Fisher, § 1349.

thereupon brought both the properties to sale, but the surplus proceeds of sale of *P* was insufficient to pay off *A's* mortgage, and he thereupon claimed contribution against *B*, but it was held that *B* was not liable to contribute, as there was no common liability to pay a common demand.(1) The second point may be illustrated by a case where one property is mortgaged and the other is subject only to a general lien.(2) This is what Lord St. Leonards meant by laying down that there must be a "common fund."(3)

1847. It is, moreover said in Madras that in order to originate a right to contribution it is essential that the owner of one of several properties subject to a common debt must redeem the mortgage by paying off the debt. In other words, if the mortgage has not been redeemed, and one of the properties is sold in execution of the decree obtained on such mortgage, there is no right to contribution in favour of the owner of such property as against the owners of the other properties forming part of the security.(4) So where certain lands were mortgaged to *A* and subsequently a portion of the land comprised in his mortgage was mortgaged to *B* together with other land, and *A* then obtained a decree on his mortgage in pursuance of which only the partition of the property also mortgaged to *B* was sold to an auction-purchaser *C* and thereby *A's* decree was satisfied; it being then unnecessary to sell the remaining portion comprised in *A's* security, *B* then sued on his mortgage, claiming not only as against his mortgagor, but also against *A* in respect of the land purchased by him, but it was held that *B* was not entitled to enforce contribution against *A*. In such a case, however, if *B* had not suffered the property mortgaged to him to be sold(5) in execution of *A's* decree, but had instead paid him off, there can be no doubt that in that case his position would have been analogous to that of one of several mortgagors, who, having redeemed the whole property, was entitled to enforce his right of contribution against *B's* property.(6)

1848. The view taken in Madras appears to be too narrow, and restricts the fundamental principle underlying the doctrine of contribution which is not peculiar to the law of mortgage; since whenever estates are subject to a common demand and that demand is satisfied by the person interested in one of them, he has the right to call upon the other owners to contribute, and, if the demand was on account of land-revenue payable to Government, it has been conceded even in Madras that he has in addition a lien on the land of others forming part of the entire estate in respect of which revenue was payable.(7) But in Allahabad the section is held to have a wider operation. Where two properties, *A* and *B*, belonging to different owners, were mortgaged under a joint bond for the same debt, and the mortgagee enforced his mortgage and in execution of the decree obtained by him caused property *A* to be sold, the proceeds of which left a surplus after satisfying the whole mortgage-debt. Before his suit, however, another person, *P*, having in execution of a money-decree attached and himself purchased a share in the same property, A claimed contribution from property *B*, on the ground that he had satisfied the mortgage-debt to the extent his interest represented in the sale, and his claim was to that extent

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(1) In re *Keily*, 9 Ir. Ch. R., 87.
(2) In re *Dunlop*, 21 Ch. D., 583 (592).
(3) *Averall* v. *Wade*, Ll. & G., 252.
(4) *Sesha Ayyar* v. *Krishna*, I. L. R., 24 Mad., 96 (108); *Rajah of Vizianagram* v. *Rajah Setrucherla*, I L R, 26 Mad., 686.
(5) *Sesha Ayyar* v. *Krishna*, I. L R, 24 Mad., 96 (107).
(6) *Danappa* v. *Yamnappa*, I. L. R., 26 Bom, 379 (385, 386)
(7) *Seshagiri* v. *Pichu*, I. L. R., 11 Mad, 452 (457); *Sesha Ayyar* v. *Krishna*, I.L.R., 24 Mad., 96 (108). This case was, however, distinguished in *Danappa* v. *Yamnappa*, I.L.R., 26 Bom., 379 (385, 386).

allowed. (1) It therefore follows that such of the mortgaged properties as have been sold for realization of the mortgage-money and have thus contributed to the mortgage debt are not liable to a claim for contribution, and that such a claim can only be advanced by the owners of those properties which have contributed more than their rateable share of the debt and only against those portions of the mortgaged property which have not contributed to the mortgage-debt and have benefited by the sale of the property of the claimants for contribution.

1849. The unsold portion of the mortgaged property affords the fund out of which the claims of all the persons whose properties have contributed more than their own share of liability must be satisfied.(2) A certain estate comprising 38 villages was the subject of several successive incumbrances, 31 villages being mortgaged on the 12th December 1867, and 28 villages being again mortgaged on the 28th April 1873, while the third mortgage, dated the 4th July 1874, embraced the entire estate. All the mortgages were simple, and the decrees obtained on the prior two mortgages were satisfied by sale of only a few villages in each case. The last mortgagee *A* obtained a decree on his mortgage on the 28th February, 1878. Subsequently to this decree, four of the villages affected by it were sold in execution of a money-decree and were acquired by *B*. Similarly, *A* also acquired about six of the mortgaged villages, and a share in another of those villages was purchased by *C*. Finally, in execution of his mortgage-decree, *A* brought to sale the four villages which *B* had purchased, and thereupon the latter sued both *A* and *C* for contribution, alleging that the said four villages had been sold for considerably more than the amount for which they were proportionately liable under the mortgage-decree; that *A* and *C* were owners of villages which were equally liable with his villages under the decree of 1878, but which had contributed nothing towards its satisfaction, although both *A* and *C* were on account of their purchase liable, and these contentions were upheld by the Court. (3) Similarly, in another case where the purchaser of a joint Hindu family in execution of a mortgage-decree obtained against the father was deprived of four-fifths of the property on suit by the sons, and which represented their interests, it was held that the latter being liable to pay the debt incurred by their father, they were also liable to contribute to the extent of four-fifths of the purchase-money exempted from sale in their favour, and for which the auction-purchaser had a charge on their interests. (4) The principle underlying all these cases is clear, and while an antecedent payment of the amount in respect of which contribution is sought is a usual circumstance found in ordinary cases, it is not a *sine qua non* of the doctrine, and it was not so implied in the Madras cases to which reference has been before made, (5) though an antecedent payment was considered essential to create a charge. (6)

And even if payment be essential, it is conceded that it need not be made by the claimant himself. If, for instance, the land-revenue being in arrear it is realised by the Collector under the Revenue Recovery Act from the income of his share after it had been registered as a separate estate, it would not affect the right of contribution. (7)

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(1) *Baldeo* v. *Baij Nath*, I. L. R., 13 All., 371 (372).

(2) *Hari Raj Singh* v. *Ahmaduddin*, I. L. R., 19 All., 545 (548).

(3) *Hari Raj Singh* v. *Ahmaduddin*, I.L. R., 19 All., 545; *Shanto Chandar* v. *Nain Sukh*, I.L.R., 23 All., 355 (358).

(4) *Shanto Chandar* v. *Nain Sukh*, I.L.R., 23 All., 355 (359).

(5) *Sesha Ayyar* v. *Krishna*, I.L.R., 24 Mad., 96; *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R., 26 Mad., 686 (693).

(6) *Sesha Ayyar* v. *Krishna*, I.L.R., 24 Mad., 96 (108).

(7) *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R., 26 Mad., 686 (724); *Seshagiri* v. *Pichu*, I.L.R., 11 Mad., 452.

Does contribution create a charge?

1850. The High Courts were, at one time, however, sharply divided on the question whether the right of contribution also carried with it a charge on the property. Apart from section 95 which applies only to a co-mortgagor there was held to be no explicit provision in the Act to create a charge in all cases of contribution. Its existence was held to depend upon the principle of subrogation or other equitable considerations apart from the statutory enactment. And it was on this point that the difference of opinions had arisen. According to the earlier cases of the Allahabad [1] and Calcutta [2] Courts, it would be contrary to the policy of legislative enactments to recognize an equitable charge superadded to the right created by the Statute. "We are not," observed Wilson, J., "at liberty to treat the matter as if it were *res integra*, and under the name of equity and good conscience to adopt whatever rule we think most likely to work well. If we were, I should hesitate much before adopting such a rule as that pressed upon us. In the tangle of interests which an estate in this country presents—zemindari rights, tenures, and under-tenures without limit, every one of them held in co-ownership, and every share of every interest perhaps subject to mortgages—I cannot pretend to foresee what the consequences may be of broadly laying down such a doctrine as we are asked to do." [3] A similar view was echoed by the Allahabad Full Bench [4] who went the length of adding that such lien was at variance with the present enactment,[5] though in a later case its existence was recognized, it being held that the rule here enacted created a statutory charge independently of section 95, and which as regards limitation might, like any other charge, be enforced under Art. 132 of the Limitation Act. [6] The Bombay and Madras Courts have always adhered to the view favouring a charge, though while it has been justified in Bombay on the ground of salvage, the Madras Court has upheld it on the construction it places upon this section coupled with section 100. "The payment of the assessment," observed Sargent, C.J., "by the part-owner is by a person entitled to pay it, and who does so *ex-hypothesi* under circumstances which make it necessary, in order to save the estate for himself and co-owners, and in either view of such payment, he becomes equitably entitled to a charge on the whole estate as against the other co-sharers." [7]

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(1) *Seth Chitor Mal* v. *Shib Lal*, I.L.R., 14 All., 273 (299), F.B.

(2) *Kinu Ram* v. *Mozaffer*, I.L.R., 14 Cal., 809 (826) F.B.; *Khub Lal* v. *Pudmanund*, I.L.R. 15 Cal., 542; followed in *Gopinath* v. *Ishur Chundra*, I.L.R., 22 Cal., 800; *Upendra Lal* v. *Girindra Nath*, I.L.R., 25 Cal., 565; *Nawab Jahan* v. *Mirza Sujauddin*, 9 C.W.N., 865. The same view was maintained in a long series of earlier cases of the same Court; *Andrew* v. *Harris*, (1852) S. D. A., 697; *Sone Kolee* v. *Sheik Ezahar*, (1855) S. D.A., 44; *Gobind Pershad* v. *Sundri*, (1856) S.D.A., 867; *Manik Mula* v. *Parbuttee*, (1859) S.D.A., 515; *Ram Buksh* v. *Modhusudan*, B.L.R. (sup. vol.). 675, F.B.; on the other hand charge was allowed in *Enayet Hossain* v. *Muddunmoollee*, 14 B.L.R., 155; *Ram Dutt* v. *Horakh Narain*, I L.R., 6 Cal., 549; *Mahesh Chunder* v. *Ram Prosonno*, I.L.R., 4 Cal., 589; *Kristo* v. *Kali Prosunno*, I.L.R., 8 Cal., 402; *Nobin Chunder* v. *Rup Lall*, I.L.R., 9 Cal., 377; but in *Prabhu Narain* v. *Beni Singh*, 14 C.W.N. 361; 5 I.C. 779, the Court allowed the charge as a matter of equity.

(3) *Kinu Ram* v. *Mozaffer Hosain*, I. L. R., 14 Cal., 809 (832), F.B.

(4) *Seth Chitor Mal* v. *Shib Lal*, I. L. R., 14 All., 273 (299), F.B.; *Ibn Hasan* v. *Brijbhukan*, I. L. R., 26 All., 407 (418, 419), F. B.; dissenting from *Ahmaduddin* v. *Banke Rai* (unrep.), All., case 382 of 1883, cited in *ib.*, p. 421, 422; *Rajah of Vizianagram* v. *Rajah Setracherla*, I. L. R., 26 Mad., 686, F.B.

(5) *Per* Edge, C.J., in *Seth Chitor Mal* v. *Shib Lal*, I.L.R., 14 All., 273 (299, 300).

(6) *Bhagwan Das* v. *Karam Husain*, I.L. R., 33 All. 708 (716, 717) F.B., distinguishing *Ibn Hasan* v. *Brijbhukan*, I L.R., 26 All., 407, following *Muhammad* v. *Muhammad*, I. L R., 31 All., 65.

(7) *Achut Ramchandra* v. *Hari*, I. L. R., 11 Bom., 313 (319); *Danappa* v. *Yamnappa*, I.L.R., 26 Bom., 379 (385).

But this is a view which has not been indorsed by Jenkins, C.J., who holds a charge as by no means an incident to a right of contribution.(1) But this view which follows the trend of the Allahabad and Calcutta cases has been controverted in Madras, where lien was declared to be deducible on the authority of this and section 100,(2) although the question was finally decided as a matter of justice, equity and good conscience.(3) The tendency of later decisions appears to recognize a charge, whether as allowed by this section, or on the principle of subrogation, as a matter of equity.(4)

1851. The language of this section is by no means clear, but if the expression "*several* properties . . . . of *several* owners" be held to convey not only separate properties independently owned by separate owners in severalty, but also separate shares owned by two or more co-owners as tenants-in-common by unity of possession, then the question would be directly governed by the terms of this and section 100.

But the language of this section alone is by no means unequivocal, since the liability of the mortgaged *properties* to contribute rateably to the *debt secured by the mortgage* could not be held to refer to a liability which springs up on extinguishment of the debt. And even if it be supposed that the liability arises and is proportionate to the extra burden discharged, it can scarcely be said that the liability of the exonerated property to equalize the burden of the other property by paying off the extra amount is a contribution *to the debt secured by the mortgage*. In other words this section merely declares the manner in which the debt shall be borne by the several properties and it does not provide for the keeping alive of the lien after the mortgage-debt has been paid. (5) The question has not yet gone up to the Privy Council, but there are certain expressions in the judgments of that tribunal which are cited in Madras as upholding their views but which, on the other hand, have been distinguished by the other Courts. (6) Their Lordships' observations in the earlier case were confessedly *obiter*, though their pronouncement on the subject is nevertheless unequivocal: "Considering," they say, "that the payment of the revenue by the mortgagee will prevent the Talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the Talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Talook as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion that this is not the form in which the question comes before them, and what they have to

(1) *Shivrao* v. *Pundlic*, I. L. R., 26 Bom., 437 (441, 442).

(2) *Rajah of Vizianagram* v. *Rajah Setrucherla*, I. L. R., 26 Mad., 686 (709), F.B.; *contra* in *Sesha Ayyar* v. *Krishna*, I. L. R., 24 Mad., 96; *Rajah of Vizianagram* v. *Rajah Setrucherla*, I L.R. 26 Mad. 686 (709) F.B.; *Amman* v. *Pakran*, I L.R., 36 Mad. 493.

(3) *Rajah of Vizianagaram* v. *Rajah Setrucherla*, I. L. R., 26 Mad., 686 (722), F. B.; following *Seshagiri* v. *Pichu*, I. L. R., 11 Mad., 453; followed in *Alaya Kammal* v. *Subbaraya*, I. L. R., 28 Mad., 493; *Puthenpurayil* v. *Mangalaseri*, 15 I.C. 262; *Amman* v. *Pakran*, I.L R., 36 Mad. 493.

(4) *Prabbu Narain* v. *Bai Singh*, 14 C. W.N. 361; *Bhagwan Das* v. *Karam Husain*, I. L R., 33 All., 708 F.B.; and cases cited *supra*.

(5) *Sesha Ayyar* v. *Krishna*, I. L. R., 24 Mad., 96; *Ibn Hasan* v. *Brij Bhukan*, I. L. R., 26 All., 407 (423), F.B.; *contra per* Banerji, J., *dissentiente*. *ib.*, 443, since followed in *Bhagwan Das* v. *Karan Husain*, I. L. R., 33 All., 708 (716, 717) F.B.

(6) *Nugender Chunder* v. *Kaminee*, 11 M. I.A., 241 (258 259); followed in *Rajah of Vizianagram* v. *Rajah Setrucherla*, I. L. R., 26 Mad. 686 (711), F. B.; distinguished in *Kinu Ram* v *Mozuffer Hosain*, I. L. R., 14 Cal., 809 (830) F.B.

decide is not whether such a charge originally existed, or whether it does now subsist, but whether the appellant can enforce such a charge in the present suit." (1) This was a case of a mortgagee whose right in this respect is now recognized in a modified form by the Act. (2) In another case of an invalid mortgage the mortgagee, was held entitled to an equitable charge upon the property in respect of the principal sum advanced with interest. (3) So yet in another case, the same tribunal described a claim for recovery of a sum paid on account of the Government revenue by a person in possession of property under a decree subsequently set aside as in the nature of salvage, but the question of lien not being raised, their Lordships did not go into the question whether such a claim would be a charge on the property. (4)

1852. Thus then it would seem that their Lordships' views encourge an excursion into the captivating regions of equity which the learned Judges of the Allahabad and Calcutta Courts deprecate. The question has long since been settled in America where the right of person interested in the property discharging a valid lien or other claim against the property, to assert such a claim or lien to the extent of compelling an equitable contribution has long since been recognized.(5) But in England the same question has been differently settled since Lord Elsdon decided that the right to contribution was a personal right and created no lien.(6) Even if a person allows another to expend money upon his property and stands by during such expenditure, no lien can arise unless the person had expended money under a belief in the validity of his own title,(7) which he standing by knew to be infirm. (8) In the opinion of Bowen, L. J., the law of salvage as a branch of maritime law imposes a peculiar liability upon the thing saved, out of regard to the special consequence arising out of the character of mercantile enterprises and the perils of the sea, but which should not be extended to things lost upon land. (9) The word " salvage " is of Irish origin, (10) and its extension to cases of contribution is there regarded consonant with equity, but these cases have received no countenance at the hands of English Judges. (11) The question is then one upon which there has been some diversity of opinions, but having regard to the nature of the doctrine it may be useful to extend it to certain cases of contribution, but it cannot be asserted that it is a necessary incidence of that right.

1853. Duration of the Right.—While a right to contribution may be affected by the terms of the contract or the rules of equity, (12) once a person becomes entitled to the right, he cannot be deprived of it by the fact that he

(1) *Nugender Chunder* v. *Kaminee*, 11 M. I.A., 241 (258, 259).

(2) Ss. 65, 68, 76 (*c*).

(3) *Bhagwati* v. *Radha Kishen*, I.L.R., 15 All., 304 (306, 310), P.C.; followed in *Subhammal* v. *Muthu Pathu*, I L.R, 26 Mad., 686, *foot note*; *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L.R, 26 Mad., 686 (725), F.B.

(4) *Dikhina Mohan* v. *Saroda Mohan* I.L.R. 21 Cal. 142 (149) P.C.

(5) Freeman's "Co-tenancy and Partition," §§ 176—263.

(6) *Ex parte Young*, 2 V. & B., 242; *Ex parte Harrison*, 2 Rose., 76; *Kay* v. *Johnstone* 21 Beav., 536; *Tesadale* v. *Sanderson*, 33 Beav., 534; In re *Leslie*, 23 Ch. D., 552 563, 564).

(7) *Per* Fry. L.J., In re *Leslie*, 23 Ch. D., 552 (565). The judgment was read by Pearson, J., who adopted it as his own.

(8) *Per* Cotton, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D., 234 (242, 243).

(9) *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D., 234 (248, 249).

(10) The word "salvage moneys" was coined by Lord St. Leonards in [1852], In re *Tharp*,, 2 Sm. & Giff., 578, *note*.

(11) See *per* Fry, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch D., 234 (254).

(12) In re *Dunlop*, 21 Ch. D., 583; *Satya Kripal* v. *Gopi Kishore*, 6 C.W.N., 583; *Magniram* v. *Mehdi Hossain*, I.L.R., 31 Cal. 95 (104).

had indemnified himself against loss in some other way.(1) Thus where the owner of certain lands mortgaged them, and subsequently effected a partition of the family-property between himself and his three sons, each person taking a fourth share in the family property, and each became liable for a fourth of the mortgage-debt. One of the sons then sold the greater portion of his share in the mortgaged property to the plaintiff giving him a security-bond to indemnify him from any loss which might be occasioned if the original mortgagee should bring the mortgaged lands to sale. The plaintiff having been sold out by the mortgagee who paid himself from the sale-proceeds of that portion alone, the former first enforced his indemnity, and for the balance sued for a rateable contribution from the other portions of the mortgage-property which had not been sold to satisfy the mortgagee's decree. The liability of this property to contribution was conceded, but the lower Court was of opinion that by the fact of having accepted indemnity from his vendor the latter and not the plaintiff was entitled to sue for it. But this view did not ultimately prevail, it being held that the plaintiff could not be deprived of his right by the fact of his having protected himself by an indemnity-bond.(2) A claim for contribution is essentially an equitable claim, and in determining the amount of it the Court must take an equitable view of all the circumstances attending the case, and must not give effect to what is only an apparent and not the real state of things.(3)

A claim for contribution, though not laid in the plaint, would still be decreed, if it is at least pressed in argument, and the title which can be lawfully asserted is clear from the facts on record. (4)

1854. Quantum of Contribution.—Where a claim for contribution is made out against several properties in the hands of different purchasers, the property which was purchased from the mortgagor last is sometimes ordered to be first sold in the satisfaction of the mortgage-decree. That is for the purpose of drawing upon the different funds, the rule is sometimes said to be to bring the several properties to sale in the inverse order of sales of the different purchasers. But this is a rule which is now seldom applied. For though as between the mortgagor and the purchaser from him, property in the hands of the mortgagor should be sold first without giving him any claim for contribution, yet when all the properties have passed to the hands of purchasers for value, there is no sufficient reason for holding that later purchasers should not be entitled to contribution as the earlier ones.(5)

1855. Four parcels of the property were mortgaged by the owner. Subsequently in July, 1888, *A* purchased the two parcels *P* at an execution-sale subject to the said mortgage, and *B* the other two parcels *Q*, at a private sale in January 1888. The mortgagee later on brought a suit making the said purchasers *A* and *B* co-defendants and obtained a mortgage-decree directing the sale of the property *P* to satisfy the mortgage-debt, which was completely satisfied out of the sale-proceeds. It was found by the Court that *B* had purchased without express notice of the said mortgage which had been registered. In a suit for contribution by *A* against *B* it was held that the latter were not entitled to throw the whole

(1) *Ramabhadrachar* v. *Srinivasa*, I.L.R., 24 Mad., 85 (93).
(2) *Ib.*
(3) *Magniram* v. *Mehdi Hossein*, I.L.R., 31 Cal., 95 (104).
(4) *Danappa* v. *Yamnarpa*, I.L.R., 26 Bom., 379 (387), following *Mohidin* v. *Shivlingappa*, I.L.R., 23 Bom., 666 (670).
(5) *Magniram* v. *Mehdi Hossein*, I.L.R., 31 Cal., 95 (103).

of the mortgage-debt on the property *P*, the rule of inverse order being inapplicable to such a case where *A* would be further entitled to contribution, and that the properties in the hands of the purchasers should contribute to the mortgage-debt in proportion to their respective values.(1)

Against whom avails.

1856. The obligation to contribute attaches to the property and cannot be enforced personally against its owner who may consequently elect to forego his interest if he declines to contribute.(2)

1857. Extension of the Rule.—The principle of contribution is not peculiar to the law of mortgage. Whenever estates are subject to a common demand and that demand is satisfied by the person interested in one of them, he has the right to call upon the other owners to contribute, and, if the demand was on account of land-revenue payable to Government, the Madras Court has held that he has in addition a lien on the land of others forming part of the entire estate in respect of which revenue was payable.(3) And the Allahabad High Court appears to regard the section itself as having wider operation,(4) but the Madras Court has not acceded to this view.(5) The subject is one which will have to be more adequately discussed in the sequel.

1858. The first paragraph enunciates what is essentially a rule of apportionment, and is so treated in the English law.(6) The branch of the law may be compared to the maritime law as to general average, or a general contribution made by all the interested parties towards a loss or expense incurred for their common benefit. This law is like the subject here dealt with dictated by natural law and is not the creature of a contract.(7) The right to contribution as between sureties is likewise grounded on the same salutary precept.(8) And the same principle runs through cases of contribution as between partners, joint-tenants, tenants-in-common and co-owners of property.

The rule does not affect the mortgagee, and is no authority for splitting up his security. Its sole object is to determine the liabilities of the holders of several properties when they are owned by different mortgagors, or when, being all the properties of one mortgagor, there are prior incumbrances on some of the properties.(9) Indeed, contribution is only a species of marshalling, inasmuch as both are the adjustment between several persons of their rights respectively *inter se* in respect of a charge or claim which, affecting all of them or properties belonging to all of them respectively, has been or may be enforced in a manner not unjust as far as the person is concerned by whom it was or may be enforced, but not just as between the persons or properties liable. "Contribution," observed Knight Bruce, V. C., "if it differs from marshalling does so in species rather han generically, in form rather than in nature."(10)

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(1) *Magniram* v. *Mehdi Hossein*, I. L. R., 21 Cal., 95.

(2) *Bhagirath* v. *Naubat*, I. L. R., 2 All., 115: *Ibn Hussain* v. *Ramdai*, I. L. R., 12 All., 110.

(3) *Seshagiri* v. *Pichu*, I. L. R., 11 Mad., 452 (457); *Sesha Ayyar* v. *Krishna*, I. L. R., 24 Mad., 96 (107, 108); *Ramchandra* v. *Saaashiv*, I. L. R., 11 Bom., 422 (424).

(4) *Ibn Hussain* v. *Ramdai*, I. L. R., 12 All., 110 (114); *Baldeo* v. *Baij Nath*, I. L. R., 18 All. 371.

(5) *Sesha Ayyar* v. *Krishna*., I. L. R., 24 Mad., 96(108); distinguished in *Danappa* v. *Yanappa*, I. L. R., 26 Bom., 379 (386).

(6) *Harris* v. *Ingledew*, 3 P. Will., 98.

(7) *Dering* v. *Winchelsea*, 1 Cox., 318 (323); *cf* Dig. Bk., 14, tit. 2, l. 1.

(8) *Layer* v. *Nelson*, 1 Vern., 456; *Averall* v. *Wade*, Ll. & G., 264; *Ex parte Snowdon*, 17 Ch. D., 44; Mercantile Law Amendment Act (1856), 19 & 20 Vict., c. 97, s. 5.

(9) *Roghunath* v. *Harlal*, I. L. R., 18 Cal., 230 (321); *Kuppusami* v. *Papathi*, I. L. R., 21 Mad., 369 (371).

(10) *Tombs* v. *Rock*, 2 Coll., 500.

1859. No Contribution.—Though the rule is somewhat loosely stated, it does not mean that where the mortgagor mortgages two or more properties to the mortgagee, he can compel the latter to apportion his debt rateably on each property and resort to it exclusively for its satisfaction. This would have the effect of breaking in upon the indivisibility of his mortgage, which entitles him to recover his debt from, or release all or any of the properties mortgaged to him. But there may be cases when even the mortgagor may invoke the aid of this rule as where the mortgagee acquires a portion of the mortgaged property by fraud, undue influence, or at an under-value, or where it operates prejudicially on the rights of third parties acquired before his purchase. In some cases it has been even held that the mortgagee may release a part even to the prejudice of persons who had previously acquired an interest in the mortgaged property. (1) But the principle of this section appears opposed to it (2) (§ 1830). Neither the first nor the second paragraph has been held to apply to mortgaged property acquired by purchase in execution. Thus if *A* and *B* mortgage their property to *C*, and *C* afterwards acquires the equity of redemption from *A*, the question whether *C* would or would not have to contribute to his own mortgage depends not upon *C's* purchase but the mode of his purchase. If *C* had purchased his interest from *A*, there can be no doubt but that he would have to contribute, for he will not be permitted to throw on *B's* share the whole burden of his mortgage.(3) But if, on the other hand, *C's* purchase was at a sale in execution of a decree obtained on a prior mortgage, he will not be then liable for rateable contribution. It, therefore, follows that when property subject to a second mortgage is sold in execution of a decree obtained on a first mortgage in a suit to which the second mortgagee was a party, the purchaser, whether he be a decree-holder himself or an outsider, may take the property free of all claims under the second mortgage. (4) So where *A* mortgaged his property to *C* and he then conjointly with his brother *B* executed a second mortgage to *D*, *B* then executed another mortgage to *C* who sued on his first mortgage impleading *D* as interested in redeeming *A's* share, and obtained a decree on execution of which he himself purchased the property. *C* then redeemed *D's* mortgage and then put in force his third mortgage claiming the whole amount against *B's* share, and it was held that since *A's* share was entirely swallowed up by the prior incumbrance, no right of contribution in respect of the second mortgage could be enforced against it, and that therefore the whole burden of the second mortgage must fall on the property of *B*.(5) Another exception is made in Bombay against the mor gagee-purchaser who had himself brought the property to sale, in which case, he is held to take the property free from his right to contribution, which would otherwise arise even if he had purchased the property at a sale brought about by any one but himself.(6) The exception is justified on the ground that by so doing "he obtains advantage of the situation which he himself has created to secure an undue profit at the cost of the mortgagor." But no such exception is recog ized by the oth er Courts (7)

(1) *Sheo Prasad* v. *Behari Lal*, I.L.R. 25 All., 79 ; *Ghafur Hasan* v. *Muhammad*, I L. R., 28 All., 19 ; *Sheo Tahal* v. *Sheodan*, *ib.* 194 ; *Pirthu* v. *Amir Singh*, I.L.R., 29 All., 369.

(2) *Ram Ranjan* v. *Indra Narain*, I.L.R., 33 Cal. 890; *Mir Eusuf Ali* v. *Panchanan*, 11 C. L J., 639 (648); *Krishna* v. *Muthu*, I.L R., 29 Mad , 217 ; *Ponnusami* v. *Srinvasa*, I.L.R., 31 Mad., 333 ; *Jugal Kishore* v. *Kedar Nath*, 10 A L.J., 211 ; *Basant Singh* v. *Rameshar*, 20 I.C., (Oudh), 765.

(3) *Bohra Thakur Das* v. *Collector of Aligarh*, I.L.R., 28 All., 593 ; *Raghunath* v. *Jamna*, I L.R., 29 All., 233.

(4) *Baldeo Prasad* v. *Sheo Dial*, 3 A.L.J. R., 441.

(5) *Ib.*

(6) *Fakiraya* v. *Gadigaya*, I L.R., 26 Bom., 88 (103).

(7) *Mutty Lal* v. *Nandu Lal*, 12 C.W N., 745 ; 8 C.L.J. 92 ; *Mir Eusuf Ali* v. *Panchanan*, 11 C.L.J., 639 (644).

who see no reason to place the mortgagee-purchaser whether in execution of his own decree or by contract in a class apart. There can be no contribution when of two properties subject to a second mortgage one is sold in satisfaction of a prior mortgage free from the subsequent incumbrance, in which case, the whole burden of the second mortgage must fall on the other property, and if the second mortgage-deed contained a covenant for payment by the second mortgagee of the Government revenue on the two properties, he would be liable to pay it for both properties, and he will not be allowed to throw the burden of his own laches on the property for which the revenue was not paid, and that any equity that might have been invoked against the mortgagor, who was not seeking redemption could not be enforced against the purchaser of the equity of redemption.(1) Of course, the right to contribution is an equitable right which may be destroyed by the claimant's wrongful conduct, negligence or default. So where *A* and *B* jointly mortgaged their respective properties to *C* by a single deed, leaving in his hand a portion of the consideration for redemption of a prior mortgage of a portion of *B's* property in favour of *D*. *C* failed to redeem *D* who thereupon put his mortgage in suit and brought the property to sale which, *C* purchased *benami* in the name of *E*. It was held that since the sale had been precipitated by *C's* own wrongful conduct in not redeeming *D's* mortgage he could not claim any contribution, and that since the integrity of *C's* mortgage had been broken up by the sale, *A's* representatives were entitled to redeem the portion of the mortgaged property upon payment of a proportionate amount of the mortgage-money, and that *C* could not throw the whole burden upon it and claim that *D's* sale had been in discharge of a prior mortgage since it would enable *C* to profit by his own wrong.(2)

Deposit in Court.

Power to deposit in Court money due on mortgage.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee and the mortgagee may, on presenting a petition verified in manner prescribed by law (for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

(1) *Bohra Thakur* v. *The Collector*, I.L.R., 32 All., 612, P.C.

(2) *Wajahat* v. *Ratan Lal*, 8 A. L.J. 1092; 12 I. C. 182.

1860. Analogous Law.—This section is in a modified form taken from the Bengal Regulations[1] which provided for a similar tender or deposit within the year of grace allowed to the mortgagor for redemption. The provisions of this section should be compared with sections 102, 103, *post*, to which the section appears to be supplemental.

The amount deposited in Court is treated as a tender. A similar rule is enacted in England. [2]

The section is confined to money due under a mortgage. It has no application to money due under a simple money-bond.[3]

1861. Principle.—The mortgagor may after the mortgage-money has become payable and before his right of redemption is barred, (i) pay or tender out of Court at a proper time and place the amount due on the mortgage [4] or (ii) deposit the same in Court under the present section, or (iii) bring a regular suit for redemption.[5] All three courses being at one and the same time open to the mortgagor, he is at liberty to adopt one or the other, or all of them successively. The section provides a speedy and summary remedy for redemption to the mortgagor, who is empowered to tender by deposit the sum which he calculates to be due on the mortgage. The Court is thereupon to cause a written notice [6] of the deposit to be served on the mortgagee, who may withdraw the amount deposited for him, upon giving up the mortgage-deed to be made over to the mortgagor. Having surrendered his muniment of title, the mortgagee has no more right to remain in possession of the property, but if he continues to retain possession the mortgagor cannot recover it under the section, but must bring a suit under section 62 or proceed against him as a trespasser. The person making deposit under this section cannot introduce any litigious contentions which the Court in the exercise of its summary jurisdiction cannot enquire into.[7] The section, as it is, confers upon the mortgagor an exceptional privilege which other debtors do not enjoy, of paying the amount of their debt in Court, even when his creditor has not brought any suit against him, and must not be further enlarged in its operation. [8]

1862. Meaning of Words.—"*After the principal money has become payable*:" See under section 60 (§§1347—1352). "*Before a suit is...barred*:" *i.e.* either by order of a Court, the Limitation Act, or, by act of parties, *e.g.*, estoppel agreement, etc." [9] (§§ 1413—1433). "*Any person entitled, &c.*:" Such persons are described in section 91. "*In any Court, &c.*:" This clause differs slightly from the corresponding provision in the Regulations by which the deposit was to be made in the Civil Court of the district in which the land was situate.

Ordinarily, the suit will even now be instituted in the district in which the property is situate. [10] *Written notice* may be served upon the mortgagor, his agent, [11]or in the case of a person incompetent to contract upon the legal curator of his property. [12] "*Petition verified*:" as provided in O. 6, r. 15 of the

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(1) Beng. Reg. I of 1798, s. 2; *cf.* Reg. XVII of 1806.

(2) Rule 48, Ord. 39 B, County Court Rules, 1882, now see County Court Rules, 1903, Ord. 29, Rule 4. *The Vulcan*, [1892] P. 222.

(3) *Eshahuq Molla* v. *Abdul*, I. L. R., 31 Cal., 183 (185).

(4) S. 60.

(5) S. 91.

(6) As to which, see ss. 102, 103.

(7) *Cf. General* v. *Tutcliffe*, [1892] Ch. 1.

(8) Macpherson on Mortgage (7th Ed.), p. 689.

(9) Stokes' Anglo-Indian Codes, 790.

(10) S. 16 of the Civil Procedure Code (Act XIV of 1882; Act V of 1908).

(11) S. 102, *post*.

(12) S. 103, *post*.

Civil Procedure Code, [1] to the effect that the statements are true to the knowledge of the person making them, except as to matters stated on information and belief, and that as to those matters he believes them to be true. "*In full, discharge of such amount;*" *i.e.*, of his claim. "*If then in his possession or power:*" As to the effect of this see the commentary below.

1863. Tender by Deposit.—Out of solicitude for the interest of a mortgagor, the Legislature has provided means to enable him to effectually discharge his liability by making a deposit of the mortgage-money in Court. As remarked before, the remedy provided by this section is one of the three, provided for him in the Act, for (*a*) under section 60 the mortgagor may, under similar circumstances, pay or tender the mortgage-money out of Court, or (*b*) as provided in this section deposit the same in Court, or (*c*) under section 91 institute a regular suit for redemption. He is not confined to any particular remedy, and is at liberty to resort to one or the other as he may choose. But the remedy under section 60 is open only to him, and not to any other person entitled to institute a suit for redemption. In order to save the difficulty of having to prove that the tender was a proper one and to ensure cessation of interest, it is always preferable to make a deposit in Court [2] which to be valid, must be made on or after the due date, [3] or at any date, then payable. The deposit will only entitle the mortgagor to discontinuance of interest if it is otherwise sufficient to discharge the mortgage, where, for instance, under the terms of the mortgage-deed, the mortgagor was bound to put the mortgagee in possession of the mortgaged properties, the former cannot deposit the mortgage money in Court before first giving possession to the mortgagee.[4] The section pre-supposes that the mortgagor when he deposits money under this section has a valid right to redeem, and is not attempting to exercise the right of redemption in a manner contrary to the provisions of the contract between the parties.

1864. It is conceived that a deposit must satisfy all the requirements of a valid tender, [5] since deposit is nothing but a tender through the agency of the Court. The amount which the mortgagor must deposit is that remaining due on the mortgage and includes interest [6] and such other sums which the mortgagee is entitled to add to the mortgage-money.[7] And the fact that the mortgagee had obtained a decree for the interest is no reason for not depositing it. [8] A tender of a fraction of the amount due is ineffectual where the mortgagor admits more to be due than is tendered, but if it is made in the belief that it is the whole amount due, it may be good *pro tanto* [9] (§ 1372—1377.)

1865. But the mortgagee is not bound to accept an insufficient tender as good *pro tanto*. [10] As a general rule the amount deposited should not be less than that due, but it may be more; *omne majus continent in seminus*. [11] But a tender

(1) Act V of 1908.

(2) *Ram Nith* v. *Gopal Chandra*, 8 C. W. N., 153 (155).

(3) *Eshahuq* v. *Abdul*, I.L.R., 31 Cal., 183.

(4) *Bayya Sao* v. *Narsinga*, I.L.R., 35 Mad. 209; *Ramsonji* v. *Krishnaji* I L.R, 26 Bom. 312; *Tani* v. *Hari*, (1887), B.P.J. 315 F.B.; *Mulhar* v. *Anandram*, (1889) B P.J. 51.

(5) As to which, see s 60 (§§ 1372-1377).

(6) *Hewanchal Singh* v. *Jawahir Singh*, I.L R., 16 Cal., 307, P. C.

(7) *Anandi Ram* v. *Dur Najaf Ali*, I.L.R, 13 All., 195.

(8) *Hewanchal Singh* v. *Jawahir Singh*, I.L.R, 16 Cal., 307, P. C.

(9) *Dixon* v. *Clarke*, 5 C. B, 365; *Haji Abdul Rahaman* v. *Haji Noor Mahomed*, I.L.R., 16 Bom,, 141 (149). But see s. 84 comm. *post*.

(10) *Balaram* v. *Nanuram*, 1 C. P. L. R., 154; *Rupchand* v. *Pannalal*, 14 C. P. L.R., 49 (52).

(11) *Wade's case*, 5 Rep., 115; *Dean* v. *James*, 4 B. & Ad., 546; "The greater includes the less."

of a bank-note or coin of a larger amount than the sum due, requiring change, is not a good tender, since the creditor may be unable to take what is due and return the balance. (1) Hence if no objection is made on the ground of change the tender is good. (2) A deposit may, it is said, be made by two or more instalments, as it does not contravene the provisions of this or the next section. (3) But such a deposit can scarcely be said to be of "the amount remaining on the mortgage" and which would seem to indicate that the payment must be of the whole amount due at the time of the deposit. At all events, the mortgagee is not bound to take notice of such a deposit, unless it is sufficient to discharge his debt. (4) The mortgagor is not bound to deposit the mesne profits to which the mortgagee may have become entitled on account of his being kept out of possession on account of the wrongful act of the mortgagor. (5) But it has been held that where the mortgagee accepts the money paid into Court and relinquishes possession of the mortgaged property he must be taken to have waived his lien on account of any sum due on the mortgage, which he cannot recover in a separate suit by sale of the mortgaged property, although he might bring a simple money-suit if the amount sought to be recovered was paid to save the property from forfeiture or sale (6) The deposit may be made in the currency in which the debt is contracted, (7) and if the mortgagor pays in the coin of the realm, (8) he must allow for the difference in value between the currency in which the debt is contracted and that in which it is paid.

1866. Conditional Tender.—A tender must be unconditional,(9) (§1374) but a tender under testpro, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any condition on the creditor, (10) and the mortgagor is entitled to recover the excess so paid to the mortgagee. (11) Payment under protest is not conditional, because the protest merely obviates the effect of payment as an admission, and does not impose any condition on the acceptance. (12) But where in making the deposit the mortgagor prays that the amount should be paid out to the mortgagee on his producing certain deeds, the provisions of the section are not complied with.(13) So also where the mortgagor, without placing any actual restriction on its being paid over to the mortgagee, with express notice denies the mortgage, and threatens to sue to recover back the money so deposited.(14)

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(1) *Be Betterbee* v *Davis*, 3 Camp., 70; *Robinson Cook*, 6 Taunt. 336.

(2) *Bevans* v. *Rees*, 5 M. & W., 308; *Black* v. *Smith*, Peake, 127.

(3) *Raghub* v. *Bhobin*, 8 C.W.N., 216.

(4) *Behari Lall* v. *Ram Ghulam*, I.L.R., 24 All, 46.

(5) *Rameshwar Singh* v. *Kanahia Saha*, I.L.R., 3 All., 653. F. B.; followed in *Allah Baksh* v. *Sada Sukh*, I L.R., 8 All., 182.

(6) *Anandi Ram* v. *Dur Najal Ali*, I.L.R., 13 All., 195.

(7) *Trimbak Jivaji* v. *Sakharam*, I.L.R., 16 Bom., 599.

(8) *Trimbak Jivaji* v. *Sakharam*, I.L.R., 16 Bom., 599 (602); Indian Coinage Act (XXIII of 1870), ss. 12, 13, 14. See now as amended by the Indian Coinage and Currency Act, 1899 (Act XXII of 1899), by which "Gold Coins" whether coined at Her Majesty's Royal Mint in England, or at any mint established in pursuance of a proclamation of Her Majesty, as a branch of Her Majesty's Royal Mint, shall be a legal tender in payment of an account at the rate of fifteen rupees for one sovereign." *Ib.*, s. 2. [The Act came into force on the 15th September, 1899].

(9) *Prannath* v. *Rookea Begum*, 7 M.I.A., 323; S. 38, Indian Contract Act (IX of 1872).

(10) *Greenwood* v. *Sutcliffe*, [1892] 1 Ch., 1.

(11) *Juggutputtee Singh* v. *Madho Singh*, (1855) S. D.A., 54.

(12) *Scott* v. *Uxbridge Railway Co.*, L. R. C. P., 596; *Manning* v. *Lunn*, 2 C. & K. 13; *Sweny* v. *Smith*, L.R., 7 Eq., 324; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch., 1.

(13) *Nanu* v. *Manchee*, I.L.R., 14 Mad., 49.

(14) *Abdoor Rahman* v. *Kistolal*, 6 W.R., 225; *Prannath* v. *Rookea Begum*, 7 M.I.A., 323; *Makhan Kuar* v. *Jasoda Kuar*, I.L.R., 6 All., 399.

But the fact that a certain sum of money deposited and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount and that the tender is accompanied by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds, does not render the tender conditional, and therefore invalid.(1) A deposit accompanied by a petition that the money might be retained in Court until the decision of certain objections made by the mortgagor, is not valid.(2) Nor is a deposit made to the credit of the mortgagee and a third person, even though the latter be the mortgagee's pleader, but inasmuch as such a deposit involves his concurrence to withdrawal by the mortgagee, the deposit cannot be held to be unconditional.(3) As the Court observed: "The section confers on mortgagors an exceptional privilege, which other debtors do not enjoy, of paying the amount of their debt into Court and so relieving themselves of any further liability. An exceptional privilege of the kind, however, must not be abused, and a mortgagor who does not strictly observe the provisions of the section, but makes a payment which involves the necessity of decision of the Court as to the rights of parties other than the mortgagee, cannot be regarded as having made the payment within the meaning of the section.(4) It is, of course, no deposit, when there is no direction to pay it to the mortgagee or when for want of definite instructions it is not available to him.(5) Where the deposit is sought to be made on the last day before his right would be barred, and the Courts are closed, he can make it on the next open day.(6) With regard to payment it is provided in the Indian Contract Act(7) that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them," and hence tender of payment to or refusal by one of the several mortgagees has in law the same effect as if the tender or payment was made to or refused by all of them jointly.(8)

1867. A deposit on account of disputing claimants to the deceased mortgagee's estate is good and gives the mortgagor the right to sue for the possession of the mortgaged property.(9) Where a deposit is made to the credit of persons who are entitled to it in addition to those who are not, and the former are thereby prevented from drawing it, the deposit is invalid, and cannot avail the mortgagor in a subsequent suit for redemption.(10) The mortgagor need not deposit if the creditor has dispensed with the tender. Thus if he claims too much or set up other claims, or so conducts himself as to show that a tender even if made will not be accepted, the mortgagor need not make it.(11) In a valid plea of tender the mortgagor must, however, show his continued readiness to pay,(12) and where the mortgagee refuses to receive the amount, it is a fit case in which deposit should be made in Court.(13) An offer by letter

(1) *Kora Nayar* v. *Ramappa*, I. L. R., 17 Mad., 267.

(2) *Nobungo* v. *Goluckmonee*, 1 Hay., 76; confirmed in *Gcolukmonee* v. *Nobungo*, W. R. F. B., 14.

(3) *Debendra Mohan* v. *Sona*, I. L. R., 26 All. 291 (294).

(4) *Ib.*

(5) *Cf. Jawahir Singh* v. *Lachman*, 9 C. W. N. 745, P. C.

(6) *Dabee Rawoot* v. *Heeramun*, 8 W. R. 223.

(7) Act IX of 1872, s. 38 (3).

(8) *Barber* v. *Ramana*, I. L. R., 20 Mad., 461 (464); following *Wallace* v. *Kelsall*, 7 M. and W., 264. To the same effect *Dixon* v. *Clarke*, 5 C. B., 365.

(9) *Ram Sumran* v. *Sahibzada*, (1885) A. W. N., 328.

(10) *Madhavi* v. *Kunhi Pathumma*, I.L.R. 23 Mad., 510.

(11) *Scarfe* v. *Morgan*, 4 M. & W., 270; *The Norway*, B. & L., 409; *Kerford* v. *Mondel*, 29 L. J., Ex., 303.

(12) *Rivers* v *Griffiths*, 5 B. & Ald., 630; Addison on Contracts (9th Ed.), p. 152.

(13) *Chapman* v. *Hicks*, 2 C. & M. 633; *Dixon* v. *Clarke*, 5 C. B., 365 (377); *Coore* v. *Callaway*, 1 Esp, 116; *Haji Abdul Rahman* v. *Haji Noor Mahomed*, I. L. R., 16 Bom., 141 (150).

unaccompanied by money actually produced for payment [1] or a mere notice in a newspaper by a mortgagor to a mortgagee to receive the mortgage-debt is not a sufficient tender, [2] nor is a mere willingness to pay equivalent to a tender, and *a fortiori* it canot be held equivalent to a payment in Court [3] which implies that, once deposited, the money is not withdrawn but remains in Court and is available for payment to the mortgagee. [4] A cheque even of a man of credit is not a good tender in law and need not be accepted, but if it is once accepted, then the payee is bound by it unless it be dishonoured.[5]

1868. Who may deposit.—Under this section not only the mortgagor but any other person entitled to redeem may make the deposit in Court. Persons who are so entitled are enumerated in section 91. The mortgagee is not bound to accept a tender made by a stranger or by any one not entitled to redeem, for, as against all but such persons he has a right to hold the property.[6] So conversely a tender must be made either to the principal whose business it is to consider it or to his authorized agent, and a tender made to a person who disclaims authority to receive it, is made at the maker's risk. [7] The deposit cannot be made until after the mortgage-money has become payable, that is, until the date fixed in the mortgage for re-payment and before the mortgagor's suit for redemption is barred, for, if the mortgagor cannot redeem, he cannot for obvious reasons be allowed to make a deposit.

In what Court.

1869. The deposit may be made in the Court in which he might have instituted his suit for redemption. Such Court is the Court of the lowest grade of competent jurisdiction to try the case,[8] situated within the district in which the property is situate.[9] After the deposit is validly made in the proper Court, the liability of the mortgagor to see to the appropriation of his money ceases, the Court being required then to issue a written notice to the mortgagee which may be served upon him or his agents, [10] or the curator of his property in the case of his incompetency. [11] It has been held that this section must be read in conjunction with sections 67, 86 and 88. Consequently, after one Court has taken cognizance of a suit by a mortgagee for the enforcement of his security, the mortgagor cannot deposit the mortgage-money in another Court under this section. [12]

1870. Form of Notice.—The form of notice prescribed by the Calcutta High Court under section 104 will be found printed under that section.

1871. Court's Power in Case of Dispute.—The summary jurisdiction possessed by the Court while exercising its power under this section (1872) precludes it from going into the question of sufficiency of the deposit, if it is challenged by the mortgagee. Nor is it for the Court to construe the mortgage-deed and calculate for the parties the amount really due, since no decision given by it can be final, and without which

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(1) *Chetan Das* v. *Gobind*, 12 A. L. J. 111.
(2) *Pandjirav* v. *Naroji* (1881), B. P. J., 57.
(3) *Kraus* v. *Arnold*, 7 M. 59; P.C., *Leatherdale* v. *Sweepstone*, 3 C. & P., 342; approved in *Haji Abdul Rahman* v. *Haji Noor Mahomed*, I. L. R., 16 Bom., 141 (150); *Kaniya* v. *Devapa*, I. L. R., 22 Bom. 440.
(4) *Krishnaswami* v. *Thippa Ramaswami*, 8 I. C. (Mad). 763.
(5) *Johnstone* v. *Boys*, [1899] 2 Ch., 73.
(6) *Lomax* v. *Bird*, 1 Vern., 182; *Lant* v. *Crisped*, 2 Eq. Cr., Abr., 599
(7) *Bai Ruttonbai* v. *Fraser Ice Factory*, I. L. R. 32 Bom, 521.
(8) S. 15, Civil Procedure Code (Act XIV of 1882, now Act V of 1908).
(9) S. 16, *ibid.*
(10) S. 102.
(11) S. 103.
(12) *Bayya Sao* v. *Narsinga*, 10 I. C. (Mad.) 393.

its action would be purely officious warranted neither by the terms nor the spirit of the rule. Its chief and only function is that stated in the second paragraph. If the mortgagee receives the money, the Court must pay it over to him in full satisfaction of the mortgage and make the mortgage-deed over to the mortgagor. If there be any dispute as to the amount due or the person it is payable to, the Court must stay its hand and leave parties to their legal remedies.

If the mortgagee is a minor or otherwise incompetent to contract, the Court, has under section 103, power to appoint a guardian *ad litem* and serve notice upon him. Some care is required to appoint a duly qualified person to act for him (1) as his receipt would amount to a valid discharge of the debt. (2) It is the duty of the mortgagor to see that a proper person is appointed his minor mortgagee's guardian. Until he does so, he cannot be said to have completely performed his part, so as to exempt him from payment of interest. (3) Where on the death of a mortgagee, the mortgagor deposited the money in Court, giving notice to two rival claimants and the Court paid the money to one having no title at all, it could not affect the discharge which the mortgagee had validly received under this section. (4) The money deposited by the mortgagor is held by the Court on the terms on which it is deposited, and the mortgagee is only entitled to withdraw it upon fulfilling the conditions laid down in this section, that is, if he accepts the money deposited in full discharge of his mortgage and is in return willing to deposit the mortgage-deed, if in his possession or power. (5) Where, therefore, a sum found due in a suit for redemption by the mortgagor was deposited by him under this section for payment to the mortgagee, the latter could not withdraw the amount and file an appeal against the decree claiming a larger sum than that deposited. And if he withdraws the amount during the pendency of his appeal, the Court will dismiss the appeal on the ground that his withdrawal imported acquiescence in the conditions subject to which alone it could be withdrawn, and which precluded an appeal on the ground of its insufficiency.(6) But if the appellant had withdrawn the money, being misled by the terms of the decree and he had since repaid or redeposited it or was at least willing to do so, he should not be prejudiced in his appeal.(7) Another effect of deposit on the mortgagee is that the interest on the mortgage ceases as from that date,(8) and he cannot then institute a suit to enforce his mortgage. Where a deposit is once duly made, the fact that the legal representatives of the mortgagee are not qualified to withdraw the amount does not affect the mortgagor, for the interest will cease to run as from the date of the deposit, whether there is any one competent to withdraw the money or not.(9) He becomes also liable to the mortgagor for his *gross receipts* from the mortgaged property.(10)

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(1) *Shiva* v. *Manoharlal*, 16 O. C. 261.

(2) *Ram Sumran* v. *Sahibzada*, (1885) A.W.N. 328.

(3) *Pandurang* v. *Mahadaji*, I. L. R. 27 Bom. 23.

(4) *Ram Sumran* v. *Sahibzada*, (1885) A. W.N. 328; *Pandurang* v. *Dadabhoy*, I.L.R. 26 Bom. 643.

(5) Hence till this is done the money cannot be attached as of the mortgagee. *Mothair* v. *Ahmatti*, I. L. R., 29 Mad., 232; *Rane Chandra* v, *Kesho Bati*, I.L.R. 36 Cal., 840 (855) P. C.

(6) *Dal Singh* v. *Pitam Singh*, I. L. R., 25 All., 179; followed in *Mothair* v. *Ahmatti*, I. L. R., 29 Mad.. 232.

(7) *Dal Singh* v. *Pitam Singh*, I. L. R., 25 All., 179 (182).

(8) S. 84 (*q. v.*), but see para. 2 of s. 84.

(9) *Pandurang* v. *Dadabhoy*, I. L. R., 26 Bom., 643.

(10) S. 76 (i): see comm.; *Rukhmini Bai* v. *Venkatesh*, 9 Bom. L. R., 958.

1872. If he withdraws the amount and delivers possession of the property, it has already been stated that he cannot then enforce his lien which he may have had on the property on account of payment by him of the Government revenue.(1) If the mortgagee pleads insufficiency of the deposit, the Court in England is entitled to make an inquiry, (2) but no such power appears to be reserved to the Courts in this country (3) (§1871). But there is nothing to preclude the mortgagor from waiving any of the conditions implied by the section. He may, for instance, permit the mortgagee to withdraw the money without prejudice to his claim for a larger amount. (4) In such case the Court should indorse payment and return the mortgage-deed to the mortgagee. The delivery of the discharged mortgage-deed is however, not a condition precedent to the validity of withdrawal, for the mortgagee is only to deliver the deed "if then in his possession or power." But, of course, the Court has to be satisfied that the non-delivery is not one to the deed being otherwise charged or sub-mortgaged. The withdrawal of the deposit by the mortgagee, is tantamount to redemption of the mortgage in respect of which the deposit is made. He must give up the deed and cannot then sue for any payments made by him, and which he might, under the law be entitled to add to the mortgage money. (5) Since the tender and acceptance of the mortgage-money postulates the relationship of mortgagor and mortgagee it follows that by acceptance the mortgagee is deemed to acknowledge the title of the depositor. (6) It has been stated before that the mortgagor may permit the mortgagee to withdraw his deposit without prejudice, but it is a variation of the procedure which could not be extended. For instance, it is obvious that the mortgagor could not deposit any money for payment to the mortgagee under protest, as in such a case, it is open to the mortgagor to make his tender without the intervention of the Court. The mortgagee is not bound to accept an insufficient deposit, but if he does he is bound to give up the deed and forego any further claim he may. The petition filed under the section and the order passed thereon are not proceedings in a regular suit, and from the mere direction that the petition be verified in the manner prescribed by law for verification of plaints does not warrant the inference that the order made upon it has the force of a decree in a regular suit. Hence the mortgagor's promise subsequent to the deposit to convey some lands to the mortgagee, who on that assurance accepted the deposit, can be specifically enforced, the petition and the order thereon being no bar to the suit under O. 34, r. 3 or any other section of the Civil Procedure Code. (7) Reading section 67 together with sections 83 and 84(8) the Madras High Court has held, that "it was not intended to take away the plaintiff's right of suit before there was notice to him or knowledge on his part of the deposit." Hence where the defendant paid money into Court one day previous to the institution of the suit on the mortgage, but the notice under the section was not served upon him before he filed his plaint and he was not aware of the deposit at the time he filed it, it was held that he was not precluded from proceeding with the suit, and was entitled to a decree as in a confession of judgment with full costs.(9)

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(1) *Anandi Ram* v *Dur Najaf Ali*, I.L. R., 13 All., 195.

(2) *Sharpnell* v. *Black*, 2 Eq. Ca. Abr., 604.

(3) *Cf. Tarayya* v. *Pichayya*, I. L. R., 13 Mad., 316.

(4) *Hardayal* v. *Pirthi Singh*, I. L. R., 32 All., 142.

(5) E.g. under Ss. 72, 76; *Anandi Ram* v. *Dar Najaf Ali*, I. L. R., 13 All. 195; *Balaram* v. *Nanuram*, 1 C. P. L. R., 154.

(6) *Sunehara* v *Shadi*, 1 A.L.J. 590.

(7) Act V of 1908.

(8) Now O. V, r. 4; O. V, r. 20 (2); O. V, r. 20 (3), Act V of 1908.

(9) *Sitaramayya* v. *Venkatramanna*, I. L. R., 11 Mad., 371.

1873. Premature Deposit.—In order that a deposit may be valid, it must be made "at any time after the principal money has become payable." What significance is to be attached to these words has been already the subject of a previous discussion(§§ 1347-1377). It may here suffice to state that a deposit in Court before the due date is not a valid tender of the debt.(1) A decree provided that if the mortgagor committed a default in the payment of Rs. 300 on the 7th October 1897, the mortgagee should be entitled to take possession. The mortgagor having committed a default, the mortgagee became on that date entitled to possession, but which however he did not get till the 3rd April 1898. In the meantime, however, on the 19th March, the mortgagor had deposited the mortgage-amount in Court under this section. On the question arising as to whether the tender so made had effectually redeemed the mortgage, it was held that since the right to redemption could accrue only after the mortgagor had delivered possession to the mortgagee, the tender made on the 19th March was premature and ineffectual.(2)

1874. Does Delivery of Deed create any Right?—The provision that on accepting deposit the mortgagee must deliver up the mortgage-deed to the mortgagor "or such other person as aforesaid," may occasion some difficulty. So far as regards the mortgagor, redelivery of the deed may be regarded as symbolizing cancellation of the mortgage, but it is scarcely so regarded in section 60, under which a much more elaborate procedure is prescribed on the discharge of a mortgage. Of course, if the mortgagee is in possession or more has to be done beyond the delivery of the deed, the mortgagor would have to institute a regular suit. Similarly, a person entitled to redeem may not get all he wants by resorting to the procedure of this section. Again, delivery of the deed is out of the question where the deposit is made after a suit on the mortgage, and in which case, the benefit to the other person from payment under this section would still be more problematical.

1875. Limits of the Rule.—As this section relates only to a deposit made of money due on a mortgage, the Court is incompetent to receive it if it is paid towards a simple money-bond, and if the Court accept deposit and issue notice to the creditor it will not be a valid tender. (3)

84. When the mortgagor or such other person as aforesaid has tendered or deposited in the Court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Cessation of interest.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when

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(1) *Eshahuq Molla* v. *Abdul*, I. L. R., 31 Cal., 183.

(2) *Ram Sonji* v. *Krishnaji*, I. L. R., 26 Bom., 312 (316); following *Tani* v. *Hari*, (1887) B. P. J. 315, F. B.; *Malhar* v. *Anandram*, (1889) B. P. J., 51; followed in *Bayya Sao* v. *Narsinga*, I. L. R., 35 Mad. 209.

(3) *Eshahuq Molla* v. *Abdul*, I. L. R., 31 Cal., 183 (185).

there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

1876. Analogous Law.—This section is supplementary to section 83, to which reference should be made for a fuller commentary.

With the section may be compared the following section of the Indian Contract Act :—

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :—

(1) It must be unconditional.

(2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

(3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration.

A contracts to deliver to *B* at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, *A* must bring the cotton to *B*'s warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

The effect of deposit in regard to interest is the same here as in England.(1) And the provisions of the Bengal Tenancy Act (2) would appear to be nowise different (3).

1877. Principle.—By depositing the money the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of Court, and therefore he is no longer bound to pay him interest unless payment was stipulated to be made after reasonable notice, in which case the section provides for its continuance. It must be noted that the interest ceases from the date of *deposit* and not from the receipt of notice by the mortgagee.(4) This fixes the date and avoids the uncertainty that would have been involved in fixing for its cessation the date of service which may be evaded by the mortgagee. But where the deposit is inadequate it does not entitle the mortgagor to the benefit of the section even *pro tanto*.(5)

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(1) Fisher, § 1851, citing *Lutton* v. *Rodd*, 2 Ch. Cas., 206; *Roberts* v. *Jeffreys*, 8 L. J. Ch., 137; *Cliff* v. *Wordsworth*, 2 Y. & C.C.C. 598; *Kinnaird* v. *Trollope*, 42 Ch. D., 610; *Bank of New South Wales* v. *O'Connor*, 14 App. Cas., 273 (284).

(2) S. 67, Bengal Tenancy Act (VIII of 1885).

(3) *Kripa Sindhu* v. *Ananda*, 11 C.W.N., 983, F.B.

(4) *Deo Dat* v. *Ram Autar*, I. L. R., 8 All., 502 (508); but see *Haji Abdul Rahman* v. *Haji Noor Mahomed*, I. L. R., 16 Bom., 141 (147, 148).

(5) *Deo Dat* v. *Ram Autar*, I.L.R., 8 All., 502.

1878. Meaning of Words.—"*Such other person as aforesaid*:" *i.e.*, as mentioned in section 83. "*Tender*:" See sections 60 and 83. "*Deposit*:" See section 83.

"*Nothing in this section, &c.*:" this is in accordance with the last but one paragraph of section 60 (q. v.).

1879. Effect of Deposit upon Interest.—This section provides that interest on the principal money shall cease from the date of the tender or deposit of "the amount remaining due on the mortgage." Hence where the mortgagor deposits an amount which falls short of the amount actually due, presumably interest does not cease *pro tanto*.(1) But in an elaborate judgment Telang, J., has drawn a distinction between such payment when made under the belief that it was the entire sum due, and when made knowing more to be due than is tendered. In the former case he would not allow interest *pro tanto*, and in the latter case, following the English cases,(2) he would hold that the partial tender being bad, the mortgagee is entitled to interest.(3) But it is submitted that the view taken by the Bombay High Court is scarcely fair to the mortgagee, or supported by the language of the section, since there seems no reason why the mortgagee should suffer for the mortgagor's mistake. As is manifest from the section, a condition precedent to the cessation of interest is the tender or deposit of "the amount remaining due on the mortgage," and which means, of course, the whole amount legally due and recoverable from the mortgagor. The case is, of course, different where in a regular suit the Court decrees a certain sum as due which the mortgagor deposits and the mortgagee withdraws, but which was subsequently raised in appeal, in which case, interest would stop on the sum received which would operate as satisfaction of the mortgage *pro tanto*.(4) But the case might be different if the money was withdrawn without prejudice to his right of appeal.(5) The amount due on the mortgage naturally includes the interest and other incidental charges which the mortgagee may add to the mortgage-money, where interest was payable "from this day, until payment of the whole amount," interest in the absence of mercantile custom or usage cannot be charged for either the day the money was advanced or on which it was repaid.(6)

1880. Where after a valid tender the mortgagee refuses to act as provided in the last section, the mortgagor must bring a suit for redemption, the costs of which will have to be paid by the mortgagee,(7) and which the former can set off against the mortgage-money payable by him, notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of suit,(8) and if the costs exceed the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance of the costs against the defendant.(9) Besides the suit for redemption, it would appear the mortgagor has no other remedy. He cannot bring a suit compelling the mortgagee to accept the tender, or to recover the title-deeds.

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(1) *Deo Dat* v. *Ram Autar*, I.L.R., 8 All., 502 (508); *Behari Lal* v. *Ram Ghulam*, I. L. R., 24 All., 461.

(2) *Dixon* v. *Clarke*, 5 C. B., 365 (379); *Henwood* v. *Oliver*, 11 B.D., 409.

(3) *Haji Abdul Rahman* v. *Haji Noor Muhomed*, I.L.R., 16 Bom., 141 (148).

(4) *Digambar* v. *Harendra*, 11 C.L.J. 226 (234).

(5) *Ib.* p. 235; following *Bowen* v. *Owen*, 11 Q.B. 130.

(6) *Raghub* v. *Bhoben*, 8 C.W.N 216.

(7) *Dhondo Ramchandra* v. *Balkrishna*, I.L.R., 8 Bom., 190 (193).

(8) *Brijnath* v. *Juggernath*, I.L.R., 4 Cal., 742; s. 221, Civil Procedure Code (Act XIV of 1882).

(9) *Sidu* v. *Bali*, I.L.R., 17 Bom., 32.

Tender ever ready.

1881. It has been held in Calcutta that a proper tender, though improperly refused, would still carry interest unless it is shown that the mortgage-money was kept unemployed.(1) In this view, a tender is then a continuing offer, and postulates the earmarking of the money for payment to the mortgagee. If, therefore, after making a valid tender improperly refused by the mortgagee, the mortgagor employs the money or does not keep it ready for payment to the mortgagee, then he cannot ask for cessation of interest. This is also the view taken by the English Courts, (2) though a different rule prevails in America where it is not necessary that after refusal of the tender the money should be held in readiness for payment to the mortgagee.(3) And this view is taken in Madras where relying upon the language of this section that "interest *shall* cease from the date of the tender" it is held by no means necessary that the mortgagor should offer the tender, always keep the money ready for payment.(4)

1882. Notice when required.—The section is subject to the proviso that if the mortgagee has contracted for a reasonable notice before redemption, he cannot in violation of his agreement redeem unless after the requisite notice. But the object of the notice being to enable the mortgagee to find another security, it is not required if the mortgagee has waived it by his own action as by demanding payment or otherwise.(5) By a rule of practice in England, six months' notice is deemed requisite, or in lieu of notice interest for the same period is usually payable.(6) No notice is, however, required in the case of an equitable mortgage which is presumed to be merely temporary, (7) but there is of course, nothing against the parties contracting.(8) A reasonable notice, is deemed to be necessary even in the case of a loan payable on demand. (9)

Suits for foreclosure, sale or redemption.

Parties to suits for foreclosure, sale and redemption.

85. [Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

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(1) *Ram Nath* v. *Gopal Chandra*, 8 C.W.N. 153 (155); *Satyabadi* v. *Mt. Hirabati*, I.L.R, 34 Cal. 223 (229); *Jajat Tarini* v. *Naba Gopal*, I.L.R. 34 Cal. 305.

(2) *Gyles* v. *Hall*, 2 P. Wms., 378; *Cliff* v. *Wordsworth*, 2 Y. & C.C.C., 598; *Kinnaird* v. *Trollope*, 42 Ch. D., 610; *Lutton* v. *Rodd*, 2 Ch., Ca., 206; *Edmondson* v. *Copland*, [1911] 2 Ch., 301 (310) in which Joyce, J. laid down that the tenderer is bound to account to the mortgagee for any interest he has himself made from the money—the view taken being that after withdrawal of the tender it would be unreasonable that the mortgagor should have and make full use of the mortgagee's money without paying any interest." Otherwise interest was charged to mortgagor *dubitante ib.* 311.

(3) *Revard* v. *Clink*, 33 Am. S. R., 458; *Kortright* v. *Cady*, 21 N. Y., 343; *Werner* v. *Tuch*, 12 N.T., 217, cited in Jones, §§ 886-903.

(4) *Velayuda* v. *Hyder Hussan*, I.L.R., 38 Mad., 100.

(5) *Banner* v. *Berridge*, 18 Ch. D., 254.

(6) Fisher, § 1499.

(7) *Fitzgerald* v. *Mellersh*, [1892] 1 Ch., 385.

(8) Coote on Mortgage (5th Ed.), 1174:

(9) *Toms* v. *Wilson*, 4 B. & S., 442; *Brighty* v. *Norton*, 3 B. & S, 305; cited in *Fitzgerald* v. *Mellersh*, [1892] 1 Ch., 385 (390).

Foreclosure and sale.

86. [In a suit for foreclosure if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit if any, awarded to him, on the day next hereinafter referred to or, declaring the amount so due at the date of such decree,

Decree in foreclosure suits.

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents, in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.]

NOTE.—Ss. 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

87. [If payment is made of such amount and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

Procedure in case of payment of amount due.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Order absolute for foreclosure.

Provided that the Court may upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

Power to enlarge time.

On passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129, for the words "final decree" the words "decree absolute" shall be substituted.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

Decree for sale.

88. [In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Power to decree sale in foreclosure-suit.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court to meet to the expenses of a sale and to secure the performance of the terms.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99, of this Act, being sections relating to procedure have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

Procedure when defendant pays amount due.

89. [If in any case under section eighty-eight the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him, and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

Recovery of balance due on mortgage.

90. [When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

Redemption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

Who may sue for redemption.

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(*b*) any person having any interest in, or charge upon, the right to redeem the property;

(*c*) any surety for the payment of the mortgage-debt or any part thereof;

(*d*) the guardian of the property of a minor mortgagor on behalf of such minor;

(*e*) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;

(*f*) the judgment-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property;

(*g*) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

1883. Analogous Law.—This section closely resembles the English law according to which the persons enumerated in the section are also entitled to redeem.(1)

Prior to the passing of the Act, there was no statutory provision permitting redemption in favour of persons other than the mortgagor's representative. (2) But this term was construed to designate a person who, "either by law or by contract between the parties succeeds the mortgagor, whether mediately or immediately in the position which he holds relative to the mortgagee in respect of the property which is the subject of the mortgage."(3) Under the pre-existing law a person holding under the mortgagor, as for instance, a *mokurruree* lessee could not redeem,(4) but such a person can no longer be denied that right.

The last clause is acknowledged to have been taken from Fisher's work on mortgage. (5) It will be observed that, though the section enumerates seven classes of persons who are declared entitled to redeem, still on close examination it would appear that clauses (*c*) to (*g*) are more or less illustrative of the

(1) Fisher, § 1415, *et seq.*; Robbin's Mortgage, pp. 692, 706. Clause (*b*) is taken from the judgment of Lord Hatherley in *Pearce* v. *Morris*, L.R., 5 Ch., 227. Snell's Equity, pp. 354, 355; Story's Equity Jurisprudence (2nd Eng. Ed.), §§ 1023, 1023*a*, 1023*b*.

(2) S. 8, Reg. XVII of 1806.

(3) *Kishen* v. *Belasoo*, 3 W.R., 230; *Bissonath* v *Brojo Nath*, 6 W.R., 230. (Both these cases are cited in the marginal note against clause (*b*) of this section in the Bill.)

(4) *Doorga Pershad* v. *Luchmun*, 17 W.R., 272. (This case is cited against clause (*c*) in the Bill with the note added—"But see marginal note in the Bill").

(5) § 768.

first two clauses which only declare that any person having an interest in the mortgagor or the mortgaged property may redeem. Clauses (*d*) and (*e*) are instances of persons interested in the mortgagor, while clauses (*c*), (*f*) and (*g*) afford instances of persons interested in the mortgaged property.

This section does not provide a solution in case of competition between the several persons enumerated.

1884. Principle.—The object of the section is to enable the mortgagor to obtain the fullest value for his security, as also to enable him to disencumber his property with the help of others. The rule being primarily for the benefit of the mortgagor, persons possessing no interest in the property cannot be allowed to redeem. The equity of redemption being an estate in the land, only such persons as are entitled to any estate or interest in that equity are entitled to redeem a mortgage. The right is an inseparable incident of every mortgage,(1) and no agreement between mortgagor and mortgagee can make the mortgage irredeemable.(2) But the person claiming to redeem must show his title, for "the mortgagee is not bound to *any* person who may start up with the allegation that he has succeeded to the rights of the original mortgagor. On the contrary, it is his duty, as trustee for the mortgagor, to take the same care of the estate as he would of his own, and to admit no claims upon it until assured of the title of the claimant." (3)

1885. Meaning of Words.—"*Besides the mortgagor*:" *i.e.*, a mortgagor who has a subsisting title to the mortgaged property. "*May redeem or institute a suit for redemption*:" "May redeem" in an execution-proceeding pending between the mortgagee and mortgagor, or out of Court if the mortgagee permits it. A suit would become necessary only if the other means fail. A person entitled to redeem is not necessarily entitled to sue for redemption (§1892). So while a prior mortgagee is, as such not entitled to redeem his junior mortgagee, he will be permitted to redeem him if he was impleaded in his suit and the mortgagee proceeds to execute his decree for sale which he may avert by redemption (4) (§ 1726). Another instance is furnished of the right of redemption without the right of suit by the mortgagor who after the sale of his equity of redemption is sued on his personal covenant (5) (§1892). "*Other than the mortgagee.*" A puisne mortgagee cannot redeem himself, but may redeem a prior or subsequent mortgagee. "*The judgment-creditor of the mortgagor*:" Even after attaching the equity of redemption such a person does not acquire any interest in or charge on the property (§§ 846—849).

1886. Mode of Redemption.—This section only enumerates certain persons who may, if they choose, redeem the mortgaged property. It does not state when and how that right may be exercised and in what order the several persons should rank in case of competition amongst them. These *lacunæ* of the law are, however, by no means unimportant, and they often render the section less useful than it might otherwise be. The first paragraph confers on the persons enumerated in the following clauses the right to redeem or institute a suit for redemption. These words have been used here in the sense, in which they are defined in section 60, which defines what is implied by the "right to redeem," and in which a suit to enforce that right is designated a suit for redemption. One mode of redeeming the mortgaged property is for

(1) *Tasker* v. *Smith*, 3 My. & Cr., 70.
(2) *Courtenay* v. *Wright*, 2 Giff., 337.
(3) *Baboo Kankha Lal* v. *Syud Dad Ali*, (1859) S.D.A., 1273 (1276).
(4) *Bhojahari* v. *Gajendra*, I. L. R., 97 Cal., 282.
(5) *Kinnarid* v. *Trollope*, 39 Ch. D., 636.

the party redeeming to declare his status and pay or tender the mortgage-money to the mortgagee. If the latter refuses to accept payment, it may then be necessary to institute a suit for redemption, unless some other course is feasible. A question has sometimes been raised in practice whether a person entitled to redeem can intervene in execution, as for instance, after the passing of the *nisi* decree, and before it is made absolute. This he can only be permitted to do, if he can be described as the representative of the mortgagor within the meaning of section 47 of the Code. There can be no doubt that this term is wide enough to include a representative in point of interest, such as an assignee of the mortgagor's interest.(1) In such a case it is not the mortgagor but his assignee who is entitled to redeem the mortgaged property. For a mortgagor, as such, has not the right to redeem the property, if he has absolutely parted with his equity of redemption, or if the equity of redemption (2) has been sold in execution, though no certificate of sale may have been granted to the purchaser.(3) But in England if the mortgagee sues the mortgagor on his personal covenant after foreclosing his mortgage, a new right to redeem the mortgage, which had been previously foreclosed, revives in the mortgagor, who may then on payment of the mortgage-money, insist upon the mortgaged property being reconveyed to him, subject to such equity of redemption as may be vested in any person other than himself.(4) In India, however, since foreclosure has the effect of discharging the debt, such a *contretemps* is seldom possible.

1887. The assignee of the equity of redemption has, however, the unquestionable right to redeem, even though the equity may have been abandoned for a considerable time, or the assignment was for an inconsiderable sum.(5) But, of course, as the assignment of the right to redeem creates an interest in immoveable property, it must be registered under the provisions of the Indian Registration Act.(6) Of co-mortgagors any one may redeem subject to accounts as between himself and his co-owners.(7) He cannot, however, redeem his own share of the mortgaged property, but must redeem the whole, enforcing his right of contribution against the other co-mortgagors.(8) In such a case where there has been an out-and-out transfer of the equity of redemption, the assignee would properly represent the mortgagor in execution, and he may, if challenged, prove the assignment in his favour without being driven to a separate suit. But it may be questioned whether a person who has merely agreed to purchase the equity of redemption has equally the right to represent the mortgagor. A purchaser of the equity of redemption may be said to possess the privity of estate with the mortgagee. But a person who has only agreed to purchase the mortgaged property has no interest in the property, and he cannot represent the mortgagor after the passing of the preliminary decree even though he may have paid the whole or a portion of the

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(1) *Ishan Chunder* v. *Beni Madhub*, I. L. R., 24 Cal., 62, F. B.; *Dwar Buksh* v. *Fatik Jali*, I. L. R., 26 Cal., 250; *Janki Prasad* v. *Ulfat Rai*, I. L. R., 16 All., 284; *Badri Narain* v. *Jaikishendas*, I. L. R., 16 All., 483; *Lalji* v. *Nand Kishore*, I. L. R., 19 All., 332; *Gur Prasad* v. *Ram Lal*, I. L. R., 21 All., 20.

(2) *Kinnaird* v. *Trollope*, 39 Ch. D., 636 (642); *Gangadhar* v. *Balsher*, (1887) B. P. J., 209.

(3) *Apa* v. *Salam*, (1889) B. P. J., 246.

(4) *Palmer* v. *Hendrie*, 27 Beav., 349; O.A. 28 Beav., 341; *Walker* v. *Jones*, L. R., 1 P. C. 50 (62); *Pearce* v. *Morris*, L. R., 5 Ch., 277; *Kinnaird* v. *Trollope*, 39 Ch. D., 636 (644, 645).

(5) *Anon.*, 3 Atk., 314.

(6) *Maung Po* v. *Mhd. Cassim*, I. L. R., 30 Cal., 1016, P. C.; *Mutha* v. *Pyanda*, I. L. R., 27 Mad., 348.

(7) *Wynne* v *Styan*, 2 Phil., 306; *Pearce* v. *Morris*, L. R., 5 Ch., 227.

(8) S. 95 *post*; *Hall* v, *Heward*, 32 Ch. D., 430.

purchase-money, and thereby acquired a charge on the property (§§ 1086-1093); such a charge-holder is entitled to redeem, but he is not entitled to redeem in the suit closed. This view was unaffected by the divergence of views which once prevailed as to the character of the proceedings subsequent to the preliminary decree. And now that all proceedings subsequent to the passing of the decree are declared to be the proceedings in suit, the same conclusion appears to be inevitable. For unless a person with the benefit of an obligation be regarded as possessing an interest in the property to which the contract relates,(1) he is not a necessary party to the suit,(2) and it being so, he cannot compel the Court to adjudicate on his right to redeem in a proceeding to which he is a stranger.(3) It would then seem that a person may be entitled to redeem, but he is not therefore entitled to enforce his right in a suit between mortgagor and mortgagee. Where a decree for foreclosure was obtained against *S* who was the executor of his father's estate and subsequently his brother *A*, and a purchaser *M*, of the bulk of the mortgaged property from him applied to be made parties to the suit, and to redeem, the Court refused their prayer on the ground that having transferred a considerable portion of his interest in the property *A* had little or no interest in redeeming the property, and as regards the purchaser "he had no right to be made a party to the proceedings in the redemption suit."(4) But this case is no authority for negativing the right of *A* and *M* to redeem by instituting a separate suit.

1888. Order of Redemption.—But where several mortgagees are also part-owners of the equity of redemption there may arise a question as to the order in which they should be permitted to redeem. As between several successive mortgagees, the rule is settled that the mortgagee entitled to priority in date has the first right to redeem, and in the event of his not redeeming, successive rights of redemption are given to those who follow.(5) And the same rule prevails as regards other persons admitted to redeem, their order being determined by the order in which they acquired their rights in the equity of redemption, whether in the same or in different properties affected by the mortgage sought to be redeemed.(6) But where several mortgagees are also part-owners of the equity of redemption, the practice in England in a suit by the prior mortgagee for the recovery of his debt appears to be to direct by the judgment that, upon payment to the first mortgagee of all that is due to him by the second, the former shall convey the whole estate subject to his right to redeem the part in which he has acquired the equity of redemption. The second or other subsequent mortgagee will be redeemed in his turn by the first mortgagee, being the owner of part of the equity, as well as by the owner of the residue of the equity on payment by each of a part of the mortgage-debt proportionate to his share, and upon redemption, the estate is conveyed to them in the proportion in which they were entitled.(7)

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(1) S. 54, *ante*.

(2) S. 85, *ante*.

(3) *Dina Nath* v. *Lachmi Narain*, I. L. R., 25 All., 446; *cf. Mohananda* v. *Akhoy Kumar*, 6 C. W. N., 488.

(4) *Mohananda* v. *Akhoy Kumar*, 6 C. W. N., 488 (489).

(5) *Per* Wood, V. C., in *Beevor* v. *Lock*, L. R., 4 Eq., 537 (543); following *Titley* v. *Davies*, 2 Y. & C. Ch., 399, *note;* distinguishing *Edwards* v. *Martin*, 28 L. J. Ch., 49 (in which the decree did not fully declare the rights of the parties, but left it to them to work out their rights in chambers—*per* Wood, V. C., in *Beevor* v. *Lock*, L. R., 4 Eq., 537, 548, (549).

(6) *Mills* v. *Jennings*, 13 Ch. D., 639 (650); O. A. 6 App. Cas., 698. This was a case of consolidation in which the owner of equity of redemption in one estate was held entitled to redeem the two estates which the mortgagee had consolidated. Such a case will, however, seldom arise in India. (*See* s. 61, Comm.)

(7) *Dina Nath* v. *Lachmi Narain*, I. L. R., 25 All., 446 (455, 456).

Rights acquired on redemption.

1889. A person redeeming property is for certain purposes entitled to step into the shoes of the out-going mortgagee, and if, as in the case of a puisne mortgagee he was a party to the latter's suit, he may be permitted to continue the proceedings for the enforcement of his own right. It is not always necessary that he should be driven to a separate suit to enforce his right, for by his payment he practically becomes the decree-holder or the plaintiff as the case may be, and only with this change of interest the suit would continue to be a subsisting one till all the rights and liabilities of the parties have been finally adjusted, and with this view, the Court is competent to pass a final decree for foreclosure or sale in favour of the party so entitled.(1) But this view cannot be given effect to in execution after the decree has been made absolute. (2)

1890. Procedure in Redemption Suit.—If a suit for redemption becomes necessary, it is the duty of the plaintiff to implead all persons interested in the mortgage as parties to the suit ; (3) the rest of the procedure being *mutatis mutandis* similar to that followed in mortgagee's suit. The form of the decree *nisi* for redemption is prescribed in the Code of Civil Procedure which also directs in what cases, and when it is to be made absolute.

In redemption-suits where a defendant denies the *factum* of the mortgage, very slight *prima facie* proof that a mortgage had been originally made will. in this country, be sufficient to shift the entire burden of proof on the defendant.(4) So it was observed in a case: "It being the ordinary custom in this part of India that deeds creating mortgages should remain in the custody of the mortgagee alone, no counterpart being taken by the mortgagor, very slight *prima facie* proof that a mortgage had been originally made would serve to shift the entire burden of proof on the defendant in case of this character ; but this *prima facie* proof must be forthcoming, and in its absence a plaintiff seeking redemption cannot be relieved of the burden which is imposed on all plaintiffs of establishing the fact or facts out of which their claim to relief arises." (5) Where, however, the plaintiff asserts his right after a considerable time, he will be required to give more cogent evidence in support of his title (6) Where a certain property was mortgaged and described in the mortgage-deed, it is for the mortgagee to shew that the property so described was really different to that claimed on redemption. It is the duty of the mortgagee and his assignees to identify fully the property mortgaged, and if they fail "the Court in cases relating to confusion of boundaries proceeds upon the same principle as it does when an agent or bailiff or any other person, who is under an obligation, expressed or implied, to keep his own property separate from the property of another, mixes them together, for under such circumstances, he will have the *onus* thrown on him of distinguishing his own property ; and if he is unable to do so, the other person will be entitled to the whole property."(7) The mortgagee is then bound to restore the whole property in its entirety and he cannot be heard to say that he does not know what has happened to a portion of the mortgaged property.(8)

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(1) S 74, *ante*, and Comm., (§§1702—1705), *Bansidhar* v. *Gaya Prasad*, I. L. R., 24 All., 179 (182).

(2) *Gopi Narain* v. *Bansidhar*, I. L. R., 27 All., 325 (330), P. C.

(3) O. XXXIV. r. 1, *See* Comm , Pt. 2.

(4) *Balaji* v. *Babu*, 5 B. H. C. R., 159 ; *Rama* v. *Baburao*, (1874) B. P. J., 18 ; *Chinto* v. *Suga*, (1886) B. P. J., 247 ; *Vishwaram* v. *Devkuran*, (1886) B. P.J., 248 ; *Ramachandra* v. *Mukund*, 3 Bom. L. R., 152 ; *Bala* v. *Shiva*, I. L. R., 27 Bom., 271.

(5) *Balaji* v. *Babu*, 5 B. H. C. R., 159.

(6) *Sevaji* v. *Chinna*, 10 M. I. A.. 180.

(7) *Wake* v. *Conyers*, 2 W. & T. L. C., 438 ; followed in *Ramchandra* v. *Mukund*, 3 Bom. L. R., 152.

(8) *Ramchandra* v. *Mukund*, 3 Bom. L. R., 152.

1891. The Court-fee payable in a redemption-suit is to be calculated on the principal money expressed to be secured by the instrument of mortgage; [1] and the value of the subject-matter of such suits for the purposes of jurisdiction is also the same.[2] But the Court-fee payable on appeal would, in any case, be *ad valorem* on the subject-matter of appeal.[3]

Court-fee.

1892. Mortgagor's Right of Redemption.—The mortgagor's right of redemption is a necessary incident of his mortgage, and which he is entitled to enforce not only against the original mortgagee but also against all those who stand in the position of the mortgagee (§§1353-1356). But his right to redeem his status as mortgagor (§1376), that is to say, he has the right to redeem depends upon only so long as he possesses or is interested in the equity of redemption, or in any part thereof (§§1382-1385). A mortgagor who has absolutely parted with his equity of redemption cannot redeem, unless he is sued by the mortgagee upon his personal covenant to pay the mortgage-money when he acquires a new right to redeem, and is entitled upon paying the mortgage-money to a re-conveyance to himself, subject to any equity of redemption vested in any other person. And he is so entitled, even if after the assignment of the equity of redemption the assignee has further charged the property either to the original mortgagee or to some other person.[4] But on the mortgagor absolutely assigning his equity of redemption in the mortgaged property, the mortgagor does not retain any right to redeem by reason of his covenant, but that right springs into existence the moment he is sued thereon. The rule depends upon the reciprocity of rights and obligations between mortgagor and mortgagee and if the former cannot redeem, the latter cannot sue him on the mortgage, and if he sues him on the covenant he is bound to reconvey subject only to such equity of redemption as may be vested in any person other than himself.[5] A mortgagor is entitled to redeem notwithstanding the existence of a puisne mortgagee, [6] and an undertaking on the part of the puisne mortgagors to join in the sale by the mortgagor to the first mortgagee does not amount to a sale of the equity of redemption.[7] Under a mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion, and out of the proceeds of sale to pay the mortgage-debt and to pay the surplus moneys to the mortgagor, the only right of the mortgagor is to redeem, and he cannot sue for a sale.[8] Any assignee of the mortgagor's right whether for or without consideration may redeem. [9] If the transaction amounts to a mortgage and there is a mortgagor he has the right to redeem. But it is sometimes not easy to say whether a contract amounts to a mortgage (§§ 1167—1171, 11891—192). For where, for instance, the mortgagee who had lent a sum of money to *A* on the security of a reversionary interest to which he was entitled contingently on his surviving his

(1) S. 7 (ix), Court Fees Act (VII of 1870).

(2) *Gobind Singh* v. *Kallu*, I. L. R., 2 All., 778; *Bahadur* v. *Nawab Jan*, I. L. R., 3 All., 822; *Kubair Singh* v. *Atmaram*, I. L. R., 5 All., 332; *Amanat Begam* v. *Bhajan Lal*, I.L.R., 8 All., 438, F. B.; *Mana Vikrma* v. *Surya Naryana*, I. L. R., 5 Mad., 284; *Vasudeva* v. *Madhava*, I. L. R., 16 Mad., 326; *Konna Panikar* v. *Karunakara*, I. L. R., 16 Mad., 328; *Eachcharam* v. *Appu*, I. L. R., 19 Mad., 16; *Deosthan* v. *Makunda*, 14 C. P. L.R., 154; but *contra* in *Rupchand* v. *Balwant*, I. L. R., 11 Bom., 591; *Amrita* v. *Naru*; I. L. R., 13 Bom., 489; *Ramchandra* v. *Janardhan*, I. L. R., 14 Bom., 19.

(3) *Nepal Rai* v. *Dabi Prosad*, I. L. R., 27 All, 447; *Mahadeb* v. *Gorakh Prosad*, I. L. R., 30 All., 447.

(4) *Kinnaird* v. *Trollope*, 39 Ch. D. 636 *Lacknart* v. *Hardy*, 9 Bear. 355, *Palmer* v *Hendrie*, 27 Beav, 349; 28 Beav. 341.

(5) *Pearee* v. *Morris*, L. R. 5 Ch., 277; followed in *Kinnaird* v. *Trollope*, 39 Ch. D. 266 (645).

(6) *Bai Kantha* v. *Mohendra*, 1 C. L. J. 65.

(7) *Gangadhar* v. *Balshet*, (1887) B. P. J., 209.

(8) *Locking* v. *Parker*, L.R., 8 Ch., 30.

(9) *Howard* v. *Harris*, 1 Vern., 193.

father: as part of the loan transaction the mortgagee insured *A's* life in an Insurance society of which he was the trustee for more than thrice the amount of the loan, it being provided that the policy was to belong to *A* if he paid up the loan, but that it was to belong to the mortgagee if he predeceased his father without redeeming the mortgage, and which he did. It was held that since the policy was not effected for the sole benefit of the mortgagee but was to have become *A's* own, if he paid off the debt, it amounted to a mortgage subject to redemption by *A's* representatives. (1) The case would have been, of course, different, if the policy had been purchased by the mortgagee for his sole protection. (2)

The term mortgagor, of course, includes not only the original mortgagor but also his legal representatives and assigns (§1205).

The phrase " or institute a suit for redemption" seems to be superfluous in view of the fact that the right to redeem necessarily implies a right of suit for that purpose.

1893. Redemption of the mortgaged Property.—This section does not lay down any rule as to redemption of the whole or a part of the mortgaged property by one who is interested only in a part thereof. That question is a large one and depends upon other circumstances, and the rights acquired by the mortgagee or by third persons subsequent to the mortgage. (3) But where no such rights have accrued a person interested in only a small portion of the equity of redemption is entitled to redeem the whole mortgage. In other words, the right to redeem depends upon possession of an interest in the equity of redemption and not its quantity which may be ever so small, provided that the interest is not too remote. (4) But a person who is entitled only to a part of the equity of redemption has not, under all the circumstances, the right to insist on redeeming the whole mortgage. If there are several persons in whom the equity of redemption is vested any one of them may redeem provided that by doing so the rights of the others are not thereby prejudicially affected, where the mortgagee has dealt with one of those entitled to the equity of redemption, a person entitled to the remainder may claim to redeem his share only of the equity of redemption. The objection to a mortgagee splitting up a mortgage is entitled to weight only where the owner of a part of the equity of redemption is prejudicially affected thereby. If some of the co-owners of the equity of redemption should desire to continue the mortgage of their shares, one of the co-owners cannot be held entitled to redeem the whole of the mortgage.

Redemption of the whole or part.

1894. Persons interested may redeem.—Except the mortgagee whose interest is sought to be redeemed, the first clause enables " any person having any interest in or charge upon the property " to apply for redemption. Such persons may either be those who became interested in the property before its mortgage, or those who became interested therein after its mortgage, and upon whom the same right is conferred by the second clause. The effect of these two clauses is to enable all persons, whether they have acquired an interest in the property before or since the mortgage, to claim redemption.

Cl. (a).

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(1) *Salt* v. *Marquess of Northampton*, [1892] A.C. 1 (15).

(2) *Bruce* v *Garden*, L.R., 5 Ch. 32; reversing L.R., 8 Eq. 430.

(3) *Rathna* v. *Perumal*, 23 M. L. J., 576; 17 I. C. 837; distinguishing *Huthasanan* v. *Parameswaran*, I. L. R. 22 Mad., 209.

(4) *Taru* v. *Turner*, 39 Ch. D. 456 (462).

Thus, besides the mortgagor, every transferee of the whole or a part of the property, (1) such as a vendee, or an execution-purchaser, (2) a purchaser *pendente lite*,(3) and even an auction-purchaser before the confirmation of his sale,(4) a sub-mortgagee,(5) or a pusine mortgagee(6) may redeem. But a plaintiff who had previously denied the title of the defendant in the Court of the first instance, although he may have admittedly an interest in a part of the premises comprised therein.(7) And it has been held that the illegitimate son of an illegtimate member of a Hindu family, who as such illegitimate son might have had a right to maintenance from the property of his father, had no such interest in the estate belonging to the family as would entitle him to redeem a mortgage made by a previous rightful owner of the estate.(8) In England, however, if the heir-at-law cannot be traced the *hœres faetus* may redeem.(9) So a devisee of the equity of redemption may redeem against a purchaser from a pretended heir with notice of the suit to establish the will. (10) The mortgagor's heir is allowed to redeem on the death or disappearance of the mortgagor, his death being presumed if he has not been heard of for a period of seven years. (11) But in such cases the Court as a rule takes security for restitution in case of the re-appearance of the absent owner.(12)

1895. The right of maintenance being a purely personal right, does not, in itself, confer on the person entitled to it a right to redeem the property against which his right is enforceable. But as the right may be enforced by obtaining a charge on the property, if such a charge has been obtained by contract or decree, it will then enable the charge-holder to exercise the right of redemption.(13) So in England where legacies were charged by the will of the mortgagor upon the equity of redemption, the legatees were held entitled to redeem.(14 In England a dowress has been held entitled to redeem,(15) but inasmuch as a mere right to dower does not create any interest in any specific property, the Indian rule in this respect must be pronounced to be different.(16)

1896. A person having only an inchoate right may not redeem until the completion of his title. But if a person whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption.(17) As was observed by Westropp, C.J.:—

(1) *Nainappa* v. *Chidambaram*, I. L. R., 21 Mad., 18.

(2) *Periandi* v. *Angappa*, I. L. R., 7 Mad., 423 ; *Muhammad Niamat Ali* v. *Ghaffar Muhammad*, I. L. R., 21 All., 272 ; *Sheo Narayan* v. *Chunilal*, (1900) A. W. N., 51.

(3) *Har Sankar* v. *Sheo Gobind*, I.L.R., 27 Cal., 966.

(4) *Hara Sankar* v. *Sheo Gobind*, I.L.R., 27 Cal., 966 (972) ; *Radha Kishun* v. *Hem Chandra*, 11 C.W.N., 495.

(5) *Muthu Vijia* v. *Venkatachallam*, I. L. R., 20 Mad., 35 ; *Ram Subhag* v. *Narsiurh*. I.L.R., 27 All., 472 ; *Harprasad* v. *Phul Chand*, 2 A.L.J.R., 609.

(6) S. 74, comm. *ante* ; *Radhabai* v. *Shamrav*, I.L.R., 8 Bom., 168.

(7) *Konna Panikar* v. *Karunakara*, I.L.R., 16 Mad., 328.

(8) *Balwant Singh* v. *Roshan Singh*, I L R., 18 All., 253.; O.A. *Roshan Singh* v. *Balwant Singh*. I.L.R., 22 All., 191, P. C.

(9) *Saunders* v. *Hawkins*, 2 Eq. Ca. Abr., 771 ; *Lewis* v. *Nangle*, 2 Ves., 431; *Phillips* v. *Hall*, 1 Ch. R., 191; *Bhyroo* v. *Nuthoo*, (1854) N.W.P.S.D.A., 525; distinguishing *Konna Panikar* v. *Karunakara*, I.L.R., 16 Mad., 328.

(10) *Saunders* v. *Hawkins*, 2 Eq. Ca. Abr., 771, and cases cited *supra*.

(11) S. 108, Indian Evidence Act (I of 1872).

(12) *Dowley* v. *Winfield*, 14 Sim. 277 ; *Bailey* v. *Hammond*, 7 Ves. 590.

(13) *Roshan Singh* v. *Balwant Singh*, I.L. R., 22 All., 191 (199) P.C., *Gajadhar* v. *Thula*, 120 C. 37; 1 I. C. 690.

(14) *Bachelor* v. *Middleton*, 6 Hare, 75.

(15) *Palmes* v. *Danby*, Freem. Ch., 137 ; *Dawson* v. *Bank of Whitehaven*, 6 Ch. D., 218 (230).

(16) *Cf. Roshan Singh* v. *Balwant Singh*, I. L.R., 22 All., 191, P. C. ; *Bhola Nath* v. *Maqbulunnissa*, I.L.R., 26 All., 28 ; *Ameer Ammal* v. *Sankaranrayanan*, I. L. R., 25 Mad., 658.

(17) *Krishnaji* v. *Ganesh*, I. L. R. 6 Bom., 189 ; *Tukaram* v. *Satvaji*, I.L.R., 5 Bom., 207.

" We cannot perceive that we should confer any benefit upon the mortgagees by rejecting the present suit. The plaintiff might to-morrow file another suit for the same purpose if we were to reject this suit."(1) But the interest here spoken of is evidently a present as distinguished from a contingent interest. For instance, the interest possessed by the reversioner of a Hindu widow during her lifetime is a contingent interest which does not give him the right to redeem.(2)

1897. In England "even a person claiming under a prior or subsequent voluntary conveyance may, as against the mortgagee, redeem. An assignment of debt generally draws after it the land mortgaged, as a consequence and an appurtenance of the debt, upon the rule *omne principale trahit ad se accessorium.*(3) But an assignment of the mortgage without an assignment of the debt, is treated, at most, as a transfer of a naked trust."(4)

But the test in India would in such cases be whether the person claiming the right had any interest in or charge on the property. A person who is only interested in the mortgage-money has no right to redeem. So a co-mortgagee who had advanced to his co-lender a part of the mortgage-money on another security was held disentitled to redeem.(5) The question depends upon what persons must be deemed to be interested in the mortgaged property. The term "interested" used here would appear to be used in the same sense as in O. 34, r. 1 of the Code of Civil Procedure. It may then be generally predicated of all persons so interested that they possess the right of redemption. Indeed, the fact that they are necessary parties to a mortgage-suit pre-supposes that they possess that right. A charge upon property may be created in a variety of ways. It is sufficient here to state that the party claiming the right to redeem on the strength of his charge would have to show that he had a valid subsisting charge on the mortgaged property. A person purchasing the equity of redemption of the mortgaged property, a part of which had been sub-mortgaged, is entitled to redeem the whole mortgage, although he might not have specifically sought to redeem the sub-mortgage, and in such a case the proper course is to ascertain the amount due to the sub-mortgagee and direct payment of that amount to him, out of the amount payable for redemption of the whole mortgage.(6) A person possessing a heritable estate is entitled to redeem though the estate be not transferable. (7)

1898. Can Mortgagee redeem.—It has been before remarked that a mortgagee cannot be permitted to redeem his own mortgage. Indeed, redemption being a right of the mortgagor *against* the mortgagee, the latter cannot be permitted to defeat that right by any action of his own (§§ 1396-1426). But the disability of the mortgagee is as regards his own mortgage. He is not absolutely debarred from redeeming other mortgages, and, indeed, he has been explicitly given that right by sections 74 and 75. But the mortgagee cannot be his own debtor, and he cannot therefore extinguish the right of redemption which may have the effect of defeating the very right which is created against him out of compassion to the mortgagor.

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(1) *Krishnaji* v. *Ganesh*, I.L.R., 6 Bom., 139 (143).

(2) *Ramchandar* v. *Kallu*, I.L.R., 30 All., 497.

(3) "An accessory follows the principal."

(4) Story's Equity Jurisprudence (2nd Eng. Ed.), § 1023, note 5.

(5) *Emmet* v. *Tottenham*, 10 Jur. (N.S.), 1090.

(6) *Gokul Das* v. *Debi Prasad*, I. L.R., 28 All., 638.

(7) *Lotan* v. *Patan Din*, (1909) 12 O. C., 271.

But while the mortgagee is so far competent, it does not thence follow that he may not purchase or inherit the equity of redemption, but this, of course, depends upon the consent of the mortgagor, and even then the effect of his acquisition is to extinguish the mortgage-debt *pro tanto*.(1) In other words, the mortgagee who acquires any portion of the mortgaged property must bear a rateable share of the debt, and bring into account the value of the property acquired by him. So it has been held that where the mortgagee has acquired the right of redemption in a portion of the mortgaged property, and an attaching creditor had also become part-owner of that equity, the mortgagee could maintain a suit for foreclosure or sale against the attaching creditor who had so purchased, for a portion of the mortgage-debt proportionate to the value which the property purchased by the latter bore to the value of the entire mortgaged property,—such value being calculated in accordance with the provisions of section 82,—and that the attaching creditor who had so purchased was entitled to redeem only the share which he had purchased.(2) Where one of several co-mortgagees purchases the equity of redemption, it does not affect the interest of other co-mortgagees who may recover their share of the mortgage-debt, (3) but the question whether they would be entitled to redeem the outgoing co-mortgagee depends upon other considerations elsewhere set out (§§ 1427-1433). Where one of the co-owners of an estate under the management of the manager of joint property appointed under section 93 of the Bengal Tenancy Act, mortgaged his share which in execution of a decree on the mortgage was purchased by the mortgagee, it was held that the mortgagee thereby became a co-owner under the manager, and as such was entitled to the benefit of a decree for redemption in a suit for mortgage of the estate by the manager.(4)

1899. Sub-mortgagee.—The sub-mortgagee is clearly a person who has both an interest in and a charge on the mortgaged property. As such, he is entitled to redeem and in point of priority he will rank with his own sub-mortgagor to whose rights he is subrogated by the assignment. (5)

1900. Persons interested in the Equity of Redemption.—Of persons interested in the equity of redemption, it is enough to say that such persons, whether they be assignees or mortgagees, are equally entitled to redeem. A co-mortgagor is not merely interested in the equity of redemption. He is a debtor himself and is as such entitled to redeem the mortgaged property; but he must redeem the whole, and cannot redeem only a part of the property. It has been before remarked that a contractor for the purchase of the mortgaged property has, as such, no right to redeem (§ 1886), and the same remark applies to a contractor for the purchase of the equity of redemption.(6) In England a voluntary alienation though fraudulent against the mortgagee, entitles the alienee to redeem the mortgage.(7) A person interested in only a distinct portion of the mortgaged property, or of the equity of redemption is not of right entitled to redeem anything more than

Cl. (b).

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(1) *Bisheshur* v. *Ram Sarup*, I. L. R., 22 All., 284, F.B.; *Shib Lal* v. *Bhawani*. I. L. R., 26 All., 72 (75); *Sami Rawappa* v. *Kuppusami*, 10 M L.T. 240; *Shankar Das* v. *Gobind Ram*, (1911) P.R. No. 62.

(2) *Dina Nath* v. *Lachmi Narain*, I. L. R. 25 All., 446; *Shib Lal* v. *Bhawani*, I. L. R., 26 All., 72 (75).

(3) *Ramdas* v. *Sheo Lal*, 9 I.C., 1026.

(4) *Amar Chandra* v. *Shoshi Bhusan*, I. L. R., 31 Cal., 305 P. C.

(5) *Venkat Narayanasami* v. *Kanni*, 14 M.L.T., 390; 21 I.C., 560.

(6) *Tasker* v. *Small*, 3 My. & Cr., 69; *Pearce* v. *Morris*, L. R., 5 Ch., 227 (231).

(7) *Rana* v. *Cartwright*, 1 Ch. Ca., 59; *Howard* v. *Harris*, 1 Vern., 193; *Barthorp* v. *West*, 2 Ch. R., 62.

the portion in which he is interested, unless the mortgagee wills otherwise.(1) In any other case, he must be content to redeem only his share upon payment of a sum equivalent to the portion of the mortgage-debt chargeable on that share (2) (§§ 1423—1433). Among persons having charge on the equity of redemption must be classed such persons as the subsequent mortgagee, (3) and all other persons who have established a charge properly so called on the property. In all cases in which the claims of a third party to redeem are considered the mortgagor is a necessary party, if supposing he has any subsisting interest in the equity of redemption. (4)

Lessee.

1901. Persons entitled to a charge on property are dealt with elsewhere. (5) They are in the nature of incumbrancers and as such undoubtedly entitled to redeem, because possessing as they do rights in the nature of rights *in rem* there is a priority of estate between them and all mortgagees which confers on them the right of redemption. But persons "having any interest in the property" are more difficult of description. An effort has been made to enumerate such of them as are held to possess such interest (6) but beyond these the term "interest" must comprise such interest which is affected by the mortgage sought to be redeemed. The question whether any one claiming to redeem has such interest must then be decided according to the circumstances of each case. Thus while a *ryot* under a zemindar in Bengal is held to possess no such interest in the redemption of the Zemindari (7) the contrary is maintained in Madras where the word "interest" is held as "not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant"; (8) and so in England "according to the general law of the lands a person who claims as lessee under a mortgagor after the mortgage, and has thereby derived an interest in the equity of redemption, has the right to redeem."(9) This view has been cited with approval both in Madras and Allahabad, where the mortgagor's permanent lessee was held to possess the right of redemption, it being added: "The plaintiff cannot be described as a mere tenant of an ordinary lessee. Subject to the payment of this fixed amount every year he has all the rights of ownership."(10) But these words were not intended to negative the right of such tenant to redeem; they were used to strengthen the claim of the permanent lessee who had sued for it—and the question still remains whether a lessee for a term of years is entitled to redeem the proprietary interest in the property of his lessor. But in view of the diverse and varying interests possessed by the lessees in this country, depending upon the character of the property and the lease, and the incidents attaching thereto both by contract and the statute it cannot be generally predicated that lessees as such have or have no right of redemption. Then again, persons who might have had no right to redeem in a suit of their

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(1) *Azumatali* v. *Jowahir Singh*, 13 M. I. A., 404 (415); *Girish Chunder* v. *Juramani*, 5 C.W.N., 83 (85).

(2) *Azumat Ali* v. *Jowahir Singh*, 13 M. I. A., 404 (416).

(3) *Fell* v. *Brown*, 2 Bro. C. C., 276; 29 E. L. R., 151 (153).

(4) *Per* Thurlow, L.J., in *Fell* v. *Brown*, 2 Bro. C. C., 276 (278); *Palk* v. *Clinton*, 12 Ves., 48 (58, 59).

(5) S. 100, *post*.

(6) O. 34, r. 1, Comm.

(7) *Girish Chunder* v. *Juramoni*, 5 C. W. N., 83; The report of this case does not show the character of the "rayyati lease" and it was on that ground distinguished in *Raghunandan* v. *Ambika Singh*, I. L. R., 29 All., 679 (682).

(8) *Paya* v. *Koramel*, I. L. R., 19 Mad., 151.

(9) *Taru* v. *Turner*, 39 Ch. 456 (468); followed in *Paya* v. *Koramel*, I. L. R. 19 Mad., 157; *Raghunandan* v. *Ambika Singh*, I. L. R., 29 All., 679.

(10) *Ib.*, p. 682.

own may acquire that right if they are impleaded in a suit, and in which case the Court may from the very fact of their joinder give them the right of redemption. (1) But apart from this fact, the cases on the subject are by no means unanimous. It is evident that in this respect a *Zurepeshgi* lessee being in fact a mortgagee (§§1190-1192) forms a class apart, and his right to redeem cannot be questioned. (2) But a *mokurrari* lessee stands on a different footing. In cases decided without reference to the Act he was held to "hold under the mortgagor" and as such had no right to redeem. (3) But the case of a *patnidar* was held to be different he being entitled to redeem. As Pontifex, J. observed: "In this country *patnis*, *Zuripeshgi* leases, and interests of that nature are very considerable interests in the land, and cannot be looked upon as mere leases for a term of years which a mortgagee might have the right to disregard. They are in fact substantial proprietorial interests, on the grant of which, as in this case, considerable premiums are paid; and it is only equitable that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgage made by the superior holder." (4) A tenant of the property can equally enforce that right. (5) It might be suggested that the foreclosure or sale of the mortgaged property having relation to a right paramount to the tenancy which is not necessarily affected thereby, the tenant can scarcely be said to be interested in the right of redemption. But the question has not to be approached in this light. If the assignee of the equity of redemption has the right, why should not a lessee, who is an assignee by demise, have also that right? "The interest which a tenant gets from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time." (6) So Fry, L. J., said: "According to the general law of the land a person who claims as lessee under a mortgagor after the mortgage, and has thereby derived an interest in the equity of redemption, has the right to redeem." (7) In this case the redeemer had merely an agreement for a lease from the mortgagor in his favour, and still Fry. L.J., said that the right to redeem existed though no lease had been executed in his favour. In other words, the right to redeem was conceded to one who had merely the benefit of an obligation giving him merely the right to specific performance. (8) The right of a lessee to redeem has been admitted in several Indian cases. As already stated, in Calcutta a *patnidar* is held to possess that right. (9) In Allahabad the right is held to belong to a permanent lessee; and the fact that the premium payable annually does not make his interest any the less permanent so as to disqualify him from enforcing his right. (10) A *verumpattom* tenant in Malabar claiming under a lease from the ottidars is entitled to redeem the prior kanom. (11) It may then be taken to be settled that the word "interest" is sufficiently large to include any

(1) *Bhajahari* v. *Gajendra*, I. L. R., 37 Cal. 282 (284).

(2) *Radha Pershad* v. *Monohur*, I. L. R., 6 Cal. 317.

(3) *Doorga Pershad* v. *Luchmun*. 17 W. R. 272; followed in *Sripati* v. *Mohip Narain*, I. L. R., Cal., 643.

(4) *Kasimunnissa* v. *Nilratna*, I L.R., 8 Cal. 79 (87); followed in *Raghunandan* v. *Ambika Singh*, I.L R., 29 All., 679.

(5) *Taru* v. *Turner*, 39 Ch. D., 456 (460).

(6) *Per* Cotton, L. J., in *Taru* v. *Turner*, 39 Ch. D., 456; (465) *Pearce* v. *Morris*, L. R, 5 Ch., 227.

(7) *Taru* v. *Turner*, 39 Ch. D., 456 (468).

(8) *Ib*, p. 469.

(9) *Kokil Singh* v. *Duli Chand*, 5 C. L. R., 243. (Case of *mokurari* lessee); *Kasimunnissa* v. *Nilratna Bose*, I. L. R., 8 Cal., 79; *Jugul Kishore* v. *Kartic Chunder*, I. L. R., 21 Cal., 116 (120).

(10) *Raghunandan* v. *Ambika Singh*, I. L. R, 29 All 679.

(11) *Paya* v. *Kovramel*, I.L.R., 19 Mad., 151; following *Taru* v. *Turner*, 39 Ch. D. 456 (468).

minor interest such as that of a tenant. But, of course, the tenant must be at least of a part of the mortgaged property, and not merely a tenant of the mortgagor. A ryot (1) or holder of a tenancy land in a settled village would, for instance, be incompetent to redeem. And similarly the landlord has no such interest as would entitle him to redeem mortgages of his holding by an absolute occupancy-tenant. (2) But a zemindar in the United Provinces may upon escheat redeem a mortgage subsisting on the holding of his fixed rate tenant who has merely a right of occupancy in his land and is liable to ejectment for non-payment of rent or breach of conditions. (3) Indeed, where the tenancy is determined, the zemindar may exercise the right of re-entry without even redeeming the mortgage, since the tenure ceasing the mortgage which was a graft thereon would also cease. The heir of a trespasser-mortgagor who had acquired a possessory title at the time of the mortgage, may redeem, though his title as rightful owner may have become barred by time. (4) A person who has acquired a possessory title under the Statute of limitation against the mortgagor may likewise redeem. (5)

1902. A superior proprietor who holds decrees against the inferior proprietor on account of revenue payable under a sub-settlement has a charge upon the land comprised in such sub-settlement which gives him a right to redeem a mortgage made thereon, (6) and which right he does not lose by obtaining a simple money-decree against the inferior proprietor. For in the words of Ellenborough, C., "a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." (7)

1903. Surety.—"A surety is entitled to redeem the estate charged by virtue of his right to avail himself of all the creditor's securities; (8) but not where the surety ship is for another debt, or for a distinct part of the same debt, for which the first security is given. Therefore, if a security by bond for part of a debt, the other part whereof is secured in another transaction by a mortgage, be compelled to pay on his bond, he is not entitled against a subsequent mortgage of the same estate to the benefit of redemption of the mortgage in satisfaction of what he has paid on the bond." (9) The right of the surety to redeem is a part of his general rights as a surety defined in sections 140 and 141 of the Contract Act, under which he is entitled to the benefit of every security which the creditor has

Cl. (c).

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(1) *Girish Chunder* v. *Juramani*, 5 C. W. N., 83.

(2) *Ganpat* v. *Bhangi*, 15 C.P.L.R., 175.

(3) *Tulshi Ram* v. *Gurdial Singh*, I. L. R. 33 All., 111 F. B; overruling *Ram Dihal* v. *Maharaja of Vizianagram*, I.L.R., 30 All., 488. The same view has been held to prevail in Oudh where a zemindar is held entitled to redeem a possessory mortgage of his grove by a tenant upon the latter's abandoning the village entailing the forfeiture of his tenancy under the village *wajib-ul-arz*. *Debi Sahai* v. *Sumer Singh*, (1909) 12 C. 197; 3 I. C. 519; overruling *Ram Sahai* v. *Bansgopal*, 1 O. C. 42; followed in *Iqbal Husain* v. *Sheo Charan*, 12 O. C. 201; 3 I. C. 521. But in such case redemption of the mortgage is a concession to which the mortgagee is legally not entitled.

(4) *Swamirao* v. *Padapa*, I.L.R., 18 Bom., 22 (33); reversed O. A., in *Padapa* v. *Swamirao*, I.L.R., 24 Bom., 556 P. C.; but on a point which does not affect the principle which was affirmed (*ib.*, p. 561).

(5) *Fletcher* v. *Bird*, Rep., in Fisher, p. 972.

(6) *Ratan Lal* v. *Umed Kuar*, 11 C. P. L. R., 95.

(7) *Drake* v. *Mitchell*, 3 East., 251 (258, 259).

(8) *Crisp*, *Exp.*, 1 Atk., 608; *Wright* v. *Morley*, 11 Ves., 12; *Mayhew* v. *Crickett*, 2 S. W., 185; *Copis* v. *Middleton*, T. & R., 224. *Green* v. *Wynn*, L. R., 4 Ch., 204.

(9) Fisher, § 1427; Indian Contract Act (IX of 1872), ss. 140, 141.

against the principal debtor at the time when the contract of suretyship is entered into, whether he knows of the existence of such security or not. The surety is, however, entitled to redeem only during the continuance of his security. If he is discharged or a release takes place under the law, he is no longer entitled to redeem the mortgage in respect of which he is discharged or released. (1)

1904. A surety for the payment of interest alone under a mortgage may redeem. (2) The right of a surety who redeems the mortgage, to stand in the shoes of the mortgagee whom he has redeemed, is one which has been affirmed on the general principle both in England and in this country. (3) The right of the surety to be subrogated to all the rights of the mortgagee is so far recognized as to entitle him to the benefit of the securities which were unknown to him, and although they may have been taken by the mortgagee after his own security. (4) The right of the surety originates in law, and therefore the moment the surety pays off the debt, rights similar to those possessed by the mortgagee are at once created in him, which he may enforce against the mortgagor, and for that purpose he is entitled to the benefit of all the securities held by the mortgagee, (5) including even those which were subsequently taken. (6) But, of course, the right of the creditor to hold the securities until his whole debt is paid is paramount to the surety's claim. (7) As between co-sureties all the securities which they may have received must be brought into the hotchpotch; so when one co-surety obtains from the principal debtor a counter-security against his liability, he must give his co-sureties the benefit of that security *pari passu*. (8) But the principal creditor is not entitled to the benefit of all collateral securities given by the principal debtor to the surety. (9) On the other hand, the surety is only entitled to the securities given to him by the debtor, and as against the creditor not those given by the co-sureties. (10)

Surety's rights.

1905. Guardian.—The minor being himself incapable of maintaining a suit for redemption is allowed to redeem through his guardian. This is in accordance with the general law and the Code of Civil Procedure. (11) Formerly the guardian must have been certificated, but these Acts (12) have now been repealed. (13)

Cl. (d).

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(1) *Commercial Bank* v. *Jones*, [1893] A. C. 313; *Bolton* v. *Salmon*, [1891] 2 Ch., 48.

(2) *Green* v. *Wynn*, L. R., 4 Ch., 204; *Forbes* v. *Jackson*, 19 Ch. D., 615.

(3) *Craythorne* v. *Swinburne*, 14 Ves., 160 (162); In re *Wrexham, &c.*, [1899] 1 Ch., 440; *Nicholas* v. *Ridley*, [1904] 1, Ch. 192; Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97, s. 5); *Heeralall* v. *Ozeer Ali*, 21 W.R., 347.

(4) *Cf.* s. 140, Indian Contract Act (IX of 1872); *Pearl* v. *Deacon*, 1 DeG. & J., 461; *Lake* v. *Brutton*, 8 v. DeG. M. & G., 440; *Duncan Fox & Co.* v. *N. W. Bank*, 6 App., Cas.; *Forbes* v. *Jackson*, 19 Ch. D., 615.

(5) S. 141, Indian Contract Act (IX of 1872).

(6) *Forbes* v. *Jackson*, 19 Ch. D., 615 (621); *Newton* v. *Chorlton*, 10 Hare, 646; *Mayhew* v. *Crickett*, 2 Swan., 185; *contra* in *Williams* v. *Owen*, 13 Sim. 597; *Farebrother* v. *Wodehouse*, 23 Beav., 18 is no longer sound law; *per* Hall, V. C., in *Forbes* v. *Jackson*, 19 Ch. D., 615 (621, 622).

(7) *Goverdhandas* v. *The Bank of Bengal*, I.L.R. 15 Bom., 48.

(8) *Steel* v. *Dixon*, 17 Ch. D., 825; *Berridge* v. *Berridge*, 44 Ch. D., 168.

(9) *Per* Sterling, J., In re *Walker*, [1892] 1 Ch., 621.

(10) *Cf. Per* James, L. G., in *Duncan Fox Co.* v. *North & South Wales Bank*, 11 Ch. D., 88 (94, 95); O.A., 6 App. Cas., 1, reversed on other ground (see *Per* Lord Selborne, L. C., pp. 13, 14).

(11) S. 440.

(12) Act XL of 1858 (s. 3f or Bengal); Act II of 1864 (for Bombay).

(13) By Act VIII of 1890.

1906. Under the Guardians and Wards Act [1] a guardian may now be appointed or declared by the District Court having jurisdiction in the place where the minor ordinarily resides, or by a District Court having jurisdiction in a place where he has property.[2] The persons qualified to be guardians are those recognized by the personal law to which the minor is subject.[3] These are usually his nearest blood relatives. The minority of a person is now subject to the Indian Majority Act,[4] according to which except in the case of a minor whose guardian has been appointed before he has attained the age of eighteen years, "every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."[5]

Appointment of Guardian.

1907. Where the mortgagor is a minor and his guardian sues to redeem for him, his name must be brought upon record. If then he is ignored and there is nothing on the face of the proceedings to show that his guardian was acting for him, he cannot afterwards be bound by the proceedings. [6] Thus in a case it was held that a widow did not represent the estate so as to bind the son when the existence of the minor son was, from whatever cause, altogether ignored, and there was nothing on the face of the proceedings to show that she was sued as representing the minor son. Accordingly where the plaintiff, a minor, sought to redeem a certain property from the defendant who had purchased the equity of redemption at an auction-sale in execution of a decree obtained against the plaintiff's mother alone as representative of her deceased husband, he was held entitled to redeem.[7] But this case has been recently distinguished by Jenkins, C.J., who has upon an elaborate review of the existing authorities laid down that the mere fact of a minor son being not represented in the former suit, is not by itself a sufficient reason for allowing a second suit for redemption, unless it can be shown that the son is not bound by the previous decree passed against his natural guardian, either on the ground that the foundation of the decree was of such a nature that no liability arising from it could attach to the family-property, or, failing which, that the entirety of the family-property was in fact not sold. [8]

Procedure.

1908. Curator of a Lunatic.—A lunatic or an idiot like a minor labours under the same incapacity to contract or look after his own interests, and he is therefore likewise entitled to redeem through the committee or other legal curator appointed to take care of his property during his lunacy or idiocy as the case may be. The law here enacted as regards minors and lunatics closely resembles the English rule.[9]

Cl. (e).

The administrators or *interim* curators of the felon mortgagor are empowered to redeem. [10]

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(1) Act VIII of 1890.
(2) S. 9 (2), Act VIII of 1890.
(3) *Ib*, ss. 3, 6.
(4) Act IX of 1875.
(5) S. 3, Act IX of 1875. As to certain exceptions, see *Birj Mohun Lall* v. *Rudra*, I. L. R., 17 Cal., 944 ; *Yeknath* v. *Warubai*, I. L. R., 13 Bom., 285 ; *Sarat Chandra* v. *Forman*, I. L. R., 123 A. 213.
(6) *Ishan Chunder* v. *Buks Ali.*, Marsh., 614 ; *General Manager, Raj Darbhanga* v. *Maharaja Coomar Ramaput Singh*, 14 M. I. A., 605 ; *Sotish Chunder* v. *Nil Comul*, I. L. R., 11 Cal., 45 ; *Jatha Naik* v. *Venkatapa*, I. L. R., 5 Bom., 14.
(7) *Akoba* v. *Sakharam*, I. L. R., 9 Bom., 429.
(8) *Deoji* v. *Sambhu*, I. L. R., 24 Bom., 135 (147, 148).
(9) *Grimstone, Exp.*, Amb., 706 ; Robb., Mort., 697 ; Fisher, §§ 1440, 1441.
(10) 33 and 34 Vict., c. 23.

1909. Trustees or trust to sell and pay off debts which have been satisfied have no redeemable interest in the property.(1) But in the case of mortgage by an executor or administrator, it has been held that the equity of redemption passed to his representative though he be not the heir of the deceased, and not his administrator *de bonis non*.(2) The official assignee of the insolvent mortgagor has also the same right.(3) So of course a trustee in bankruptcy, or a trustee of a deed of assignment for the benefit of creditors may exercise the same right, (4) and should whenever it is to the benefit of the creditors.(5) And if they refuse to redeem, and it appears that their refusal is due to collusion,(6) then even the creditors may be permitted to redeem.(7)

Trustee.

The right of one or more of trustees of a public or charitable endowment to redeem depends upon his individual rights and powers. If the trustees possess powers only collectively, then some of them cannot act independently. Their right to redeem depends upon their right of representation. One trustee may redeem if he represents all. But otherwise those suing to redeem must join the recalcitrant trustees as party defendants. If the majority of them are in favour of redemption, the minority cannot be ignored unless their dissent can be validly overruled. (8) One trustee may sue for redemption without consulting the other trustees or making them co-plaintiffs, and the Court may decree redemption to all the trustees for the benefit of the *cestui que trust* (9).

1910. A remainderman or reversioner may redeem.(10) An equitable tenant-for-life, (11) a tenant-for-life of property settled to uses, (12) and a tenant-in-tail (13) are all entitled to redeem. The tenant-for life of a settled equity of redemption has the first right to redeem the mortgage, and during his life the remainderman is not entitled to redeem without his consent.(14)

Reversioner's limited interest.

1911. Attaching Creditor.—A judgment-creditor when he has *attached* the mortgagor's interest may also redeem.(15) Such a person, it has been held, does not by his attachment acquire any interest in or charge on the property (§§846—849). But in this respect the English rule has always been divergent. For there a judgment-creditor was always permitted to redeem even before taking out execution,(16) except as regards, mortgaged leaseholds which he could redeem only after his execution had first issued.(17) In English law a judgment was formerly sufficient to create a lien upon the debtor's property,(18) and this view has survived the statutory zeal to

Cl. (f).

(1) *James* v. *Bion*, 3 Swanst., 237.

(2) "The goods of deceased persons not administered"; *Butler* v. *Bernard*, Freem. Ch., 139; *Skeffington* v. *Whitehurst*, 9 Cl. & F., 219.

(3) Eng. Bankruptcy Act, 1883, ss. 57, 19 (13).

(4) *Franklyn* v. *Fern Barn*, Ch., R., 30; *Troughton* v. *Binkes*, 6 Ves. 573.

(5) *Benfield* v. *Solomons*, 9 Ves., 77; *Saxton* v. *Davis*, 18 Ves., 72.

(6) *Doran* v. *Simpson*, 4 Ves., 651; *Alsager* v. *Rowley*, 6 Ves., 748.

(7) *Troughton* v. *Binkes*, 6 Ves., 574 (776).

(8) *Thatlan* v. *Mangalath*, I. L. R., 34 Mad., 406; *Istoop* v. *Ayappen*, 16 I.C., 435.

(9) *Ib.* p. 416; See O. 34, r. 1 Comm., *post*.

(10) *Aynsley* v. *Reed*, Dick., 249.

(11) *Haymer* v. *Haymer*, 2 Vent., 343.

(12) *Lewis* v. *Nangle*, Amb., 150.

(13) *Playford* v. *Playford*, 4 Hare., 546.

(14) *Ravald* v. *Russell*, 1 Younge. 9 (21); *Prout* v. *Cock* [1896], 2 Ch., 808.

(15) *Venkata* v. *Venkataramayya*, I.L.R., 37 Mad., 418.

(16) *Sharpe* v *Earl of Scarborough*, 4 Ves., 538; *Turnstall* v. *Trappes*, 3 Sim 296 (300).

(17) *Shirley* v. *Watts*, 3 Atk., 200; *Angell* v. *Draper*, 1 Vern., 399.

(18) *Brace* v. *Marlborough*, 2 P. Wms., 492; *Stonehewer* v. *Thompson*, 2 Atk., 440 (441); 26 E.R., 765 (666).

annul it.(1) This clause overrules(2) that an attaching creditor had not, as such, any right to redeem a mortgage subsisting prior to his attachment. A similar view was also taken at one time in an English case,(3) but it was afterwards disapproved.(4) In this case, it was held that a judgment-creditor who has not issued execution has no interest in the land and cannot redeem.(5) But in India the taking out of mere execution does not give the creditor a redeemable interest, which only commences with the attachment of the property. The equity of redemption in mortgaged property is under section 266 of the Civil Procedure Code attachable.(6) The mode of attachment is prescribed by section 274 of the Code, that is, it shall be made "by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise. The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court house. When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the district in which the land is situate."(7) An attaching creditor may redeem, but he cannot buy back the property under section 310-A of the Code, since he is not "the person whose immovable property is sold" within the meaning of that section.(8) The term "judgment-creditor," is a term of English law and is used here to signify a creditor who has obtained a judgment against his debtor, who is then designated a judgment-debtor. Having regard to the significance of the term, it would appear that a creditor who has obtained a conditional attachment before judgment is not competent to redeem. Such a creditor, however, becomes eligible to redeem as soon as he files his execution, for as no fresh attachment is necessary in his case, (9) the moment he executes his decree, he satisfies the condition upon which his right to redeem is contingent. As between several attaching creditors, the right to redeem will be determined by the rule of priority.

1912. Creditor in Administration Suit.—A creditor in a suit for the administration of the estate (10) of the deceased to insolvent mortgagor is also entitled to redeem after obtaining a decree for sale of the mortgaged property. The last condition must be fulfilled, inasmuch as its effect is to give the creditor an interest to maintain the subsequent suit for redemption. It is said that in such a case he is allowed to redeem so that he may get the benefit of the decree. (11) But if the mortgagor's estate is confiscated and granted to another, but it has to be restored on reversal of the order, the right of redemption also reverts to him. (12) But if there is no restoration, the right to redeem will vest in the grantee.(13)

Cl. (g).

(1) 27 & 28 Vict., c., 112, s. 1, provides that a creditor can obtain charge only by issuing legal or equitable execution. But while such creditors may no doubt redeem (*Champneys* v. *Burland*, 19 W. R. (Eng.) 148; *Fawcet* v. *Fathergill*, Dick., 19, the taking out of an execution is by no means a condition precedent to the exercise of that right; (see *per* Sir Charles Hall, V.C., in *Beckett* v *Buckley*, L. R., 17 Eq., 435 (437); who observed "The proper course for a judgment-creditor to pursue where the legal title is outstanding is to come to the Court by a bill and ask to be allowed to remove the obstacle which prevents him from enforcing his inchoate right" (*Cf* also *Hatton* v. *Haywood*, L.R., 9 Ch., 229.)

(2) *Soobul Chunder* v. *Nity Churn*, I.L.R., 6 Cal., 663.

(3) *Mildred* v. *Austin*, L.R., 8 Eq., 220.

(4) *Earl of Cork* v. *Russell*, L.R., 13 Eq., 210.

(5) *Per* Malins, V.C., *ib*, 216.

(6) *Gossain Munraj* v. *Deen Dyal*, 20 W. R., 20; *Sarasvati Nabawip*, 5 B.L.R., 380.

(7) S. 274, Civil Procedure Code.

(8) *Kedar Nath* v. *Uma Charan*, 6 C.W.N., 57.

(9) S. 490, Civil Procedure Code.

(10) See s. 213, Civil Procedure Code.

(11) *Christian* v. *Field*, 2 Hare. 177.

(12) *Peyton* v. *Aylifje*, 2 Vern., 312.

(13) *Attorney-General* v. *Crofts*, 5 Bro., P.C., 136; *Lovel's case*, 1 Shalk., 85.

1913. Crown.—The right of redemption may also be vested in the Crown upon forfeiture of the mortgagor's interest on his conviction or attainder (1) or escheat on the mortgagor's death without an heir, in which case, the Crown or Lord may redeem a term created by the mortgagor in right of the escheated reversion. (2) At any rate, such is the law in England. (3) But though a *Mokurraree istimrari* tenure which is absolute and alienable estate may be escheated, (4) there can be no escheat to the Crown of a fixed rate tenant who has merely a right of occupancy and is liable to ejectment for non-payment of rent or breach of conditions.(5) Such tenure ceasing by death, abandonment or forfeiture, the remainder is clearly entitled to possession and it follows to redemption of any outstanding mortgage, though the tenure ceasing the mortgage will also ordinarily cease to exist.

1914. Others entitled to redeem.—As remarked before, this section is ill-drafted. Even its enumeration of persons entitled to redeem is neither logical nor exhaustive. For besides those enumerated there are unquestionably others equally entitled to redeem: such for example, is the assignee of an insolvent or a trustee under a deed of arrangement for the benefit of creditors, (6) the Court of Wards and the Crown (§1912).

Decree in redemption suit.

[**92.** In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of this suit, if any, awarded to him, on the day next hereinafter referred to or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such persons as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and

that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as order XXXIV, rules 1 - 6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

(1) *Attorney-General* v. *Crofts*, 4 Pro., P C., 136; *Hancock* v. *Attorney-General*, 33 L.J.Ch., 161; *Sutton* v. *Smith*, 10 Jur. (N. S.), 557*n*.

(2) *Rogers* v. *Maule*, 1 Y and C.C.C. 4; *Cattley* v. *Sampson*, 33 Beav., 551; *Attorney-General* v. *Crofts*, 4 Bro. P.C. 136; *Downe* v. *Morris*, 3 H.A., 394; *Beale* v. *Symonds*, 16 Beav., 506.

(3) *Viscount Downe* v. *Morris*, 3 Hare 394; *Attorney-General* v. *Crofts*, 4 Pro., P. C., 136.

(4) *Soonet Koer* v. *Mirza Hunmar*, I.L.R., 1 Cal., 89 P.C.

(5) *Tulshi Ram* v. *Gurdial*, I.L.R. 33 All., 111 F.B.

(6) *Fray* v. *Drew*, 11 Jur. (N. S.) 130, S.20, Provincial Insolvency Act (III of 1907).

93. [If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

In case of redemption, possession.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary, apply to the Court, for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

In default, foreclosure, or sale.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale, be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished :

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section ninety-two for payment to the defendant.]

Power to enlarge time.

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as Order XXXIV. rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

94. [In finally adjusting the amount to be paid to a mortgagee in case of a redemption or sale, by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs to suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.]

Costs of mortgagee subsequent to decree.

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

95. When one of several co-mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Charge of one of several co-mortgagors who redeem.

1915. Analogous Law.—This section evidently taken from Macpherson on Mortgage, is closely analogous to section 69 of the Indian Contract Act [1] and reproduces the English equitable rule by which on the principle of subrogation one co-mortgagor redeeming the entire estate can retain it until he is in his turn re-deemed by the other co-mortgagors. The contribution is to be made as directed by section 82.

1916. Principle.—Ordinarily, a mortgage is indivisible and the mortgagee may therefore compel the co-mortgagor to redeem the entire mortgage or not at all. [2] If he does so, in redeeming his own share he has also to redeem the share of his co-mortgagors, and therefore in equity he is entitled to ask them for their quota of the redemption-money, and until payment to retain possession of the property which he has redeemed against payment by the other co-mortgagors. The latter cannot complain as they are in no worse position than if they had to redeem directly from the mortgagee. And the co-mortgagor must be recompensed for money expended by him, and from which they have or might be benefited. They cannot plead that the co-mortgagor might have let their shares alone, for the indivisibility of the mortgage, and his liability to redeem the *entire* estate, or not at all, is the foundation of the equity he has against them. [3] The right to indemnity or contribution in these cases exists, although there may be no privity between the plaintiff and the defendant. [4]

1917. Meaning of Words.—"*One of several mortgagors*:" [5] Is the term "mortgagor" here used in the limited sense assigned to it in section 58? It seems not. "*Obtains possession*:" This does not mean that charge cannot be created without possession. In the words of the Privy Council, the section should be construed distributively, that is the condition of obtaining possession should be held to apply only to the cases in which its fulfilment is from the nature of the mortgage possible. In other cases the charge should follow on redemption. [6] "*He has a charge*:" A charge is defined in section 100, and means the same thing as "Lien" in England. A charge or a lien is an obligation which by implication of law, and not by express contract, binds the estate for the discharge of the debt or engagement, but does not pass any property in the subject of the charge. [7] "*Expenses properly incurred*:" Originally the word here used was "costs" and not "expenses," [8] but the latter word was subsequently substituted probably, so as to enlarge the scope of the section including in the term the proportion of the mortgage-debt as well as the costs properly so called.

1918. Co-mortgagor's Claim for Contribution.—The questions that arise in a case for contribution are: (i) What is the nature of the right; (ii) who is entitled to it; (iii) against whom is it available; (iv) for what payments; (v) when does it commence; (vi) how it may be enforced; and, lastly, (vii) its duration. These questions may now be considered in the order in which they are stated.

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(1) Ed., 1877; p. 145; *Perianna* v. *Madurainayagam*, 9 M. L. J. R., 166 (170).

(2) Act IX of 1872.

(3) S. 60, last para; *Asanah* v. *Vamana*, I. L. R., 2 Mad., 223; *Nainappa* v. *Chidambaram*, I. L. R., 21 Mad., 18.

(4) *Asanah* v *Vamana*, I. L. R., 2 Mad., 223 (225); *Cholmondely* v. *Clinton*, 2 Jac. & W., 184.

(5) *Johnson* v. *Royal Mail Steam Packet Co.*, L. R., 3 C. P., 38; *Lampleigh* v. *Brathwait*, 1 Sm. L. C., 151; *Edmunds* v. *Wallingford*, 14 Q. B. D., 811 (1815). ["If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principle of justice, and does not spring from contract, though contract may qualify it." *Per* Eyre, C. B., in *Dering* v. *Earl of Winchelsa*, 1 Cox. 321.]

(6) *Ahmad Wali Khan* v. *Shamshul Jahan*, I. L. R., 28 All., 482 (487), P. C.

(7) In re *Leith's Estate*, L. R., 1 P. C. 296.

(8) Law Commissioners' Report, 1879 (15th Nov. 1879), § 34.

1919. Nature of Right acquired by Co-mortgagor.—"A person" says the Indian Contract Act "who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."[1] This generally states the principle which the section under discussion extends to the case of co-mortgagors. But while no doubt section 69 of the Indian Contract Act includes the principle embodied in the section, the latter gives the plaintiff a charge upon the property which the Contract Act does not give. The co-mortgagor enforcing his remedy under this section is said to acquire a right to treat the other co-mortgagors as *his* mortgagors,[2] only however, for the limited purpose specified in the section. He cannot, for instance, compel the other co-mortgagors to redeem the entire property, but can only insist upon each co-mortgagor to redeem on payment of his quota, only his share of the mortgaged estate; with this reservation, his position is certainly the same as of the mortgagee whom he has redeemed.[3] The co-mortgagor redeeming the estate must, however, have some subsisting interest in the property. Hence if he redeem the property without any interest, however small therein, he cannot enforce his claim for contribution.[4] But any interest, however small, is sufficient to create the right. So where with the consent of the real owner a *benamidar* executes a mortgage for a consideration binding upon the former, a payment made by the *benamidar* of the mortgage amount is not an officious and voluntary payment, and he is entitled to a charge upon the property.[5] Similarly where a judgment is passed against several defendants, jointly and severally, and some of them pay the whole of the judgment-debt, these latter become entitled to contribution from the rest.[6]

(1) Nature of the right.

But such persons are not within the scope of the section, which deals only with the case of a co-mortgagor, who is similarly declared entitled to a charge on the share of his co-mortgagors, a frail security to be sure, if a charge be held unenforceable against a *bona fide* transferee without notice.[7] The principle of subrogation entitles the co-mortgagor to the same security as was possessed by the mortgagee whom he has redeemed, and it may be a question whether the term "charge" was not inadvertently inserted at a time when that concept was little distinguished from a "mortgage."

1920. And this leads to the second question, who is entitled to the right. The section speaks only of "one of several mortgagors." But if the term 'mortgagor' be here understood in the narrow sense in which it is defined in section 58 (§ 1205), the section would exclude cases of all other incumbrances. But this

(2) Who is entitled.

(1) S. 69, Indian Contract Act (IX of 1872).

(2) *Asanah* v. *Vamana*, I.L.R., 2 Mad., 223 (225).

(3) *Moidin* v. *Oothumangonni*, I.L.R., 11 Mad., 416; *Nainappa* v. *Chidambaram*, I.L.R., 21 Mad., 18 (26); *Pancham* v. *Ali Ahmed*, I.L.R., 4 All., 58; *Fakir Buksh* v. *Sadat Ali*, I.L.R., 7 All., 376; *Nura Bibi* v. *Jagatnarain*, I.L.R., 8 All., 295; *Chedi Lal* v. *Bhagwan*, I.L.R., 11 All., 234; *Ashrat Ahmad* v. *Wazir Ali*, (1891), A.W.N., 211; *Roni* v. *Amir Baksh*, (1900) A.W.N., 39; *Raghubar* v. *Bunyad Ali*, (1886) A.W.N., 152; *Bhagwan Das* v. *Hardei*, I.L.R., 26 All., 227; *Danappa* v. *Yamunappa*, I.L.R., 26 Bom., 379. But in Calcutta the right is said to be merely personal—*Nawab Jahan* v. *Mirza Shujouddin*, 9 C.W.N., 865. See § 1259.

(4) *Chedi Lal* v. *Bhagwan Das*, I.L.R., 11 All., 234.

(5) *Subbamal* v. *Muthu Pathan*, 13 M.L.J. R., 228; following *Bhagwati* v. *Radha Kishen*, I.L.R., 15 All. 304.

(6) *Danappa* v. *Yamunappa*, I.L.R., 26 Bom., 379 (384); following *Suppanachari* v. *Chakara*, 1. M. H. C. R., 411; *Chagandas* v. *Gansingh*, I.L.R., 20 Bom., 615; *Ramchandra* v. *Sadashiv*, I.L.R., 11 Bom., 422; *Ibn Husain* v. *Ramdai*, I.L.R., 12 All., 110; *Baldeo* v. *Baijnath*, I.L.R., 13 All., 371; *Sesha Ayyar* v. *Krishna*, I.L.R., 24 Mad., 96 (108); distinguished.

(7) S. 100 Comm. *post*.

at any rate is certain that the term cannot be held to exclude owners of equity of redemption, who stand for all other purposes in the same position as mortgagors (§ 1205). Such persons and those claiming under them are admitted to the same right in England.(1) But it has been doubted in Calcutta whether the several representatives of a deceased mortgagor could be regarded as co-mortgagors within the meaning of this section, so as to confer upon the representatives who pay off the mortgage a charge against the rest.(2) But this view was sought to be distinguished by another bench of the same Court(3) and it is otherwise unsupported by reason. Not only the co-mortgagor and his representatives, but a puisne mortgagee paying off a prior mortgagee may claim to be placed in the position of a prior mortgagee if his intention was not to extinguish the prior lien.(4) But the same principle cannot be extended to persons who do not fill the character of a co-mortgagor used in that large sense. For example, the assignee of a *mokurari* interest granted by the mortgagor himself cannot claim the same lien but is merely entitled to a personal decree.(5) On the other hand, in another case the same Court applied the doctrine of subrogation to a stranger paying off the debt, by holding that even a stranger paying off a mortgage-debt is *prima facie* entitled to the benefit of the security he has discharged.(6) But it is scarcely correct to say that any officious intermeddler may step into the shoes of the mortgagee by paying off his mortgage.

1921. This section is like many other sections of the Act ill-drafted. Strictly construed, it implies that the right of contribution is not dependent upon mere redemption in addition to which the mortgagor must have obtained possession of the property, which would confine its operation only to possessory mortgages. As the Privy Council observed: "That section might be so strictly construed as to limit its operation to mortgages under which possession passes, and therefore on redemption property repasses. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases, to make the charge follow upon redemption."(7) But even this is clearly a concession to the wisdom of the Legislature, since it places the redeemer of a possessory mortgage in a position of comparative disadvantage, and he may at times be even defeated if he is unable to obtain possession and which may occur in many conceivable circumstances.

However, as the section stands, it must be read as meaning that a co-mortgagor becomes entitled to contribution as soon as he redeems; but that "if from the nature of the mortgage" he should on redemption become entitled to possession, then his right would date from when he obtains possession. There still remains the question whether in the latter case he must obtain possession of the entire property, for the section is so worded. But probably a certain degree of latitude is permissible in its construction also.

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(1) *Aldrich* v. *Cooper*, 8 Ves., 390; *Clarke* v. *Brereton*, 1 Jo., 165; *Johnson* v *Child*, 4 Hare, 87; *Norender* v. *Dwarka Lal*, I.L.R., 3 Cal., 403; *Vithal* v. *Vishvasrav*, I.L.R., 8 Bom., 497; *Mohan* v *Kashinath*, 3 Nag. L. R., 92.

(2) *Nawab Jahan* v. *Mirza Shujauddin*, 9 C.W.N., 865, dissenting from *Bhagwan Dass* v. *Hardei*, I.L.R., 26 All., 227; *Danappa* v. *Yamunappa*, I.L.R., 26 Bom., 379.

(3) *Raushan Ali* v. *Kali Mohan*, 4 C.L.J., 79 (84, 85).

(4) *Gokuldas* v. *Puranmal*, I. L. R., 10 Cal., 1035, P. C.; *Raushan Ali* v. *Kali Mohan*, 4 C.L.J., 79 (84).

(5) *Raushan Ali* v. *Kali Mohan*, 4 C.L.J., 79 (85).

(6) *Jagatdhar* v. *Brown*, 4 C. L. J., 121 (135).

(7) *Ahmad Malikhan* v. *Shamthul Jahan*, I.L.R. 28 All. 482 (487) P.C.

1922. As regards the persons against whom the right avails, it is sufficient here to state that *prima facie* all persons liable to contribute should be subject to the right, though this again is by no means apparent from the Act. But in cases decided independently of the Act, it has been decided that where a prior mortgage had been redeemed by the mortgagee of one of several co-parceners, he was entitled to claim contribution from the mortgagees of another co-parcener before giving up the latter's share.(1) So where one or more of several tenants-in-common redeem the mortgage, they have a right to remain in possession of the mortgaged property until the amount due from the other co-mortgagors as their contribution towards the redemption-money has been paid off, and they have therefore priority over a subsequent mortgagee of property mortgaged by the other co-parceners.(2) Purchasers of the equity of redemption of a co-mortgagor are equally bound to contribute rateably. Thus where the mortgagor mortgages his two properties, and one of them is subsequently sold to a purchaser in execution of a decree against him, without notice of the mortgage, the execution-purchaser of one property and the original mortgagor stand in precisely equal positions towards the mortgagee who could enforce his mortgage against both together, or against either of the two, leaving that one, if forced to pay the whole sum, to recover the proper rateable contribution from the other. On the other hand, either the original mortgagor or the purchaser might redeem the whole, and seek contribution from the other.(3)

(3) Against whom.

A claim to contribution cannot be resisted on the ground that the co-sharers against whom the right is enforced has been improperly left out in the mortgagee's suit,(4) or the mortgagee had given up the land belonging to a co-sharer.(5) Being a right issuing out of a mortgage, in the latter case it might be urged that the mortgagee could not by an arrangement made with an individual co-sharer increase the liability of the others. When contribution creates a charge, it may be enforced against all persons irrespective of notice, except only a *bona fide* purchaser without notice. (6)

1923. Although the word "expense" is inapt as primarily denoting the incidental cost as distinguished from the redemption-money, there can be no doubt that what was intended is to enable the mortgagor to recover the whole of his outlay of course. Where a co-mortgagor is suing the other co-mortgagors for contribution upon the allegation that the portion of the mortgaged property in which he is interested has been made to discharge more than its proper share of liability under the mortgage, the Court in assessing contribution has first to ascertain the values of the various items of property in question as they stood at the date of the mortgage; next the rateable liability of each item for the amount payable under the decree; next how much each item has contributed to the payment of the decretal amount, disregarding any purchase-money which any of the

(4) For what payments.

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(1) *Shankar* v. *Aniaji*, (1886) B. P. J., 165.

(2) *Ganesh* v. *Ragunath*, (1880) B. P. J., 300; *Pandjirav* v. *Naroji*, (1881) B.P.J., 57.

(3) *Norender* v. *Dwarka Lal*, I.L.R., 3 Cal., 408; *Vithal* v. *Vishvasrav*, I.L.R., 8 Bom., 427 (500). But such a charge cannot be enforced against a *bona fide* purchaser without notice—*Haymes* v. *Cooper*, 33 Beav., 431; *Devkabai* v. *Jefferson*, I.L.R., 10 Bom., 248; In re *Tyabji*, 7 Bom. L. R., 547; *Khetter Kristo* v. *Kally Prosunno*, I.L.R., 25 Cal., 887.

(4) *Jagat Narain* v. *Qutub Husain*, I.L. R., 2 All., 807.

(5) *Chagandas* v. *Gansing*, I.L.R., 20 Bom., 615.

(6) See s. 100 *post*; *Haymes* v. *Cooper*, 33 Beav., 431; *Devkabai* v. *Jafferson*, I.L.R., 10 Bom., 248; In re *Tyabji*, 7 Bom. L.R., 547; *Khetter Kristo* v. *Kally Prosunno*, I.L.R., 25 Cal., 887.

purchasers has paid or retained, and it should then proceed to apportion the liability between the different items.(1) Since the consolidation of mortgages has been abolished, where two successive mortgages in respect of the same property were created, the first by all the co-mortgagors jointly, and the second by only some of them, a co-mortgagor who redeemed the first mortgage becomes entitled to a contribution from his fellow-mortgagors, and his claim cannot be resisted on the ground that the further charge remains unsatisfied. He is entitled to hold the property till his contribution is paid and thereafter the mortgagee will be entitled to enforce his further charge.(2)

1924. In recovering the proportionate share of the redemption-money from the contributories, the plaintiff is entitled to charge also a reasonable interest from the date of redemption.(3) The right which the co-mortgagor thus acquires is transferable (4) but not so as to prejudice the right of the contributories who may enforce it against the subsequent transferees.(5) The contributories are not bound to pay to the mortgagor anything paid by him in excess on account of the mortgage. The expense must have been in the language of the section "properly incurred." Hence where it appears that the claimant with a view to swell his claim against the co-mortgagors has paid what was not due, or could not be legally recovered, the latter are not bound to contribute rateably to this sum, but can redeem on payment of their fair proportion.(6) But where the claimant has paid the amount *bona fide*, the mere fact that it has been erroneously recovered from him is no ground for disallowing it,(7) but if he was exonerated in a suit by the mortgagee, redemption of the property by him would not *per se* create an "interest" therein so as to entitle him to sue for contribution.(8) And so also where the claimant has suffered a decree without availing himself of the Statute of Limitation, in which case the contributories may well plead that, if the plea had been set up, the claim would have been dismissed.(9)

1925. As regards the time when the charge fastens on the co-sharer's property the language of the section is again defective. At first sight it would seem that the right does not commence till the mortgagor has not only paid off the mortgage-money, but has also entered into possession. But such a construction would render the section nugatory except in a usufructuary mortgage, to which alone there is no sense in confining it. This section then presents a fit case, in the construction of which some degree of latitude is permissible. For there can be no doubt that the phrase "and obtains possession," has not been used to mean that the co-mortgagor in possession is alone entitled to have a charge on the property.(10) Several attempts have therefore been made at its decipherment. In the opinion of the Madras Court: "The true construction of section 95 is that the co-mortgagor redeeming the whole of the mortgaged property, has as well a right of obtaining possession as of treating the co-mortgagor's share

(5) When does it commence.

(1) *Bhagwan Singh* v. *Mashar Ali*, I.L.R., 36 All., 272.

(2) *Pandjirav* v. *Naroji*, (1881) B.P J. 57; *Ganesh* v. *Raghunath*, (1880) B.P J. 300.

(3) *Rani* v. *Amir Baksh*, (1900) A W.N., 39. But in *Digambar* v. *Harendra*, 11 C.L.J., 226 (232), the granting of interest was held to be merely discretionary with the Court.

(4) *Vithal* v. *Vishvasrav*, I.L.R., 8 Bom., 497.

(5) *Ib.*, p. 500.

(6) *Vickers* v. *Oliver*, 1 Y & C. (Ch.), 211.

(7) *Nobin Krishna* v. *Mon Mohan*, I L.R., 7 Cal., 573; *Dahina* v. *Saroda*, I.L.R., 21 Cal., 142, P.C.; *Bindu Bashini* v. *Harendra Lal*, I.L R., 25 Cal., 305.

(8) *Chedi Lal* v. *Bhagwan Das*, I.L.R., 11 All., 234.

(9) *Fordham* v. *Wallis*, 10 Ha., 217.

(10) *Moidin* v. *Oothumanganni*, I. L. R., 11 Mad., 416; *Gulam* v. *Mt. Banno*, (1901) 4 O.C. 173; *Bhagwan Dass* v. *Hardie*, I.L.R., 26 All., 227.

of the mortgage-debt as a charge on the latter's interest in the property redeemed." (1) But this interpretation was not accepted in Allahabad where the phrase was held to be elliptical, the phrase " and obtains possession " being held as meaning " obtains possession when the mortgagee had possession under his mortgage."(2) But this view implies discrimination unsupported by reason between a possessory and a non-possessory mortgage. For why should the mortgagor's charge be postponed until he obtains possession only in case when the mortgagee was in possession. Indeed, it would be a relief of doubtful virtue, if the mortgagor had to obtain possession before he could establish a charge on his co-sharers' property. On the other hand, there could be no valid objection to his taking possession in enforcement of his right, in cases in which the nature of the mortgage renders it feasible. This view is now supported by the *dictum* of the Privy Council who remarked: "The section might be so strictly construed as to limit its operation to mortgages under which possession passes, and therefore, on redemption property repasses. But it seems to their Lordships more reasonable to construe that section distributively to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption."(3) This case sets at rest the controversy on the subject, but one is inclined still to question the policy of the rule which makes the taking of possession even in some cases obligatory before creating a charge. Indeed, in such cases the right to assume possession should have even by reason of the charge and not as a necessary preliminary to it. Though neither section 72 nor section 76 is strictly speaking applicable to a person so taking possession(4) still his liability to account arises from the very fiduciary nature of his position.(5) Moreover, it is not, as of course, that he can claim possession by disturbing that of his co-mortgagors,(6) though in a possessory mortgage, he may well claim to take possession which the mortgagee was obliged to deliver upon redemption.

(6) Procedure.

1926. The procedure for enforcing a charge will be set out under section 100.

(7) Limitation.

1927. The co-mortgagor's possession of the property held by him against payment by the other co-mortgagors cannot be regarded as adverse to them,(7) as a man cannot have a *charge* on his own property, and the person entitled to redeem has, therefore, the right of redeeming the charge subject to the law of limitation, upon which, however, the Courts are not agreed. In view of the Allahabad High Court the charge is redeemable within sixty years, as provided in Article 148 of the Limitation Act, and not only within the twelve years allowed by Article 134. (8) According to the view taken in Oudh the limitation in such cases is that of 12 years as

(1) *Moidin* v. *Oothumanganni*, I.L.R., 11 Mad., 416 (418); *Dhakeshwar* v. *Harihar*, 21 C.L.J 104 (110).

(2) *Bhagwan Das* v *Hardie*, I. L. R., 26 All., 227 (230); *Gulam Maula* v. *Mt. Banno*, (1901) 4 O. C., 273; dissenting from *Moidin* v. *Oothumanganni*, I. L. R., 11 Mad., 416: The first case was followed in *Mohan* v. *Kashinath*, 3 Nag.L.R., 92.

(3) *Ahmad Wali Khan* v. *Shamshul Jahan*, I.L.R., 28 All., 482, P. C; overruling I. L. R., 25 All., 337.

(4) *Vasudev* v. *Balaji*, I. L. R., 26 Bom., 500 (503).

(5) *Deonarain* v. *Naik Pershad*, 2 N. W. P. H. C. R., 217 (220).

(6) *Anand Rao* v. *Tatya*, (1888) B.P.J., 37.

(7) *Nura Bibi* v. *Jagat Narain*, I. L. R., 8 All., 295.

(8) *Nura Bibi* v. *Jagat Narain*, I. L. R, 8 All., 295 (300); *Ashfaq Ahmad* v. *Wazir Ali*, I. L. R., 11 All., 423, F. B.; again reported, I. L. R., 14 All., 1 F. B.; explaining *Umrunnissa* v. *Mhd. Yar Khan*, I. L. R., 3 All., 21, F. B. But a suit to enforce the charge must be brought within 12 years, *Yakub Ali* v. *Kishan Lal*, I. L. R., 28 All., 743.

provided for by Article 144, calculated from the date when the redeeming co-mortgagor sets up his adverse possession. (1) Now Article 148 of the Limitation Act relates to a suit maintained against a mortgagee, while Article 134 is more general and embraces the case of a trustee. As this section only creates a charge and in view of the definition of that term, since a charge-holder is not a mortgagee, (2) it may be plausibly urged, and has been so held in Bombay, that Article 148 is inapplicable, (3) and that Article 144 is more appropriate. (4) But it may be urged against this view that the distinction between the two terms has been for the first time made by this Act, and that no such distinction was observed in 1877 when the Limitation Act was passed. But this objection is not insuperable (§§ 1222—1228).

Sale of property subject to prior mortgage.

96. [If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.]

Sale of property subject to prior mortgage.

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act, and are re-enacted as Order XXXIV, rules 1—6, 7, 8, 10 and 12—14, respectively. They will be found set out and annotated in Part 2 of this Volume.

97. [Such proceeds shall be brought into Court and applied as follows:—first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

Application of proceeds.

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the persons proving himself to be interested in the property sold, or, if there be more such persons than one, then persons according to their respective interest therein or upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.]

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(1) *Makhdum Khan* v. *Mt. Jadi*, 9 O. C., 91.

(2) S. 100, *post*,

(3) *Vasudev* v. *Balaji*, I. L. R., 26 Bom., 500 (503); *Vithal* v. *Dinkar Rao*, 3 Bom. L. R., 685; *Faki Abbas* v. *Faki Nurudin*, I.L.R. 16 Bom., 191; *Ramchandra* v. *Sadasiv*, I. L. R., 11 Bom., 422.

(4) So held in *Makhdum Khan* v. *Mt. Jadi*, 9 O. C., 91.

Anomalous Mortgages.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidence in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in s. 58, clauses (b), (c), (d) and (e).

1928. Analogous Law.—This section deals with mortgages, resulting from the combination of certain pure forms of mortgages defined in section 58. In England anomalous mortgages as a class do not exist, nor are mortgages there classified as in the Act. The Punjab anomalous mortgages often assume quaint and varied forms and are dealt with in Tupper's Punjab Customary Law. (1)

For the history of the section see below (§ 1928).

1929. Principle.—To the list of the four forms of primary mortgages, this section further adds two other forms, *viz.*, usufructuary mortgage, combined with either simple mortgage, or mortgage by conditional sale (§§ 1227—1248). All other combinations are here designated anomalous mortgages and are to be dealt with according to the intention of the contract—as evidenced in the mortgage-deed. But the section, while providing for the rights and liabilities of the parties in the case of an anomalous mortgage, does not do the same in the case of the two combinations it excepts from that class. It appears that it was originally intended to provide for these mortgages by declaring that the parties have the same rights and liabilities as they have in each of the two forms of which they are made up, so far as such rights and liabilities are consistent with the right of the mortgagee to avail himself of any of his remedies. (2) But it appears that subsequently the declaration was cut out, on the motion of Mr. Justice West who thought that the general provisions of the Bill were sufficient to cover the matter. (3)

1930. Meaning of Words.—"*Combination of the first and third:*" *i. e.*, a simple mortgage usufructuary. "*Or the second and third:*" *i. e.*, a mortgage usufructuary by conditional sale, which is the combination of a mortgage by conditional sale with a usufructuary mortgage. "*Evidenced in the mortgage-deed*: " oral evidence being inadmissible." (4) "*Contract does not extend:*" as where a mortgage is described by a term which is well understood to import certain conditions, in which case oral evidence of local usage on the point is admissible. (5)

1931. Simple Mortgage usufructuary.—To the list of the four pure forms of mortgages described in section 58, two other forms mentioned in this section must be added. All other combinations are declared by it to constitute anomalous mortgages. The combination of a simple with a usufructuary mortgage which may be called *simple mortgage usufructuary*, " is that in which, though the property is only collaterally pledged, as in the

(1) Vol. III, p. 217, *et seq.*
(2) Law Commissioners' Report, 1879, dated 15th November, 1879, p. 34.
(3) Macpherson's "Mortgage" 7th Ed. 707.
(4) S 91, Indian Evidence Act (I of 1872).
(5) *Ib.*, s. 925 proviso (5).

case of a pure simple mortgage, the mortgagee is permitted to have the usufruct of it. This may be done either by simply allowing him to receive the rents and profits or by giving him a lease for a limited period. In either case the proceeds are credited to the mortgagor against interest, and, if they exceed what the mortgagee is entitled to for interest, against principal also. As in a pure simple mortgage, the mortgagor is personally liable, (1) and his estate is subject to be sold in default, though redeemable until it is sold." (2) The following may be cited as specimens of this form of mortgage:—"We, *M* and *S*, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for Rs. 300, to *K* and *G* for two years: that we have received the mortgage-money, and nothing is due to us: that we have put the mortgagees in possession of the mortgaged property: that eight-annas has been fixed as the monthly interest in addition to the rent of the house, which we shall pay from our own pockets: that we promise to pay the aforesaid sum to the mortgagees within two years, and redeem the mortgaged property: that if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage-money in any manner they please." (3) So where an instrument mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to credit the balance towards payment of the instalment, also expenses of collection, to credit the balance towards payment of the instalment, also contained the following:—"Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of the instalment by sale of the villages, and of other moveable and immoveable property belonging to me." Construing the document as a whole, and giving effect to all its clauses, the Privy Council held that under its terms, the mortgagee was entitled to take possession upon default in payment of an instalment, and that he might also sell if the mortgagor objected to his applying the rents in reduction of the principal and interest due. (4)

1932. Another instance of a simple mortgage usufructuary is the following;—"Usufructuary mortgage-bond in respect of *inam* land executed on the 27th June 1884...to Vissannavadhanulu by us both jointly Ravi and his undivided son Chenulu. The amount of loan received from you this day.... is Rs. 300, and interest Rs. 30. For the discharge of the said interest my 5 acres of land.... have been made over to you. It is settled that we should pay the principal amount to you in three instalments within this period. In default of payment... it is settled that you should continue to enjoy the same for interest in the aforesaid manner, and if the *principal* money be paid in the 30th Phalgun Bahula of any year, make over to our possession the said land." Here the mortgagor, having covenanted to pay the mortgage-debt the mortgagee was held entitled to sue for sale of the mortgaged property. In another case the mortgage-deed (5) put the mortgagee in possession of the

(1) *Ramayya* v. *Guruva*, I.L.R., 14 Mad., 232.

(2) Macpherson's "Mortgage" (7th Ed.), p. 21.

(3) *Phul Kuar* v. *Murli Dhar*, I. L. R., 2 All., 527 (532).

(4) *Deputy Commissioner of Rae Barelli* v. *Rampal Singh*, I.L.R., 11 Cal., 237, P. C.; *Salamabullah* v. *Partap Singh*, 6 I. C. (All.) 795. For other cases see § 1544—1550.

(5) *Ramayya* v. *Guruva*. I. L.R., 14 Mad, 232.

mortgaged property and authorized him to retain possession until payment of the mortgage-money. the mortgagor being given credit for all profits recovered from the mortgaged property over and above the Government assessment. It also contained a personal covenant for payment of the mortgage money, and an implied agreement that in the event of non-payment. the property should be sold, the balance, if any still remaining due, being recoverable from the person and other property of the mortgagor. In this transaction the first proviso constituted it a usufructuary mortgage,(1) and the second clause a simple mortgage.(2) It was thus a simple mortgage usufructuary.(3) In this case the mortgagee having subsequently sublet the mortgaged property to the mortgagor for a certain term, sued him to regain possession, but the Court held that though the mortgagee could not rejoin possession he was nevertheless entitled to enforce the distinct and independent right to sue for the mortgage-money and to obtain a decree for sale of the mortgaged property.(4) A simple mortgage usufructuary is not an anomalous mortgage as was held in the Bombay case just cited.(5) Where a mortgagor gives possession of the mortgaged property to the mortgagee and states that the mortgagor shall cause the money to be paid within a certain date and redeem or recover back the land by paying the money on a certain date in a particular year, but that if he does not so pay within the said period and recover the land, he may pay the money on the corresponding date of any future year and recover back the land. It was held that the mortgage was a combination of simple and a usufructuary mortgage and that the mortgagee was, in default of payment, entitled to a decree for the mortgage-money, and a decree for sale.(6) Another instance of the same mortgage is furnished by the following The mortgagor placed the mortgagee in possession of the property (*a*) stipulating for payment of interest at a certain rate and for appropriation of the usufruct towards discharge of interest (*b*) adding "that if the net profits should not cover the amount of interest, the mortgagor would make good the deficiency out of his own pocket, it was held that though clause (*a*) standing alone might possibly be construed as constituting an ordinary usufructuary mortgage, its *prima facie* meaning was qualified by clause (*b*) which entitled the mortgagee to sue the mortgagor for the principal money with interest.(7) In such and similar cases a good plan is to first reduce into their elements all the covenants however numerous or varied and then to group them so as to conform to some form of the primary mortgages defined in section 58. It will then be easier to classify it.

1933. It is often difficult to distinguish the two kinds of mortgages described above, from what are denominated in the section as anomalous mortgages. Thus in a case (8) where the mortgagor agreed to repay the loan, within four years and after stating that certain property had been mortgaged to the plaintiff-mortgagee as security for the loan, and that if the principal and interest were not paid within the time fixed, the plaintiff was to take up the management of the property. And the bond further contained the following clause: "We will redeem the mortgaged property on the day on which we shall pay the amount of the principal and the amount of the interest that may be

(1) S. 58 (*d*), *ante*.
(2) S. 58 (*b*), *ante*.
(3) *Amarchand* v. *Kila Morar*, I. L. R., 27 Bom., 600.
(4) *Amarchand* v. *Kila Morar*, I. L. R., 27 Bom., 600; *Kangay* v. *Kalimuthu*, I. L. R., 27 Mad., 526, F. B.
(5) *Amarchand* v. *Kila Morar*, I.L.R., 26 Bom., 600.
(6) *Kangaya* v. *Kalimuthu*, I. L. R., 27 Mad., 526, F.B.
(7) *Jawahir* v. *Someshar*, 13 C. W. N., 266, P. C. (Oudh Appeal).
(8) *Motiram* v. *Vital*, I. L. R., 13 Bom., 90, F. B.

found due on making up the account." This mortgage was classed by the Court as a simple mortgage usufructuary, "one of the anomalous mortgage referred to in section 98 of the Transfer of Property Act." (1) Of course, the mortgage is *not* anomalous, but only a simple mortgage usufructuary. Where usufructuary mortgage is simple, the mortgagee can maintain a suit for the sale of the property, although as only a usufructuary mortgagee he could not have maintained it.(2) And similarly in a mortgage usufructuary and by conditional sale, the mortgagee can foreclose which he could not have done in a purely usufructuary mortgage. (3)

1934. Mortgage usufructuary by conditonal Sale.—The other form of mortgage similarly excepted from the category of an anomalous mortgage is that composed of a usufructuary mortgage and a mortgage by conditional sale. Such a mortgage would result where the mortgagee, by conditional sale is allowed by the same contract usufruct of the property mortgaged to him, either under a lease, or an agreement entitling him to take possession of it. "The position of the parties up to the date on which the loan is repayable is in all respects the same as in a pure usufructuary mortgage. From that date their position resembles what it would be in a pure mortgage by conditional sale." (4) Hence until he obtains a decree for foreclosure, he is accountable to the mortgagee for the rents and profits received by him, unless there is no necessity to render accounts as where by the contract the usufruct is taken in lieu of interest, or there are other reasons for which any other usufructuary mortgagee would not be liable to account. If before foreclosure the mortgagee has received the amount due on the bond, the mortgagor is entitled to redeem, otherwise a decree in the terms of section 86 will be passed and the relations between parties will thenceforth be governed on the footing of the decree.

The combination of a usufructuary with a mortgage by conditional sale gives rise to a transaction known as *kat-kabala muddatakriyam* among Hindus, and *byebil-wufa* with possession among Mohammedans.(5)

1935. Anomalous Mortgage.—Having eliminated the two forms of composite mortgages described above from the category of anomalous mortgage, the section leaves the combinations of the remainder, as well as other mortgages not comprised in the six forms, to be included in that term. Such mortgages are far too numerous and varied to form the subject of an exact definition. Moreover, they differ in their remedial incidents in various localities so that all that can be really said of them is what has been said in the section. Some well known instances of this form of security are presented by the *otti* and *kanom* mortgages of Malabar, the *Illudwara* and the *Peruarthum* of Madras, the *Lakhamukhi*, *Dharthe*, *Waldi* and *Niawa* mortgages of the Punjab and the adjacent districts, and the *San* mortgages of Guzerat, which all present such contrasts to each other as to baffle all attempts at systematization.

Some forms of anomalous mortgages closely resemble one or other of the elementary forms. For instance, in a pure usufructuary mortgage, there is no term fixed for the determination of the mortgage, the mortgagee being entitled to retain possession of the property until repayment of the mortgage-money.

(1) *Per* Sargeant, C. J., in *Motiram* v. *Vital*, I. L. R , 13 Bom., 90, F. B.

(2) *Chathu* v. *Kunja*, I. L. R., 12 Mad., 109; *Ramayya* v. *Guruva*, I. L. R., 14 Mad., 232.

(3) See s. 67 (*d*); *Chathu* v. *Kunjan*, I. L. R., 12 Mad., 109.

(4) Macpherson's "mortgage" (7th Ed.), p. 21.

(5) *Ramasami* v. *Samiappa Nayakan*, I.L. R., 4 Mad., 179 (183); *Girwar Singh* v. *Thakur Narain Singh*, I. L. R., 14 Cal., 730 (737).

A contract therefore which was described and stamped as a mortgage and in which the mortgagor in lieu of a sum due on account, made over to the mortgagee certain land " for enjoyment for a period of ten years in liquidation of the aforesaid rupees," after which the mortgagee " will have no right whatever left to the land," was construed to be an anomalous mortgage.(1) The following are some other instances of an anomalous mortgage : " Now of my own free will, I have mortgaged two and a half biswas . . . in lieu of Rs. 300 to Wilayatullah for a term of four years with interest at the rate of one per cent. Having received the whole and entire mortgage-money from the mortgagee, I have put the mortgagee in possession of the mortgage-property." After providing that the yearly profits were to be credited towards interest, and the balance if any towards the principal, the bond concluded :—" Should any deficiency arise in the interest, I will pay the same from my own pocket, and the whole money, principal and interest, having been paid at the time of the expiry of the term, the mortgaged property will be redeemed."(2) This bond was held to create an anomalous mortgage, but its terms scarcely distinguish it from the specimens of simple mortgages usufructuary above given (§ 1930-1932). Another instance of a bond " not without hesitation " considered to be an anomalous mortgage ran thus :—" As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of the Arakattuotti, ... on the condition that, on the expiry of the said three years, we should redeem the land without paying either principal or interest. You will on the expiry of the said period, deliver possession of the said immoveable property without raising any objection."(3) This bond was construed to be a usufructuary mortgage by the lower Court ; the High Court, however, held it to be an anomalous mortgage, but it is difficult to see why the bond is not a usufructuary one especially as in its term the contract is nowise different from a *zur-i-peshgi* lease.

Madras customary mortgages.

1936. The "*Peruarthum*" (4) mortgage, prevailing in a certain part of Malabar, is, however, clearly anomalous. " The *Peruarthum* mortgage is a transaction in which the proprietor receives the full marketable value of the property for the time being retaining the empty title of 'Jenm' not being entitled to the smallest token of acknowledgment of proprietorship, and in redeeming the property he repays, not the amount originally advanced to him, but the actual value of it in the market at the time of redemption. If he is to repay only the amount so advanced, then he does not pay '*peruarthum*,' because that term means full value realizable and this value. . . . would be one hundred per cent. more than the said amount."(5) Other forms of anomalous mortgages also indigenous to Madras are *otti* and *kanom* of Malabar, and *Illudwara* to be found in certain parts of the Madras Presidency. These mortgages are in the nature of usufructuary mortgages, but are not redeemable before the lapse of a certain time. Thus for instance, in *otti*(6) and *kanom*(7) mortgages a certain time is fixed for redemption,(8) and in any case in the absence of an express agreement

(1) *Tukaram* v. *Ramchand*, I.L.R., 26 Bom., 252 (258), F.B.

(2) *Hikmatullah* v. *Imam Ali*, I. L. R., 12 All., 203.

(3) *Visvalinga* v. *Palaniappa*, I. L. R., 21 Mad., 11.

(4) Means " full value realizable."

(5) *Shekari Varma* v. *Mangalam*, I. L. R., 1 Mad., 57; *Ramasami* v. *Samiappa Nayakan*, I. L. R., 4 Mad., 179 (184).

(6) *Edathil* v. *Kopashon*, 1 M. H. C. R., 122 ; *Kumini* v. *Pakram*, 1 M. H. C. R., 261.

(7) *Kumini* v. *Pakram*,, 1 M.H.C.R , 261 ; *Pramatan* v. *Madati*, 1 M. H. C. R., 296.

(8) *Keshava* v. *Keshava*, I. L. R., 2 Mad., 45 ; *Shekhara* v. *Raru*, I. L.R., 2 Mad., 193 ; *Ahmed* v. *Kunhamad*, I. L. R., 10 Mad., 192; *Raman* v. *Vasudevan*, I. L. R., 27 Mad., 26.

to the contrary, they cannot be redeemed before twelve years from the date of their creation. And even on expiration of the twelve years the *kanom* lease does not determine, though he is then liable to be redeemed at any time (1) unless there is a covenant for renewal which would bind the lessor to renew the *kanom* and though such a covenant must be clear and definite it may be for perpetual renewal.(2) But a mere covenant for renewal would not be sufficient to answer to the mortgagor's suit for redemption even though the kanomdar be in possession. In order to resist such a suit the mortgagee must produce a renewed *kanom* executed and registered in accordance with law. (3)

Kanom.

1937. Madras Mortgages : A *kanom* mortgage in Madras is, according to Sir Muttusamy Ayyar, J., (4) another instance of a transaction in which the ingredients of both simple and a usufructuary mortgage are combined. " According to the usage of Malabar it is a mortgage with possession for twelve years with a right in the kanomdar to appropriate the usufruct in lieu of interest, or both of principal and interest and the Jenmi is also bound, under the contract, to pay the *kanom* amount on the expiration of twelve years."(5)

Otti.

1938. But an *otti* differs from a *kanom* mortgage, *first*, in respect of the right of pre-emption which the *otti*-holder possesses; *secondly*, in being for so large a sum that, the jenmi, or mortgagor receives practically a pepper-corn.(6) Moreover, an ottidar possesses the right to make further advances, which a kanomdar does not possess. Indeed, an ottidar may redeem a prior kanomdar,(7) a kanomdar being regarded as little more than a mere lessee. On the other hand, an ottidar is regarded as little less than an absolute owner. The consideration paid for this mortgage is ordinarily two-thirds of the value of the land, and the interest due on the debt is considered to be equal to the annual rent.(8) A kanom mortgage does not imply a personal covenant to pay, (9) but if the jenmi fails to give possession, the amount advanced by the kanomdar may be immediately recovered from him.(10) A kanomdar in possession is liable to eviction if he repudiates the jenmi's title, (11) even for the first time in the pleadings, (12) or if he has committed wilful and extensive waste. (13) But he cannot be ejected for mere non-payment of rent, (14) which the jenmi may, however, recover by a suit, or he may choose to take credit for the amount, in arrears at the time of redemption ; (15) a right is not affected by the three years'

(1) *Kelappan* v. *Madhavi*, I. L. R., 25 Mad., 452 ; *Vyathilingam* v. *Kuthiravattah*, I. L., R., 29 Mad., 501 ; *Kurri* v. *Kurri*, I. L. R., 29 Mad., 336, F. B.

(2) *Gopalan* v. *Kunhan*, 17 M. L. J. R., 189.

(3) *Kurri* v. *Kurri*, I.L.R., 29 Mad., 366. F B. ; *Gopalan* v. *Kunhan*, 17 M. L. J. R. 189.

(4) In *Ramunni* v. *Brahma Dattan*, I. L. R., 15 Mad., 366. But see *Nellaya* v. *Vadakipat*, I. L. R , 3 Mad., 382 ; *Mana* v. *Surya Narayana*, I. L R., 5 Mad., 284 ; *Sri Devi* v. *Virarayan*, I. L. R., 22 Mad., 350, in which *kanom* has been held to be no more than a usufructuary mortgage.

(5) *Ramunni* v. *Brahma Dattan*, I. L. R., 15 Mad., 366 (369) ; dissented from in *Sri Devi* v. *Virarayan*, I. L. R., 22 Mad., 350.

(6) *Kamini* v. *Pakram*, 1 M. H. C. R., 261.

(7) *Kuyhamu* v. *Attakuretti*, I. L. R., 3 Mad., 246.

(8) *Kundu* v. *Impichi*, I. L. R., 7 Mad., 442.

(9) *Sri Devi* v. *Virarayan*, I. L. R., 22 Mad., 350 ; *Viyathen* v. *Veerayan*, 9 M. L. J.R., 108.

(10) *Vayalil* v. *Udaya*, 2 M H.C.R., 315.

(11) *Ramen* v. *Kandapuni*, 1 M. H C. R., 445 ; *Mayavanjari* v. *Nimini*, 2 M. H. C. R., 109 ; *Kelu* v. *Pudpalli*, 2 M.H.C R., 161.

(12) *Mayavanjari* v. *Nimini*, 2 M. H. C. R., 109 But not so an otti-holder ; *Kannoth* .v. *Vannathan*, I.L R., 3 Mad., 74.

(13) *Mallarkandi* v. *Narayana*, 9 M. L. J. R., 306.

(14) *Rautan* v. *Kadangot*, 1 M. H. C. R., 112 ; *Kunju* v. *Manavikrama*, 1 M. H. C. R., 113, *note* ; *Krishna* v. *Shankara*, 1 M. H. C. R., 113, *note*.

(15) *Kanna* v. *Kombi*, I.L.R., 8 Mad., 381.

rule of limitation for the recovery of arrears of rent; (1) and which he may enforce even against the kanom-holder's assignee. (2) A jenmi who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years, but such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution-sale. (3)

1939. The kanomdar has the right to remove the trees that he has planted during the period of his occupation, provided that he leaves the property substantially in the state in which he received it. (4) On redemption the kanomdar is entitled to claim compensation for improvements, and it is customary in Malabar to take accounts of the improvements at the end of the term of kanom, the value of which are added to the kanom, unless it is at once discharged by payment. (5) But this rule may differ in other localities, as by the local usage of Ernad the jenmi is, on redemption, given credit for one-half of the value of improvements effected by the kanomdar, (6) except, it would seem, when valuable timber is grown on the land. (7) The kanomdar is not entitled to claim the value of trees of spontaneous growth under the head of improvements. (8) There is no presumption nor usage in Malabar against a tenant being allowed compensation for improvements effected prior to the date on which the kanom was renewed, if his right to it was not specially reserved by the deed. (9)

1940. As an *otti* mortgage is superior to a *kanom* mortgage, so is a "*kavidu otti*" superior to *otti* itself. Indeed, a *kavidu* is essentially a sale with the right of pre-emption reserved to the mortgagor. (10) In another form of mortgage called *nirmutal* nothing is reserved to the transferor except the right of water. (11) As an intermediate security between this and *otti*, stands the *ottikamparam* in which a sum 10 per cent. more of the amount of the *otti* is usually lent, the mortgagor being liable to pay this amount as also the further advance with interest at 10 per cent. A still further sum is lent in the *nirmutal*, while the last stage in the gradations is reached in *jenmi panayam*, *attiper* and *Anubhasam* (12) which are mortgages merely in name, being in reality absolute transfers. Akin to them is *ubhaya pattom*, which is a *kanom* mortgage, and in one specimen of it which came up before the Madras Court there was a covenant for perpetual renewal entitling the mortgagor "to hold the properties for ever without surrendering them" and which the Court naturally treated as a clog on redemption. (13) In another case in which the mortgagor had covenanted: "You shall obtain a renewed demise on the expiration of every twelve years and thus hold the properties" and the mortgagee on his part had covenanted "I shall obtain a renewed demise on the expiration of every twelve years and shall hold the lands thus" the Court while holding the transaction to amount to an anomalous mortgage and not a renewable lease construed the covenants as neither

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(1) *Unnian* v. *Rama*, I.L.R., 8 Mad., 415.
(2) *Achutan* v. *Kali*, I.L.R., 7 Mad., 545.
(3) *Achutan* v. *Keshavan*, I. L. R., 17 Mad., 271.
(4) *Vasudevan* v. *Valia*, I. L. R., 24 Mad., 47.
(5) *Narayana* v. *Narayana*, I. L. R., 8 Mad., 284 (288).
(6) *Unnian* v. *Rama*, I.L.R., 8 Mad., 415.
(7) *Achutan* v. *Narasimham*, I. L. R., 21 Mad., 411.
(8) *Narayana* v. *Narayana*, I. L. R., 8 Mad. 284 (488).
(9) *Mupana* v. *Virupa*, I. L. R., 4 Mad., 287.
(10) *Kundu* v. *Impichi*, I.L.R. 7 Mad., 442 (450).
(11) *Kundu* v. *Impichi*, I.L.R. 7 Mad., 442 (451).
(12) *Vythilingam* v. *Kuthiravattah*, I. L. R., 29 Mad., 501 (504, 505).
(13) *Neelakandhan* v. *Tirunilai*, I. L. R., 30 Mad., 61.

obligatory nor amounting to a grant of a perpetual renewal and that such a renewal required to be registered under section 59 of this Act. (1)

1941. Punjab Customary Mortgages.—A few well-known species of anomalous mortgages also find place in the Punjab Customary Law. The *Lakhamukhi* is an instance of such a mortgage in which either a well or a share therein, or an estate is transferred to the creditor for management, the lakhmukhidar being responsible for proper management for which he is entitled to charge *muhasil* 2 *topas per karwar* besides interest if the proprietor gets into his debt (2) In *waldi* the mortgagee is placed in possession and pays one-tenth of the produce to the mortgagor as the landlord's due. The *Dharta* is a security obtaining in the Multan District, in which the mortgagor remains in possession, but pays to the mortgagee one eightieth part of the produce of the land.(3) Other variations of this form of security are to be met with in the Trans-Indus Districts.

1942. The *San* mortgages in Gujerat is another instance of a transaction which possesses peculiarities of its own; a *San* mortgagee without possession having priority over a subsequent *bona fide* purchaser with possession.(4)

1943. It should be noted that though this section covers mortgages of all kinds, however peculiar their provisions may be, still it does not extend to a transaction which does not answer the definition of a mortgage as contained in section 58 before. Some of the so-called mortgages which exist in various parts of India are probably not mortgages at all, as defined in the Act, and therefore this section does not provide for them.

1944. General Incidents.—Of anomalous mortgages no more need be said than that they are governed by the terms of the written contract, except where their nature is such as to admit of oral evidence, which is admissible only to prove "any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract.(5)" The true and appropriate office," says Story, "of a usage or a custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical according to the subject-matter to which they are applied."(6) Local usage may be proved by the decrees though not *inter partes* in which such a custom or usage is recognized.(7) It may also be proved by statements of witnesses, whose opinion supported by instances in which the usage has been recognized is relevant.(8) In the words of the Privy Council "a custom is a rule which in a particular family or district has from long usage obtained the force of law. It must be ancient, certain and reasonable, (9) and being in derogation of the general rules of law must be construed

(1) *Gopalan* v. *Kunhan*, I. L. R., 30 Mad., 300.

(2) 3 Tupper's Punjab Customary Law, p. 219.

(3) 3 Tupper's Punjab Customary Law, pp. 219, 222.

(4) *Parmaya* v. *Sonde Shrinivasapa*, I. L. R., 4 Bom., 459 (461).

(5) S. 92, proviso (5), Indian Evidence Act (I of 1872).

(6) Equity Jurisprudence (2nd Eng. Ed.).

(7) *Bai Baiji* v. *Bai Santok*, I. L. R., 20 Bom., 53.

(7) S. 13 (*a*), (*b*), Indian Evidence Act (I of 1872).

(9) *Har Prasad* v. *Sheo Dyal*, 26 W. R., 55, P.C.; *Lachman Rai* v. *Akbar Khan*, I.L. R., 1 All., 440.

strictly." An usage which has been shewn to have existed for at least twenty years may raise a presumption in the absence of direct evidence of a usage existing beyond the period of legal memory.(1) If the antiquity of an usage cannot be proved, "it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."(2) A local usage, or *desachar*, is a custom prevalent over a large area, and is not like *kulachar* or a family custom confined to one particular estate. Evidence which may be sufficient to prove the latter is not necessarily so as to establish the former, which from its universality must be susceptible of clear and cogent proof, (3) by clear and unambiguous evidence.(4) But though in their operation such mortgages are subject to contract as modified by local usage, still being "mortgages" they are subject to all the rules applicable to them. For instance, while a covenant for perpetual renewal of a Kanom mortgage may be sanctioned by usage, it cannot be enforced because it operates as a clog on redemption.(5) They are equally subject to other principles applicable to all mortgages, contract and local usage being left to determine only such incidents as do not detract from their essential character as mortgages. Where, for instance, he is entitled on default either to foreclosure or sale, it is for him to choose his remedy, and if he elects to foreclose, the mortgagor cannot compel him to sell.(6) But should the mortgage confer him the power of sale without the intervention of the Court it cannot be exercised because such sale is interdicted by section 69.(7) But otherwise the mortgagee may put in force his multiple remedies.(8)

1945. Court fee.—A claim to enforce the terms of an anomalous mortgage should be valued at the amount of the debt sought to be recovered.(9)

Attachment of Mortgaged Property.

Attachment of mortgaged property.

99. [Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section forty-three.]

NOTE.—Sections 85—90 and 92—94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act and are re-enacted as Order XXXIV. rules 1—6, 7, 8, 10 and 12—14 respectively. They will be found set out and annotated in Part 2 of this Volume.

Charges.

Charges.

100. Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the

(1) *Jagomohun Rai* v. *Nimu Dasi*, Montriou's cases on Hindu Law, 596; *Jai Krishna* v. *Durga Narain*, 11 W. R., 348.

(2) *Juggo Mohun* v. *Manikchund*, 7 M. I. A., 263; see also *Seth Samur* v. *Choga Lal*, I.L.R., 5 Cal., 421, P.C.

(3) *Amritnath* v. *Gauri Nath*, 6 B. L. R., 238.

(4) *Ramalakshmi* v. *Sivanantha*, 14 M. I. A., 585; *Vandravan* v. *Manilal*, I.L.R., 16 Bom., 470; *Vydianada* v. *Appu*, I. L. R., 9 Mad., 44.

(5) *Neelakandhan* v. *Tirunilai*, I.L.R., 30 Mad., 61.

(6) *Baquar Hussain* v. *Balak Ram*, 18 I. C., (*Oudh*), 24.

(7) *Kangaya* v. *Kalimuthu*, I.L R., 27 Mad., 526, F.B.

(8) *Azimdad* v. *Ghansam*, 1 A.L.J., 20; *Amarchand* v. *Kila Morar*, I.L R., 27 Bom., 600.

(9) *Hemraj* v. *Trimbak*, (1897) B.P.J., 416; *Amarchand* v. *Kila Morar*, I.L.R., 27 Bom., 600.

transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections eighty-one and eighty-two shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to a charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

1946. Analogous Law.—The section has been amended by striking out the words " and all the provisions herein before contained as to a mortgagee instituting a suit for the sale of the mortgaged property"(1) which occurred after the word " eighty-two," the reason of the amendment being that the said provisions have now been relegated to the Code of Civil Procedure so that such provisons, though they still apply to charges,(2) are no longer a part of this Act.

The term " charge " was originally proposed to be defined as follows :— " If by any assurance other than a mortgage-deed or by any will or under the provisions of this or any other Act, or by operation of law, certain immoveable property of one person is made security for the payment of certain money to another, the latter person is said to have a charge on the property. The Law Commissioners, however, substituted for it the present definition, which is substantially the same.

1947. The term " charge " corresponds with the term " lien " which in England is defined to be an obligation which by implication of law, and not by express contract, binds real or personal estate for the discharge of a debt or engagement; but does not pass any property in the subject of the lien.(3) But while a " charge " may be created by act of parties (as by settlement or will), a lien is created only by " operation of law." The latter term appears to have been used in this sense in the Indian Contract Act,(4) but as applicable only to moveable property, whereas the term " charge " in this and other Acts seem to be confined in its use to only immoveable property. The term " lien " is, however, used in English Law where " charge " would be the more appropriate word in this country, but words like " vendor's lien " and the like have become too familiar to be easily discarded in favour of the more correct expression "vendor's charge " and the like.

This Act for the first time makes a distinction between a " charge" and a " mortgage," the two terms being before used interchangeably.(5)

The second paragraph refers to section 32 of the Indian Trusts Act.(6)

1948. Instances of charges created by operation of law will be found in this and other Acts. In the Act itself both the vendor(7) and purchaser (8) are given statutory charges for the purchase-money while the mortgagee is given a charge on the surplus of the proceeds of sale of the mortgaged property to him for arrears of

Instances and analogues.

(1) Fifth Schedule, Civil Procedure Code (Act V of 1908)
(2) *Ib*., O. XXXIV, r. 15.
(3) Fisher, § 466; *Wilson* v. *Heather*, 5 Taunt., 642.
(4) Act IX of 1872 ; see s. 95 *et. seq.*
(5) *Girwar Singh* v. *Thakur Narain Singh*, I. L. R., 14 Cal., 734, F. B.
(6) Act II of 1882.
(7) S. 55, (4) (*b*).
(8) S. 55, 6 (*b*).

revenue[1] while a co-mortgagor is given a charge on the mortgaged property redeemed by him against his co-mortgagors for their contribution.[2] Besides these there are other occasions when, apart from the statute law, law fastens a charge on property and which will be found set out in the ensuing discussion.

Other Acts furnish other instances of charges, some of them the same,[3] others similar[4] while the rest are neither.[5]

1949. Principle.—The definition of "charge" given in the section is new, and limits the indiscriminate use of the term found in the earlier reported cases.[6] The section now draws a clear distinction between a "mortgage" and a "charge," the former being a *transfer* of an interest in immoveable property made by the mortgagor as a security for the loan, whereas the latter is *not* a transfer, though it is none the less a security for the payment of moiety to another. A charge may be created (i) by act of parties, or (ii) by operation of law. A mortgage, however, can only be created by act of parties, and not by operation of law. A charge being thus a wider term includes also a mortgage.[7] In other words, while every mortgage is a charge, every charge is not a mortgage. And hence it is that in the English Conveyancing Act mortgage is defined to include "any charge on any property for securing a money's worth."[8] Usually a mortgage is the result of an express contract between the creditor and the debtor, but a charge is in most cases created not by express contract, but by either implication, or it is the result of legal compulsion.

1950. The difference between the two terms would not be important were it not for the difference it at one time made in the question of limitation, for while a suit to enforce a charge was held to be governed by Article 132 of Schedule II of the Limitation Act, a suit to enforce a mortgage was under Article 147, held to be within time if instituted at any time within sixty years from the same date. But this question is now finally disposed of by a ruling of the Privy Council,[9] the force of which has been impliedly recognized by the legislature in the new Limitation Act passed in 1908 after the promulgation of that ruling. But the difference has now gained importance for another purpose, for while a mortgage deed must be attested by two witnesses a charge need not be made in writing and if reduced to writing it need not be either attested or registered. There is also some divergence of opinion as to its enforcement against a transferee without notice (§1966). In other respects there is practically no difference in the remedies open to the incumbrancer, since "all the provisions herein before contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82" and all the provisions contained in the Code of Civil Procedure[10] as to a mortgagee instituting a suit for the sale of the mortgaged property are, as far as

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(1) S. 73.

(2) S 95.

(3) S. 65, C. P. Land Revenue Act (XVIII of 1881).

(4) *E g* S. 32, Indian Trusts Act (II of 1882).

(5) *E.g.* S 65. Beng. Ten. Act (VIII of 1885); *Maradugula* v. *Kotala*, 21 M L J. 413. 9 I.C. (Mad.) 255 (charge on goods assigned when not in existence).

(6) Thus Sir Barnes Peacock speaking of a hypothecation bond designated it as a "charge upon immovable property." *Surwar Hossain* v. *Gholam Mahomed*, 9 W. R., 170. F. B.; similarly in *Ramdin* v. *Kolka Prasad*, I. L. R., 7 All., 502. P. C., the term "charge" was assumed to include a "simple mortgage."

(7) The view of the legislature is now confirmed by the decision of the Privy Council in *Vesudeva* v. *Srinivasa*, I L R., 30 Mad. 426 P. C. and by the Legislature in the present Limitation Act (IX of 1908). Art. 132.

(8) S. 1 (vi), Conveyancing Act, 44 & 45 Vict., c. 41.

(9) *Vasudeva* v. *Srinivasa*, I. L. R., 30 Mad. 426, P.C.

(10) O. XXXIV, r. 15, Act V of 1908.

may be, enacted to apply to the person having such charge. In other words, a charge-holder has now very much the same legal status and remedies as a simple mortgagee. He cannot foreclose, but may bring the property charged to sale. But the rights and remedies of the person subject or entitled to the charge are not identical with but only *so far as may be* similar to those under a mortgage. The two transactions are analogous, but not identical. "A charge" says Day, J., "differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt." (1) In such a case, where a decree is obtained against the land, it is the decree which transfers the interest, and not the original transaction between the parties.(2) But a decree for sale may be obtained in the same way as upon a mortgage. And the rule is the same in England, where the Land Titles and Transfer Act (3) provide that the registered proprietor of a registered charge may enforce a foreclosure or sale of the land charged in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time. (4) A document may fall short of a mortgage, but may yet contain stipulations sufficient to create a charge.

1951. Meaning of Words.—"*Act of the parties*:" as by a covenant, a settlement, a will or other instrument given as security for the payment of money. "*Operation of law*:" as by a seller on the property sold for the unpaid purchase-money; (5) or as provided in sections 72, 73 and 95, "*Immoveable property is made security*:" as in the case of a mortgage. "*And the transaction does not amount to a mortgage*:" This does not connote that a deed failing of its effect as a mortgage may still operate as a charge, but only that the transaction was not intended to be a mortgage and does not amount to it. If therefore it was intended to be a mortgage but somehow does not have that effect, it will not be effective as a charge. "*All the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property*:" means all provisions dealing with a sale of the mortgaged property.(6)

"*Charge of a trustee*:" who is entitled to reimburse himself as provided in section 32 of the Indian Trusts Act. (7)

The word "charge" in the section is used in the same sense as in Article 132 of Schedule II of the Limitation Act.(8)

1952. Pre-requisites of a Charge.—Under the section a charge is created when a transaction is not a mortgage, but a specified immoveable property is made security for the payment of money to another. This may arise as the section indicates (*a*) by act of parties or (*b*) by operation of law. Where charge is created by a

Contingent charge excluded.

(1) *Burlinson* v. *Hall*, 12 Q.B D ,347 (350); followed in *Tancred* v. *Delagoa Bay Ry. Co.*, 23 Q.B D., 239 (242). *National Provincial Bank* v. *Harle*, 6 Q B D., 625, dissented from; see also *Kishan Lal* v. *Gangaram*, I. L. R., 13 All., 28 (48) *Motiram* v. *Vithal* I.L.R., 13 Bom. 90 (99), F B.

(2) *Sheoratan* v. *Mahipat*. I. L.R., 7 All., 258 (266): *Motiram* v. *Vitai*, I. L. R., 13 Bom., 90 (100), F.B.

(3) 38 & 39 Vict., c. 87 (1875).

(4) *Ib.*, s. 26.

(5) S. 55, clauses 4 and 5, *ante*.

(6) *Uttam Ishok* v. *Phulman*, 2 A.L J.R., 379 (388); but according to Banerji, J., these words are wide enough to include the right to proceed under s 90 (*ib.*, p. 385). See the subject discussed under s. 91.

(7) Act II of 1882.

(8) *Lallubhai* v. *Narain*, I.L.R., 6 Bom. 719 (724); *Khemji* v. *Rama*, I.L.R. 10 Bom. 519 (526).

document, it must be a document that creates such charge immediately on its execution and which therefore does not operate only as a charge at some future time, such as in the event of non-payment of money secured by it,—the latter being the possibility of a "charge" ultimately arising on the land and not "a charge" within the meaning of the section. Thus where the document after receipt of a loan and the time for re-payment continued: "If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to one bigha seven cottahs of guzashta land..... "If I do not pay the money according to the promise then the aforesaid Misser shall take possession of the land," it was held that the document did not create either a mortgage or a charge. "All that it does is to create the possibility of a charge under section 100 of the Transfer of Property Act." (1) But where the document provides "that if the money could not be recovered from the resumed *muafi* land (the land specifically mortgaged) the mortgagees might realize it from the property in Nagoria Alampore." the words were in one case held to be sufficient to create a charge in favour of the mortgagee; (2) though in a later case the "hypothecation" of property as security for a loan was held to amount not only to a charge but a mortgage. (3) So also the words, "I have willingly and as a thanksgiving fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said village for my eldest brother." (4) The *ratio recidendi* of all these cases is that an expression of desire to take effect *in future* does not create a charge, but the expression of present intention coupled with the necessary words is sufficient to constitute it. So it has been held in England that a mere covenant to charge lands to be acquired in future does not create a charge, unless they can be identified by existing facts and circumstances so that there is no ambiguity about them. (5) But if the property charged is ascertained or at least ascertainable, the fact that the creation of the charge was contingent on the happening of a certain event would not appear to affect the question. (6) In India, however, such a contingent charge is not recognised, it being, as remarked before, the essence of a charge that it should take effect immediately. (7) But though law does not recognize the *future* charging of *existing* property, it recognizes and enforces the present charging of future property, in which case, when the property comes into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign this becomes complete assignment (8) (§ 898).

Writing unnecessary.

1953. There is no provision in the Act prescribing the mode in which a charge should be effected. It may then be executed without any writing, but if a writing is executed it must then conform to the requirements of the Registration Act. In England, on the other hand, writing is essential to create a charge, though its registration is by no means essential. Hence it follows that while an unregistered writing can never operate as a charge in India, (9) a writing though

(1) *Madho Misser* v. *Sidh Binaik*, I.L.R., 14 Cal., 687 (691).

(2) *Bhagwan Pershad* v. *Narain Prasad*, (1887) A. W. N., 192.

(3) *Muhammad* v. *Vinayak*, 9 I, C. (Mad.), 828.

(4) *Kanhia Lal* v. *Muhammad Husain*, I. L. R., 5 All., 11.

(5) *Per* Cotton, L. J., in *Montagu* v. *Earl of Sandwich*, 32 Ch. D., 525.

(6) *In re Hurley's Estate*, [1894] 1 Ir. R., 488.

(7) *Madho Misser* v. *Sidh Binaik*, I. L. R., 14 Cal., 687 (691).

(8) *Per* Jessel, M. R, in *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Holroyd* v. *Marshall*, 10 H. L.C. 191; *Tailley* v. *Official Receiver*, 13 App. Cas. 523.

(9) S. 17, Registration Act (III of 1877); *Bengal Banking Corportion* v. *Mackertich* I. L. R., 10 Cal., 315 (322); cf. *Appasami* v. *Manikam*, I. L. R., 9 Mad., 108 (107, 108).

informal and unregistered may have that effect in England on the principle that equity regards that as done which ought to be done. In Madras it has been held that a charge must be expressed in writing registered and cannot be raised by implication, (1) but there is no authority for this view.

1954. Charges created by act of parties.—Of all charges, those created by the act of parties are most liable to be mistaken for simple mortgages. But since a charge is not a mortgage, it is evident that the Legislature intended to discriminate the two kinds of securities, though in doing so the Courts have often made a distinction without a difference, and indeed, if regard be had to the fact that while a charge presents obvious points of divergence from an English mortgage, the only form of security ordinarily in vogue in England, the various forms of mortgages prevalent in India must necessarily render it often difficult here to define when a charge ends and a mortgage begins. It is not therefore surprising that contracts which are regarded as constituting mortgages in Allahabad, and Calcutta, are construed to create no more than a charge in Bombay and Madras and cases of the same Court are at times contradictory and conflicting. Thus for example where the document sued upon ran thus:—"Having pledged to you this day. . . . the brick-built house, &c., &c.," the Madras High Court held the document to create no more than a charge on the property.(2) But the Allahabad High Court, subsequently commenting upon the case, dissented from the view taken in Madras, and seems to have been of opinion that the contract, construed in the light of the intention of the parties and the terms ordinarily employed in that connection, was clearly one of mortgage as defined by the Act. (3) In another case Muthuswamy Ayyar, J., observed: "The distinction then between a simple mortgage and a charge consists in this, *viz.*, where a power of sale is conferred upon the mortgagee expressly or implied by the instrument of mortgage the transaction is a mortgage; otherwise it only creates a charge;" (4) According to this view it is not however necessary that the power of sale conferred by the bond should be exercised by the mortgagee, otherwise than through the intervention of the Courts, but it is urged that if the bond only stipulates that the loan should be repaid with interest in a certain year and certain immovable property is hypothecated as security for repayment of the debt, the bond could not be regarded as creating anything more than a charge since the power of sale is wanting. (5) And this seems to be the *rationale* of a number of cases decided in Madras, (6) though in other cases similar words were held to suffice to create a mortgage. (7) So where the obligor promised to repay the loan on the security of his house site, the Court construed it to amount to a mortgage merely because there was a covenant to pay, and, which in the opinion of the Court was the sole point of distinction between a mortgage and a charge, and for which a Bombay decision (8) was cited in support but which itself dissented from the earlier Madras cases,

(1) **Charge and mortgage distinguished.**

(1) *Kuttiamma* v. *Madhava*, 11 M.L.J.R., 186; distinguishing *Imdad Hasan* v. *Badri Prashad*, I. L. R., 20 All., 407.

(2) *Rangasami* v. *Muttu Kumarappa*, I. L. R., 10 Mad., 509, F. B.

(3) *Kishan Lal* v. *Gangaram*, I.L.R., 13 All., 28 (46).

(4) *Aliba* v. *Nanu*, I. L. R., 9 Mad., 218 (221).

(5) *Ibid.*

(6) *Chetti Gaundan* v. *Sundaram*, 2 M.H. C.R., 51; *Golla Chinna* v. *Kali Appiah*, 4 M. H.C.R., 434; *Sadagopa* v. *Ruthna*, 5 M.H.C. R., 457; *Davani* v. *Ratna*, I.L.R., 6 Mad., 417; *Cooling* v. *Sarvana*, I. L. R, 12 Mad., 69.

(7) *Balasubramania* v. *Sivaguru*, 21 M.L. J, 562; 11 I.C., 629.

(8) *Datto* v. *Vithu*, I.L.R., 20 Bom., 408, F.B.

and in which the words "*taran gahan*" (security mortgage) were held to be decisive, though in so holding the Court followed its own previous cases and acted more on the principle of *stare decisis* (1) and convenience than upon the strength of its own conviction.

1955. The course of decisions in Bombay, then, appears to be to regard the power of sale as of the essence of a mortgage though such power may be impliedly given to the mortgagee.(2) This view has been impugned by Mahmud, J., in an elaborate judgment (3) in which Young, J., pointed out that a "charge in strictness not only empowers of its possessors in many cases to hold the property charged, if in his possession, but also gives him the right to come into Court and sue actively for the satisfaction of his claim," it may be added, by bringing the property charged to sale. Again, in a simple mortgage, the mortgagee can no more sell the property out of Court than he can in a charge. "The use of the phrase 'to cause' in section 58 (*b*) taken with the provisions of section 67, as to order for sale clearly shows that in a simple mortgage, the mortgagee's power of sale is not intended to be exercised independently of the Court. If any doubt could exist upon the point, it is removed by the express provisions of section 69, which in dealing with the matter, lays down that 'a power of sale without the intervention of the Court' is valid in the following cases and *in no others*, and the cases enumerated in the section do not include simple mortgages, as defined in clause (*b*) of section 58. It is therefore clear that in order to constitute a simple mortgage, an express or implied power of sale exercisable through the Court is all that is required, and that it is none the less a mortgage, if it conveys no power to the mortgagee to sell the property out of Court, a power which, as I have shown, could not be invalid in such mortgages... It seems to me that the question whether the mortgagee's power of sale is to be exercised out of Court or through the intervention of the Court is a matter relating to what may be called the *modus operandi* as distinguished from the essence of the mortgage." (4) And so it has been held by the Full Bench of the Calcutta High Court, that to constitute a mortgage "it is sufficient if it appears to have been the intention of the parties to create a charge upon the lands, and in ascertaining the intention the form of expression, the literal sense is not to be so much regarded as the real meaning which the transaction discloses."(5) In another case (6) stress was laid on the intention more than on the expression. In this case, by a document on the face of it a simple money bond the obligor agreed to repay the debt, and admitted that, if he failed to do so, the obligee would be entitled to recover the debt by sale of a certain factory belonging to him and from his person and other properties, and that the property referred to in the bond would be held bound for the debt, it was held that the bond created no charge on the factory, because (*a*) a general charge created on the obligor's entire assets merely amounted to a declaration that the debt was recoverable as provided under the

(1) *Datto* v. *Vithu*, I.L.R. 20 Bom., 408 (413, 414.)

(2) *Khemji* v. *Rama*, I.L.R., 10 Bom., 519 (527); *Govind* v *Kalnak*, I.L.R., 10 Bom; 592; *Moti Ram* v. *Vitai*, I.L.R, 13 Bom. 90; *Venkatesh* v. *Narayan*, I.L.R., 15 Bom. 183, *Bavaji* v. *Tarya*, (1891) B.P.J. 35; *Datto* v. *Vithu*, I.L R, 20 Bom. 408.

(3) *Kishan Lal* v. *Gunga Ram*, I.L.R., 13 All., 28.

(4) *Per* Mahmud, J., in *Kishan Lal* v. *Ganga Ram*, I. L. R., 13 All., 28 (48, 50); *Mohammad Amin* v. *Jan Patel*, 12 C.P.L.R., 26

(5) *Per* Couch, C.J., in *Radha Pearee* v. *Nobin Chunder*, 13 W.R., 82 (84), F.B.

(6) *Jagatdhar* v. *Brown*, I L. R., 33 Cal., 1133 (1153); following *Najibulla* v. *Nusir*, I. L.R, 7 Cal., 196. To the same effect *Collector of Etawah* v *Beti Maharani*, I. L R. 14 All. 162; followed in *Kishen Lal* v. *Dhawan* 8 I C. (All.) 865; *Bheri* v. *Maddipatu*, I.L.R., 3 Mad. 5.

law, and (*b*) because the bond was registered as an agreement in Book No. I and not as a mortgage in Book No. IV under the Registration rules. Inanother case the Court adopted the simpler but by no means infalliable criterion of distinguishing a mortgage from a charge in that the instrument creating a charge directs the realization of money from a particular property without reference to sale." (1)

1956. But as sale is the remedy provided by law in each case, why should its mere mention alter the nature of the transaction. It seems that the only distinction recognized by the legislature between a mortgage and a charge is that while there is the (*a*) *transfer* of an (*b*) *interest* in specific immoveable property in the one there is merely the creation of a security without anything more in the other, and as of these elements that of "transfer" is the most material, the question depends upon whether any transfer was made in favour of the obligee, and since such transfer must be symbolized by a specific right whether of forclosure, possession or sale in favour of the obligee, its absence would suggest the absence of transfer and the possibility of a charge. This is the sole feature of distinction when the two transactions are otherwise identical. But in not a few cases they present other points of divergence. In this view the covenant for sale is not the sole test but merely an index of intention, which may be indicated by use of other apt expressions evidencing a mortgage, (§, 1153-1166) the absence of which would be a circumstance justifying the inference that while the obligor created a security he did not effect a transfer. If for instance, the obligor were to say "I mortgage you my land" it could not be held to be a charge because there was no power of sale. If, on the other hand, he were to say "I offer you the security of my land, which I know you can sell as provided by law, and, therefore, agree that you should do so" it would be a charge though the covenant for sale may have been inserted, which without it would be implied as its necessary legal incident. The power of sale as a contract, in view of section 69 is never literally construed nor enforced, and the mere use of an expression devoid of its legal significance is no more than the evidence of intention of whether the obligor had parted with an interest in his land or merely burdened it with a payment. The fact that the sequel of the two transactions is the same does not necessarily prove their identity but proves only their affinity.

1957. A charge may be created generally as where a company may by its articles of association confer upon itself a lien on all shares registered in the name of a member for his debts to the company and such a lien may be discharged by a new arrangement between the indebted member and the company, the terms of which are incompatible with its retention or which shew an intention to waive it.(2) The payment of a premium on a life policy is not to be regarded as securing a certain part of the money assured by the policy. The whole of the premimus are paid to keep up the policy and no proportionate part of the money payable under it is represented by the payment of any particular premium.(3) A mere agreement to sell,(4) or mortgage,(5) does not create any charge on the property agreed to be sold or mortgaged. So where a deposit of title-deeds is insufficient to create a mortgage, it cannot be held to create a charge.(6) And

(1) *Govind* v. *Dwarka*, I. L. R., 35 Cal., 837; (1844) followed in *Akhoy Kumar* v. *Corporation*, 19 C.W.N. 37; 21 C.L.J., 177 (182); *Khemchand* v. *Malloo*, 10 N.L.R. 81 (85, 86). To the same effect *Moti Begam* v. *Har Prasad*, 11 A.L.J. 570; *Masuma* v. *Tahira*, 11 A.L.J. 580.

(2) *Bank of Africa* v. *Salisbury Gold Mining Co.*, [1892] A.C., 281.

(3) In re *Harrison* v. *Ingram*; *Ex parte Whinner*, [1900] L R., 2 Q.B. 710.

(4) S 54.

(5) *Konchadi* v. *Shiva Rao*, I. L. R., 28 Mad., 54.

(6) *Konchadi* v. *Shiva Rao*, I. L. R., 28 Mad., 54.

generally a document intended to be a mortgage cannot be construed to create a charge if it fails to operate as a mortgage.(1) If it were otherwise, a facile loophole would have been obtained for deeds otherwise defective and ineffective. In this respect the law here widely differs from that in England where the subtle distinctions between law and equity result in taking the wish for the deed, so that a security, though defective as legal mortgage, may nevertheless be enforceable as creating an equitable charge.(2) This view has been transported across the Atlantic to the Courts of America, where the bald doctrine that a mortgage failing as legal mortgage may still be enforced in equity is well recognized.(3) As the distinction between law and equity is foreign to the notions of Indian jurisprudence, no mortgage can be here enforced circuitously when it cannot be enforced directly, and the phrase "and the transaction does not amount to a mortgage" must, it is apprehended, be understood in that sense.

(2) Property must be specified.

1958. Though the section does not state that the property charged must be specified, it is nevertheless essential, for otherwise there can be no security unless the property is reasonably certain. A loose statement that if the obligor does not pay the money then the obligee could recover it from his person and property does not charge his estate, because it is a statement of the law and no covenant creating a charge. So where the debtor stipulated that if the debt be not paid then "the obligee be entitled to recover the whole of his money together with the interest fixed by instituting a suit from my (the debtor's) moveable and immoveable property" was held to create no mortgage, nor did it suffice to create a charge on any specific property of the debtor.(4) So again where some co-sharers of property subject to a mortgage agreed to divide it amongst themselves stipulating that "if, for any reason, any of the co-sharers fail to pay the debt, then the co-sharer, who has to pay any amount of the debt in excess of his share, shall be entitled to get the same from the person and property of the defaulting co-sharer, it was held to constitute no charge because it merely amounted to a declaration of the obligee's legal rights.(5) In other words the covenant that the obligee could recover from the "person and property" of the debtor is too wide to fasten a charge on any of his property. But in considering the question of definition of property it is well to remember that *certum est qui certum reddi potest.*(6) By a partition deed two co-sharers partitioned their shares in the properties jointly held by them, and in lieu of a larger share allotted to the defendant he was to pay the joint debt. It was stipulated that if the defendant failed to pay the debt and plaintiff had to pay it, the defendant would have to pay him double the amount out of his "properties." The plaintiff claimed a charge for the amount from the share allotted to the defendant, who resisted it on the ground of indefiniteness, but the Court considered the purpose of the

(1) *Kumari Bibi* v. *Sri Nath*, 1 C. W. N., 81; *Tofaluddi* v. *Mahar Ali*, I.L.R., 26 Cal., 78 (81); *Pran Nath* v. *Jadu Nath*, I. L. R., 82 Cal, 723: *Royzuddi* v. *Kali Nath*, I.L.R. 33 Cal., 985; *Narayan* v. *Lakshmandas*, 7 Bom.L R. 934. *Collector* v. *Bhagwan Prsad*, I.L.R., 35 All., 164 F.B.; *Samoo* v *Abdula* I.L.R. 31 Mad. 337; *Khemchand* v. *Mallo*, 10 N.L.R. 81 (88); *Malon Ma* v. *Mg Shwe*, 10 I.C. (Bur) 919.

(2) In re *Strand Music Hall Co.*, 3 DeG. J. & S. 147; *Mathews* v. *Goodday*, 31 L J. Ch., 282; *Marshall* v. *Shrewsbury*. L R., 10 Ch. 250 (254); *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. D., 43; In re *Queensland Land Coal Co.* [1894] 3 Ch. 181; In re *Johnston Foreign Patent Co.*, [1904] 2 Ch., 234.

(3) 1 Jones Mortgage (6th Ed.), §§ 82, 168, 522. In India the validity of an equitable mortgage is not unknown though it is limited to a narrow compass, *Konchadi* v. *Shiva Rao*, I.L R. 28 Mad., 54.

(4) *Collector of Etawah* v. *Bati Maharani*, I L.R , 14 All. 162; followed in *Kishen Lal* v. *Bhawan Kuar* 8 I.C. All. 865.

(5) *Kishen Lal* v. *Bhawan Kuar*, 8 I.C. All. 865. To the same effect *Jagat Dhar* v. *Brown*, I.L.R. 33 Cal. 1133, (1153); *Bheri* v. *Maddipatu*, I.L.R. 3 Mad. 5, and cases *supra*.

(6) "It is certain what is capable of being ascertained."

whole deed and the inequality of division and held that the "properties" referred to the share allotted to the defendant which was liable to be charged for the payment.(1)

1959. Then, again, even if the property be mentioned it must be "made security for the payment of money to another". Such security may be created by contract or by law, but then it must be a security. Where, therefore, the obligor merely covenants not to alienate his property it does not constitute a charge, because it does not secure any of his property (§§ 1165, 1166). It will be noticed that while a mortgage may be made not only for the payment of money but also for the performance of an engagement giving rise to a pecuniary liability a charge is here described as made only for the payment of money—but the difference in language was merely inadvertent, for since a charge is a wider concept embracing the higher security of mortgage, it may equally be made for the same purpose as a mortgage. In fact its operation is more extended since it is made or implied for a variety of purposes, and law furnishes many examples of a charge for the performance of an engagement, as in the cases before noticed.(2)

(3) Property must be secured.

1960. Property may be charged both expressly as well as by necessary implication, but in the latter case there must be something more than the mere possibility of a charge (§ 1951). Of course, a mere statement that the plaintiff and his children were to receive certain allowances at the *chatrum*, would not charge the endowment with their payment.(3) But since charge unlike a mortgage may be created and proved by parol the circumstances in which it was created may be shown to support it. So, for instance, that a certain payment by way of maintenance (§§ 659-660) had been for a long number of years paid out of the profits of a certain property it would be reasonable to infer that the payment was secured on the property. The question is in each case one of evidence. The fact that payment was made in circumstances justifying a charge is material though not conclusive.(4)

1961. Instances of Charge.—The following are some instances of documents held to create a "charge." A document which ran thus: "I have willingly and as a thanksgiving fixed an annual allowance of Rs. 1,000 in cash in perpetuity out of the profits of the said village for my eldest brother."(5) So a stipulation in the sale-deed by the vendor for payment to him by the vendee of a certain sum as *malikana* was inserted in the sale-deed as follows: "the said vendee is at liberty to retain possession himself or to sell it to some one else; *and he is to pay Rs. 25 of the Queen's coin to me* annually (as *malikana*), which he has agreed to pay." It was held that the words "as *malikana*" in the deed of sale could not be regarded as surplusage; that they showed an intention that the payment of the Rs. 25 should be an annual charge upon the property and the profits arising therefrom analogous to that of a *malikana* reserved on a settlement by a Government settlement-officer for a zemindar; that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property; and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance.(6) Similarly in several cases where *malikana* was reserved, it was held to be a distinct proprietary

(1) *Manickam* v. *Audinarayana*, (1910) 7 M.L.T. 158; 5 I.C. 517.

(2) See S. 55-4 (*b*); 6 (*b*).

(3) *President, Taluk Board* v. *Chilakamarri*, (1911) 2 M.W.N. 238.

(4) *Kaua* v. *Karnavan*, 9 L.R., 30 Mad. 203 (206).

(5) *Kanhia Lall* v. *Muhammad*, I. L. R., 5 All. 11, cited *supra*.

(6) *Churaman* v. *Balli*, I.L.R., 9 All., 591.

(right, and an annual recurring charge on the property.[1] In one case the bond after acknowledgment of the principal sum received ran thus: "To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell mortgage, or dispose of the property to another banker, such transfer shall be void." It was held that the bond showed that the intention of the parties was to create by it a charge upon all the property of the obligor for the payment to the plaintiff of the principal moneys borrowed together with interest at the agreed rate.[2] Similar view was taken by the same Court of a compromise decree in which for a certain payment it was agreed that "this share as well as the person of the defendant shall be liable and until this money is paid, the property in dispute cannot be alienated," and which decree was construed to create merely a charge and was held therefore incapable of execution.[3] A deed the material portion of which ran thus: "Whereas I have borrowed Rs. 99 from Madho Misser.... I shall pay interest at Rs. 1-6 per cent. per mensem without any objection...If I do not pay the money according to the stipulation then I declare in writing that I shall lose my right to one bigha seven cottas of guzashta land... If I do not pay money according to the promise then the aforesaid Misser shall take possession of the land," was held to be not a mortgage, but a charge.[4]

1962. A registered agreement whereby the debtor acknowledged the sum of Rs. 15,505 as due upon an account made, and which he promised to liquidate by paying Rs. 4,000 before Bhadrapad Vadya (18th September 1895) adding: "If I fail to pay you Rs. 4,000 as agreed above, I shall pass to you a mortgage-bond for the whole amount. If I fail to pass a mortgage-bond as agreed above within the stipulated period, and if you file a suit against me for the same, I shall pay you the costs of the suit with interest. As written above I shall pay you Rs. 4,000 before Bradrapad Sudh 15th and I shall afterwards pass to you a mortgage-bond in respect of the above property before Bhadrapad Vadya 30th (18th September 1895) for such balance as may be found due with interest." It was held that since the existing indebtedness consisted of a valuable consideration, a good charge was created in the obligee's favour even without the execution of the contemplated mortgage-deed.[5] But the correctness of this view is open to doubt. There can be no doubt that all that the agreement did was to promise a mortgage *in futuro*, and as such it fell short of a charge which must take effect immediately[6] (§§1165, 1166, 1951). Similarly where a person by a written instrument charged "all his present and future personality" to secure to the plaintiffs any sums he might become indebted to him, and afterwards incurred debts to the plaintiff, Fry, J., allowed the claim holding it to operate to charge all the personal property belonging to the debtor at the date of the instrument, but not the after-acquired property.[7] But it must be noted that the property in this case was charged by a letter dated the 7th October 1881, in which the property being "my appointed interest under the will of dame

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(1) *Heeranund* v. *Oozeerun*, 9 W.R., 102; *Bhoalee Singh* v. *Neemo Behoo*, 12 W. R., 498; *Gobind Chunder* v. *Ram Chundra*, 19 W. R., 94; *Hurmuzi* v. *Hirday*, I. L. R., 8 Cal., 93; *Mohomed Karamottollah* v. *Abdool Majeed*, 1 N.W P.H.C R., 205 (Ed. 1873, p. 288.)

(2) *Ram Sidh* v. *Balgobind*, I.L.R., 9 All., 158.

(3) *Rameshar* v. *Subkaran*, 8 A.L.J. 418 F.B.; 10 I. C. 481.

(4) *Madho Misser* v. *Sidh Binaik*, I. L. R., 14 Cal., 687.

(5) *Gobind* v. *Parasharam*, I.L.R., 25 Bom. 161 (166).

(6) *Madho Misser* v. *Sidh Binaik*, I. L. R., 14 Cal., 687 (691).

(7) *Tadman* v. *D'Epineuil*, 20 Ch. D., 758.

Mary O'Connell" was sufficiently specified by a memorandum dated the same day by which "all my present and future personalty" was again charged. Fry, J., in allowing the charge was of opinion that the property in possession of the debtor on the date of the latter memorandum was specific, because it could be ascertained [1]—*certum est quoa certum reddi potest* [2]—and as to the after-acquired property, he observed: "There are many reasons why such a charge as this should not be operative as regards undefined property not belonging to the mortgagor at the date of the execution of the deed; it would interfere with his power of maintaining himself. But the invalidity of the charge as to part of the property included in its terms does not, in my opinion, interfere with its validity as to the rest." [3]

1963. It appears that in such a case everything depends upon the intention of the parties at the time of the contract. A mere promise to charge a certain property, or intention to do the same in future, is not enough. [4] But if there is a sufficient indication that the supposed assignee is to have the benefit of the fund or chose in action in question, in addition to relying on the credit of the assignor or as it is sometimes put, is to be paid 'out of the fund' as distinguished from 'when the assignor gets the fund,' a valid equitable assignment is created, provided that the transaction is for value." But in such a case where no specific property is charged, even according to the Madras High Court, it does not create a charge so as to bind a purchaser unless he purchase it in fraud. [5] A document creating a charge must do so by its terms. It must not contemplate the mere possibility of a charge. A covenant entered into by the vendor of property to the effect that if in the future any person appear as a claimant of the property and injury results thereby, then the purchaser may recover the money from one person or sold property or any other property creates no charge, inasmuch as the covenant provides against a contingency which might never happen. [6] and the clause moreover does not sufficiently specify the property to be charged so as to make it security for the payment of money for it is no specification to mention all the debtor's assets out of which his debts would be payable in any case. [7] Such, however, would have been the case if the property mentioned had been only the sold property. [8]

1964. Perpetual Charge. The fact that an allowance had been received out of certain lands for a long period from several successive owners, is proof of a grant of perpetual allowance charged on such land. [9] Another instance of a charge created by the act of parties is what is known as a corrody, which creates a charge on the profits of the estate. A document called a sanad attested by witnesses, and whereby the executant, a Hindu, promised to pay an annuity to his sister and on her decease to her daughter from the produce of his inheritance,

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(1) *Tadman* v. *D'Epineuil*, 20 Ch. D., 758 (760); see also *Belding* v. *Read*, 3 H. & C., 955; *Holroyd* v. *Marshall*, 10 H. L. C., 191; *Wilmot* v. *Alton*, [1897] 1 Q.B., 17; see also Bills of Sale Act, 1882, s. 9, by which a general assignment of future acquired chattels is made absolutely void for the reason of which see *Thomas* v. *Kelly*, 13 App. Cas. 506.

(2) "That is sufficiently certain which can be made certain." [This is an old maxim of both logic and law, and is peculiarly applicable in construing a written instrument.

(3) *Casey's Patents*, [1892] 1 Ch., 104.

(4) Fisher, § 230.

(5) *Bheri Doraŷya* v. *Maddipatu*, I. L. R., 3 Mad., 35.

(6) *Harjas* v. *Naurang*, 3 A.L.J.R., 220.

(7) *Harjas* v. *Naurang*, 3 A.L.J.R, 220; explained in *Maina* v. *Bachchi*, I. L. R., 28 All. 655 (658).

(8) *Cf. Maina* v. *Bachchi*, I.L.R., 28 All., 655 (658).

(9) *Mana* v. *Karnaban*, K.R. 30 Mad., 203.

was so construed. (1) Such a document would be supported even under the English law as a settlement. (2)

1965. Of course, a valid charge may be created by a settlement or a will. Thus where a testator after disposing of his other property gave four legacies to each of his four sisters, and in the same clause added, "all of which legacies I mean shall be paid out of my freehold estate in N," it was held that the real estate was primarily liable.(3) The gift of property by will upon trust to pay a particular debt or particular debts creates a good trust, and the debts will then be a charge on the property set apart for their payment.(4) So where *D* bequeathed lands in *C* and *L* to the use that *M* should receive an annuity of £50 per annum out of the *C* lands and a like annuity out of the *L* lands, and devised the *C* lands to *H* in strict settlement. He devised the *L* lands, subject to the annuity of £50 and "to the charge of £1,000 hereafter mentioned," to *H*, in strict settlement. He then gave to *X*, *W*, and *R*, £1,000 and charged the sum upon the *L* lands, and bequeathed the residue of his real and personal estate to *X*, *W*, and *R*, it was held that the £1,000 was charged on the *L* lands in exoneration of the personalty.(5) So the testator may charge his real estate to pay "all his just debts, funeral and testamentary expenses" in exoneration of his personal estate.(6) But in England such a charge if made upon a legacy may fall personally upon the legatee who, on failure of that legacy by means of the Mortmain Act takes it.(7) In one sale by a deed of compromise between *U* and *L*, the former conveyed a certain fee simple estate to a trustee, "charged and chargeable with all leases, mortgages, gifts, conveyances, judgments, and incumbrances, theretofore made by him, of all or any part of the said estate," upon trust to permit him, *U* during his life, to receive the rents, and after his decease to convey the said estate to *L* and his heirs. Previous to the execution of this deed, *U* had confessed several judgments, and mortgaged the whole estate. *U* afterwards died leaving considerable personal property. It was held that the real estate, so conveyed by him was the primary fund for the payment of those incumbrances. (8) Apart from any special power given by a will to an executor, money borrowed by him on a promissory note for the benefit of an estate is not a charge upon the estate. (9) So the unsecured creditors of a Hindu have no charge or lien on the inheritance.(10)

Settlements, wills, etc.

1966. These instances to which numerous others could be added, are sufficient to show the nature of the charge created by a settlement or a will. Charges so created are of course subject to the same rules as other charges. Parol evidence to prove intention is in every case inadmissible and in other respects it can be admitted to the same extent and subject to the same limitations as in the case of a mortgage. (11) In construing a document the Court cannot look to extrinsic circumstances, but must confine itself to the document;

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(1) *Ghatti Chalamanna* v. *Pandrangi*, I. L.R., 7 Mad., 23.

(2) *Cradock* v. *Scottish Provident Institution*, 63 L.J. Ch., 15.

(3) *Amesbury* v. *Brown*, 1 Ves., 482.

(4) *Anund Move* v. *Grish Chunder*, I. L. R., Cal., 772 (776).

(5) *Daunt* v. *Daunt*, 18 Ir. Ch. R., 175: *Ion* v. *Ashton*, 28 Beav.; 379; *Fream* v. *Dowling*, 20 Bev., 624; *Thomas* v. *Nurse*. 19 L.T. (N. S.), 8.

(6) *Young* v. *Young*, 26 Beav., 522.

(7) *Dacre* v. *Patrickson*, 1 Dr. & Sm., 186.

(8) *Alen* v. *Hogan*, Ll. & G., *temp*. Sugd., 231.

(9) *Romanath* v. *Kanai Lal*, 7 C. W. N., 104; following *Farhall* v. *Farhall*, L. R., 7 Ch., 123.

(10) *Veerasokkaraju* v. *Papiah*, I. L. R., 26 Mad., 792 (796).

(11) See s. 91, Evidence Act (I of 1872).

and cannot advert to other facts although these may in its opinion explain the deed. (1)

1967. The charge created by a settlement or a will cannot be enforced as against the property in the hands of a *bona fide* transferee for value whether the alienation has been made absolute by sale or by mortgage. (2) The reason for the rule is thus stated by Williams: "It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors into the hands of the alienee. The principle is that the executor or administrator in many instances must sell in order to perform his duty in paying debts, etc., and no one would deal with an executor or administrator if liable afterwards to be called to account." (3) The same principle is applicable to real property. (4) So in a case Pontifex, J., observed: "In India the general creditors seem to have had no higher rights than the speciality creditors had under the common law in England. For if they had a charge on the descended land, it would have been impossible for the heir to deal it without the concurrence of all the creditors; and in early times, therefore, it would have been impossible to make any title." (5) Where, however, from intrinsic evidence it appears that in making the alienation, the executor was not acting in the execution of his duty but was committing a breach of the trust—the mortgagee or purchaser being a party to the breach of trust, cannot hold the property discharged from the trusts, but must hold it subject to the payment of debts and legacies to the same extent as property in the hands of the executor. (6)

Not available against transferee without notice.

1968. Charge of Annuities.—The question whether an annuity given by a will constitutes a charge on the *corpus* or only on the rents and profits is one which depends upon the intention as expressed in the instrument. (7) A power to recover it by "distress and sale" is insufficient to charge the *corpus*, for rents are so recoverable by law. (8) But if the estate is devised "*subject* to an annuity," it is then clearly a charge on the estate. (9)

1969. A charge of debts generally by a testator upon his property or any part of it, will not affect limitation, because it does not at all vary the legal liabilities of the parties, or make any difference with respect to the effect and operation of the Statute itself. The executors take the estate subject to the claim of the creditors, and are in point of law trustees for the creditors, and such a charge adds nothing to their legal liabilities. But the case is different when particular property is given upon trust to pay particular debt or debts. In such a case the trustee has a new

Limitation.

(1) *Gittins* v. *Steele*, 1 Swan., 24.

(2) *Bazayet Hossein* v. *Mahomed Wajid*, I.L.R., 4 Cal., 402, P. C.; *Kherodemoney* v. *Doorgamoney*, *ib.*, 455: *Greender* v. *Mackintosh*, *ib.*, 897.

(3) "On executors," p. 872.

(4) *Per* Sir John Leach in *Watkins* v. *Cheek*, 2 Si. & St., 199; cited by Lord Cairns in *Corser* v. *Cartwright*, 7 App. Cas., 731 (736).

(5) *Greender Chunder* v. *Mackintosh*, I. L. R., 4 Cal., 897 (905).

(6) *Per* Sir John Leach in *Watkins* v. *Cheek*, 2 Si. and St., 199; *Colyer* v. *Finch*, 5 H. L. C., 905.

(7) *Clifford* v. *Arundel*, 1 DeG. F. & J., 307 (311).

(8) *Addecott* v. *Addecott*, 29 Beav., 460; In re *Tucker*, [1893] 2 Ch., 323.

(9) *Haynes* v. *Haynes*, 3 DeG. M. & G., 590; *Birch* v. *Sherratt*, L. R., 2 Ch., 644; *Carmichael* v. *Gee*, 5 App. Cas., 588; In re *Mason*, 8 Ch. D., 411; In re *Livesley*, (1883) W. N. 127; but see *Michell* v. *Wilton*, L. R. 20 Eq., 269.

duty, not the ordinary duty of an executor to pay debts generally out of property generally, but a duty to apply a particular property to secure a particular debt; and there is then a trust within the meaning of section 10 of the Limitation Act.(1)

1970. Charges by Operation of Law.—The other class of charges includes those created *not* by any volition of the parties, but as the result of a legal obligation. Such charges are known as equitable liens in the English law,(2) which may be created by any law and under the Act they have been created by sections 39, 55 (4) (*b*), 72, 73 and 95. These charges "are founded upon the consideration of a duty or implied intention on the part of the owner of property to make it answerable for a specific claim." (3) Thus according to the Hindu Law the maintenance of a Hindu widow is a charge upon her husband's estate, (4) but it is a *quære* whether a claim of an illegitimate son, not founded on contract or decree, is equally a charge within the meaning of this section.(5) A widow's claim for dower under Mahommedan law is not a charge on her husband's property, but ranks on a par with ordinary debts.(6) The vendor of immoveable property is declared to have a charge on the property sold for unpaid purchase-money, and which he may enforce in the manner stated in section 55.(7) And similarly the purchaser has a charge on the property purchased by him in respect of the price repaid by him.(8) Section 72 entitles the mortgagee in possession to hold the property charged against payment of sums expended on the objects therein specified, and similarly section 73 enables the mortgagee to have a charge on the surplus of revenue-sale, while section 95 enables a co-mortgagor redeeming the entire property to have a charge on the share of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining posession.(9)

(1) Statutory charges.

1971. Equitable Charges.—Cases out of salvage-liens stands on the same footing. According to Roman law a *negotiorum gestor*, or person who volunteered to render some necessary service to property in the absence of its owner, had a claim to be compensated by the owner for the trouble he had taken, and the owner had also a claim for any loss which had resulted from the interference of the *negotiorum gestor*. Of a similar character are the rights given by English law to the salvors of ships in distress and recaptors of ships which have been made prize by the enemy, and to those who have supplied necessaries to persons who being lunatics or in a state of drunkenness were incapable of entering into an agreement.(10) As

(2) Salvage liens.

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(1) *Anund Moye* v. *Grish Chunder*, I. L. R., 7 Cal., 772; following *Scott* v. *Jones*, 4 C. & F., 382; *Willamson* v. *Naylor*, 3 Y. &. C, Ex., 208; *Philips* v. *Philips*, 3 Hare, 281.

(2) *Nadir Hossein* v. *Baboo Pearoo*, 19 W. R., 255.

(3) Fisher, § 504.

(4) S. 39 Comm., *ante*; *Hemang Dasi* v. *Kedarnath*, I, L. R., 16 Cal., 758, P.C., *Golab Koonwur* v. *Collector of Benares*, 4 M. I.A., 246; *Muttusawmy* v. *Vencataswara*, 12 M.I.A., 203; *Kachekalyana* v. *Kachivijaya*, Ib., 495; *Matangini Dassee* v. *Chooneymoney Dassee*, I.L.R., 22 Cal., 903: *Sheonarain* v. *Chunni Lal*. I.L R., 23 All., 88.

(5) *Rosham Singh* v. *Balwani Singh*, I. L. R., 22 All, 191 (199), P. C; O A., from I.L. R., 18 All., 253, in which the High Court held that the right was not a charge within the meaning of this section.

(6) *Ameer Ammal* v. *Sankaranarayanan*, I.L.R., 25 Mad., 658.

(7) See s. 55, cls. 4 & 6, Comm.

(8) S. 55 (6) (*b*) *ante*.

(9) S. 95,

(10) Holland's Jurisprudence (7th Ed.), p. 220. ["A contract may be implied by law in many cases even where the other party protested against any contract. The law says he did contract because he ought to have done so"] *Per* Pollock, C.B., in *Gore* v. *Gibson*, 13 M. & W., 628.

Bentham observed: "A surgeon has bestowed his services upon a sick man who had lost his senses and who was not in a condition to ask for assistance. A depository, though not requested to do so, has employed his labour, or has made pecuniary advances for the preservation of a deposit. A man has exposed himself in a fire to save valuable property or to rescue persons in danger. The effects of a passenger have been thrown overboard to lighten the ship and to preserve the rest of the cargo. In all these cases and in a thousand others which might be cited, the law ought to ensure a recompense equivalent to the value of the services. This title to indemnity is founded upon the best of reasons. Grant it, and he by whom it is furnished will still be a gainer; refuse it, and you leave him who has done the service in a condition of loss. Such a regulation is less for the benefit of him who receives the compensation, than for the benefit of those who need the service. It is a promise of indemnity made beforehand to every man who may have the power of rendering a burdensome service, in order that a prudent regard to his own personal interest may not come into opposition with his benevolence.....Three precautions must be observed in arranging the interests of the two parties: *First* to prevent a hypocritical generosity from converting itself into tyranny, and exacting the price of a service which would not have been accepted had it not been supposed disinterested. *Secondly*, not to authorize a mercenary zeal to snatch rewards for services which the person obliged might have rendered himself, or have obtained elsewhere at a less cost. *Thirdly*, not to suffer a man to be overwhelmed by a crowd of helpers who cannot be fully indemnified without counterbalancing by an equivalent loss the whole advantage of the service.'(1) So also Lord St. Leonards in one case remarked: "In Ireland it is a very common equity to have, as a prior charge to all other incumbrances what is called salvage-money. Where a household estate or an estate held for lives to which half-a-dozen people are entitled in succession, many of them being mortgagees according to certain priorities, the last man of all who is entitled after everybody, being in possession redeems, I may say, the estate by paying the landlord who otherwise would have recovered the estate and taken it from everybody; and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because so far as any interest is left to anybody beyond the charge, it is acquired by that payment in the shape of redemption-money."(2) But the doctrine so stated has not been followed in the English cases.(3)

1972. The doctrine of salvage had no doubt its origin in maritime practice, which enjoins the navigators on the high seas to render to each other mutal help in distress. This practice, primarily owing its origin to sheer necessity—was in England enforced by a Statute (4) at the instance of Lord Kingsdown "in consequence of some case or cases which came within its cognizance while sitting in the Judicial Committee of the Privy Council, in which, after a collision one ship had sailed away and left the other to perish." (5) But although owing its origin to maritime custom, the doctrine has, on account of its utility, been generally extended. (6) And it now appears to be the law both in England and this country, that a person rendering necessary service to another has a right to be reimbursed by him, provided that his interference with the affairs

(1) Theory of Legislation, pp. 191, 192.
(2) In re *Tharp*, 2 Sm. & G., 578.
(3) See *infra*.
(4) 25 & 26 Vict., c. 63, s. 33.
(5) *Per* Sir Robert Phillimore in *The Hannibal* v. *The Queen*, L. R., 2 Adm., 53 (56); *Currie* v. *M. Knight*, [1897] A.C., 97.
(6) But see *per* Mahmud J., in *Seth Chitor Mal* v. *Shib Lal*, I.L.R., 14 All., 273 (305); *Rajah of Vizianagram* v. *Rojah Setrucherla* I.L.R. 26 Mad. 686 F.B.

of another has not been wholly officious or purely mercenary.(1) For such service, however, the party rendering service is entitled to no more than reimbursement. But there are cases where equity and public policy require that the person undergoing trouble and expense shall not only have a claim against the other, but that his claim shall be secured in some way, so as to afford him a measure of protection for the expense which he has undergone. In all such cases a charge is created by the operation of law. Thus it has been laid down that a person who pays the Government revenue, due on an estate in which he is interested, is entitled to hold it as a charge for its payment with interest,(2) though he could not recover the sum personally from the defaulter.(3) But it has been held in Calcutta that where one of two co-sharers in a revenue-paying estate pays the whole revenue in order to save, and so does save the estate, he is not entitled to a charge upon the share of the defaulting co-sharers(4) or a purchaser from him. This case has been approved in Allahabad where Edge, C. J., in delivering judgment of the Full Bench, held that there is no general principle of equity to the effect that whoever having an interest in an estate, makes a payment in order to save the estate, obtains a charge thereon, and, therefore, in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer.(5) But in this case the contrary view was maintained by Mahmud, J., who in his dissentient judgment, after reviewing the existing authorities, was of opinion, that although there was no statutory enactment providing a charge such as that claimed in the case, still the co-sharer was equitably entitled to a charge which could be enforced as provided in the present section.(6) And this view has since been followed by Sargent, C. J., in Bombay,(7) and in several cases decided in Madras.(8) But so far as regards Bombay the view taken by Sargeant, C. J., has since been dissented from by Jenkins, C.J., who preferred to follow the Full Bench decisions of the Calcutta and Allahabad High Courts.(9) In the view of the learned Chief Justice, unsolicited expenditure in respect of the property of another even if made for the purpose of its preservation gives no lien outside maritime law.(10) But there is no reason why it should not and the English law would in such cases presume a consideration executed upon request.(11) Moreover, maritime lien is but a branch

(1) See ss. 69 & 70 of the Indian Contract Act (IX of 1872); *Shriram Harbaiji*, 12 C. P. L.R., 4.

(2) *Nugender Chunder* v. *Sreemutty Kamini Dossee*, 11 M.I.A., 241 (258); *Lachman Singh* v. *Salig Ram*, I.L.R., 8 All., 384; *Puthenpurayil* v. *Mangalaseri*, I.L R., 36 Mad., 493.

(3) *Puthenpurayil* v. *Mangalaseri*, I. L. R. 36 Mad., 493.

(4) *Kinu Ram* v. *Mozaffer Hossein*, I. L. R., 14 Cal., 809, F. B. Contra *Parbhu* v. *Beni Singh*, 14 C. W. N., 361; 5 I. C. 779, in which charge was equitably allowed apart from the statute law. *Gopi Nath* v. *Ishur Chundra*, I. L. R., 22 Cal., 800 (decided with special reference to S. 174 of the Bengal Tenancy Act VIII of 1885); *Upendra* v. *Govindra*, I. L. R., 25 Cal., 565, charge was refused but personal liability decreed.

(5) *Seth Chitor Mal* v. *Shib Lal*, I. L. R., 14 All., 273, F. B.; of *Guda Kulita* v. *Joyram*, I. L. R., 23 Bom., 262, note; *Hiran* v. *Lakhan Singh*, 8 C. P. L. R., 42.

(6) *Per* Mahmud, J., in *Seth Chitor Mal* v. *Shib Lal*, I. L. R., 14 All, 273 (331).

(7) *Achat Ramchandra* v. *Hari*, I. L R., 11 Bom., 313, dissented from in *Shivrao* v. *Pundlik*, I. L. R., 26 Bom., 437 (440, 441).

(8) *Rajah of Vizianagram* v. *Rajah Setrucherla*, I. L. R. 26 Mad., 686, F. B; *Alaya Kammal* v. *Subbaraya*, I. L, R., 28 Mad, 493; *Vanmikalinga* v. *Chidambara*, I. L. R., 29 Mad., 37 (39); *Subramania* v. *Mahalingasami*, I. L. R. 33 Mad., 41; *Puthenpurayil* v. *Mangalaseri*, I. L. R., 36 Mad., 493.

(9) *Shivrao* v. *Pundlik*, I. L. R., 26 Bom., 437 (441); citing *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D., 234 (241).

(10) *Foster* v. *Ley*, 2 Bing. H. C., 269; *Brittain* v. *Lloyd*, 14 M. & W., 762.

(11) Story's Eq. Juris., §§ 1234, 1236; *The Peruvian Guano Co.*, v. *Dreyfus Brothers*, [1892] A. C., 166 (177); *Dakhina Mohan* v. *Saroda Mohan*, I. L. R., 21 Cal., 142 (149) P. C., in which payment of Government revenue by a person who turned out to be in wrongful possession was held to be a payment in the nature of salvage.

of the general law which says that the thing preserved shall bear the costs of its preservation.(1)

1973. So, in a case, a mortgage-decree was passed against two defendants mortgagors, *A*, *B*. In execution the property was ordered to be sold, but before the day fixed for the sale, one of the defendants *A* applied for and obtained permission to raise the amount by a private sale of the property, which he did by selling the whole of the property to *C*. The decree being thus satisfied, *C* now sued to eject *B*, who had not joined in the sale. So far as regards the sale by *A* the Court held that permission to sell under section 305 of the Code did not put him in a better position than he would have been in, had the sale been made by private auction, and that the result of the private sale was to leave *B's* share in the property intact, but since *A* had paid off the whole mortgage-debt with *C's* purchase-money he became entitled to a rateable contribution from his co-judgment-debtor, and he had a lien on *B's* property for the amount of his liability under the decree, and which passed to *C* as *B's* transferee which he was entitled to assert against payment of *B's* share of liability under the mortgage-decree.(2)

1974. So it has been held in England that where one person is the legal owner of the shares in a company and another is the beneficial owner thereof, the latter is bound to indemnify the former in respect of calls which he has been compelled to pay. It is no defence to say that they were not vendor and purchaser or that there was no contract between them, or that the latter did not constitute the former a trustee. (3) Even in Calcutta it is conceded that if the part-proprietor be also a mortgagee of a share of an estate, then he should be equitably entitled to a charge for the revenue paid by him. (4) But that appears to be the limit, for that Court has refused a charge for payment made by the assignee of a *mokurari* interest made by the mortgagor himself, though he was held entitled to a mere personal decree. (5) But money paid under the compulsion of law by one interested is held equitably entitled to a charge on the property. (6)

1975. Of course there can be no charge as there can be no claim for contribution in respect of illegal or void contracts (§1843). In a case, however, where in a conveyance found to be fraudulent and void under section 53 of this Act, a part of the consideration was found to be paid in discharge of a subsisting mortgage on the property purchased by the fraudulent transferee the Madras Court held that the sale not being void *ab initio* the transferee was entitled to a charge on the property to the amount of such consideration (7). But in such a case it is submitted *ex turpi* (8) *non oritur actio.* A transfer invalid for fraud (9) or non-registration (10) or non-compliance with the other formalities of law, *e.g.*, attestation does not germinte the equitable right when

(1) *Dinnappa* v. *Yamnappa*, I. L. R., 26 Bom., 379.

(2) *Hardoon* v. *Belilios*, [1901] A C., 118

(3) *Per* Fry, J., in *Leslie* v. *French*, 23 Ch. D, 552 (564); *Shivrao* v. *Pundlik*, I.L.R., 24 Bom, 437 (441).

(4) *Upendra* v. *Tara Prosanna*, I.L.R., 30 Cal, 794 following *Smith* v. *Dino Nath*, I.L R., 12 Cal., 213; *Raushan Lal* v. *Kali Mohan*, 4 C.L.J. 79.

(5) *Raushan Lal* v. *Kali Mohan*, 4 C.L.J., 79.

(6) *Jugdeo* v. *Rajah Singh*, I.L.R., 15 Cal., 656.

(7) *Palamali* v. *S.I. Export Co.*, I. L. R., 33 Mad., 334.

(8) *Jaladanki* (In re), 10 M.L.T., 183; 11 I. C., 868 (869); *Chidambaram* v. *Srinivasa*, I. L.R, 37 Mad., 227 P.C. in which however the question raised in the text was expressly reserved.

(9) *Royzuddi* v. *Kali Nath*, I.L.R., 33 Cal., 985 (995).

(10) *Ma LonMa.* v. *Mg. Shiva Byu*, 4 Bur. L.R. 115; 10 I.C. 919.

it has forfeited all right to legal assistance. Nor does the mere right to contribution imply a charge, for the right to contribution is a personal right leading to a personal remedy, and a charge is not incident to that right.(1)

1976. Similarly persons in fudiciary position possess liens in certain cases. For instance, the trustee possesses a lien on the trust-property for money spent by him in its preservation, (2) and the same principle obtains in the case of an agent who has made advances on property on account of his principal, though this right is modified into one of detinue under the Indian Contract Act. (3) Similarly receivers, managers, solicitors (4) and pleaders (5) possess a right of lien which is closely akin to a salvage-lien, and which is therefore confined to the realization of costs from a fund recovered by their exertions.(6) Such lien may be enforced against all persons irrespective of notice, except only a *bona fide* purchaser without notice. (7) The Shebait of a temple expending money from his own pocket for the benefit of the *debutter* estate has a charge on that property. (8) And so an executor or trustee carrying on the testator's trade with power to employ a specific portion of the trust-estate for the purpose, has the right to resort for his indemnity to the specific assets so directed to be employed, and the creditors of the trade are consequently entitled to the benefit of that right, and thus become creditors of the fund to which the executor of trustee has a right to resort. (9) Similarly a tenant-for-life of a lease-hold is on renewal by him entitled to a lien on the renewed lease, because the renewal would enure for the benefit of the remainderman. (10) And in some cases the right of a co-tenant to a lien on the share of the other co-tenant in respect of the renewal fee paid by him is conceded, (11) though these cases were held by Fry, J., to be insufficient to establish a general rule. (12)

(3) Liens of trustee and cestui que trust.

1977. But there can be no doubt that the equitable doctrine of lien is an elastic one, and the Courts have extended it even in favour of a licensee who has expended money in the *bona fide* belief that his occupation would not be disturbed.(13) And so Lindley, L.J., in one case, said: "If an owner of onerous property, agrees with me to indemnify me or my property from the burdens on the onerous property, and the owner makes default, and I or my property have to bear those burdens, I am inclined to think that I should have as against the owner of the onerous property a lien on it for the money expended by me in bearing that burden, which as between him and me he ought to bear. I should in the case supposed have preserved the onerous property for him, under circumstances which entitled me to do it at his expense; and I do not think that in

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(1) See *post*.
(2) Ss. 217, 221.
(3) *Ex parte Morrison*, L. R., 4 Q. B., 153 (156); *Bulley* v. *Bulley*, 8 Ch. D., 479; *Greer* v. *Young*, 24 Ch. D., 545 (*Per* Bowen, L J., at p. 556).
(4) *Subha Piai* v. *Ramasawmy*, 14 M.L.J., R., 274 (280); In re *Tyabji*, 7 Bom., L. R., 547; *Cullianji* v. *Raghowji*, I.L.R., 30 Bom., 57 (32).
(5) *Per* Turner, L.J., in *Ex parte Edmonds*, 4 De F. & J., 488; In re *Johnson*, 15 Ch. D., 548 (553).
(6) *Peary Mohan* v. *Narendra*, I L R., 32 Cal., 582 (601).
(7) *Haynes* v. *Cooper*, 33 Beav., 431.
(8) *Haynes* v. *Cooper*, 33 Beav., 431; *Dev Kabai* v. *Jefferson*, I.L R., 10 Bom., 248; *Khetter Kristo* v. *Kally Prosunno*, I.L R., 25 Cal., 887; In re *Tyabji*, 7 Bom., L.R., 547; *Cullianji* v. *Raghowji*, I.L.R., 30 Bom., 27 (32, 32.)
(9) *Jones* v. *Jones*, 5 Hare, 440 (465).
(10) *Swan* v. *Swan*, 8 Price, 518; *Hamilton* v. *Denny*, 1 B. & B. 199.
(11) In re *Leslie*, 23 Ch. D, 552 (564).
(12) *Plimmer* v. *Mayor of Wellington*, 9 App. Cas., 699 (714).
(13) *Strutt* v. *Tippett*, (1890) W.N., 23.

such a case, my sole remedy is by an action for damages against him; and the existence of such personal remedy would not, I think, exclude such lien."(1)

(4) Partner's lien.

1978. Where a partner lends money to another generally, and it is not entered in the partnership books, it is said he gains a special lien upon the share of the borrower, and shall be preferred to separate creditors, but the rule has no application after a bankruptcy, nor after the death of a partner, where his effects have become subject to the rule of distributing assets.(2) But no partner can acquire a lien by lending money to the other upon the partnership stock, though he may assert a lien on dissolution.(3)

(5) Subrogation.

1979. Allied to the doctrine of salvage-lien is the equitable principle of subrogation to which frequent references have been made in the preceding pages (§§1503, 1702—1705) and to which reference will become necessary for elucidation of the principle underlying the next section. There is a wide scope for the application of this doctrine, the essence of which is founded on the broad equity intelligible alike to the lawyer and the layman, that a person who pays money for another is as regards the debtor entitled to treat himself as the *alter ego* of him whom he has paid off, and as such he is entitled to avail himself of all his rights and remedies to the extent necessary for his own reimbursement. Subrogation is then the substitution of one creditor for another. It may be effected by direct assignment of the creditor's claim, in which case, the assignee acquires the legal right to his assignor's remedies and there is, ordinarily, no need for him to resort to subrogation, which only applies when he succeeds to the creditor's remedies without assignment. In this case, law recognizes several exceptions tending to shut out officious intermeddlers, for the first condition it imposes upon the acquisition of that right is that the payer must have some interest of his own to protect by the payment. Secondly the payment must have been legally due and recoverable and *thirdly*: it must have protected some right of the debtor equally with his own. These are the leading principles, and subject to them the payer is as against the debtor permitted to step into the shoes of payee. But the intervention of other equities might disentitle him to all the remedies to which he may have become entitled and law then gives him a charge on the property of which several instances will be found noted under another head.(4)

1980. Remedy of Charge-holder.—From the wording of the section it is clear that a charge-holder has the same rights and liabilities, so far as may be, as a mortgagee. Hence he must enforce his remedy subject to sections 85 and 99. Accordingly, if he obtains a money-decree he cannot bring to sale the property charged, but must institute a suit under section 67.(5) Of course the owner of the property cannot redeem his property in the same sense that he could redeem a mortgage, but if the charge is not recurrent or of a permanent nature, he can wipe it off by payment. In the latter case, too, he may resort to the provisions of section 57, and thus free his property from the burthen. Arrears of maintenance may, it has been settled, be recovered in execution when there is a precise direction in the decree to pay maintenance on certain dates,(6) and execution may be taken out against the property so charged.(7) But it would appear that were a decree

(1) *Ryall* v. *Rolle*, I Atk., 165 (184).
(2) *Ibid*, p. 184.
(3) *Kelly* v *Hutton*, L.R., 3 Ch., 703 (709), *Binney* v *Mutrie*, 12 App. Cas., 160 (165).
(4) S. 101 Comm.
(5) *Aubhoyessury* v. *Gouri Sunker*, I. L. R., 22 Cal., 859; *Matangini Dassee* v. *Chooneymoney Dassee*; *ib.*, 903.
(6) *Asutosh Banerjee* v. *Lukhimoni*, I. L. R., 19 Cal., 139, F. B.
(7) *Mans Deir* v. *Jewana Lal*, I. L. R., 19 Cal., 683, P. C.

after declaring the amount payable to the plaintiff in respect of future maintenance and that should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance a deed would be executed in favour of the plaintiff, charging such immoveable property, on her executing a release, of all her rights and interests in the general estate, distinguishing the above cases, Hill J., held that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution.(1) The questions upon the wording of the decree: If it merely declares a charge, but does not further order its realization by execution by the attachment and sale of the specified property, there can be no doubt that the property cannot be brought to sale in execution, and that a fresh suit must be instituted under section 67.(2) A proper decree should declare a charge and direct that in default of payment of the decretal amount, etc., the same shall immediately become due and realizable by execution by the attachment and sale of the properties set forth in the schedule. But there may be cases in which no relief can be given to the charge-holder in the same suit. For instance, where the purchaser of a part of the equity of redemption comes into Court seeking to redeem the whole mortgage, and pays into Court the entire amount due at the time upon that mortgage, the rights of a purchaser of another portion of the equity of redemption claiming only to redeem his proportionate share in the mortgage cannot be dealt with in that suit for upon payment by the plaintiff of the full amount due the mortgage had been ceased to exist. (3) Where the owner of the property fails to extinguish it by payment, the property must be put up for sale, and in which the charge-holder may obtain permission to bid, but which should not be given as a matter of course, but only when the property cannot be otherwise advantageously sold (4). A charge-holder cannot foreclose: his only right is to bring the property to sale,(5) unless that right is modified by a special Act, in which case the remedy provided by the special Act must be given effect to. (6)

Charge on debt.

1981. The holder of a charge on a debt due to his debtor by way of security for his own loan is a transferee of an actionable claim, and as such, entitled to recover the debt from the transferor's debtor. (7)

1982. Rights and Liabilities of Parties.—The rights and liabilities of the owner and charge-holder are declared in the section to correspond with those of mortgagor and mortgagee. In other words so far as regards the owner of the property, his rights would appear to be the same as those of a mortgagor. But as regards the charge-holder, he does not possess all the rights of a mortgagee, but only those of marshalling and contribution as defined in sections 81 and 82 and such other rights as are subservient to his right to bring the property to sale. Thus of sections 67 to 77 which deal with the rights and liabilities of a mortgagee,

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(1) *Matangini* v. *Chooneymoney*, I. L. R., 22 Cal., 903; following *Chundra Nath* v. *Burroda Shoondury*, I. L. R., 22 Cal., 831.

(2) *Aubhoyessury* v. *Gouri Sunker*, I. L. R., 22 Cal., 859 (863, 864); *Hemangini* v. *Kumode*, I. L. R., 26 Cal. 441.

(3) *Rugad Singh* v. *Satnarain*, I. L. R., 27 All., 178 (181) *cf. Gopi Narain* v. *Babu Bunsidhar*, (1905) 7 Bom. L. R., 427, P. C.

(4) *Per* Lord Hatherley, L. C., in *Tenant* v. *Trenchard*, L. R., 4 Ch., 537 (547).

(5) *Tennant* v. *Trenchard*, L. R., 4 Ch., 537; In re *Owen* (1894), 3 Ch., 220.

(6) *Horneey District Council* v. *Smith* (1897), 1 Ch., 843 (864)

(7) See S. 134 Comm *post*; *Muthu* v. *Venkatachallam*, I. L. R. 20 Mad. 35; *Rama samy* v. *Muthoo*, (1910) 7 M. L. T., 125; 5 I. C. 834; *Isri Prasad* v. *Rai Ganga*, 14 C. W. N., 165; *Ardesir* v. *Syed Sirdar Ali*, I. L. R., 33 All. 610; *Durham Brothers* v. *Robertson*, [1898] 1 Q. B., 765 (769).

only such sections are applicable as accelerate his remedy by sale. He cannot then avail himself of the provisions of section 68, for instance.(1) So in England it has been held that the owner of a rent-charge is not in the position of a mortgagee so as to be entitled to restrain waste by a tenant.(2) So a charge-holder cannot even insist that the property charge shall on no account be alienated free from his charge without shewing that the security for which the holder bargained would be taken away from him; and not merely that the property charged would be different.(3) So here the objects of a company comprised of the carrying on three distinct businesses, supplemental to one another, the Court refused at the instance of debenture-holders having a floating charge on the whole undertaking to restrain the sale of one business.(4) But a company with power to amalgamate with or sell its business and assets to another company of the same kind, was, in an action on behalf of holders of debentures charged on its assets, and maturing in case of a winding up restrained by an injunction from parting with its assets, after it had contracted to sell its business.(5)

Against whom is charge enforceable.

1983. This naturally leads to another question, against whom is a charge enforceable? It would seem that being a right *in rem* a charge should avail against all subsequent transferees with or without notice. And it has been so held in Allahabad.(6) But in England it is held to be inoperative against a subsequent *bona fide* purchaser without notice,(7) being operative only against a purchaser with notice or a volunteer with or without notice.(8) And this would also appears to be the law, accepted in several decided cases of this country, (9) though they are by no means unanimous, the contrary being also held in several cases. (10) But if the rights of the charge-holder are co-ordinate with those of a mortgagee as is enacted in the section, there appears to be no reason why they should not enure even against a subsequent purchaser without notice. It is otherwise difficult to see how the charge-holder's money "*secured*" on the owner's immoveable property can be said to be secure. However, where notice is material, it must, in order to affect third parties, be a notice of a valid charge. No notice of an invalid prior charge can affect a subsequent valid charge. (11) And since in order to be valid a charge must conform to the law of the country where the immoveable property to be affected is situate, it follows that if for want of registration, or any other defect the charge fails of its effect, it cannot be enforced against a subsequent transfer with notice. (12)

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(1) *Fotick Chunder* v. *Foley*, I. L. R., 15 Cal., 492 (495).

(2) *Sandemann* v. *Rushton*, 61 L J , 136.

(3) *Per* Cozens-Hardy, J., in In re *Vivian & Co.* [1900]. 2 Ch., 654.

(4) In re *Vivian & Co* , [1900] 2 Ch., 654.

(5) In re *Borax Co.*, [1899] 2 Ch., 130. C A. [1907] 1 Ch., 326.

(6) *Ahadi* v *Asaram*, I. L.R., 2 All., 162; *Maina* v. *Bachchi*, I. L.R., 28 All., 655 (658, 660).

(7) *Taylor* v. *Blakelock*, 32 Ch. D., 560 (569).

(8) *Per* Bowen, L J., in *Taylor* v. *Blakelock*, 32 Ch. D., 560 (569).

(9) *Churaman* v. *Balli*, I. L. R., 9 All., 591 (599); *Kishan Lal* v. *Ganga Ram*, I. L. R., 13 All., 28 (44); *Bheri Dorayya* v. *Maddipatu*, I.L. R., 3 Mad., 35; *Chatti* v. *Pandrangi*, I. L. R , 7 Mad., 23; *Akhoy Kumar* v. *Corporation*, 19 C. W. N. 37; 21 C. L. J. 177 (183); *Royzuddi* v. *Kali Nath*, I. L. R., 33 Cal. 985 (993); *contra* in *Ahadi* v. *Asaram*, I. L. R., 2 All., 162; *Maina* v. *Bachchi*, I. L. R., 28 All., 655 (659).

(10) *Abadi* v. *Asaram*, I. L. R. 2 All., 162; *Maina* v. *Bachchi*, I. L. R., 28 All., 655 (659); *Muthu Nadan* v. *Shunmoogatha*, 7 I. C. (Mad), 79 (80).

(11) *Martin* v. *Martin*, 2 R. & M., 507.

(12) *Norton* v. *Florence Land. &c., Co.*, 7 Ch. D., 332 (336); *Liverpool Marine Credit Co.* v. *Hunter*, L. R., 4 Eq., 62; C. A., L. R., Ch., 479.

1984. The limitation for suits to enforce payment of money charged upon immoveable property is twelve years, as provided in article 132, schedule II of the Limitation Act, [1] calculated from the time when the money sued for becomes due. An explanation appended to the article further provides that the allowance and fees respectively called *malikana* and *haqqs* shall, for the purpose of the clause, be deemed to be money charged upon immoveable property. While the co-mortgagor redeeming the entire mortgage, and so obtaining a charge may enforce it within twelve years, what is the limitation within which his other co-mortgagors may redeem? As against the mortgagee they have sixty years from the date of the mortgage, and, according to the view taken in Allahabad, this period should equally be allowed in a case where the party they redeem from is their co-mortgagor.[2] But this view has not been accepted in Bombay, where on redemption by one co-mortgagor, the relations of the parties undergo a charge, the mortgage being extinguished but a charge created in favour of the redeeming co-mortgagor which may be wiped off by the other co-mortgagors only within the period that his title does not become indefeasible by twelve years' adverse possession.[3] Hence when it is said, that the co-mortgagor acquires all the rights of the mortgagee the proposition implies that the rights are, as far as may be, co-extensive.[4]

Limitation.

1985. Rights of Trustees.—The proviso refers to section 32 of the Indian Trusts Act.[5] In other words, a trustee is not bound to enforce his charge under restraint of the section, but may reimburse himself in the manner provided by section 32 of the Trusts Act. That is, the trustee being entitled to a charge both upon the *corpus* as well as the income, is entitled to retain out of the income all expenses incurred in or about the execution of the trust. He is not bound to wait until the trust-estate has been turned into money but he has a right to come at any time and say, "I claim to have my right of indemnity. I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust-estate, and that gives me the right in equity to have a charge against the estate, and to have the charge enforced by the process of the Court of Equity." [6] In other words, the Courts may enforce the charge without bringing the property to sale. [7] So where the foreclosure or sale of the trust-estate would destroy the trust, the Court will prohibit any alienation of the property without previously discharging his lien. [8] It should be noted that the charge acquired by the trustee for his legitimate expenses is a *first* charge [9] obtaining priority of every other debt of the same class. Where trust money is laid out together with money advanced by the trustee himself in the purchase of land, the trust-estate is entitled to a first charge upon such land. [10] And if a person is trustee of different estates for the same *cestui que trust*, and he incurs expenditure on account of one estate for which he has no funds, he is entitled to repay himself the outlay out of funds belonging to any of the other estates. But, of course, he must not mix up claims under one instrument of trust with those under another. Nor is a trustee holding for different *cestui que trust*, though under the same instrument, entitled to indemnify himself from

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(1) Act XV of 1877; Now Act IX of 1908; *Rajah of Vizianagram* v. *Rajah Setrucherla*, I.L R.; 26 Mad. 686.

(2) *Ashfaq Ahmad* v. *Wazir Ali*, I. L. R., 11 All., 438.

(3) *Vithal* v. *Dinkar Rao*, 3 Bom. L. R., 685 (690).

(4) *Vithal* v. *Dinkar Rao*, 3 Bom. L. R., 685 (690); citing *Ramchandra* v. *Sadashiv*, I. L. R., 11 Bom., 422.

(5) Act II of 1882.

(6) *Per* Kay, J., in In re *Pumfrey*, 22 Ch. D., 255, 261, 262).

(7) *Ibid*, p. 262.

(8) *Darke* v. *Williamson*, 25 Beav., 622.

(9) S. 32, Act II of 1882.

(10) In re *Pumfrey*, 22 Ch. D., 255.

one estate for losses incurred in respect of another. And where a trustee mixes his own money with trust-funds so that it is impossible to make out how much was the trust-fund and how much was the trustee's money, the trustee can claim no right of indemnity.(1) So again there is no lien for expenses where the act done was in excess of the trustee's powers,(2) or the trust-deed is shown to be invalid,(3) or the appointment is defective.(4) But where the defect is only formal, the Courts allow his costs, charges and expenses notwithstanding the defect of title; and indeed where his conduct has been honest and straightforward, he may be allowed his costs out of the estate in any case.(5) Where a trustee under a *bona fide* mistake as to the effect of a will pays money to wrong parties, the Court will, in administering the estate, order a restitution and repayment, and will give a lien on the other interests of such parties under the will, even as against an assignee for valuable consideration.(6)

1986. Charges in other Acts.—The "charge" referred to in section 65 of the Bengal Tenancy Act(7) has been held to be not such a "charge" as is defined in the present section. Hence, it has been held that a landlord, who has obtained a decree for arrears of rent of an under-tenure, is not restricted by the provisions of the Bengal Tenancy Act to executing such decree in the first instance by sale of the under-tenures but is at liberty to execute it in the ordinary manner against the person or other property, whether moveable or immoveable, of his judgment-debtor.(8) So it has been held in Madras that in the absence of a contract or usage to the contrary *kattubadi* is not a charge on the land.(9)

But in the Central Provinces it has been maintained that the word "charge" as used in section 40 of the Central Provinces Tenancy Act,(10) and section 65 of the Central Provinces Land Revenue Act(11) imports the same thing as in the present section.(12) In short, while rent is not a charge on the land on which it is assessed, in view of the Calcutta and Madras Courts, it is so under the Land Acts in force in the Central Provinces. In England rent may be charged, but is not necessarily a charge on the land, but a sale may be directed even when there is no charge.(13)

1987. Charge on Moveables.—Although the section deals only with immoveable property, it is conceivable that a charge may also be created in respect of moveables. Thus, where a debtor agreed that his creditor should be first paid out of the realisations made on a decree obtained by the debtor

(1) In re *Pumfrey*, 22 Ch. D., 255 (260, 261).
(2) *Leedham* v. *Chawner*, 4 K. & J., 458.
(3) *Smith* v. *Dresser*, L. R., 1 Eq., 651; *Hoods* v. *Axton*, (1886) W.N., 207; *Ex parte Russell*, 19 Ch. D., 588 (602); *Dulton* v. *Thompson*, 23 Ch. D., 278.
(4) *Travis* v. *Illingsworth*, (1868) W. N., 206.
(5) *Everitt* v. *Everitt*, L.R., 10 Eq., 405, In re *Holden*, 20 Q. B. D., 43; *James* v. *Couchman*, 29 Ch. D, 212 (217).
(6) *Dibbs* v. *Goren*, 11 Beav., 483.
(7) Act VIII of 1885.
(8) *Fotick Chunder* v. *Foley*, I. L. R., 5 Cal., 492; dissented from in *Selh Ratan Lal* v *Rani Umed Kuar*, 11 C. P. L. R., 95; see *Tarini Prasad* v. *Narayan*, I. L. R., 17 Cal, 301; *Soshi Bhusan* v. *Gogan Chunder*, I.L.R., 22 Cal., 364; *Tajaluddi* v. *Mahr Ali*, I.L. R., 26 Cal., 78; *Sourendra Mohan* v. *Surnomoyi*, I.L R., 26 Cal., 103 (108); *Rajah Peary Mohan* v. *Ram Chunder*, 6 C. W. N., 88, notes.
(9) *Lingain* v. *Vikrama*, 10 M. L. J. R., 256; *Mullupadi* v. *Venkatanarasimha*, I.L.R., 19 Mad., 329; *Lakshminarayana* v. *Venkatarayanam*, I. L. R., 21 Mad., 116, F. B.; *Gajapati* v. *Suryanarayana*, I. L. R., 22 Mad., 11.
(10) Act IX of 1883; repealed, now see s. 43 of Act XI of 1898.
(11) Act XVIII of 1881.
(12) *Mangal* v. *Chandramal*, 1 Nag. L. R., 117; *Khemchand* v. *Dhanraj*, 16 C. P. L. R., 52; *Bhagwandas* v. *Tarachand*, 14 C. P.L. R., 95; *Bhao Pate* v. *Raja Raghoji*, 10 C.P. L.R., 48, dissented from.
(13) *Hambro* v. *Hambro*, [1894] 2 Ch., 564.

against a third party, it was held that the agreement constituted a valid charge on the funds realized under a decree, and that the fund having been distributed amongst several persons each was liable to replace it in proportion to the extent to which he intercepted it. (1) So "if *A* tells *B* that he expects that 10,000*l.* are coming to him on a given day, and agrees out of that to pay *B* 5,000*l.*, that is a good agreement to constitute a charge upon the fund." (2) But in order to create a valid charge the fund must be specified, (3) though it need not be definitely ascertained as to amount. (4) Indeed, a valid assignment may be made of a fund to be subsequently acquired, though its acquisition may depend on a contingency. (5) Nor it is necessary that the precise amount of the debt to be paid should be ascertained. (6)

Valuation of suits.

1988. The Court-fee payable in a suit to enforce a charge is the same as would be payable in a suit to enforce in a simple mortgage. For purposes of jurisdiction, however, the value of the subject-matter of the suit is when the property is in excess of the charge, the amount of the charge; when the charge is in excess of the property, the value of the property. (7)

Extinguishment of charges.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

1989. Analogous Law.—The principle here recognized and enacted so far as it is applicable only to mortgages and charges is of wider application, being applied not only to settle priorities between different incumbrancers, but also as regards the rights of the owners and persons entitled to successive or limited interest in properties and their representatives, and it would have been well if the section had been more generally worded somewhat on the following lines, and placed among the general sections of the Act immediately next after section 48, section 78 being also transposed as an exception to the general rule so enacted. As it is, section 78 must still be read as modifying the rule here enacted (§§ 1773—1793):

"A person entitled to an interest in immoveable property is, if so intended, entitled to treat it as distinct from any interest which he may subsequently acquire therein, and he may be presumed to have so treated it if it was to his advantage."

The Law Commissioners of 1879 thus reported on this section: "The section relating to the merger of charges is, in the opinion of Mr. Stokes and

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(1) *Palaniappa* v. *Lakshmanan*, I.L.R., 16 Mad., 429.

(2) *Per* Page Wood, V.C. in *Riccard* v. *Prichard*, 1 K. & J., 277 (279).

(3) *Watson* v. *Duke of Wellington*, 1 R. & My., 602 (605); *Percival* v. *Dunn*, 29 Ch. D., 129.

(4) *Pooley* v. *Goodwin*, 4 A. & E. 94; *Walker* v. *Rostron*, 9 M. & W., 411; *Riccard* v. *Prichard*, 1 K. & J., 277.

(5) *Rodick* v. *Gandel*, 1 De G.M. & G., 763.

(6) *Hutchison* v. *Heyworth*, 9 A. & E., 375.

(7) *Krishnama* v. *Srinivasa*, I.L.R., 4 Mad., 339; *Modhusudan* v. *Rakhal Chunder*, I L.R., 15 Cal., 104, *Daya Chand* v. *Bomchand*, I.L.R., 4 Bom. 515; *Durga Prosad* v. *Rochla Kuar*, I.L.R., 9 All., 140; *Dwarka Das* v. *Kameshar*, I L.R., 17 All., 69; *Mojiram* v. *Nandram*, 15 C.P.L.R., 161.

Sir Charles Turner, in exact accordance with the English and Indian decisions on the subject. Mr. West would substitute the following: 'The holder of one or two or more incumbrances may purchase another, or the property subject thereto, and hold the same with his original incumbrance as separate interests'."(1) The section may be said to be the expression of the maxim "*omne majus continct in se minus;* (2) and has, as such, a general application.(3) As such it applies to cases arising out of transactions to which the Act itself has no application.(4) Section 80 does not control the application of the principle laid down in this section.(5)

1990. The provisions of this section are of general application and do not conflict with the provisions of section 167 of the Bengal Tenancy Act. For while the object of the section is to preserve a certain right, that of section 167 of the Bengal Tenancy Act is to destroy or annul it under given circumstances. Thus, where the mortgagee of a property purchases it at a sale in execution of a rent-decree under section 165 of the Bengal Tenancy Act and takes out the balance of the surplus sale-proceeds and applies it *pro tanto* to the satisfaction of a mortgage-decree which he had obtained, the fact must be regarded as a sufficient indication to use those proceeds to satisfy *pro tanto* his lien on his property, and it is not necessary that he should have taken steps to annul the incumbrance under section 167 of the Bengal Tenancy Act. And the fact that his mortgage has been satisfied *pro tanto* is no reason why he should not proceed for the satisfaction of the balance of his decree against the other properties of the judgment-debtor where the nature of the mortgage allows of it.(6)

1991. In the case of a mortgagee purchasing an equity of redemption, Sir William Grant laid down the dictum (7) that one purchasing the equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice. In other words according to the ruling, a mortgagee purchasing the equity of redemption of the mortgagor, must forfeit his mortgage in favour of his new acquisition. This view was followed in a number of Indian cases,(8) while in others it was distinctly held to be inapplicable to this country, (10) until the Privy Council (9) set the controversy at rest by holding the English rule to be inapplicable to India, (11) where according to their Lordships in the interest of justice, equity and good

Previous Law.

(1) Report, dated 15th November, 1879, s. 35.

(2) "The greater always contains in itself the less;" *Gaya Prasad* v. *Salik Prasad*, I. L. R., 3 All, 682 (695), F. B. A similar rule is assumed in the maxim "*Nemo potest esse dominus et tenens.*" "The same person cannot be both the landlord and tenant at the same time"

(3) *Mastulla* v. *Jan Mamud*, I. L. R., 28 Cal., 12.

(4) *Vinayak* v. *Dhundiraj*, (1882) B. P. J., 351; *Bapu* v. *Mahadaji*, I. L. R., 18 Bom., 348; *Fakiraya* v. *Gadigaya*, I. L. R., 26 Bom., 88 (92).

(5) *Girdhar Das* v. *Ram Autar*, 8 C.W.N., 690.

(6) *Mastulla* v. *Jan Mahmud*, I.L.R., 28 Cal., 12 (16), dissenting from *Goluk Chunder* v. *Ram Sunker*, 4 C. W. N., 268.

(7) *Toulmin* v. *Steere*, 3 Mer., 210.

(8) *Toulmin* v. *Steere*. *ib.* followed in *Gaur Narayan* v. *Brajanath*. 5 B.L.R. 463; *Icharam* v. *Rartji*, 11 B. H. C. R., 41; *Shankar Lal* v. *Nanaik Chand*, (1885) A. W. N., 293. The view taken in *Baldeo Prasad* v. *Umai Shankar*, I.L.R., 32 All., 1 (2) that the section merely codifies the pre-existing law is, therefore, incorrect.

(9) Cases in which *Toulmin* v. *Steere* was not followed are *Ramu* v. *Subaraya*, 7 M.H. C.R., 229; *Gopee Bandhoo* v. *Kali Pudo*, 23 W.R., 338; *Apaji* v. *Raoji*, I. L. R., 6 Bom., 64; *Mulchand* v. *Lallui*, I.L.R., 6 Bom., 404, F.B.; *Santapa* v. *Balapa*, I. L. R., 6 Bom., 561.

(10) *Golakdas* v. *Puranmal*, (1884) I. L.R., 10 Cal., 1035, P. C.

(11) But the same tribunal held the doctrine applicable to a case under the Dutch Law—*Wilkinson* v. *Simson*, 2 Moo., P. C., 275.

conscience there applicable,—the question to ask is, what was the intention of the party paying off the charge? In this case the appellant Golakdas had obtained a money-decree against the respondent Puranmal, and in execution of which he attached and put to sale certain houses belonging to the latter, purchasing them himself. Subsequent to his purchase, Golakdas paid off the prior mortgage made by Puranmal to the Bank of Bombay. He was then sued by one Rambaksh, who was holding two mortgages posterior to the one already paid off by Golakdas. On the strength of his mortgages, the terms of one of which provided that the holder was to be put into possession of the property as soon as the prior mortgage in favour of the Bank of Bombay should be redeemed, the defence of Golakdas, *inter alia*, was that Rambaksh Sheochand could not claim possession of the property until he had repaid him, since he had, by paying the mortgage-debt due to the Bank, acquired the rights of the first mortgagee, as against a subsequent incumbrancer. The Privy Council held that as Golakdas had a right to extinguish the prior charge or to keep it alive, the question was what intention was to be ascribed to him; and that in the absence of evidence to the contrary the presumption was that he intended to keep it alive for his own benefit.(1) Where property is subject to a succession of mortgages and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course, according to the English practice to have it assigned to a trustee for his benefit, as against intermediate mortgagees, to whom he is not personally liable. But in India, a formal transfer for the purpose of a mortgage is never made, nor, is an intention to keep it alive ever formally expressed. "In India," their Lordships went on to observe, "the art of conveyancing has been and is of a very simple character. . . . . To apply to such a practice the doctrine of *Toulmin* v. *Steere*(2) seems to them likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense and to litigation. The obvious question to ask in the interest of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interests. . . . Their Lordships are of opinion that the Lower Courts in this case were wrong in holding that the appellant was in the same position as the mortgagor. They hold that the mortgage to the Bank was not extinguished, and that the appellant, the second defendant, has a good defence to the suit for possession of the three houses included in that mortgage."(3)

Doctrine of Toulmin v. Steere considered.

1992. It is needless to add that, so far as this country is concerned, this decision has finally set at rest the conflicting decisions previously given on the strength of the English cases. And even in England the ruling in *Toulmin* v. *Steere*(4) was but recently animadverted upon in a case,(5) the facts of which were also similar. Speaking of the leading precedent Herschell, L. C., said "That

(1) 3 Mer., 210.

(2) *Golakdas* v. *Puranmal*, I. L. R., 10 Cal., 1035 (1045, 1046), P. C.; To the same effect *Mohesh Lal* v. *Biwan Das*, I. L. R., 9 Cal. 961, P. C; *Dinobundhu* v. *Jogmaya*, I. L. R., 29 Cal., 154, P. C.; *Mahomed Ibrahim* v. *Ambika Pershad*, I.L.R., 39 Cal., 527 (554, 555), P. C.

(3) 3 Mer., 210.

(4) *Ib.*

(5) *Thorne* v. *Cann*, [1895] A. C. 11; but it has been followed more recently in *Manks* v. *Whiteley*, [1912] 1 Ch., 735 (744) which was, however, reversed O.A. though on other grounds in *Whiteley* v. *Detaney*, [1914] A.C. 132.

a case which certainly has not met with universal acceptance; it has been often commented upon and criticised adversely." Lord Watson also condemned it in similar terms. He said: "It seems clear that in such circumstances intention must prevail notwithstanding the very doubtful authority of the rules laid down in *Toulmin* v. *Steere*." So also observed Lord Macnaghten: "The authority of that case cannot nowadays be treated as going beyond the actual decision. . . . . Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."(1) So in another case(2) it was said: "In a Court of Equity it has always been held that the mere fact of a charge having been paid off, does not decide the question whether it is extinguished. If a charge is paid off, by a tenant-for-life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it."

English Law.

1993. The section here enacts a rule which though directly opposed to the rule enunciated in a leading precedent (3) often animadverted upon but still not yet overruled—, is otherwise on all fours with the modern English doctrine as understood since the passing of the Judicature Act, 1873, (4) prior to which the prevaling doctrine as understood at law often varied from the doctrine as administered in equity, so that there was frequently merger in law but not in equity and *vice versa*.(5) But now that the two are to be administered side by side since the passing of the Judicature

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(1) *Thorne* v. *Cann*, [1885] A. C., 11 (1819); followed in *Fakiraya* v. *Gadigaya*, I.L R., 26 Bom., 82 (92); *Liquidation Estates Purchase Co.* v. *Willoughby*, [1886] 1 Ch., 726, O. A. (reversed but on a different point); [1898] A.C., 321; see also *Liquidation, &c., Co.* v. *Willoughby*, [1896] 1 Ch., 726; *Adam* v. *Angell*, 5 Ch. D., 634; *Anderson* v. *Pignett*, 8 Ch., 180 (*per* Selborne L.C., p. 187); In re *Pride*; *Shackell* v. *Colnett*, [1891] 2 Ch., 132. [*Per* Sterling, J., "The presumption in either of these cases is that the intention is to keep the charge alive, because to keep it alive is for the benefit of person who pays it off, p. 142.]

(2) *Adams* v. *Angell*, 5 Ch. D., 645; In re *Wrexham Railway Co.*, [1899] 1 Ch., 440, Vaughan Williams, L.J., observed that some, though a very little evidence of intention must be given, but then he was not dealing with the presumption arising from benefit.

(3) *Toulmin* v. *Steere*, (1817) 3 Mer., 210; 36 E. R., 81, held inapplicable to India; *Gokul Das* v. *Ram Bux*, I.L.R.,10 Cal., 1035 P. C., reflected on in *Thorne* v. *Cann*, [1895] A. C., 11; doubted in *Liquidation Estate & Co* v. *Willoughby*, [1896], Ch. 726, but *contra* O.A [1898] A. C., 321; *held* applicable till overruled by the House of Lords. *Manks* v. *Whiteley*, [1912] 1 Ch. 735 (744) reversed (on other grounds) O. A.; *Whiteley* v. *Delaney*, [1914] A.C., 132, doubted In re *Cork Harbour Docks Co.*, 17 L. R. Ir., 515; Re *Howards Estate*, 29 L. R. Ir. 266. See Fisher's Mort. §§ 1526-1529.

(4) 36 & 37 Vict., C. 36, s. 25, sub-s. 4; *Snow* v. *Boycott*, [1892] 3 Ch., 110; *Ingle* v. *Vaughan Tenkris*, [1900] 2 Ch., 368.

(5) *Forbes* v. *Moffat*, 18 Ves., 384; *Bulkeley* v. *Hope*, 1 K. & J., 482.

Act, the doctrine as understood in equity is all that remains, and this doctrine is identical with the rule enunciated in this section. In English practice, merger is often obviated by reconveyance to a trustee.(1)

1994. Principle—This section enunciates the rule as to the merger of securities, which is that if two securities are vested in the same person, the inferior security merges into one of a higher nature. "At law," says Lewin, "merger is the necessary consequence of the union of two estates in the same person in the same right, but in equity, two estates without any intervening interest may meet in the same person in the same right without merger, and on the other hand, though the estates are separated by an intervening interest, merger may take effect. The principle by which the Court is guided is the *intention;* and in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates became vested."(2)

In its earlier part the section states the doctrine of merger, which is the *rule of law*, namely, that the lesser right is lost in the higher; in the latter part, it states the *rule of equity*, namely, that the right may be saved by an intention expressed or implied to the contrary. In other words, the earlier half of the section enacts the rule, while the latter clause states the exception. The presumption is then in favour of merger, and the contrary would have to be established as indicated in the section.

But for merger, the union of two interests in the same person would have led to endless complications, and but for the equitable rule enabling the person to keep alive the securities when, to his advantage, merger would have deprived him of his rights which, according to the doctrine, were intended to be only merged, but not annihilated.

1995. Meaning of Words—"*Or other incumbrance*:" such as a mortgage. "Incumbrance" is nowhere defined in the Act, but it is used in the section in a wider sense than "charge" "*Is absolutely entitled*:" *i.e*, acquires full ownership over the estate—but not necessarily free from all incumbrances. The term is the nearest equivalent to acquisition in England of a tenancy in fee-simple. "*Becomes.....entitled*:" *i.e.*, refers to a title acquired by operation of law, or by act of other persons, as by inheritance or under a gift. "*Shall be extinguished*:" Presumably this means that the incumbrance shall merge or coalesce but the term is scarcely accurate, for, strictly speaking, if the incumbrance is extinguished, so should also be the debt. "*Or such continuance*:" *i.e.*, where no intention has been declared or is implied, the test would be whether the continuance of the two securities would benefit the person in whom they become vested.

1996. Doctrine of Merger generally.—"Whenever a greater," says Blackstone, "and a less estate coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is sunk or drowned in the greater. So where a creditor takes from his debtor a security of a higher nature than that which he already possesses for his debt, for instance, if he takes a bond or a covenant or recovers judgment in respect of a simple contract debt, his remedies on the minor security or cause of action are merged by operation of law in

(1) Halsbury's Laws of England, Vol. 21. § 572. (2) On Trusts (9th Ed.), p. 819.

the higher remedy and are extinguished. But a deed or bond may be taken as a collateral security without affecting the original right of action if it appears that this was intended by the parties. (1) So again, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more since a man cannot, strictly speaking, be a landlord and his own tenant at the same time. But they must come to one and the same person in one and the same right, else if the freehold be in his own right and he has a term in right of another (*en auter droit*), there is no merger.(2) But even when they are held by the same person in the same right, the question of merger is governed in equity by the actual or presumed intention of parties. But this is one but by no means the only condition. Indeed the doctrine has no application unless the following conditions are fulfilled: (*a*) That the two securities should not be equal, but that one of them must be of a higher nature. Hence there can be no merger of a new mortgage when it is executed as security for the old debt and further advances. (*b*) The remedies on the two securities must be co-extensive.(3) "Therefore, if several be indebted on a joint and several note, and some only of them execute a mortgage, the liability on the note will not merge in the covenant in the mortgage."(4) (*c*) The securities must be vested in the same person. In the wording of the section *the owner of the charge* must become entitled to the property absolutely. "It is also necessary for merger that the debt comprised in each security should be the same. Therefore, a bond conditioned for the payment of sums already or thereafter to be advanced, will not destroy the remedy on simple contract for the existing balance of account,(5) nor, on the other hand, will the remedy for a debt of an indefinite amount be merged in a bond for a limited sum."(6) There can, of course, be no merger if the higher security be ineffectual. This section lays down the conditions in which the merger of securities may be prevented. If there can be no merger, then the rule does not apply. It only comes into play if but for its intervention there would be merger.

1997. Ordinarily, there will be no merger when the prior mortgagee acquires the equity of redemption, behind the back of a subsequent mortgagee, whether such acquisition be by purchase from the mortgagor, foreclosure or by his right of pre-emption,(7) because if his prior mortgager merged in the equity of redemption the subsequent mortgagee would compel him to redeem him and the prior mortgagee forfeit his priority which he would otherwise have over the puisne mortgagee and on the strength of which he could compel the former to redeem him. The half of certain land the whole of which was at the time under mortgage to Z was purchased by A who redeemed a prior mortgage over the said half in favour of X. Subsequently B obtained a decree for pre emption against A, Z having sued for possession as mortgagee, without, however, offering to redeem the prior mortgage in favour of X, it was held that inasmuch as, in the absence of evidence to the contrary, A when he redeemed the prior mortgage, must be presumed to have intended to keep it alive for his benefit and that B as pre-emptor from A was entitled to all the rights of the original purchaser, that therefore

(1) *Commissioner of Stamps* v. *Hope*, [1891] A.C., 476, P C.

(2) 2 Comm., p. 177; s. 111 (*d*) *post*.

(3) *Bell* v. *Banks*, 3 Man. & G., 258; *Chetwynd* v. *Allen*, [1899] 1 Ch., 353.

(4) Fisher, § 1556, citing *Twopenny* v. *Boys*, 3 B. & C., 208; *Ansell* v. *Baker*, 15 Q.B., 20; *Sharpe* v. *Gibbs*, 16 C.B, (N.S.), 627; *Boaler* v. *Mayor*, 19 C. B. .N S.), 76; explaining *Price* v. *Moulton*, 10 C.B., 561; *Bate, Exp.*, 3 Dea., 358; *Westmoreland, &c., Co.*, v. *Fieldon* [1891], 3 Ch., 15.

(5) *Holmes* v. *Bell*, 3 Mann. & G., 213.

(6) *Norfolk Ry. Co.* v. *M.Namara*, 3 Exch, 625; Fisher, § 1557.

(7) *Baldeo Prasad* v. *Umai Shankar*, I. L. R., 32 All., 1; *Mahalakshmammal* v. *Sriman Madhwa*, I.L.R., 35 Mad, 642.

B was entitled to use the said prior mortgage as a shield against the mortgage in favour of *Z*.(1) In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If an intention to keep alive a charge on property is inconsistent with the real intention of parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting, simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. Plaintiff, who held a mortgage of 8th January, 1884, over certain property purchased it by means of two sale-deeds, whereupon he was sued for pre-emption. He claimed the amount due on his mortgage which was by a mistake misdescribed in the sale deeds as dated the 11th January, 1894, the date being really the date of its registration, while the mistake in the year was purely clerical. Being challenged to prove it by the pre-emptor he led false evidence in support of the supposititious deed. He, however, disclosed the true facts, but when it was too late and the Court found his mortgage not proved. He then sued on foot of his mortgage claiming priority, but the Court held that there had been merger because when the sale was taken there was no claim against which the plaintiff could have intended to keep his mortgage alive(2) to which it might have been added that the second suit was *res judicata* by reason of the previous suit in which the claim subsequently made either was or might and ought to have been set up.(3)

Pre-requisites of the rule.

1998. The doctrine underlying this section is the doctrine of subrogation, about which something has been already said in the foregoing commentary (§§1503, 1702—1709). It was there stated that subrogation is either legal or conventional and that the rights acquired by the subrogatee are in either case the same. But the question of intention does not arise in a conventional subrogation, for which there is a contract, there is no room for implication of law. It is only when there is no assignment by the creditor of his right, that the question of the intention becomes material, and it is only then that the rule here enunciated becomes at all applicable.(4)

1999. In England a large number of cases have been decided on the question of merger of a charge when it is paid off by the owner of the estate of inheritance. Thus, the payment of a mortgage on the estate by a tenant in fee-simple, or in tail is presumed to be for the benefit of the inheritance, so that the charge is merged or extinguished.(5) But if a charge is paid off by a tenant-for-life,(6) or a lessee(7), there is no presumption in favour of merger, since having as he has only a scanty interest, there is reason to suppose that he will discharge a debt on another man's estate for no benefit of his own. But in the one case as in the other there is only a presumption which may be rebutted by evidence to the contrary.(8) But in the absence of such evidence the questions that arise

(1) *Thabar* v. *Singh Ram*, (1899) P. R. No. 67.

(2) *Jusal Kishore* v. *Ram Narain*, 9 A.L.J. 296; 13 I.C. 619.

(3) *Mahomed Ibrahim* v. *Ambica Prasad*, I.L.R., 39 Cal., 527 (552) P.C.

(4) *Gurdeo Singh* v. *Chandrakantha Singh*, 5 C.L.J., 611 (632).

(5) *Jones* v. *Morgan*, 1 Bro. C.C., 206.

(6) *Jones* v. *Morgan*, 1 Bro. C. & C., 206 (217); *Falkner* v. *Daniel*, 3 Hare, 199; *Jameson* v. *Stein*, 21 Beav., 5.

(7) *Lea* v. *Thursby*, [1904] 2 Ch., 57 (64).

(8) *Per* Lord Eldon in *Earl of Buckinghamshire* v. *Hobart*, 3 Swanst., 186 (199); *Drinkwater* v. *Coombe*, 2 S & St., 340 (345); *Adams* v. *Angell*, 5 Ch. D., 634 (645, 646); *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch., 726 (733).

are (*i*) were the two interests capable of merger? (§§1996—1998). (*ii*) If so, would their non-merger be to the acquirer's benefit? (§§2011, 2012), (*iii*) apart from known or presumed benefit, did he elect against merger? (§2009) (*a*) either expressly, (§2002) or (*b*) by necessary implication (§2006). Further questions that may arise in the same connexion are (*iv*) at what time must he elect (§§2009, 2010)? at the moment of possible merger, or at any time, even when an attack is made upon his interest? (§2010) and (*v*) exceptions; effect of fraud (§2025); mistake (§2024); and, novation (§§2014, 2015).

2000. Case of Merger.—It has been stated before that the question whether the earlier security merges in a later one is one of benefit and intention. The question is then essentially one of fact which must be decided with due regard to the circumstances at the time of the acceptance of the later security. *A* and *B* were two separated members of a family. *A* mortgaged his share in 1876 and *B* mortgaged his in 1881. In 1887 *A's* widow and *B* jointly executed another mortgage in renewal of those previously executed by *A* and *B*. No fresh consideration passed. The mortgagee's suit on the mortgage of 1887 was dismissed against *A's* widow on the ground that she was not bound by it, his claim against *B* being decreed but the mortgage-money remaining unpaid, the mortgagee sued *A's* widow on the earlier mortgage of *A's*, but the Court threw out his suit holding that the renewal was intended to supersede the earlier securities and that the mortgagee so treated them in his previous suit when he could have confined his suit to *B's* share of the mortgage declaring his intention to keep alive *A's* earlier mortgage of 1876. [1] The case where there was no intention as well as reason to prevent merger was the case [2] finally decided by the Privy Council, in which one Mangal had executed two mortgages, one in favour of one Lachmi Narayan in 1869, and another in favour of one Mahesh Lal in 1872. The first mortgage was executed by him when, as agent he was competent to charge the property, whilst the second mortgage, executed partly to pay off the first, was made when his agency had terminated, claiming to be the full owner of the property. But in a suit by the second mortgagee he was against the person who was ultimately declared to be the proprietor of the estate, the second mortgagee contended that since his mortgage was executed to provide fund for the payment of the first mortgage, he was entitled to fall back upon it, but the Privy Council, in holding that there was nothing in the bond or in the evidence, or even in the surrounding circumstances, to show that Mangal intended to keep Lachmi Narayan's mortgage alive, or that he or the plaintiff intended that the latter should hold that mortgage as an additional security for the loan, observed: "That the only benefit that the plaintiff could have derived from taking an assignment of Lachmi Narayan's mortgage of 1869 was that he might have the benefit of that security if it should turn out that Mangal was not the proprietor of the estates, as he represented himself to be, and, therefore, could not legally charge them. But such an event could not have been contemplated by the plaintiff. It is not probable that Mangal would have admitted his ability to bind the property by the deed of 1872, or would have consented to do anything which could raise a doubt as to his power to bind the property as a security for so much of the Rs. 20,000 as was in excess of the amount secured by Lachmi Narayan's mortgage. Even if he would have consented, it is not probable that the plaintiff would have advanced the full amount of Rs. 20,000 upon the security of the estates if he had any doubt as to Mangal's title or right to

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(1) *Sheoraj* v. *Harchandilal*, 11 A.L.J., 365.

(2) *Mohesh Lal* v. *Mohant Bawan Das*, (1888) I.L.R., 9 Cal., 961, P.C.

charge them." (1) In an Allahabad case this judgment of the Privy Council was thus observed upon: "It is obvious to us," the learned Judges remarked "that if there had been in that case an intermediate incumbrance, their Lordships would not have held that there must have been any such presumption, and that they would have held that there must, unless the contrary appeared, have been the opposite presumption. The judgment of their Lordships of the Privy Council in *Gokul Dass* v. *Ram Bux*(2) appears to place that question beyond doubt." (3) But it would be otherwise where the payer in ignorance of his rights has made no declaration, nor expressed an intention to keep his prior security alive. In such a case there will be no merger, as an intention to merge cannot be imputed to a man who is *ex hypothesi* ignorant of his rights.(4)

Merger where mortgagee is mortgagor's administrator.

2001. Another case of merger arises where the mortgagee takes out letters of administration to the estate of his mortgagor, and has assets which he may retain to pay himself since possession of assets amounts to payment, (5) and there can be no debt if the person who is to receive the money is also the person who ought to pay. But where the administrator is one of two or more mortgagees who are tenants in common all except the administrator may sue for their share of the debt.(6)

Interest index of intention.

2002. It is then settled that when the owner of an estate pays charges on the estate, which he is not personally liable to pay, the question whether these charges are to be considered as extinguished or as kept alive for his benefit, is simply a question of intention. The intention may be found in the deed or the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot. (7) So the section enacts in similar terms that a charge may be kept alive (*a*) if there is a declaration to that effect, or (*b*) if its subsistence would be for his benefit. In the absence of all evidence, however, there is a presumption in favour of continuance of a charge and not of merger.(8) The expression "charge or incumbrance" used in the section is wide enough to embrace all mortgages and charges whether created by contract or by operation of law. And since in point of priority both a charge and a mortgage stand on the same footing priority would be governed by its seniority in point of time and not superiority in point of interest. There is, again, no necessity to obtain an assignment of the prior mortgage, since the priority created by assignment would be one created by contract, while that conferred by this rule is a matter of law. (9)

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(1) *Mohesh Lal* v. *Mohant Bawan Das*, I. L. R., 9 Cal., 967 (976); followed in *Golakdas* v. *Puranmal*, I. L. R., 10 Cal., 1035, P.C.; *Dinobundhu* v. *Jogmaya*, I. L. R., 29 Cal., 154 (165), P. C.

(2) I. L. R., 10 Cal., 1035, P. C.

(3) *Tulsa* v. *Khub Chand*, I. L. R., 13 All., 581 (584).

(4) *Burrell* v. *Earl of Egrement*, 7 Beav., 205.

(5) S. 4 Probate & Administration Act (V of 1881); I Will. Executors 1058; *Wankford* v. *Wankford*, 1 Salk, 299 (305); *Hossaindra* v. *Rahimanessa* I.L.R. 38 Cal. 342 (347).

(6) *Ib.* p. 350.

(7) *Dinobundho* v. *Jogmaya*, I. L. R., 29 Cal., 154 (165), P. C.; *Girdhar* v. *Ram Autar*, 8 C. W. N., 690; *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch., 726 738; *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch., 652; *Lea* v. *Thursby*, [1904] 2 Ch., 57 (64).

(8) *Phillips* v. *Gutteridge*, 3 DeG. & J., 531; *Adams* v. *Angell*, 5 Ch. D., 634; *Tulsa* v. *Khubchand*, I. L. R., 13 All., 581; *Goluck Nath* v. *Prem Lall*, I. L. R., 3 Cal., 307; *Golakdas* v. *Puranmal*, I.L.R., 10 Cal., 1035, P. C.; *Gopal Chunder* v. *Herembo*, I. L. R., 16 Cal., 523, (529); *Dinabundho* v. *Joymaya*, I. L. R., 29 Cal., 154, P. C.; *Girdhar* v. *Ram Autar*, 8 C. W. N., 290; *Jagatdhar* v. *Brown*, 10 C. W. N., 1010 (1019).

(9) *Mahomed Ibrahim* v. *Ambika Pershad*, I. L. R., 39 Cal., 527 (553, 554), P. C.

It may be added that the doctrine is applicable not only to subsequent mortgagees but also to mere outsiders and strangers. (1) So where after the sale of a property in execution of a mortgage-decree a person advanced money on the mortgage of that property to enable the mortgagor to set aside such a sale under section 310A (now O. 21, r. 89) of the Code of Civil Procedure, he was held entitled to be subrogated to the rights of the prior mortgagee.(2) The soundness of this view was doubted in the second edition of this work, it being then stated that the mere payment by a stranger at the request of the mortgagor could not confer that privilege, though it would be otherwise if there is even some evidence evidencing an intention as between himself and the person at whose request he has paid off the debt that he should be treated as the transferee of the securities.(3) This view would appear to have been acceptable to the legislature, who have amended what is now O. 21, r. 89, by enacting that such payment can only be made by one who had acquired an interest in the property before the sale.(4)

2003. Express Declarations.—As regards express declarations, it is evident that if the intention is clear, the question of benefit would not at all arise. For a party is *prima facie* the best sponsor for himself, and all constructive canons must yield to an explicit declaration of intention. But when must the declaration be made? Need it be made at the time of payment, or it may be made at any time. Where the expression of intention is unequivocal and clear no evidence of contemporaneous acts and conduct can be admitted to vary its meaning or modify its terms. So if an intention to keep alive a charge is inconsistent with the terms of the deed, it cannot be implied merely because the assignee of the mortgage might, by keeping the charge alive, assert a doubtful claim against third parties; nor because he afterwards finds that it would have been better for him to have kept the charge alive.(5) But where the subsequent declaration is in continuation of the same transaction, it would be effective. So a recital in the subsequent security that it is given by way of further or additional security will exclude merger.(6) Similarly, a declaration in the original security that its terms shall continue during the subsistence of the debt may have the same effect. But it has been held that "even the express extinction of certain charges, and the conveyance of the estate subject to another charge, does not necessarily imply an intention not to extinguish the latter; as where the charge referred to was not capable of being extinguished at the date of the conveyance, the grantor being only contingently entitled thereto.(7) And where a person, whose title to a share in the equity of redemption as being disputed by a third party, paid off the mortgage *pendente lite* and took a reconveyance, the Court presumed an intention to keep alive the mortgage in favour of the person who paid it off." (8) Again, where the second mortgagee pays off the first mortgage without intending the latter to keep security alive, and without being aware of the plaintiff having purchased in execution the equity of redemption, it was held that the plaintiff must pay him

Exception 1.

(1) *Dino Bandho* v. *Nistarini*, 3 C. W. N., 153; *Amar Chandra* v. *Roy Goloke Chandra*, 4 C. W. N., 769; *Bikhu* v. *Shujat Ali*, I. L. R., 29 Cal., 25 (30).

(2) *Vanmikalinga* v. *Chidambara*, I. L. R., 29 Mad., 37; *contra Veeraghava* v. *Lakshmana*. 25 M.L J., 312; 18 I.C., 247.

(3) In re *Wrexham Railway*, [1899] 1 Ch., 440; *Jagatdhar* v. *Brown*, I. L. R., 33 Cal., 1133 (1154, 1155).

(4) Now so held in *Veeraragava* v. *Lakshmana*. 25 M.L.J., 312; 18 I.C. 247.

(5) *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch., 726 (734, 735).

(6) *Twopenny* v. *Young*, 3 B. & Cr., 208; *Ex parte Penal*, 2 M. D. & DeG., 273; *Lea* v. *Thursby*, [1904] 2 Ch., 57 (65).

(7) *Johnson* v. *Webster*, 4 DeG. M. & G., 474; followed in Re *Somerset*, 55 L. T., 753.

(8) Re *Pride*; *Shackell* v. *Colnett*, [1891] 2 Ch., 135; Fisher, § 1545.

on account of the first mortgage before he could obtain possession of the property "it being equitable that the plaintiff should give him credit for payment of the mortgage which he would otherwise have had to meet ?(1)

Equivocal declaration.

2004. As regards express declarations of intention nothing need be said save that in case of ambiguity the presumption will be made against merger. (2) Where a deed is drawn up as an independent deed without reference to the earlier security, the parties must be regarded as treating the new security as independent. (3) But a mere omission to connect the two securities would not make for merger where other facts point to a different intention. (4) If, moreover, there has been a variation in the rate of interest, it may be regarded as an additional circumstance favouring the same conclusion. (5) Where an equitable mortgage by deposit of deeds is followed by a formal assignment the equitable mortgage merges in the formal mortgage, unless it is kept alive by express mention in the deed (6) So a recital in the subsequent deed that it is given by way of further or additional security would clearly exclude merger. (7)

Revival of higher security.

2005. But even though the old security may have been discharged because a fresh security was taken, it would revive if the new security prove ineffectual or inoperative. (8) For example, when after the creation of an equitable mortgage by deposit of deeds, the mortgagor executes a formal mortgage or other document of charge, which for want of registration cannot be given in evidence, the invalid legal mortgage or document charging the land does not in such cases, destroy or impair the prior equitable charge. (9) Similarly, a *bona fide* mortgage does not become merged in a deed of sale by the mortgagor to the mortgagee, which is found to have been executed for the purpose of defrauding execution-creditors. (10)

2006. Notice immaterial.—Notice of an intermediate incumbrance does not affect the rule, (11) unless indeed the prior mortgagee has *contracted* to waive his priority or to pay off the subsequent incumbrancer. (12) Fraud may also vitiate a right otherwise good under the rule. (13)

Exception 2.

2007. Implied Intention.—Where, however, the words used are not sufficiently expressive of the intention, resort may be had to acts and the attendant circumstances as indicative of intention. It appears that here too the intention to keep alive or extinguish the security must be judged from the position of the parties at the time of the

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(1) *Lomba Gomaji* v. *Visvanath*, I. L. R., 18 Bom., 86 (91); following *Mahomed Shamsool* v. *Shewakram*, 14 B. L. R., 226, P. C.

(2) *Gopee Chunder* v. *Herembo*, I.L.R., 16 Cal., 523 (529).

(3) In re *Brettle*, 2 DeG. J. & S., 244 (248, 249); *Vaughan* v. *Venderstegen*, 2 Drew., 289.

(4) *Girdhar* v. *Ram Autar*, 8 C.W.N., 690 (695).

(5) *Per* Turner L.J., in In re *Brettle*, 2 De G. J. & S., 244 (248,249).

(6) *Vaughan* v. *Vanderstegen*, 2 Drew, 289 (292, 293).

(7) *Twopenny* v. *Young*, 3 B. & C., 208; *Commissioner of Stamp* v. *Hope*, [1891] A. C. 476. But see *Jivandas* v. *Framji*, 7 B.H.C. R., 45, which, however, referred to the state of law before the first Registration Act.

(8) *Kehoe* v. *Hales*, 5 Ir. Eq. R., 597: *Ex parte Harvey*, 1 Mont. & C., 261; *Ex parte Harris*, L R., 19 Eq., 253 (255).

(9) *Jivandas* v. *Framji*, 7 B.H.C.R. (O.C.) 45; *Jaitha Bhima* v. *Haji Abdul*, I.L.R., 10 Bom., 634 (644).

(10) *Choturam* v. *Dala*, (1880) B P.J., 215.

(11) *Gangadhara* v. *Sivarama*, I. L. R., 8 Mad., 246 (249).

(12) *Parry* v. *Wright*, 5 Russ., 142.

(13) *Worthington* v. *Morgan*, 16 Sim., 547

transaction,(1) and not before(2) or afterwards. For if the lesser right is originally given up it cannot be subsequently revived,(3) and it is with reference to this time that the words "of such continuance would be for his benefit" should be construed.(4) But a person's intention to prevent merger may also be gathered from his dealings with the property subsequently to the date of coalescence.(5) Thus where a lessee became temporarily entitled to the freehold, the Court considered the fact of the leasee having further charged the term on the date on which he obtained a conveyance of the reversion is sufficiently indicative of an intention of keeping the term subsisting especially when it was also for his benefit that the term should not merge upon the conveyance of the freehold reversion.(6) So where the plaintiff took on one and the same day a mortgage of the proprietary rights in a moiety of a certain village, and also a lease of the *Khudkast* of the same share there was held to be no merger of the tenant right thus acquired, but that on the mortgage being set aside the tenant right revived, having till then been suspended or dormant.(7)

Oral evidence admissible.

2008. Moreover, for the purpose of obtaining indication of intention it is allowable to refer to the contemporaneous correspondence(8) and parol evidence of conduct and dealings relating to the property is admissible to explain the intention.(9) Such evidence may be either direct or presumptive,(10) and a slight demonstration of intention is sufficient.(11) Thus if a person having paid off an existing first mortgage takes a fresh mortgage of the property, an intention to preserve the charge may well be inferred.(12) So the inclination of the puisne mortgagee to keep the charge alive may be inferred from the fact that the first mortgagee had agreed to execute an assignment of the mortgaged property, but which he afterwards refused to do.(13) But though a slight evidence is sufficient to prevent merger in the absence of all evidence, the presumption is in favour of merger(14) and in this respect the section follows the English law.

2009. Where a person is owner of an estate, and has a charge upon it, the presumption of merger arises upon his death.(15) So also will the presumption in favour of merger be strengthened though not concluded if the owner of property disposes of it by will, but makes no mention of the charge. But the omission may be explained by the fact that the omission was accidental so that the other charges to which the devise was subject were also not mentioned.(16) So also "if the owner mortgage the estate absolutely without noticing the charge, it will merge.(17) And a charge secured by a term has been held to merge,(18) contrary to the admitted intention of the owner, where he settled the estate, covenanting fully that it was free from incumbrances, even though he afterwards made a disposition by will, which showed that he considered it to be subsisting. A prior charge will not be held to subsist, as against a puisne incumbrancer

(1) *Tulsa* v. *Khub Chand*, I.L R., 13 All., 581 (584).
(2) *Tyrwhitt* v. *Tyrwhitt*, 32 Beav., 244; *Wilkes* v. *Collin*, L.R., 8 Eq., 338.
(3) Fisher, § 1538; *Harrison* v. *Round*, 2 DeG M. & G., 190; *Kirkham* v. *Smith*, 1 Ves., 257.
(4) *Shan Maun* v. *Madras Building Co.*, I. L R., 15 Mad., 268 (280).
(5) *Lea* v. *Thursby*, [1904] 2 Ch. 57 (65); *Tulsa* v. *Khub Chand*, I. L. R., 13 All., 581 (584)
(6) *Lea* v. *Thursby*, [1904] 2 Ch., 57 (65); see S. 111*(d)* Comm. *post*.
(7) *Vasli* v. *Durga*, 7 N. L. R. 154.
(8) *Adams* v. *Angell*, 5 Ch. D., 634.
(9) *Astley* v. *Miles*, 1 Sim., 298 (345); *Hood* v. *Phillips*, 3 Beav., 513.
(10) *Hood* v. *Phillips*, 3 Beav., 513.
(11) *Burrell* v. *Earl of Egremont*, 7 Beav., 205.
(12) *Phillips* v. *Gutteridge*, 4 DeG. & J. 531.
(13) *Banks* v. *Whitall*, 17 L. J. Ch. 352.
(14) *Bailey* v. *Richardson*, 9 Hare, 734.
(15) *Swinfeen* v. *Swinfen*, 29 Beav., 139.
(16) *Pitt* v. *Pitt*, 22 Beav., 294.
(17) *Tyler* v. *Lake*, 4 Sim., 351; and see *Otter* v. *Lord Vaux*, 6 DeG M. & G., 638; *Pltat* v. *Mendel*, 27 C. D., 246 (251).
(18) *Gower* v. *Gower*, 1 Cox., 53.

where the owner of it and of the estate in disposing of the latter by an instrument to which the puisne incumbrancer was not a party, has provided that the charge be not raised." (1)

In one case where a co-mortgagee had purchased property mortgaged to him jointly with others, on the principle that payment to one co-mortgagee is payment to all and discharges the debt,(2) it was held that the effect of purchase by the joint mortgagee was to extinguish the joint incumbrance.(3)

2010. Time for Election.—In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. (4) If an intention to keep alive the charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting, simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive.(5) Plaintiff held a mortgage dated 8th January 1884, over certain property which he purchased by means of a sale deed in which the date of his mortgage was wrongly given as the 11th January 1894, the mistake in the year being merely clerical, while the date 11th January was the date of its registration, and not execution. There was no mortgage in fact of that date. In a suit for pre-emption the pre-emptor pleaded that reference to the mortgage of the 11th January 1894 was to a fictitious deed intended to swell the price. The plaintiff gave false evidence in support of the alleged deed of that date, but he produced a copy of the true date when it was too late and the Court held the mortgage not proved. Pre-emption being decreed the plaintiff sued on his mortgage of 1884, but the Court held that the mortgage found non-existent at the date of the pre-emption suit could not be revived to remedy the error of the Court or a party.(6) In another case plaintiff held an equitable mortgage by deposit of title-deeds in 1895, which he sued on obtaining a decree on the 13th February 1900. In June 1899 the defendant took a mortgage of the equity of redemption subject to the plaintiff's mortgage and on which he obtained a decree on the 28th September 1900, brought the property to sale and purchased it himself subject to the plaintiff's first mortgage. On the 11th August 1903 plaintiff took another mortgage for the amount of his mortgage-decree and a further advance which had to compete for priority over the defendant's mortgage, and the Court allowed it priority dating from his equitable mortgage of 1895 in respect of the amount due thereon holding that neither the renewed mortgage nor the decree nor notice of the defendant's intermediate mortgage sufficed to deprive him of his priority which he retained in view of the second mortgage.(7)

2011. The rule that the mortgagee must elect once for all at the time he finds himself on cross-ways and that he cannot recall a lost opportunity underlay

(1) *Farrow* v. *Rees*, 4 Beav., 18; Fisher, §§ 1543, 1564.

(2) See ss. 38, 43, 44 and 45, Indian Contract Act; *Barbar Monn* v. *Ramana*, I.L.R., 20 Mad., 461; following *Wallace* v. *Kelsall*, 7 M. & W., 264: *Hemendro* v. *Rajendra*, I. L. R., 3 Cal., 353.

(3) *Bapu Singh* v. *Zain-ul-Abdin*, I. L. R, 9 All., 205.

(4) *Liquidation Estates Purchase Co.* v. *Willoughby*. [1898] A.C., 321 (339); *Gokul Das* v. *Ram Bux*, I.L.R. 10 Cal., 1035 P.C.; *Bhwan., Koer* v. *Mathura Prasad*, I. L R., 40 Cal., 89, P.C.: *Jugal Kishore* v. *Ram Narain*, I.L.R. 34 All, 268; *Vellapaddi* v. *Sriman*, (1912) M.W.N. 24; 11 I.C 865; *Mahalakshmimmal* v. *Sriman Madhwa*, I.L.R. 35 Mad. 642.

(5) *Jugal Kishore* v. *Ram Narain*, I.L.R. 34 All., 268.

(6) *Ibid.*

(7) *Vellapaddi* v. *Sriman*, (1912) M.W.N. 24; 11 I. C., 865.

the following case. *A* and *B* were two separated members of a family. They separately mortgaged their respective shares in 1876 and 1881. In 1887 the mortgagee obtained a renewed mortgage for the same consideration jointly from *B* and *A's* widow and which he put in suit. *A's* widow pleaded her non-liability and was discharged and the entire claim was decreed against *B*, whose share being found insufficient to satisfy the mortgage, the mortgagee sued *A's* widow on the basis of *A's* mortgage of 1876 ; but the Court threw out his suit holding that when *A's* widow repudiated her liability for the joint loan the mortgagee was put on election and he could have then withdrawn his claim against her on the joint mortgage continuing the suit only for *B's* share and as his conduct in the previous suit was inconsistent with the continuance of the security of 1876, he was not competent to fall back upon it.(1) Such was also held to be the case in another case in which the plaintiff who held a mortgage on the defendant's property purchased the equity of redemption in an auction sale brought about by another attaching creditor, whereupon he sued the defendant in ejectment claiming himself to have become the full owner, but his suit was dismissed in default. He then sued the defendant on the basis of his mortgage but the Court held that the plaintiff having elected to describe himself as owner in the previous case, must be deemed to have submitted to merger and as there was thus neither intention nor was it to his benefit to presume continuance of his mortgage, the merger which had once taken place could not be ignored to revive a right once legally extinguished.(2) Of course, the case would have been different if there had been another subsequent mortgage on the property at the date of the plaintiff's first suit when the continuance of the mortgage would have been presumed even though he had described himself as the "full owner" of the property in his suit against the mortgagor.(3)

2012. Where Continuance beneficial.—The third exception to merger is where the continuance of the charge is for the benefit of the owner. The question of benefit can only arise in a case where there are no express or implied declarations (§§ 2002, 2006), or they are equivocal. In either case, the rule depends upon the presumption that a man is deemed to intend what is for his benefit, and thus then even in this case the question again resolves itself into one of intention, (4) to infer which the law applies the obvious test of self-interest. In such a case the law imputes an intention from a motive which is the mainspring of human action. In doing so it eliminates the considerations of charity or philanthropy, as these are considerations which do not ordinarily move men to act, and the law therefore presumes the intention to be in accordance with one's real interest, whatever one may at the time have in fact intended. In other words whenever the Court has to presume an intention, it takes no heed of what might have been present in the mind of the person, but only considers whether the continuance of the charge would have been for his benefit at the time the payment was made. Hence, where the owner of five-sixths shares of the estate paid off the charge pending a suit to set aside the sale of one-sixth, it was presumed that the person paying off the charge intended to keep it alive as regards that one-sixth, because that was for his benefit as he could not be presumed to have meant to benefit the person who was seeking to impeach his title.(5) In the same way where a tenant-for-life pays off a charge on the property without

Exception 3.

(1) *Sheoraj* v. *Harchandilal*, 11 A.L.J., 865.
(2) *Baldeo Mahabir*, 18 I. C. All. 99.
(3) *Shankarv. Sadashiv*, 15 Bom. L. R. 817 ; 21 I. C. 39.
(4) *Thorne* v. *Cann*, [1895] A.C., 11 (19).
(5) In re *Pride*, (1891) 2 Ch., 135 (142).

expressly declaring his intention, the intention to keep the charge alive must be presumed.(1) But an intention to keep the mortgage alive cannot be inferred from the mere fact that it is paid off. Thus where the owner mortgaged the property to *C* on 10th June 1885, and in 1886 *A* purchased the same property in execution of his money-decree against the mortgagor, who, however, two years later in 1888 created a third mortgage in favour of *B*, who advanced him the necessary funds to pay off *C*, which the mortgagor did. *A* having then attempted to take possession was obstructed by *B*, a subsequent mortgagee, who however contended that inasmuch as he had advanced money to pay off *C*, he was entitled to hold *C's* mortgage as a shield against *C*, but it was held, having regard to the fact that *B* took no part in paying off *C*, that the receipt endorsed on the mortgage-deed was in favour of the mortgagor, together with the recital in *B's* mortgage-deed that *C's* mortgage had been paid off out of the money advanced by *B*, without any words showing an intention to keep it alive, indicated that the only object *B* had in view was to insure the property being cleared of *C's* mortgage, and that he could not therefore contend that he had kept it alive on his own account.(2) But in such a case if there had been an intermediate mortgage to be protected against, an intention to keep *C's* mortgage alive would have been presumed. So in England if the estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, in which case it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.(3) So a prior mortgagee having purchased the ultimate interest, may still use his mortgage as a shield against the claims of subsequent mortgagees. (4) So where the owner in 1870 mortgaged his property to *B*, and in 1876, *C*, a tenant of the land, obtained an injunction against the owner restraining him from interfering with his possession. A year later in 1877, *B* enforced his mortgage and in execution obtained possession of the property from the mortgagor, and thereupon *A* who was the assignee of both the owner and *B's* rights sued *C* in ejectment, contending that having taken an assignment of the mortgagee from *B*, he was not bound by the proceedings of 1876 between *C* and the owner, but the Court held that the fact that *A* having previously taken an assignment of *B's* mortgage, his subsequent purchase of the equity of redemption from the owner had the effect of extinguishing the mortgage, there being no circumstance from which an intention could be presumed to keep it alive, and that as a consequence *A's* rights were no higher than those of the owner of the property. (5) A coparcener sold his coparcenary interest to another coparcener, who paid a portion of the price in cash and for the rest promised to mortgage to the vendor some of the same properties which he had purchased from him, but before doing he executed a mortgage of the same properties in favour of a stranger who competed for priority against the coparcenary vendor whose mortgage ranked second in point of time, but the Court awarded him priority on the basis of his prior vendor's lien which it held had not been merged in the mortgage. (6) Similarly a landlord who in execution of his decree for arrears of

(1) *Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves., 227; *Drinkwater* v. *Combe*, 2 S. & S. 340.

(2) *Lomba* v. *Vishvanath*, I. L. R., 18 Bom., 86.

(3) *Golakdas* v. *Puranmal*, I.L.R., 10 Cal., 1035 (1045), P C., s. c., *sub nomine*; *Gokul Dass* v. *Ram Bux*, L.R., 11 I.A., 126.

(4) *Ramu* v. *Subaraya*, 7 M.H.C.R., 229; approved by P.C., in *Golakdas* v. *Puranmal*, I.L.R., 10 Cal., 1035 (1045), P.C.

(5) *Bapu* v. *Mahadaji*, I.L.R., 18 Bom., 348; following *Lomba* v. *Vishvanth*,, I.L.R., 18 Bom., 86.

(6) *Lakshmana* v. *Sankaramoorthy*, 18 I.C. (Mad.) 199.

rent purchases his tenant's property is entitled to keep alive his rent-charge against any incumbrances of his tenant which might otherwise be binding on him. (1)

2013. In another case there were two earlier mortgages, and, pending the attachment of the property in execution of a certain decree, a large sum of money was advanced by a subsequent mortgagee with which those two mortgages were paid off, and the property was reconveyed to the mortgagor, who handed over the reconveyance to the subsequent mortgagee. It was held that the old mortgages were intended to be kept alive for the benefit of the subsequent mortgagee, and that therefore an attachment of the properties, though prior in point of date to the subsequent mortgage, did not affect the interest of the subsequent mortgagee.(2) So in another case, the prior mortgagee obtained a decree on his mortgage without impleading the second mortgagee, and in execution himself purchased the property. He then sued the second mortgagee for possession and obtained it. The second mortgagee then sued him for redemption and recovered possession which he had lost by the decree of the prior mortgagee against him. The execution-purchaser of the equity of redemption from the mortgagor thereupon sued the second mortgagee for redemption of his mortgage without offering to redeem the first mortgage, and his suit was thrown out, the Court holding that since the second mortgagee was in possession, not only by virtue of his own mortgage but also because he had redeemed the prior mortgage, he (the second mortgagee) was entitled to step into the shoes of the first mortgagee and to hold up the amount due on that mortgage as a shield against any claim that might be brought against him for ousting him from possession of the mortgaged property, and that redemption could have been decreed only if the plaintiff had offered or consulted to redeem both the mortgages.(3)

2014. Purchase for Another.—Where the mortgagee is entitled to use a charge as a shield against a rival incumbrancer, it would seem to make no difference whether the mortgagee expends his own money in paying off a mortgage, or whether he acts simply as the banker of the mortgagor, (4) for in either case, it would appear, he is entitled to use that mortgage as a shield against a subsequent mortgagee if his intention was to keep the prior mortgage alive. "In a Court of Equity, "observed Jessel, M. R., "it has always been considered that the mere form in which a charge has been paid off does not decide the question whether it was intended to be kept alive or not." (5) Thus, in a case certain lands were mortgaged in 1876 to *A* and on 10th February 1877 to *B*, and two days afterwards to *C* : the last mentioned mortgage was effected to satisfy a decree obtained by *A* on his mortgage. In February 1882 *C* obtained a decree on his mortgage, which was discharged by sale of the land to *D*, who borrowed a part of the purchase-money from the plaintiff to whom he mortgaged it on the day of the sale. *B* subsequently obtained against *D* and the mortgagor's representative, a decree on his mortgage, which comprised a declaration that the sale of 1882 was subject to his lien, and brought the property to sale, and himself purchased it. The plaintiff now having sued on his mortgage, it was held that the plaintiff's mortgage was entitled to priority over the mortgage of 10th February 1877 to the extent to which the loan secured thereby had gone to

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(1) *Meherunnessa* v. *Sham*, 6 C. W. N. 834.

(2) *Dinobundhu* v. *Jogmaya*, I.L.R., 28 Cal., 154, P.C. ; *Girdhar* v. *Ram Autar*, 9 C. W.N., 690.

(3) *Kirat* v. *Debi Singh*, I.L R., 27 All., 308.

(4) *Seetaram* v. *Lachman*, 12 C.P.L.R., 10 (72).

(5) *Adams* v. *Angel*, 5 Ch. D. 634.

discharge the mortgage of 1876. (1) So in another case where the mortgagor borrowed money from the mortgagee a second time professedly to pay off his first mortgage, and the second mortgage-bond contained the following clause: "Now in order to liquidate the said debt, and on account of our necessity we three brothers do this day mortgage to you whatever right, title and interest we have in the said two premises and take the loan of Rs. 3,400; out of his money we have also to liquidate the said debt; therefore, for interest of the said money, we are paying at the rate of Re. 1-8 per month," —it was held that "looking at the construction of the deed of May 1884, we do not think the transaction amounted to payment of the original debt; but looking at what was done, fact and not to mere words we think that it was in reality a fresh advance upon fresh security being given for both the old debt and the fresh advance and upon a fresh arrangement being made as to interest, but that the old security for the old debt remained untouched." (2) Even if this were not so, and the old debt was paid by the new transaction the cases (3) show that, that would not necessarily destroy the security but that if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection. (4).

2015. Novation.—Closely connected with the doctrine of merger is the doctrine of novation, but from which it is easily distinguishable. For while in merger the lower security is extinguished in the higher, in novation there is only a renewal of the securities, the two securities being co-ordinate. A novation was classified in the civil law into cumulative and substitutionary, according as the new security preserved or extinguished the old security.(5) In a *novatio* with a *delegatio* the creditor accepts not only a new security but also accepts another person as his debtor in place of the original debtor.(6)

2016. The question what effect novation has on the prior contract depends upon the express terms of the deed, inference from conduct or the circumstances of the transaction. It is, however, clear that the creditor does not necessarily surrender his original mortgage by obtaining its renewal. As Lord St. Leonards observed: "Then another point was started that as the successive mortgages were from the sum secured by the former mortgages and for the sums subsequently advanced the old security were merged in the new, and that the judgment-creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deed. I have had considerable experience in this particular department of the law, and I never before heard of such a doctrine. It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether by taking a new security for their old debt, and for further advances

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(1) *Seetharama* v. *Venkata Krishna*, 1. L. R., 16 Mad, 94; see also *Rupabai* v. *Audimulam*, I.L.R., 11 Mad., 345.

(2) *Gopal Chunder* v. *Herembo Chunder*, I.L R., 16 Cal., 523 (529); followed in *Inderdawan* v *Govind Lall*, I.L.R ,23 Cal., 790 (793).

(3) *Phillips* v. *Gutteridge*, 3 De G. & J., 531; *Adams* v *Angell*, 5 Ch. D., 634; *Goluk Nath* v. *Lalla Premlal*, I.L.R., 3 Cal, 307; *Golakdas* v. *Puranmal*, I.L.R., 10 Cal. 1035, P.C.

(4) *Gopal Chunder* v. *Herembo Chunder*, I.L.R., 16 Cal., 523 (529).

(5) Dig. 46, 2, 1 pr. Abdy and Walker's Roman Law. pp. 473—476; Colquhoun Roman Law, ss. 1852—1855. But *Novotio* was at one time regarded as little distinguishable from merger. See Dig. 46, 2. 1, pr. Hunter's Rom, Law p. 629.

(6) Dig. 46, 2, 11 pr.

they do not prejudice their original securities." (1) The substitution of one security for another is really a mere change of the form of the evidence of the debt, and cannot satisfy a mortgage unless it is intended to have that effect. The charge created by the mortgage can only be destroyed by payment or discharge of the debt, or by a release of the mortgage.

Renewal of mortgage.

2017. It has been consequently held in several cases that the taking of a fresh bond for the consideration of the old bond and the accumulated interest has not the effect of extinguishing the first bond unless it was the intention of the parties.(2) And the fact that the creditor has chosen to put in suit the later bond does not alter the question (3) any more than that the prior mortgage has taken the form of a decree.(4) And similarly it has been held in Madras that where a mortgagee subsequently to the execution of the mortgage-deed, takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed.(5) And the result is the same even if the prior incumbrance had at the time taken the form of a decree.(6) The same view has been taken in Bombay (7) and Allahabad,(8) the later cases being also authorities for the proposition that a mortgagee purchasing the property does not thereby forfeit the benefit of his mortgage, but may still use it as a shield against the claims of subsequent mortgagees. But this he cannot do in every case without regard to the value of property purchased and the price paid for it. And accordingly it has been held by the Full Bench of the Allahabad High Court that where the mortgagee-purchaser subsequently sues upon his mortgage, he must bring into account the value of the property purchased by himself. (9) A person using the prior incumbrance as a shield, cannot however, resist the suit of the intermediate mortgagee for sale, in other words, he cannot have more rights than the prior incumbrancer who could not have resisted it. This view taken by Mahmud. J., (10) is opposed to that taken by Oldfield, J., but it was subsequently followed by the Full Bench of the same Court (11) and in other subsequent cases. (12)

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(1) 1 Jones and Lat., 717; cited with approval in *Golak Nath* v. *Lalla Prem Lal*, I. L.R., 3 Cal., 307 (310, 311); *Miln* v. *Walton*, 2 Y. & C. C. C., 354; To the same effect *Vellapadi* v. *Sriman*, (1912) M. W. N. 24; 11 I. C. 865.

(2) *Chujjo* v. *Joorawun*, [1852] S. D. A. N. W. P. 34; *Khyratee* v. *Chenro*, [1853] S. D. A. N. W. P., 726; *Kishoree* v. *Umrit*, (1856) S. D. A., 942; *Koondun* v. *Judoonath*, (1857) S. D. A., 1184; *Gopee Bundhoo* v. *Kaleepada*, 23 W.R., 238; *Lala Bansidhar* v. *Government*, 14 M. I. A., 86; *Golokenath* v. *Premlal*, I. L. R., 3 Cal., 307; *Gopal Chunder* v. *Herembo*, I. L. R., 16 Cal., 523; *Inderdawan* v. *Gobind*, *Lal*, I. L. R., 23 Cal., 590 (794); *Dullavdas* v. *Lakshmandas*, I. L. R., 10 Bom., 88; *Rupabai* v. *Audemulam*, I. L. R., 11 Mad., 345; *Seetharama* v. *Venkata Krishna*, I. L. R., 16 Mad., 94; *Alangaran* v. *Lakshmanan*, I. L. R., 20 Mad. 274; *Puranmal* v. *Venkata*, I. L. R., 20 Mad., 486; *Shankar Sarup* v. *Mejo Mal*, I. L. R., 23 All., 313 (323), P. C.

(3) *Shankar Sarup* v. *Mejo Mal*, I. L. R., 23 All., 313 (323), P.C.

(4) *Adams* v. *Angell*, 5 Ch.D., 645; *Puran mal* v. *Venkata*, I.L.R., 20 Mad., 486.

(5) *Alangaran* v. *Lakshman*, I.L.R., 20 Mad., 274.

(6) *Puranmal* v. *Venkata*, I.L.R., 20 Mad. 486.

(7) *Dullabhdas* v. *Lakshmandas*, I.L.R., 10 Bom. 88.

(8) *Ali Hasan* v. *Dhirja*, I.L.R., 4 All., 518; *Gaya Prasad* v. *Salik Prasad* I.L.R., 3 All., 682, F.B.; *Har Prasad* v. *Bhagwan Das*, I.L.R., 4 Cal., 196; *Sirbadh Rai* v. *Raghunath*, I.L.R., 7 All., 568; *Raghunath* v. *Jurawan*, I.L.R., 8 All., 103 F.B.

(9) *Nand Kishore* v. *Raja Hari Raj Singh*, I.L.R., 20 All., 23 (32).

(10) *Sirbadh Rai* v. *Raghunath*, I.L.R., 7 All., 568; *Janki Prasad* v. *Sri Matra*, I.L.R. 7 All., 577.

(11) *Raghunath* v. *Jurawan*, I.L.R., 8 All. 105 F.B.; *semble* in *Salig Ram* v. *Hari Charan Lal*, I.L.R., 12 All., 548; and see *Mata Din* v. *Kazim Husain*, I.L.R., 13 All., 432 F.B.; *Kali Charan* v. *Ahmad Shah*, I.L.R., 17 All., 48.

(12) See cases cited *supra*.

2018. In a case the Privy Council had to decide upon the following facts: The plaintiff-appellant had obtained two mortgages of the same property on the 4th May and the 3rd November 1883; the first mortgage was for Rs. 15,000, and the second mortgage for Rs. 20,000, which included the sum due on the previously executed mortgage. The first bond carried interest at 74 per cent. The security in the second bond was the same as in the bond for Rs. 15,000 besides certain additional shares for the first time hypothecated. Thus then, all the elements necessary to constitute a substitutionary novation were present except that the bond of May had not been superseded. But in competition with an intermediate mortgage executed on the 30th June 1883, the Privy Council allowed the plaintiff appellant to hold as a shield his mortgage of the 4th May, which was held to be subsisting hypothecation. "The appellants did not need to sue on the bond of May in order to obtain a sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply or to lead others to believe that they abandoned what apart from abandonment was a subsisting hypothecation."(1) It is then settled that a creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage or forfeit its priority by taking a subsequent mortgage, including the same lands with the other lands for the same debt.(2) The question is in every case the question of intention. If, for instance, the original deed remained with the creditor, it would be a clear indication of an intention to keep the security alive.(3) On the other hand the contrary would be presumed if on obtaining renewal of the security, the old deed is torn or cancelled and delivered up to the debtor. Nor does the fact that he had sued on the prior incumbrance and obtained a decree negative that intention;(4) unless satisfaction of the decree was certified to the Court, and afterwards a mortgagee taken for a balance of the old debt.(5) So any variation in the rate of interest by entering into fresh arrangement whereby it is agreed to be paid at an increased (6)or reduced rate(7) is not vital to the issue. So again the fact that the new security embraces other properties as well, or that it consolidates other debts, is equally inconclusive. *B* became surety under a bond to Government for the treasure of a collectorate. The Collector yearly examined the accounts and struck a balance which he certified to be correct. On such occasions *B* executed a new bond, but the old bonds were not cancelled or given up. On such enquiry, the treasurer was discovered to have embezzled moneys during each year. It was held that, on such discoveries being made, *B* was still liable under the old bonds, there having been no novation.(8) Where the creditor abandons his remedy and not his claim against the debtor there is no novation.(9) But while the addition of an obligee would not affect the question the substitution of a new obligee

(1) *Shankar Sarup* v. *Mejo Mal*, I.L.R., 23 All., 313 (323), P.C.

(2) *Goluk Nath* v. *Lalla Prem Lal*, I.L.R., 3 Cal., 307 (310, 311); following *Tenison* v. *Sweeney*, 1 Jo & Lat, 711; *Miln* v. *Walton*, 2 Y.C.C.C., 354, 361; *Dullabhdas* v. *Lakshmandas*, I.L.R., 10 Bom., 88; *Wasudev* v. *Narayan*, (1882) B.P.J. 21.

(3) *Gopee Bundhoo* v. *Kalee Pudo*, 23 W. R., 338; *Ram Gopal* v. *Blaquiere*, 1 B.L.R., (O.C.), 35; *Radha Gobind* v. *The Bank of Bengal*, 1 C.L.R., 565; *Weston* v. *Foster*, 2 Bing N.C., 693.

(4) *Puranmal* v. *Venkata*, I.L.R., 20 Mad., 486.

(5) *Ramkrishna* v. *Chothmal*, I.L.R., 13 Bom., 348 (351).

(6) *Gopal Chunder* v. *Herembo*, I.L.R., 162 Cal., 523 (529).

(7) *Golucknath* v. *Lalla Prem Lal*, I.L.R., 3 Cal., 307; but Turner, L.J., in In re *Brettle*, 2 Dely J. & S., 244 (248, 269) regards the difference in the rate as one reason though not a conclusive one in favour of merger. (See this case discussed *post*.)

(8) *Lalla Bansidhar* v. *Government*, 14 M.I.A., 86; *contra* in *Homed Bux* v. *Bindrabun*, 2 N. W. P. H. C. R., 37, must be held to be no longer sound.

(9) *Chedambaram* v. *Muttuvira*, 7 M. H. C. R., 85 (95); O. A. *Chedambara* v. *Renjakrishna*, 13 B.L.R., 509, P.C.

may change the aspect of the case.(1) So where the parties have once treated the earlier security as defunct, neither of them can afterwards be allowed to set it up as still subsisting. (2)

2019. A mortgagee does not waive his security by taking a promissory note for the interest due to him, (3) and even endorsing satisfaction to that extent on the mortgage unless the rights of third parties acting on the belief that interest had been really paid would be thereby imperilled.(4) Moreover, if the creditor is shown to have taken the promissory note in satisfaction of what it was given for, it will have that effect independently of the intervention of an equity in favour of a third party.

A case of novation arose where subsequent to the execution of a bond, the parties agreed that the creditor shall recover its interest from the rents of certain tenants of the debtor, who agreed to the agreement, to which both they and the debtor were parties. It was held that the new contract operated as a novation of the original contract which was thereby modified. (5)

2020. Judgment on later Security no Bar.—The fact that a decree was obtained on a later security does not operate to extinguish the earlier charge. The reason for this was made clear by Lord Ellenborough who said "I have always understood the principle of *transit in rem judicatum* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a cause of action judgment recovered in any form of action is still but a security for the original until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have."(6) So where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered, it was held to be no bar to an action of covenant against the three, unless the bill had been accepted in satisfaction of the entire obligation, or though not so intended, had in fact satisfied the joint obligation.(7) So the mere fact that a person obtains a money-decree would not suffice to extinguish the charge if he otherwise possessed it against the debtor,(8) though his omission to enforce it in his former suit may have imperilled his remedy.

2021. Limits of the Rule.—The rule here enacted only applies to a case where an incumbrancer acquires the equity of redemption, but it will not apply to the converse case of the owner of the equity of redemption acquiring an incumbrance. If such were the case the mortgagor could defeat all puisne

(1) Existence of another charge essential.

(1) *Badri Prasad* v. *Doulat Ram*, I.L.R., 3 All., 706 (709).

(2) *Cf Badri Prasad* v. *Daulat Ram*, I.L.R., 3 All., 706 (709)

(3) *Barret* v. *Wells*, Prec. Ch., 113; *Putti Narayanamurthi* v. *Marimuthu*, I.L.R., 26 Mad., 322; *Doraisami* v. *Lakshmanan*, 14 M.L.J., 285.

(4) *Barret* v. *Wells*, Prec. Ch., 131.

(5) *Ganga Prasad* v. *Chandrawati*, I. L. R., 7 All., 256; *Autu Singh* v. *Ajudhia*, I. L.R., 9 All., 244 (251).

(6) *Drake* v. *Mitchell*, 3 East, 251 (258, 259); *Vestry of Bermondsey*, v. *Ramsey*. L. R., 6 C. P., 247 (251); In re *Davison*, 13 Q.B.D., 50 (54); *Surji Ram* v. *Barhamdeo*, 2 C. L. J., 202 (214); *Bhawani Koer* v. *Mathura Prasad*, 7 C.L.J.; *Dhakeswab* v. *Haribat* 21 C. L. J., 104; *Kanhaya Lal* v. *Chhida Singh*, 7 A.L.J. 984; But in *Parsotam* v. *Patesri*, 11 A L.J. 241 (243); *Shadi Ram* v. *Het Ram*, *ib.*, 634, the mortgage was held to merge in the decree. But the finding must be taken in conjunction with the facts of those cases, since there was no occasion to lay down any general rule.

(7) *Draket* v. *Mitchell*, 3 East, 251 (259); *King* v. *Hoare* 13 M. & W., 494; *Vendall* v. *Hamilton*, 4 App. Cas., 504; *Cambefort* v. *Chapman*, 19 Q.B.D., 229. *Hoare* v. *Niblet* [1891] 1 Q.B., 781.

(8) *Ratan Lal* v. *Umed Kuar*, 11 C. P. L R., 95 (101).

mortgagees by redeeming the prior mortgage and so hold up that mortgage as a shield against all subsequent incumbrancers. So where one Het Ram had purchased the property in suit in 1883, subject to the two prior mortgages of 1880 and 1881 and the first mortgage being put in suit a decree was obtained in 1892 but it was never executed, but in 1896 by an arrangement with the mortgagor's heirs it was allotted to Het Ram who used it as a shield against the claim of the second mortgagee of 1881,(1) but his defence did not prevail though the reasons assigned for it were that Het Ram could not be regarded as the owner of the mortgage of 1880 by reason of his acquisition of a time-barred decree. In another case while the mortgagor's property was under attachment in execution of a money decree the mortgagee *A* took a mortgage and agreed to apply a portion of its consideration to discharge of the decree which he failed to do, and the property was sold, whereupon one *B* was induced by the mortgagor to take another mortgage and pay off the decree which he did under section 310 A of the Code of Civil Procedure, 1882. *B* claimed priority over *A's* mortgage *inter alia*, on the strength of this section and on the principle of salvage, but the Court held that neither claim could be sustained because, as to salvage the payment was voluntary and was not made to protect any antecedent interest of his own, and as to this section *B* could not claim priority as he had no earlier security which he could retain as a shield.(2)

(2) Stoppage of interest.

2022. The rule here enacted is necessarily subject to another qualification. For while a mortgagee enforcing his security against a subsequent mortgagee is ordinarily entitled to his interest, but a mortgagee who has acquired the equity of redemption from the mortgagor has then no right to claim interest from the subsequent mortgagee any more than he can claim it from the previous owner, the reason being that as regards the latter there is a merger of the mortgage and as regards the former he cannot obtain what he could not have obtained against the mortgagor. (3) But the subsequent mortgagee is not bound by any accounts taken behind his back between the prior mortgagee and the mortgagor. He is entitled to a fresh account of the mortgage-money due up to the date of his acquisition of the equity of redemption. (4)

(3) Merger against Revenue Sale.

2023. The rule, again, has no application to rights of persons unconnected with the mortgagor and mortgagee. Consequently, the fact that the acquisition of the equity of redemption by the mortgagee operates as merger of his own interest as mortgagee against the mortgagor renders him liable as from that date to pay the Government revenue. If, therefore, he fails to pay it when due and the property is sold and purchased by another, he cannot hold his prior mortgage as a shield against the auction-purchaser. (5) The Privy Council took this view in a case in which the mortgagee *A* had on the 19th March 1900, purchased the mortgaged property comprising four villages in execution of his own decree, nine days after which, *i.e.* on the 28th March 1900) the Government revenue on 71 of the villages including the four purchased by *A* fell due

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(1) *Shadi Ram* v. *Het Ram*, 11 A.L.J., 634.

(2) *Veeraraghava* v. *Lakshmana*, 25 M.L.J., 312; 18 I.C., 247; *contra Vanmikalinga* v. *Chedambara*, I L.R., 29 Mad. 37 is no longer law. See (§ 2002).

(3) S. 75; *Ibrahim* v. *Arumugathayee*, 16 I.C. (Mad.), 877.

(4) *Shankar* v. *Sadashiv*, 15 Bom. L.R., 817; 21 I.C., 39.

(5) *Bhawani Koer* v. *Mathura Prasad*, 7 C.L.J., 1; reversed O.A. in I.L.R., 40 Cal., 89, P.C.

and they were all notified for sale and sold to *B* who sued *A* for possession of the four villages which *A* resisted on the strength of his prior mortgage, which, though allowed by the High Court was disallowed by the Privy Council who said: "It was not within the legal right of the mortgagee on the one hand to claim as against the mortgagor that the ownership of the property had been transferred, and at the same time to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee, but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred is a conclusion not supported by good sense, and in the opinion of their Lordships, they are not forced to it by any canon or rule of law. In their Lordships' 'opinion' it is clearly unsafe to apply considerations as to the rights of prior and succeeding mortgagees to questions like the present. For in the present case, no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate on the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such."(1)

(4) Knowledge of another charge.

2024. Again, while a party paying off a prior mortgage has unquestionably the right to use that mortgage as a shield against a subsequent mortgagee, if his intention was to keep the prior mortgage alive(2) such an intention cannot be presumed where he was unaware of the intervening mortgages.(3) But the soundness of this view may be doubted. In the words of Lindley, L. J., "Where there was an unknown mesne incumbrancer who would be let in as a first incumbrancer, if Norton's (mesne incumbrancer's)charge were not treated as subsisting; it may be that .... it could not be so treated. But why? Because in that case, the purchaser would not have got what he bargained for, namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger in order to defeat the real intentions of the parties to it." (4) The Courts have on this ground prevented a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him. (5) Two mortgagees and the executors of the mortgagor joined in a mortgage for 1,200*l.*, part of which the deed stated was to be applied in paying off 400*l.*, due on one mortgage and 300*l.*, due on the other. The mortgage-debts were not assigned. The mortgagees and the executor assigned and confirmed to the new mortgagee the property which was leasehold and all their respective estates and interests therein. No intention to keep the mortgage alive was expressed and the form of the deed was rather against such an intention. But, though Knight Bruce, L. J., in his judgment said that the deed was so constructed as to render it possible that the payment to the original

(1) *Bhawani Kuar* v. *Mathura Prasad*, I.L.R. 40 Cal., 89, P.C.

(2) *Rupabai* v. *Audimulam*, I.L.R., 11 Mad., 345; *Gopal Chunder* v. *Herembo*, I.L.R., 16 Cal., 523 (529); *Seetaram* v. *Lachman*, 12 C.P.L.R., 70.

(3) *Madras Building Co.* v. *Rowlandson*, I. L. R., 13 Mad., 383 (389).

(4) *Per* Lindley, L. J., in *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch., 726 (735).

(5) *Phillips* v. *Gutteridge*, 4 De G. & J., 531; *Anderson* v. *Pignet*, L. R., 8 Ch., 180; *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch., 726 (735).

mortgagees extinguished the mortgage-debts as debts, the intention to preserve the priority of those debts over charges created by the will of the mortgagor was indubitable. (1) Now this conclusion was obviously nothing but the presumption of an intention from the fact that the existence of these mortgages was important to protect the new mortgagee against the charges created by the will. (2)

2025. Mistake, fraud and novation may disentitle a person to claim his priority. In a case the facts of which have been already set out elsewhere (3), the plaintiff, a second mortgagee, claimed priority over the defendant who had taken a subsequent mortgage to pay off the first mortgagee, but owing to the mortgagor's suppression of the plaintiff's mortgage, the deeds necessary to maintain the defendant's priority in respect of the payment made to redeem the first mortgage were not drawn up and the property was reconveyed free of the first mortgage to the mortgagor who mortgaged it to the defendant, and whereupon the plaintiff urged that the reconveyance to the mortgagor having extinguished the first charge he became entitled to priority over the defendant, but the Court held that since the assignment of the first mortgage to the defendant was not executed owing to the mistake or fraud of the mortgagor and inasmuch as the deeds were not then past rectification, the plaintiff could not deprive the defendant of his priority which he had obtained by paying off the prior mortgagee.(4) So where a person acts in ignorance of his rights, merger cannot be presumed. Thus, where a tenant-for-life of devised estates subject to a charge of 25,000*l.*, who was also residuary legatee of personal estate, paid off the charge out of the personal estate under the mistaken belief that he was, as residuary legatee liable to pay it, and did nothing to keep the charge on foot, it was held on his death, that the 25,000*l.* still subsisted as a charge on the settled estates for the benefit of his personal representatives.(5) So likewise where a tenant in tail paid off a charge under a mistaken belief that he was a tenant in fee-simple, it was held that there was no merger though the circumstances showed that the tenant intended to extinguish the charge.(6)

(5) Mistake.

2026. There can be no merger in favour of a person who acquires title by fraud, since fraud and negligence prevent the operation of merger. For though the principle is clear, it is necessarily subject to the important qualification that a mortgage will not be kept alive in aid of a fraud or wrong. A mortgage substantially satisfied may be kept alive in equity only when this is requisite to the advancement of justice, and it will never be allowed when the result will be from the form of law, to aid in the perpetuation of a fraud or injustice.(7) So while the object of a purchase by a mortgagee at a sale in execution of a decree upon his mortgage is to obtain the equity of redemption and thus become full owner of the property, it may sometimes be an advantage to him to preserve his mortgage-title so that he may not be defeated by an intermediate title which ought not justly to supersede on extinguishing his title. But it is obvious, that this is a rule which

(6) Fraud.

(1) *Phillips* v. *Gutteridge*, 4 DeG. & J., 531.

(2) *Per* Kay, L. J., in *Liquidation Estates Purchase Co.* v. *Willoughby*, (1896) 1 Ch., 726 (735).

(3) S. 78 Comm.

(4) *Whiteley* v. *Delaney*, [1914] A. C., 132; reversing O. A. *Manks* v. *Whiteley*, [1912] 1 Ch., 735.

(5) *Burrell* v. *Earl of Egremont*, 7 Beav., 205; *Connolly* v. *Barlet*, [1904] 1 Ir. R., 130.

(6) *Earl of Buckinghamshire* v. *Hobart*, 3 Swanst., 186; *Girdhar* v. *Ram Autar*, 8 C. W. N., 690.

(7) *Bhawani Koer* v. *Mathura Prasad*, 7 C. L. J., 1 (31, 32); *Surjiram* v. *Barhamdeo*, 2 C. L. J., 202 (214); *Choturam* v. *Dala*, (1880) B.P.J. 215 in which a mortgage held not merged in a sale executet to defeat an execution-creditor.

could not be enforced to the detriment of other interests equally entitled to protection, and where both interests are equally so entitled, negligence may be sufficient to displace one in favour of the other (§§1778—1785). Thus where on a sale of property it was agreed that the vendor shall take a mortgage of the property for a portion of the purchase-money, but the purchaser neglected to execute the mortgage, and before he was compelled to do so by a decree of the Court, he mortgaged the property to another person who did not investigate the title, nor made inquiries as to the title-deeds which the vendor had withheld, it was held that the prior incumbrance remained on foot for the benefit of the vendor. (1) So fraud may bring about merger even where it was not intended. Thus, for example, it has been held in a number of cases that purchase by the mortgagee of a portion of the property comprised in his mortgage at an under-value, under circumstances which shew that he had taken advantage of his position as mortgagee has the effect of extinguishing the security *pro tanto*. (2) But the mere fact that the mortgagee-purchaser has made profit by the purchaser does not warrant a presumption of undue influence. (3) But in Allahabad and Bombay the question has evidently nothing to do with fraud or undue advantage, for it is there held that purchase of the equity of redemption by the mortgagee is subject to its due proportion of the mortgage-debt; what that amount is being dependant upon the proportion of the value of the property purchased to the rest of the mortgaged properties. (4) At one time it was even said that the purchase by the mortgagee of any portion of the mortgaged property had the effect of extinguishing the whole mortgage. (5) But this was subsequently admitted to be a mistaken view. (6) But this question apart, the rule which subjects the mortgagee-purchaser to a reduction of his claim is rather a rule of contribution elsewhere propounded (7) than a rule of merger upon which the doctrine is sometimes said to rest. Where a mortgagee purchases the equity of redemption, and the sale is set aside as fraudulent, there is no merger of the mortgage and the mortgagee is entitled to fall back upon his mortgage. A judgment in a suit for setting aside an auction-sale to the mortgagee as fraudulent and for recovery of possession from the mortgagee-purchaser will not bar the latter from suing to recover the amount due under his hypothecation. (8)

(7) Remedies must be co-extensive.

2027. There can be no merger where the remedies in the two securities are not co-extensive. Thus, where the debtor executed a promissory note specially registered under a Bengal Act, (9) and on the due date of the note the creditor renewed it in consideration of the debtor securing the debt by an assignment by way of mortgage of his certain landed property, it was held that the creditor's summary remedy on the note was unaffected by the mortgage. (10)

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(1) *Worthington* v. *Morgan*, 16 Sim , 547.

(2) *Bisheshar Dial* v. *Ram Sarup*, I. L. R., 22 All., 284, F. B.; *Lakmidas* v. *Jamnadas*, I. L. R., 22 Bom., 364, F. B.; *Fakiraya* v. *Gadigaya*, I. L. R., 26 Bom., 88; *Sesha Ayyar* v. *Krishna Ayyangar*, I. L. R., 24 Mad., 96 (111, 112).

(3) *Sesha Ayyar* v. *Krishna Ayyangar*, I. L. R., 24 Mad., 96 (100, 113).

(4) *Bisheshar Dial* v. *Ram Sarup*, I. L. R., 22 All., 284 (290), F. B.; *Lakmidas* v. *Jamnadas*, I. L. R., 22 Bom., 364, F. B.; but see *Fakiraya* v. *Gadigaya*, I. L. R., 26 Bom., 88 (92).

(5) *Sumera* v. *Bhagwant*, (1885) A. W. N., 1; *Chunna Lal* v. *Anandi Lal*, I. L. R., 19 All., 196; *Nandikishore* v. *Raja Hariraj Singh*, I. L. R., 20 All., 23, explained *per* Banerji, J., in *Bisheshar Dial* v. *Ram Sarup*, I. L. R., 22 All., 284 (290, 291), F. B.

(6) *Bisheshar Dial* v. *Ram Sarup*, I. L. R., 22 All., 284 (290), F. B.; *Fakiraya* v. *Gadigaya*, I. L. R., 26 Bom., 88 (96).

(7) S. 82, *ante*.

(8) *Gurusami* v. *Kaveri*, 14 M. L. J. R., 485.

(9) S. 52, Beng. Act XX of 1866.

(10) *Ram Gopal* v. *Blaquiere*, 1 B.L.R., (O. C.) 35.

2028. Although the section is generally worded, it is obvious that a mortgagor paying off an incumbrance cannot set it up against a subsequent incumbrance of his own creation. He is by contract liable to discharge all incumbrances created by him, and he cannot therefore by paying off a mortgage stand in the mortgagee's place against other incumbrances.(1) And the same rule would appear to apply to the purchaser of the equity of redemption and his representatives, (2) the latter because they are presumed to have notice of the incumbrances, and the former because if he were permitted to hold up the prior incumbrance against the puisne incumbrancer the claim of the latter would be defeated.(3)

(8) Mortgagor excepted.

2029. Limitation.—Since the rule here enacted does not create any charge apart from that already existing, it follows that the charge-holder or incumbrancer will be entitled to no variation in the period of limitation allowed to him under the general law. Consequently, his suit will be limited by articles 132 or 135 of the Limitation Act calculated from the date of the accrual of the causes of action as therein specified,(4) *i.e.*, in the one case from the date the money sued for becomes due, and in the other case from when the mortgagee becomes entitled to take possession.

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Service or tender on or to agent.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

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(1) *Per* Chitty, J., in *Platt* v. *Mendel*, 27 Ch. D., 246 (251); *Maniappa* v. *Krishnappa*, I.L.R., 29 Mad., 113; *Ibrahim* v. *Armugathayee*, 16 I.C. (Mad.) 877.

(2) *Bissesswar* v. *Lala Sarnam Singh*, 6 C. L. J., 134; following *Rajaram* v. *Krishnasami*, I. L. R., 16 Mad., 301; *Hamilton* v. *Royse*, 2 Sch. & L., 315; *Roddy* v. *Williams*, 3 Jones and La Touche, 1.

(3) *Ib.*, pp. 138, 139.

(4) *Mahomed Ibrahim* v. *Ambika Pershad*, I.L.R., 39 Cal., 527 (558), P.C.

2030. Analogous Law.—This section generally follows the following provisions of the English Conveyancing Act [1] :—

> 67. (1) Any notice required or authorized by this Act to be served shall be in writing.
>
> (2) Any notice required or authorized by this Act to be served on lessee or mortgagor shall be sufficient although only addressed to the lessee or mortgagor by that designation without his name, or generally to the person interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.
>
> (3) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business, in the United Kingdom, of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or in case of a mining-lease, is left for the lessee at the office or counting-house of the mine.
>
> (4) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name at the aforesaid place of abode or business, office, or counting-house, and if the letter is not returned through the post office, undelivered ; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.
>
> (5) This section does not apply to notices served in the proceedings in the Court.

This section may also be compared with O. 3, r. 3 and O. 3, r. 6 of the Code of Civil Procedure, relating to the service of summons.

2031. Principle.—The reason for inserting this and the next section is thus explained by the Law Commissioners :—We all think that the bill should contain provisions as to serving notices and making or accepting tenders and deposits under this chapter, when the person concerned is non-resident, or unknown, or incompetent to contrast. These provisions are novel; but they are suggested by difficulties which have occurred in practice."[2]

2032. Meaning of Words.—"*District*" is nowhere defined in the Act. Probably it is intended to be used in the same sense as in section 2 (4) of the Civil Procedure Code, where it means " the local limits of the jurisidiction of a principal Civil Court of original jurisdiction and includes the local limits of the ordinary Civil Jurisdiction of a High Court." [3]

"*Service* or *tender* :" The General Clauses Act [4] thus defines the meaning of service by post : "Where any Act of Governor-General in Council or Regulation made after the commencement of this Act[5] authorizes or requires any document to be served by post, whether the expression "serve " or either of the expressions "give " or "send " or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time of which the letter would be delivered in the ordinary course of post."[6] It is, however, to be noted that the Act is not retrospective and would not, strictly

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(1) 44 & 45 Vict., c. 41.

(2) Report, dated 15th November 1879, p. 35.

(3) But this definition will not hold good in the case of Scheduled Districts--*Ram Ratan* v. *Lalta Prasad*, I. L. R., 17 All., 488.

(4) Act X of 1897.

(5) The Act came into force on the 11th March 1897, the day it was passed.

(6) S. 27.

speaking, regulate the section, there being no corresponding provision in the older Acts [1] which by the enactment of 1897 are wholly repealed.

"*Holding a general power of attorney*:" *i.e.*, he need not have been specially empowered to accept such service or tender.

"*Or duly authorized*:" *i.e.*, he need not be *generally* empowered.

"*Such Court shall direct*:" It is obligatory on the Court to order in what manner such notice shall be served. The Court on proper grounds shown may, it is conceived, order the *substituted service* of such notice as is provided in section 82 of the Code of Civil Procedure.

2033. Notice and Tenders.—This section may have to be resorted to whenever any notice or tender is to be made "under this chapter," *i.e.*, under the provisions of the chapter relating to mortgages of immoveable property and charges. Such a necessity may arise under sections 60, 69 (1) and (2), 73, 74, 79 and 83. Under the first paragraph the notice or tender may be served or made upon (*a*) the agent generally empowered, or (*b*) upon one specially empowered to accept such service or tender.

If such a person cannot be found in the district, or is unknown to the person desiring to serve the notice, such service may be effected under directions of the Court which could have taken cognizance of the suit for redemption. Under the second paragraph, the Court is only to direct the manner in which service of *notice* is to be effected. But if a tender has to be made, then the procedure prescribed in the third paragraph must be followed. Under this paragraph a deposit made into Court is deemed to be a sufficient tender of the amount, it being then the duty of the Court to inform the party concerned of it. [2]

Notice, etc., to or by person incompetent to contract.

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure [3] shall, so far as may be, apply to such application and to the parties thereto and the guardian thereunder.

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(1) General Clauses Acts (I of 1868 and I of 1887).

(2) See s. 83, *ante*.

(3) This reference to Ch. XXXI of Act X of 1877 should now be read as applying to O. 32—s. 158, Code of Civil Procedure (Act V of 1908).

2034. Analogous Law.—This section which is supplementary to the last section does not empower the Court to issue a notice, but it merely prescribes a procedure which it must observe in the service of a notice where it has otherwise power to issue it.

2035. Principles.—The section provides for the case of incompetent mortgagors or mortgagees who are empowered to act through their legal curators, and it provides that if a person is not represented by the legal curator, then the Court may, on the motion of the other party, appoint a guardian *ad litem* for the limited purpose set forth in the section, that is to say, to give or receive notice, or to make or receive tender or deposit of the mortgage-money or to do other acts germane thereto. The procedure laid down for the appointment of a guardian *ad litem* is prescribed in O. 32, rr. 1—16 of the Code of Civil Procedure. It is to be noted that the Court is empowered to appoint a guardian *ad litem*, only when "it is requisite or desirable *in the interests*" of the incompetent person, that is to say, when in the opinion of the Court it would be *for the benefit* of the incompetent person. In any other case, the Court may not act under the section, and then it would be necessary to institute *a suit*, for which the Court would have to appoint a guardian *ad litem* under the same chapter of the Code, after which the powers of the Court will be no longer circumscribed as when acting under the present section. The powers here conferred on the Court are primarily intended to notify a tender or deposit of the mortgage-money to the mortgagee. If the latter is a minor, it is the duty of the mortgagor to get the Court to appoint a guardian *ad litem* for him as a preliminary to proceedings under section 83.(1) It is apprehended that as a matter of judicial precaution the Court will, before appointing a guardian, under this section, adapt itself to the more general provisions of O. 32, r. 3 of the Code of Civil Procedure.

A legal curator may be appointed as provided in the Guardian and Wards Act, (2) or any other law expressly saved by section 3 thereof.

2036. Meaning of Words.—This section is ill-drafted. The section opens with "a notice is to be served *on or by*, but later on the words italicized seem to have been dropped out after "such notice may be served," after which they must be now understood, for otherwise, if literally construed, the section would be illogical as it would then read thus: "Where a notice may be served *on or by* . . . . . any person incompetent....such notice may be served...*by* the legal curator, &c.," "*or a tender or deposit made*:" The word "made" must be taken to refer to both "tender" and "deposit". "*Accepted*" refers only to "tender," and "*taken out*" can refer to nothing else but to the "deposit" made in Court.

"*Any person incompetent to contract*:" as a minor, an idiot or a lunatic or other persons labouring under a legal disability, as for example, a person who is under the management of the Court of Wards. Persons *competent* to contract are those enumerated in section 11 of the Indian Contract Act (§§ 277-290). Those excluded from the section are persons deemed incompetent to contract by themselves.

"*Chapter XXXI*" (now Order 32) relates to "suits by and against minors and persons of unsound mind." The chapter consists of rules 1 to 16 both inclusive.

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(1) *Shiva Nath* v. *Manohar*, 16 O. C. 261. (2) Act VIII of 1890.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself or in the Courts of Civil Judicature, subject to its superintendence, the provisions contained in this chapter.

Power to make rules.

2037. Analogous Law.—This section enables the High Courts to make supplementary rules to carry out the provisions of this chapter. The propriety of delegating to the High Courts the power of legislation may be questioned, but its legality is unquestionable. Indeed, some of the rules framed under this section have given rise to a lively controversy as to whether the High Courts have not gone beyond the terms of the section in framing some of the rules.(1) It has been held in Madras that the power to make rules here conferred must be read as subject to section 15 of the Charter Act,(2) which (subject to sanction of the Governor-General or of the Governor in Council) confers on the High Courts the power to make and issue general rules for regulating the practice and proceedings of all Courts subject to its appellate jurisdiction. The rules to be framed under this chapter would not be those by which the High Court would be itself guided in the exercise of its original jurisdiction, which is regulated partly by the rules of the old Courts of Equity in England, partly on the present practice of the Courts in England, and partly on its own rules and not by the provisions of this Act.(3) In cases decided under the last Code the Calcutta High Court held that its rules framed under this section had the effect of superseding Chapter XIX, and consequently there was no necessity of a notice as required in section 248. (4) Of course, now that the processual sections of the Act have been relegated to the Code of Civil Procedure, there will be no occasion for a similar conflict in future.(5)

2038. The power to make subsidiary rules of procedure is also conferred on the High Court by sections 121-131 of the Code of Civil Procedure, (6) and by the Royal Charter Act, 1861.(7) The powers here conferred have been held in Madras to be subject to section 15 of the Charter Act which provides that the High Court shall have power to make and issue general rules for regulating the practice and proceedings of all Courts which may be subject to its appellate jurisdiction, provided that the rules so made are not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction of the Governor-General in Council or of the Governor in Council of Madras or Bombay as the case may be.(8)

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(1) *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244 (273, 274). F. B. ; *Murlidhar* v. *Anand Rao*, I.L.R., 25 Bom., 418 ; *Kader Nath* v. *Kali Churn*, I. L. R., 25 Cal., 703, F.B.

(2) 24 & 25 Vict., c. 104.

(3) *Mackintosh* v. *Watkins*, 1 C.L.J., 31.

(4) *Keshab* v. *Rajendra*, 5 I.C. (Cal. 101).

(5) The following cases decided under the old Code have, therefore, ceased to have any practical value in view of the change in the law —*Alikunnissa* v. *Roop Lal*, I. L. R., 25 Cal. 133 ; *Kedarnath* v. *Kalichurn*, I. L. R., 25 Cal., 703, F.B.; *Hasen Ali* v. *Abdul*, 8 C.W.N. 102 ; *Shyam Kishen* v. *Sundur*, I. L. R , 31 Cal., 373 ; *Keshab* v. *Rajendra*, 5 I. C. 101 ; *Harish Chandra* v. *Jagabandhu*, 12 C. W. N. 283; *Bepin Behary* v. *Jotindra Nath*, 14 C.W. N. 1019 ; *Mallikarjunadu* v. *Lingamurti*, I.L. R., 25 Mad., 244, F. B.; *Murliahar* v. *Anand Rao*, I. L. R., 25 Bom., 418.

(6) Act V of 1908.

(7) 24 & 25 Vict., c. 104, s. 15.

(8) *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244 (271), F. B. ; *Queen* v *Meares*, 14 B. L. R.. 106 (112). Similar powers have been conferred by the Bengal Patent, 1865, s. 37 ; The Royal Charter Act, 1861 (24 & 25 Vict., c. 104), s. 15, generally empowers the High Courts to be constituted thereunder to frame rules of practice for subordinate Courts.

2039. Principle.—This section empowers the High Court to make rules for the efficient working of the provisions of the Chapter on Mortgages and Charges. The section is not directory and leaves the framing of rules entirely to the High Courts' discretion. In the absence of rules the procedure to be followed in carrying out the provisions of the chapter would be presumably that laid down in the Code of Civil Procedure, but only in so far as it is consistent with this Act. (1) Thus, for example, the procedure of the Code which allows the judgment-debtor to purchase back his property after sale under O. XXI, r. 89, has been held to be inapplicable to a sale ordered under section 89 under which the judgment-debtor is not entitled to redeem after the decree is made absolute against him.(2) As Maclean, C. J., in one case observed :—" Under section 89 of the Transfer of Property Act, if an order for an absolute sale be passed, the mortgagor's right to redeem and the security are extinguished, and the proceeds of sale are to be applied according to the provisions of section 88 of the same Act. Those are the mortgagee's rights under that Act. But if section 310-A (now O. XXI, r. 89) of the Code is to apply to such a case, the mortgagee's rights are materially affected as are those of the purchaser, since after the sale has been made, the mortgagor on certain terms, may yet redeem his property. In other words, the period for redemption is substantially extended." (3) It was also thrown out in the same case that if a High Court were to make a rule applying section 310-A of the Code to a sale made in execution of a mortgage-decree, it would be *ultra vires*, being as it would be, inconsistent with the provisions of this Act. But in this view the Calcutta High Court stood alone, for the contrary had been maintained by the other High Courts,(4) it being assumed in several cases that not only section 310-A but section 311 of the Code was applicable as well to sales of mortgaged property as to sales in execution of simple money-decrees.(5) And this is the view now enacted in O. XXI, rr. 89 and 90, of the present Civil Procedure Code. (6)

2040. In a recent case arising out of the construction of the fourth Rule (7) of the Calcutta High Court Circular Order No. 13, dated 27th April 1892, by which sections 304 to 309 were made applicable to proceedings subsequent to sale under a mortgage, it has been held that although section 588 which allows an appeal from orders passed under section 312 of the Code, was not incorporated as a rule, still the procedure in all cases being *mutatis mutandis* the same, as is prescribed in the Code, an appeal would lie in the same way as in the case of any other order made under that section.(8)

There is a considerable difference between a rule and an enactment, for while the Court may canvass the former and determine whether or not it

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(1) *Dakhina Mohan* v. *Srimati Basumati*, 4 C.W.N., 474; *Roja Ram Singhji* v. *Chunni Lal*, I.L.R., 19 All., 205 (208).

(2) *Kedar Noth* v. *Kali Churn*, I.L.R., 25 Cal., 703 (708), F.B.; overruling *Ashraf Ali* v. *Net Lal*, I.L.R., 23 Cal., 682; distinguished in *Dakhina Mohan* v. *Srimati Basumati*, 4 C.W.N., 474.

(3) *Kedar Nath* v. *Kali Churn*, I.L.R., 24 Cal., 703 (709), F.B.; *Nitya Nanda* v. *Hiralal*, 5 C.W.N., 63; but *contra* in *Dakhina Mohan* v. *Srimati Basumati*, 4 C.W.N. 474.

(4) *Tirumal* v. *Syed Dastaghiri*, I.L.R., 22 Mad., 286; *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244 (273, 274) F. B.; in which the scope of this section is discussed (see *ib.*, pp. 270-273); *Krishnaji* v. *Mahadev*, I.L.R., 25 Bom., 104; *Raja Ram Singhji* v. *Chunni Lal*, I.L.R., 19 All. 205.

(5) *Birj Mohan* v. *Rai Uma Nath*, I.L.R., 20 Cal., 8, P.C.; *Mahomed Meera* v. *Sorvisi*, I. L. R., 23 Mad., 227, P.C.; explained in *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244 (276), F.B.

(6) Act V of 1908.

(7) Printed under s. 89, *ante*.

(8) *Dakhina Mohan* v. *Srimati Basumati*, 4 C.W.N., 474; distinguishing *Kedar Nath* v. *Kali Churn*, I. L. R., 25 Cal., 703, F.B.

is within the power of those who made it, the Court cannot canvass in the same way the provisions of an Act. (1)

2041. Meaning of Words.—The term "*High Court*" is defined to mean the highest Civil Court of appeal in any place. (2) In the General Clauses Act of 1897, (3) the term is thus defined: "High Court, used with reference to Civil Proceedings, shall mean the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates." (4) Hence besides the Chartered High Courts, the Chief Courts of the Punjab and Lower Burmah, the Judicial Commissioner's Courts in the Central Provinces and Oudh are "High Court" within the meaning of the section and competent to make rule thereunder. "*May*:" *i.e.*, the section is enabling, and does not oblige the High Courts to frame rules pursuant to its provisions.

"*Consistent with this Act*:" *i.e.*, so far as the rules framed thereunder do not affect the procedure already prescribed to its provisions.

2042. Rules framed under s. 104.—With the exception of the High Courts of Calcutta(5) and Madras (6) which have framed or adopted the following rules, (7) the rest of the High Courts have not availed themselves of the powers conferred upon them by the section. All these rules were framed and have been adopted by the Calcutta High Court; and with the exception of rules numbered 12, 16, 17 and 18 enclosed within crotchets, the remaining rules have been also adopted by the Madras High Court.

2043 Calcutta Rules.—

Application under s. 83.

1. Every application under section 83 shall be made by a verified petition, stating the facts.

Payment into Court of costs and expenses under s. 83.

2. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under section 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under section 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered,

Cost to be estimated and certified.

such costs to be estimated and certified by the Taxing Officer.

Order for payment of money into Court under s. 83.

3. Every order for payment of money into Court, under section 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

Service of notice under s. 83.

4. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under section 83.

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(1) *Institute of Patent Agent* v. *Lockwood*, [1894] A. C., 347 (360).

(2) S. 2 (11), General Clauses Act (I of 1868).

(3) Act X of 1897.

(4) S. 3 (24).

(5) These rules were first published in the *Calcutta Gazette*, dated 6th August 1884.

(6) These rules were first published in the supplement to the *Fort St. George Gazette*, dated 16th June 1891, see p. 29.

(7) Printed *post*.

Of notice of payment under any subsequent section.

5. When money is paid into Court under section 86, or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Application for payment of money out of Court under s. 57 (c).*

6. Every application by a mortgagee to obtain payment of money out of Court shall be by a verified petition.

And, when made under section 83, it shall be shown whether the property has been transferred, and [where the applicant was in possession] possession delivered up, free from incumbrance, and whether the transfer has been registered. The documents of title which were held by the applicant, shall also be accounted for.

Or under s. 86 or s. 92.

Or, when made under section 86 or section 92, it shall be shown that the provisions of such section have been complied with.

To be on notice.

7. Every application under the last preceding rule shall be on notice to the person by whom, or on whose behalf, the money was paid, or to his attorney, unless the Court shall think fit to dispense with such notice.

Affidavit of service of notice or order.

8. Unless otherwise ordered, whenever any notice, or order, is served under the Act, or under these rules, an affidavit, or affirmation, in proof of such service, shall be filed as soon as possible thereafter.

Costs of mortgagee.

9. Where it shall appear that previous to any payment into Court under section 83, or any subsequent section a sufficient tender was made to, and refused by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Accountant-General and the Bank, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

Disallowances where tender refused.

When interest disallowed.

10. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under section 87, no interest shall be allowed for the enlarged time.

Order for payment of money out of Court under s. 83, or any subsequent section.

11. On an application for payment of money out of Court, under section 83, or any subsequent section, by a mortgagee, who has complied with the orders of the Court and the provisions of the Act and of these rules, so far as they relate to him, or apply to his case and has, when required so to do, transferred the property and possession, free from incumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

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* This is hardly the rule framed under the section which empowers the High Court to make no rules only for carrying out the provisions of Chapter IV, *which does not include* s. 57.

[12. Every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant (if the original mortgagor) shall personally (or if the representative in estate of the original mortgagor shall out of his estate) pay the amount of the deficiency.]

Decree for sale to provide for payment of amount of deficiency.

13. Every final order for foreclosure, under section 87 or section 93, shall direct that possession of the property be given to the mortgagee, except where he is already in possession. It shall also, at the option of the mortgagee, be drawn up with a recital of the decree and the proceedings had thereunder, and with a full description of the property, or without any such recital or description. (1)

Final foreclosure order, s. 87 or s. 93.

14. Where immovable property is sold under section 88, or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him, and may also, at his own costs, obtain a conveyance from the mortgagor.

Conveyance of property sold under s. 88 or any subsequent section.

15. Every enforceable order made under section 83, may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Order under s. 83 how enforced.

[16. Rules 45 and 46 of the rules of the 1st of August 1877 (Rules 431 and 432 Belchambers' R. and O., pp. 200, 201), relating to sales by the Registrar, are hereby repealed.]

Rules repealed.

From Rule 50 of the same rules shall be omitted the words "unless otherwise ordered the costs of such application in the case of a person under disability shall be part of the costs of the sale, and in other cases shall be borne and paid by the defaulting party."

Rules amended.

At the end of Rule 58 of the same rules shall be added the words "or the grant to him of a certificate of sale."

[17. Rules 387 to 449 (Belchambers' R. and O., pp. 189 to 205), relating to sales by the Registrar as modified by the last preceding rule, and so far as they are applicable, shall apply to all sales by the Court under sections 88 and 89 or 92 and 93.]

Rules relating to sales by Registrar to apply to sales under the Act.

[18. The money-rules 579 (*a*) to 641 (Belchambers' R. and O., pp. 240 to 253) shall also, so far as they are applicable, apply to the payment of money into Court, and out of Court, under these rules.

Money-rules to apply to payments under these rules.

19. The form set forth in the annexed schedule shall be followed with such variations as the circumstances of each case may require.

Form.

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(1) Designated an "order absolute" in s. 87.

2044. The following additional rules have also been made by the Calcutta High Court:—

"Every certificate or report of the Registrar or other referee stating what is due to the mortgagee in mortgage-suit, shall, on being confirmed by effluxion of time or otherwise, be submitted in open Court to a judge exercising original civil jurisdiction, in order that it may be countersigned by him, and the period for payment under sections 86, 88, or 92, of the Transfer of Property Act shall run from the date of such countersignature, which shall be deemed to be a declaration of the amount under the provisions of those sections. (1)

2045. The following Circular Order regulates the procedure of the Courts subject to the superintendence of the High Court (2):—

(1) An application under section 89 of the Transfer of Property Act shall be made by means of a verified petition stating the facts.

(2) If the Court passes an order directing that the property or any part of it shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamation regarding the sale of immovable property.

(3) Sections 286 to 294, both inclusive of the Code of Civil Procedure, shall apply to such sales.

(4) Sections 304 to 319, both inclusive and sections 328 to 335 of the Code of Civil Procedure, shall apply to proceedings subsequent to sale under a mortgage.

(5) The procedure to be followed in the execution of a decree passed under section 90 of the Transfer of Property Act is that prescribed by the Code of Civil Procedure.(3)

2046. Notice under s. 83 (4).—*In the High Court of Judicature at Fort William in Bengal, Ordinary Original Civil Jurisdiction.*

To *B*.

WHEREAS *A* has, under section 83 of the Act IV of 1882, deposited in Court Rs. 10,000 as the amount remaining due on the mortgage to you dated the day of 19 , (5) and Rs. 100 for the commission and charges of the Accountant-General and the Bank of Bengal, and Rs. 500 to provide for such necessary costs and expenses as you may incur [and whereas it is alleged that a sufficient tender was previously made to you]:—You are hereby informed that the Court, upon being satisfied that you have retransferred the property comprised in the said mortgage and [where *B* is in possession] delivered up possession thereof to the said *A*, and have also delivered up to the said *A*, or deposited in Court, or accounted for, all documents in your possession or power, or for which you are responsible, relating to the said property, the Court will make such order as to it shall seem fit for the payment to you of the said sum of Rs. 10,000 [less, where a tender was made the commission and charges of the Accountant-General and the Bank of Bengal] with all costs and expenses to which you may be entitled.

Dated this *day of* 19 .(6)

Registrar.

(1) *Calcutta Gazette*, 10th March 1886. Rule 555 of Belchambers' Rules and Orders has also been amended by the same Notification by substituting the words "the period allowed for payment by s. 86, 88 or 92 of the Transfer of Property Act (IV of 1882)" for the words "the date of the decree."

(2) *Calcutta Gazette*, 13th April 1892, p. 414.

(3) *Ibid.*, 13th April 1892 (Pt. I, p. 414), *Assam Gazette*, 16th April 1892 (Pt. III, p. 272).

(4) Also printed under s. 83.

(5) Altered from 188.

(6) See *supra*.

2047. Rules under s. 89.—The Calcutta High Court has also framed certain rules under section 89, and which will be found printed thereunder.

2048. Bombay High Court Rules.—Rules relating to the Civil jurisdiction of the Original Side in the High Court of Bombay. (1)

CHAPTER XXXI.

Application under s. 83.

582. Every application under s. 83 shall be made by a verified petition, stating the facts.

Payment into Court of costs and expenses under s. 83 or any subsequent section.

Cost to be estimated and certified.

583. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under section 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Court, and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under section 83, a further sum to provide for the mortgagee's cost of transferring the property and causing such transfer to be registered; such cost to be estimated and certified by the Taxing Officer.

Order for payment of money into Court under s. 83.

584. Every order for payment of money into Court, under section 83, shall specify the sums to be paid and the purpose for which each sum is intended.

Service of notice under s. 83.

585. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under section 83.

Of notice of payment under any subsequent section.

586. When money is paid into Court under section 86, or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

587. Every application by a mortgagee to obtain payment of money out of Court shall be by a verified petition.

Affidavit of service of notice, or order.

588. Unless otherwise ordered, whenever any notice or order is served under the Act or under these rules, an affidavit in proof of such service shall be filed as soon as possible thereafter.

Cost of mortgagee.

Disallowances where tender refused.

589. Where it shall appear that previous to any payment into Court under section 83, or any subsequent section, a sufficient tender was made to, and refused by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim without deduction of the fees and the charges of the Court, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

When interest disallowed.

590. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under section 87, no interest shall be allowed for the enlarged time.

(1) *Bombay Gazette*, 18th September 1891.

591. On an application for payment of money out of Court, under section 83, or any subsequent section by a mortgagee, who has complied with the orders of the Court and the provisions of the Act and of these rules, so far as they relate to him or apply to his case and has, when required so to do, transferred the property and possession free from encumbrance, and caused such transfer to be registered, and accounted, for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

Order for payment of money out of Court, under s. 83, or any subsequent section.

592. Every decree absolute for foreclosure under section 87 or section 93 shall direct that possession of the property be given to the mortgagee except where he is already in possession. It shall be drawn up with a recital of the decree and the proceedings had thereunder and with a full description of the property.

593. Where immovable property is sold under section 88, or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor.

Conveyance of property sold under s. 88 or any subsequent section.

Cost to be estimated and certified.

594. Every enforceable order made under section 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

595. Rules relating to sale by the Commissioner for taking accounts so far as they are applicable, shall apply to all sales by the Court under sections 88 and 89 or 92 and 93.

596. In this Chapter the Act means "The Transfer of Property Act, 1882," and the sections referred to are the sections of that Act.

2049. Madras High Court Rules.—Rules of the High Court of Judicature at Madras in its ordinary original jurisdiction which came into force on the 1st day of September 1902.(1)

ORDER XXIX.

MORTGAGES AND CHARGES.

A.—General.

374. Every plaint shall contain an allegation that the plaintiff has caused a search to be made in the office of the Registrar of Assurances of the district, or sub-district, in which the immovable property comprised in the mortgage, or subject to the charge sued on, is situate, for a period of not less than twelve years prior to the date of presentation of the plaint, and that he is not aware that any person other than the persons made parties to the suit, has any interests in the said property. The certificate of the Registrar of Assurances stating the result of the search shall be filed with the plaint.

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(1) *Fort St. George Gazette* Supplement, dated 16th June 1891.

The costs of making the search and filing the certificate shall be costs in the cause: Provided that a plaint which does not comply with the above provisions shall be returned for amendment under section 53 (*b*) (2) of the Civil Procedure Code and shall be rejected under section 54 (*d*) of the Code if it be not amended within the time fixed.

375. The plaint shall be in one of the forms, Nos. 47 to 50, inclusive, with such variations as circumstances may require.

376. Where there are several parties to a suit claiming successive charges or incumbrances on the mortgaged property, the Court shall determine their respective rights and priorities, and insert in its decree a declaration with respect thereto as in form No. 51.

377. In a suit for sale by a second or subsequent mortgagee, the plaintiff shall, in his plaint, aver that he is willing to redeem the prior mortgagee or mortgagees; and, unless the Court otherwise orders, the decree shall be drawn up in form No. 52 to form No. 55, and shall not be made subject to the claims or interests of the prior mortgagee or mortgagees.

378. The Court shall determine whether the defendant is responsible personally, and to any and what extent, for the repayment of the mortgage-moneys, and a declaration with respect thereto shall be inserted in the decree as in forms Nos. 57 and 58.

379. If, in any suit or matter, it is found necessary to take an account, an *interim* decree shall be drawn up in form No. 56, with such variation as circumstances may require.

380. A sale of mortgaged property shall be conducted in manner prescribed by Order XVIII: Provided that, if leave to bid is granted to the plaintiff or applicant, and unless the Court otherwise orders, the sum allowed to be bid shall be not less than the whole amount then due for principal, interest, and costs; and in the event of the property being sold in lots, not less than the market-value of each lot in respect of which the bid is made.

381. If a money-decree only is obtained, the decree shall not direct execution to issue against the mortgaged property.

2050. B.—Simple Mortgages and Charges. Suits for Sale.—

382. At the trial of the suit the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment, and shall determine the extent of the liability of the defendant therefor. A decree shall then be drawn up in form No. 57, and the case shall be ordered to be posted in Chambers on the first convenient day after the day limited for payment by the defendant.

383. On the adjourned day—

(1) If the defendant has paid the amount due under the decree into Court the Court may pass an order in form No. 59.

(2) If the defendant has made default in payment, the Court may, on the oral application of any party for the sale of the mortgaged property, pass an order for sale in form No. 60.

(3) If default being made by the defendant, the plaintiff does not appear and the defendant appears, or if neither party appears, the Court may adjourn the suit and direct that no order for sale shall be passed except on notice to the other party.

384. If an order for sale is passed on the application of the defendant the Court may direct that the defendant shall have the conduct for the sale and be entitled to the further costs of the proceedings.

385. If at any time it is made to appear to the Judge that the plaintiff or other party having the conduct of the sale, has failed to comply with any order of the Court or any of the provisions of these rules, or is not proceeding with due diligence, the Court may give the further conduct of the suit to any other party or may refuse to allow to the plaintiff or such other party any further costs of suit, or interest on the mortgage-moneys.

386. If the sale is confirmed, the Judge may pass an order in form No. 61 or 62.

387. (1) A person other than a party to the suit, who claims an interest in the mortgaged property (hereinafter called "the claimant"), may apply by summons in chambers to be made a party.

(2) If the Judge finds that the claimant has an interest in the mortgaged property, and should have been joined as a party to the suit (and the application is made before decree has been passed therein) the Judge may add the claimant as a party, and raise such further issues as may be necessary, or may grant leave to the plaintiff to withdraw from the suit or may dismiss the suit; but, if the application is made subsequently to the decree, the Judge may make such order as regards the application of the proceeds of any sale, or such other order as may seem fit.

(3) If the Judge finds that the claimant has not such an interest in the mortgaged property as entitles him to be joined as a party to the suit, he may pass an order that the sale of the mortgaged property is to be subject to the interest, if any, of the claimant, and in such case the proclamation of sale shall recite the said order, and the interest in the property claimed by him; or the Judge may dismiss the application, and make such order as to the costs thereof as he thinks fit.

2051. Suits for Redemption.

388. At the trial of the suit, the Court shall determine whether the plaintiff is entitled to redeem the mortgaged property, and, if possible, shall ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for redemption, and a decree shall then be drawn up in form No. 63, and the case ordered to be posted in chambers on the first convenient day after the day fixed for payment by the plaintiff.

389. If it is found necessary to take an account, an *interim* decree shall be drawn up in form No. 56; and at the adjourned hearing, the Court or a Judge may declare the amount due on taking the account, and, if the balance is found to be against the plaintiff, may appoint a day for payment by him, and declare the aggregate amount of principal, interests and costs due on that day, and thereupon an order shall be drawn up in form No. 64, and the suit shall be adjourned to a day as soon as possible after the day so fixed. If the balance is found against the defendant, the Court or a Judge may at once pass a decree directing payment thereof to the plaintiff, and, if the defendant is in possession of the mortgaged property, directing delivery thereof to the plaintiff, and payment of mesne profits, and may make such order as to the costs of the suit as is just.

390. If the plaintiff proves that a valid tender of the mortgage-moneys has been made, the Court or a Judge may pass a decree as in form No. 65.

391. On or before the day to which the case is posted the plaintiff may apply to the Judge by summons in chambers, to appoint a further day for payment, and thereupon the Judge may, for sufficient cause, and upon such terms as he thinks fit, postpone payment to a fixed day and adjourn the further hearing to a day as soon as possible after such day, as in form No. 66.

392. If, on the adjourned day, it appears that the mortgage-moneys have not been paid by the plaintiff, and if no further time for payment is granted, the defendant may apply for the sale of the mortgaged property, and thereupon the Judge may pass an order for sale, as in form No. 67.

2052. C.—English Mortgages and Mortgages by Conditional Sale.

SUITS FOR FORECLOSURE OR SALE.

393. At the trial of the suit, the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment, and a decree shall be drawn up in form No. 68; and the case shall be ordered to be posted in chambers on the first convenient day after the day limited for payment by the defendant.

394. Where there are several successive incumbrancers, the Court may fix a day for payment by the defendants, or any of them, or may allow several periods of redemption to the several incumbrancers, in succession, according to their respective priorities, as in forms Nos. 69 and 70.

395. Unless otherwise ordered, a decree absolute for foreclosure shall be drawn up in form No. 71; and a final decree upon redemption by the defendant shall be drawn up in form No. 72.

396. If, in a suit other than on a mortgage by conditional sale, the Court, upon the application of any party, thinks fit to pass an order for sale of the mortgaged property in lieu of a decree for foreclosure, the order may be made conditional upon the applicant paying into the Court, within a fixed period, a sum sufficient to provide for the expenses of the sale, and upon the applicant other than the plaintiff also paying into Court the amount of interest at the date of the application due on the principal amount, the estimated costs of the sale, and the costs of the suit already incurred by the plaintiff, or the said or any of the said sums. If the application is made by the defendant, and unless otherwise ordered, the order shall direct that, in default of compliance with any of the said conditions, and of payment of the mortgage-moneys within the period fixed by the Court, the defendant shall be foreclosed, as in form No. 73.

Subject to the foregoing provisions, the rules relating to a suit for sale under a simple mortgage shall apply to a suit or decree for sale under an English mortgage.

2053. Suits for Redemption.

397. It is not necessary to take an account, and unless the Court otherwise orders an *interim* decree for redemption by the mortgagor shall be drawn up in form No. 74, and the suit shall be ordered to be posted in chambers on the first convenient day after the day fixed for redemption for further consideration.

398. If the plaintiff pays the amount fixed by the *interim* decree a final decree may be made similar to that in form No. 72.

399. If the plaintiff makes default in payment and the mortgage is not by conditional sale, the Court may, on the application of the defendant, pass a decree absolute for foreclosure, similar to that in form No. 71 or an order for sale of the mortgaged property, or a sufficient part thereof, as in form No. 67.

If the mortgage is by conditional sale, the Court may pass a decree similar to that in form No. 71.

400. In taxing the costs awarded by the *interim* decree, the Taxing officer may include the cost of the stamp-paper and other costs necessary for the preparation of the deed of reconveyance of the mortgaged property or of acknowledgment of payment of the mortgage-moneys.

401. Subject to the foregoing provisions, the rules relating to a suit for the redemption of a simple mortgage shall, so far as applicable, apply to a suit for the redemption of an English mortgage, a mortgage by conditional sale and a usufructuary mortgage.

2054. D.—Deposit in Court of Mortgage-moneys.

402. When a mortgagor desires, under the provisions of the Transfer of Property Act, 1882, to deposit in Court the amount due on his mortgage, he shall file an affidavit entitled in the matter of the mortgage and the said Act and stating the facts of the case.

403. (1) Unless otherwise ordered, the mortgagor shall, in addition to the amount due on his mortgage, deposit in Court a sum sufficient to provide for the costs of the mortgagee of obtaining payment out of Court of the mortgage-moneys and of reconveying the mortgaged property, or executing an acknowledgment of the discharge of the mortgage, as the case may be, and of registering the said reconveyance or acknowledgment, in the office of the Registrar of Assurances of the district, or sub-district, in which the mortgaged property is situate.

(2) If by the terms of the mortgage, he is entitled to notice before payment or tender of the mortgage-moneys the mortgagor shall, in addition to the said sums, deposit in Court a sum sufficient to provide for any subsequent interest to which the mortgagee may be entitled.

404. Notice of the deposit shall be in form No. 75, and shall, subject to the provisions of section 102 of the said Act, be taken out and served on the mortgagee in manner prescribed for service of summons on a defendant. The notice shall require the mortgagee to deposit in Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property.

405. The Court by endorsement on the affidavit or otherwise may order the deposit to be received. Such order shall specify the several sums to be paid into Court, and the purpose for which the sum is intended.

406. Every application by a mortgagee for payment out of any money paid into Court, under section 83 or section 102 of the said Act, shall be by original petition, as in form No. 76, entitled in the matter of the mortgage and shall specify the documents in his possession or power relating to the mortgaged property and shall be accompanied by the mortgage-deed and the said documents, and a draft deed of reconveyance of the mortgaged property, or

acknowledgment of discharge of the mortgage, as the case may be. The Registrar shall appoint a day for the hearing of the petition, and notice thereof in form No. 77, shall be served on the mortgagor, not less than five days before the said day.

407. The draft deed of reconveyance or acknowledgment shall, if so required by either party, be settled by the Registrar and, if proved, shall be signed by him as approved.

At the hearing, the Court may, if the provisions of the said Act and these rules have been complied with, pass an order that upon the mortgagee bringing into Court a reconveyance or acknowledgment of discharge as agreed on or settled by the Registrar, duly stamped and executed, the moneys in Court be paid out to the mortgagee.

408. If it is made to appear to the Court that previously to payment of any moneys into Court, under section 83 or section 102 of the said Act, a sufficient tender was made to, and refused by, the mortgagee he shall not be allowed his costs of obtaining payment out of the said moneys. Except as aforesaid, or unless the Court otherwise orders, a mortgagee shall be allowed all costs properly incurred by him, and he shall not be compelled to execute the reconveyance or acknowledgment until such costs have been paid.

FORMS.

2055. RULE 375. FORM NO. 47.

Plaint in a suit by mortgagee for personal decree and sale.

(Cause-title.)

Plaint.

A. B., the above-named plaintiff, states as follows:—

1. } Proceed as in paragraphs 1 and 2 of form No. 5.
2. }

3. By way of security of moneys advanced to, and owing by the defendant to the plaintiff, an instrument of mortgage was executed by the defendant in the plaintiff's favour on the day of , mortgaging certain property situated within the jurisdiction of this Court and described in the schedule hereto annexed.

4. The plaintiff has caused a search to be made in the register of assurances of the sub-district in which the said property, is situated and is not aware of any incumbrances on the said property, other than those herein mentioned, or of any person possessing an interest in the said property, other than those who are made parties to this suit.

5. There is now due from the defendant to the plaintiff on the said mortgage the sum of Rs. (here enter aggregate amount of principal and interest of which Rs.) is principal and Rs. interest.

6. The plaintiff prays—

(*a*) That the Court will order the defendant to pay to him the said sum of Rs. with such further interest as may accrue between the filing of the

plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the said property may be sold, and the proceeds (after defraying thereout the expenses of the sale) applied in and towards the payment of the amount of the said principal, interest and costs;

(*b*) That if such proceeds shall not be sufficient for the payment in full of such amount, the defendant may be ordered to pay to the plaintiff the amount of the deficiency with interest thereon at the rate of six per cent. per annum until realization, and

(*c*) that for that purpose all proper directions may be given and accounts taken by the Court.

Enter verification as in form No. 5.

SCHEDULE.

Serial number.	DESCRIPTION OF THE MORTGAGED PROPERTY.	INCUMBRANCES.		
		Date.	Short description.	Owner.

(Signed) E. F.,
Pleader of plaintiff.

(Signed) A. B.,
Plaintiff.

2056. FORM No. 48.

Plaint in a suit upon a mortgage of ancestral property or of the property of an undivided Hindu family.

(Cause-title.)

Plaint.

1.
2. Proceed as in paragraphs 1, 2 and 3 of form No. 47.
3.

4. (In the case of mortgage of ancestral property by the Hindu father and son). The defendant *A* is the father of the defendant *B*, and he was previously to the execution of the said mortgage, indebted to the plaintiff in the amount, for which the said mortgage was given as security. (Or, in the case of a mortgage by the manager of an undivided Hindu family), the defendant *A* is the manager of the Hindu family consisting of himself and the defendants *B*, *C*,

and *D*, and as such manager, he executed the said mortgage in respect of moneys advanced to him for the purposes of the family.

5.
6. } Proceed as in paragraphs 4 and 5 of form No. 47.

7. The plaintiff prays—

(*a*) That the Court will order the defendants to pay (*continue as in form No.* 47).

(*b*) That, if such proceeds shall not be sufficient for payment in full of the said amount, the defendants may be ordered, the defendant *A*, personally and the defendants *A* and *B*, out of the ancestral property belonging to them (or, in the case of a mortgage by the manager of an undivided Hindu family) the defendants *A*, *B* and *C*, out of the property of the said Hindu family, to pay to the plaintiff (*continue as in form No.* 47).

2057. FORM NO. 49.

Plaint in a suit for redemption of mortgage.

(Cause-title.)

Plaint.

A. B. the above-named plaintiff, states as follows :—

1.
2. } Proceed as in paragraphs 1 and 2 of form No. 5.

3. By way of security for moneys advanced to, and owing by, the plaintiff to the defendant, an instrument of mortgage was executed by the plaintiff in defendant's favour on the day of mortgaging certain property situated within the jurisdiction of this Court and described in the schedule hereto annexed.

4. The plaintiff has caused a search to be made in the register of assurance of the sub-district in which the said property is situated, and is not aware of any incumbrances on the said property, other than those herein mentioned or of any person possessing an interest in the said property, other than those who are made parties to this suit.

5. There is now due from the plaintiff to the defendant on the said mortgage the sum of Rs. of which Rs. is principal and Rs. is interest.

6. The plaintiff is ready and willing to pay such sum as may be found due on the footing of the said mortgage.

7. The plaintiff prays—

(1) that an account may be taken of the amount due to the defendant for principal, interest and costs ;

(2) that, upon payment of the same by the plaintiff, the defendant be directed to (*a*) deliver to the plaintiff the mortgage-instrument and all the documents in his possession relating to the property, (*b*) deliver possession of the said property to the plaintiff, and (in case the property exceeds Rs. 100 in

value), (c) to execute and register an acknowledgment in writing to the effect that the interest created by the mortgage has been extinguished.

8. Enter verification as in form No. 5.

SCHEDULE.

(See form No. 47.)

2058. FORM NO. 50.

Plaint of second mortgagee seeking to redeem the prior mortgage.

1—5. (Proceed as in form No. 47.)

6. The plaintiff admits that the mortgage in favour of the first defendant dated the day of , has priority over his interest in the said property.

7. The plaintiff prays—

(a) that an account may be taken of the amount due to the first defendant, under his mortgage, dated the day of for principal and interest.

(b) That the plaintiff may be at liberty by a day to be fixed by the Court to pay the said amount and the costs of the first defendant of this suit into Court, and that thereupon the said first defendant may be ordered to bring into the said mortgage instrument and all documents in his possession or power relating to the property, and as acknowledgment in writing that the interest created by the said mortgage has been extinguished.

(c) That the second defendant (the mortgagor) may be ordered to pay to the plaintiff the said sums so paid into Court and the sum of Rs. (the amount due under plaintiff's mortgage) with such further interest as may accrue, on the principal sum so paid into Court from the said day so affixed for payment and on the said principal sum of Rs. from the filing of this plaint until payment, and also the costs of this suit, on some day to be fixed by the Court, and in default (*continue as in form No.* 47).

2059. RULE 376. FORM NO. 51.

Decree in a suit by the first mortgagee against a subsequent mortgagee and mortgagor.

(Formal parts as in form No. 52.)

It is declared that the several amounts due on the day of are to the plaintiff Rs. for principal and Rs. for interest, making in all the sum of Rs. X; and to *C. D.*, the first defendant (the subsequent mortgagee), Rs. for principal and Rs. for interest, making all the sum of Rs. ; and it is further declared that there is due to the plaintiff the sum of Rs. A, and to the first defendant the sum of Rs. B, for their respective costs of this suit.

(*Insert declarations as to the liability of the mortgagor for the said mortgage sums see form No.* 58)—and it is further declared that the plaintiff is entitled to payment of the amount due to him in priority to the first defendant (or if there are several subsequent mortgagees that the several parties hereto are entitled to repayment of the sums due to them respectively in the following order:—first,

the plaintiff, secondly, the first defendant, thirdly, the second defendant, &c.), and is decreed as follows :—

(1) The said first defendant and the said second defendant shall be at liberty on or before the said day of to pay into Court the said sums of Rs. X and Rs. A.

(2) If a payment shall be made as aforesaid, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged premises in the plaint mentioned, and also an acknowledgment signed by him of the receipt of the said sums and that all interest in the said premises created by the said mortgage has been extinguished and thereupon he shall be at liberty to apply for payment over to him of the said sums (if the plaintiff the first mortgagee, is in possession), and shall put the defendant in possession of the said property.

(3) In default of payment in as aforesaid, the said premises or a sufficient part thereof shall be sold and the net sale-proceeds shall be paid into Court and applied first in payment of the amount due to the plaintiff together with such further interest and costs as may be allowed by the Court, secondly, in payment to the 1st of the amount due to him together with such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the defendant.

And the further consideration of the suit is adjourned to, etc.

2060. RULE 377. FORM No. 52.

Decree in a suit by a second mortgagee against the first mortgagee and the mortgagor.

(Cause-title.)

Claim under a mortgage of immovable (or movable) property, dated the day of for Rs. principal, and interest at Rs. per cent per annum, for sale in default of payment for a decree against the defendant personally, for the deficiency on such sale, and for costs.

This suit coming on this day for final disposal in the presence of Mr. , Vakil for the plaintiff, and Mr. , Vakil for the defendant (the first mortgagee), Rs. for principal and Rs. for interest, making in all the sum of Rs. ; and it is further declared that there is due to the plaintiff the sum of Rs. A, and to the said first defendant the sum of Rs. B, for their respective costs of this suit.

(1) (Where defendants are legal representative of a deceased mortgagor) :—

And it is further declared that *A. B.* and *X. Y.*, the defendants herein, are liable for the said amount to the extent only of the property of *E. F.*, deceased, come to their hands and his legal representatives.

(2) (Where defendants are Hindu father and sons) :—

And it is further declared that *A. B.*, the first defendant, is personally liable for the said amount, and that *X. Y.*, and *E. F.*, the second and third defendants, are liable only to the extent of the ancestral property belonging to them and the said *A. B.*

(3) (Where defendants are the managers and members of an undivided Hindu family) :—

And it is further declared that *A. B.*, the second defendant, is personally liable for the said amount and that *X. Y.* and *E. F.*, the third and fourth

defendants, are liable only to the extent of the property of the undivided Hindu family, consisting of them and the said *A. B.*

(4) (Where under the mortgage the mortgagor is not personally liable) :—

And it is further declared that, under the terms of the said mortgage, *A. B.*, the defendant, is not personally liable for the repayment of the said amount.

(5) (Where the personal remedy is barred by limitation) :—

And it is further declared that the remedy of the plaintiff against *A. B.*, the defendant, personally, is barred by limitation and that he is entitled only to repayment out of the mortgaged property.

And it is further declared that the plaintiff is entitled to payment of the amount due to him after the first defendant who has priority (or, if there are several subsequent mortgagees, that the several parties hereto are entitled to payment of the sums due to them respectively in the following order :—first, the first defendant, secondly, plaintiff ; thirdly, the second defendant, &c.).

And it is decreed as follows :—

1. On or before the day of the plaintiff shall be at liberty to pay into Court the said sums of Rs. and Rs. (insert the amounts due to the first mortgagee for principal and interest and for costs), and the second defendant (the mortgagor) shall be at liberty to pay into Court the said sums of Rs. (insert the amounts due to the first mortgagee, and to the plaintiff, for principal, interest and costs).

2. If default is made in payment of the said sums of Rs. and Rs. (insert amounts due to the first mortgagee), the first defendant, shall be at liberty to apply for the sale of mortgaged property ; but if such payment is made, the first defendant shall bring into Court all documents in his possession or power relating to the mortgaged premises in the plaint mentioned and also an acknowledgment signed by him of the receipt of the said sums and that all interest in the premise created by the said mortgage has been extinguished, and thereupon he shall be at liberty to apply for payment out to him of the said sums (if the mortgagee is in possession) and shall put the defendant into possession of the said property.

3. If the plaintiff does, and the second defendant does not, make the said respective payments, then the mortgaged property, or a sufficient part thereof, shall be sold and the net sale-proceeds shall be paid into Court and applied in payment to the plaintiff of the said sums in the first paragraph mentioned together with such subsequent interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

And the further consideration of this suit is adjourned to .

2061. FORM NO. 53.

Decree in a suit by sub-mortgagee against the original mortgagee and the mortgagor.

(Cause-title.)

This suit coming on this day, etc.

It is declared as follows:—

There is now due to the first defendant (the original mortgagee under his mortgage) the sum of Rs. for principal and Rs. for interest and on the day of there will be due the further sum of Rs. for interest at the rate of Rs. per cent. per annum, making in all the sums of Rs. X and for his costs of this suit the sum of Rs. Y.

2. There is now due to the plaintiff under his derivative mortgage the sum of Rs. for principal and Rs. for interest and on the day of there will be due the further sum of Rs. for interest at the rate of Rs. per cent. per annum, making in all the sum of Rs. Z. and for his costs of this suit the sum of Rs. A.

3. (*Insert declarations as to liability of the defendants as in Form No.* 58).

And it is decreed as follows:—

4. The second defendant (the mortgagor) shall be at liberty on or before the said day of to pay into Court the said sums of Rs. X and Rs. Y and Rs. A (the costs of the plaintiff) and the first defendant shall be at liberty on or before the same day to pay into Court the said sums of Rs. Z and Rs. A (the amounts due to the plaintiff).

5. In the event of payment by the second defendant aforesaid the plaintiff and the first defendant shall each bring into the Court all documents in his possession or power relating to the mortgaged premises and also an acknowledgment, etc., and thereupon the petitioner shall be at liberty to apply for payment out to him of the said sums of Rs. Z and Rs. A and the first defendant for payment of the balance.

6. In default of payment by the first and second defendants as aforesaid the property or a sufficient part thereof shall be sold and the net sale-proceeds shall be paid into Court and applied first in payment to the plaintiff of the said sums of Rs Z and Rs. A and such further interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant); secondly, in payment to the first defendant of the excess of the said sums of Rs. Z and Rs. Y and such further interests and costs as may be allowed by the Court over the aggregate amount paid to the plaintiff, and the balance, if any, shall be paid to the second defendant.

7. In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the plaintiff shall bring into Court all documents (*continue as in paragraph* 5, *but in place of the last sentence insert*) and the first defendant shall be at liberty to apply for the sale of the said property, and thereupon the same or a sufficient part thereof shall be sold and the net sale-proceeds shall be applied in payment of the said sums of Rs. X and Rs. Y and such further interests and costs as aforesaid, and the balance shall be paid to the second defendant.

And the further consideration, etc.

2062. FORM No. 54.

Decree in a suit by a sub-mortgagee where the amount due on the derivative mortgage exceeds the amount due on the original mortgage and the former contains a covenant to pay the mortgage-moneys.

1. } *Commence as in Form No.* 53 *to the end of the paragraphs* 1 *and* 2.
2. }

3. The amount due to the plaintiff for principal and interest exceeds that due to the first defendant (the original mortgagee) for principal, interest and costs of suit by the sum of Rs. B.

4. *Insert declarations as to liability of the defendants*), and it is decreed as follows :—

5. (*Insert paragraphs 4 and 5 as in Form No. 53 down to and including the words "payment out to him of the said sums," and continue*) so paid into Court.

6. In default of payment by the first and second defendants as aforesaid the property or a sufficient part thereof shall be sold and the net sale-proceeds shall be paid into Court, and then applied in payment to the plaintiff of the said sums of Rs. , Rs. and Rs. (insert the sums due to the first defendant for principal, interest and costs and to the plaintiff for costs), and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

7. In default of payment by the first defendant as aforesaid the plaintiff shall be at liberty to apply for a decree against him for the said sum of Rs. B. and further interest thereon, and, if the net sale-proceeds in the preceding paragraph shall not be sufficient to pay to the plaintiff the several sums therein mentioned, for a decree against the first and second defendants for the amount of such deficiency. And the further consideration, &c.

2063. FORM NO. 55.

Decree in a suit by a second mortgagee against the first mortgagee and the mortgagor when the first mortgagee consents to a sale free from his mortgage.
(*Formal parts as in Form No. 51.*)

And *C. D.*, the first defendant (the first mortgagee) by his Vakil consenting that, if the second defendant (the mortgagor) shall make default in payment into Court as hereinafter mentioned, the mortgaged property shall be sold free from his mortgage, dated the day of on condition that he shall have the same interest in the sale-proceeds as in the mortgaged property (insert declarations as to the amounts due to the plaintiff and first defendant respectively, for principal, interest and costs, and as to the liability of the mortgagor, and the priorities of the mortgagees as in Form No. 51).

And it is decreed as follows :—

1. The said second defendant shall be at liberty on or before the day of to pay into Court the said sums (insert the amounts due to the plaintiff and first defendant for principal, interest and costs).

2. On payment as aforesaid, the plaintiff and the first defendant shall each bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and also an acknowledgment signed by him of the receipt of the amount due to him, and that all claims and interest to and in the mortgaged property of himself, and of all persons claiming under him and under whom he claims have been extinguished; and thereupon they be at liberty to apply for payment out of the amounts due to them respectively.

3. In default of payment as aforesaid, the said premises or a sufficient part thereof, shall be sold, and the net sale-proceeds shall be paid into Court

and applied, first, in payment of the amount due to the first defendant together with such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

And the further consideration of this suit is adjourned to .

2064. RULE 379. FORM NO. 56.

Interim decree for an account in a redemption-suit.

Claim for an account of the amount due on a mortgage, dated the day of and made between , and to redeem the property comprised therein.

(*Where an account is claimed against a mortgagee in possession, insert account claimed, for example for*, an account of the rents and profits of the said property received by the defendant, or which without wilful default might have been so received, and to redeem, &c.)

This suit coming on this day, &c.

And it appearing that the defendant has been in possession of the mortgaged property since the day of and has made certain improvements therein: It is ordered that the following accounts be taken, that is to say :—

1. An account of what is due to the defendant for principal and interest under the said mortgage.

2. An account of the rents and profits of the mortgaged property, in the plaint mentioned, received by the defendant, or by any other person by his order or for his use, or which without the wilful default of the defendant might have been so received.

3. An account of all sums paid by the defendant for kist and other public charges in respect of the said property.

4. An account of all sums paid by the defendant for the management of the property, and the collection of the rents and profits thereof.

5. An account of all sums properly laid out by the defendant in necessary repairs and lasting improvements on the said property.

6. An account of the sums paid by the defendant for premiums on the policy of insurance, dated day of and interest thereon at the rate of Rs. per cent. per annum.

7. An account of all sums properly paid by the defendant, in connection with suit No. on the file of the Court of for the support of the plaintiff's title to the said property.

8. An account of the deterioration in value of the mortgaged property since the day of caused by the wilful neglect of the defendant in not repairing the same (*or state shortly any other act of waste*).

9. (*Where tender has been duly made to mortgagee in possession, limit the ordinary accounts to date of tender, and add*) :—An account of the gross amount of rents and profits of the said property received since the day of (*date of tender*) by the defendant or by any other person by his order or for his use, or which without wilful default might have been so received.

10. (*Where annual rests are ordered, add*):—And in taking the said accounts, annual rests shall be made for the clear balance, and interest computed on such respective balance at Rs. per cent. per annum and in making such annual rests, except the first, the interest on each preceding balance shall be included in the balance then stated, so far as to charge the defendant with compound interest thereon. But if the amount spent in any year by the defendant in respect of the matters mentioned in paragraphs 3, 4, 5, 6 and 7 exceed the net balance of rents and profits received by him, after deducting the interest due under the said mortgage, then interest shall be allowed to him at the rate aforesaid on such excess.

11. And it is ordered that the defendant do, on or before the day of , file in Court, and deliver to the plaintiff a copy of his account of the matters abovementioned, and that the plaintiff do, on or before the day of , file in Court and deliver to the defendant a copy of his objections, if any, to such account and of any items of surcharge (or, and it is ordered that the defendant do, on or before the day of , file in Court his account of the matters abovementioned and that the plaintiff shall be at liberty to inspect the same and do, on or before the day of , file in Court a statement of his objection, if any, to such account and of any items of surcharge, and that the defendant shall be at liberty to inspect such statement). And it is decreed as follows:—

12. The plaintiff shall be at liberty, within months from the date on which the Court shall declare the amount (if any) due under the said mortgage, to pay the said amount and the costs of this suit into Court, and thereupon the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property together with an acknowledgment in writing signed by him of the receipt of the said sums, and that claims and interest to and in the mortgaged property of himself and of all persons claiming under him and under whom he claims, have been extinguished.

(*a*) In the event of payment in as aforesaid, the said sums shall be delivered to the defendant, who shall, at the request of the plaintiff, concur in duly registering the said acknowledgment in the office of the registrar of assurance of (*if the mortgagee is in possession*), and the defendant shall deliver to the plaintiff possession of the mortgaged property.

(*b*) If the plaintiff shall make default in payment as aforesaid, then the defendant may apply for the sale of the mortgaged property, and the same or a sufficient part thereof shall be sold accordingly.

13. But, if it shall appear on taking the said accounts, that there is nothing due to the defendant, then the defendant shall deliver to the plaintiff the documents, and the acknowledgment abovementioned, and possession of the mortgaged property, and shall pay to the plaintiff any sum which shall be found due from the defendant in excess of the amount due to him.

And the further consideration of this suit is adjourned to the day of

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2065. RULE 382. FORM No. 57.

Decree in suit for sale.

(Cause-title.)

(*Formal parts as in Form No.* 52).

It is declared that there is now due on the said mortgage the sum of Rs. (X) for principal and the sum of Rs. (Y) for interest, and that, on the day

of , there will be due the further sum of Rs. (Z) interest at the said rate, making in all the sum of Rs. (X+Y+Z). And it is further declared that the defendant is personally liable for the said amount. And it is ordered as follows :—

1. The defendant shall be at liberty on or before the said day of to pay into Court the said sum of Rs. (X+Y+Z) and the further sum of Rs. for the costs of this suit.

2. On payment as aforesaid the plaintiff shall bring into Court (*continue as in paragraph 2 of Form No. 53*).

3. In default of payment in as aforesaid. the said premises. or a sufficient part thereof, shall be sold, and the net sale-proceeds shall be paid into Court and applied in payment of the said sums, together with such subsequent interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the defendant.

2066. RULE 388. FORM No. 58.

Declarations to be inserted where the defendants or some of them are not personally liable for the mortgage-moneys.

1. *Where defendants are legal representatives of a deceased mortgagor* :—

And it is further declared that *A.B.* and *C.D.*, the defendants herein, are liable for the said amount to the extent only of the property of *E. F.*, deceased, come to their hands as his legal representatives.

2. *Where defendants are Hindu father and sons* :—

And it is further declared that *A. B.*, the first defendant, is personally liable for the said amount and that *C. D.* and *E. E.*, the second and third defendants, are liable only to the extent of the ancestral property belonging to them and the said *A.B.*

3. *Where the defendants are the manager and members of an undivided Hindu family* :—

And it is further declared that *A. B.*, the first defendant, is personally liable for the said amount and that *C. D.* and *E. F.*, the second and third defendants are liable only to the extent of the property of the undivided Hindu family consisting of them and the said *A. B.*

4. *Where under the mortgage the mortgagor is not personally liable* :—

And it is further declared that, under the terms of the said mortgage, *C.D.*, the defendant, is not personally liable for the repayment of the said amount.

5. *Where the personal remedy is barred by limitation* :—

And it is further declared that the remedy of the plaintiff against *C. D.*, the defendant, personally is barred by limitation and that he is entitled only to repayment of the mortgaged property.

2067. RULE 383. FORM No. 59.

Order upon payment by the defendant.

(Cause title.)

Upon reading the application of the plaintiff presented on the day of and upon hearing Mr. , Vakil for the plaintiff, and the

defendant (not appearing by pleader or in person though served with notice of this application) or (this suit coming on this day for further consideration in the presence of, &c.), And it appearing that on the day of and the defendant paid into Court the sum of Rs. (X+Y+Z) in pursuance of the decree herein, dated the day of and that on the day of the plaintiff brought into Court the documents of title relating to the mortgaged property in his possession or power and the acknowledgment in writing in the said decree mentioned. It is ordered and decreed as follows :—

(1) That the sum of Rs. (X+Y+Z) be paid out of Court to the plaintiff.

(2) That the said documents and acknowledgment be delivered to the defendant, and that the plaintiff do, when so requested, concur in duly registering the same in the office of the Registrar of Assurance of

(3) (*When the mortgagee is in possession*). That the plaintiff do herewith deliver to the defendant possession of the mortgaged property in the schedule hereto described.

(4) That satisfaction be entered up for the full amount of the said decree.

SCHEDULE.

(*When mortgagee is in possession, insert description of property as in the plaint.*)

2068. RULE 383. FORM No. 60.

Order for sale if defendant has made default in payment.

(Cause-title.)

This suit coming on this day on further consideration in the presence of Mr. , Vakil for the plaintiff, and the defendant (not appearing by pleader or in person, and it appearing that the defendant has made default in payment of the amount mentioned in the decree herein dated the day of . It is ordered that the mortgaged property (or the portion of the mortgaged property specified in the schedule hereto) be sold, and that the plaintiff do, on or before the day of , bring into Court the affidavits and the certificate prescribed by rule 205 of the Original Side Rules, 1902, and a sum sufficient for the expenses of the sale.

And the further hearing of this suit is adjourned to the day of 19 .

2069. RULE 386. FORM No. 61.

Order confirming sale.

(Cause-title.)

This suit coming on this day on further consideration in the presence of, &c. Upon reading the report of sale directed by the order herein dated the day of , and it appearing that there is now in Court to the credit of this suit the sum of Rs. .

It is ordered as follows :—

1. That the sale of the several lots specified in the schedule hereto to the respective persons and at the respective prices in the third and fourth columns of the same schedule mentioned be confirmed, and that the certificates of sale be issued to the said persons accordingly.

2. That copies of the said several certificates be sent to the Registrar of Assurances of

3. That the further sum of Rs. (XX) being interest at the rate of Rs. per cent. per annum on the principal amount of the decree herein dated the day of , from the date thereof to this day and the sum of Rs. (YY), for costs subsequent to the said decree, be allowed to the plaintiff.

4. That the sum of Rs. (X+Y+Z), the amount of principal, interest and costs due under the said decree, and the said sums of Rs. (XX) and Rs. (YY), making in all the sum of Rs. , be paid out of Court to the plaintiff and that satisfaction in full of the said decree be entered up.

5. That the sum of Rs. , being the balance of the said sum of Rs. now in Court, be paid to the defendant.

SCHEDULE.

Number of lot.	Description of the property.	Name of purchaser.	Sale-price.

2070. FORM NO. 62.

Order confirming sale, when the sale-proceeds are not sufficient to satisfy the decree.

(Cause-title.)

This suit coming on this day, on further consideration in the presence of &c., and it appearing that there is now in Court to the credit of this suit the sum of Rs. , which is not sufficient to discharge the amount due to the plaintiff in full, and the plaintiff by his vakil applying for a decree against the defendant, personally, for the deficiency. It is ordered as follows :—

1. }
2. } Insert paragraphs 1, 2 and 3 of Form No. 61.
3. }

4. That the sum of Rs. be paid out of Court to *A. B.*, the plaintiff, and that satisfaction of the said decree be entered up for the said sum.

5. That *C. D.*, the defendant, herein do pay to *A. B.*, the plaintiff, the sum of Rs. (being the balance of the aggregate amount of principal, interest and costs, due under the said decree and further interest and costs hereby decreed) together with interest thereon at the rate of Rs. per cent. per annum from this day until realisation.

6. *Or, if any, defendant be not personally liable.* That *C. D.* and *E. F.*, the defendants herein, do, out of the property and credits of *E. F.*, deceased, come to their hands as his representatives, pay (*continue as in paragraph* 5).

Or, that *C. D.*, the first defendant, do personally and the said *C. D.* and *E. F*, and *G. H.*, the second and third defendants, do, out of the property of the undivided family, whereof they are members, in their possession, pay (*continue as in paragraph* 5 *above*).

Or, in the case of a mortgage by a Hindu father. That *C. D.*, the first defendant, do personally, and the said *C. D.* and *E. F.* and *G. H.*, the second and third defendants, do, out of the ancestral property belonging to them, pay (*continue as in paragraph* 5).

SCHEDULE.

(*As in form No.* 61.)

2071. RULE. 388. FORM No. 63.

Decree in a redemption-suit by the mortgagor against a single mortgagee.

(Cause-title.)

(*Formal parts as in form No.* 56.)

The suit coming on this day, &c., it is declared that the plaintiff is entitled to redeem the said mortgage, and that the amount due to *C. D.*, the defendant (*the mortgagee*), on the day of (*date fixed for redemption*) is Rs. (X) for principal and Rs. (Y) for interest at the rate of Rs. (*contract rate*) per cent. per annum, making in all the sum of Rs. (X+Y), and the sum of Rs. (Z), for which costs of this suit. And it is decreed as follows : —

1. The plaintiff shall be at liberty, on or before the said day of to pay into Court the said sums of Rs. (X + Y) and Rs. (Z) and thereupon the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property together with an acknowledgment in writing signed by him of the said sums and that all claims and interest to and in the mortgaged property of himself and of all persons claiming under him and under whom he claims, have been extinguished.

2. In the event of payment in as aforesaid, the said sums shall be delivered to the defendant, who shall at the request of the plaintiff, concur in duly registering the said acknowledgment in the office of the Registrar of Assurance of (*if the mortgagee is in possession*) and the defendant shall deliver to the plaintiff possession of the mortgaged property.

3. If the plaintiff shall make default in payment as aforseaid, then the defendant may apply for the sale of mortgaged property, and the same or a sufficient part thereof shall be sold accordingly.

And the further consideration of the suit is adjourned into chambers to be heard on the day of

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2072. RULE 389. FORM NO. 64.

Redemption-suit. Order upon accounts and objections.

(Cause-title.)

This suit coming on this day on consideration of the account directed by the decree herein dated the day of

It is declared as follows :—

1. The amount due to the defendant under the mortgage in the plaint mentioned is Rs. for principal, and Rs. for interest to the day of , and on the day of (*day fixed for redemption*) there will be due the further sum of Rs. for interest at the rate of per cent. per annum ; making in the sum of Rs.

2. The balance of the rents and profits of the said property chargeable to the defendant together with interest at the said rate to the said day of (*date fixed for redemption*) is Rs.

3. The amount due to the plaintiff in respect of deterioration caused to the mortgaged property by the defendant is Rs. and Rs. interest therein at the rate of per cent. per annum from the day of to the said day of (*the day fixed for redemption*), making in all the sum of Rs.

4. The amount due to the defendant on the said day of , after setting off the said sums chargeable against him, is Rs. , together with Rs. the cost of this suit, and the said day is hereby limited for payment by the plaintiff to the defendant of the said amounts and costs.

And the further consideration of this suit is adjourned to the day of

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2072. RULE 390. FORM No. 65.

Decree in a redemption-suit by the mortgagor who has made tender of the mortgage-amount.

Claim for an account of the amount on the day of (*date of tender*), due on a mortgage, dated the day of and made between parties (*for a declaration*) that the amount then due was duly tendered to the defendant by the plaintiff, to redeem the property comprised in the said mortgage ; and for costs of suit. This suit coming on this day, etc.

It is declared that on the day of the plaintiff duly tendered to the defendant the sum of Rs. X, being the amount then due to him for principal and interest under the said mortgage, and that the defendant is not entitled to any further interest, and that the plaintiff is entitled to the sum of Rs. A. for his cost of this suit.

And it is decreed as follows :—

1. That the plaintiff shall be at liberty on or before the day of to pay into Court the sum of Rs. (Y) (being the balance due under the said mortgage after deducting the said sum of Rs. A) and thereupon (*continue as in form No.* 63, *paragraphs* 1, 2 *and* 3).

2073. RULE No. 391. FORM No. 66.

Order extending time for redemption.

(Cause-title.)

This suit coming on this day on further consideration in the presence of, etc., and the vakil for the plaintiff applying that the time by the decree herein, dated the day of fixed for payment of the mortgage-moneys be postponed to the day of

It is ordered that the plaintiff do pay to the defendant the sum of Rs. for his costs of this hearing and that, upon the plaintiff paying to the defendant before the day of the said sum of Rs. the sum of Rs. being the costs by the said decree directed to be paid and the sum of Rs. for further interest on the principal sum at the rate of Rs. per cent. per annum from this day to the day of making in all the sum of Rs. the time for redeeming the mortgaged property be extended to the said day of (*the extended date*) and that the further hearing of this suit be adjourned to the day of . But in default of payment of the said sum of Rs. by the time aforesaid, then it is ordered that this application be refused and that the further hearing of this suit be adjourned to the day of

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2074. RULE 392. FORM NO: 67.

Redemption-suit. Order for sale on default of payment upon the application of the mortgagee.

(Cause-title.)

This suit coming on this day, etc., and it appearing that the plaintiff has made default in payment of the amount mentioned in the decree herein, dated the day of and the defendant by his *vakil* applying for sale of the mortgaged property. It is ordered that the mortgaged property (*or the portion of the mortgaged property specified in the schedule hereto*) be sold, and that the defendant do, on or before the day of bring into Court the proclamations for sale, the affidavit and certificate prescribed by rule 205 and a sum sufficient for the expenses of the sale.

And the further hearing, etc.

2075. RULE 393. FORM No. 68.

Decree in a foreclosure-suit.

(Cause-title).

Claim under a mortgage of immoveable property, dated the day of , for Rs. principal and Rs. , interest thereon, the day of , and further interest at Rs. per cent. per annum, for foreclosure or sale in default of payment, and for costs.

This suit coming on this day for final disposal in the presence of, etc. It is declared that there is now due on the said mortgage the sum of Rs. (X) for principal, and the sum of Rs. (Y) for interest and that on the day of there will be due the further sum of Rs. (Z) for interest at the said rate, making in all the sum of Rs. (X+Y+Z). And it is ordered as follows:—

1. The defendant shall be at liberty on or before the said day of to pay into Court the said sum of Rs. (X+Y+Z), and the sum of Rs. (A) for the costs of this suit.

2. On payment as aforesaid the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint-mentioned, and shall reconvey to the defendant the said property free and clear of and from all incumbrances due by him, or any person claiming under him, (*if the plaintiff derives his claim from the original mortgagee add*, or by those under whom he claims) (*if the plaintiff is in psssession, add*, and shall deliver to the defendant possession of the said property).

3. In default of payment as aforesaid, by the time aforesaid, the defendant shall from henceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property.

And the further consideration of this suit is adjourned into chambers to be heard on the day of

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2077. RULE 394. FORM NO. 69.

Suit for foreclosure—Several mortgagees—Decree giving one period to redeem.

(Cause-title).

(*Insert declarations as to the amounts due to the several mortgagees for principal and interest on the day fixed for redemption, and their several properties.*)

And it is ordered as follows:—

1. That, upon the defendants, or any of them, paying to the plaintiff on or before the day of , the said sum of Rs. (*the amount due to the plaintiff for principal and interest on the day fixed for redemption*) and the sum of Rs. for the costs of his suit, the plaintiff do bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and do reconvey the said mortgaged property free and clear of all incumbrances made by him, or by any person claiming under him (or under whom he claims) to the defendants or such of them as shall redeem the mortgaged property, as he or they shall direct, such conveyance to be settled by the registrar in case the parties differ.

2. In default of defendants or any of them paying to the plaintiff the said sums by the time aforesaid (*insert names of the defendants*) the first, second, third, etc., defendant shall thenceforth stand absolutely debarred and foreclosed of and from all interest in, and all right to redeem the mortgaged property.

And the further consideration, etc.

2078. FORM NO. 70.

Suit for foreclosure—Decree in suit by first mortgagee against a second mortgagee and the mortgagor—Successive periods for redemption.

(Cause-title.)

Claim under a mortgage of immoveable property, dated the day of for Rs. principal and Rs. interest thereon on the day of , and the further interest at Rs. per cent. per annum, for foreclosure or sale in default of payment and for costs.

This suit coming on this day for final disposal in the presence of, etc.

It is declared that the several amounts due on the day of are, to the plaintiff Rs. for principal and Rs. for interest, making in all the sum of Rs. X; and to C. D., the first defendant (*the second mortgagee*) Rs. for principal and Rs. for interest, making in all the sum of Rs. and it is further declared that there is due to the plaintiff the sum of Rs. and to the first defendant the sum of Rs. for their respective costs of this suit, ; and it is further declared that the second defendant (the mortgagor) is personally liable for the aforesaid amounts; and it is further declared that the plaintiff is entitled to payment of the amount due to him in priority of the first defendant (*or if there are several subsequent mortgagees*, that the several parties hereto are entitled to payment of the sums due to them respectively in the following order—first, the plaintiff; secondly, the first defendant; thirdly, the second defendant, etc.).

And it is decreed as follows:—

1. *C. D.*, the first defendant (*the second mortgagee*), shall be at liberty on or before the day of to pay into Court the sum of Rs. (X) (*the amount found to be due to the plaintiff for principal and interest to the said date*) and the sum of Rs. (A) for his costs of this suit.

2. On payment as aforesaid the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and shall reconvey to the first defendant the said property clear of and from all incumbrances due by him, or any person claiming under him (*if the plaintiff derives his claim from the original mortgagee, add,* or by those under whom he claims) (*if the plaintiff is in possession, add,* and shall deliver to the first defendant possession of the said property).

3. In default of payment as aforesaid by the time, the first defendant shall from henceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property.

4. And, in case of such foreclosure, *E. F.*, the second defendant (*the mortgagor*) shall be at liberty on or before the day of to pay into Court the said sum of Rs. (X) and the sum of Rs. (Z) being further interest on the principal sum of Rs. to the said day, making together the sum of Rs. (X+Z) and the sum of Rs. , the costs of the plaintiff.

5. On payment by the second defendant as aforesaid the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and shall reconvey to the second defendant the said property free and clear of and from all incumbrances due by him, or any person claiming under him (*if the plaintiff derives his claim from the original mortgagee, add,* or by those under whom he claims) (*if the plaintiff is in possession, add,* and shall deliver to the second defendant possession of the said property).

6. In default of payment as aforesaid by the time aforesaid, the second defendant shall from thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property.

7. But, in case *C. D.*, the first defendant, shall redeem the said mortgaged property, then *E. F.*, the second defendant, shall be at liberty on or before the day of to pay into Court the said sums of Rs. (X) and Rs. (A) the said sum of Rs. (Y) (*the amount declared to be due to the second mortgagee for*

principal and interest), making in all the sum of Rs. (X+A+Y) and also the sum of Rs. (B) being interest on the said aggregate amount at the rate of Rs. per cent. per annum from the said day of *(the date to which interest was calculated on the principal amounts due to the plaintiff and the second mortgagee)*, to the said day of , the date fixed to redemption by the mortgagor, and also the sum of Rs. (C) for the costs of the first defendant of this suit.

8. On payment as aforesaid by the second defendant the first defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and shall reconvey to the second defendant the said property free and clear of and from all incumbrances due by him, or any person claiming under him (*if the first defendant derives his claim from the original mortgagee, add*, or by those under whom he claims) (*if the first defendant is in possession, add*, and shall deliver to the second defendant possession of the said property).

9. In default of payment as aforesaid the second defendant shall from henceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property.

And the further consideration, etc.

2079. RULE 395. FORM NO. 71.

Decree absolute for foreclosure.

(Cause-title.)

This suit coming on this day on further consideration in the presence of, etc., and it appearing that the defendant has not paid into Court the sum of Rs. (X+Y+Z) in the decree herein, dated the day of mentioned and that the whole thereof still remains due. It is decreed as follows :—

1. That *C. D.*, the defendant, and all persons claiming through or under him do from henceforth stand absolutely debarred and foreclosed of all rights to redeem the mortgaged property in the schedule hereto set forth : (*if the defendant is in possession*) and do forthwith deliver to *A. B.*, the plaintiff, possession of the said property.

2. That *C. D.*, the defendant, to pay to *A. B.*, the plaintiff, the sum of Rs. (A) the costs in the said decree mentioned, and also the sum of Rs. (B) for his costs subsequent thereto, making in all the sum of Rs. (A+B), together with interest thereupon at the rate of Rs. per cent. per annum from this day until realization.

SCHEDULE.

(*Set out description of the mortgaged property as in the plaint*).

2080. FORM NO. 72.

(*Final decree in a foreclosure-suit or suit for redemption upon payment by the defendant*).

(Cause-title).

This suit coming on this day on further consideration in the presence of, etc., and it appearing that on the day of the defendant paid into

Court the sum of Rs. (X+Y+Z) and the sum of Rs. (A) for the costs of this suit in the decree herein, dated the day of mentioned, and that the plaintiff on the day of executed a deed of reconveyance of the mortgaged property in the plaint mentioned in favour of the defendant, and has brought into Court all documents in his possession or power relating to the said property.

It is ordered as follows:—

1. That the said sums of Rs. (X + Y + Z) and Rs. (A) be paid out of Court to the plaintiff.

2. That the said deed and documents be delivered out of Court to the defendant, and that the plaintiff do, when so requested, concur in registering the said deed in the office of the Registrar of Assurance of the district of (*if the plaintiff is in possession, add,* and do forthwith deliver possession of the said property, in the schedule hereto set forth, to the defendant).

3. That *C. D.*, the defendant, do pay to *A. B.*, the plaintiff, the sum of Rs. for his costs of the said reconveyance and of this suit subsequent to the said interim decree, with interest thereon at the rate of Rs. per cent. per annum from this day until realization.

(SCHEDULE.)

(*If the mortgagee is in possession, insert description of the mortgaged property as in the plaint.*)

2081. RULE 396. FORM NO. 73-

Suit for foreclosure—Order for sale on application of the defendant.

(Cause-title and claim.)

This suit coming on this day for final disposal in the presence of, etc., and the vakil for the defendant applying that the mortgaged property may be sold, and it appearing to this Court that a sale of the said property is for the benefit of all parties to this suit. It is declared that there is now due on the said mortgage the sum of Rs. (X) for principal, and the sum of Rs. (Y) for interest, and that on the day of there will be due the further sum of Rs. (Z) for interest at the said rate, making in all the sums of Rs. (X+Y+Z); and it is further declared that the defendant is personally liable for the said amount.

And it is ordered as follows:—

1. That the defendant do, on or before the day of pay into Court the sum of Rs. , being the amount of interest now due on the principal sum secured by the said mortgage, the sum of Rs. for the expenses of the sale of the said property, and the costs of the plaintiff in respect thereof, and also the sum of Rs. for the costs of the plaintiff of this suit.

2. That on payment as aforesaid, the said property be sold, and that the plaintiff do have the conduct of the said sale and do, on or before the day of , bring into Court the proclamation, affidavits and certificate, etc., prescribed by Order XVIII.

3. That the net proceeds of the said sale be applied in payment to the plaintiff of the said sum of Rs. (*the principal sum declared to be due to the plaintiff*) and subsequent interest thereon at the rate aforesaid and the subsequent cost of the plaintiff of this suit, so far as the same will extend.

4. If the said sale-proceeds shall not be sufficient to pay the said sum, and costs in full, the plaintiff shall be at liberty to apply for a decree for the balance.

5. If the defendant shall make default in payment of the sums in the first paragraph hereof mentioned, then he shall be at liberty, on or before the day of , to pay into Court the said sum of Rs. (X+Y+Z) and the sum of Rs. (A) for the costs to this suit.

6. On payment as aforesaid the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and shall reconvey to the defendant the said property free and clear of and from all incumbrances due by him or any person claiming under him (*if the plaintiff derives his claim from the original mortgagee, add,* or by those under whom he claims) (*if the plaintiff is in possession, add,* and shall deliver to the defendant possession of the said property).

7. In default of payment as aforesaid the defendant shall from thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the said mortgaged property.

And the further consideration, etc.

2082. RULE 397. FORM No. 74.

English mortgage or mortgage by conditional sale. Interim decree in a suit for redemption.

(Cause-title and claim).

This suit coming on this day, etc.

1. (*Insert declaration of the amount due as in Form No.* 63.)

And it is decreed as follows :—

2. The plaintiff shall be at liberty on or before the day of to pay into Court the said sums of Rs. and Rs. , and thereupon the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property and shall reconvey the said property to the plaintiff free from the said mortgage, and from all incumbrances created by the defendant, or any person claiming under him, or under whom he claims (*if the mortgagee is in possession*), and shall put the plaintiff into possession of the said property.

3. In the event of payment in as aforesaid and upon the defendant complying with the provisions of the last preceding paragraph the said sum shall be paid out of Court to the defendant, who shall, at the request of the plaintiff, concur in duly registering the said reconveyance in the office of the Registrar of Assurances of .

4. If the plaintiff makes default in payment as aforesaid the defendant shall be at liberty to apply that the plaintiff may be foreclosed (*where the mortgage is not by conditional sale*) or that the property, or a sufficient part thereof, may be sold.

And the further consideration of this suit is adjourned to the day of

2083. RULE 404. FORM NO. 75.

Notice of payment into Court.

(Cause-title).

In the matter of a mortgage, dated the day of and in the matter the Transfer of Property Act, 1882.

To *C. D.* of (*residence and description*). Take notice that on the day of *A. B.* of (*address and description*), under the circumstances set forth in his affidavit filed in this matter on the day of , paid into Court to the credit of the above matter, to the account of *C. D.* of etc., the sum of Rs. consisting of the several items specified in the schedule hereto in accordance with the provisions of section 83 (*or* 102) of the said Act; and that you are named in the said affidavit as the person entitled to the said moneys as the mortgagee under the said mortgage-deed (*or, as the case may be*).

And also take notice that, upon bringing into Court the said mortgage-deed and all documents in your possession or power relating to the property comprised therein and upon executing and registering a proper reconveyance of the said property (or acknowledgment of discharge of the said mortgage) and delivering up possession of the said property to the said *A. B.*, you are at liberty to apply, by original petition and upon notice to the said *A. B.* for payment out to you of the said moneys.

The adddress for service of the said *A. B.* is

SCHEDULE.

(*Set out particulars as given in the Lodgment Schedule.*)

(Signed)——————————

L. S.

Registrar.

2084. RULE 406. FORM No, 76.

Original petition for payment out of Court to the mortgagee.

In the High Court of Judicature at Madras.

Original petition No. of

In the matter of a mortgage, dated the day of and in the matter of the Transfer of Property Act, 1882.

Between *C.D.* , Petitioner

and

A.B. , Respondent.

Petition under section 83 of the said Act.

The above-named petitioner states as follows :—

1. *C.D.*, the petitioner, is a land-owner and resident at , *E. F.*, the second petitioner, is a dealer in grain and resides at , etc.

The address for service of the petitioner, (or petitioners) for all notices and proceeeding is

2. *A.B.*, respondent, is a land-owner and resides at , *X.Y.*, the second respondent is an infant of about years and resides with *T.M.P.*, a land-owner at , and is added as the legal representative of *M.I V.P.* (land-owner deceased).

3. On the day of a notice entitled in the matter of the said mortgage and Act was served upon your petitioner who was thereby informed that the sum of Rs. had been paid into Court to the credit of the said matter to the account of *C. D.*, of, etc.

4. Your petitioner has read the affidavit of *A. B.* of, etc., filed in the said Court on the day of and the three exhibits therein referred to and admits statements therein contained.

5. The amount due on the said mortgage on the day of is Rs. for principal and Rs. for interest, making in all the sum of Rs.

6. I am the same person as *C.D.* named in the said mortgage (*or, if not the original mortgagee, show how the applicant derives his title to the mortgage-money)* and am solely and absolutely entitled to all moneys due thereunder.

7. I am willing to accept the said sum of Rs. deposited in Court in full discharge of all moneys due under the said mortgage and my costs of this application and the reconveyance of the mortgaged property.

8. I have brought into Court the said mortgage-deed and the documents specified in the schedule hereto, which are all the documents in my possession or power relating to the mortgaged property (*if any documents delivered to the mortgagee are not brought into Court, the same should be accounted for*).

9. On the day of I delivered possession of the mortgaged property to the said *A. B.*

10. Your petitioner therefore prays—

(*a*) That an order may be made for payment out of Court to him of the said sum of Rs.

(*b*) For such other relief as to this Court may seem fit.

11. I declare that the facts above stated are true to my knowledge except as to matters stated to be on information and belief and as to those matters I believe them to be true.

(Signed) *C. D.*———

(Signed)———

Pleader of the petitioner.

2085. RULE 406. FORM No. 77.

Notice of petition by mortgagee for payment out of Court.

(Cause-title.)

To *A. B.* of (*address and description*).

Take notice that on day of *C. D.*, of, etc., presented a petition to the above Court for payment out to him of the sum of Rs. , on the day of deposited by you in Court to the credit of the above matter to the account of the said *C. D.*, and that the day of is appointed for the hearing of the said application, and that, if you do not attend on the said day in person or by pleader, an order may be passed in your absence.

And also take notice that the address for service of the said *C. D*, is

(Signed) E. F.———

Pleader for the said C. D.

PART THE SECOND

THE

PROCEDURE RELATING TO MORTGAGES AND CHARGES.

PART II.

[ORDER XXXIV, CIVIL PROCEDURE CODE, 1908.]

Suits relating to Mortgages of Immoveable Property.

Parties to suits for foreclosure, sale and redemption.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption, shall be joined as parties to any suit relating to the mortgage.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

2086. Analogous Law.—Though this order provides a procedure primarily applicable to immoveable property it has been held equally applicable to the mortgage of moveables (1) in which relief by way of foreclosure is equally admissible (§1340).

This rule was formerly section 85 of this Act: being a section relating to procedure it has been transposed to the Code of Civil Procedure. But it is not intended that any different effect should be given to it than if it had been a part of the Act. As it is, it extends the rule laid down in O. I, rr. 1, 3, 4, of the Civil Procedure Code.(2) Its provisions are, however, declared to be subject only to this Code. Under the corresponding section, the reference was made to s. 437 of the Procedure Code which is now O. 31, r. 1 and runs as follows:—

Representation of beneficiaries in suits concerning property vested in trustees, etc.

"In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the person so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties."

This clause is the same as 15 and 16 Vict., Ch. 86, section 42, (3) and the other provisions of the rule correspond with the English law.(4)

The section is now, of course, a part of adjective law inasmuch as it merely enacts a rule of procedure. It is not a part of the substantive law of mortgage formulating the rights and obligations arising out of such a legal relation. As such, it will operate retrospectively irrespective of the date of mortgage. Indeed, the rule is generally in keeping with the pre-existing law, in so far as the latter provided that every person having the right to redeem should be made a defendant.(5) But the present section considerably widens its scope by making the joinder of all persons interested in a mortgage compulsory.

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(1) *Mahamaya* v. *Haridas*, 20 C.L.J. 183.
(2) Act V of 1908.
(3) See Rules of 1883 (Order XVI, rule 8).
(4) Calvert on Parties, 13, 91; *Palmer* v. *Carlisle*, 1 S. & St., 423; *Vickers* v. *Cowell*, 1 Beav., 429; *Caddick* v. *Cook*, 32 Beav., 70; *Mills* v. *Jennings*, 15 Ch. D., 639; *Griffith* v. *Pound*, 45 Ch. D., 553; *Moore* v. *Morton*, (1886) W.N., 196; *Bolton* v. *Salmon* [1891] 2 Ch., 48; Re *Continental Oxygen Co.*, [1897] 1 Ch., 511.
(5) *Mohun Lall* v. *Goluck Chunder*, 10 M. I. A., 1.

In this respect the Legislature makes a departure, the object of which was apparently to prevent multifarious and conflicting decisions relating to the same property. Even, as such, the section lays down a salutary rule of practice, and has a wider application even where the Act itself is not in force.(1)

2087. This provision, now enacted as a rule under the Code of Civil Procedure, was formerly s. 85 of this Act, and ran as follows :—

> 85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage, must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

Parties to suits for foreclosure, sale and redemption.

2088. As now amended, the rule makes two noticeable changes. The former section was qualified by the clause. "Provided that the plaintiff has notice of such interest." As to this clause the present writer had said: "The proviso subordinating the obligation to join to notice is unnecessary and misleading. For in the absence of any discriminating equity affecting the right of excluded interests it is not clear what object the proviso is intended to serve. Can it be supposed that if the plaintiff has omitted to join a necessary party because he had no notice of his interest, then his interest will be differently affected to what it would be if he was excluded, even though the plaintiff did have notice of his interest? Notice may sometimes affect the question, but it does not always do so, as has been pointed out before."(2) The Legislature were apparently of the same opinion, and the clause has been omitted from the present rule. Another change made is in the explanation added, which is also in conformity with the author's opinion expressed in the previous editions of this work, and which have now the effect of setting at rest the controversy that had arisen on the subject.

2089. The effect of the incorporation of section 85 of the Transfer of Property Act into this order is to put an end to any independent practice on the Original Side of the High Court of Calcutta based on the old procedure, and the Original Side have now to follow the provisions of this order. (3)

Change of practice of Original Side.

2090. This rule is the same as section 85 of the Act amended on several points the effect of which may be set out here. The amendment of the opening words "subject to the provisions of this Code" are merely formal necessitated by the transposition of the section to the Code. The words "having an interest either in the mortgage security or in the right of redemption" in place of "having an interest in the property comprised in a mortgage" are intended to clear up an ambiguity which had given rise to a crop of cases (§ 2097). It is now clear that whether the "interest" be on the side of the mortgagor or mortgagee, the person possessing it must be joined.

Effect of the amendment.

The proviso as to notice has been omitted. It was both misleading and unnecessary inasmuch as it was apt to lead to the construction that the effect of non-joinder was dependent on notice. The explanation settles a moot point upon which the Courts had been at variance. (§ 2103).

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(1) *Thakaing* v. *Ma Htaik*, 2 L. B. R., 241; *Hukam Chand* v. *Karam Chand*, [1908] P. R., No. 64.

(2) 2 Law of Transfer (2nd ed.), § 1331, p. 893.

(3) *Sarat Chandra* v. *Nabapiet*, I. L. R., 37 Cal., 907.

2091. Principle.—The section is enacted to enable all persons interested in the mortgaged property to press home their respective rights and so avoid the multiplicity of suits, and the conflicting decisions which such suits may occasion. Prior to the Act when "there was no machinery for bringing into one suit the various incumbrancers on the property, endless confusions had been the result, and the decisions of the Courts upon the almost insoluble problems arising from the state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered. .....It had been one of the objects of this chapter to remedy these and other similar evils."(1) Thus then while the rule avoids multiplicity and protects the rights of all parties interested in the mortgage, it is also consonant with the right of the mortgagee to account once only, which can only be done if the account is taken in the presence of all the parties entitled to demand an account.(2) So Pomeroy on Remedies says: "*Necessary* party-defendants are those without whom no decree at all can be rendered: *proper* party-defendants are those whose presence renders the decree more effectual; and *all* the *proper* parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy."(3) The section embodies an old rule of practice, and it does not affect the rule of *res judicata*, so that findings arrived at with reference to matters affecting the rights of defendants in mortgage-suits may at times be of no avail as estoppel in a superior Court with reference to the same points.(4)

2092. The rule does not lay down the consequences of non-joinder, and this has given rise to a crop of cases which will be found set out in the sequel. It was suggested by the Select Committee on the Procedure Code to add that "persons not so joined shall not be bound by the decree." But these words were not added, and even if they had been, they could not have affected the questions which the section has done nothing to settle (§§ 1730-1741).

2093. Meaning of Words.—"*Having an interest in the property*:" This phrase has been the subject of numerous cases, and will be dealt with below (§§ 1729-1732). "*Must be joined*" *i.e.*, impleaded to begin with, but they may be subsequently discharged. (§§ 1729-1732, "*Plaintiff has notice*;" *i.e.*, as defined in section 3, *ante* (§§ 109-170).

2094. Necessary Parties.—As regards persons who are necessary parties to a mortgage suit the rule enacts that persons "interested" therein should be impleaded. This is merely an adaptation of the more general rule that only persons interested in the suit should be made parties to it.(5) But this is a general statement which is of little practical value. Indeed, it is impossible to make any general statement on the subject which would not be both inaccurate and misleading, for the question of "interest" must depend upon the nature of the transaction and the suit, the claim made, the defence set up and the interests

(1) Sir Griffith Evans' speech on the Bill, Abstract to Proceedings of the Governor-General's Legislative Council printed in the Appendix; cited in *Mata Din* v. *Kazim Husain*, I. L. R., 13 All., 432 (530). F. B.; to the same effect *Sri Gopal* v. *Pirthi Singh*, I.L.R., 20 All., 110 (114), O. A., I.L.R., 24 All., 429, P. C.

(2) *Palk* v. *Clinton*, 12 Ves., 48.

(3) S. 330; *Keshavram* v. *Ranchhod*, I.L.R., 30 Bom. 156 (161).

(4) *Giriya Chettiar* v. *Sabapathy*, I. L. R., 29 Mad., 85 (68).

(5) *Haji Jakaria* v. *Haji Casim*, I.L.R., 11 Bom. 496.

directly or indirectly to be protected and in jeopardy. But nevertheless attempts are frequently made at stating the rule in more general terms, and the English practice on the subject is thus summed up: "As a general rule all persons interested in the equity of redemption, and, therefore, in the proper taking of account, either primarily as the mortgagor or derivatively as the trustee in bankruptcy of the mortgagor, the assignees of the equity of redemption, the devisee and heir of the mortgagor and his personal representative, and also all persons interested in the security primarily as the mortgagee or derivatively as his heir, or personal representative, or as assigns or devisee of the security or debt are necessary parties to foreclosure and redemption action."(1) Similarly, Story describes the practice of the American Courts as follows: "The general doctrine may be asserted, that all persons, whose interests are to be affected or concluded by the decree, ought to be made parties. Therefore all persons having an interest in the equity of redemption, should be made parties to a bill of foreclosure, and *a fortiori* to a bill to sell the mortgaged property; for it will not in general be sufficient, if the equity of redemption is conveyed or devised to a trustee in trust, to bring him before the Court; but the *cestuis que trust* (the beneficiaries) also should be made parties. If on the other hand the *cestuis que trust* are brought before the Court, it should seem that the trustees are not indispensable parties. So, if the equity of redemption belongs to different persons as devisees, or as legatees having charges thereon, all of them should be joined as defendants. And hence it has been asserted to be the general (although not the universal) rule, that all encumbrancers, as well as the mortgagor, should be made parties if not as indispensable, at least as proper parties to such a bill, whether they are prior or subsequent encumbrancers. Prior encumbrancers are properly made parties to a foreclosure for the purpose of ascertaining and paying off the amounts due to them. The prior mortgagee, when thus joined, may properly file a cross-bill to enforce his mortgage and to have its validity and priority established. There are certainly some acknowledged exceptions; such, for example, as where a second mortgagee brings a bill for foreclosure against the mortgagor, and a third mortgagee; for in such a case the first mortgagee need not be made a party. And it may now well be doubted, whether in any case it is necessary for a puisne mortgagee, who seeks to sustain a bill of foreclosure against the mortgagor and subsequent mortgagees to himself, to make any prior mortgagee to himself a party to the bill. If, indeed, any encumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as, also, a decree of sale would not. The *prior* encumbrancers are not bound, because their rights are paramount to those of the foreclosing party. The subsequent encumbrancers are not bound; because their interests would otherwise be concluded without any opportunity to assert or protect them."(2)

2095. It will be observed that in the last two quotations the writers have included not only persons who are "necessary" parties but also those whose joinder would be deemed "proper" though not strictly necessary under the Indian Code. But the party must in either case be interested in the suit: the difference between them is only one of degree. It is, of course, no part of the rule that in order to justify his joinder a party must be interested as to all the reliefs claimed in the suit,(3) or that his interest should be necessarily present and immediate, though of course as already stated, it must not, on the other hand,

(1) 2 W. & T.L.C. 43.
(2) Story's Eq. Pleadings. 193.
(3) O. 1, r. 5, Civil Procedure Code.

be remote and contingent. In the matter of joinder the policy of the Court is usually one of inclusion rather than one of exclusion. But there is and must be a limit to the multiplication of parties, and as no general rules are possible, interests entitled to be represented in a mortgage suit are capable of categorical enumeration, while those who have no such right might also be enumerated. But there will still remain an intermediate class whose joinder or non-joinder will depend upon circumstances.

2096. Parties to a Mortgage-suit.—It is a cardinal rule of Civil Procedure that every suit should, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.(1) In furtherance of this policy, the Civil Procedure Code enacts that "all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction, or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."(2) And, similarly, all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or, in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.(3) These provisions enable the Court to effectually dispose of a subject-matter "arising out of the same act or transaction." Under the previous Code, only joinder in respect of the same cause of action was permitted, and which gave rise to considerable difference of opinions as to the meaning of the term "cause of action." The object of the present amendment of the Procedure Code is to broaden the rule so as to admit of a joinder in respect of the same "act or transaction, or a series of acts or transactions." In future these words are likely to be the battle-ground for controversy, for though the object was to enlarge the scope of the rule, it was not intended to make it unlimited. But, whatever may be their scope, these rules have obviously no application to mortgage-suits for which the Procedure Code has now provided a special rule as to the joinder of parties which alone would then have to be referred to to determine what persons are necessary parties to a mortgage-suit. But though a suit under this chapter may be of a varied character, the section is only confined to suits relating to mortgages. Such suits may be for foreclosure, sale, possession or redemption according to the nature of the mortgage, but whatever may be their character, or the relief sought, it is incumbent upon the plaintiff to see that all persons interested in the mortgage-security or in the equity of redemption (though they may be in no wise interested in the plaintiff's mortgage), are impleaded in the suit. Even in a suit for contribution all persons liable to contribute are proper parties and should be joined.(4) It will be observed that the rule as now settled classifies persons interested into (*a*) those interested in the mortgage-security, and (*b*) into those interested in the right of redemption. It is, of course, not seldom that a person interested in the one is also interested in the other, but the categorization is intended to shed a further light on the term "interested" which though apparently simple is too comprehensive to be susceptible of an easy definition, though it is possible to describe them by enumeration

(1) O. II, r. 1, Code of Civil Procedure.

(2) *Ibid.*, O. I, rr. 1, 4 (*a*).

(3) *Ibid.*, O. I. r. 10 (1). It need scarcely be added that the scope of these amendments of the corresponding sections (ss. 26, 28) of the old Code is to enlarge considerably the limits within which parties could be under previous Code added as plaintiffs or defendants.

(4) *Periya* v. *Venkatachellum*, 15 M.L.J. R., 24.

and elimination. Such persons are *necessary* parties to a mortgage suit, but besides these there remain others who though not necessary parties would still be *proper* parties. But they should mark the limit of the array of parties, for while the rule enjoins joinder to avoid multifarious suits, it does not invite the raising of multifarious issues wholly foreign to its underlying purpose. But subject to this necessary reservation, a mortgage suit should be complete as to both parties those interested on the side of the mortgagee being arrayed on one side, and those interested on the side of the mortgagor, on the other.

2097. Persons "interested."—Persons who are interested in the mortgage and who cannot be joined as plaintiffs will have to be arrayed as defendants. The question then resolves itself into one, the solution of which depends upon what significance the legislature has intended to be attached to the word "interested." The term, as here used, is nowhere defined, but, generally speaking, interest-holders are persons such as prior and subsequent mortgagees, purchasers, a *patnidar*, a permanent lessee of the mortgaged property, a trustee, a representative, or a person interested in the equity of redemption, namely, such persons as are enumerated in section 91. It is not necessary under the section that the party to be joined should have interest of any extent in the property, for a person having an interest, however small, is a necessary party if the interest is direct, and not merely indirect and distant.(1) And interest-holders for consideration are in this respect on the same footing as volunteers.(2) The question what persons are said to have interest in the mortgage-security or the right of redemption now depends upon what other interests are affected by the subject-matter of the suit. On this point the present rule has eschewed the language of section 85, in which the words used were "the property comprised in a mortgage," and which had given rise to some controversy as to the meaning of the word "property" and of the interests that should be deemed to be comprised therein. For the word "property" is not defined in the Code, and it is a term which may as much mean a physical object or anything including incorporeal rights which are the subject of ownership (3) (§ 175).

A lessee or a tenant, for example, in a zemindari village, in the former case, might well lay claim to be a necessary party in a suit to enforce mortgage of the zemindari, though he may not have the slightest concern with the mortgaged property. And yet the Allahabad High Court had at one time understood the term in that sense, (4) though the inevitable consequences to which that view led were not overlooked by it, and it has since overruled its earlier precedent, (5) its present view being in consonance with that taken by the other Courts who have understood the term in its other acceptation (6) (§175).

2098. Unnecessary Parties.—Again, the term "interested" in the subject-matter of the suit may as much refer to a proximate and certain interest as to a remote and contingent interest, as for example, of the reversioner of a Hindu widow.(7) It has been held in Allahabad that the interest of the reversionary heir during the life-time of the widow

(1) *Moser* v. *Marsden*, 1 Ch. D. 487; *Rupchand* v. *Fateh Chand*, 6 I. C. (All.) 36.
(2) *Thorne* v. *Thorne*, 1 Vern., 182.
(3) *Jajneswar* v. *Bhuban*, I. L. R., 33 Cal. 425 (432).
(4) *Mata Din* v. *Kazim Husain*, I. L. R., 31 All., 432, F. B.
(5) *Ram Shankar* v. *Ganeshi Pershad*, I L. R., 29 All., 385 F. B.
(6) *Sujiram* v. *Barhamdeo*, 1 C. L. J., 337; *Jajneswar* v. *Bhuban*, I. L. R., 33 Cal., 425 (432).
(7) See also s. 6 (*a*), (*b*), *ante*.

being uncertain and contingent; he could not be held to be "interested" in the mortgagee within the meaning of section 91, so as to be entitled to redeem it. It was said that if such a person were held entitled to redeem the property, one consequence of redemption would be that, on payment of the mortgage-money, he should under the provisions of section 92 (now O. 34, r. 7) be put into possession of the mortgaged property, but to which he is not during the lifetime of widow in any case entitled. Moreover, another consequence of the same rule is that if the plaintiff fails to pay up the decretal amount, he is then debarred of all right to redeem the mortgaged property. So the Court observed: "The plaintiffs-respondents rely upon the language of section 91 (*a*) as giving them a right to redeem. This section provides that any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property may redeem, and the contention is that the plaintiffs-respondents have such an interest. We think that the interest there referred to is a present interest and not a mere contingent right such as the plaintiffs possess. In view of the difficulty of carrying out a decree for redemption in a case of this kind, particularly in cases in which persons are entitled to an interest in the property for life in succession, as for instance, the widow of a deceased mortgagor and after her the daughters of such mortgagor, we do not see our way to extend the meaning of the word 'interested' as used in this section so as to embrace the chance of inheritance of a reversionary heir."(1)

2099. To the same class belong other persons mentioned in section 6 (*a*) and (*b*) to which might be added collateral heirs, licensees, legatees during the lifetime of the testator, scheduled creditors of an insolvent mortgagor, maintenance grantees and the like. In this view a reversioner is not a *necessary* party under this section. It remains to see whether he is a *proper* party (§ 2091). Of course, this rule does not go beyond laying down the qualification of a person who is a necessary party. It leaves intact the general rule of Civil Procedure which permits the joinder of persons for a different purpose. For as the rule now runs "all persons may be joined as defendants against whom any right to relief in respect or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise." This rule is wide enough to authorize the joinder of a person with only a contingent interest in the subject-matter of the mortgage, and there may be cases when such joinder is not only permissible but also advisable. Again, it is by no means necessary under the Procedure Code, that to justify the joinder of a defendant some relief should be claimed against him, for a party may be joined by the Court (and it is conceived, that what the Court could do the plaintiff is equally competent to do in this respect) in order to enable the Court to finally hush hostile claims, and effectually and completely to adjudicate upon and settle all questions involved in the suit.(2) At any rate, a party once joined cannot be discharged from the suit unless he is shown to have been *improperly* joined.(3) The question whether a party has been rightly impanelled or not, then depends not upon any *a priori* considerations, but upon the nature of the relief claimed by the plaintiff the interests affected thereby, and the propriety of adjudicating upon matters which the Court considers necessary or appropriate for the full and final determination of the matter in controversy. In some cases parties are impleaded

(1) *Ram Chandar* v. *Kallu*, I. L. R., 30 All., 497 (498, 499).

(2) O. I, r. 10 (2), C.P.C.

(3) *Ib.*

because they claim some interest jointly or in common, or are those against whom some relief is actually claimed, or if not claimed, the plaintiff considers it necessary to safeguard his own title by hushing up hostile claims which may be subsequently raised against it. In such cases the Court allows a joinder not because it is necessary or even proper but merely *ex abundanti cautela*. Having regard to the diversity of claims arising and the diversity of interests involved, it is impossible to lay down any general rule which will fit in with the facts of all cases. As Story observed "whether the common formulary be adopted, that all persons materially interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit, ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable, indeed, as practical guide, but is still open to exceptions and qualifications and limitations the nature and extent and application of which are not, and cannot independently of judicial decision, be always clearly defined."(1)

It is therefore necessary to see what persons have been held to be qualified, and what not, to be joined as parties to a mortgage-suit.

(1) Persons pleading jus tertii.

2100. And, first, as to those who are not "interested" within the meaning of this rule, and who cannot therefore be impleaded. Such persons are certainly those who set up a *jus tertii* and who have no interest of their own in the suit. So where in a suit instituted to enforce a mortgage executed by a Mahomedan mortgagor against his heirs, the latter pleaded that the mortgagor had no power to mortgage the shares of his sisters who were also sharers in the property, the Court overruled the plea holding that it was not open to the defendants to set up a *jus tertii* to defeat the plaintiff's claim.(2) So it is the ordinary rule that the plaintiff-mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is in no way connected with the mortgage, and who has set up a title antagonistic or paramount to that of the mortgagor and mortgagee.(3)

(2) Adverse claimants.

2101. Persons claiming adversely or possessing a paramount title need not be made parties.(4) Indeed, it may be questioned whether they are proper parties in a suit in which the primary question to be determined is only as regards the discharge of the mortgage-security and the Court cannot try the validity of a legal title which is independent of the mortgage and accrued prior to its execution. Nor has it the power to try the relative merits of legal titles claimed by adverse litigations in such a suit. For one thing the Court having jurisdiction to try the mortgage-suit may not have the power to try the title of adverse claimants. Such a course would, moreover, lead to cross-combats and wholly confuse the issue. According to the view expressed in Calcutta it may be, moreover, open to objection on the ground of misjoinder and multifariousness.(5) But this is scarcely correct, for if the Procedure Code empowers the Court to impanel all such interests it is an authority against which the plea of misjoinder cannot stand.

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(1) Story's Eq., Pl. 76 (*e*).
(2) *Joti Prasad* v. *Aziz Khan*, 6 A.L.J. 5.
(3) *Jajneswar* v. *Bhuban Mohun*, I.L.R., 33 Cal., 425; *Mon Mohini* v. *Parvati Nath* I. L. R., 32 Cal., 746; *Khairati* v. *Banni Begum*, 5 A.L.J., 604; *Hakim Singh* v. *Ram Singh*, I.L.R., 30 All., 248.
(4) *Jajneswar* v. *Bhuban*, I.L.R., 33 Cal. 425.
(5) *Ib.*

But the rule is in this respect not inflexible and the court may implead an adverse claimant though no party can complain of his exclusion.(1) But the rule is not one of convenience, as it was in one case held to be.(2) It is rather based upon the principle that issues foreign to the mortgage suit cannot be permitted to be raised, and the "Court will not permit the mortgagor's title to be investigated in proceedings for foreclosure; the Court can only bar the equity of redemption and leave the mortgagee to pursue his legal means to establish his title."(3) "A plaintiff-mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. In a suit so framed, according to the plaintiff himself, such third party has no interest in the equity of redemption, which he seeks to put an end to. The plaintiff, therefore, cannot very consistently make such a stranger who has no priority, a party to his to enforce the security."(4) But a party who has been impleaded on his motion, or being impleaded does not object cannot after being cast in the suit change front and complain of the error in impleading him. Having taken the chance of a favourable verdict he cannot be permitted to undo the effect of an adverse verdict by being permitted to retire from the suit.(5)

(3) Claimants by paramount title.

2102. The same observations hold good in the case of a person claiming by a title paramount to the mortgagor and mortgagee.(6) As his interest is unaffected by the result of the suit he is in no way "interested" therein and as such he is not a necessary party. Nor is he a proper party because his presence will rather embarrass than complete the trial. Consequently, where in a mortgage suit, the Court ordered a stranger claiming to be the owner of the property to be made a party, it was held to be a case for revision on the ground that his joinder was liable to confuse the issues(7); but the rule is not inflexible, and cases may occur when the court will consider such joinder as only proper for the just adjudication of the rights of immediate parties (8) (§ 2095).

(4) Prior mortgagee.

2103. The question whether a prior mortgagee was a necessary party in a suit to enforce a subsequent mortgage at one time depended upon the meaning to be attached to the word "property." It was said that if all that is involved in the subsequent mortgagee's suit is the equity of redemption, then the prior mortgagee not being interested therein need not be joined. But if the interest involved be regarded as something more than the equity of redemption, or in other words, if it be the mortgaged property subject to the rights of the prior mortgagee, then the prior mortgagee was a necessary party, whatever may have been the nature of the mortgage sought to be enforced. In the latter view the prior mortgagee would naturally be interested(9) in the suit, and it was accordingly held in

(1) *Bhaja* v. *Chunilal*, 5 C.L.J. 95; *Gokul* v. *Rasheswari*, 14 C. L. J., 108; *Dwarka* v. *Kesory Lal*, 14 C. W.N. 703; 11 C.L.J. 426.

(2) *Hari Krishna* v. *Watson & Co.*, 8 C.W. N. 365; dissented from in *Jajneswar* v. *Bhuban*, I.L.R. 33 Cal., 425 (436).

(3) 2 Robb. Mort. p. 1023; Anonymous 2 Ch. Ca. 244.

(4) *Jajneswar* v. *Bhuban*, I.L.R., 33 Cal., 425 (440).

(5) *Bhaja Chowdhury* v. *Chuni Lal*, 5 C.L. J., 95.

(6) But a person possessing a paramount title but asserting a title as the mortgagor's assignee is a proper party. *Panchanan* v. *Mir Abdul*, 16 C.W.N. 920; 16 I.C. 703.

(7) *Maharaj Singh* v. *Lachman*, 24 I. C. (Oudh) 871.

(8) *Obalampalli* v. *Ramalakshmana*, (1914) M.W.N. 623; 22 I.C 976.

(9) In England the word "interested" is equal to have a mortgage; *Hunnings* v. *Williamson*, 11 Q. B. D., 533; but here the term is obviously used in a wider sense.

several cases that a prior mortgagee was a necessary party; (1) though it was doubted whether his non-joinder was fatal to the progress of the suit.(2) But, of course, being a person with priority he could not be compelled to redeem the subsequent mortgage. But the question what object was attained by joining the prior mortgagee, and how far his interest was safeguarded by the decree was one upon which the Courts do not appear to have taken a uniform view. There can be scarcely any objection to a puisne mortgagee combining in one suit, a prayer to redeem a prior and to foreclose his own mortgage.(3) But is he bound to redeem the prior mortgage before being able to foreclose his own? In the view at one time taken in Allahabad there could be no foreclosure or sale at the instance of a subsequent mortgagee subject to the rights of a prior mortgagee.(4) The reason given for this view was that the object of the section being to bring all persons interested before the Court in one suit, so that their rights might be once for all dealt with and disposed of, that object would have been frustrated if the subsequent mortgagee were allowed to obtain a decree subject to another mortgage. This view taken on the authority of a case (5) which had long held sway in that Court was in conflict with its earlier precedent, (6) and the current of authorities of the other Courts had since been abandoned (7) it being held there as elsewhere that a puisne mortgagee was competent to bring the interest as comprised in his mortgage to sale without being required to implead the prior mortgagee or to redeem him. This view accorded with that taken in Calcutta, but where, however, this much was conceded that a prior mortgagee may well be regarded as interested in the property comprised in a subsequent mortgage so as to be a necessary party to a suit to enforce that mortgage. (8) But in another case it was further conceded that although a subsequent mortgagee was, as a rule, entitled to a decree to sell the property subject to the prior incumbrances, still the rule was not an inflexible one, and whenever it was equitable and proper, the Court should be justified in ordering redemption of the prior incumbrances before bringing the property to sale. (9) On the other hand, in another case it was held that in a suit by a puisne mortgagee upon his mortgage, a prior mortgagee was not a necessary party, though he may be properly joined, if the puisne mortgagee offer to redeem his mortgage: (10) "The property over which the second mortgagee

(1) *Kantiram* v. *Kuttubuddin*, I.L.R., 22 Cal., 33; *Sorabji* v. *Rattonji*, I.L.R., 22 Bom., 701; *Ammayi* v. *Rathna*, 14 M.L.J. R., 467; *Matadin* v. *Kazim Husain*, I.L. R., 13 All., 432, F. B.; *Lakhmichand* v. *Ganpati*, 14 C. P. L. R., 177 (179); *Ghulam* v. *Fakir Shah*, 17 C.P.L.R., 139.

(2) *Srinivasa* v. *Yamunabhai*, I. L. R., 29 Mad., 84 (86).

(3) *Ratiram* v. *Ghasiram*, 3 C. P. L. R., 82; *Lakhmichand* v. *Ganpati*, 14 C. P L. R., 177; overruling *Narsingh* v. *Mt. Jamna Bai*, 12 C. P. L. R., 86 (90).

(4) *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432, F. B.; *Hira Lal* v. *Kishan Lal*, I. L. R., 19 All., 543 (545); *Sri Gopal* v. *Pirthi Singh*, I. L. R., 20 All., 110 (114, 115), F. B.; O. A., I. L. R., 24 All., 429 P. C.; *contra* in *Sirbadh Rai* v. *Raghunath*, I. L. R., 7 All., 568, O. A.; *Raghunath* v. *Jurawan*, I. L. R., 8 All, 105, F. B.; explained *per* Edge, C. J., in *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432 (447), F.B.; on the ground that the prior mortgage there was not ripe for redemption. *Parsi* v. *Girand Singh*, (1885) A. W. N., 155; *Kudratulla* v. *Kubra Begam*, (1900) A. W. N., 185. Nor does the rule extend to prior *charge holders*—*Lalman* v. *Mohar Singh*, 3 A. L. J. R., 348.

(5) *Matadin* v *Kazim Husain*, I.L.R., 13 All., 432, F.B.

(6) *Raghunath* v. *Jurawan*, I.L.R., 8 All., 105, F.B.

(7) *Ram Shankar* v. *Ganesh Prasad*, I. L. R., 29 All., 385, F. B.

(8) *Kanti Ram* v. *Kuttubuddin*, I. L. R., 22 Cal., 33 (38, 39); *Maghal* v. *Abdul Aziz*, 1 C. W. N., lxiv; *Durga Churn* v. *Chandra Nath*, 4 C.W.N., 541; *Debendro* v. *Ramtaran*, I. L. R., 30 Cal., 599, F. B.; *Jogeshwar* v. *Bhuban*, I. L. R., 33 Cal., 425.

(9) *Beni Madhub* v. *Sourendra Mohun*, I. L.R., 23 Cal., 795 (799).

(10) *Per* Jenkins, J., in *Raj Coomary* v. *Preo Madhub*, 1 C. W. N., 453 (454); followed in *Surjiram* v. *Barhamdeo*, 1 C. L. J., 337 (351). The difference between a "necessary" and a proper party is maintained

acquires an interest is not the entire original interest of the mortgagor, but only what is left in him after the first mortgage has been granted. In a suit, therefore, framed as I have indicated, the subject-matter of the litigation is the interest of the mortgagor *minus* the interest of the first mortgagee, and no decree made in such an action can possibly affect the rights of persons who claim under a prior title. On the other hand, if the second mortgagee frames his action in such a way that it is one in substance to redeem the prior mortgagee as also to foreclose the equity of redemption, the subject-matter of the litigation is the entire interest in the property, and the first mortgagee as also the owners of the equity of redemption are necessary parties to a suit of this composite character." (1)

2104. In an Allahabad case the facts were these: *A* mortgaged a portion of a property to *B*, and afterwards joined his brother *C* in mortgaging that portion together with some other property to *D*. Both the mortgages were registered. *B* brought a mortgage-suit, without bringing *D* on the record, and obtained a mortgage-decree in execution of which the portion of the property mortgaged to him was sold by auction and purchased by *E*. Subsequent to the date of *B's* decree *D* brought a suit on his mortgage and obtained a mortgage-decree, in the execution of which the property mortgaged to *D* was purchased by *F*. Afterwards *F* tendered to *E* the amount of the debt due by *A* to *B*, and he not accepting it, *F* brought a redemption-suit. It was contended on *E's* behalf that the suit was not maintainable on the ground that *D* ought to have impleaded the prior mortgagee *B* in his redemption-suit, and without offering to redeem his mortgage in his suit, he could not bring the mortgaged property to sale, and if notwithstanding the prior mortgage being not on the record the property be sold, the purchaser does not get any property. Therefore by this sale *F* did not get any interest. It was held that such a suit would lie and that *F* was entitled to redeem.(2) A similar view appears to have been taken in Madras.(3) In England the presence of a prior mortgagee is only enjoined in a suit in which the subsequent mortgagee offers to redeem him,(4) or prays for a sale subject to his mortgage, or claims priority in his own favour,(5) or if the amount payable on redemption cannot be otherwise ascertained, (6) but he is not bound to implead him otherwise as a matter of form. So in Daniell's Chancery practice the rule thus stated: "A second incumbrancer cannot redeem a prior incumbrance without bringing the mortgagor as well as the prior incumbrancer, before the Court, but he may, if he please, foreclose the mortgagor and the third mortgagee without bringing the first mortgagee before the Court, because by so doing he merely puts himself in the place of the mortgagor and subsequent mortgagee, and leaves the first mortgagee in the situation in which he stood before; and if in such a case he makes the prior mortgagee a party, he must offer to redeem him."(7)

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in the English law, *e.g.*, in Ord. XI., rule 1, but the difference is often imperceptible—*Massey* v. *Haynes*, 21 Q. B. D., 330 (333); *cf. Sykes* v. *Scholfield*, 28 Sol. J., 477.

(1) *Surjiram* v. *Barhamdeo*, 1 C. L. J., 337 (351).

(2) *Kudralulla* v. *Kubra Begam*, (1900) A. W. N., 185; distinguishing *Matadin* v. *Kazim Hussain*, I. L. R., 13 All., 432. F.B.; *Janki Prasad* v. *Kishen Datt*, I.L.R., 16 All., 478; *Meherban* v. *Nadir Ali*, I. L. R., 22 All., 212.

(3) *Muthu* v. *Venkatachellum*, I. L. R. 20 Mad., 35 (39).

(4) *Imman* v. *Wring*, 3 DeG. & S., 729; *Ross* v. *Page*, 2 Sim, 471.

(5) *Feltham* v. *Clark*, 3 DeG. & S., 307.

(6) *Lord Kensington* v. *Bouverie*, 16 Beav., 194.

(7) Vol. I (6th Ed.) p. 217; *cf.* to the same effect 2 Coobe Mortgage (7th Ed.), 1025; Fisher § 1693; In re *Hodson & Howes* 35 Ch. D., 668. *contract*, 35 Ch. D., 668.

2105. The wording of the rule here closely followed the English law, (1) but the divergence in its application was the outcome of the interpretation placed upon the words "all persons having an interest in the property comprised in a mortgage." If the word "property" were held to mean as actual physical object as it was at one time held in Allahabad,(2) the prior mortgagee was then no doubt a necessary party. But if the term were held to include also mere rights relating to physical objects, there was then no difficulty in reconciling the Indian law to the English practice. For since the only property comprised in the subsequent mortgage is the equity of redemption, in which the prior mortgagee can in no way be said to be interested, his presence as a party is unnecessary in a suit to enforce that mortgage. And this is now the effect of the amendment of the rule and the explanation added which places the present rule in harmony with the prior predominating view and the rule of English law. Indeed, any other view would have led to the result that not only the prior mortgagee but also a lessee or a person howsoever interested in the property—even one having the right of easement—would become essential. And yet no object would be gained by joining them, for the prior mortgages may not be ripe for redemption. Moreover, a suit in which a prior mortgagee is joined, is, so far as the latter is concerned, a suit to redeem, (3) and a prior mortgagee must insist upon being redeemed or discharged from the suit, if he is impleaded by a subsequent mortgagee, failing which his suit for the same relief would be *res judicata*, in the same way, if being a party to a suit on a mortgage prior to his own, he omits to enforce his right to redeem such prior mortgage, he could not afterwards sue for that purpose on the mortgage he has omitted to plead.(4) Moreover, in such a case, according to the practice of the Allahabad High Court the puisne mortgagee would not be permitted to foreclose without redeeming the prior mortgage (§ 1726). According to the view taken in a case of the Calcutta High Court he may even be permitted to redeem his puisne mortgagee.

In America the prior mortgagee is impanelled to serve a variety of purposes. He may be joined so that the property may be sold with his consent, either free from, or subject to his declared lien, and thus ensure sale of the property for its full value.(5) Not infrequently the prior mortgagee is joined, because the pusine mortgagee attacks his priority;(6) and it is the rule in America that whenever the prior mortgagee is impleaded, the plaintiff must disclose the purpose for which he is made a party. He is, however, not a party as a matter of course, and if he is, he is unaffected by the decree.(7) These principles equally apply to this country so that while it is by no means necessary to implead a prior mortgagee in a suit based on a subsequent mortgage, as a matter of course, the Courts commend joinder only when it is subservient to some other purpose. But where the prior mortgagee is to be impleaded the plea must be raised in the pleadings and not deferred till the hearing.(8)

(5) Contingent interest.

2106. Apart, however, from persons admittedly having a share in the mortgaged family property, this section is no authority for drawing in persons whose interest therein may be speculative or remote. Thus the section has never been understood

(1) 2 Robb. Mort., 1005; *Wickenden* v. *Rayson*, 6 DeG. M. & G., 210; *Delabere* v. *Norwood*, 3 Swans, 144*n*; *Parker* v. *Fullerr*, 1 Russ. & M., 656.

(2) *Mataain* v. *Kazim Husain*, I. L. R., 13 All., 432, F.B.; *Ganga Prasad* v. *Chuni Lal* I.L.R., 18 All., 113; *Ramjatan* v. *Ramhit Singh*, 2 A.L.J.R., 484.

(3) *Dalton* v. *Haytor*, 7 Beav., 313; *Inman* v. *Waring*, 3 DeG. & S., 729.

(4) *Sri Gopal* v. *Pirthi Singh*, I.L.R., 24 All., 429, P.C.

(5) Jones on Mortgage (6th Ed.), §§ 1439, 1445, 1474, 1589.

(6) *Ib.*, § 1589 *a*.

(7) *Ib.*, § 1439.

(8) *Balfe* v. *Lord*, 2 Dr. & War., 480.

to enjoin the joinder of a collateral relation, as for example, a nephew of the mortgagor, even though his share may be remotely affected by the suit.(1) Persons merely entitled to collateral or contingent interest are not necessary parties. Such interest is possessed by a reversioner of a Hindu widow (2) who has been held to be not "interested" within the meaning of this rule in a mortgage executed by the widow. As before stated the reversionary interest can be little distinguished from a *spes successionis* or a mere expectancy which is not even an alienable interest in property (§§ 200—205). To the same class belongs the expectancy of a Mahomedan heir, (§ 206) licensees and legatees (§ 208) and other persons entitled to a mere possibility (§§ 209—214) which cannot be even designated as any interest in land. So in a case decided under the Procedure Code of 1877 (3) now amended, the plaintiff, an execution-purchaser of the equity of redemption before he obtained a certificate of sale (4) was held to possess no right *in rem* but merely an equitable right against the judgment-debtor, and consequently he could not resist the right of possession of a subsequent purchaser in execution of a decree on a mortgage prior to the plaintiff's sale.(5) Following this analogy a person who has merely the benefit of an obligation, such as merely a contract for sale, would not be held interested in the property to be joined in a mortgage suit affecting it, though the case would, of course, be different if he has paid any portion of the price and thus acquired a charge thereon. Persons indirectly interested in the subject-matter of the suit are not necessary parties,(6) though they may be proper parties if a case for their joinder is made out (7) though before joining such persons on their motion the Court usually orders deposit of a sufficient sum as security for costs of the other side.(8)

2107. It has been before stated that all persons interested in the equity of redemption are necessary parties (§ 2096), and from which it follows that persons who claim adversely to the mortgagor ought not to be made parties to a mortgage-suit for the purpose of litigating their titles, and that the proper parties to such suit are only persons interested in the equity of redemption, (9) and from which it follows that if the mortgagor has parted with his equity of redemption, he is then no longer a necessary party. Persons who profess to be interested in the mortgage must, if challenged, give at least *prima facie* evidence of their interest which must be a subsisting interest at the time of the institution of the suit. Persons fraudulently set up by the mortgagor to shield himself from foreclosure are not necessary parties.(10) As the persons to be impleaded are only those interested either in the mortgage-security, or in the right of redemption, it is evident that if a portion of the mortgaged property had already been released or redeemed, the holder of the property so discharged, being in no sense interested in the property in respect of which the mortgage is enforced, need not and should not be impleaded in the suit. Hence, if the plaintiff-mortgagee

(5) Persons whose interest is safeguarded.

(1) *Ram Nath* v. *Lachman*, I. L. R., 21 All., 193 (195); *Kanhai* v. *Seth Brindawan*, 16 C. P. L. R., 169.

(2) *Ram Chandar* v. *Kallu*, I.L.R., 30 All. 497 (498, 499).

(3) Act X of 1877; *Nanjundapa* v. *Hemapa* I. L. R., 9 Bom., 10; *Lachmi Narayan* v. *Indrabhan*, (1883) B.P.J. 254.

(4) *Cf.* s. 316, Act XIV of 1882; but now see s. 65, Act V of 1908, which vests the title as from the date of the sale.

(5) If the second purchase had been made in execution of a money decree it would have made no difference. *Lachminaryan* v. *Indrabhan*, (1883) B.P.J., 254.

(6) *Rupchand* v. *Fateh Chand*, 6 I. C, (All.) 36; facts not reported

(7) *Moser* v. *Marsden*, 61 L.J. Ch., 319.

(8) *Ib.*

(9) *Jajneswar* v. *Bhuban Mohan*, I. L. R., 33 Cal., 425; *Mon Mohni* v. *Parvati*, I.L.R., 32 Cal., 746; *Khairati* v. *Banni Begam*, 5 A. L. J. R. 604.

(10) *Yates* v. *Hambly*, 2 Atk., 237; see s. 50, *ante*, § 1160.

releases a portion of the property from his mortgage the mortgage must be treated as having been spilt up and the property released can no longer be considered as strictly speaking comprised in the mortgage, so as to make its purchaser a necessary party.(1) It is within the mortgagee's right to omit from his suit any part of the mortgaged property, whether the mortgage be simple or one by conditional sale, and in such a case the owners of the equity of redemption of the property omitted need not be made parties.(2) But though the mortgagee may find this a convenient course to adopt in the case of property with disputed or doubtful title, still there may be cases in which this procedure may not quite fit in with the rights of third parties.(3) For example, the release of a fraction of the property, though sold by the mortgagor to another, is held to have the same effect as if the mortgagee had himself bought it and the mortgage-debt should therefore be apportioned between it and the remaining mortgaged property. So in a suit by the mortgagee for contribution or apportionment of the mortgage-debt, the heirs of a mortgagor against whom a decree on the mortgage had been obtained by the mortgagee, and in execution of which the mortgaged property was sold and a part of which was purchased by the mortgagee himself, and a person who had purchased a portion of the mortgaged property with the consent of the mortgagee are not necessary parties, inasmuch as the property of the heirs being sold they can no longer be regarded as having any interest in the property, and as regards the purchaser of a part, the purchase being with the mortgagee's consent, no relief could be claimed against him.(4) But in the latter case the effect of the sub-purchase is to release the other party from liability for such portion of the mortgage-debt as on apportionment is attributable to the property purchased by him.(5) It being so, the impleading of a purchaser of a part of the mortgaged property may sometimes be expedient in the interest of the mortgagee, though his exclusion would by no means be a vitiating defect in the suit.

2108. Parties in a Foreclosure Suit.—In a suit for foreclosure or sale, a co-mortgagee cannot separately sue for his share without arraying the other mortgagees as plaintiffs, or if they are unwilling to join as plaintiffs, then as defendants. And a mortgage being indivisible, no sharer therein can sue in respect of his own share in any case.(6) Thus in a case decided under the Regulations it was observed:—The whole of the mortgage-debt is due to the persons claiming under the original mortgages jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay, in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid debt, except under circumstances which do not exist in this case."(7) In a suit for foreclosure by a puisne mortgagee, the prior mortgagee was at one time held to be a necessary party,(8) and so *vice versa*(9), but the former view is now, in view of the explanation, no longer tenable. And whether the mortgagee makes a mortgage for himself and as an

(1) Necessary plaintiffs.

(1) *Wazir Hussain* v. *Nihal Chand*, (1905) A.W.N., 156; *Sheo Tahal* v. *Sheodan Rai*, I.L.R., 28 All., 174, F.B.

(2) *Hari Kissen* v. *Sheikh Velait Hossain*, 7 C.W.N., 723; *Nazir Husain* v. *Nihal Chand*, 2 A.L.J.R., 628; *Sheo Tahal* v. *Sheodan*, *ib.*, 630, F.B.

(3) S. 82 Comm.; *Imam Ali* v. *Baijnath*, 10 C.W.N., 551.

(4) *Rammoy* v. *Premchand*, 5 C.W.N., 423 (425).

(5) *Rammoy* v. *Premchand*, 5 C.W.N., 423; *Hari Kissen* v. *Sheik Velait Hossain*, 7 C.W.N. 723.

(6) See s. 60, *ante*; *Mushtaq Ali* v. *Bahari Lal*, 25 I.C. (Cal.) 508.

(7) *Bishan Dial* v. *Manni Ram*, I.L.R., 1 All., 297 (300); *Bhora Roy* v. *Abilack Roy*, 10 W.R., 476.

(8) *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432, F.B.; followed in *Sorabji* v. *Ratonji*, I. L. R., 22 Bom., 701.

(9) *Sivathi* v. *Ramasubbayyar*, I. L. R., 21 Mad., 64.

agent for the other sharers, he must join the latter in his suit for possession (1) unless the two mortgages are separate and independent of each other.(2) It has been held that in a suit between Mohammedans by the heirs of a *zur-i-peshgi* mortgagee to recover the amount advanced, all the heirs of the mortgagee must be represented either as plaintiffs or defendants,(3) the same rule being applicable to Hindus so that in a suit on a mortgage brought by the managing members of a Mitakshara joint family all the coparceners are necessary parties and should be impleaded (4) (§§ 2143—2148). But a wife having an English domicile can sue without joining her husband as a co-plaintiff.(5) Except in the case of *benami* owner under the circumstances above stated, if a person interested in the mortgage is not impleaded, his rights can on no account be affected by a decree to which he was not a party.(6)

(2) Necessary defendants.

2109. The mortgagee must implead not only the mortgagor, but all other persons interested in redemption. Thus where the mortgagee of a zemindari brought a suit on his mortgage against a mortgagor, who previously to the mortgage had granted a *patni* lease of the zemindari to a third party, the latter was held to be a necessary defendant in order to give him an opportunity to redeem.(7) In a case where out of three mortgagors, the third mortgagor had satisfied his share of the debt, and when examined as a witness it appeared that he had no interest, save in a small portion of the property, it was held in the second appeal that the suit could not proceed without him, and the case was accordingly remanded for re-trial after joining him as a defendant.(8) The mortgagor's *legal* representatives are in the event of his death necessary parties,(9) but not his personal representatives who are neither interested in the accounts nor entitled to redeem.(10) A person in possession of the mortgaged premises must be impleaded with the mortgagor(11) whether his possession is under(12) or adverse to him.(13) But while all persons interested in a mortgage are necessary parties, the mortgagee must not capriciously make persons defendants when they ought to be plaintiffs and thus increase the costs of the other defendants.(14) A person improperly impleaded must object to his joinder at the earliest moment possible, otherwise he cannot, afterwards, when the merits seem to go against him, be permitted to object to the propriety of his joinder.(15)

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(1) *Punchum* v. *Mungle*, 3 Agra. 207; *Mahomed* v. *Lalla Dhundur*, 25 W. R., 39; *Muhammad* v. *Man Singh*, I.L.R., 9 All., 125.

(2) *Sundar Singh* v. *Bholu*, (1898) A. W. N., 58.

(3) *Mujeedoonissa* v. *Dildar Hossain*, 14 W. R., 216. [The divisibility of the mortgage herein recognised would hardly now be legal in ordinary cases.] *Omrao Begum* v. *Government of India*, I. L. R., 9 Cal., 704, P. C.

(4) *Sidhesuri* v. *Dharanijit*, I. L. R., 41 (Cal) 727.

(5) *Hughes* v. *Delhi & London Bank*, I. L. R, 15 Cal., 35.

(6) *Raghubans Kuar* v. *Ram Sahai*, (1888) A. W. N., 193; *Muhammad Samir-ud-din* v. *Man Singh*, I.L.R., 9 All., 125; *Balmakund* v. *Mt. Sangari*, (1897) A.W.N., 94; *Gajadhar* v. *Mulchand*, I.L.R., 10 All., 520, (1888) A. W. N., 210; *Hiralal* v. *Kishan Lal*, I.L.R., 19 All., 543; *Mohun Manor* v. *Togu Uka*, I.L.R., 10 Bom., 224; *Anundo Moyee* v. *Dhonendro*, 14 M. I. A., 101; *Norender Narain* v. *Dwarka Lal*, I. L.R., 3 Cal., 397; *Jugul Kishore* v. *Kartic Chunder*, I.L.R., 21 Cal., 116; *Sivathi* v. *Ramsubbayyar*, I. L. R., 21 Mad., 64.

(7) *Kasamunnissa* v. *Niratna*, I.L.R., 8 Cal., 79, *Radha Pershad* v. *Monohur*, I.L. R., 6 Cal, 319; *Krishnama* v. *Perumah*, I. L. R., 8 Mad., 388.

(8) *Subban* v. *Arunachalam*, I. L. R., 15 Mad., 487; so also in *Jamuna Pershad* v. *Ganga Pershad*, I.L.R., 19 Cal., 401 (411).

(9) S. 368, Civil Procedure Code (Act XIV of 1882).

(10) Fisher, § 1678.

(11) *Ram Yad Singh* v. *Lalla Saligram*, 16 W. R., 98.

(12) *Ramchandra* v. *Kanyapa*, (1874) B. P. J., 90.

(13) *Yashavant* v. *Gopal*, 2 B. H. C. R., 202: *Nilkant* v. *Peary Mohun*, 3 B. L. R., O. C., 7; *Krishna* v. *Hurry Nath*, 25 W.R., 60.

(14) *Per* Jessel, M. R., in *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D., 121 (127).

(15) *Bhaja Chowdhury* v. *Chuni Lal*, 5 C.

2110. Benamidar Plaintiff.—Since all persons interested in enforcing the mortgage should join as plaintiffs, it follows that the beneficiary of a *benami* mortgage is a necessary party and must join as a co-plaintiff in a suit instituted to enforce it. And so it has been held in several cases that a *benamidar* cannot sue without joining the beneficiary. (1) But the contrary view has prevailed in more recent decisions, (2) although there appears to be no reason why a beneficiary who is so far interested in the mortgage as to be its real holder should not be joined, especially if, as has been maintained by the Calcutta High Court, the effect of the non-joinder is that the real owner is not bound by the result of the suit by his *benamidar*. (3) The Bombay High Court has, however, on this point taken what appears to be the more correct view that although a *benamidar* may sue as such, but where a suit is brought by him in order that the real purchaser may escape the consequences to which the latter would be liable if he purchased and sued in his own name, the Court will look behind the record to see who the real purchaser is. (4) And it has been held by Ranade, J., that where the true owner holds back, a decree obtained against a *benamidar* would bind the true owner in the same way as if it were passed against him. (5) Of course, *benami* transactions are not to be regarded as fraudulent, (6) but there can be no doubt that in a *benami* mortgage the real owner is more interested than the ostensible owner, *benamidar*. Of course, so far as the mortgagor is concerned, the question that the mortgagee was a benamidar is immaterial, for whether the mortgagee is the ostensible or the real owner of the security, the debtor is not concerned beyond seeing that he is not prejudicially affected in his defence or is made to pay his debt twice over, and to this extent he is protected, inasmuch as the debtor may set up the same defence against the *benamidar* plaintiff, as he could have urged against the beneficiary, (7) and a payment made to the *benamidar* not only binds the beneficial owner but any adjudication between him and the *benamidar* operates as *res judicata* equally against the beneficial owner. (8) Moreover, the mortgagor is bound to the *benamidar* by a privity of contract (9) and he is under no obligation to enquire that the ostensible mortgagee was not the real mortgagee. It has, therefore, been held that a *benamidar* mortgagee is competent to sue on the mortgage without joining the beneficial owner, (10) who, however, may be joined for the sake of additional caution.

L. J., 95 ; following *Hari Krishna* v. *Watson & Co.*, 8 C.W.N., 365 ; *Hefner* v. *N. W. Mutual Life Insurance Co.*, 123 U. S., 747.

(1) *Kally Prosonno* v. *Dinonath*, 11 B.L. R., 56 ; *Fazeelun* v. *Omdah Bibee*, 11 B. L. R., 60 (note) : 10 W. R., 469 ; *Kalee Prosunno* v. *Dinonath*, 19 W. R., 435 ; *Tamaoonnissa* v. *Wooijulmonee*, 20 W.R., 72 ; *Sita Nath* v. *Nobin Chunder*, 5 C. L.R , 102 ; *Gopi Nath* v. *Bhagwat Pershad*, I.L.R., 10 Cal., 697 : *Hari Gobind* v. *Akhoy Kumar*, I.L.R., 16 Cal., 364 ; *Issur Chunder* v. *Gopal Chundra*, I. L. R., 25 Cal., 98 ; *Baroda Sundari* v. *Dino Bundho*, *ib.*, 874.

(2) *Nand Kishore* v. *Ahmad Ata*, I.L.R., 18 All., 99 ; *Bhola Pershad* v. *Ram Lall*, I.L. R., 24 Cal., 34 ; *Sachitanand* v. *Bolaram*, I. L. R., 24 Cal., 644 ; *Chowdhry* v. *Gopal*, 18 C.W.N. 814 ; *Dagdu* v. *Balwant*, I.L.R, 22 Bom., 820 ; *Ravji* v. *Mahadev*, *ib.*, 672 ; *Annaji* v. *Rapuchand*, I. L. R., 7 Bom. 520 ; *Shangara* v. *Krishnan*, I.L.R., 15 Mad., 267 ; *Thakur Rohini* v. *Vishwanath*, 18 C. P. L. R., 33.

(3) *Bhola Pershad* v. *Ram Lall*, I. L. R., 24 Cal., 34 (36).

(4) *Dagdu* v. *Balwant*, I. L. R., 22 Bom., 820 (824).

(5) *Ravji* v. *Mahadev*, I. L. R., 22 Bom., 672 (679).

(6) *Gopeekrist* v. *Gunga Pershad*, 6 M. I. A., 53 ; *Mt. Bulkuns Kowar* v. *Lalla Buhoree Lall*, 14 M. I. A , 496.

(7) S. 132, *post*.

(8) *Ravji* v. *Mahadev*, I. L. R., 22 Bom., 672 (679).

(9) *Kishan Prasad* v. *Har Narain*, I.L. R., 33 All., 272 P.C.

(10) *Nand Kishore* v. *Ahmed*, I.L.R., 18 All., 69 ; *Yad Ram* v. *Umrao Singh*, I.L.R., 21 All., 380 ; *Bholapershad* v. *Ram Lall*, I. L.R., 24 Cal., 34 ; *Sachitananda* v. *Bolaram*, I.L.R., 24 Cal., 644; *Gopi Nath* v. *Bhugwat Pershad*, I.L.R., 10 Cal., 697 ; *Shangara* v, *Krishna*, I.L.R., 15 Mad., 267; *Sivasankaran* v. *Panchani*, 8 M.L.J., 302; *Ravji* v. *Mahadev*,

2111. But the question does not rest there. For while on the one hand, the mortgagor is not bound to look beyond his mortgagee, in view of the mandatory provisions of this rule, the question is not one of convenience but one of competency. Are the benamidar and his beneficiary both interested in the mortgage? In one sense they both are, since the term "interest" is not necessarily confined to connoting personal interest, and the benamidar is interested in so far as he holds the mortgage in trust for the beneficiary, while the latter is interested because he is the real owner thereof. These considerations appear to have been overlooked in several cases in which the right of the *benamidar* to sue at all has been denied.(1) But these cases rest upon no intelligible foundation, especially those in which the right was denied, even though the rightful owner had been made a defendant.(2) Such a position to be tenable must assume that a *benamidar* is intrinsically a vicious person or that *benami* transactions are presumably fraudulent, but this view can be scarcely maintained in view of the decisions of the Privy Council(3) (§ 705). Indeed, to say that a defendant may show that the person from whom he had borrowed was not his creditor, would furnish him with a facile ground of attack, without in any way furthering the cause of justice. Of course, he should not be in any way damnified by the *benamidar's* action, and, as has been remarked before, to this extent he is protected. It is sometimes said that the statement that a *benamidar* may sue in his own name is only true as regards suits on contracts not relating to immoveable property.(4) And so it has been recently held in Calcutta that a *benamidar* being merely a person who lends his name to another, but who has neither title to nor possession of the property, has no right to maintain a suit for recovery of possession of property, of which he is merely a *benamidar*, although where a suit has been allowed to be brought by him, the decree will equally bind the beneficial owner.(5) But it may be urged against this view that it is not a person with title or possession who alone is entitled to maintain a suit, for if it were so, an agent, a trustee or other persons acting in a fiduciary character will have no right to sue. The crux of the question rather is whether a *benamidar* may not be regarded as a person possessing the implied authority of the beneficiary to maintain a suit. Indeed such an authority must be presumed where the *benamidar* is permitted to take a mortgage or otherwise hold himself out as the beneficial owner. It may, therefore, be taken as the better view that the mortgagee is not precluded from suing merely because he is shown to be the *benamidar*, nor is the suit without him necessarily defective because the rule was never intended to compel persons to disclose their secret title, though if the fact be known they would be proper if not the necessary parties to a mortgage suit.(6)

I.L.R., 22 Bom., 672; *Dagdu* v. *Balwant*, I. L.R., 22 Bom., 820; *Thakur Rohini Singh* v. *Vishwanth*, 13 C.P.L.R., 33.

(1) *Hari* v. *Akhoy Kumar*, I.L.R., 16 Cal., 364; *Prosonno Kumar* v. *Gooro Churn*, 3 W. R., 159; *Fuzeelun* v. *Omda Bebee*, 10 W. R., 469; *Rambhorosee* v. *Bissessur*, 18 W.R., 454; In re *Muthu Kumar*, 9 M.L.T., 157; 9 I.C., 40.

(2) *Hari Gobind* v. *Akhoy Kumar*, I.L.R., 16 Cal., 364 (366); *cf. Amirto Lal* v. *Rajonee Kant*, 15 B.L.R., 10.

(3) *Gopee Krist* v. *Gangapersuad*, 6 M. I. A., 53; *Mt. Buhuns Kowar* v. *Lalla Buhoree Lall*, 14 M. I. A., 496; *Sheoraj Singh* v. *Amiruddin*, I.L.R., 20 All., 539.

(4) *Bojjamma* v. *Venkataramayya*, I. L. R., 21 Mad., 30 (31).

(5) *Mohendra Nath* v. *Kali Prosad*, I. L. R., 30 Cal., 265 (273); [explained in *Hara Gobind* v. *Purna Chandra*, 11 C. L. J., 47; I. C. 522, to apply only to suits on a title to immoveable property; it being held that a benamidar is competent to sue on a contract; to the same effect—*Alikjan* v. *Bambaran*, 12 C. L. J., 357; 7 I. C. 166 (170); *Kiribash* v. *Gopal*, 19 C.L.J., 193; 20 I C., 499.] *Issur Chunder* v. *Gopal Chandra*, 1. L. R., 25 Cal., 98 (99); *Baroda Sundari* v. *Dino Bandhu*, 1. L. R., 25 Cal., 874 (876); *Munshi Basiruddin* v. *Md. Jalish*, 12 C. W. N., 409.

(6) *Koothaperumal* v. *Secretary of State*, I. L. R., 30 Mad., 245.

2112. Heirs of Deceased Mortgagee.—Where the original mortgagee is dead, all persons entitled to a share in the inheritance should be made the plaintiffs, unless there is an executor or administrator of his estate who may then sue alone in his own name. In the event of the legal representatives being insolvent, or collusively or otherwise refusing to sue, the legatee or the next-of-kin would be entitled to sue on it, if it appears that the benefit of the mortgage would probably be otherwise lost to the estate.(1) In case of collusion even an unsecured creditor may bring an action for foreclosure.(2) If the mortgagee has absolutely assigned his mortgage, he has no more living interest, and the assignee alone is competent to enforce the mortgage. But if the assignment was merely by way of security, he would have to be added as a co-plaintiff.(3) In the latter case the judgment directs an account of what is due to the original mortgagee, and then of what is due to the derivative or sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor.(4)

2113. Where there are several mortgagees and some of them afterwards take fresh mortgages of the equity of redemption, it is then impossible for all of them to join as plaintiffs, for since all subsequent mortgagees must be impleaded in the suit by the prior mortgagee, the mortgagees holding both the prior and subsequent mortgages would have to be made both plaintiffs and defendants in such a suit and which would be clearly anomalous. Moreover, if any subsequent mortgage is held by the prior mortgagee, he could not proceed upon his first mortgage without suing also on his second mortgage, since it is the object of the rule that all the rights and interests of parties impleaded in the suit shall be adjudicated. It, therefore, follows that where the same mortgagee holds several mortgages, the right arising therefrom should also be comprised in the suit and adjudicated upon; and a mortgagee cannot be permitted to obtain an order for sale in a suit brought on only one of his mortgages, leaving the determination of the existence or otherwise of other mortgages and charges in his own favour, and of the extent and validity thereof for future suits, between himself, the mortgagors and purchasers of the mortgaged property in such sale.(5) In such a case, therefore, all the mortgagees need not combine to foreclose a mortgage, it being sufficient if the mortgagees interested in the equity of redemption are made defendants.(6)

2114. Parties to Redemption.—The right of redemption differs from the mortgagee's remedies in that while any single individual at all interested in how small so ever a portion of the mortgaged property may singly sue to redeem the entire property any co-mortgagee cannot apart from the rest sue to enforce the creditor's remedies against the mortgaged properties. In this view it is not necessary for a redeemer to await the joinder of all others entitled to the same right, though in view of this rule, as a matter of *procedure* he is bound to implead all those

(1) Necessary plaintiffs.

(1) *Stainton* v. *Carron Co.*, 18 Beav., 146 *Hilliard* v. *Fiffe*, L. R., 7 H. L., 39; *Yeatman* v. *Yeatman*, 7 Ch. D., 210 (215); *The Oriental Bank* v. *Gobin Lall*, I. L. R., 10 Cal., 713 (717).

(2) *White* v. *Paruther*, 1 Knapp., 179.

(3) *Hobart* v. *Abbott*, 2 P. Wms. 643; *Norrish* v. *Marshall*, 5 Madd., 475; In re *Burrell*, L. R., 7 Eq., 399, 643; *Muthu* v. *Venkatachallam*, I. L. R., 20 Mad., 85 (39), distinguishing *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432, F.B.; *Ganga Prasad* v. *Chuni Lal*, I. L. R., 18 All., 113; *Padgaya* v. *Baji*, I. L. R., 20 Bom., 549.

(4) *Narayan* v. *Ganoji*, I. L. R., 15 Bom., 692 (693, 694).

(5) *Dorasami* v. *Venkataseshayyar*, I. L. R., 25 Mad., 108 (114).

(6) *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D., 121 (128).

whether ranking as mortgagees or on his side.(1) In a suit for redemption all persons jointly interested in the equity of redemption would ordinarily have to join as plaintiffs. But it may happen that all persons interested in redemption are not equally willing or able to redeem, and in such case those unwilling or unable to join as plaintiffs may be impleaded as defendants. A co-heir of the mortgagor having an interest in the mortgage at the time of the redemption-suit is a necessary party to the suit, but not otherwise.(2) But in the absence of evidence to the contrary, it is presumed that the mortgagor contracts in his individual capacity, and is, therefore, entitled to redeem without joining his relations.(3) But where the mortgagor was a Mahomedan, his brother and sister were held to be necessary parties, as otherwise the possessor may be exposed to many suits upon the same cause of action.(4) If all persons interested in the equity of redemption cannot be made to join as plaintiffs, they may be impleaded as defendants. And when an infant member of an undivided Hindu family ought to be a party to a suit by name in order to be bound by it, he is not properly represented by the manager of the family, but must be represented by a certificated guardian.(5) In one case it was held that the manager of a Hindu family could in a suit for redemption represent a minor member of the family(6) but in a subsequent case it was said that in the case there were special circumstances affording ground for holding that the plaintiff had been efficiently represented by the manager(7) and that where it appears that the minor is not sufficiently represented by his brother who was not then either the *de facto* manager, and did not profess to act for the family, the Court will not hold the minor to be bound by the decree to his prejudice(8) It is so in all cases that where the creditor seeks in suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him that the son should be made party to the suit.(9) The son can then raise all proper defences, and if a decree for sale shall be made, a purchaser will be protected without any prejudice being done to the son.(10) And where the mortgagor has more than one son, they must all be joined in the suit. And if a son is excluded although the mortgagor's other sons may have been joined in the suit against him he can insist upon a re-trial of the issues which he may subsequently raise, and is not bound by the proceedings in the previous case.(11) But while this view has not been impugned by the Allahabad High Court, it has been there laid down generally that the son of a Hindu being bound to pay the debt incurred by his father, it is not necessary to implead the son in a suit against the father. The creditor may no doubt in his original suit implead him, but his omission to do so will not deprive him of his subsequent remedy against him. In this respect, according to the Allahabad view, there is no difference in principle as regards the subsequent remedy of the creditor against the son between the case

(1) *Bhandin* v. *Ismail*, I. L. R., 11 Bom., 425

(2) *Trimbak Jivaji* v. *Sakharam*, I. L. R., 16 Bom., 599.

(3) *Ragho* v. *Daud*, I. L. R., 13 Bom., 51.

(4) *Bhandin* v. *Ismail*, I. L. R., 11 Bom., 425.

(5) *Doorga Pershad* v. *Kesho Pershad*, I.L.R., 9 Ind. App., 275 ; explained in *Padmakar* v. *Mahadev*, I.L.R., 10 Bom., 21 (23).

(6) *Maya Ram* v. *Jayantray*, I.L.R., 5 Bom., 685.

(7) *Padmakar* v. *Mahadev*, I.L.R., 10 Bom., 21 (24).

(8) *Padmakar* v. *Mahadev*, I.L.R., 10 Bom., 21 (24) ; *Deoji* v. *Sambhu*, I.L.R., 24 Bom., 135, cited *post*.

(9) *Ramasamayyan* v. *Virasami*, I.L.R., 21 Mad., 222 ; followed in *Palani* v. *Rangaya*, I.L.R., 22 Mad., 207 ; but see *Ariabudra* v. *Dorasami*, I.L.R., 11 Mad., 13 ; followed in *Dharam Singh* v. *Angan Lal*, I.L R., 21 All., 301 (306).

(10) *Ponnappa* v. *Pappuvayyangar*, I.L.R., 9 Mad., 343 (353), F.B.

(11) *Ramasamayyan* v. *Virasami*, I.L.R., 21 Mad., 222 ; followed in *Palani* v. *Rangayya*, I.L.R., 22 Mad., 207 ; dissenting from *Bhawani Prasad* v. *Kallu*, I.L.R., 17 All., 537, F.B. ; see also in support of the Madras view, *Nanomi* v. *Mohun*, I.L.R., 13 Cal., 21, P.C.

of a debt secured by a mortgage and a simple money-debt.(1) The effect of this ruling seems to be that a son need not be necessarily joined in a suit against the father, but in such a case the decree would be defective, for it may be questioned by the son who is not barred from trying the fact or the nature of the debt in a suit of his own, and similarly, if the creditor desires to obtain a remedy against the ancestral property or any part of it, in the hands of the son, he must seek that remedy in another suit against him, in which case, again, the decree obtained against the father would not operate as *res judicata*, for the obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father; and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only.(2) In this view of the law the Allahabad and Madras views are more in concord with each other than they would appear to be at first sight. But where the son of a Hindu, forming a member of the joint family, has not been joined in the suit but is subsequently upon the death of the judgment-debtor made a party as the legal representative of his deceased father to proceedings in execution, it is not open to him to impugn the decree in the execution department, on the ground that he was not made a party to the suit in which the decree was passed. "The determination of such a question would lead to a determination of the question of the validity of the decree passed against the father. Such a question is beyond the scope of the powers of a Court executing a decree."(3)

Where a mortgage is made by two tenants in common, both of them must be parties to the action to redeem; one cannot redeem in the absence of the other. Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem without making the person entitled to redeem the other estate a party.(4)

The presumption of death arises in the case of a mortgagor not heard of for thirty years, upon which his heirs might redeem.(5) Where the party entitled to redeem does not ask for the relief in express terms, the Court should not be too technical in such a matter, especially where the result of not recognizing such right would be to extinguish his security.(6)

(2) Necessary defendants.

2115. The defendant to a suit for redemption must necessarily be the person in whom is vested the corresponding right of the mortgagee.(7) If the latter has assigned or sub-mortgaged his interest, then the latter are necessary parties. And since the rights and liabilities of the mortgagor and mortgagee are correlative and reciprocal it follows that those who would be necessary plaintiffs to the mortgagee's suit would be equally necessary defendants to the mortgagors' suit against him. Indeed, the rule makes no distinction between the two forms of action, and between those who should sue and those who should be sued against. But from the very nature of the suit, persons having adverse interests must be arrayed in opposition.

(1) *Dharam Singh* v. *Angan Lal*, I.L.R., 21 All., 301.

(2) *Dharam Singh* v. *Angan Lal*, I.L.R., 21 All., 301 (308); following *Dhunput* v. *Sham Soonder*, I.L.R., 5 Cal., 292; *Sundar Lal* v. *Chattar Mal*, 3 A.L.J.R., 644.

(3) *Hiralal* v. *Parmeshar*, I.L.R., 21 All., 356, following *Bhawani Prasad* v. *Kallu*, I.L.R. 17 All., 537; *Sanwal Das* v. *Bismillah*, I.L.R., 19 All., 480; *Liladhar* v. *Chaturbhuj*, I.L.R., 21 All., 277; dissenting from *Lochan Singh* v. *Sant Chander*, (1899) A.W.N., 24.

(4) *Bolton* v. *Salmon*, [1891] 2 Ch., 48 (52); citing *Cholomondely* v. *Chinton*, 2 J. & W., 134.

(5) S. 107, Indian Evidence Act (I of 1872).

(6) *Muhammad Samir ud-din* v. *Man Singh*, I.L.R., 9 All., 125; *Saukana* v. *Virupakshapa*, I.L.R., 7 Bom., 146.

(7) *Saiduddin* v. *Hiralal*, 12 A.L.J., 619; 24 I.C. 25.

Plaintiff as defendant.

2116. A man cannot either solely or conjointly with others bring an action against himself.(1) The principle of this rule is so well recognized that if a debtor be appointed the executor of the will of his deceased creditor, the appointment has in common law the effect of extinguishing the debt, lest otherwise he may have to sue himself in administering the estate of the deceased testator.(2) But in equity, however, he remains accountable for his debt, for it is a rule of English law that a release of a debt without consideration is invalid unless made by deed.(3)

The rule is so strictly observed that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same suit.(4) It is to prevent this incongruity that it is provided that a defendant cannot act as the next friend of an incapacitated plaintiff, nor can the plaintiff as the guardian *ad litem* of the incapacitated defendant.(5) But this disability does not stand in the way of adjusting and determining the rights of all the parties to a suit.(6) But where the first mortgagee being also a puisne mortgagee, had in an action for foreclosure on the first mortgage impleaded himself as a defendant, his name was struck out as a co-defendant.(7)

But where the mortgagee is interested both as a creditor and debtor, though the mortgagee cannot be both a plaintiff and defendant, that would not prevent the rights of the parties from being equitably adjusted.(8) But in no case will the Court allow the mortgagee to appear both as a plaintiff and defendant, and for that purpose the Court will order amendment of the plaint and pleadings if necessary.(9) But if after the institution of the suit one of several co-plaintiffs should refuse to prosecute the suit which he should desire to withdraw, the proper procedure for the Court is then to order that the recusant plaintiff's name be struck out as plaintiff and added as defendant.(10)

Arrayed on wrong side.

2117. This rule merely enjoins the joinder of all interested persons; it does not further insist upon the proper array of parties as plaintiffs or defendants, as to which the courts possess ample powers.(11) A purchaser from a co-sharer mortgagee brought a suit on the mortgage for the amount due to him alone, alleging that the amount due to the other sharer had been paid by the mortgagor, and agreeing to pay the court fee if anything be found due to the co-sharers whom he had impleaded. It was held that the suit was really one for whatever might be due under the mortgage, and if anything was due to the other co-sharers they could apply to be made plaintiffs, but that the suit could not be defeated as all persons representing the mortgagor and mortgagee were parties to the suit.

2118. Time for joining Parties.—A necessary party must be joined before the institution of the suit. But if the mortgagee has through inadvertence or mistake omitted to join him, the defect may be rectified at the first, or even at

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(1) *Wavell* v. *Mitchell*, (1891) W. N., 86.

(2) Wentworth's Executors (14th Ed.), 73; *Freakley* v. *Fox*, 9 B. &. C., 130; Re *Applebee*, [1891] 3 Ch., 422.

(3) *Edwards* v. *Walters*, [1896] 2 Ch., 157; *Simmons* v. *Gutteridge*, 13 Ves., 264; Re *Applebee*, [1891] 3 Ch. D., 422; Bac. Abr. Exors. (A.), 10.

(4) *Bosanquet* v. *Wrag*, 6 Taunt., 597.

(5) Civil Procedure Code, ss. 455—457.

(6) *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D., 121; *Rustomji* v. *Sheth Purshotamdas*, I. L. R., 25 Bom., 606 (612).

(7) *Wavell* v. *Mitchell*, 64 L. T., 560.

(8) *Rustomji* v. *Sheth Purshotamdas*, I. L. R., 25 Bom., 606 (612).

(9) *Wavell* v. *Mitchell*, (1891) W. N., 86.

(10) S. 32, Civil Procedure Code; *Brown* v. *Sawer*, 3 Beav., 598; *Attorney-General* v. *Cooper*, 3 My. & Cr., 258 (261); *In re Mathews*, [1905] 2 Ch., 460.

(11) *Ramachandra* v. *Dhadhai*, 19 C.L.J., 327

a later hearing.(1) Non-joinder of a necessary party may be pleaded by the defendant in his defence, but a party pleading non-joinder must prove who that party is.(2) So a person applying to be added as a party must show that he has a subsisting interest in the property. For example, a usufructuary mortgagee suing for a declaration that a decree for sale obtained by a prior mortgagee without joining him must shew that the usufructuary mortgage still subsisted and had not been discharged.(3) Where a person finds his own right recognised, he cannot complain that some other person who has no right has been also recognised as having some right.(4)

In England, leave may be given to join a party even before a decree for foreclosure is drawn up,(5) and a similar power is conferred on the Courts in India.(6)

Having in view the object with which this section is enacted, the Court should not refuse a prayer to amend the plaint, and join a necessary party, even though the plaintiff had been previously given an opportunity, and the case was nearing conclusion (7) though in such a case the plaintiff may be mulcted in all costs incurred up to date.(8) The Court will not, however, allow an amendment which will preclude the defendant from raising the plea of limitation;(9) though this qualification applies only to an added defendant.(10) But subject to just limitations the Court will allow an amendment even at a late stage of the case so as to ensure the joinder of all persons, and in this respect the Court would appear to possess unfettered discretion.(11)

2119. Joinder after Preliminary Decree.—In England it is said that parties may be added to an action for foreclosure at any time until the final decree is made.(12) The rule is even wider in India where the Court may at any time add parties to a suit so as to enable it to effectually and completely adjudicate and settle all the questions involved in the suit.(13) The Court may then add a necessary party even after decree.(14) But in what cases would the Court be justified in exercising this power? The provisions of the English Judicature Act (15) in a measure answer this question. For they provide as follows :—

(1) S. 32, Civil Procedure Code.

(2) *Venkatacharya* v. *Katrapa*, 3 Bom. L. R., 935 (938).

(3) *Chitta Singh* v. *Devi Din*, I.L.R., 42 All., 170.

(4) Mad. Unrep. S. A., 1243 of 1901.

(5) R. S. C. Ord. XVI, R. 11; *Keith* v. *Butcher*, 25 Ch. D., 750.

(6) S. 32, Code of Civil Procedure.

(7) *Bhagmani* v. *Subh Narain*, (1905) A. W. N., 35; *Amiruddin* v. *Khairuddin*, (1900) A.W.N., 20.

(8) *Dhaniram* v. *Bhagirathi*, I.L.R., 22 Cal., 692 (711, 712); *Bhagmani* v. *Subh Narain*, (1905) A.W.N., 35.

(9) *Weldon* v. *Neal*, 13 Q. B. D., 394; followed in *Mallikarjuna* v. *Pullaya*, I.L.R., 16 Mad., 319; *Alagappa* v. *Vellian*, I.L.R., 18 Mad., 33 (38); *Dhaniram* v. *Bhagirathi*, I.L.R., 22 Cal., 692 (712); *Mangal Prasad* v. *Chandramall*, 1 Nag. L. R., 117.

(10) S. 22, Limitation Act (IX of 1908).

(11) So Bowen, L. J., said: "I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the case of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or grace." *Cooper* v. *Smith*, 26 Ch. D., 710, O.A., 10 App. Cas., 259; *Dhaniram* v. *Bhagirathi*, I.L.R., 22 Cal., 692 (712).

(12) *Keith* v. *Butcher*, 25 Ch. D., 750, in which the reporter cites *Attorney-General* v. *Corporation of Birmingham*, 15 Ch. D., 423, as authorizing this procedure. But on turning to that case, it will be found that all that Jessel, M. R., laid down was that parties could *not* be added *after* final judgment (see p. 425) and which certainly does not warrant the assumption that they can be added before it. The case was, moreover, not a case of foreclosure, but of injunction.

(13) S. 32, Code of Civil Procedure.

(14) *Lingammal* v. *Chinna*, I. L. R., 6 Mad., 227; *Sotish Chunder* v. *Nilcomal*, I. L.R., 11 Cal., 45; *Ahmedbhoy* v. *Vulleebhoy*, I.L.R., 8 Bom., 323 (330); *Bhagmani* v. *Subh Narain*, (1905) A.W.N., 35; *Amiruddin* v. *Khairuddin*, 1900) A.W.N., 20.

(15) Ord. XVII of 1883.

In accordance with these rules, the practice in England under the Judicature Acts has been to admit as parties to the suit, all persons whose interest might in any way be affected.(1) The same practice appears to have been followed in India both before and since the passing of the Code.(2) Even the Appellate Court has inherent power to add as parties to the appeal persons who were not parties to the original suit.(3)

2120. Joinder in Appeal and Execution.—The question whether a person joined in a suit must also be joined in appeals and execution has been answered in the affirmative. As regards joinder in appeal it has been held in Madras that a person interested in a mortgage must be joined in appeal, though he may not be interested in the result of the appeal.(4) The Madras Court regards the provisions of this section as imperative, and as such must be strictly conformed to even in appeals and second appeals. Accordingly, if the necessary parties are not made parties in the second appeal, it will be dismissed even though all the interested persons had been joined in the Court of First Instance. Indeed, in a case the appellants' pleader applied to join the excluded persons explaining that he was not able to make them parties to the second appeal as they had not been made parties in the lower Appellate Court. But as no satisfactory reason was forthcoming, the Court refused leave to add, and dismissed the appeal.(5) And so in another case it was held that the mortgagees are necessary parties in an appeal against a part of the decree for redemption, though they may not be interested in opposing the appeal; and if the appeal is withdrawn as against them, it cannot proceed against the others and will have to be dismissed.(6) Similarly, a person joined in the suit is a necessary party to the execution-proceedings.(7) But his non-joinder in execution would not entail the same consequences on the result of the suit as his non-joinder in the suit. A co-sharer who had obtained a portion of the mortgaged properties on a partition after the execution of a mortgage-bond by the other co-sharers hypothecating their undivided shares in the said properties was made a party to the mortgage-suit, but he was not joined in the execution-proceedings in which, however, his share was sold. He contended that the sale was so far as regards his share a nullity, but it was held that though he should have been, but had not been, joined, the sale was not a nullity, but could be set aside only in a proceeding properly set on foot for that purpose.(8) So where a suit was brought upon a mortgage against the original mortgagor, and upon the latter's death all his heirs were not brought on the record, and in execution of the decree thus obtained the mortgaged property was sold, it was held in a suit by the heirs not on the record, that they were entitled to redeem their share of the mortgaged property upon payment of a proportionate share of the

(1) *Kino* v. *Rudkin*, 6 Ch. D., 160; *Campbell* v. *Holyland*, 7 Ch. D., 166.

(2) *Lakmidas* v. *Advocate-General*, 8 B. H.C.R., 96; *Ahmedbhoy* v. *Vulleebhoy*, I.L. R., 8 Bom., 323; *Ashabai* v. *Rustamji*, Bom. No. 616 of 1879; *Mithbai Limji*, Bom. No. 870 of 1879, cited *per* Bayley, J., in *Ahmedbhoy* v. *Vulleebhoy*, I. L. R., 8 Bom., 323 (336).

(3) *Gyananda* v. *Kristo Chandra*, 8 C.W. N., 404.

(4) *Manakal* v. *Collector of Malabar*, 9 M. L. J. R., 47; *Kesavan* v. *Sankaran*, 7 M. L. J. R., 266.

(5) *Kesavan* v. *Sankaran*, 7 M. L. J. R., 266. In laying down this rule the Court followed the earlier rulings of that Court in S. A. 51 of 1892, and 1476 of 1889.

(6) *Manakal* v. *Collector of Malabar*, 9 M. L. J. R., 49.

(7) *Golam Ahad* v. *Judhister*, I. L. R., 30 Cal., 142.

(8) *Golam Ahad* v. *Judhister*, I. L. R., 30 Cal., 142; *Ramchandra* v. *Ranjt Singh*, I. L. R., 27 Cal., 242.

mortgage-debt.(1) Although persons joined in the suit must be impleaded in execution, it does not necessarily follow that an omission to join them in the original suit can be made good by joining them in execution, for the executing Courts are bound to execute the decree as it stands, and the mere joinder of an excluded interest could not serve the purpose of the rule; since there can be no adjudication of the rights of the person newly joined in execution. Where, therefore, a puisne mortgagee had obtained a decree for sale without joining the prior mortgagee, and the latter applied in execution claiming priority and his right to be first redeemed, it was held that the executing Court had no jurisdiction to join him.(2)

2121. Persons wrongly joined.—It is the duty of the plaintiff to see that the person whom he sues is competent to represent the interest affected by his claim. If, therefore, he sues a person who had in law ceased to represent it, he cannot by his decree charge the estate. So where the mortgagee sued his mortgagor's widow on his mortgage, obtained a decree and having himself purchased the property sued the mortgagor's mother in ejectment who shewed that the widow had at the date of the mortgagee's suit forfeited her husband's estate by reason of her re-marriage, and therefore, could not represent it, the Court upheld her defence and held both the decree and the sale to be nullities.(3)

2122. A defendant impleaded in the suit but against whom no adjudication is made, is not precluded from maintaining a separate suit to establish his right to the property attached by the decree-holder in execution of the decree passed in the case.(4)

While sons, brothers and other male members of a joint Hindu family are necessary parties because they are possessed of determinable interest in the joint property, the same cannot be predicated of the female members and others having only a claim to maintenance and who are, therefore, not necessary parties. Similarly, where the property involved is the self-acquired property of the mortgagor, the fact that he was a member of a joint family would not make the other members interested in his mortgage. So a Hindu female may mortgage her *stridhan* and the mortgagee may sue her alone without making her husband a party.

A member of an undivided Hindu family might enter into a contract in his individual capacity, and when suing to recover moneys due to him under that contract, he need not join the members of the joint family as plaintiffs, and members of an undivided Hindu family, who are minors and who are not shown to have been admitted into the trading firm to have taken part in its business need not be made parties as plaintiffs to a suit to recover moneys due to the family trading firm.(5)

As the law of the devolution of property in the case of a Mahommedan is different, persons other than the executant of the deed would only be joined if they have acquired any interest in the mortgaged property by transfer.

The question whether the decree obtained against a Mitakshara father was obtained in his representative capacity would depend upon the nature of the debt, and cannot be gone into in the course of execution-proceedings.(6)

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(1) *Surya Bibi* v. *Monindra Nath*, 4 C. W. N., 507.

(2) *Hukam Singh* v. *Raghubir*, I. L. R., 27 All., 700.

(3) *Gouri Charun* v. *Sita*, 14 C.W.N. 346; 5 I.C., 710.

(4) *Kalka Prasad* v. *Basant Ram*, I.L.R., 23 All., 346, following *Chowdhry Wahed* v. *Juman*, 11 B.L.R., 149, P.C.

(5) *Lutchmanan* v. *Siva*, I.L.R., 26 Cal., 349; *Anant Ram* v. *Chhannulal*, (1900) Unrep. N.W.P. Case No. 185.

(6) *Jugat Lal* v. *Audh Behari*, 6 C.W.N., 223.

Partition.

2123. Mortgagees *inter se* have no right of partition of the property by a suit to which the mortgagors are not made parties.(1)

2124. Pleadings by Parties joined.—The policy of the rule being then to avoid multiplicity of suits (§ 2091), it is essential that the parties joined must assert whatever rights they may possess in the same suit, failing which they may conceivably be debarred from enforcing them in a separate suit. If, for instance, all the property comprised in the mortgage was liable for the debt, persons joined as being interested in different fragments of the equity of redemption may legitimately plead that not more than a rateable part of the mortgage-debt should be thrown upon the property in their hands, and it would be no answer to them the mortgagee has, because of his own laches lost his remedy as against a portion of the mortgaged property.(2) So a prior mortgagee, being joined in a suit instituted by the puisne mortgagee, is bound to set up his prior mortgage and claim to have it redeemed or that the property should be sold subject to his prior mortgage-lien,(3) and if he fails to do so, the mortgage-lien would be deemed to have been extinguished (4) Similarly if the puisne mortgagee being a party to a suit on a mortgage prior to his own, omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead.(5) But persons joined as co-plaintiffs or co-defendants are not bound to have their rights *inter se* determined in the same suit. If suppose a suit for sale is instituted by a first mortgagee against the mortgagor and a second mortgagee, can the latter compel the mortgagor to redeem not only the first mortgagee but also his own mortgage, and in default is the sale to be ordered for payment of both the mortgages or only the first mortgage? In cases governed by this Act, there is no doubt, but that having regard to the language used in section 88, the sale can be made only to pay off the plaintiff-mortgagee. There are, however, certain cases of the Calcutta High Court which lay down the contrary.(6) But these cases illustrate the practice and procedure on the original side of the High Court, which is based on its own rules and the present practice of the English Courts, and is not governed by this Act. These cases, then, afford no guidance for interpreting the procedure to be followed under the Act and which must be determined having regard to the language of the Act.(7) The object making a puisne mortgagee a party defendant is no doubt to simplify procedure, by giving him a chance to redeem, or selling the property free from his incumbrance, but it is said that it does not therefore enable the puisne mortgagee to practically obtain a decree against the principal defendant without bringing a suit properly framed for that purpose.(8) But at the same time this much is certain that in any case the subsequent mortgagee may participate in the surplus sale-proceeds.(9) In this respect the Act prescribes a

(1) *Mungli Prasad* v. *Ishri Prasad*, I.L. R., 18 All., 476.

(2) *Imam Ali* v. *Baij Nath*, I. L. R., 33 Cal., 613 (621) following *Hari Kissen* v. *Viliat Hossein*, I.L.R., 30 Cal., 755; *Surjiram* v. *Barhamdeo*, 2 C.L.J., 202.

(3) *Sri Gopal* v. *Pirthi Singh*, I.L.R., 20 All., 110; O.A., I. L.R., 24 All., 429, P. C.; *Gopal Lal* v. *Benarasi*, I.L.R., 31 Cal., 428; *Keshavram* v. *Ranchhoddas*, 7 Bom. L. R. 815.

(4) S. 13, Exp. 2, Code of Civil Procedure. *Gopal Lal* v. *Benarasi*, I. L. R., 31 Cal., 428 (431); *Sri Gopal* v. *Pirthi Singh*, I. L. R., 24 All., 429 (436), P.C.

(5) *Sri Gopal* v. *Pirthi Singh*, I. L. R., 20 All), 110, O. A., I. L. R., 24 All., 429 (436, 437), P. C.

(6) *Auhindro* v. *Chunnoolall*, I. L. R., 5 Cal., 101; *Kissory Mohun* v. *Kally Churn*, I. L. R., 22 Cal., 100; *Kissory Mohun* v. *Kally Churn*, I, L. R., 24 Cal., 190.

(7) *Mackintosh* v. *Watkins*, 1 C. L. J., 31.

(8) *Ib.*

(9) *Dorasami* v. *Venkataseshayyar*, I.L.R., 25 Mad., 108 (114.) See S. 97 "*fourthly*"; Form 128, Sch. 4, Civil Procedure Code.

procedure in consonance with the practice of the American Courts,[1] though it differs from that followed in the English Courts.[2] There can be no *res judicata* as between co-defendants in a mortgage-suit, or for that matter, in any suit, unless the matter was in issue between the co-defendants *inter se* and not merely in issue between the plaintiff and the defendant in the suit. Where therefore in a suit for sale, the plaintiff a puisne mortgagee made the mortgagor and the prior mortgagees parties to the suit, and obtained a decree for sale subject to prior mortgages of all the defendant mortgagees, but there was no question of priority or of redemption dealt with in the suit or decree, the claim of one defendant against another would not be *res judicata* by reason of any decision in the former suit.[3]

2125. It is the duty of the mortgagee to discover the persons who are entitled to the equity of redemption, or are entitled to redeem the mortgaged property,[4] fact stated in a written statement in a previous suit between the parties is sufficient notice of the fact, though the written statement was rejected.[5] It has been held that for the purpose of the section a prior mortgagee is deemed to have notice of a subsequent registered incumbrance affecting the property mortgaged to him inasmuch as it is the duty of such prior mortgagee before suing on his mortgage to search the registry for record of any such subsequent incumbrance.[6] Similarly the subsequent mortgagee is deemed to search the registry for any prior incumbrances.[7] And where a *patnidar* has been in possession for some years before the date of the suit, it cannot be said that the plaintiff has no notice of his interest and, therefore, if he does not make him a party, the prior mortgagee cannot obtain *khas* possession of the property on his mortgage as against him.[8] The mortgagee is bound to take notice of a person in possession of the mortgaged property, and hence of a puisne mortgagee in possession,[9] unless he was in possession by tenants in which case the prior mortgagee cannot be presumed to have notice of his mortgage.[10]

2126. A party complaining of having been unrepresented in the previous suit must shew that he was entitled to be joined as a party, but was not, the question of notice being now immaterial.[11] One consequence of not impleading a person interested in the mortgaged property is stated to be that he may sue the mortgagee for redemption only of his own share on payment of a proportionate share of the mortgage-money to which, however, the mortgagee may himself confine him if he so desire.[12] In such a case it may be said that the mortgagee having himself broken in upon the indivisibility of his mortgage by acquiring by the foreclosure-decree an absolute title to the mortgagor-defendant's share in the property, he cannot complain if the party excluded deals with him on that basis. According to the view taken in Calcutta want of notice

(1) Jones' Mortgage (5th Ed.), § 1574.

(2) Daniell's Chancery Practice (7th Ed.), 1160.

(3) *Muhammad* v. *Visvanatha*, 12 M. L. J. R., 471, *cf. Balwant Rao* v. *Narayan*, 5 Bom. L. R., 97.

(4) *Norendra* v. *Dwarka*, I. L. R., 3 Cal., 397.

(5) *Matheris* v. *Gulab*, 6 Bom. L.R., 284.

(6) *Janki Pershad* v. *Kishen Dat*, I. L. R., 19 All., 478, F.B.

(7) *Matadin* v. *Kazim Hussain*, I.L. R., 13 All., 432 (465), F. B.

(8) *Jugal Kishore* v. *Kartik Chunder*, I.L. R., 21 Cal., 116: following *Kokil Singh* v. *Dulu Chund*, 5 C. L. R., 243; *Kasimunnissa* v. *Nilratna*, I. L. R., 8 Cal., 79; see also *Muhammad* v. *Man Singh*, I. L. R., 9 All., 125.

(9) S. 3, *ante*, § 137; *Narayan* v. *Maru*, (1878) B. P. J., 201; *Balshet* v. *Ganesh*, (1874) B. P. J., 154.

(10) *Wasudev* v. *Narayan*, (1882) B.P.J., 21.

(11) *Norender* v. *Dwarka*, I. L. R., 3 Cal., 397; decided when the rule was qualified by notice.

(12) *Brij Kishore* v. *Madho Singh*, 2 A. L. J. 752; O. A., I.L.R., 28 All., 279; *cf. Bhawari Lal* v. *Daya Sundari*, 13 C.W. N. 815 (822).

may, in some cases, be a good and sufficient impeachment of a mortgage-decree on that ground. If, for example, the mortgagee had sued the manager of a Mitakshara family without joining the other co-parceners, the latter cannot make their mere exclusion a ground for attacking the decree, unless they also plead and prove that the mortgagee had notice of their interest. (1) In other words according to this view his *mere* exclusion does not entitle a party to sue for or claim redemption. So where the person sued was in possession of the mortgaged property it was held that the other person a minor excluded from the suit could not sue to annul the sale held in execution of the mortgage-decree, when at the time of the suit he was a minor unknown to the mortgagee and where there was nothing in the preliminary decree to shew that his interest had suffered by reason of his non-joinder. (2)

2127. Necessary Parties:—Having generally set out the leading principles regulating the joinder of parties (§§ 2094—2099) of plaintiffs (§ 2108) and defendants (§§ 2109, 2114) in the mortgagee's suit (§§ 2108—2113) as well as in the mortgagor's suit for redemption (§§ 2114, 2115) and eliminated those whose interest in the suit is either negligible (§ 2106) or non-existent (§§ 2098—2100) and who, are, consequently neither necessary (§ 2094) nor proper parties to a mortgage suit there now remain interests whose representation is necessary therein. Such are puisne mortgagees (§ 2129) sub-mortgagees (§ 2130) members of a Mitakshara family whose position has to be considered from the dual standpoint of the rule here enacted (§§ 2144—2149) and that of Hindu law (§ 2146); attaching creditor (§ 2133) alienees *pendente lite* (§ 2134); trustees, administrators and the like (§ 2137) debenture-holders (§ 2138) kanomdar (§ 2139) lessees (§ 2140); and the surety (§ 2142) after which other incidental matters will have to be considered. (§§ 2151—2176),

2128. The following persons have been judicially held to be interested in the mortgage-security or in the right of redemption, and who should, therefore, be impleaded in a mortgage-suit.

2129. Puisne Mortgagee.—It is universally conceded that a puisne mortgagee must be impleaded in a suit instituted by a prior mortgagee to enforce his mortgage. A puisne mortgagee has the right to redeem a prior mortgage.(3) As such, he is obviously interested and cannot be put out of account if the prior mortgagee knew of his existence. But in any case, being a person interested in the equity of redemption, his right to redeem the prior mortgage cannot be imperilled by any proceeding concluded behind his back and to which he was not a party. He is, moreover, entitled to have his interest protected upon the taking of accounts.(4) Where the puisne mortgagee is a mesne mortgagee, he has not only the right to redeem the prior mortgage but also to foreclose the subsequent mortgage.(5) But inasmuch as in relation to the subsequent mortgagee his position is that of a prior mortgagee, under the rule as now settled he is not a necessary party to a suit instituted on a subsequent mortgage, though he on his part remains liable to implead the subsequent mortgagee, who possesses the right to redeem him and which cannot be foreclosed or lost otherwise than in a suit to which he was a party. The Allahabad High Court appears to still maintain that the non-joinder of a puisne mortgagee entails the dismissal of the

(1) *Ram Avatar* v. *Chowdhri Nursingh*, 3 C. L. J. 12 distinguishing *Suraj Prasad* v. *Golab Chand*, I. L. R., 28 Cal., 517.
(2) *Ram Taran* v. *Rameswar*, 11 C.W.N., 1078.
(3) S. 74.
(4) *Graves* v. *Wright*, cited in 1 Dr. & War. 193.
(5) O. XXXIV, r. 11.

suit, or so much of it as affected the puisne mortgagee.(1) But this rule does not penalize the plaintiff to that extent, and O. 1. r. 9 is an authority against the dismissal of a suit on the mere ground of non-joinder.

2130. Sub-Mortgagee.—In a suit by a sub-mortgagee to foreclose the original mortgage both the mortgagor and original mortgagee are said to be necessary parties, since they have both a right to redeem the sub-mortgage.(2) This view was at one time in conflict with that taken in Allahabad where the contrary was maintained on the ground that the sub-mortgagee could not bring to sale the mortgagee's rights sub-mortgaged to him.(3) But the cases in which this was held have now been overruled.(4) A sub-mortgagee may, therefore, now bring to sale the only interest mortgaged to him. But is the original mortgagor still a necessary party to his suit? In England, in such case it is usual to implead both the sub-mortgagor as well as the original mortgagor, and the ordinary decree in such a case directs an account to be taken of what is due to the original mortgagee, and next what is due to the sub-mortgagee, and further directs that upon payment of the latter amount to the sub-mortgagee not exceeding the amount due to the original mortgagee, and of the residue, if any, of what is due to the original mortgagee both of them shall reconvey. In default of payment the original mortgagor is foreclosed and the sub-mortgagee is ordered to reconvey the property to the original mortgagee on payment by the latter of what is due on foot of the sub-mortgage, and in default of payment the original mortgagee is foreclosed.(5) The original mortgagor is then, undoubtedly, a proper party, but is he also a necessary party? According to the English practice he is not.(6) The sub-mortgagee may, if he is so advised, foreclose the sub-mortgagor without impleading the original mortgagor. And he may equally sell his interest without him. But, of course, in doing so he cannot imperil the original mortgagor's right of redemption which he may then enforce.(7) The sub-mortgagees having a derivative interest are necessary parties to a suit for redemption. And where sub-mortgagees are joined, the judgment should direct an account of what is due to the sub-mortgagee ordering the payment of this sum out of the money deposited by the plaintiff.(8)

2131. Assignee of Mortgage.—The assignment of a mortgage may be absolute or by way of security. In the former case the assignee takes the place of the mortgagee who is no longer interested in the mortgage and need not be joined by the assignee unless he has some claim against him on the failure of his assignment in which case he would be a proper though not a necessary party.(9) So where the assignment is by way of sub-mortgage then in a suit to enforce the sub-mortgage, since the mortgagee is in the position of the mortgagor to the sub-mortgagee and the original mortgagor has the right to redeem, they are both necessary parties.(10) But in the case of assignment of the equity of redemption by the mortgagor, the assignee takes his place and he is then no longer a necessary party as he is no longer interested in the

(1) *Alam Singh* v. *Gokal Siugh*, I. L. R. 35 All., 434.

(2) *Hobart* v. *Abbott*, 2 P. Wms., 642.

(3) *Ramjatan* v. *Ramhit Singh*, I. L. R., 27 All., 511; *Ganga Prasad* v. *Chunni Lal*, I. L. R., 18 All., 113.

(4) *Ram Shankar* v. *Ganesh Prashad*, I. L. R., 29 All., 385, F.B.

(5) Seton on Decrees (5th Ed.), 1730.

(6) See Seton on Decrees (5th Ed.), p. 1733 *note*; 2 Daniel's Chancery Practice (6th Ed.), p. 1887.

(7) *Ram Shankar* v. *Ganesh Parshad*, I. L. R., 29 All., 385, F.B.

(8) *Narayon* v. *Ganoji*, I. L. R., 15 Bom., 692; *Gokul Das* v. *Debi Prasad*, I. L. R., 28 All., 638.

(9) *Dirg Singh* v. *Manbhar*, 7 I. C. (All.) 69.

(10) *Ram Shankar* v. *Ganesh Prashad*, I. L. R., 29 All. 385, F. B., overruling *contra* in *Ramjaban* v. *Ramhit Singh*, I.L.R., 27 All., 511.

equity of redemption. But the original parties still continue interested if the assignment does not relate to the whole property mortgaged, or if they are somehow bound by covenants of indemnity to their assignee. Other circumstances may justify the joinder of the assignor, as where the mortgagor alleges payment to him,(1) or that he is otherwise accountable to the mortgagor.

Fraudulent and voluntary transferee.

2132. If an assignment is operative *inter partes*, it is no blot on the transferee's title that it was intended to defraud third parties. And since both the mortgagor and mortgagee are competent to make a gift of their interest they are equally competent to transfer them to another for a purpose which though illegal does not affect the right of the transferee to redeem, (§ 1700) and consequently to be made a party to the mortgage suit. It is not for the mortgagor to object that his mortgage was to defeat or delay creditors. Such objection can be taken only by the creditors.(2) Nor can an assignment be questioned as unfair and unconscionable by a person who was not a party to the assignment.(3) A transferee whose title cannot be attached in a mortgage suit is therefore a necessary party despite the fact that his transfer might be open to attack by third parties.(4)

2133. Attaching Creditor.—Whatever may have been the antecedent law and view as regards the right of an attaching money creditor to be joined as a necessary party to a mortgage on the property subject to his attachment, there can be no doubt that under the present rule he is a necessary party so long as his attachment continues.(5) An attaching creditor is entitled to redeem (6) and as such he is interested in the "right of redemption." He is therefore, unquestionably a necessary party and must be joined as a party to any suit relating to the mortgage. This is so, although an attachment does not confer any title in the attaching creditor,(7) (§§ 846—849), still inasmuch as an attaching creditor is permitted to redeem a mortgage, (8) he is on that account sufficiently interested in the mortgage so as to be a necessary party. In England judgment-creditors who have obtained a charge on the property are necessary parties, but those who have not issued legal or equitable execution or registered it are not necessary parties, although they might acquire a charge before the time for redemption.(9) Judged by this test an attaching creditor should not be a necessary party, since his attachment creates no charge on the property in his favour. But the scope of this rule and the Act appears to be wider since it allows not only charge-holders but others less interested in the property to redeem, and an attaching creditor has an interest to protect, since his attachment of the property amounts to a definite move in the direction of its sale which law regards as sufficient to confer on him the right of redemption. But the right is not a right *in rem* in the nature of a charge or lien which enures for the benefit of the

(1) *Aiythurai* v. *Santhu*, 1. L. R. 31 Mad. 252; *Mahadeo* v. *Nago*, 7 N. L. R., 130 (132).

(2) *Asan* v. *Aru*, I. L. R., 31 Mad. 206.

(3) *Bhagwan* v. *Debi Dayal*, I. L. R., 35 Cal. 420, P. C.

(4) *Panchanan* v. *Mir Abdul*, 16 C. W. N., 920.

(5) *Shanabda* v. *Srinath*, 17 C. W. N., 871; 17 I. C 432; *Venkata* v. *Venkataramayya*, I. L. R., 37 Mad. ,418.

(6) S. 91 (*f*).

(7) *Moti Lal* v. *Carrabuldin*, I. L. R., 26 Cal., 179, P. C.; *Peacock* v. *Madan Gopal*, I. L. R., 29 Cal., 428, F. B.

(8) S. 91 (*f*).

(9) *Per* Malins, V. C., in *Earl of Cork* v. *Russell*, L. R., 13 Eq., 210 (215); disapproving of *Mildred* v. *Austin*, L R., 8 Eq., 220, in which a judgment-creditor before execution was impleaded on the ground that he might acquire a charge, but so might any other creditor; *Rotleston* v. *Morton*, 1 Dr. & War., 174; *Adams* v. *Paynter*, 1 Coll., 530; *Harrison* v. *Pennell*, 4 Jur. N. S., 682; *Joyce* v. *Joyce*, 10 Ir. Eq., R., 128 (130); *Johnson* v. *Holdsworth*, 1 Sim. N. S., 106; *Cradock* v. *Piper*, 14 Sim., 310.

subsequent auction-purchaser.(1) The contrary was, however, held in a case in Allahabad but in which the learned Judges proceeded upon the incorrect *datum* that an attaching creditor, as such, acquired a charge on the attached property.(2) Moreover, the facts of this case were somewhat peculiar, and the judgment proceeded upon a different ground altogether. A judgment-debtor in consideration of a money-decree mortgaged certain property by a deed of conditional sale. It was then attached as the property of the judgment-debtor, and an order for sale was passed. But before the sale the mortgagee having put his mortgage into suit, the judgment-debtor confessed judgment and prayed that as he was unable to redeem the mortgage, an immediate decree for possession in favour of the mortgagee be passed, and a decree was so passed. The mortgagee had notice of the attachment but he never made the attaching creditor a party. The latter proceeded on with his execution and himself purchased the property. Being resisted in obtaining possession by the mortgagee he sued him for possession. It was contended that the auction-purchaser had lost his right to redeem and which could not be re-opened except on the ground of fraud or collusion. But it was held that a decree suffered in contravention of the provisions of law, could not operate to destroy the rights of redemption of persons other than the actual parties to the suit. It was also added that as the attachment created a charge in favour of the attaching creditor, it inured in favour of the auction-purchaser as one purchasing the property sold for the discharge and satisfaction of the charge.(3)

Interest created pendente lite.

2134. Whatever may be urged in favour of joining an attaching creditor, there can be no doubt that a person attaching the property *pendente lite* is not a necessary party, for on the principle *pendente lite nihil innovatur*, such a person acquires for the purpose of the suit no right distinct from that of his assignor.(4) "The rule is grounded upon the reason that any person interested in the subject-matter of a cause might otherwise harass the other parties to the suit by making occasions for the addition of new parties."(5) An assignment *pendente lite* being void or voidable and the assignee being bound by the judgment adverse to the assignor, there is no reason why an assignee should be deemed a necessary party. Indeed, as is remarked by Sir T. Plumer, V. C., if one party by conveying to others, create a necessity for introducing new parties, suits would be undeterminable.(6) The rule is, therefore, applicable whether the assignor be plaintiff or defendant.

2135. But in a suit for redemption an assignee *pendente lite* is generally a proper party as having an interest in the subject-matter of the action, and being interested in the accounts. Indeed, Shadwell, V. C., laid down that an action for redemption was defective and could not proceed in the absence of an assignee *pendente lite* if the defendant took an objection on that ground.(7) But the addition of an assignee *pendente lite* could not affect the question of redemption

(1) *Shananda* v. *Srinath*, 7 C. W. N. 871; 17 I. C., 432.

(2) *Ghulam Husain* v. *Dina Nath*, I L. R., 23 All., 467 (470); dissented from in *Shananda* v. *Srinath*, 7 C. W. N. 871; 17 I. C., 432.

(3) *Ghulam Hussain* v. *Dina Nath*, I. L. R., 23 All., 467 (470).

(4) *Ishaq Ali* v. *Chunni*, I. L. R., 21 All., 142; *Dimmar Singh* v. *Naziruddin*, [1889] A. W. N., 91.

(5) *Metcalfe* v. *Pulverroft*, 2 V. & B., 200; Fisher § 1651, 2 Robb., 1014.

(6) Sir T. Plumer, V. C., in *Metcalfe* v. *Pulverroft*, 2 V. & B., 200 (205). In *Mead* v. *Lord Orrery*, 3 Atk, (243); *Worsely* v. *Lord Scarborough*, 3 Atk., 392, the question was looked at from the standpoint of notice.

(7) *Soloman* v. *Soloman*, 13 Sim., 516.

or enlarge that right, as such an assignee must take his interest subject to all the incidents of this suit.(1)

2136. The Court may, however, in a proper case being made out, allow an assignee *pendente lite* to be added as a party,(2) and such leave would seldom be refused where his presence would be conducive to a final settlement of the accounts. So in England if the legal estate had been conveyed(3) or the title-deeds have been handed over to him, or other incidental or consequential relief is prayed for requiring something to be done by him,(4) or the suit is for an administration or account the assignee is invariably added as a party. The English practice has been followed in several cases in Bombay,(5) but no general working rule is deducible from them.

Where a mortgagor became bankrupt pending the suit, the official receiver or the trustee in bankruptcy is a necessary party, and even should the trustee disclaim all interest, the bankrupt mortgagor cannot be appropriately retained, though that may be a sufficient ground for proceeding *ex parte* against the trustee.(6)

It is the duty of the auction-purchaser when made a party in the mortgagee's suit to enforce his right of redemption, failing which he cannot re-assert that right when he is sued for possession.(7)

2137. Trustees, Administrators, etc.—An administrator is a necessary party as representing the estate, unless his powers are limited by the letters of administration.(8) An administrator *pendente lite* does not sufficiently represent the mortgagor's estate,(9) nor is an insolvent trustee a sufficient party to a suit so as to bind the *cestui que trust*.(10) As regards the executor, the English rule is that he is not a party where the mortgage is of freehold,(11) but he was always joined if it was doubtful whether the mortgaged property was sufficient to satisfy the mortgage-debt.(12) As trustees, executors and administrators ordinarily sufficiently represent the beneficiaries the latter are not necessary parties.(13) But a trustee who has become bankrupt, or who is himself a mortgagee, can no longer represent his *cestui que trust*, who then becomes a necessary party.(14) Otherwise, all trustees are necessary parties.(15) But in the case of charitable trusts the act of the majority binds the rest if the

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(1) *Umes Chunder* v. *Zahur Fatima*, I. L. R., 18 Cal., 164 (178). P. C.; *Opendra Mohun* v. *Poorno*, 19 W. R., 85; *Kaim Ali* v. *Luckhy Kant*, 10 W. R., 32, F. B.

(2) S 372, now (O. XXII, r. 10) Code of Civil Procedure. In England (1883), R.S.C., Ord. 171, Rule 3.

(3) *Daly* v. *Kelly*, 4 Dow., 435.

(4) *Wood* v. *Surr*, 19 Beav., 551; *Batwell*, 4 Dr. & War., 58 (68).

(5) *Kino* v. *Rudkin*, 6 Ch. D., 160; *Campbell* v. *Holyland*, 7 Ch. D., 166; followed in *Ahmedbhoy* v. *Vulleebhoy*, I. L. R., 12 Bom., 323 (336); *Lakmidas* v. *The Advocate-General*, 8 B. H. C. R., 96; *Ashabai* v. *Rustamji*, Bom., unrep., No. 616 of 1879; *Mithubai* v. *Limji*, Bom. Unrep. No. 877 of 1870; but *contra* in *Golabchand* v. *Dhondi*, 11 B. H. C. R., 64; *Umamoyi* v. *Tarini*, 7 W. R., 225; *Manual* v. *Sanagapalli*, 7 M. H. C, R., 105.

(6) *English* v. *Barlow*, 48 L. T., 188, an extreme case; *Lloyd* v. *Lander*, 5 Madd., 282; *Pannell* v. *Hurley*, 2 Coll., 241; *cf.* Re *Mercer* v. *Moore*, 14 Ch. D., 288.

(7) *Chet Ram* v. *Brenmal* 2 A.L.J.R., 278.

(8) *Faulkner* v. *Daniel*, 3 Hare., 199; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D., 294 (304).

(9) *Ellis* v. *Deane*, Beat., 5; *Cave* v. *Cork*, 2 Y. & C. C. C., 130.

(10) *Per* North, J., in *Aylward* v. *Lewis* [1891] 2 Ch., 81 (83).

(11) *Duncombe* v. *Hansley*, 3 P. Wms., 333. *n.*

(12) *Daniell* v. *Skipwith*, 2 Bro. C. C., 155; *Knight* v. *Knight*, 3 P. Wms., 331.

(13) *Morley* v. *Morley*, 25 Beav., 253; Re *Mitchell*, [1892] W. N., 11; S. 337, Civil Procedure Code; *Lala Surja Pershad* v. *Golab Chand*, I. L. R., 27 Cal., 724.

(14) *Francis* v. *Harrison*, 43 Ch. D., 183 (184).

(15) *Adams* v. *Paynter*, 1 Coll., 533.

former have acted after full opportunity was given for mutual discussion to all the members.(1) But no suit can fail by mere omission to join all the trustees if the latter were not averse to obtaining the relief claimed. And although the interests of the co-trustees is joint and indivisible, it is fully represented when they are all arrayed on one side or other of the suit.(2) A single trustee may sue for redemption without consulting the other trustees or joining again as co-plaintiffs ; but the proper decree in such a case would be to order the trust property to be restored to all for the benefit of the *cestui que trust*.(3) It has been before remarked that the case of a receiver stands on a different footing, and a receiver need not be impleaded where the beneficial owner has been impleaded.(4)

The legatee under the will of a deceased person is not sufficiently interested to be allowed to contest the will, and it is certain that he has no right to be impleaded in a mortgage-suit.(5)

If the defendant be a lunatic, his interests would have to be protected by appointing a guardian *ad litem*, notwithstanding that he has not been so adjudged under the Lunacy Act.(6)

2138. Debenture-holders.—Persons having any interest either in the security or in the equity of redemption are necessary parties. Accordingly, where an equity of redemption has been purchased by a joint-stock company which subsequently issued debentures charged on the mortgaged property, all the debenture-holders become individually interested in the equity of redemption and must be joined in a foreclosure-suit. (7)

So where the trustees of a company by its authority gave a legal mortgage in fee of its land to the plaintiffs, and subsequently it issued debentures to secure principal sums and interest which were thereby charged on all its undertaking and present and future property, it being provided that the debentures were " all to rank *pari passu* in point of charge as a floating security on the property" thereby charged, it was held that the debenture-holders, having an immediate equitable charge, were proper parties to the plaintiff's action for foreclosure. (8)

2139. Kanomdar.—A *kanomdar* is a necessary party in a mortgage-suit and where in a suit for redemption, some of the terms were modified on appeal by the sub-tenants, and which affected him prejudicially, it was held that the decree so passed in his absence should be set aside. (9) So one of two co-uralans cannot sue without impleading the other co-uralan either as a co-plaintiff or if he is recalcitrant, then as a defendant. (10) But if one uralan is empowered to act without the co-operation of the other, it would then be unnecessary to join the latter. (11)

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(1) *Teramath* v. *Lakshmi*, I. L. R., 6 Mad., 270; *Kunhan* v. *Moorthi*, I. L. R., 34 Mad., 406 (410).

(2) *Kunhan* v. *Moorthi*, I. L. R., 34 Mad., 406 (415).

(3) *Karattole* v. *Unni*, I. L. R., 26 Mad. 649, F. B.; *Kunhan* v. *Moorthi*, I. L. R., 34 Mad., 406 (414).

(4) *Rodger* v. *Ashutosh Mukerji*, 6 C. W. N., 829; distinguishing *Chartered Bank* v. *Hurish Chunder*, 5 C. W. N., xv.

(5) *Rahamatullah* v. *Rama*, I. L. R., 17 Mad., 373.

(6) Act XXXV of 1858; *Kadala* v. *Narisi*, I. L. R., 24 Mad., 504; *Venkatrammana* v. *Timmappa*, I.L.R. 16 Bom., 132; *Pansukhram* v. *Bai Ladkar*, I.L.R., 23 Bom., 653; *Nabbu Khan* v. *Sita*, I.L.R. 20 All., 2.

(7) *Griffith* v. *Pound*, 45 Ch. D., 553.

(8) *Wallace* v. *Evershed*, [1899] 1 Ch. 891.

(9) *Vedapurathi* v *Avara*, I.L.R., 25 Mad., 568.

(10) *Savitri* v. *Raman*, I.L.R., 24 Mad., 296 (299).

(11) *Teramath* v. *Lakshmi*, I.L.R., 6 Mad., 270 (272).

2140. Lessees.—Leases of the mortgaged property present a great complexity both in the nature of their origin as well as in their extent and operation, so that it is not possible to make a general statement as regards their right to be represented in the mortgage-suit. It may, however, be generally asserted that in a suit for redemption a lessee or even a mere occupant of the land without title may be impleaded as a defendant so that his title may be quieted and he may be ejected. But this is only a prudential course, which is by no means necessary. Indeed, a lessee of the mortgaged property holding only from the mortgagee has no right to resist the mortgagor's right to possession on redemption, (1) even though he was not impleaded. On the other hand, where the lessee holds from the mortgagor, or which is the same thing, from the mortgagee with the express or implied authority of the mortgagor, then he cannot be ejected except in execution of a decree to which he was a party. But all lessees have neither the right to redeem nor are they "interested" either in the mortgage security or in the equity of redemption so as to be necessary parties to the suit. The test is whether the lease would be affected by the result of the suit. (2). It is needless to add that since the holder of a mere subordinate tenure such as that of a *ryot* is unaffected by the mortgage and transfer of proprietary interest, he cannot claim to be impleaded in a suit affecting it. (3) But in a suit for foreclosure a lessee of the mortgaged property is, ordinarily, a necessary party. As Pontifex, J., observed: "In this country *patnis*, *zur-i-peshgi* leases, and interests of that nature are very considerable interests in the land, and cannot be looked upon as mere leases for a term of years which a mortgagee might have the right to disregard. They are in fact substantial proprietorial interests, on the grant of which, as in this case, considerable premiums are paid; and it is only equitable, that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgages made by the superior holder." (4) But in an agricultural village where tenancies constitute distinct interests in land, it cannot be said that the tenants are necessary parties to every suit on the mortgage of the landlord's interest. But a new tenant settled by the mortgagee on his own account may properly be impleaded in a suit in which the mortgagor seeks to dispossess him on that account. (5)

2141. Landlord.—The landlord being a person holding by a title paramount to that of his tenant is not a necessary party to a suit affecting the mortgage of his tenant's holding. But where it is found that a landlord obtained possession of an occupancy holding alleged to be non-transferable by bringing a collusive suit for ejectment against a transferee from his tenant, it was held that in a suit by a mortgagee of the holding on his mortgage, the landlord would be a proper party, since his possession of the holding rested on acquisition from the transferee and not on a paramount title. (6)

2142. Surety.—A person who mortgages his estate as a surety for the mortgagor is both under the English and Indian law entitled to redeem; (7) but

(1) *Ram Chand* v. *Raj Hans*, 3 A.L.J., 517.

(2) *Raghunandan* v. *Ambika Singh*, I.L. R., 29 All, 679 (682);

(3) *Girish Chunder* v. *Juramoni*, 5 C.W. N. 83. In England the rule is different; only lessees whose lease is not binding on the mortgagee being permitted to redeem—Fisher § 1451.

(4) *Kasumunnissa* v. *Nilratna*, I.L.R., 3 Cal., 79 (87); *Jugul Kishore* v. *Kartic Chunder*, I.L.R., 21 Cal., 116 (120); *Kokil Singh* v. *Duli Chand*, 5 C.L.R., 243 (249, 250); *Bloomfield* v. *Gangadhar*, 4 C.L.J., 562.

(5) See s. 28, Civil Procedure Code; *Nundo Kumar* v. *Banomali*, I. L. R., 29 Cal, 871 (880, 881).

(6) *Panchanan v. Mir Abdul*, 16 C.W.N. 920.

(7) *Beckett* v. *Micklethwaite*, 6 Mad., 199; s. 9 (c).

according to English cases he becomes "interested" only after he has paid atleast a part of the debt. A surety who has entered into only a personal covenant is not a necessary party, unless by having paid off a part of the debt he has acquired a charge on the property. (1) The discharge of a surety who was only personally liable for the payment of the mortgage-money does not preclude the mortgagee from continuing the suit against the mortgagor. (2)

The mortgagor of another estate charged as a collateral security is a necessary party. (3)

2143. As a rule the reversioners of a Hindu female are not necessary parties to a suit instituted against her, though there may be cases when their joinder would be unobjectionable and even proper. A decree passed against a Hindu widow is as a rule personal and does not bind the estate unless so framed. (4) The nature of the estate possessed by a Hindu female has been the subject of a previous discussion (§ 247), and having regard to what has been there stated, the necessity of joining a reversioner would seem to arise whenever the issues involved affect the mortgaged estate and which would consequently affect his interest.

2144. Members of a Mitakshara Family.—The right of the manager of a joint Hindu family to maintain and defend suits on behalf of the family depends upon the position assigned to him by Hindu Law (§§ 299–302). Consistently with it the question depends upon the effect of this rule on his general powers to represent the family. Generally speaking, there can be no doubt, that where a joint family business has to be carried on in the interests of the joint family as a whole, the manager will be presumed to have been entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business; and as such he is entitled to make in his own name contracts in the course of that business, and to maintain and defend suits upon these contracts without joining with him other members of the family. (5) But in such a case the defendant may, of course, insist on all persons with whom he expressly contracted being made parties to the suit. (6) This is the general law, and it remains to see whether this rule, while providing for a special procedure applicable to mortgages has modified it so as to render the joinder of all co-parceners necessary in a mortgage suit. As to them it has been laid down in several cases decided with reference to section 85 of the Act that in a suit against a Mitakshara father on a mortgage of ancestral property executed by him alone, the son, whether minor or adult, is a necessary party, if he was in existence at the day of the institution of the suit (7) and the mortgagee had notice of his interest. (8) Now since a Mitakshara son must be impleaded because he has

(1) *Newton* v. *Earl of Egmont*, 4 Sim. 574; *Gedye* v. *Watson*, 25 Beav., 310.

(2) *Mehdi Husain* v. *Sughra Begum*, I. L. R., 25 All, 206.

(3) *Stokes* v. *Clendon*, 3 Swans., 150*n*.

(4) *Tekoo Ram* v. *Karim Chand*, (1901) P. L. R. 94.

(5) *Kishen Prasad* v. *Har Narain*, I.L.R., 33 All., 272, P.C., reversng *Shamrathi* v. *Kishan Prasad*, I.L.R., 29 All., 311; *Lalji* v. *Keshowji*, I.L.R., 37 Bom., 340.

(6) *Kishan Prasad* v. *Har Narain*, I.L. R., 33 All., 272 (279), P. C.

(7) *Doollee Chand* v. *Wooma Sunkur*, 7 C. L.R., 429; distinguishing *Luchman* v. *Girdhur*, I.L.R., 5 Cal., 855, F.B.

(8) *Ramjatan* v. *Ramhit Singh*, I.L.R., 27 All., 511; *Ganga Prasad* v. *Chunni Lal*, I. L.R., 18 All., 511; *Lala Suraj Prosad* v. *Gulab Chand*, I.L.R., 28 Cal., 517; *Ram Chandra* v. *Kondayya*, I. L. R., 24 Mad, 555; *Bhawani* v. *Kallu*, I.L.R., 17 All., 537, F.B.; *Kanhaia Lal* v. *Raj Bahadur*, I.L.R., 24 All., 281; *Debi Dat* v. *Jadu Rai*, I.L.R., 24 All., 459; *Debi Singh* v. *Jai Ram*, I.L.R., 25 All., 214, F.B.

an interest in the family property from his birth, it being immaterial whether or not he was a party to the mortgage, it follows by parity of reasoning, that all co-parceners, such as brothers and nephews. in a joint Hindu family, must also be joined, as they have an interest in the property in so far as they are interested in redeeming it. Indeed, where a mortgage of joint family property was executed by the managing member of a joint Hindu family, the remaining members of the family were, in Allahabad held to be, necessary parties to a suit based thereon. (1) And, at one time that Court went so far as to hold that the other members of a joint Hindu family were necessary parties in every suit instituted by or against the manager, whether the suit be for recovery of a debt secured or unsecured or for any other purpose.(2) In the last edition of this work this view was stated to be unsustainable, (3) and it has since been overruled by the Privy Council.(4) But since then some cases of that Court appear to have moved to the opposite extreme in holding that the other co-parcenary members are not necessary parties to a mortgage suit under this rule as they are sufficiently represented therein by the manager. (5) But this view appears to be equally untenable and has been dissented from in Calcutta, (6) but in view of a recent pronouncement by the Privy Council (7) they require further examination. A Full Bench of the Allahabad High Court had to deal with two cases in which the right of the co-parceners to be joined as plaintiffs and defendants came up for adjudication. In the first case one Naiti Singh had executed a mortgage in favour of the plaintiff's husband who sued his brother and two nephews as representatives of the original mortgagor, and Hori Lal and Jagannath the two sons of the purchaser of the equity of redemption from him, but failed to join the four sons of Hari Lal and Jagannath grandsons of the purchaser which was pleaded as a defect, and whereupon the suit was originally dismissed but the lower appellate Court held that the purchaser's family was sufficiently represented by the managing members who appealed to the High Court.(8) In the other case the suit was instituted by the mortgagee's grandson on foot of two mortgages without impleading his own son, aged four years: objection being taken on the score of non-joinder the plaintiff pleaded that he was suing as manager and sought leave to amend the plaint to make that fact explicit, but the Court refused to allow the amendment and dismissed the suit on the ground that the son was a necessary party to the suit, and the two cases were decided by a Full Bench which held that in neither case was there any defect of parties supporting their view on three grounds:—(*i*) on the ground of inconvenience, holding that "the members of a joint Hindu family are frequently very numerous, comprising often absent members and infant of tender years. Furthermore, during the course of the litigation there would be in all probabilities frequent births of sons, and the array of defendants would never be strictly complete unless during the entire time the suit was running its course, every newly born son was added as a defendant," (9) (*ii*) because the rule makes no new departure, enacting as it merely does an old rule of practice, under which managers were held

(1) *Jas Ram* v. *Sher Singh*, I. L. R., 25 All., 162.

(2) *Shamrathi* v. *Kishanprasad*, I.L.R., 29 All., 311; reversed, O. A., *Kishan Prashad* v. *Shamrathi*, I L.R., 33 All., 272, P C.

(3) 2 Gour's Law of Transfer, (3rd Ed.), § 1741.

(4) *Kishen Prashad* v. *Shamrathri*, I.L.R., 33 All., 272 P.C.

(5) *Hari Lal* v. *Nunman*, I.L.R., 34 All., 549, F.B: *Madan Lal* v. *Kishan Singh*, *ib.*, 572.

(6) *Debi Prosad* v. *Dharamjit*, I.L.R., 41 Cal., 727.

(7) *Sheo Shankar* v. *Jaddo*, I. L. R., 36 All., 383, P.C; affirming *Jaddo* v. *Sheo Shankar*, I.L.R , 33 All., 71.

(8) *Hari Lal* v. *Munman*, I.L.R., 34 All., 549, F.B.

(9) *Ib.* p. 554.

to represent the family [1], (*iii*) a different view justified by the enactment of this rule as a part of the substantive law, can no longer be maintained since its relegation to the Procedure Code. [2] In this view the Court distinguished and overruled its own former precedent[3] which made the joinder of all parties necessary. It was also added that since the sufficiency of such representation is recognized by the Privy Council in cases arising out of contracts there was no reason why the same rule [4] should not apply equally to mortgages. It is submitte dthat none of the reasons given by the Full Bench justify the practical annulment of the rule which enjoins the joinder of all persons interested in the mortgage, though it does not of course, imply that the penalty for non-joinder should be the dismissal of the suit, nor indeed, does it necessarily render a decree nugatory against all those who should have been but were not joined.

2145. But a member of an undivided Hindu family might enter into a contract in his individual capacity and in that case, it would be unnecessary to join the other members. So where the suit is to enforce the mortgage of a co-parcenary share of an individual member, other co-parceners are not necessary parties, since the mortgagee cannot force them to a partition until he has acquired his mortgagor's interest.[5] Co-parceners in a Hindu family do not necessarily become partners in the trading firm, unless it was set up with the help of family-funds, and there is no presumption that a business carried on by a co-parcener is a family-business.[6]

2146. Mitakshara Son.—The right of a Hindu son to redeem a mortgage executed by his father may be looked at from two stand-points —(*a*) the stand-point of Hindu law and (*b*) from the stand-point of this section. Under the former the rule is that a son is under a pious obligation to discharge his father's debts, unless they are tainted by illegality or immorality. Moreover, since the manager is the sole representative and mouth-piece of the family fully representing the other co-parceners in his dealings with the outside world (§ 299), it follows that any act done by him in his representative capacity necessarily binds the co-parceners, who are equally bound by any alienation of the family estate made in that capacity. And as regards the sons, the binding character of their obligation is greater but not less than in the case of any other co-parcener (§ 296). It therefore follows and is settled (§§ 293—298) that the son is bound by any alienation made by the father, and by a sale held in execution of a money-decree obtained against him. As the Privy Council observed. "It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debts and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing the liability. If his duty was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that not being parties to the sale or execution-proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own."[7] But this was conceded and, indeed, could not well be disputed, but it was contended that though this was the rule and the effect of Hindu law, the imperative

(1) *Hari Lal* v. *Munman*, I. L, R., 34 All., 549 (554.) F.B.
(2) *Ib.* p. 556.
(3) *Bhawani Prasad* v. *Kallu*, I.L.R., 17 All. 587, F.B., overruled in *Hari Lal* v. *Munman*, I.L.R., 34 All. 549 (555), F.B.
(4) *Kishan Prasad* v. *Har Narain*, I.L.R., 33 All., 272, P.C.
(5) *Lal Chand* v. *Balkrishna*, 21 I. C. (Bom.) 689.
(6) *Vadilal* v. *Shah Khusal*, I.L.R., 27. Bom., 157 (161).
(7) *Nanomi Babuasin* v. *Modun Mohun*, I. L.R., 13 Cal., 21, P.C.

provisions of this section had had the effect of modifying it so far as it was inconsistent with the legislative enactment, and that the object of this rule being to afford all persons having an interest in the mortgagee's suit an opportunity to exercise their right of redemption, that right of the son could not be foreclosed in a suit to which he was not a party. In other words, this section impliedlv enacted that though a Hindu son may forfeit his right to redeem under Hindu law, he could not forfeit it under this Act unless the mortgagee had foreclosed him in consonance with the procedure here enacted. And this view at one time found favour with the other Courts.(1) On the other hand, the contrary was laid down by the Madras High Court who based their view on a judgment of the Privy Council(2); but in this case no reference was made to this section or to the view of redemption it is held to support. But even those who hold the effect of this section to be to preserve the right of redemption until it is foreclosed in a suit to which the sons are expressly made parties, qualify the rule by the proviso, which was a part of section 85, but which has been since omitted. It made the rule as to joinder subject to notice of the excluded interest by the mortgagee. And it was accordingly held that the right of an excluded son to redeem was qualified and not absolute, being only enforceable against the mortgagee decree-holder on the sole ground of his exclusion if he could show that he had failed to join him as a party to his foreclosure-suit in spite of the notice of his interest.(3)

2147. This was the only logical outcome of the rule as it existed prior to its repeal by the Procedure Code. For if the right is the necessary outcome of this section, it must be subject to the proviso to which the section itself is subject, or to put it differently, if the legislature has the right to enact a rule it has equally the right to enact an exception. Consequently, the rule was so interpreted in certain cases (4) though the exception appears to have been lost sight of in others.(5) It has been, moreover, held that even such an exclusion would be no ground for permitting redemption in a subsequent suit instituted by the excluded son, if he was a minor at the time of the mortgagee's suit and if the suit was instituted against the manager of his family in his representative character.(6) But the question of minority is immaterial, since if the Hindu manager has the power to represent other members of the family, he has the power to represent them all irrespective of their ages ; and consequently, a decree obtained against him should be equally available against all those whom he constructively represented in the suit. Judging from the latest cases the Courts seem now inclined to settle down to this view.(7) This

(1) *Bhawani Prasad* v. *Kallu*, I.L.R., 17 All., 537, F.B. ; following *Badri Prosad* v. *Madan Lal*, I.L.R., 15 All., 75, F.B., in which the same view was taken, but which Banerji, J., held to be an *obiter dictum*. It was however held in *Bhawani Prasad* v. *Kallu*, I.L.R., 17 All., 537 (564), F.B., that that decision was not *obiter* but necessary for the decision of that case. Followed in *Kanhyalall* v. *Raj Bahadur*, I.L.R., 24 All., 211 ; *Ram Prasad* v. *Man Mohun*, I.L.R., 30 All., 256 ; *Lala Suraj Prosad* v. *Golab Chand*, I.L.R., 28 Cal., 517 ; *Bhagwat* v. *Suba Lal*, 7 C.L.J., 195 ; *Balaji* v. *Tulsi Ram*, 2 N.L.R., 90; *Dindayal* v. *Sheoraj Singh*, 2 N. L. R., 116 ; *Jian* v. *Gopadya*, 5 N.L.R., 117; *Dulibai* v. *Gopibai*, I.L.R., 26 Bom., 433.

(2) *Krishna Reddi* v. *Thambu Reddi*, I.L.R., 26 Mad., 28 ; following *Daulat Ram* v. *Mehr Chand*, I.L.R., 15 Cal., 70, P.C.

(3) *Ram Avatar Singh* v. *Chowdhuri Nursingh*, 3 C.L.J., 12 ; *Ram Taran Gosawami* v. *Rameswar Malia*, 6 C.L.J., 719.

(4) *Ram Nath Rai* v. *Luchman Rai*, I.L.R., 21 All., 193 ; followed in *Kanhai Dubay* v. *Brindawan*, 16 C. P. L. R., 169 ; *Jian* v. *Gopadya*, 5 N.L.R., 117.

(5) *Balaji* v. *Tulsiram*, 2 N. L. R., 90 ; *Dindayal* v. *Seoraj Singh*, ib. 116.

(6) *Baladeo Sonar* v. *Mobarak Ali Khan*, I.L.R., 29 Cal., 583 ; *Ram Taran* v. *Rameswar*, 11 C.W.N. 1078 ; 6 C.L J 719 ; *Lalji* v. *Keshowji* v. I.L.R. 37 Bom. 340.

(7) *Debi Singh* v. *Jia Ram*, I. L. R., 25 All., 214, F.B. ; *Balwant* v. *Aman*, I. L. R., 33 All., 7 ; *Jaddo* v. *Sheo Shankar*, I. L. R.,

view proceeds on the principle that since the interest of the son was sufficiently represented by the father sued in his representative capacity as manager, and since he would have really represented the son if the latter had been made a *pro forma* defendant, his formal exclusion from the suit was at least a mere irregularity which could not affect the decree as obtained against the manager: *Cessante ratione cessat ipse lex.* And this view has now been affirmed by the Privy Council in a case in which the excluded members claimed redemption of the mortgage foreclosed against their manager and in which they made their exclusion the sole ground for redemption. The High Court at Allahabad negatived their contention holding that they had been substantially represented in the previous suit through their manager whose foreclosure sufficed to foreclose even their interest in the equity of redemption.(1) This view was upheld by the Privy Council in a guarded judgment in which their Lordships accepted the finding of the Courts in India that the mortgagee had no notice of the existence of the plaintiffs, and therefore, they held section 85 of the Act inapplicable, and apart from that section, their Lordships added: "There are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family as a whole is bound."(2) But this observation became a mere *obiter* in view of the finding that the plaintiffs had failed to bring their case within the terms of section 85 under which their suit was laid and the decision given.

2148. The proviso as to notice being now omitted in the rule, it is rendered more unqualified than its corresponding prototype. But the qualification was superfluous and at times misleading (§ 2088) and its omission not intended to make the rule more rigid. Nor, indeed, is its effect relaxed by its transposition to the Procedure Code. All the same the correct view of its operation should exclude the deduction sometimes drawn and justified by no recognised canon of construction that persons excluded are not bound by the decree. In the first place the Procedure Code offers its own solution as to the effect of non-joinder, for it might be waived,(3) and in any case no suit can be defeated by reason of non-joinder the Court being empowered to adjudicate the rights and interests of the parties actually before it.(4) Again, there can be no doubt that an adjudication made against the manager is *res judicata* against the other members(5) and, therefore, another suit for the same relief on the mere ground of exclusion would be barred by the rule which clearly recognises vicarious representation. Moreover, it is in consonance with the accepted canon of construction that a rule regulating a mere procedure cannot abrogate a rule of substantive law, much less Hindu Law—the integrity of which has been too well guaranteed to be shaken even by an Act of the Indian Legislature. In any case, it would be too far-fetched to assume that a general rule enacted to regulate procedure could be read as striking at the very

33 All., 71; affirmed O.A., but the constructive liability of the son whom the mortgagee had failed to implead not considered—*Sheo Shankar* v. *Jaddo*, I.L.R., 36 All., 383, P.C.; *Vebri Singh* v. *Chunni Lal*, I L.R., 33 All., 436; *Hari Lal* v. *Munman*, I.L.R., 34 All., 549, F.B.; *Madan Lal* v. *Keshan Singh*, I.L.R., 34 All., 572, F.B; *Balki Mahapatra* v. *Brojobasi*, 16 C. W. N. 1019; 14 I. C. 333. *Ramakrishna* v. *Vinayak*, I.L. R., 34 Bom., 354; *Chimna* v. *Sada Barka*, 12 Bom. L R.; 811; *Tatya Rao* v. *Puttappa*, *ib.* 940; *Baldeo* v. *Mobarak*, I. L. R., 29 Cal., 583; *Gore* v. *Kashi Ram*, 9 N.L.R. *contra*; *Ramasamayyan* v. *Virasami*, 1. L. R., 21 Mad., 222; *Palani* v. *Rangayya*, I.L.R., 22 Mad, 207; *Jigamba* v. *Jathai*, 22 M.L J. 45; 14 I.C. 374; *Sheo Dulare* v. *Brij Bhukan*, 25 I.C. (Oudh) 849; *Balaji* v. *Tulsiram*, 2 N.L.R., 90; *Moti* v. *Kanhaya*, 5 N.L.R., 181, dissented from.

(1) *Jaddo* v. *Sheoshankar*, I.L.R., 33 All., 71 (78).

(2) *Sheoshankar* v. *Jaddo*, I.L.R., 36 All. 383 (387) P.C.

(3) S. 34, (now O. 1, r. 13), Civil Procedure.

(4) *Ib.* S. 31 (now O. 1, r. 9).

(5) *Ib.* S. 13 (now S. 11).

foundation of the joint family system of the Hindus and the necessary safeguards by which it is buttressed.(1) It is, therefore, suggested that too many implications must not be drawn from the wording of the rule, which while laying down a positive rule of procedure fails to prescribe the penalty for non-compliance which must be understood to mean that the penalty if any is not the outcome of the rule, though it may necessarily follow in certain cases from other considerations. But supposing the mere exclusion to be a good ground for permitting redemption, then a further question arises, whether the party excluded is entitled to redeem the entire mortgage or only to the extent of his own interest in the property. It has been so held in Allahabad.(2) The question, however, depends upon the terms of section 60, the last clause of which is relevant, and under which the acquisition of a portion of the mortgaged property has the effect of destroying the indivisibility of the mortgage. But that proviso only creates a right in favour of the mortgagor to redeem his own share under the circumstances therein stated. It does not confer a corresponding right in the mortgagee to compel the mortgagor to redeem only his own share. The question will be found more fully discussed under section 60 (§§ 1423—1433).

Limitation.

2149. The right of the excluded son to redeem may raise the question of limitation. Ordinarily, the period prescribed for redemption is sixty years calculated from the time when the right to redeem or to recover possession accrues.(3) But the effect of the final decree made under O. 34, r. 3 is to vest the estate as from that date absolutely in the mortgagee, and, since his possession would then be *prima facie* adverse to the sons, the latter could be permitted to exercise their right of redemption only within twelve years from the date of the mortgagee's entering into possession of the property in consequence of the final decree passed under Rule 3. (4)

Indeed, the effect of this rule barring the right of redemption of all persons claiming through or under the mortgagor, would seem to negative the son's right to redeem upon the mere ground of exclusion. And it may be questioned whether the effect of section 85 (now O. 34, r. 1) is so far-reaching as the Courts have held it to be. That section was enacted as a rule of procedure, and no processual rule could be held to abrogate a well-established rule of Hindu law by a mere, and by no means a necessary, implication. This subject had attracted the attention of the Revision Committee who had at one time recommended the insertion of the words—"and he shall not be bound by the decree, unless he was so joined," but these words were soon afterwards cut out and the rule enacted in its present form, which leaves the effect of exclusion to the decisions of the Courts. Now if these decisions had been unanimous, then the rule might have been held to leave them intact, for, as Lord Campbell, C. J., said, where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction.(5) But this cannot be said of the present rule.

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(1) *Ramakrishna* v. *Vinayak*, I.L.R. 34 Bom. 354 ; *Chinna* v. *Sada Barka* ; 12 Bom. L.R., 811; *Tatya Rao* v. *Puttappa*, *ib.* 940.

(2) *Sundar Lal* v. *Chittar Mal*, I.L.R. 29 All., 215, S.C., before remand *ib.*, 1 ; *contra Dindayal* v. *Sheoraj Singh*, 2 N.L.R., 116.

(3) Art. 148. Act XI of 1908.

(4) *Nidhiram* v. *Sarbessur*, 14 C. W. N., 439 ; 5 I.C. 877 ; *Thakur Kalka* v. *Thakur Debi Singh*, [1905] O. C. 233; *Malkhan* v. *Bhagirath Prasad*, *ib.* 33 ; *Bahadur* v. *Naina Mal*, (1914) P.L.R. 231 ; 25 I.C. 35.

(5) *Mansel* v. *Queen*, 8 E. R. 73 : *Ex parte Campbell*, L. R. 5 Ch. 703 ; *Jogendra Chundra Roy* v. *Syam Das*, 9 C. L. J., 271.

2150. Position of Excluded Interests.—Beyond declaring that all persons interested in a mortgaged property must be joined in the suit to enforce the mortgage, the section does not lay down the consequences of exclusion. In the old Chancery practice the misjoinder of the plaintiffs was fatal, and if any person among the plaintiffs had done anything which might have amounted in equity to a release of his right, the whole suit failed, and it was, therefore, customary to see that all persons were arrayed on one side or the other. But this practice was abrogated by the Judicature Act which enables the Courts to deal with the misjoinder of plaintiffs according to law, justice and equity of the case. (1) Nevertheless cases must occur when a person though a necessary party has not been joined, and in such a case the English practice as regards subsequent incumbrancers is that if the exclusion was because the plaintiff had no notice, the puisne mortgagee, though not a party to the suit, is yet bound by the accounts taken in the action, the only right remaining to him being that he is allowed to redeem the prior mortgage on payment of the decretal amount.(2) But beyond this he has no right, and he cannot be permitted to unravel the account once gone into even on the ground of collusion and fraud unless he insists on any particular errors.(3) But a single fraudulent item is then sufficient for re-opening an account.(4) Indeed, this would seem to be the only course open to a puisne mortgagee whether the prior mortgagee had or had no notice of his interest.(5) "Land is mortgaged to *A*, then to *B*, then to *C*. If *A* sued to redeem and try his debt by decree, *C*, *A* and *B* shall be bound by the account which *A* made in his suit and pay or contribute to the charges of suit, if made without fraud or collusion."(6)

(1) English law.

2151. Turning now to the Indian law, it will be found that the obligation imposed by the words '*shall be joined*' has been the subject of considerable difference of opinion between the several High Courts. Thus it has been held by the Allahabad High Court that the non-joinder is a fatal defect in the suit unless cured by Order I, rr. 8 (2), 10 (2), (3), (5) and 11 of the Code of Civil Procedure; and where such non-joinder is brought to the notice of the Court, it will give effect to the objection and dismiss the suit, even though such objection be raised for the first time in appeal.(7) But the soundness of this view has been doubted in a later case (8) and in another case the Court was of opinion that if a necessary party had not been joined the Court should allow the prayer to join by amending

(2) Joinder by amendment.

(1) *Per* James, L.J., in *Luke* v. *South Kensington Hotel Co.*, 14 Ch. D., 121 (128); *Kendall* v. *Hamilton*, 44 App. Cas., 504 (529); 1 Chitty on Pleading (7th Ed.), 462; R.S.C. Order XVI, R. 11.

(2) *Derswold* v. *Marsham*, 2 Ch. Ca., 170 22 E. L. R., 898; *Lomax* v. *Hide*, 2 Vern., 185; *Godfrey* v. *Chadwell*, ib., 601; *Morret* v. *Western*, ib., 663.

(3) *Needler* v. *Deeble*, 1 Ch. Ca., 299; 22 E.L.R., 810.

(4) *Taylor* v. *Haylin*, 2 Bro. C. C., 310; *Pritt* v. *Clay*, 6 Beav., 503; *Gething* v. *Keighly*, 9 Ch.D., 547 (550).

(5) *Williams* v. *Day*, 2 Ch. Ca., 32.

(6) *Per* L.C. in *Williams* v. *Day*, 2 Ch. Cas., 32; 22 E.L.R., 832 (838).

(7) *Saligram* v. *Harcharan*, I.L.R., 12 All., 548; *Gulam Kadir* v. *Mustakin*, I.L.R., 18 All., 109; *Mhd. Abdul* v. *Dilsukh*, 2 A.L.J., 210; *Bhagmani* v. *Subh Narain*, (1905), A.W.N., 35. *Alam Singh* v. *Gokal Singh*, I.L.R., 35 All. 484. But where out of several persons who apparently had a right to bring a suit as co-plaintiffs some only appeared as plaintiffs, the others being joined as co-defendants, the suit ought not to be dismissed merely because the plaintiff failed to show that the persons whom they joined as co defendants refused to appear with them as plaintiffs; *Biri Singh* v. *Nawal Singh*, I.L.R., 24 All., 226; *Pyari Mohun* v. *Kedar Mall*, I.L.R., 26 Cal., 409, F.B.

(8) *Kundan Lal* v. *Fakir Chand*, I.L.R., 27 All., 75 (77). In *Bhagmani* v. *Subh Narain*, (1905) A.W.N., 35, the refusal to allow a very late amendment was treated as a material irregularity calling for the interference of the Court in revision.

the plaint, even though the application be made at a very late stage of the case, the plaintiff being mulcted in costs if the application was unreasonably delayed.(1) And where the defect is disclosed before the decree, according to the Allahabad view, the suit must be dismissed,(2) at least, as regards the property comprised in the subsequent incumbrance.(3) But in Calcutta, Bombay and Madras the suit is allowed to be proceeded with after joining the interested party(4) even in second appeal.(5) All the High Courts were, however, agreed when the rule was a part of the Act that it was uncontrolled by what was section 34 (now O. I. r. 13) of the Civil Procedure Code, and that, therefore, there could be no waiver of an objection to the non-joinder of a necessary party. But, as already pointed out, this view can no longer be maintained. Moreover, there is a difference between the non-joinder of a person as defendant and a non-joinder of plaintiff. The plea as to non-joinder of plaintiffs in an action on a joint contract is a plea in bar of the suit, and, if established at the hearing, must result in the dismissal of the suit.(6)

(3) Operation of decree excluded on interests

2152. And where the mortgagee has succeeded in obtaining a decree behind the back of a person who was no party to the suit, then the question whether he is bound by it must depend upon other considerations. If he was a stranger to the parties he is of course in no way bound, and as regards him the decree is a nullity(7) (§ 2163). But if his interest was represented as in a suit instituted against the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit his sons, the latter could not successfully impeach the decree, on the sole ground of their exclusion from the suit.(8) This view accords with that taken in Madras, where, while the imperative character of the section is fully recognized, it has been held that the failure to join the party interested does not *ipso facto* vitiate the decree. "The creditor, although he may have failed to obey the rule contained in the section, has got the decree which he requires as a foundation for his application to sell the whole estate." In such a case, "all that the son can claim is that, not having been a party to the sale or the proceedings which led up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale."(9) In Madras as in Allahabad, then the effect of non-joinder is to leave the interests of the party omitted unaffected.(10) This view appears to be supported by a *dictum* of the Privy Council.(11) And the Calcutta High Court seems also to favour the same view.(12)

(1) *Bhágmani* v. *Subh Narain*, (1905) A. W.N., 35; *Nathi Lal* v. *Lala*, 9 A.L.J., 410.

(2) *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432; *Kali Charan* v. *Ahmed Shah*, I. L. R., 17 All., 48; *Balmukund* v. *Sangari*, I. L. R., 19 All., 384; *Sundar Singh* v. *Bholu*, I. L. R., 20 All., 322, F. B.; *Alam Singh* v, *Gokal Singh*, I.L.R., 35, All. 484.

(3) *Alam Singh* v. *Gokal Singh* I.L.R. 35 All. 484.

(4) *Alam Singh* v. *Gokal Singh*, I.L.J., 35 All. 484.

(5) *Jamuna Pershad* v. *Ganga Pershad*, I. L.R., 19 Cal., 401 (411); *Sorabji* v. *Ratonji*, I. L. R., 22 Bom. 701; *Subban* v. *Arunachalam*, I. L. R., 15 Mad., 487.

(6) *Subban* v. *Arunachalam*, I.L.R., 15Mad., 487; *Mushtaq* v. *Behari*., 25 I. C. (All.), 508.

(7) *Ramsebak* v. *Ramlall*, I. L. R., 6 Cal., 815; *Lutchmanan* v. *Siva*, I.L.R., 26 Cal., 349 (354).

(8) *Hari Lal* v. *Munman*, I.L R. 34 All., 549 F.B; overruling *Bhawani* v. *Kallu*, I. L. R., 17 All., 537; *Madan Lal* v. *Kishan Singh*, *Ib.* 572, F.B; *Ramakrishna* v. *Vinayak*, I.L.R., 34 Bom. 354; *Chemina* v. *Sada*, *ib.* 811; *Tatyarao* v. *Puttoppa*, *ib.* 940.

(9) *Ramsamayyan* v. *Virasamy*, I. L. R., 21 Mad., 222 (224, 225); followed in *Palani* v. *Rangayya*, I. L. R., 22 Mad., 207; see also *Kunhali Beari* v. *Keshava*, I. L. R., 11 Mad., 64 (76).

(10) *Sivathi* v. *Ramasubayyar*, I. L. R., 21 Mad., 64.

(11) *Umesh Chunder* v. *Zahur Fatima*, I. L. R., 18 Cal., 164, P. C.; see also *Anundo Moyee* v. *Dharendro*, 14 M. I. A., 101.

(12) *Kanti Ram* v. *Kutubuddin*, I. L. R.,

2153. Where a party excluded in the former suit makes his exclusion the basis of another suit, the *onus probandi*, was, however, held to lie on him to show that the mortgagee, when he brought his suit, had notice of his interest in the mortgaged property.(1) A person may forfeit his remedy by estoppel. Thus where a legal representative of a deceased judgment-debtor, who was the managing member of a Mitakshara family, allowed execution to proceed actively for nearly a year without the slightest objection, and twice successfully obtained the stay of sale from Court on the plea that he would satisfy the decree, if time were allowed, paying even a part of the debt which induced the decree-holder to consent to the proposed extension, he could not afterwards be heard to say that the decree was incapable of execution against him. (2) The right of the excluded sons to redeem may be materially affected if the property sold in execution of the mortgagee's decree was purchased by a person who was a stranger to the suit, in which case the sons cannot set aside the sale except on the ground that would justify the setting aside of an alienation if it had been made by the father himself. (3) But in this case the sons cannot redeem, not because they have no right, but because their right is subordinate to the equity in favour of a stranger auction-purchaser. As Sir Barnes Peacock observed in delivering the judgment of the Privy Council, "A purchaser under execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it." (4) In such a case the title acquired by the auction-purchaser can be displaced only if the debt is shown to be non-existent, or if existent to be infected with immorality.

2154. Mortgagor's Partners.—A co-sharer who has obtained a portion of the mortgaged properties on a partition after the execution of a mortgage-bond by the other co-sharers mortgaging their undivided shares in the said properties, and who has been made a party to the mortgage-suit is a necessary party to the execution-proceedings.(5) On the same principle the partners of a mortgagor who have a right of pre-emption over his mortgaged share are necessary parties in a suit to foreclose his share.(6) Both the husband and wife are necessary parties to a suit in which any right relating to a mortgage jointly executed by them is in issue.(7)

2155. A mortgage-decree may be obtained against the Mitakshara father in respect of his self-acquired property without impleading his sons as the latter have no interest in such property (§ 292). It is only as regards ancestral property that the son possesses certain rights which he may assert both against the father

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22 Cal., 33 (44); *Jugul Kishore* v. *Kartik Chunder*, 1.L.R., 21 Cal., 116; *Rammoy* v. *Premchand*, 5 C. W. N., 423; *Hari Kissen* v. *Veliat Hossain*, I. L. R., 30 Cal., 755.

(1) *Ram Nath* v. *Lachman*, I. L. R., 21. All., 193.

(2) *Coventry* v. *Tulsi Pershad*, I. L. R., 31 Cal., 822 (827); *Sadasiva* v. *Ramalinga*, 15 B.L.R., 383, P. C.; The previous orders would, moreover, estop him on the principle of *res judicata* also; *ib.* p. 828; *Mungul Pershad* v. *Grija Kant*, I. L. R., 8 Cal., 51, P. C.; *Lakshmanan* v. *Kattayan*, I. L. R., 24 Mad., 669; *Bholanath* v. *Prafulla*, I. L. R., 28 Cal., 122; *Sheoraj* v. *Kameshar*, I. L. R., 24 All., 282.

(3) *Girdhari Lal* v. *Kanto Lal*, 14 B. L. R., 187 (199) P. C.; *Malikarjun* v. *Narhari* I. L. R., 25 Bom., 337, P. C.; *Debi Singh* v. *Jia Ram*, I. L. R., 25 All., 214; *Lal Singh* v. *Purander Singh*, 2 A. L. J. R., 647.

(4) *Girdhari Lal* v. *Kanto Lal*, 14 B. L. R., 187 (199), P. C.; *Kishun Pershad* v. *Tipan Pershad*, 5 C. L. J. 569; *Rewa Mahton* v. *Ram Kishen*, I. L. R., 14 Cal. 18 P. C.; *Mukhoda* v. *Gopal Chunder*, I. L. R., 28 Cal., 734 (736); *Ram Gulam* v. *Barsati Singh*, I. L. R., 36 Cal, 336 P. C.; *Zain-ul-Abdin* v. *Muhammad*, I. L. R., 10 All., 166, P.C.

(5) *Golam* v. *Judhister*, I.L.R., 30 Cal., 142.

(6) *Yates* v. *Hambly*, 2 Atk., 237.

(7) *Ma Sein* v. *Muthucurpan* 25 I. C. (Bur.) 931.

as well as his alienee. To these rights this rule adds a valuable adjunct which the son may avail himself of on a proper case being made out. This right the son possesses as a co-parcener with his father, and therefore as one interested in the equity of redemption. He is, therefore, a necessary party to all mortgage suits. (1) But the contrary has been laid down in Allahabad, in cases equally decided with reference to this rule.(2) As such he may plead his mere exclusion from the mortgagee's suit as a sufficient cause for being permitted to redeem. It is not even necessary for him to shew the illegality or immorality of his father's debt. In this respect a mortgage differs from a money-decree in which an execution-sale can be invalidated only by showing that it was on account of an obligation to which he was not subject under Hindu law. And as regards his being not made a party to the suit or the decree, all that the son can claim is that not being a party to the sale or execution-proceedings, he ought not to be debarred from trying the fact or the nature of the debt in a suit of his own, and it will avail him nothing unless he can prove that the debt was not such as to justify the sale.(3) Of course, even a mortgage-decree may be attacked on these grounds, and that would be the only course open where the mortgage-suit was instituted only against the father as manager of the family,(4) but where these grounds succeed it will be no case for redemption, for the suit will be dismissed altogether or so far as it affects the son's interest in the ancestral property.

Following the language of this section, as originally enacted, it was held in Allahabad that sons complaining of improper exclusion must show that the mortgagee had notice of their interests in mortgaged property.(5) But in view of the present amendment this is now no longer necessary (§2088).

2156. When Exclusion is immaterial.—A party who is impleaded but is on his own motion discharged from the suit, cannot avail himself of his rights by bringing another suit. Thus where on setting up a title paramount to the mortgage he causes the dismissal of the suit as against him, he is precluded from afterwards claiming to redeem. (6) Having once asserted his parmount title, he cannot afterwards be allowed to plead his interest subordinate to the mortgage.(7) Again, where the subsequent mortgagee has through his laches allowed the purchaser of property at a sale held in execution of a decree obtained on the prior mortgage, to take possession, and has taken no steps to prevent the sale he cannot afterwards oust him except on the ground of fraud or collusion.(8) And so where a prior purchaser of an equity of redemption does not obtain a certificate of sale or possession of the property purchased by him in execution of a money decree against the mortgagor, and subsequently to his purchase, the mortgagee brings a suit upon his mortgage and puts the property to sale, and it is purchased by one who has no notice of the prior sale and obtains both the sale certificate and possession, it has been held that the prior purchaser of the equity of redemption having chosen to keep his rights wholly in the dark and invited

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(1) *Debi Prosad* v. *Dharamjit*, I. L.R., 41 Cal., 727.

(2) *Hari Lal* v. *Munwan*, I.L.R., 34 All., 549 F.B; *Madan, Lal* v. *Kishan Singh*, *ib.*, 572.

(3) *Kanhale* v. *Keshaya*, I. L. R., 1 Mad., 64; *Jagabhas* v. *Bhukandar*, I.L.R., 1 Bom., 37; *Govind* v. *Sakharam*, 6 Bom., L. R., 344 (349). The difference between the two classes of suits has been overlooked in *Kanhai* v. *Seth Brindawan*, 16 C. P. L. R., 169.

(4) *Lala Suraj Prasad* v. *Golab Chand*, I. L. R., 27 Cal., 274.

(5) *Krishna* v. *Muthukumara*, I. L. R., 29 Mad., 217.

(6) *Nilkant Banerji* v. *Suresh Chandra*, I. L.R., 12 Cal., 414, P. C.

(7) *Nilkant Banerji* v. *Suresh Chandra*, I. L. R., 12 Cal., 414 (423) P. C.

(8) *Khub Chand* v. *Kalian Das*, I. L. R., 1 All., 240; *Ali Hasan* v. *Dhiraj*, I. L. R., 4 All., 518 (527); *Sitaram* v. *Amir Begum*, I. L. R., 8 All., 324.

others to act as if they were not in existence, could not look to the Courts to extend and complete such rights in a way which would render the subsequent purchaser a victim not of his own negligence but of the negligence of him who would gain by it. (1)

2157. And since the object of the rule is to avoid the multiplicity of suits, where the rights of all parties under the mortgage are fully and finally dealt with in the suit, and the decree concludes the whole matter, no person can re-open it merely because he has a right, inasmuch as he was not joined in the suit, although his rights were identical with the one or the other party in the previous suit and when he is in no way damnified by the previous proceeding. In such a case the reason failing the rule fails: *cessante ratione legis cessat ipsa lex.*(2) Thus in a case where a Hindu widow had mortgaged some lands and a house to pay off a debt due by her husband, and the mortgagee having subsequently purchased her equity of redemption sold in execution of a money-decree obtained subsequently to the mortgage was sued by her minor sons who claimed not to be bound by the decree in execution of which the equity of redemption was sold, it was held that the Court must look to the substance of the transaction, and that since the sons would have been represented by the mother had they been joined, and their joinder would not have substantially affected the decision, the mere fact that they were not formally joined in the suit which culminated in the sale of the property to the mortgagee, did not entitle them to re-open the sale.(3)

Can mortgagee again sue the excluded parties.

2158. If the mortgagee had originally omitted to implead a necessary party, the question may arise whether he is at liberty to maintain another suit against the parties excluded. The question has been answered in the affirmative by the Allahabad High Court in the case of a decree obtained by the mortgagee against the father of a joint Hindu family for a debt incurred by him, the mortgagee being held entitled to maintain another suit on the same mortgage against the sons whom he had originally omitted to implead. (4) This was an extremely typical case, for in that case the mortgagee sued the sons after the latter had sued, and recovered possession of their share of the property from the auction-purchaser in execution of the decree against the father, and thereupon the mortgagee filed another suit, putting in force his original mortgage and praying for sale of the property which the sons had wrested out of the possession of the purchaser, and the Court held that the former suit against the father offered no impediment to maintaining the second suit and a decree in the terms of the mortgage was passed. In such a case the question that the auction-purchaser was the mortgagee himself, and that the property had once been sold in execution of the decree was immaterial. As the Court observed: "The fact of the mortgaged property having been once sold by

(1) *Nunjundepa* v. *Hemapa*, I. L. R., 9 Bom., 10; *Shivram* v. *Ravji*, I. L. R., 6 Bom., 193.

(2) The maxim is from Co. Litt., 70*b*, and means: "When the reason of the law ceases, the law itself ceases"; *Hunooman Persaud* v. *Kalee Persaud*, (1864) W.R., 285; *Amrit Rao* v. *Kali Khan*, 7 C.P.L.R. 145. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. Co. Litt. 122 *a*; 2 Black Comm., 390, 4 Rep., 38; Finch Law, 8; *Gullett* v. *Lopes*, 13 East., 348.

(3) *Devji* v. *Sambhu*, I. L. R., 24 Bom., 135. [This case, however, it should be noted, was not decided with reference to s. 85, as the decree sought to be contested was a money and not a mortgage-decree, but it is difficult to appreciate any difference in the principle.]

(4) *Dharam Singh* v. *Angan Lall*, I. L. R., 21 All., 301: to the same effect and on the same facts, *Lachman Das* v. *Dallu*, I.L.R., 22, All., 394 (398); *Ram Singh* v. *Sobha Ram*, 4 A. L. J. 424. (The Limitation in such a suit is the same as would be in a suit on mortgage—*ib*).

auction in execution-proceedings against the father alone does not amount to a satisfaction of the decree, where, as in this case, a large part of the property sold has been taken out of the hands of the creditor, purchaser, by the sons on the ground that they were not joined as parties to the creditor's suit. As four-fifths of the property, which the creditor purchased at auction in satisfaction of his debt, has been decreed to the sons, and the creditor has thus been deprived of that portion of the property, his debt must be held to have remained *pro tanto* unsatisfied." (1) These cases were explained in a Calcutta case to lay down no more beyond this that a mortgagee *may* enforce his security against the excluded party by a fresh suit, but it is not obligatory upon him to do so, for the mortgagee may sue for possession on the strength of his purchase, but even in such a case he cannot divest himself of his liability to be redeemed by the mortgagor. (2) There is then no merger of the debt in the decree. If, however, the interest of the father alone had fetched at auction-sale a price sufficient for the complete satisfaction of the debt, there would then be no debt of the father due which could be recovered from the sons. The right of the creditor to maintain a separate suit against the sons does not depend upon any peculiarity of the mortgage-law, since the same right equally exists in the case of a simple obligation. (3) But at the same time the son's liability is a matter of pious obligation, and the rule could not be, therefore, indefinitely stretched so as to bring all excluded parties within the ambit of another suit. But the rule avails against joint-debtors against whom the cause of action is one and the same, (4) at all events if the obligation was joint and several, in which case a decree obtained against one of the promisors would not bar a second suit against another. (5) Of course, puisne mortgagees and other persons interested in the equity of redemption cannot be similarly classed. It should, therefore, be ascertained as to what is their position in the *catena* of the mortgage-suit and how far the rule is subservient to their rights.

2159. Unfortunately this subject too is not free from that want of harmony of opinions which pervades the whole subject. But the questions at issue may really be traced to a few elementary principles. It is sometimes stated that one effect of non-joinder is that the persons excluded are unaffected by the decree. But this cannot be laid down as a universal rule, for the question depends upon not whether there had been exclusion but rather upon who were excluded. Thus, for example, the exclusion of a joint Mitakshara son would not imperil the decree to the same extent as the exclusion of a puisne mortgagee. Moreover, as regards the rights of the mortgagee against the excluded son, the Court holds him entitled to sue the son for foreclosure in a fresh suit on the mortgage (6) and it will suffice if he sues him for possession but gives him the right to redeem. (7)

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(1) *Dharam Singh* v. *Angan Lal*, I.L.R., 21 All , 301 (308) ; *Muhammad* v. *Radhe Ram*, I.L.R., 22 All., 307.

(2) *Gangadas* v. *Jogendranath*, 11 C.W.N., 403 ; following *Har Pershad* v. *Dal Madan Singh*, I.L.R., 32 Cal., 991 ; explaining *Dharam Singh* v. *Angan Lal*, I.L.R., 21 All., 301 ; *Lachman Das* v. *Dallu*, I.L.R., 22 All., 394.

(3) *Lachmi Narain* v. *Kunji Lal*, I.L.R., 16 All., 449 ; *Bhawani Prasad* v. *Kallu*, I. L.R., 17 All., 537 F.B. ; *Dharam Singh* v. *Angan Lal*, I.L.R., 21 All., 301 (305).

(4) *Muhammad* v. *Radhe Ram*, I.L.R., 22 All., 307 ; but *contra* in *Hemendro* v. *Rajendro*, I.L.R., 3 Cal., 353.

(5) *Dhunput* v. *Sham Soonder*, I.L.R., 5 Cal., 292 ; *Muhammad* v. *Radhe Ram*, I.L. R., 22 All., 307.

(6) *Dharam Singh* v. *Angan Lal*, I. L. R., 21 All., 301 ; *Lachman Das* v. *Dallu*, I.L.R., 22 All., 394.

(7) *Jugdeo* v. *Habibulla*, 12 C.W.N., 107 ; *Bunwari* v. *Ramjee*, 7 C. W. N., 11 ; *Ram Narain* v. *Bandi Pershad*, I. L. R., 31 Cal., 737 ; *Har Pershad* v. *Dalmardan Singh*, I.L. R., 32 Cal., 891 ; *Gangadas* v. *Jogindra Nath* 5 C.L.J., 315 (319).

2160. Right of Excluded Co-parcener.—Although the sons of a Mitakshara father possess a vested interest in the family property, and should, as such, be joined in a suit to enforce the mortgage of that property, still where the mortgagee has obtained a decree against the father, the question how far they are entitled to impeach that decree would have to be answered by reference to the very relation which confers on them an interest in the estate. The sons being under a pious obligation to pay their father's debt, cannot repudiate their liability, unless they deny the debt or impeach its validity on the ground of immorality. They are, therefore, bound by the decree obtained against the father, unless they seek to set it aside on those grounds.(1) And so even the other co-parceners will be bound if the mortgagee or the purchaser, as the case may be, could prove that the debt had been contracted for their benefit or the purposes of a trading business in which they were interested,(2) and if the decree was substantially one against them, though in form it might be against the head member or members of the family.(3) In other words, the rule that sons and co-parceners should be joined would be sufficiently complied with if their interests were sufficiently represented in the previous suit by the manager of the family. Such would specially be the case, if the other co-parceners were minors at the time the suit was brought.

Mitakshara sons when bound though not joined.

It has even been held in Allahabad that sons though joined and exempted from liability to the mortgage-debt may nevertheless be proceeded against in a decree obtained only against their father on the principle of pious obligation unless they can shew that the decree had been obtained for debt fraught with immorality.(4) But one fails to grasp the principle of this decision. It would seem that the exoneration of the sons' interest in the ancestral property would put an end to their liability in execution, otherwise what is the meaning of their discharge from the suit?

2161. It is now settled by the consensus of authorities that, except on the grounds attacking the *factum* or validity of the debt, Hindu sons cannot sue to set aside a decree obtained against their father on the sole ground that they were not impleaded in the former suit. As the Privy Council remarked: "The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against the creditor's remedies for their debts if not tainted with immorality... It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing the liability. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale of execution-proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own."(5) The manager being *ex-officio* the

(1) *Baldeo Sonar* v. *Mobarak Ali*, I.L.R., 29 Cal., 583; following *Hari* v. *Jairam*, I.L.R., 14 Bom., 597; *Sakharam* v. *Devji*, I.L.R., 23 Bom., 372; *Sheo Pershad* v. *Saheb Lal*, I.L.R., 20 Cal., 453; In the *Calcutta Bank* v. *Nathumal* (9 C.W.N., ccvi), they could not even attack on those grounds.

(2) *Daulat Ram* v. *Mehir Chand*, I.L.R., 15 Cal., 70, P.C.

(3) *Baldeo Sonar* v. *Mobarak Ali*, I.L.R., 29 Cal., 583.

(4) *Shiam Lal* v. *Ganeshi Lal*, I.L.R., 28 All., 288 (291); *Chhannu* v. *Dwarka*, 3 A.L.J.R., 433.

(5) *Nanomi* v. *Modun Mohun*, I. L. R., 18 Cal., 21, P.C.; *Bhagbut* v. *Girja Koer*, I.L.R., 15 Cal., 717, P.C.

accredited agent of the family has then the power to bind all the members, and therefore all their property divided and undivided, for all purposes within the legitimate scope of his authority. And it has therefore been always held that members of a Hindu family stand on a different footing from other persons, and the mere fact that they had not been joined is alone never sufficient to unravel an account once taken or re-open a decree once passed against the manager,[1] there being in this respect no difference between the case of sons and that of other members of the family.[2] But the question of the right of the manager to act on behalf of the other members being one of authority, if the other co-sharers are adults, the right to bring on record the other co-parceners is one which the mortgagee will seldom fail to exercise. In any case, if having notice of their existence the mortgagee fails to implead them, his case cannot then be met on the ground that there had been sufficient representation of their interests through the existing defendant. Indeed, as the section casts upon him a statutory obligation to join all interested persons, his failure to join may entitle the other members to remedy which they would not have otherwise possessed. It has accordingly been held that although in such a case exclusion would not *per se* justify the setting aside of the decree, it is a sufficient ground for allowing redemption.[3] Indeed, in determining the right of excluded persons the Court not only consider whether the exclusion was intentional or accidental, but also whether the persons complaining of non-joinder have been guilty of standing by or laches and whether relief to them would involve loss to an innocent stranger who may have since come in. If, for example, the claim is made after the mortgaged property is sold to a stranger in execution of the mortgagee's decree, a much stronger case would have to be made out than if the decree is attacked before any sale has taken place.[4] In the latter case, the decree may be set aside at the instance of the son, even on the sole ground that the mortgagee had omitted to join him in the previous suit although he had notice of his interest.[5]

2162. Sale of ancestral property by the father of a joint Hindu family may be set aside at the suit of the sons to the extent of their interests in the

(1) *Girdharee Lall* v. *Kanto Lall*, 14 B. L. R., 187, P.C.; *Johurra Bibee* v. *Sree Gopal*, I.L.R., 1 Cal., 470; *Suraj Bansi* v. *Sheo Proshad*, I.L.R., 5 Cal., 148, P.C.; *Bemola* v. *Mohun*, I. L. R., 5 Cal., 792; *Pursid Narain* v. *Hanooman*, I.L.R., 5 Cal., 845; *Bissessur* v. *Luchmessur*, 5 C. L. R., 477, P.C.; *Baso* v, *Hurry Dass* I. L. R., 9 Cal., 495; *Nanomi* v. *Modun Mohun*, I. L. R., 13 Cal., 21, P C.; *Daulat Ram* v. *Mehir Chand*, I.L.R., 15 Cal., 70 P.C.; *Sheo Pershad* v. *Shaheb Lal*, I L.R., 20 Cal., 453; *Baldeo Sonar* v. *Mobarak Ali*, I L. R., 29 Cal., 583; *Gayadin* v. *Raj Bansi*, I.L.R., 3 All, 191; *Ram Narain* v. *Bhawani*, I. L. R., 3 Cal., 443; *Phul Chand* v. *Luchmi*, I. L.R., 4 All., 486; *Kanhaia Lal* v. *Raj Bahadoor*, I. L. R., 20 All., 211 (214); *Debi Singh* v. *Jai Ram*, I. L. R., 25 All., 214, F.B.; *Banke Rai* v. *Raghubir*, All. Unrep. No. 641 of 1903, cited and followed in *Lal Singh* v. *Pulandar Singh*, I. L. R., 28 All., 182; *Hari* v. *Jai Ram*, I. L. R., 14 Bom., 597; *Vishnu* v. *Venkatrav*, [1889] B. P. J., 248; *Vasudev* v. *Krishna*, 1891 B. P. J., 18; *Sakharam* v. *Devji*, I. L. R., 23 Bom., 372; *Devji* v. *Sambhu*, I. L. R., 14 Bom., 135; *Guruvyya* v. *Dattarayya*, I. L. R., 28 Bom., 21; *Kunhali* v. *Keshava*, I. L. R., 11 Mad., 64 (76); *Ramasamayyan* v. *Virasami*, I. L. R., 21 Mad., 222; *Palani* v. *Rangayya*, I.L R., 22 Mad., 207; *Krishna* v. *Shambu*, I. L. R., 26 Mad., 28; *Sivaraman* v. *Kuppumuthu*, 13 M. L. J. R., 72; *Kanhai* v. *Seth Brindawan*, 16 C. P. L. R., 169; *Kesho* v. *Jawahir*, 16 C. P. L. R., 19 (22, 23); *Manhahal* v. *Gopal*, (1901) A. W. N., 57.

(2) *Sakharam* v. *Devji*, I. L. R., 23 Bom., 372 (374).

(3) *Lala Surja Prosad* v. *Golab Chand*, I. L. R., 27 Cal., 724 (affirming judgment of Harington, J., O. A., I. L. R., 28 Cal., 517.

(4) *Debi Singh* v. *Jia Ram*, I. L. R., 25 All., 214 (224), F. B.; citing *Malkarjun* v. *Narhari*, I. L. R., 25 Bom., 337, P.C.

(5) *Bhawani* v. *Kallu*, I. L. R., 17 All., 537, F. B.; explained in *Debi Singh* v. *Jia Ram*, I. L. R., 25 All,, 214 (227), F. B.; *Kanhai Lal* v. *Raj Bahadur*, I. L. R., 24 All 211.

property, provided there was no antecedent debt or valid necessity for sale, although the transaction may not be shown to be tainted with immorality.(1) The *quantum* of interest possessed by the son in the family property is the share to which he would be entitled on partition.(2) Hence where he was neither born nor begotten at the time of the mortgage, though he was in existence at the time of the mortgagee's suit, he cannot bring a suit for possession against the mortgagee on the ground that he was not made a party to the mortgagee's suit against his father.(3) Nor can such after-born son question his father's mortgage on the ground of impropriety, for since he was not even in existence at the time of the mortgage, he had no interest in the property alienated, for the protection of which he might be permitted to attack the validity of his father's act. (4) But inasmuch as the after-born son acquires on his birth an interest in the equity of redemption, he would be entitled to sue for redemption if he was not impleaded by the mortgagee in his suit on the mortgage. He may then justly complain that his interest in the equity of redemption, which gave him the right to redeem, could not be foreclosed or sold without giving him an opportunity to redeem it. In this respect the case of an adopted son gave the same footing. He is, as it were, born to his father as from the date of his adoption, and he cannot therefore question the propriety of an alienation made by his adoptive father before his own adoption, (5) though he is equally entitled to redeem a mortgage executed by his father before his adoption and foreclosed after his adoption.

2163. Right of Excluded Puisne Mortgagee.—Where a mortgagee plaintiff has, with or without notice of the existence of the right of a person interested in the equity of redemption omitted to join him as a party defendant, the person omitted is entitled, notwithstanding a decree, sale and purchase, otherwise regular, to treat the proceedings as a nullity and, if so desired, to exercise his right of redemption in any proceeding properly framed for the purpose, or set it up in defence whenever his title is sought to be ignored or assailed. (6) In other words, his rights remain unaffected by the result of the suit to which he was no party, and he is entitled to deal with the parties of the previous suit as if it had never been instituted. The case of a Hindu coparcener is somewhat peculiar. For though he is entitled to be joined as a party to a mortgage-suit his non-joinder does not necessarily entitle him to treat the decree passed behind his back as a nullity. To him and to others to whom the doctrine of constructive representation can be made applicable, the passing of a decree is an effective bar to the re-agitation of the same questions decided therein. But the case of a puisne mortgagee and others not similarly implicated, stands on altogether a different footing. Between them and the mortgagor there is no privity except the privity of estate. Being interested in the equity of redemption, they were necessary parties (§ 1294), and if they are ignored, they may well claim to treat the decree passed behind their back, so far as they are concerned, a nullity, and it has been accordingly

(1) *Manhahal* v. *Gopal*, (1901) A.W.N., 57.

(2) *Krishnasami* v. *Ramasami*, I. L. R., 22 Mad., 519.

(3) *Doollee Chand* v. *Wooma Sunkur*, 7 C. L. R., 424 (431); *Bholanath* v. *Kartick*, I. L. R., 34 Cal., 372; *Madho Singh* v. *Hurmut Ally*, 3 Agra. 432; *Chattarpat* v. *Natha*, 3 A. L. J. R., 38.

(4) *Jado* v. *Mt. Ranee*, 5 N. W. P., H. C. R., 113; *Raja Ram* v. *Luchmun*, 8 W. R. 16, 21; *Girdharee Lal*, v. *Kanto Lall*, 15 B. L. R., 187 P. C.; *Yekeyamian* v. *Agniswariam*, 4 M. H. C. R.; 307.

(5) *Rambhat* v. *Lakshman*, I. L. R., 5 Bom., 630; *Ramakrishna* v. *Tripurabai*, I. L. R., 33 Bom., 88 (92).

(6) *Ganga Das* v. *Genalal*, 6 12 I. C. Cal.) 155.

held that the rights of a puisne mortgagee who has not been joined in the suit by the prior mortgagee to enforce, his mortgage, remain unaffected by the decree and proceedings in execution thereof. (1) Not infrequently it gives rise to complicated questions, when he sues to enforce his own mortgage. In England the puisne mortgagee, if excluded from the previous suit to enforce the prior mortgage,' is said to be only entitled to redeem upon the account already taken in the action to which he was not a party (§ 2150). But so far as regards this country, the rule would appear to be hardly sound. Assuming that the decree passed in the absence of the puisne mortgagee is of no effect against him, what is there to prevent the latter from unravelling the accounts in disregard of those previously taken? To hold otherwise, the mortgagor must be said to be partially bound by the decree, which, being passed in his absence, he has the right to ignore. Even if the decree be regarded as having been passed *ex parte* he is equally entitled to assert the same right. (2) But the account which the puisne mortgagee may enforce is the account of what is due on the prior mortgage and not for what it was assigned. Thus, if *A* mortgaged his lands *P*, *Q* and *R* to *B* for Rs. 5,000, and *P* and *Q* were sold and the proceeds applied towards the discharge of the mortgage, land *R* was sold to *C* for Rs. 990 which was not so applied. *C* transferred his rights to *D*. *B* then brought a suit on his original mortgage impleading *A* and *C* but not *D*. No appearance was made by *C*, and a consent-decree was passed for Rs. 1,050, and land *R* was brought to sale and purchased for Rs. 270 by the plaintiff who then sued *D* for possession. The latter resisted the suit on the ground of his non-joinder, and claimed to redeem land *R* on payment of Rs. 270 for which the plaintiff had purchased it, but it was held that all that *D* could claim is that he should be put into the position he would have been in, had he been a party to the previous suit, and that while he was entitled to call for an account of a proportionate share of the mortgage, but it had nothing to do with the amount the plaintiff paid as a purchaser in execution. (3) The same view has been taken in other cases in which it has been laid down that while he can sue the prior mortgagee for redemption, notwithstanding that the latter has already sued and obtained a decree against the mortgagor,(4) still he cannot be allowed to redeem on paying only the price for which the mortgagee may have purchased the property in execution of his own decree, but must pay the full amount due on his mortgage.(5) The fact that the property has been sold in execution of a decree obtained by a first mortgagee in a suit to which the puisne mortgagee was not a party does not deprive the latter of his right to enforce his own mortgage and in execution to bring the property to a sale subject to the right of the first mortgagee.(6) Ordinarily when a puisne mortgagee being excluded in the previous suit, institutes a suit of its own for redemption, it is not necessary that the Court should apportion the redemption money as between the rival claimants or even determine the rights *inter se* of persons arrayed in the suit as co-defendants. But where this is done in the

(1) *Umesh Chunder* v. *Zahur Fatima*, I. L. R., 18 Cal.,164, (180) P. C.; *Ram Narain* v. *Bandi Pershad*, I. L. R. 31 Cal., 737 (742); *Thenappa* v. *Marimuthu*, I.L.R, 31 Mad. 258; followed in *Ghasiram* v. *Thingwa* 4 N,L.R. 168 (173); *Dip Narain* v. *Hira Singh*, I.L R. 19 All 527.

Tha Hnyn v. *Maunguma*, I. L. R. 37 Cal., 239, P. C.

(2) *Raghoba* v. *Modho Rao*, 15 C. P. L. R. 26.

(3) *Sirvathi* v. *Ramasubbayyar*, I. L. R., 21 Mad., 64 (67).

(4) *Balmukund* v. *Mt. Sangari*, I. L. R., 16 All., 379, F. B.

(5) *Dip Narain* v. *Hira Singh*, I, L. R.. 19 All., 527 (530); *Wahid-u-nissa* v. *Gobardhan*, I. L. R., 25 All., 388 (398), N. B.; *Protap Chandra* v. *Ishan Chandra*, 4 C. W, N., 266; *Dhapi* v. *Barham Dao*, 4 C.W.N., 297; *Sri Kisan* v. *Gadadhar*, 12 C. P. L. R., 125.

(6) *Debendra Narain* v. *Ramtaran*, I. L. R., 30 Cal., 529, F. B.; overrulling *Durga Churn* v. *Chandra Nath*, 4 C. W. N., 541.

lower Court, and both parties do not object to it in appeal, the question of apportionment may then be fitly decided so as to avoid further litigation.(1) It has been before observed that a puisne mortgagee in property excluded from the suit filed by the prior mortgagee to enforce his mortgage is not bound by the decree and the sale under it, but it is only so far as they stand in the way of his right, which is limited to a right of redemption or sale of the mortgaged property subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter. Hence a first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase, although his right to possession may be defective.(2) He has a right to remain in possession until redeemed.(3)

2164. A prior mortgagee by conditional sale obtaining a decree upon his mortgage without joining the subsequent usufructuary mortgagee in possession of the property is no further damnified than that he is held liable to be redeemed by the subsequent incumbrancer he could not oppose the execution, nor resist his right to be put in possession of the property in execution of his decree. The subsequent mortgagee, although he has been in prior possession of the estate, could not compel the prior mortgagee to redeem him before vacating his own possession.(4) In another case the first mortgagee who had no notice of the second mortgage brought the mortgaged property to sale in a suit to enforce his mortgage in which the second mortgagee was not made a party, and himself became the purchaser. The second mortgagee had, meanwhile, obtained possession of the mortgaged properties, having purchased the same in a suit to enforce his own mortgage in which he did not make the first mortgagee a party although he had notice of his mortgage. The first mortgagee was then held entitled to sue him only for possession giving him option to redeem, it being considered unnecessary for him to bring a fresh suit for sale.(5) Where property is sold in execution of the decree passed in a suit on a prior mortgage to which the puisne mortgagee was not a party and the property is sold to a third person, he acquires against him the same rights as he had collectively against his mortgagor and the prior mortgagee, that is to say, since the purchaser acquires both the interests of the mortgagor as well as of the prior mortgagee, the puisne mortgagee may treat him as either at his option and may sue either to foreclose or redeem him.(6)

2165. A puisne mortgagee sued on his mortgage without joining the prior mortgagee and obtained a decree. The latter had similarly obtained a decree on his mortgage in the absence of the pusine mortgagee. Both the mortgagees purchased the property in execution of their separate decrees. The prior mortgagee having obtained possession, the puisne mortgagee sued him for possession to which he was held entitled on payment of the sum actually due

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(1) *Wahid-un-nissa* v. *Gobardhan*, I.L.R., 22 All., 453 (458).

(2) *Ram Narain* v. *Bandi Pershad*. I.L.R., 31 Cal., 737 (743).

(3) *Chait Narain* v. *Ganga*, 25 W.R., 216; *Bawnwari* v. *Ranijee*, 7 C. W N., 11; *Ram Narain* v. *Bandi Pershad*, I. L. R., 31 Cal., 737 (743); *Desi Lallu* v. *Mundas*. 1. L. R., 20 Bom., 390; *Ram Prasad* v. *Bhikari*, I. L. R., 26 All., 464 (467).

(4) *Baldeo Singh* v. *Jaggo Ram*, I. L. R., 23 All., 1; following *Mohan Manor* v. *Togu*, I. L. R., 10 Bom., 124; *Desai* v. *Mundas*, I. L. R., 20 Bom., 590; *Krishnan* v. *Chadayan*, I. L. R., 1 Mad., 17 (20); *Har Pershad* v. *Dalmardan Singh*, I. L. R., 32 Cal., 891 (904, 905).

(5) *Har Pershad* v. *Dalmardan Singh*, I. L. R., 32 Cal., 891 (904, 905), distinguishing *Nanak Chand* v. *Tiluck Dae*, I. L. R..5 Cal., 265; *Din Gopal* v. *Bolakee*, *ib*., 269; in which the suit was for possession merely, there being no prayer for redemption or the re-opening of the sales.

(6) *Pandurang* v. *Sankarchand*, I. L. R., 31 Bom., 112.

at the time of the sale to the prior mortgagee. And since the effect of the purchase of the property by the puisne mortgagee at court-sale had the effect of conveying to him the equity of redemption, the pusine mortgagee would acquire proprietary title on paying off the prior mortgagee. But it is not always possible that the property comprised in two mortgages should be identical, and where it is not so, a further question would arise as to the right acquired by the second mortgagee in the property not comprised in his own mortgage. Thus, suppose two properties *M* and *N* are mortgaged first to *A* and then *M* alone to *B*, it is clear that under the circumstances above described *B* would be entitled to pay off *A*. But the rights he thereby acquires in the two properties would not be the same. For being purchaser of the equity of redemption in *M* in execution of his own decree, he becomes the proprietor as soon as he wipes off the prior incumbrance. But his rights as regards *N* would not be the same, since by his purchase, all that he has acquired are " the rights and powers of the mortgagee *as such*, " (1) that is, as mortgagee. Consequently so far as the property *N* is concerned, there is still left outstanding the equity of redemption which has not passed to the second mortgagee with his purchase. It may be said that on his purchase of *M* and *N*, *A* had acquired the equity of redemption also in *N*, but this he had done not *as a mortgagee*, but as an auction-purchaser, and it being so, it (*i.e.*, *N.*) did not pass to *B.*(2). The effect of this view is to let in the mortgagor once more a right of redemption which he had finally lost by sale to the prior mortgagee. But this view is anomalous, and would involve his right to be joined in every suit whether he had or had not parted with the equity of redemption. A more rational view seems to be that a puisne mortgagee redeeming a prior mortgagee who had foreclosed behind his back, is in his turn under no liability to be redeemed by the original mortgagor (3) §§ (1708, 1709).

Unintentional omission.

2166. Whether the omission to join is intentional or unintentional the puisne mortgagee is equally entitled to say that he is not bound by a decree to which he was no party. So where the mortgagors mortgaged their lands in 1886 to *A*, which they subsequently in 1891 mortgaged with possession to *B*. Three years later in 1894, *A* sued on his mortgage the mortgagors without joining the puisne incumbrancer *B*, and in execution of his decree purchased the undivided share of one of the mortgagors. He thereupon sued *B* for partition and possession of that share and *B* having claimed the right to redeem *A*, it was held that the latter could not obtain possession without paying off *B*, it being immaterial whether *A's* failure to join *B* in the previous suit was designed or due to ignorance of *B's* mortgage.(4)

The owner of three properties *P*, *Q* and *R*, mortgaged *P* to *A*, and then all the three to *B*. *A* enforced his mortgage without joining *B*, and in execution he purchased the mortgaged property himself. *B* then sued on his mortgage without impleading *A*, obtained a decree and in execution he also purchased the property. As *B's* purchase was made subsequently to *A's*, he claimed to redeem the property *P* which had been previously purchased by *A*. The Court held that *A* having sued on his prior mortgage without impleading the puisne mortgagee all that he did acquire by his purchase of *P* in execution of his decree was the equity of redemption, *B's* right to redeem him being unaffected. And *B* acquired no right in *P* on the footing of his purchase, beyond the right to sue *A* for redemption of the property purchased by him.

(1) S. 74, *ante*.
(2) *Delhi & London Bank* v. *Bhikari Das*, I. L. R., 24 All., 185 (188).
(3) *Sonba* v. *Lachnoo*, 15 C. P. L. R., 18.
(4) *Rangaswamy* v. *Jelli*, I. L. R., 26 Mad., 484.

Such redemption however, will not affect the right of the purchaser at a sale held in execution of *A's* decree, or his assignee from redeeming *B* in his turn as owner of the equity of redemption, on payment of the amount due to him under the mortgage.(1)

Where the puisne mortgagee held two mortgages, one of which alone was the subject-matter of the suit instituted by him against the prior mortgagee, the other mortgage comprising this as well as some other property, it was held that the question of the right of the assignee of the equity of redemption to redeem the puisne mortgagee could not be gone into in the suit brought by the latter for redemption of the prior mortgage.(2)

2167. Right against the Auction-purchaser.—Having done with the rights of a puisne mortgagee against the prior mortgagee and against the property in his possession, his rights against the auction-purchaser may now be considered. Being an auction-purchaser of the outstanding equity of redemption, his right to possession against the puisne mortgagee cannot be questioned. The latter may redeem him, for that is his right which he could have asserted against the prior mortgagee. But he cannot be dispossessed until so redeemed. Where there have been different sales at the instance of different mortgagees, the right to possession is ordinarily determined by the priority of the respective sales.(3) It is evident that an auction-purchaser of property sold in execution of the puisne mortgagee's decree would have the same right to redeem the prior mortgage, if the puisne mortgagee was at the time of the sale entitled to that right. Indeed he possesses a right to redeem even though the subsequent mortgagee himself could not have brought the property to sale without having previously redeemed the prior mortgage, since "a purchaser at an auction-sale is not bound to look behind the decree to see whether the decree under which the sale is held was rightly made. It is sufficient that the decree of a competent Court directs the property to be sold." (4) A purchaser from the mortgagor of property subject to a mortgage, has, however, still greater rights, since if he is not made a party to the mortgage-suit, he is entitled to retain possession of the property as against the auction-purchaser under the mortgage decree till he is foreclosed. (5) When a purchaser from the mortgagor of one of the mortgaged properties (subsequently released by the mortgage-lien) is not made a party to a mortgage-suit brought by the mortgagee, the proper course is not to dismiss the suit for non-joinder, but to apportion the mortgage-debt between the property so purchased and released, and the other mortgaged property. In such a case the mortgage would be treated as split up into two. (6)

2168. The puisne mortgagee has the right to redeem, but he has no right to have the sale made in execution of a decree obtained by the first mortgagee upon his mortgage set aside on the ground that he had not been made a party to the suit. (7) But, of course, it is always open to an auction-purchaser to show

(1) *Sivaraman* v. *Kuppumuthu*, 13 M. L. J. R., 72.

(2) *Sivaraman* v. *Kuppumuthu*, 13 M. L. J. R., 72 (74).

(3) *Nunak Chand* v. *Talukdye*, I. L. R., 5 Cal., 265; *Dingopal* v. *Bolakee*, I. L. R., 5 Cal., 269; *Jugal Kissore* v. *Kartick Chunder*, I. L. R., 21 Cal., 116; *Ram Narain* v. *Bandi Pershad*, I. L. R., 31 Cal., 73 (74).

(4) *Malkarjun* v. *Narhari*, I. L. R., 25 Bom., 373, P. C.; to the same effect, *Girdhareelal* v. *Kanto Lall*, 14 B. L. R., 187 (199), P. C.; *Kudratullah* v. *Kubra Begam*, I.L.R., 23 All., 25 (29, 30). See on the latter point *Rewa Mahton* v. *Ram Kissen*, I. L.R., 14 Cal., 18 (25); *Mukhoda* v. *Gopal Chunder*, I.L.R., 26 Cal., 734 (737).

(5) *Girish Chunder* v. *Iswar Chunder*, 4 C. W.N. 432, but *contra* in *Protap Chunder* v. *Ishan Chunder*, 4 C.W.N. 266.

(6) *Hari Kissen* v. *Viliat Hossein*, I. L. R., 34 Cal., 755.

(7) *Mallikarjunadu* v. *Linga Murti*, I.L.R., 26 Mad., 332; *Ram Narain* v. *Bandi Pershad* I.L.R., 31 Cal., 737 (743).

that the sale held in execution of the prior mortgagee's decree was otherwise invalid. In one case *A* held a decree for possession against *B*, but which he did not execute. He, however, mortgaged the property covered by the decree to *C*, who sued on the mortgage without joining *B*, who continued to be in possession adversely to *A*, and in the meantime *A's* decree, for possession, became barred by limitation. *B* mortgaged the property to *D* who brought it to sale, and it was purchased by *E*. In a contest between *C* and *E*, it was held that the result of *A* not having executed his decree for possession was that *B* gained a good title by adverse possession as against *C* who therefore was not in a position to bring to sale the property which had passed to the auction-purchaser. (1)

Where a puisne mortgagee obtains a decree upon his own mortgage against the mortgagor and the prior mortgagee in whose suit he was not joined, he cannot eject the latter if he has entered upon possession of the property as auction-purchaser in execution of his own decree. Thus, where a mortgagee obtained a decree on his mortgage and brought the mortgaged property to sale purchasing the property himself, and which he subsequently sold to *R*, who obtained possession, and the second mortgagee instituted a suit to enforce his mortgage which had been existing from the date of the prior mortgagee's suit, in which, however, he had not been joined, and in the result obtained a decree for sale subject to *R's* rights, in execution of which the land was again sold and purchased by the second mortgagee, whose successors in title were in due course put into possession of it, whereupon *R* applied under section 244 of the Code for setting aside the order making over possession to the successors of the second mortgagee, it was held that since the decree was made subject to *R's* right which included that right of possession, *R* could not be ousted without being first redeemed. (2)

The mortgagee obtained a decree against the father on a mortgage executed in July 1893, previously to which in March, the sons had sued him for partition. In December 1894 this suit resulted in a compromise, in virtue of which the immovable property was transferred to the sons who entered upon its possession. The mortgagee sued the father alone, and from whom he purchased the property in execution. The sons thereupon sued for possession against the auction-purchaser, and it was held that the property being the separate property of the sons under the decree in the partition-suit, the mortgagee took nothing, as the father had nothing to mortgage.(3)

2169. A judgment-debtor under a decree for money mortgaged certain property by a deed of conditional sale. The property mortgaged was attached as the property of the judgment-debtor, and an order for sale was passed. Prior to the sale, however, the mortgagee sued on his mortgage, and the judgment-debtor confessed judgment, admitting the debt, and prayed that as he had no means to pay, an immediate decree for possession might be passed, and a decree was so passed. The mortgagee who was found to have had notice of the interest of the attaching creditor, however, never made him a party. The latter proceeded on with his execution, and caused the property to be sold. The auction-purchaser being resisted in obtaining possession by the mortgagee sued him for possession. It was contended that the auction-purchaser had lost his right to redeem no sooner the

(1) *Ram Lal* v. *Masum Ali*, I. L. R., 25 All., 35.

(2) *Muhammad* v. *Abdulla*, I. L. R., 42 Mad., 171.

(3) *Mithiram* v. *Lomanatha*, I. L. R., 24 Mad., 397. But it would have been otherwise if the sons had done nothing beyond asserting their right. *Kanhaia Lal* v. *Raj Bahadur*, I.L.R., 24 All., 211.

decree for possession had been made, and which could not be re-opened except on the ground of fraud or collusion. But it was held that a decree suffered in contravention of the provisions of law could not operate to destroy the rights of redemption of persons other than actual parties to the suit, and the fact that the property foreclosed was under attachment created in favour of the attaching creditor, a charge which inured in favour of the auction-purchaser, as one purchasing the property sold for the discharge and satisfaction of the charge.(1) But this latter view is strained and opposed to the ruling of the Privy Council who have declared that an attachment creates no charge in favour of the attaching creditor (§ 846).

An auction-purchaser will acquire property free from all incumbrances, if the sale has been made free from the same with the consent of the prior mortgagee.(2)

A decree passed against only the heir or heirs in possession of the estate of a deceased Mohammedan debtor does not bind the other heirs who are not parties to the suit so as to enable their rights and interests to be sold in execution. Such persons may then subject to certain conditions recover their shares from the auction-purchaser.(3)

2170. The rights of a purchaser who had not been joined in a mortgage-suit cannot be sufficiently met by a suit subsequently instituted by the mortgagee for a declaration of such purchaser's right to redeem, and for declaration of the mortgagee's absolute right over that property on the failure of the purchaser to redeem and for *khas* possession.(4) The only relief which the mortgagee in such a case is entitled to, is a decree for apportionment of the mortgage-debt on the property purchased by the purchaser, account being taken in that apportionment as well of the property transferred by the mortgagor to other parties with the consent of the mortgagee, as the portion of the mortgaged property purchased by the mortgagee himself. Where the plaintiff purchased certain properties at two sales made in execution of his two mortgage-decrees in which the defendant had not been joined, and the latter purchased a portion of the same properties at a sale held in execution of his own mortgage-decree in which the plaintiff had not been made a party, and it appeared that the defendant's purchase was prior in point of time to the sale in favour of the plaintiff, it was held that since the defendant had in respect of the portion purchased by him acquired the equity of redemption, the latter acquired nothing *in that property* beyond the mortgagee's rights, and that the defendant was consequently entitled to redeem him by paying off the proportionate amount of the plaintiff's mortgages, due on the property purchased by him, failing which the plaintiff could pay off the defendant by depositing the amount paid by him for the property.(5)

If any difficulty arises from a party's omission to join a necessary party to the suit, the party in wrong should forfeit his costs. (6)

2171. Must holder of Several Mortgages enforce all.—The question as to the joinder of parties being directed against the multifariousness of

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(1) *Ghulam Husain* v. *Dina Nath*, I.L.R., 28 All., 467 (370).

(2) S. 57, *ante*; *Dorasami* v. *Venkataseshayyar*, I.L.R., 25 Mad., 108 (114).

(3) *Dallu Mal* v. *Hari Das*, I. L. R., 23 All., 268 (264); *Jafri Begam* v. *Amir Muhammad*, I.L.R., 7 All., 822, F.B., dissenting from *Muttyjan* v. *Ahmed*, I. L. R., 8 Cal. 370.

(4) *Rammoy* v. *Premchand*, 5 C. W. N., 423.

(5) *Sheo Pershad* v. *Tiluk Singh*, 5 C. W. N., 232.

(6) *Muhammad* v. *Abdulla*, I. L. R., 24 Mad., 171 (175).

suits, it has been held that a party suing upon one of his mortgages can have no excuse for his not including in the suit his rights under his other mortgages, since he must necessarily have notice of them. This view, it is said, finds support in the form of decree prescribed in the Code, (1) which provides that upon redemption the plaintiff is to reconvey the said mortgaged premises "free and clear from all incumbrances done by him," and which indicates that the mortgagee is not to reserve to himself right over the mortgaged property.(2) Similar language finds place in sections 86 and 88. But nevertheless the question is not free from difficulty. Indeed, it may not always be possible to enforce all the mortgages together, for they may not be all mature for repayment. In this case is the mortgagee to wait till he can maintain a joint claim and if so, what if a portion of his claim in the meantime becomes time-barred. The doctrine, if sound, is scarcely distinguishable from the consolidation of securities. It was probably to steer clear of these difficulties that the Allahabad High Court has adopted the mean course of allowing a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them to obtain a decree for sale on each of the mortgages in a separate suit, but subject to this that he cannot sell the property twice over, nor sell it under the second decree subject to the first. If this had been permitted, the mortgagee would be enabled to sell the equity of redemption apart from the property itself, which, so far as the sale is made at the instance of the mortgagee, would be opposed to the tenor of the Act and let in the mischief section 99 was enacted to avert.(3) It has accordingly been held that a mortgagee holding two mortgages on the same property executed by the same mortgagor, cannot sue to enforce the prior (4) or later (5) security subject to his other mortgage. He must either enforce both the securities in the same suit, or sue on one giving up his rights under the other. But this view has not been indorsed in Madras where a person holding several mortgages in respect of the same property and against the same mortgagor is under no liability to enforce all his securities in one suit.(6) But it has been there held that if the holder of two or more mortgages put in force the first mortgage and obtains a decree, he is precluded from enforcing the second mortgage in another suit, though he may enforce his right against any surplus of a sale held in execution of his decree, under section 97.(7)

2172. Price of Redemption.—It may again be a question whether the party excluded is entitled to redeem on payment of such amount as may be found due on the date of his claim or only the amount that was found due upon the mortgage at the time the mortgage-decree was passed. A Divisional Bench of the Allahabad High Court has, in a case of improper exclusion, allowed redemption on payment of only the amount as ascertained at the date of the mortgage-decree.(8) No reason is, however, given for adopting this view, which is only possible on an assumption that the equities between the parties

(1) Sch. IV, No. 128.

(2) *Dorasami* v. *Venkatesashayyar*, I.L.R., 25 Mad., 108 (115); observing on *Sunder Singh* v. *Bholu*, I.L.R., 20 All., 322 F. B.; *Krishnamachariar* v. *Annagaracharia*r, 17 M. L. J. R., 301.

(3) *Sunder Singh* v. *Bholu*, I. L. R., 20 All., 322, F. B.; *Govind* v. *Parashram*, I.L. R., 25 Bom., 161; *Keshavram* v. *Ranchhod*, I.L.R., 30 Bom., 156 (161).

(4) *Dorasami* v. *Venkataseshayyar*, I.L.R., 25 Mad., 108.

(5) *Keshav Ram* v. *Ranchhod*, I. L. R., 30 Bom., 156.

(6) *Ramaswami* v. *Vythinatha*, I. L. R., 25 Mad., 760; *Veerana* v. *Muthukumara*, I. L. R., 27 Mad., 102; followed in *Thrikaikat* v. *Thiruthiyal*, I. L. R., 29 Mad., 153, F. B.; overruling *Rangasami* v. *Krishna*, I.L.R., 22 Mad., 259.

(7) *Krishnamachariar* v. *Anangaracharia*r, 17 M. L. J. R., 301.

(8) *Ram Prasad* v. *Bhikari*; I. L. R., 26 All., 464 (467).

cannot be worked out except by assuring him the position in which he would have been if he had been joint in the suit.(1) Any other view would, it might be said, enable the mortgagee to improve his position due to his failure to implead proper parties. On the other hand, it may be contended against this view that the decree passed behind the back of the person seeking to redeem on the ground of his exclusion, could not be permitted to be non-existent against him and as only existent against the mortgagee, whose failure to implead him should not confer upon the party excluded any advantage more than he would have otherwise possessed. The correct view appears to be that the person seeking to redeem is no more concluded by the decree than the mortgagee, and that the new suit must, so far as regards the taking of accounts and other matters legitimately arising therein, proceed on the basis of a new suit untramelled by any decision given or account taken in the previous suit. As was observed in an American case, in which the plaintiff claimed to redeem the property by paying only the amount for which the property had been purchased by the mortgagee; "to redeem property which has been sold under a mortgage far less than the mortgage-debt, it is not sufficient to tender the amount of the sale. The whole mortgage-debt must be tendered or paid into Court. The party offering to redeem proceeds upon the hypothesis that, as to him the mortgage has never been foreclosed and is still in existence. Therefore, he can only lift it by paying it. The money will be subject to distribution between the mortgagee and purchaser in equitable proportions, so as to re-imburse the latter his purchase money, and pay the former the balance of his debt."(2) Hence whether the property be foreclosed or sold, the plaintiff cannot be permitted to redeem it except on payment of the full amount due on the mortgage, and not merely the amount for which the mortgaged property may have been foreclosed or sold.(3) But the Courts are evidently not agreed on this point, for while there are no doubt cases in which the Courts have determined the rights and liabilities of the parties on the basis of the mortgage and irrespective of the decree, there are others in which the Court has decreed redemption on payment of the decretal amount together with interest at the contract rate calculated up to six months, interest at the Court rate being decreed for the subsequent period till redemption. (4)

2173. It has been generally stated before that the position of the person not joint in the previous suit is unaffected by the decree to which he was not made a party. The effect of non-joinder is that the decree obtained may in many cases be nugatory. Thus where previous to the suit the equity of redemption has passed to certain purchasers they cannot be sued

(1) *Dina Nath* v. *Lachmi Narain*, I.L.R., 25 All., 446 (453), F. B; *Dindayal* v. *Sheoraj Singh*, 2 Nag. L. R., 116.

(2) *Collins* v. *Riggs*, 14 Wall., 491; cited in 2 Jones' Mortgage (6th Ed.), § 1075.

(3) *Wahidunnissia* v. *Gobardhan*, I. L. R., 25 All., 394, F. B.; *Girish Chander* v. *Kedar Nath*, I. L. R., 33 Cal., 590; *Gangadas* v. *Jogendranath*, 11 C.W.N., 403; in which the contrary held in *Kasummunnissa* v. *Nilratna*, I. L. R., 8 Cal., 79 (88) was dissented from. The case was, moreover, overruled on appeal in *Nilkant* v. *Suresh Chandra*, I. L. R., 12 Cal., 414, P. C. To the same effect in *Lutf Ali (Syed)* v. *Futteh Bahadur*, I L. R., 17 Cal., 23, P. C.; *Umes Chander* v. *Zahar Fatima*, I, L. R., 18 Cal., 164, P. C.; *Ganga Pershad* v, *Land Mortgage Bank*, I. L. R., 21 Cal., 366. P. C.; *Jugdeo Singh* v. *Habibulla*, 6 C.L J., 612; *Kedar Prosanna* v. *Girindra Prosad*, 8 C.L.J., 173 (176); *Dadoba* v. *Damodar*, I.L., R., 16 Bom., 486; *Sivathi* v. *Ramasubbayar*, I.L.R., 21 Mad., 64; *Thenappa* v. *Marimuthu*, I. L. R., 31 Mad., 258; *contra Gangadas* v. *Jogendra Nath*, 11 C. W. N., 403; *Jugdeo* v. *Habibulla*, 12 C. W. N., 107 (112, 113); *Dip Narain* v. *Hira Singh*, I. L. R., 19 All., 527 (534); *Wahidunnissa* v. *Gobardhan*, I.L.R, 22 All., 453 O A., I.L.R., 25 All., 388; *Ghasiram* v. *Jhingwa*, 4 N. L. R. 168; *contra Raghoba* v. *Madho Rao*, 2 N, L. R., 116.

(4) *Gangadas* v. *Jogendra Nath*, 11 C. W. N., 403; *Jugdeo* v. *Habibulla*, 12 C. W. N., 107 (112, 113).

for possession by a purchaser of the property at a sale held under the previous decree. (1) And the mortgagee cannot oust a *zur-i-peshgi* lessee, although he may have purchased the property in execution of his mortgage-decree for sale, without giving him an option to redeem,(2) when he can re-open the accounts and obtain time for redemption in the same way as if no previous decree had existed. (3) He must, however, pay the full amount due on the basis of the original mortgage, notwithstanding that the mortgage-decree was sold for a smaller amount. This appears to be the view taken by the American Courts who have held that redemption of property sold under a mortgage for less than the mortgage-debt, can be permitted to redeem only on payment of the whole mortgage-debt, and not merely on payment of the purchase-money.(4) Of course, the excluded party cannot reasonably be permitted to take advantage of a favourable bargain, when he could not be compelled to redeem, nor pay a higher price if the bargain had been an unfavourable one. Where the mortgagee-purchaser has sold portions of the property purchased by him to others, the redemption money would, however, be distributed rateably to the prices paid by them and in the order of their respective conveyances. (5

2174. Rights of Mortgagee under Defective Decree.—While persons wrongly excluded remain unaffected by the decree, and can have the same questions re-tried in a suit of their own, the Courts are divided on the effect of the decree so far as regards the rights of the mortgagee who might contend that, since his decree is good against the mortgagor whom he has foreclosed, he as the holder of the equity of redemption has the last right of redeeming the puisne mortgagee who cannot then be permitted to redeem his prior mortgage(6) and that, as against the excluded persons interested in the equity of redemption, he has the right to insist that the *quantum* of interest foreclosed to him is no longer liable to redemption, since the fact that he has acquired the whole or a fraction of the equity of redemption in a suit ought to make no more difference than if he had acquired the same interest by a contract with the mortgagor.(7) But though both these views have found support in the decided cases, they are equally fallacious, because there can be no analogy between a good contract which the law allows and a bad decree which it does not ; nor can the mortgagee be permitted to use his own failure of a duty to implead necessary parties to improve his title as against those very persons whom he has wronged by their exclusion. It would be inconsistent to hold that the latter are not bound by the decree if they suffer thereby, and such a view would encourage scheming mortgagees to designedly leave out formidable rivals in their scramble for the property. Such contention was advanced but overruled by a Full Bench of the Calcutta High Court in a case in which the property had been purchased by a third party in execution of the prior mortgagee's decree to which the puisne mortgagee had not been joined and who thereupon sued to bring the property to sale subject to the first mortgage contending that he was no more than the

(1) *Hargulal* v *Gobind Rai*, I. L. R., 19 All., 541 ; *Brajanath* v. *Khilat Chandra*, 8 B. L. R., 104.

(2) *Radha Pershad* v. *Monohar Das*, I. L. R., 5 Cal., 317.

(3) *Venkata* v. *Kannam*, I. L. R., 5 Mad., 184.

(4) Jones' Mortgage (6th Ed.), § 1075 ; citing *per* Bradley, J., in *Collins* v. *Riggs*, 14 Wall., 491. To the same effect *Nilkant* v. *Suresh Chandra*, I.L.R., 12 Cal., 414 (423) P. C.; explained and followed in *Girish Chunder* v. *Kedar Nath*, I. L. R., 33 Cal., 590 : *Ganga Das* v. *Jogendra*, 5 C. L. J., 315; *Dip Narain* v. *Hira Singh*, I. L. R., 19 All., 527 ; *Sivathi* v. *Rama*, I. L. R., 21 Mad., 64.

(5) *Davis* v. *Duffle*, 18 Abb. Pr., 360; cited in Jones' Mortgage (6th Ed.), § 1075 ; *Gangadas* v. *Jogendra*, 11 C. W. N., 403.

(6) *Hasai* v. *Umajinbha*, 5 Bom. L R. 892 ; *Rangasamy* v. *Jethi*, I.L.R., 26 Mad., 484.

(7) *Ganeshi* v. *Charan*, I. L. R., 35 All., 247.

assignee of the prior mortgagee, and his contention was upheld, Maclean, C. J., observing: "If there had been no suit by the first mortgagee, the puisne incumbrancer could have sued the mortgagor and subject to the mortgagor's right to redeem, have obtained a decree for the sale of the equity of redemption, that is, of the property subject to the first mortgage. This right cannot be taken away by any decree made in a suit to which he was not a party and by which he was not bound."(1) In Bombay such purchaser is merely subject to redemption at the hands of a puisne mortgagee who was not a party to the decree (2) but there the cases are by no means uniform, for while there are some in which the Courts discriminate between the mortgagee purchaser and a stranger, holding that while the former remains still a prior mortgagee, the latter obtains title under the sale sufficient to defeat the puisne mortgagee's right of redemption.(3) Some doubt has also been cast on the Calcutta view by a Bench of the Allahabad High Court as to the appropriateness of the remedy available to the puisne mortgagee after the property has passed into the hands of an auction-purchaser (4) but whatever may be his other rights his preferential right to redeem the prior mortgagee in spite of his foreclosure cannot be denied.(5) But in Bombay it is said that the puisne mortgagee acquires against the auction-purchaser precisely the same rights as he had collectively against the mortgagor and the prior mortgagee. "That is to say, he may sue to redeem the purchaser as mortgagee, or thereafter as mortgagor to foreclose or suffer himself to be redeemed by him."(6) But there seems no reason why the puisne mortgagee should be permitted to use an invalid decree to enlarge his own rights. But since the decree is valid as between the mortgagor and the mortgagee it enables the puisne mortgagee to redeem the prior mortgagee without being in his turn liable to be redeemed by the mortgagor.(7) In so far the puisne mortgagee no doubt gains an advantage, but then it is due to no dereliction of duty on his own part. The prior mortgagee cannot in execution of his decree against the mortgagor attach property in the possession of a puisne mortgagee, if the latter had not been made a party to his suit, nor could the prior mortgagee force on a decision of his right in a suit instituted by the puisne mortgagee for a declaration that the property in his possession was not liable to attachment by the prior mortgagee.(8)

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(1) *Debendra* v. *Ramsaran*, I.L.R., 30 Cal., 599 (605) F.B.; overruling *contra* in *Durga Churn* v. *Chandra Nath*, 4 C.W.N. 541. To the same effect *Umes Chunder* v. *Zahur Fatima* I.L.R. 18 Cal. 164(180); *Dip Narain* v. *Hira Singh* I.L.R. 19 All., 527; *Munnalal* v. *Mununlal*, I.L.R 36 All., 327; *Thenappa* v. *Marimuthu*, I.L.R. 31 Mad. 258; followed in *Ghasi Ram* v. *Jhingwa*, 4 N.L.R. 168 (173).

(2) *Desai* v. *Mundas*, I. L. R., 20 Bom., 390; *Hasanbhai* v. *Umaji*, I.L.R., 28 Bom., 153 (170); *Pandurang* v. *Sakhar Chand*, I. L.R., 31 Bom., 112.

(3) *Vasudev* v. *Narayan*, (1892) B.P.J., 21 explained in *Hasanbhai* v. *Umaji*, I.L.R., 28 Bom., 153 (170); *Pati Ram* v. *Ghasi Ram*, 3 C.P.L.R., 82. The reasoning of which is faulty inasmuch as it assumes that the mortgagor's equity of redemption, became validly vested in the prior mortgagee and which he could use to defeat the puisne mortgagee's preferential right of redemption. The mortgagee can obtain no more right under a wrong decree as against the puisne mortgagee, than he can under an invalid contract with the mortgagor. See *contra Ghasiram* v. *Jawahir*, 11 C.P L.R. 75, *Narsing* v. *Mt. Jamna Bai*, 12 C.P.L.R. 86; *Shrikisan* v. *Gadadar*, *ib.* 125; *Dindayal* v. *Sheoraj Singh*, 2 N,L R. 116; *Ghasi Ram*, *Jhingwa* 4 N.L.R. 168 (173).

(4) *Manobar Lal* v. *Ram Babu*, I.L.R., 34 All., 323 (330).

(5) *Debendra* v. *Ramsaran*, I.L.R., 30 Cal., 599 F.B.; *Kedar* v. *Girindra*, 8 C.L.J. 173; *Gourdhana* v. *Veerasami*, I.L.R., 26 Mad., 537; *Poonambala* v. *Muthusami*, 23 M.L.J., 284; *Sandagar* v. *Jan Ali*, 1 A. L. J. 300; *Phulmani* v. *Nageshar*, I.L.R., 33 All., 370; dissented from in *Hasanbhai* v. *Umaji*, 5 Bom. L.R. 892; *Manohar Lal* v. *Ram Babu*, I.L.R., 34 All. 323 (330).

(6) *Pandurang* v. *Sakharchand*, I. L. R., 31 Bom., 112 (118).

(7) *Banga Das* v. *Ganalal*, 12 I.C. (Cal.), 155. *Sonba* v. *Lahanoo*, 15 C.P.L.R., 188.

(8) *Hakamchand* v. *Karam Chand*, [1908] P.R. No. 64.

2175. It is also said that one consequence of not impleading a person of whose interest the mortgagee had notice, is that he may sue the mortgagee for redemption only of his own share on payment of a proportionate share of the mortgage-money, to which, however, the mortgagee may himself confine him if he so desires.(1) In such a case it may be said that the mortgagee having himself broken in upon the indivisibility of his mortgage by acquiring by the foreclosure-decree an absolute title to the mortgagor-defendant's share in the property, he cannot complain if the party excluded deals with him on that basis. And since the party excluded should not be placed in a worse position, because of his exclusion, it would seem to follow that a person having the right to redeem would, if excluded from the mortgagee's suit, have the right to redeem not only his own share, but, if he so desires, the whole of the mortgaged property, which he would have been entitled to do if he had been a party to it. (2) Indeed, it has been held in England that a person interested in the equity of redemption of only a part of the mortgaged property is neither entitled nor compellable to separately redeem his part, but must redeem the whole, subject to the equities of the other persons interested, and with his remedy over for contribution against the other part-owners. (3)

2176. Right against Transferee without Notice—If the excluded son ratains his right of redemption unimpaired by the mortgage-decree whether for foreclosure or sale, then the right would equally avail whether the property be in the hands of the original mortgagee or in those of a *bona fide* transferee without notice. This is another inevitable consequence of the rule, and it has been accordingly held that the purchaser in execution of a mortgage-decree has no right to retain possession of the property obtained through the Civil Court against the purchaser of the equity of redemption who was not a party to the mortgagee's suit and who was in possession of the property till the sale made in execution of the mortgage-decree.(4) But the view that an auction-purchaser could be displaced by the suit of an excluded son perhaps carries the doctrine to a length when it comes in conflict with the decision of the Privy Council, who had as far back as 1874 laid down the two following propositions—*First*, where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or under a sale in execution of a decree for their father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property unless they show that the purchasers had notice that the debts were so contracted and, *Secondly*, that the purchasers at an execution sale being strangers to the suit, if they had no notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings.(5) (§ 2146). Following this view it has been held that after the purchase of the mortgaged property by a stranger in sale held in execution of a mortgage-decree, it is not competent to the excluded son to redeem the property on the sole ground of his execution, but that of course a son could then still attack the decree upon some ground which under the Hindu law would free him from liability to pay his father's debts.(6) In this view the effect of this

(1) *Brij Kishore* v. *Madho Singh*, 2 A. L. J. 752; O. A., 1. L. R., 28 All., 279.

(2) See *per* Finch. L. C., in *Cockes* v. *Sherman*, (1676) 2 Freem., 13; *Dindayal* v. *Sheoraj Singh*, 2 Nag. L. R., 116 (118).

(3) *Pearce* v. *Morris*, L. R., 5 Ch., 227; *Hall* v. *Heward*, 32 Ch. D., 430; *Magnus* v. *Queensland National Bank*, 36 Ch. D., 250; O. A., 37 Ch. D., 466; *cf. Thornycroft* v. *Crockett*, 2 H. L. C., 239.

(4) *Habibulla* v. *Jugdeo Singh*, 6 C. L. J., 609.

(5) *Girdhari Lall* v. *Kanto Lall*, 14 B. L. R., 187, P. C.

(6) *Debi Singh* v. *Jia Ram*, I. L. R., 25 All., 214, F.B.; *Lal Singh* v. *Pulandar Singh*, I. L. R., 28 All., 182, 184.

rule would be different upon different persons but there is nothing to indicate this in the rule.

Preliminary decree in foreclosure-suit.

2. In a suit for foreclosure if the plaintiff succeeds, the Court shall pass a decree—

(*a*) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(*b*) declaring the amount so due at the date of such decree, and directing—

(*c*) that, if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; but

(*d*) that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

2177. Analogous Law.—This rule was section 86 of this Act, before its transposition to the Proceduce Code. As there enacted, it is substantially a reproduction of the section, which ran thus:—

86. In a suit for foreclosure if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred from all right to redeem the property.

Decree in foreclosure-suit.

The rule lays down the form of a decree in a suit for foreclosure. The form of a plaint in such cases is that given in the Civil Procedure Code,(1) and the right to foreclosure or sale is conferred upon the mortgagee by section 67, to which this section may be regarded as so far auxiliary.

(1) Sch. IV, No. 109.

2178. The rule is obviously intended to meet only cases in which there are not several successive mortgages or in which there are not several parties interested in redemption. In complicated cases a foreclosure-decree often presents some difficulty in drawing up, and this as often as not gives rise to a crop of litigation. An attempt will therefore be made in the ensuing commentary to formulate certain rules which may enable the Courts not only to draw up appropriate and accurate decrees, but also to interpret them in case of doubt or ambiguity. The rule is apparently taken from Seton's Work on Decrees.(1) The wording of the decree will have to be varied where the debt is agreed to be paid by instalments,(2) or where a decree is payable by the mortgagor personally,(3) or where a consent decree for foreclosure without account is passed.(4) Another form would have to be adopted in a decree to enforce an equitable mortgage.(5)

The procedure here prescribed follows the English practice, to which reference may legitimately be made in the solution of doubtful points.

2179. Principle.—The object of this and the two following rules is to prevent mortgagees from realizing their securities, except in the way prescribed by the Act.(6) The essence of foreclosure and redemption suits is, that in such suits each party is entitled to enforce his rights. A plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance. On the other hand, a plaintiff claiming redemption must submit to a decree for sale or foreclosure if he makes default in payment. Unless this were so, there would be multiplicity of suits. To avoid this, it is necessary that in a suit for foreclosure or redemption the accounts between the parties should be settled or discharged. It is not open to a mortgagee, after obtaining a decree for an account or sale, on ascertaining that the accounts are going against him, to withdraw from the taking of accounts.(7) Hence, both in a suit for foreclosure or redemption, an account is ordered to be taken and a time—not more than six months in the first instance—is fixed within which the amount so found due is to be paid. The Act is, however, silent as to cases where the mortgagee has a personal remedy against the mortgagor. But it would appear that in such cases the decree should provide for payment as in the ordinary money-suits.

2180. Meaning of Words.—"*Suit for foreclosure*:" As only mortgagees by conditional sale and English mortgagees are allowed to sue for foreclosure,(8) this rule is restricted only to these mortgagees. "*The Court*:" *i.e.*, in which the suit is instituted. "*Shall make a decree*:" The section provides for a case where there is only one mortgagor and mortgagee. In cases where other mortgagees are also joined decrees have to determine the rights of the other persons as well, and will have to be framed accordingly. For the forms of such decrees see the commentary below.

"*An account be taken*:" For which the Act lays down no procedure. The one, however, commonly adopted is set out below.

"*If the defendant pays into Court*:" The corresponding language of section 86 was "*paying to the plaintiff or the Court.*" But now the money must be paid

(1) (5th Ed.), p. 1575.
(2) For form of decree in which case *vide post*, r. 2; *Greenough* v. *Litler*, 15 Ch. D., 93.
(3) *Lee* v. *Dunsford*, 54 L. J. Ch., 108; *Hunter* v. *Myatt*, 28 Ch. D., 181.
(4) *Boydell* v. *Manby*, 9 Hare (App.), 53.
(5) *Newton* v. *Aldons*, Seton, p. 1695; *Lees* v. *Fisher*, 22 Ch. D., 283.
(6) *Chunder Nath* v. *Baroda Sundary*, I. L.R., 22 Cal., 833.
(7) *Doolee Chund* v. *Omda Khanum*, I. L. R., 6 Cal., 377.
(8) See S. 67, Com.

into Court, the defendant having no option in the matter. When the payment is made into Court, it is implied that the money will be paid out to the plaintiff. "*Within six months*:" The Court can fix six months as the *maximum*, but may fix less if it chooses. "*Or declaring in Court, etc.*:" This declaration is made in the decree where accounts need not be subsequently gone into. On payment the plaintiff must not only make over "all documents in his possession or power relating to the mortgaged property," but must also transfer possession of it if his mortgage was possessory. If the documents are irretrievably lost, it will probably be sufficient in most cases to obtain an acquittance-receipt, and in other cases an indemnity-bond.

"*Where the plaintiff claims by derived title*" *e.g.* sub-mortgage.

"*If the payment is not made, the defendant shall be absolutely debarred*:" In India a foreclosure once made cannot be re-opened except on review but in England it is more readily customary to re-open if sufficient cause is shown.(1)

2181. It is said that though the determination of an issue may not operate as *res judicata*, still it may bind the parties, (2) but in order to bind a party there must be an estoppel of some kind without which the binding force of an adjudication is unintelligible. A decree in a suit to have priorities declared and to ascertain amounts due, will estop a party in the suit from suing to invalidate the security of a prior incumbrancer.(3) But if he was sued merely as a puisne mortgagee and as such was only called on to redeem, the decree will not estop him from setting up a prior mortgage.(4)

In some cases the question whether the puisne mortgagee is or is not bound by the accounts taken in the earlier suit has been held to depend upon whether the prior mortgagee had or had not notice of the puisne mortgage. (5) This is also the view of the English law, but its applicability to transactions arising under the Act does by no means follow. In some cases the right of the puisne mortgagee to redeem the prior mortgage appears to have been made contingent on his exclusion by the prior mortgagee with notice of interest.(6) But this too is a view which is rendered untenable by the course of decisions made since the passing of the Act. It has been held in a Calcutta case that Mitakshara sons being joined as parties under the section cannot be permitted to plead the immorality or impropriety of the consideration so as to exclude their own interest in the family property from the operation of the mortgage, (7) but this view is exceptional and based upon no intelligible reason.

Besides the questions that legitimately arise in a suit on mortgage there are other questions which the Court may determine; such for example is the question whether the title which a third person, a purchaser in execution of the decree obtained by the first mortgagee, alleges to have acquired after the plaintiff's mortgage, is or is not a real title, which is entitled to priority over the mortgage sought to be enforced. (8)

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(1) Fisher §§ 1965-1973.
(2) *Krishnaswami* v. *Srinivasa*, 11 M. L. J. R., 7.
(3) *Forde* v. *Tynte*, 10 L.T., 93.
(4) *Dhapi* v. *Barham*, 4 C. W. N., 297 (303).
(5) *Anand Rao* v. *Tatya*, (1886) B. P. J., 97; *Wasudev* v. *Narayan*, (1882) B. P. J., 21; *Kisan* v. *Krishnaji*, (1882) B. P. J., 177; *Munsukh* v. *Tarbhavan*, (1882) B. P. J., 213 *Ganesh* v. *Balkrishna*, (1879) B. P. J., 28; *Shivlal* v. *Jechand*, (1879) B. P. J., 482.
(6) *Shivram* v. *Genu*, I. L. R., 6 Bom., 515 (519).
(7) *The Calcutta Bank* v. *Nathumull*, 9 C.W.N., ccvi.
(8) *Bhaja Chowdhury* v. *Chunilal*, 5 C. L. J., 95.

2182. Procedure in Foreclosure-suits.—In a suit for foreclosure the mortgagee must give an account of the money due to him from the mortgagor both on account of principal and interest. In a non-possessory mortgage, the mortgagee has only to calculate the amount due on his mortgage to which the costs incurred in the suit are added. Ordinarily, where consideration is denied, it must be proved by the plaintiff who seeks to enforce his mortgage. But where the execution of the document which recites the payment of consideration, is admitted or proved, it is then incumbent upon the mortgagor to shew that the recital as to the payment of consideration is not correct.(1) But where the incorrectness of the recital so frequently made in bonds executed in this country is partly admitted by the plaintiff-mortgagee, as that the actual consideration was different from that described in the bond, the question may then arise, whether this admission is sufficient to shift the *onus* on the other party. It would appear that where the recital which cast the burden on the defendant is admitted to be incorrect, and the disability caused thereby is removed, the burden would naturally be on the plaintiff. But the contrary view was held in a case where the fact of the recital was considered as by no means sufficient to vary the rule ; and a mere admission by the mortgagee that the actual consideration was not paid as described in the deed was held insufficient to exonerate the debtor from having to prove non-receipt of consideration.(2) But this view is unsupported by either precedent or principle.

Facts the mortgagee must prove.

2183. The recital of the receipt of consideration in a bond being in law an admission against the debtor's interest, is *prima facie* evidence of its payment, which may be more or less conclusive according to circumstances,(3) and if the payment has been made in the presence of the Registrar, it is sufficient to shift the *onus* on to the mortgagor.(4) So the Privy Council have observed : "The registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction ; and all things done before him in his official capacity and verified by his signature, will be presumed to be done duly and in order."(5) And the burden in such a case would be a heavy one, for, in the words of the same tribunal, " it is valueless if it can be gone behind in every case by an assertion that, that which was stated at the time before the Registrar was untrue."(6) This, of course, assumes the admission before the Registrar as an admitted fact. But where the debtor pleads that he had had nothing to do with the execution and registration of the document, its execution and registration must then both be legally proved. The mortgagee may, however, obtain some relief if the executant is certified to have been personally known to the registering officer, in which case no identifying witnesses are required. But even in cases, where the registering officer acts on the assurance of the identifying

Value of recitals and registration.

(1) *Unnopoorna* v. *Nufar Poddar*, 21 W. R., 148 ; *Mayen* v. *Alston*, I. L. R., 16 Mad., 238 ; and the cases therein cited ; *Manohar Singh* v. *Sumitra*, I. L. R., 17 All., 428 ; *Babbu* v. *Sita Ram*, I. L. R., 36 All., 478. *Naoroji* v. *Sidick Mirza*, I. L. R., 20 Bom., 636 ; *Issan Chunder* v. *Beni Madhub*, I. L. R., 24 Cal., 62; *Baranasi* v. *Birj Lall*, 3 C. W. N., ccxxiv ; *Ghurphekin* v. *Purmeshar*, 5 C.L.J., 653 ; *Ningwa* v. *Bharmappa*, I.L.R., 23 Bom., 63.

(2) *Lal Singh* v. *Chaitram*, 15 C.P.L.R., 24.

(3) *Brajeshwara* v. *Budhanuddi*, I. L. R., 6 Cal., 268.

(4) *Ib.*, s. 60, Indian Registration Act (XVI of (1908) ; *Hamid* v. *Alla Baksh*, (1907) P.W. R., No. 8.

(5) *Gangamoyi* v. *Troiluckhyanath*, I. L. R., 33 Cal., 537 (544, 545), P. C.

(6) *Ali Khan Bahadur* v. *Indar Pershad*, I. L. R., 23 Cal., 950 (954), P. C.

witnesses, it would have to be presumed, that the executant was present before the Registrar.(1) And the facts stated in the registering officer's certificate is *per se* evidence, though not a conclusive evidence of the facts therein certified.(2) It does not, however, dispense with the evidence of execution, nor does it even shift the burden of proof on to the executant.(3) But a certificate showing that a document has been registered is conclusive proof that it has been registered according to law.(4) Apart, from that, registration does not invest a document with an additional sanctity as regards *bona fides*, as its non-registration does not affect it, if it is otherwise sufficiently proved.(5) As between the parties to a deed, a recital in a deed is, however, conclusive, and in all cases evidence, and it is of more or less weight, or more or less conclusive according to cirumstances.(6) (§§ 633, 634). But in any case the mortgagor is not precluded from giving oral evidence either in proof of the fact that notwithstanding the recitals in the deed the consideration specified in it was not in fact paid as therein recited, but was agreed to be paid in a different manner,(7) or that the consideration was not paid at all.(8) Such evidence is not distinctly excepted by the first proviso to section 92 of the Evidence Act, (9) and is in consonance with the English law. (10) Where the defendant admits the execution of the bond but denies the receipt of the consideration as recited therein, it lies upon him to show that the recital in the bond as to the payment of consideration is incorrect. (11) Where in a mortgage-deed a defendant pleaded that he never executed the mortgage-deed, that if it was signed by him, it was done under undue influence and that if the execution of the deed was proved, the contract was void by reason of his being minor at the time of the execution, the defendant's pleas were held to amount both to a denial of the execution and of its validity and the burden of proving both was cast on the plaintiff-mortgagee. (12) Where in a suit upon a mortgage, a plea of minority is raised by the defendant the burden of proving that he was of age when the contract was made lies upon the plaintiff seeking to enforce it and who must, therefore, show that it was both valid and legally enforceable. (13) The age of the executant stated to

(1) *Gangamoyi* v. *Troilukhyanath*, I. L. R., 33 Cal , 537 (544, 545), P. C.

(2) S. 60, Indian Registration Act (XVI of 1908); *Manohar Singh* v. *Sumitra*, I. L. R., 17 All., 428; *Thaa* v. *Govind*, 9 Bom. L R., 401; *Fuzal Ali* v. *Bia Bibi*, 7 C. L. R., 276; *Salimatul* v. *Kaylashpati*, I. L. R., 17 Cal., 903; *Gangamoyi* v. *Troilukhyanath*, I. L. R., 33 Cal., 537 P. C.; the contrary held in *Nittyanund* v. *Raj Bullabh*, 25 W. R. 267; under the corresponding section since amended is no longer law. *Contra* also in *Kristo Nath* v. *Brown*, I. L. R., 14 Cal., 176.

(3) *Manohar Singh* v. *Sumitra*, I. L. R., 17 All , 428.

(4) *Husaini* v. *Mulo*, I. L. R., 5 All., 84; *Hardi* v. *Ram Lal*, I. L. R., 11 All., 319; *Sheo* v. *Sunkur* v. *Hirdey Narain*, I. L. R., 6 Cal., 25; *Kripa Nath* v. *Bhashaaye*, 6 W. R., 105.

(5) *Gunga Pershad* v. *Mowjee Lall*, 16 W. R., 80, P. C.

(6) Ss 17, 21, Indian Evidence Act (I of 1872); *Manohar Singh* v. *Sumitra*, I. L. R., 17 All., 428; not conclusive, *Lala Brij Lal* v. *India*. I.L.R., 36 All. 887 P. C. but relevant; *Krishnia* v. *Ayyasami*, 27 M. L. J. 138: 24 I. C. 426: *Brajeshwaree* v. *Budhanuddi*, I, L. R., 6 Cal., 268.

(7) *Indarjit* v. *Lal Chand*, I L. R., 18 All., 168.

(8) *Hukum Chand* v. *Hira Lal*, I, L. R., 3 Bom., 159; *Lala Himmat Sahai* v. *Llewhellen*, I. L. R., 11 Cal., 486; *Ram Baksh* v. *Durjan*, I. L. R., 9 All., 392; *cf. Balkishen Das* v. *Legge*, I. L. R., 22 All., 149, P. C.

(9) Act I of 1872; *Balkishen Das* v. *Legge*, I. L. R., 22 All , 149 (159), P.C.

(10) *Pym* v. *Campbell*, 25 L. J. Q. B., 277; *Davis* v. *Jones*, 17 C. B., 625; *Pattle* v. *Hornibrook*, [1897] 1 Ch., 25.

(11) *Fulli Bibi* v. *Basirudin*, 4 B. L. R , 56 F. B.; *Dabi Prosad* v. *Daulat Singh*, 3 M. I. A., 347; *Ali Shah* v. *Amani Begum*, 19 W, R , 149; *Elias* v. *Jorawar Mall*, 24 W. R., 202; *Davlata* v. *Ganesh*, I. L. R , 4 Bom., 295; *Gorakh* v. *Vithal*, I.L.R., 11 Bom., 435.

(12) *Muhmmad Husain* v. *Lalji*, 25 I. C. (Oudh) 648.

(13) *Gaya Din* v. *Mt. Dulari*, 6 A.L J. 693; *Kanhayalal* v. *Girdhari*, 9 A. L. J., 103; *Muhammad Husain* v. *Lalji*, 25 I.C. (Oudh) 648.

and recorded by the Registrar is held to be no evidence of age since it is no part of the Registrar's duty to record the age of the executant, (1) though it is the Registrar's duty to satisfy himself that the executant is not a minor, (2) if such person *appears* to him to be a minor. Nevertheless the statement is material as evidencing fraud of the minor executant in inducing his mortgagee to accept his mortgage, and which would estop him from proving the contrary. (3) In a case in which the plaintiff sued on a bond and accounted for its non-production by alleging that the defendant had stolen it, and the latter admitted execution, but pleaded that it had been repaid, it was held that the *onus* of proving payment lay on him, and that he could discharge it by either producing the bond or by proving its payment or both. (4) But if the plaintiff refuses to put in the mortgage-bond because it is unstamped, he cannot recover more than what the defendant admits. (5) Where the plaintiff seeks to add to his mortgage-money sums which he is entitled to add, he must, of course, prove them, unless the defendant admits, in which case the amount admitted need not be proved. And although the section is imperatively worded, it should not be construed so as to render the mortgagee liable to account even in a case where the defendant admits the claim. (6)

Against whom recitals are inadmissible.

2184. Recitals in an instrument are, of course, not evidence against third parties, (7) unless they hold derivative interest from the mortgagor, in which case they are as much bound by them as the mortgagor. (8) And while the mortgagor may as against the original mortgagee shew that a recital as to the amount of consideration was incorrectly made, he cannot be permitted to shew the same thing against his assignee, if the latter had no notice of the error. (9) Where in a suit several interests are joined, an admission of receipt of consideration by the mortgagor is no evidence against other incumbrancers as to whom the burden of proof is still on the mortgagee. And if he fails to discharge the burden by adducing evidence of consideration, advantage of his failure may be taken not only by the incumbrancer who had challenged the issue, but also by the mortgagor who did not contest it. This may appear at first sight rather hard on the mortgagee, but then the Court could not in the same suit give incongruous finding by holding the consideration proved so far as regards the mortgagor, and holding it not proved so far as regards the other party incumbrancer. (10) So where the mortgagor admitted the execution but pleaded non-receipt of consideration, whereupon the plaintiff-mortgagee wrongly took upon himself to call evidence before the defendant to prove payment of consideration in which he failed, the Court held that though the *onus* of proving non-receipt of consideration

(1) *Muhammad Husain* v. *Lalji*, 25 I. C. (Oudh) 648 (654); S. 35 (*b*), Indian Registration Act (XVI of 1908).

(2) S. 3. Indian Registration Act (XVI of 1908); *Sham Charan* v. *Chowdhry*, I.L.R. 21 Cal. 872.

(3) *Surendra Krishnasakhi*, 15 C. W. N. 239; 13 C. L. J. 228; 9 I. C. 110.

(4) *Chuni Kuar* v. *Udai Ram*, I. L.R., 6 All; 73.

(5) *Ganja Mulik* v. *Bavalt*, 1. L. *R.*, 3 Bom., 669.

(6) *Taylor* v. *Mostyn*, 25 Ch. D., 48; *Bolingbroke* v. *Hinde*, ib., 795.

(7) *Brajeshwaree* v. *Budhanuddi*, I L. R., 6 Cal., 268; *Manohar Singh* v. *Sumitra*, I. L. R., 17 All., 428.

(8) S. 21. Indian Evidence Act (I of 1872); *Manohar Singh* v. *Sumitra*, I. L. R., 17 All., 428; *Bakshi Ram* v *Liladhar*, 11 A. L.J. 371; *Narain* v. *Bhika*, 21 I. C. 841; but their probative value must, of course, depend upon the facts of each case. *Nawal Kunwar* v. *Bakhtawar*, 10 A.L.J. 390; *Bihari Lal* v. *Makhdum*, I.L R. 35 All. 194; *Baranasi* v. *Brij Lall*, 3 C. W. N., 524; *Srimutty* v. *Haripada*, 18 C.W.N. 718 P. C.; *Burkur Ram* v. *Lalji*, 13 C. P. L.R., 1.

(9) *Bickerton* v. *Walker*, 31 Ch. D., 151 (158); *Bateman* v. *Hunt*, [1904] 2 K.B., 530.

(10) *Janki Das* v *Ahmad Husain*, I. L. R., 25 All., 159 (161).

was on the defendant, still as the plaintiff had irregularly begun and failed to prove payment of the consideration, the Court could not ignore that fact merely to comply with the technical form of procedure. (1) In England a solicitor taking a security from his own client cannot rely on any statement in the instrument as to the amount advanced or paid by him to the client, but must prove it by independent evidence.(2) The amount of principal and interest may be ascertained before the decree and need not be left to be determined under it. This is more convenient especially in cases where the mortgagee is not in possession, and consequently complicated accounts have not to be gone through. Oral evidence is always admissible to prove not only the actual nature and amount of the consideration,(3) but also its discharge and satisfaction, such evidence being not excluded by section 91 or fourth proviso of section 92 of the Indian Evidence Act or by any other law.(4)

2185. Proof of Mortgage.—It has been stated before (§1494) that both the mortgagor and his representative are estopped from denying the title of the mortgagee, (5) but this does not prevent the mortgagor from disputing his title in some other character; *e.g.*, the prior mortgagee (6) or a trustee. (7)

Quantum of sufficient evidence.

In appraising the degree of proof that the mortgagee is able to give, regard will always be had to the date and character of the transaction and other circumstances which are justly regarded as having a bearing upon all human events. Where the instrument and security for a debt is found in the hands of the debtor, a strong presumption naturally arises that the debt has been discharged.(8) So lapse of time is an element for consideration: it may absolve the mortgagee from the high standard of proof that would be required in relation to a recent transaction, but it cannot dispense with the necessity of some proof.(9) A transaction of long standing is presumed to have been in all respects rightly executed or legally done in the absence of evidence to the contrary.(10) The account books of parties are admissible in evidence if shown to have been kept regularly in the ordinary course of business, and may be referred to not only for the purpose of refreshing the memory of a witness, but also as corroborative evidence of his testimony.(11) In deciding foreclosure-suits, the Court must naturally follow the pleadings of the parties as in any other case. The Court must not, however, decide a case in defendant's favour on a point not raised by him with the result that if the decision be upheld it will cast upon the defendant a far higher liability than if he had made the order which the plaintiff had asked for.(12)

2186. Where a person agrees to purchase immoveable property for a sum exceeding Rs. 100, and being unable to pay the purchase-money, executes and registers an instrument mortgaging that property to the vendor, as security for

(1) *Makund* v. *Bahari Lal*, I. L. R., 3 All., 824.

(2) *Lewes* v. *Morgan*, 5 Price, 42; *Gresley* v. *Moasley*, 3 De. G. F. & J., 433; *Bateman* v. *Hunt*, [1904] 2 K.B., 530 (538, 539).

(3) *Provat Chandra* v. *Cherag Ali*, 4 C. L. J., 320; *Mhd. Yusuf* v. *Mhd. Musa*, 4 A.L. J.R., 441.

(4) *Ramlal* v. *Govinda*, 4 C.W.N., 304.

(5) *Ramjiban* v. *Shiku*, 16 C.L.J. 264: *Nandan* v. *Jumman*, I.L.R. 34 All. 640.

(6) *Shib Narain* v. *Baikunthnath*, 19 C.L. J. 200: 20 I. C. 864.

(7) *Nandan* v. *Jumman* I. L. R. 34 All., 640.

(8) *Bhog Hong* v. *Ramanathan*, I.L.R., 29 Cal., 334 (337), P C.

(9) *Subhanrao* v. *Vinayak*, 4 Bom. L. R., 465 (468).

(10) *Jamnabai* v. *Dharsey*, 4 Bom. L. R., 893.

(11) *Bhog Hong* v. *Ramanathan*, I.L.R., 29 Cal., 334 (338), P C. Account-books may be admissible either under s. 34 or s. 32 (2) of the Indian Evidence Act. In the latter case they require no corroboration: *Rampyarabai* v. *Balaji*, 6 Bom. L.R., 50.

(12) *Raichand* v. *Naran*, I.L.R., 28 Bom., 310.

payment of the price, but takes no deed of conveyance from the vendor, the mortgage must be regarded as one by a person having no title in favour of the true owner, and as such not enforceable in law. There can be no estoppel in such a case where the truth is known to both parties. (1)

Suit on unregistered mortgage.

2187. It may be a question in a mortgage whether if unregistered, it will sustain a suit for recovery of the money advanced. There can be no doubt that if the mortgage contains a *personal* covenant to pay, a suit will lie on the covenant; but in this case limitation runs from the date of promise.(2) But it is otherwise where the covenant is single and indivisible, and the plaintiff's remedy is only against the mortgaged property.(3) No such promise is implied in a mortgage by conditional sale,(4) (§§ 1227—1248, 1580) and from which it follows that the mortgagee cannot, as a matter of course, sue to recover the mortgage money from the mortgagor personally. Having agreed to take the mortgaged property as his only security, his only remedy is by foreclosure of that property whatever it may be worth. But at the same time if he is deprived of that security owing to the conduct of the mortgagor, law fastens upon him a personal liability which the mortgagee may enforce in the same way as if the mortgagor had expressly entered into it by the deed. Thus if the non-compliance with the solemnity of law was due to the conduct of the mortgagor, he is equitably bound at least to restore the benefit which he had received under the contract.(5) In this respect the position of a mortgagor is not unlike that of a vendor, who is liable to compensate the mortgagee if the sale goes off owing to his own conduct. On the other hand, if the mortgage has remained defective owing to no fault of the mortgagor, it is evident that he should not be mulcted for what he is not to blame.

Where a suit for money is brought on a mortgage by conditional sale, the period of limitation would be six or three years according to whether the document sued upon is registered or unregistered.

2188. What Rights must be adjudicated.—It has been held in England from very early times that it is not open to the mortgagor to deny his own title to the property mortgaged by him nor the title of his mortgagee, for no man can be permitted to derogate from his own grant, and as between the mortgagor and mortgagee they are mutually estopped from denying the title of each other. It is also said that since the object of a suit for foreclosure is to destroy the right of redemption, it is not open to the mortgagee to obtain an adjudication on his title as against other possible claimants, *e.g.*, the mortgagor's heirs.(6) In this case after barring redemption the mortgagee was ordered to be put in possession, but was obstructed by the mortgagor's heir who set up a title which the mortgagee challenged him to make good, but the Lord Chancellor held that the mortgagee could go no further in his suit but to take away the equity of redemption and leave the plaintiff to such title as he has, but not to amend it. It was however added that though it was the ancient rule it

(1) *Sitaram* v. *Mt. Harku Bai*, 4 Nag. L. R., 28.

(2) *Lachman Singh* v. *Kesri*, I. L. R., 4 All., 3; *Gomaji* v. *Subharayappa*, I.L.R., 15 Mad., 253; *Ulfatunnisa* v. *Hosain Khan*, I. L.R., 9 Cal,, 520, F.B.

(3) *Mattonginey* v. *Ramnarain*, I.L.R., 4 Cal., 83; *Narotum* v. *Sheo Pergash*, I.L.R., 10 Cal., 740, P.C.; *Bunseedhur* v. *Sajut Ali*, I.L.R., 16 Cal., 540.

(4) S. 58, Comm., *Ramasami* v. *Samiyappanayakan*, I.L.R., 4 Mad., 179 (183).

(5) Ss. 65, 70, Indian Contract Act (IX of 1872).

(6) Anonymous (1678) 2 Ch. Ca. 244; 22 E.R. 927; followed in *Jaggeswar* v. *Bhuban*, I.L.R. 33 Cal.,425 (436, 437) *Gopal Chunder* v. *Jadumoney*, 15 C.W.N., 915; 11 I.C. 201.

had at times been departed from. Following this rule it has been held that the plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way concerned with the mortgage, and who has set up a title paramount to that of the mortgagor and mortgagee. But since the rule is not one of convenience merely, the fact of the question of such title being determined by the Court of first instance in breach of the rule does not preclude the appellate court from reversing the decree. The question, however, is not one of jurisdiction, and where in a mortgage suit a question of paramount title raised by a defendant is tried without objection, neither party have the right to ask for a reversal on the ground that the issue was not properly triable in the suit. A mortgage was executed by a Hindu widow and her reversioners. The execution was admitted but the reversioner mortgagors pleaded that the mortgage conveyed no more than the life estate of the Hindu widow, but the Court decreed the claim refusing to go into the question as to what interest passed to the mortgagee.(1) The mortgagor is estopped from showing that the property he had mortgaged was not transferable(2) or that he had no present title to the property, for even if it were so, his subsequently acquired property would feed the estoppel. But there can, of course, be no estoppel when the truth is known to both parties nor can it be pleaded to defeat a statute (§965). Consequently, it is competent to the mortgagor to plead that the mortgage was invalid for want of registration or attestation or because it otherwise offended against the provisions of some statute. But in such cases the Court entertains the objection not with a view to assist parties but in order to preserve the sanctity of its own laws. And while it is generally true that no party is permitted to evade the law, regard must also be had to its purpose, whether it was enacted to protect private interests or subserve public policy. So where the directors of a company issued debentures in excess of their powers, they were held estopped from disputing their validity against an assignee for value without notice.(3) In another case Kay, J., stated the law on the subject to be as follows: "where a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has the right to presume *omnia rite acta*.(4) If such security be legally transferable, such an irregularity, and *a fortiori*, any equity against the original holder, cannot be asserted by the company against a *bona fide* transferee for value without notice. Nor can such equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee he has a superior equity."(5) So a mortgage executed with the sanction of the Probate Court by the administrators erroneously appointed to satisfy a debt which the executor himself was compellable to pay is valid and binding on the estate ; and all acts done by an executor or administrator in the due and legal course of administration are valid and binding even though the letters issued by the Court are afterwards revoked or the incumbent is discharged.(6) The mortgagee has the right of action so long as the equity of

(1) *Gopal Chunder* v. *Jadumoney*, 15 C., W.N., 915; 11 I.C. 201.

(2) *Bhagiratth* v. *Sheikh Hafizuddin*, 4 C. W.N., 679 ; *The Ganges Manufacturing Co.* v. *Sourajmall*, I.L.R., 5 Cal., 669 (678); *Subramanian* v. *Gangaya*, 4 L.B.R. 365.

(3) *Webb* v. *Herne, Bay Commissioners*, L. R., 5 Q. B. 642 (650) ; following *Pickard* v. *Sears*, 6 A. & E. 469 ; *Freeman* v. *Cooke*, 18 L. J.Ex , 114 ; Re *Babia and San Francisco Ry. Co.* L.R. 3 Q. B. 584.

(4) *Fountaine* v. *Carmarthan Ry. Co.* L.R., 5 Eq. 316.

(5) In re *Romford Canal Co.* 24 Ch. D., 85 (92); citing In re *Agra and Masterman's Bank* L.R., 2 Ch. 391 ; In re *Blakeley Ordinance Co.* L.R , 3 Ch. 154 ; *Dickson* v. *Swansea & Co.* L. R., 4 Q B. (44).

(6) *Sailoja* v. *Jadu Nath*, 21 C.L.J. 88.

redemption is outstanding (§§ 1413—1433). But his right of action would be gone if the equity of redemption vests in him, as if he is appointed administrator of his debtor's estate,(1) or there is otherwise the merger of his security.

2189. It is provided in the last section that a mortgagee suing to enforce his own mortgage is bound to join as parties all persons interested in the mortgage. In this connexion it has been also discussed whether a mortgagee who has several mortgages on the same property is bound to bring one suit on all his mortgages (§2171). The question was carried up to the Privy Council, but their Lordships have refrained from expressing themselves on the point.(2) Though the decree to be passed under this section is a conditional decree, it is none the less a substantive decree passed on consideration of all the pleas urged in the suit, and as such it is so far final. It is in fact conditional only in the sense that it leaves the mortgagor a *locus penitentia* to pay up the mortgage-money and redeem his property and which he cannot do as soon as it is made absolute. The litigation is, however, terminated by the first decree and all questions that arise in the suit must be determined before such a decree is passed. Those questions cannot be re-agitated afterwards, though other questions that may arise subsequently would have necessarily to be inquired into before the order absolute is made.(3) And, of course, where the preliminary decree directs the taking of accounts, as it may do in case of complicated accounts or where it would be otherwise conducive to convenience, such accounts would have to be made in pursuance of its terms.

2190. Foreclosure for an Instalment:—It has already been stated that there is nothing in the law to prevent the mortgagee from foreclosing the entire property mortgaged to him on failure to pay one or more instalments if such is his contract (§ 1534). The questions that arise in this connection have also been already considered (§§ 1534-1540).

2191. Mortgagee's other Rights:—This rule merely sets out a form of the decree appropriate to a suit for foreclosure. But it is evident that the mortgagee was not only have to implead other persons besides the mortgagor in which case the form will have to be varied in accordance with the principles elsewhere set out. (§2126—2229) But the mortgagee may have acquired other rights since his mortgage. He may have for instance, acquired a right to sue the mortgagor personally for the mortgage-money in a case contemplated in section 68, or to a contribution under section 74, and in fact in other ways, for which he is entitled to sue in the same suit,(4) and it is said that in some cases he is bound to do so (§1704). But whether he may or must sue for the alternative or additional relief, the form of the decree will have to be altered and in that case the decree would be a composite one, as containing both the directions of this rule so far as it relates to foreclosure, and the other relief which the Court may have awarded to the parties, in respect to which the decree should not necessarily follow the analogy of a mortgage decree.

2192. Mode of taking Accounts.—It has already been observed that where the mortgagee is not in possession of the property mortgaged to him, the account may conveniently be taken at the trial, but where he has been in possession, it may often be found convenient to take it after the preliminary decree, in which case the procedure to be observed is as follows:—"The gross

(1) *Hossainara* v. *Rahimannessa*, I. L. R., 38 Cal., 342 (348, 349).

(2) *Sri Gopal* v. *Pirthi Sing*, I.LR,, 24 All., 429, P.C.

(3) *Mehari Bibi* v. *Yakub Ali*, 11 C.W.N., 156.

(4) O. 2, r. 4 (*b*) (*c*), Civil Procedure Code.

collections are ascertained at the end of each year, and after deducting the necessary outlay on account of revenue-expenses, of collection and preservation of the estate, the balance goes to reduce either in whole or in part, the interest, and if there is a surplus over, it goes to the reduction of the principal, the account being closed at the end of each year. In England it is not, of course, to direct annual rests against the mortgagee in possession, but a different rule obtains in this country. If, however, the mortgage-debt is paid off by means of the rents and profits during the possession of the mortgagee, he will ordinarily be liable to pay interest on all subsequent receipts."(1) The principal heads of receipts and disbursements in the mortgagee's accounts may, perhaps, be more conveniently exhibited as follows :—

RECEIPTS.	DISBURSEMENTS.
I. Rents and profits.	I. (*a*) For Government revenue. (*b*) For interest thereon.
II. Occupation-rent (if the property is personally occupied by the mortgagee).	II. (*a*) For preservation of the property and necessary repairs. (*b*) For interest thereon.
III. Profits from the accessions. (In addition the mortgagee may be compelled to pay also for the following :—)	III. For interest on the mortgage-money. IV. For reduction of the mortgage-money to which must be added the expenditure incurred for the following :— (*a*) For management and collection-expenses. (*b*) Expenses other than specified in I and II above incurred for the preservation of the property. (*c*) For supporting the mortgagor's title to the property. (*d*) For making his own title good against the mortgagor. (*e*) Renewal fine in case of a renewable lease. (*f*) Insurance *premia* paid. (*g*) Interest on (*a*) to (*f*) at the bond-rate ; and if no rate fixed therein, then at 9 *p.c.*, *p.a.*
IV. Bad management.	
V. For failure to collect rents and profits. VI For committing waste and other acts permanently destructive of the property.	

2193. The liability of the mortgagee to account is, of course, subject to the provisions of section 77, *i.e.*, when the mortgagee is in possession of the property in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal, he is not bound to keep or liable to render accounts. Where the mortgagee is liable to render an account, it would appear from the case, an extract from which has been cited above, that he is bound to pay himself by annual rests, or in other words, piece-meal, according to the amount of the surplus left in his hands, after paying on account on the items specified in sections 63, 72 and 76. In England, on the other hand, except in cases where the mortgagee agrees to receive his capital in driblets, and which cannot be inferred from his taking possession, the mortgagor cannot compel him to pay himself piece-meal, for he is entitled to have his whole capital paid off at once. But after he is paid the principal and interest in full, annual rests are directed to be made commencing from the time of the payment.(2) "The account to be put in under the law is one to be made, verified, and proved by the

(1) *Jaijit Rai* v. *Govind Tiwrai*, I. L. R., 6 All., 303 (310, 311). It is a well settled practice of the Courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter if any balance remain to the principal ; *Luchmeshwar Singh* v. *Syad Lutf Ali*, 8 B. L. R., 110, P. C.; *Maharajah of Benares* v. *Har Narain Singh*, I. L. R., 28 All., 25.

(2) *Ashworth* v. *Lord*, 36 Ch. D., 545 (550, 551); citing *Wilson* v. *Metcalfe*, 1 Russ., 530.

mortgagee himself in the way before indicated. His *Jumma-wasil-bakee* papers, duly attested by those who prepared them or collected according to them, and supported by the receipts of the talookdars or ryots, who also may be called to depose to those receipts and to what was the real demand and balance of each of their respective tenures, may well be adduced to support the mortgagee's own account when made and put into Court under the law cited. In fact the account required from the mortgagee is one setting forth what he has realized, from what portion of the mortgaged property, in what terms or periods with that loss or gain on the several assets, with what necessary deductions, and what remains then as the net profits which can be taken as actual realizations towards liquidating the sum due under the mortgage transaction." (1) As to the deductions the mortgagee in possession is entitled to make, reference must be made to section 76 (*g*) in the commentary on which the law on the subject has been exhaustively set out. The interest and costs to which he is entitled must be debited in accordance with the principle above laid down. The order in which payments are appropriated is that prescribed by section 76 (*h*). The conflict between this clause and clause (*d*) of the same section has been before noticed. (2) The liability of the mortgagee to account, however, does not arise unless he is in possession of the property as such, and if he holds it under any other title during such possession, he could only be charged with rent payable under the contract.(3) Where he is liable to account, it has been held that his right to charge interest is not extinguished, although the arrears are time-barred. Of course, in such a case he cannot recover such arrears by suit, but he can retain possession of the mortgaged property until all arrears of interest are paid.(4) And if he is wrongfully dispossessed he is entitled to be reinstated by a suit brought within time, although his claim for foreclosure may be barred by limitation. The right to foreclose and to possession is in such a case a double right and the mortgagee may enforce either or both at his option.(5) Hence in a case where fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made, it was held that redemption could only be allowed on payment of interest of the stipulated rate for the whole period of fourteen years.(6) A mortgagee who has obtained a decree for an account, is not entitled to withdraw from the taking of accounts in his execution-proceedings when those accounts appear to be going against him.(7)

2194. Where the parties are not numerous with diverse distinct interests the mode of accounting does not present much difficulty. But, where there are several mortgagees, a number of questions may call for adjudication. If the mortgagor pleads payment of any sum to a co-mortgagee, the question would be whether it has the effect of discharging the debt *pro tanto*. In England payment to one of two joint mortgagees discharges the mortgage at law. But in equity the security is discharged only to the extent of the payee's interest therein. The fact that the payee afterwards became the survivor and might then have granted a valid discharge both in law and equity does not affect the rule. What was only a partial discharge in equity at the time of payment does not have the effect of a full discharge by reason that the

(1) *Per* Bayley, J., in *Mokund Lall* v. *Goluck Chunder*, 9 W. R., 572 (573).

(2) See under s. 76, *ante*.

(3) *Doolee Chand* v. *Omda Khanum*, I. L. R., 6 Cal., 377 (379).

(4) *Daudbhai* v. *Daudbhai*, I. L. R., 14 Bom., 114.

(5) *Aman Ali* v. *Azgar Ali*, I. L. R., 27 Cal., 185; following *Khelut Chunder* v. *Tara Churn*, 6 W. R., 269; On appeal *Brojonath* v. *Khelut Chunder*, 14 M. I. A., 144; 8 B. L. R., 104.

(6) *McMersh* v. *Brown*, 45 Ch. D., 225; followed in *Thayer* v. *Lakshmi*, I. L. R., 18 Mad., 331 (337).

(7) *Doolee Chand* v. *Omda Khanum*, I. L. R., 6 Cal., 377.

person who received the payment became afterwards capable of granting a full discharge if the payment had been made to him. A debt owed to a partner in a firm in his individual capacity cannot be validly paid to the firm unless the firm had been authorised to receive it.(1) The English equitable view has been followed in India in several cases which have already been discussed (§§ 1353—1356).

The mortgagee accepting from the mortgagor an assignment of a debt due to him by a third person, may be debited with the amount of the debt, though the mortgagee had not realized it, if it appears that he had made no serious effort to recover it.(2)

The mere fact that a party accepts payment of the principal does not debar him from claiming interest due thereon, unless he had abandoned it.(3) In finally adjusting the account the mortgagor is entitled to set off any over-payments made by him towards interest, and to recover them if made within three years of the suit. A mortgage-deed stipulated for interest at 6 per cent. to be reduced to 5 per cent. in case of punctual payment. The mortgagor paid the interest at the highest rate punctually, the mortgagee crediting it as such but both parties overlooked the stipulated reduction till it was discovered on the mortgagee's suit, when the mortgagor claimed refund of the over-payments but it was held that each overpayment of interest was a voluntary payment made by the mortgagor to the mortgagee under a mistake of fact, and without consideration; that upon its receipt by the mortgagee, the latter became indebted to the mortgagor in that amount, and that the latter could set off the sums so paid within the statute of limitation.(4)

2195. Appropriation and Limitation.—The question of limitation affecting transactions in which a decree for foreclosure may be passed has been discussed under section 58. In addition to the period thus allowed, an additional period may be allowed in cases falling under section 20 of the Limitation Act. The payment of interest must have been *as such* that is accompanied by an intimation that the payment is to be appropriated to interest and from which a promise to pay the debt may be legitimately inferred.(5) Where the debt is capable of unmistaken identification, as where it is a single one, the payment alone would afford ground for such a presumption.(6) But where there are several debts and payments are made, the question of specific appropriation must then be decided upon evidence.(7) Such appropriation may be shown by any medium of proof and does not require an express declaration of the debtor.(8) If two admitted debts are due at the time of payment, and it is doubtful to which the payment applied, such payment would not take either debt out of the Statute.(9) Where at the time of payment one debt is barred, and another not, a payment unappropriated by the debtor will not save limitation.(10) But should the creditor appropriate the payment to save limitation it will not avail him unless he can shew that the debtor had at least acquiesced n it(11). A statement in the mortgage-debt that it was executed for Rs. 1,500,

(1) *Powell* v. *Broadhurst*, [1901] 2 Ch., 160.
(2) *Shyam Kumari* v. *Rameshwar Singh*, I.L.R., 32 Cal., 27 (35). P.C.
(3) *Ahmed* v. *Union Marine Insurance Co.*, 4 Bom.L.R., 205 (210); following *Beaumont* v. *Greathead*, 2 C. B., 494; *Churcher* v. *Stringer*, 2 B. & Ad., 777; *Lumbsley* v. *Musgrave* 22 Bing.N.C., 9,; distinguishing *Dixon* v. *Parkes*, 1 E., 109 (a case under 405 Ann., c. 16, and as such no authority on the general question).
(4) Art. 96, Limitation Act; In re *Jones Estate*, [1914] 1 Ir. R., 188; In re *Rocella's Estate*, 3 Ir. L T.R. 8; In re *Carroll's Estate*, [1901] 1 Ir.R. 78.
(5) *Morgan* v. *Rowlands*, L.R., 7 Q.B. 493.
(6) *Evans* v. *Davies*, 6 L.J.K.B., 268.
(7) *Gwynn* v. *Gwynn*, 49 L.J. Ch., 5.
(8) *Waters* v. *Tompkins*, 41 R.R., 827.
(9) *Burn* v. *Boulton*, 15 L.J.C.P., 97.
(10) *Mills* v. *Fowkes*,5 0 R.R., 750.
(11) *Nash* v. *Hodgson*, 25 L.J.Ch., 186;

out of the amount of principal and interest due on a previous hypothecation bond may be used as an acknowledgment of something more due on the prior bond, and which is sufficient to enlarge limitation.(1)

A mortgagee against whom an adverse order has been passed under section 335 of the Code is not precluded by article 11 of the Limitation Act from suing within the time otherwise allowed. The article prescribes one year's limitation when the suit is instituted to establish his right to the property, but a mortgagee enforcing his security sues only to recover a debt and not to establish his right to the property.(2)

2196. Items of Account recoverable.—The mortgagee is entitled to recover not only the principal and interest due at the time of the institution of the suit, but also such sums as he is empowered to add to the mortgage-money.

Commission or Nazarana.

2197. The payment of a commission, *nazarana* or *salami* at varying rates *per centum* is usually stipulated for by the creditor as a consideration for the loan, and this he usually deducts from the cash consideration paid to the debtor. The latter, however, has to acknowledge the nominal consideration as agreed to be paid to him. Not infrequently the commission is shared by the go-betweens on either sides. The debtor who agrees to pay a commission and pays it cannot afterwards turn round and repudiate it. However reluctantly he may have agreed to it, if he had agreed to its being deducted and retained, and did consciously and knowingly admit the receipt of the full consideration, he will not be afterwards heard to plead the immorality or oppressiveness of the bargain.(3) Such a debtor borrows in haste and repents at leisure. In a Calcutta case, where the bond was for the nominal amount of Rs. 4,35,000, out of which *nazarana* and *salami* was deducted at $7\frac{1}{2}$ per cent., besides Rs. 1,200 or Rs. 1,300 were paid to the creditor's agent "for his own labour," the deductions and payments were regarded as the ordinary incidents of the bargain for which the debtor was held liable.(4)

Instead of stipulating for the payment of interest at a certain rate, the debtor is sometimes made to execute a mortgage for a much larger sum than that actually advanced Such sum is added in place of interest and is made repayable with the principal in stipulated instalments. Sometimes such sum is not even mentioned, the mortgagor being made to acknowledge the consolidated sum as actually received by him. This rule finds favour with the Mahomedan debtors who affect to respect the rule of the Mahomedan law against usury. Such contracts are no exception to the rule, and may be enforced except when they amount to a hard and unfair bargain calling for the intervention of the Court.(5) But apart from these considerations there is no objection to the enforcement of such mortgages.

2198. Rates of Allowable Interest.—Ordinarily, interest must be calculated according to the rate stipulated in the mortgage-deed. The Court in

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Friend v. *Friend*, 66 L.J.Ch., 737; *Gopal Rao* v. *Chindhu*, 15 C.P.L.R., 29.

(1) *Duraisami* v. *Venkatasheshaiyar*, 11 M. L.J.R., 373.

(2) *Bhiku* v. *Shujat*, I.L.R., 29 Cal., 25 (29).

(3) *Rameshwar* v. *Rai Sham Kishen*, I. L. R., 29 Cal., 43 (48, 49); *Gangaram* v. *Shriram*, 2 N. L.R., 162 (170) P.C.

(4) *Rameshwar* v. *Rai Sham Kishen*, I. L. R., 29 Cal., 43 (48, 49); *Hari* v. *Ramji*, I. L. R., 28 Bom., 371 (374).

(5) *Wallingford* v. *The Mutual Society*, 5 App. Cas., 685 (702, 710); *Marquess of Northampton* v. *Pollock*, 45 Ch.D., 190 (212); *Hari* v. *Ramji*, I.L.R., 28 Bom., 371 (376).

this country possess no power to revise the contracts of parties and disallow interest merely on the ground that it considers it usurious, unreasonable or excessive.[1] It is bound to decree interest at the stipulated rate, however high, and the only grounds on which it has power to reduce it are that it was agreed to render undue influence (§2215) or that it is penal (§ 2209) or that its reduction is sanctioned by the rule of *Damdupat* (§ 2204) or other local law or custom, apart from which it has no inherent power to play the poor man's friend and interfere with the contract of parties, which it cannot displace by its own notions of what is right and fair. And if through mistake or inadvertence the stipulation is ambiguous, oral evidence was in one case allowed to clear up the ambiguity. In that case a note of hand promised repayment of a loan with interest at 5 per cent., without stating either per mensem or per annum, it was held that the construction that interest was to be calculated without reference to time was contrary to all practice, and that the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom,[2] but now in face of the provisions of the Indian Evidence Act this view can no longer be maintained.[3] But in another case where the stipulation was to pay interest at " 2 per cent. the Privy Council held that it *prima facie* meant 2 per cent. per *mensem*. 'The other view that it only means 2 per cent. . . for the whole period seems almost absurd."[4] While the Courts have no power to reduce the contractual rate of interest, its very excessiveness may be evidence of an unconscionable bargain or of the exercise of undue influence. The ordinary rate of interest in this country in normal times on a reasonably sound security is 12 per cent. per annum[5] and Rs. 1-8 or Rs. 1-12 per mensem cannot be considered excessive. But this is, of course, the general rule, for interest must vary with the risk undertaken, the popularity of the kind of security, offered plentifulness of the money, the other available channels for profitable investments, and other circumstances too numerous and varied for a categorical enumeration. But nevertheless a certain return on one's landed security varying from 1 to 2 per cent., per mensem is regarded as by no means prohibitive though interest at the latter rate would be veiwed askance by the Courts in case of large sums and ample security. In the Punjaub interest which equals the principal in five years is regarded as moderate and not exeessive[6] and it would probably be so treated anywhere. In Madras White, C. J., upheld an agreement to pay interest at 36 per cent holding that it was not penal, and that the Court could not reduce it to 24 per cent.[7] On the same view interest at 60 per cent was decreed by another Court.[8] The mere fact that the rate of interest is high is not sufficient to justify a Court in holding that the bargain is an unconscionable one, and relieving the contracting party from its consequent liability.[9] The power of the Court to interfere with contracts alleged to be unconscionable is limited by the provisions of sections 16 and 19 of the Indian Contract Act, and the fact that an excessive rate of interest is charged in a contract is not alone sufficient to

(1) *Bunwaree Lall* v. *Moheshur*, Marsh 544; *Bhoramal* v. *Devi Din*, (1882) P. R. No. 40; *Hemraj* v. *Malik*, (1889) P. R. No. 135; *Raghu* v. *Bandhu*, (1908) P.R., No. 110; *Ganga Ram* v. *Jaiballa*, I.L.R., 30 Cal., 953.

(2) *Mahomed Sumsooddin* v. *Moonshee Abdool Huq*, (1864) W.R., 379; dissented from in *Pratap Chandra* v. *Mahomed Ali*, I.L.R., 41 Cal. 342.

(3) *Pratap Chandra* v. *Mahomed Ali*, I. L. R., 41 Cal. 342.

(4) *Lakha Singh*, v. *Champat Singh*, I. L. R., 28 All., 724, P. C.

(5) *Baldeo* v. *Gokal*, I. L. R., 1 All., 603; *Surja Narain* v. *Pratap Narain*, I. L. R., 26 Cal., 955 (961, 962).

(6) *Fateh Singh* v. *Nanakchand*, (1911) P. W. R. 20; 9 I. C. 927.

(7) *Annamalai* v. *Sellappa*, 10 M. L. T., 77; 12 I. C. 78.

(8) *Narain Das* v. *D'Cruz*, 4 S. L. R., 276; 10 I. C. 984.

(9) *Srichand* v. *Naider Singh*, 8 A. L. J., 407; 10 I.C. 14.

establish that the making thereof was induced by undue influence. In order to justify a Court in interfering with a contract of the kind, it must be found that the lender was in a position to dominate the will of the borrower when the contract was entered into, before any presumption can arise that the contract was induced by undue influence.(1) Urgent need of money on the part of the borrower may explain the contract to pay interest at a high rate, but it is not of itself evidence of the creditor's domination.(2) (§ 2215). But there can be no doubt that the rate of interest if unexplained may be so excessive as of itself to be evidence of an unconscionable bargain.(3)

2199. Where the mortgagee stipulated for continued payment of interest from the date of the execution of the bond until its liquidation, it was at one time held that the Court had no discretion to disallow it. (4) The terms of the section excluded, it was said, the discretion conferred on the Court by section 209 (now s. 34) of the Civil Procedure Code. (5) But it is now settled that the contract rate of interest as a matter of course, can be claimed only up to the date fixed in the decree for redemption, after which the matter passes from the domain of contract to that of judgment, and the rights of the mortgagee thenceforth depend not on the contents of his bond, but on the directions in the decree. (6) Consequently, where the Court decreed interest at the stipulated rate up to the *dies datus* and thereafter at 6 per cent the High Court saw no good and sufficient cause to interfere with the exercise of a discretion not shown to have been improperly exercised. (7) Where the Court fails to order payment of interest in case of an enlargement, it will be for the Court to decide on what terms it will be granted, and whatever interest is then ordered will be payable on the aggregate sum due, and not merely on the principal secured by the mortgage. Even where interest is not expressly stipulated to be paid after the date fixed for repayment, it must in the absence of evidence to the contrary be presumed to run at the same rate till liquidation: "The covenant to pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor; but it rarely happens, and is rarely contemplated that the mortgagor should actually pay by that time. The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken and to seek for damages which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that, though contracts are not unfrequently found to be of that imperfect nature, it

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(1) *Ganeshi Lal* v. *Mande Lal*, 10 I. C., (All.) 249; *Kesavalu* v. *Arthubai*, I. L. R., 36 Mad., 533.

(2) *Sunder Koer* v. *Rai Sham Krishan*, I. L. R., 34 Cal., 150 P. C. *Kaliprosonno* v. *Protap Singh*, 17 C.L.J., 221; 18 I.C., 965.

(3) In re *A.I. Debtor*, [1903] 1 K. B. 795; *Carrington, Ltd.* v. *Smith*, [1906] 1 K.B. 79; *Kaliprosonno* v. *Protap Singh*, 17 C.L.J. 221; 18 I. C., 965. But the English cases were decided under the Money-Lenders Act 1900, 63 & 64, Vict. c, 51. s. 1.

(4) *Chaturbhai* v. *Harbhamji*, I. L. R., 20 Bom., 744; *Balgobind* v. *Narain Lal*, I.L.R. 15 All., 339, P. C.

(5) *Surya Narain* v. *Jogendra Narain*, I.L. R., 20 Cal., 360; *Magni Ram* v. *Rajpati*, *ib*, 366, note; *Rameshwar* v. *Mehdi Hasan*, I. L. R., 6 Cal., 39 P.C.; *Bandoru* v. *Atchayamma*, I.L.R. 3 Mad., 125; *Futtehma* v. *Mohammad* I. L. R., 9 Cal., 309; *Daudbhai* v. *Daudbhai*, I L. R., 14 Bom., 113; *Ram Chandra* v. *Devre*, I. L. R., 12 Mad., 485.

(6) *Sundar Koer* (*Rani*) v. *Rai Sham Krishen*, I. L. R., 34 Cal., 150, P. C.; distinguishing *Maharajah of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181, P. C.; *Rameswar Koer* v. *Mehdi Hasan*, I. L. R., 26 Cal., 39, P. C.; followed in *Ganga Das* v. *Jogendra Nath*, 11 C. W.N., 403; followed in *Lachmi* v. *Uman Dat*, I. L. R., 29 All., 322: in which the Court reduced the stipulated rate of 10½ p. c. *compound* interest to simple interest at the same rate.

(7) *Broja Gopal* v. *Abinash*, 14 C. W. N., 532; 5 I. C. 127.

is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage-transaction." (1) And so following this view it was held that where a mortgage-decree awarded interest but did not state clearly up to what date such interest should be paid, and it was thus susceptible of being construed either as allowing interest up to the date fixed by the decree for payment of the mortgage-debt, or as allowing interest also after that date until realization, the proper construction to make the decree in accordance with law, was that interest was allowed up to the date of realization and not merely up to the date fixed by the decree for payment of the mortgage-debt. (2) But in view of the latest pronouncement of the Privy Council, this view so far as it relates to the construction of decree cannot now prevail. (3) Intention to pay interest after the due date may also be gathered from the fact that payment was continued after the time fixed for the payment of the principal. (4) In one case it was held by the Allahabad High Court that in a suit for the sale of the mortgaged property the Court has no power under this section to allow interest for a period beyond the six months fixed for payment from the date of the decree. It was said that the words of section 88—"What is so found due to the plaintiff," must mean the amount referred to in the first paragraph of section 86, that is, either the amount due by the account directed to be taken in that section or the amount which the Court at the time of passing its decree declares to be due. (5) But this view has not been followed in Calcutta, where it has been held that the words "so due" in sections 86 and 88 must mean "due on account of principal, interest and costs" and not also "due at the time of the decree" or at the date indicated in section 86. And having regard to the language used in sections 89 (now rule 5) and 90 (now rule 6) there can be no doubt that the view taken by Jenkins, J., (6) is more reasonable and that the Court is empowered to decree interest subsequent to the date of its decree and the date fixed by the decree for payment until realization. In considering the reasonableness of stipulated interest, law makes a distinction between an adult mortgagor and a minor acting through his guardian. A person *sui generis* is allowed to take care of himself and it is only when he is shown to have been overreached, or his contract savours of a hard bargain induced by undue influence that the Court is at liberty to interfere (§§ 2215—2220). But in the case of a minor this rule is reversed. For it is then for the creditor to shew that the rate of interest charged is one of necessity or of clear expediency for the benefit of the minor's estate, (7) in the absence of which the Court will allow

(1) *Mathura Das* v. *Raja Narindar Bahadur*, I. L. R., 19 All., 39 (49); P.C., overruling *Narindra* v. *Khadim Husain*, I.L.R., 17 All., 581, F.B.; followed in *Sarala Dasi* v. *Jogendra Narayan*, I.L.R., 25 Cal., 246; *Pedda Subbaraya* v. *Ganga Razulungaru*, I. L. R., 20 Mad., 149; *Nityananda*, v. *Sri Radha*, ib., 37 1.

(2) *Bakhar Sajjad* v. *Udit Narain*, I. L. R., 21 All., 361, F.B.; following *Rameshwar Koer* v. *Mahdi Hossein*, I, L.R, 26 Cal., 39, P. C.; *Achalabala* v. *Surendra Nath*, I.L.R., 24 Cal., 766; *Subbraya* v. *Ponnu Sami*, I.L. R, 21 Mad., 364, which with the following cases must be now considered as overruled; *Amolak Ram* v. *Lachmi Narain*, I. L. R., 19 All., 174; *Nain Dat* v. *Harihar Dat*, (1898) A.W.N., 57; *Maharaja of Bharatpur* v. *Rani Kanno Dei*, (1898) A.W.N., 164; see *Bakhar Sajjad* v. *Udit Narain*, I. L. R., 21 All., 361 (373), F.B.

(3) *Sundar Koer (Rani)* v. *Rai Shamkrishen*, I.L.R., 34 Cal., 150, P.C.

(4) *Manager Vithoba* v. *Vigneshwar*, I. L. R, 22 Bom., 107.

(5) *Amolak Ram* v. *Lachmi Narain*, I. L. R., 19 All., 174 (178).

(6) *Achalabala* v. *Surendra Nath*, I.L.R., 24 Cal., 766.

(7) *Gunga Persad* v. *Maharani Bibi*, I.L.R., 11 Cal., 379, P.C.

only interest at the ordinary rate payable on loans on good security. (1) If therefore a mortgage be executed by an adult as well as a minor mortgagor the Court will in such a case have to allow interest at a varying rate, at the contract rate against the adult and the normal rate against the minor, (2) in other words, the adult mortgagor cannot take advantage of the reduction made in the case of the minor.

Where the mortgagee stipulated for possession for a fixed term in lieu of interest, but there was no clause as to interest payable in case of non-possession, the Court held the security to be good only for the principal, and disallowed all interest holding the mortgagee to have no right to interest on his failure to take possession. (3)

Stoppage of interest.

2200. The mortgagee is not entitled to interest, if he enters on possession of the mortgaged property, unless he is able to account for his possession. So where the mortgagee acquired the equity of redemption and thereupon possession, he was held disentitled to interest on his mortgage money as from that date, on the ground that holding as he did the dual character of mortgagee and owner he could not claim both possession as well as interest: "It is only his mortgagee-character which can support his claim for interest, and it is only the status of full owner that can justify the enjoyment of the profits by him. He cannot simultaneously enforce his rights in both capacities." (4) The Court finally set off the profits against interest.

2201. Post diem Interest.—The mortgagee is ordinarily entitled to interest at the rate stipulated in the deed till the date fixed in the mortgage-decree for payment. He is also entitled to recover reasonable interest from that date till the date of realization. (5) Where the mortgage-deed is silent as to payment of *post diem* interest, and there is no express provision pointing to the view that *post diem* interest was not intended to be paid, it must be presumed that interest was intended to run on so long as the principal sum was not paid off. (6) Even where the intention is clear that interest is not to be charged after the due date, it may still be claimed at the same rate under the Interest Act, (7) by way of damages for the breach of a contract, (8) but in such case *interest post diem* cannot be recovered for more than six years after the date fixed for payment. (9) But in an English case it has been held that, where the mortgagor having lost his *legal right* comes into Court insisting on his *equity* to redeem, he ought to do equity to the mortgagee by paying all arrears of interest, and not merely those due in respect of six years before the action. (10) And here the

(1) *Abhiram* v. *Mukunda*, 5 C. L. J., 54 (548); following *Hurronath* v. *Rundhir Singh* I.L.R., 18 Cal., 311, P. C.

(2) *Abhiram* v. *Mukunda*, 5 C. L. J., 542 (549).

(3) *Mahadaji* v. *Joti*, I.L.R., 17 Bom., 425 (428).

(4) *Satnarain* v. *Chowdhuri*, I. L. R., 27 All., 313, ; 14 C.L.J. 500 (506).

(5) *Prayag* v. *Shyam Lal*, I.L.R., 31 Cal., 138 ; *Rameswar* v. *Meddi Hossein*, I. L. R., 26 Cal., 39 P.C. ; *Maharaiah of Bharatpur* v. *Rani Kanno Dei*, I.L.R., 23 All., 181, P. C. ; *Commercial Bank* v. *Attendrulayya*, I. L.R., 23 Mad., 637 ; *Saminathan* v. *Swamiappa*, I. L. R., 29 Mad., 170 ; dissenting from *Krishnaswami* v. *Srinivasa*, I.L.R., 11 M.L. J.R., 7.

(6) *Ghantayya* v. *Papayya*, I. L. R., 23 Mad., 534 ; dissenting from *contra* in *Moti Singh* v. *Ramohari*, I.L.R., 24 Cal., 699 ; *cf.*, *Mathura Das* v. *Raja Narinder*, I.L.R., 19 All., 39 P.C.; *Pedda* v. *Ganga*, I.L.R., 20 Mad., 149 ; *Sarala Dasi* v. *Jogendra*, I.L.R., 25 Cal., 246 (248).

(7) Act XXXII of 1839.

(8) *Niwas Ram* v. *Udit Narain*, I.L.R., 13 All., 330 ; *Jivanna* v. *Appalu*, I.L.R., 22 Mad., 339 ; *Saunadanappa* v. *Shivtavawa*, I.L.R., 31 Bom. 354.

(9) *Mathura Das* v. *Raja Narinder*, I.L.R., 9 All., 39 P.C.; *Moti Singh* v. *Ramchari*, I. L.R., 24 Cal., 699.

(10) *Dingle* v. *Coppen*, [1899] 1 Ch., 726.

stipulated rate is *prima facie*, but not necessarily the measure of the damages,(1) though the Court has then a discretion in awarding less if the stipulated rate is shown to be unreasonably excessive. A stipulation to pay interest at a certain rate per mensem without specifying the period up to which the payment shall continue must be construed in favour of payment until final discharge and not only up to the date fixed in the mortgage-deed for repayment. There can be no doubt that ordinarily such is the intention of the parties, and effect must, therefore, be given to it, unless indeed there is something on the face of the document or elsewhere to negative such construction.(2) But this rule which applies only to the construction of a contract has no application to a decree, the construction of which must be guided by a wholly different principle, though there are cases in which this distinction appears to have been overlooked. And so where a mortgage-decree provided for payment of interest from the date of the decree till the date of payment, it was held that there being nothing in the law to prevent interest at the rate stipulated in a bond being decreed up to the date of actual payment, the date of payment must be held to mean the date of actual payment and not the last day fixed for payment in the decree.(3) Indeed, as observed by the Privy Council, "the object of fixing a day for payment by the mortgagor is for the purpose of assigning a definite time at which the mortgagor's right of redemption is to cease, and the mortgagee's right to foreclose or sell is to attach, and not for the purpose of staying the payment of interest "(4) But a different note was struck by Shephard, J., in a Madras case, who appears to be of opinion that after the day fixed for payment, or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and that afterwards there is no more reason for giving interest at the contract-rate in the one case than there is in the other.(5) And this is a view which, though not followed in other cases of the same Court, (6) would now appear to have received the *imprimatur* of the Privy Council.(7)

For what period recoverable.

2202. The period for which interest *post diem* may be recovered is, as stated before, six years. This view of the law maintained by the Privy Council, and based upon the claim to interest giving recurring causes of action, has overruled a number of cases, in which it was formerly held that in such cases unless the suit is brought within six years from the date of default,(8) no interest for any period after the breach of contract could be recovered.(9) The Privy Council seem to

(1) *Chajmal Das* v. *Brij Bhukan*, I.L.R., 17 All., 511, P.C.; *Bakhar Sajjad* v. *Udit Narain*, I.L.R ,21 All., 361, F.B.; *Maharajah of Bharatpur* v. *Rani Kanno Dei*, I.L.R , 23 All., 191 (192), P.C.; *Ram Chandra* v. *Davee* I.L.R., 12 Mad., 485; *Krishnaswami* v. *Srinivasa*, 11 M.L.J.R., 7; *Rameswar* v. *Mahdi Hasan*. I.L.R., 26 Cal., 39, P.C.

(2) *Rupchand* v. *Panna Lal*, 14 C.P.L.R., 49.

(3) *Manoo Lal* v. *Durga Prasad*, 5 C.W.N. 653; following *Rameshwar* v. *Mehdi Hasan*, I,L.R., 36 Cal., 39 P.C.; *Megraj* v. *Nursing*, I.L.R., 33 Cal., 846; *Bakhar Sajjad* v. *Udit Narain*, I.L.R., 21 All., 361, F.B.

(4) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I.L.R., 23 All., 181 (192), P.C.; approving, *Bakhar Sajjad* v. *Udit Narain*, I.L.R., 21 All., 361, F.B.; overruling *Amolak Ram* v. *Lachmi Narain*, I.L.R., 19 All., 174; reaffirmed in *Balwant Singh* v. *Amolak Ram*, I.L.R., 28 All., 223, P.C.

(5) *Commercial Bank* v. *Ateendrulayya*, I.L.R., 23 Mad., 637 (642); distinguishing *Rameshwar* v. *Mehdi Hasan*, I.L.R., 26 Cal., 39, P.C.

(6) *Namburi* v. *Saladi Papiah*, 10 M. L. J. R., 101.

(7) *Sundar Koer* (*Rani*) v. *Rai Sham Krishen*, I. L. R., 34 Cal., 150, P. C.; distinguishing *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181 (192), P. C.

(8) Under Art 115 or 116 of the Limitation Act (XV of 1877).

(9) These cases are—*Gudri Koer* v. *Bhubaneswari*, I. L. R., 19 Cal., 19; overruled in *Moti Singh* v. *Ramchari*, I.L.R., 24 Cal., 699 (703); *Bhagwant* v. *Daryao*; I.L.R., 11 All.,

have, in holding that six years' interest is recoverable, left the question as to whether the interest so allowed is or is not a charge upon the property still open, although the latter part of their judgment seems to indicate that the interest is to be looked upon as a charge upon the mortgaged property without the payment of which it could not be redeemed. If the latter view is correct, then Article 132 and not Article 115 or 116 should apply, and the period for which interest could be claimed would be 12 years and not only six as provided by the earlier sections In this country, however, the High Courts are divided on this point. In Calcutta while the majority of the Full Bench have, upon the authority of the Privy Council case[1] before referred to, maintained Article 116 to be applicable, the minority consisting of Trevelyan and Banerjee, JJ., have held Article 132 to be applicable ; but all the Judges have concurred in regarding interest to be a charge on the mortgaged property.[2] The two learned Judges who formed the minority of the Full Bench, had also previously expressed themselves to the same effect in an earlier case,[3] which has been followed in Madras. [4] In Bombay in a case [5] decided before the Privy Council case before-mentioned,[6] it was held that Article 132 would govern such suits, but the facts of that case were different, for there the bond stipulated for payment of interest annually, but it did not say how long the mortgagor was to go on paying. The Madras High Court has followed Calcutta,[7] while the Allahabad High Court has held that the term "interest" as used in the sections means only *stipulated* interest, and that, therefore, interest *post diem* allowed by way of damages does not create a charge upon the mortgaged property and which, when allowed, must be recovered only in the manner provided for the execution of simple money-decrees.[8]

Where a party is not entitled to interest, but is entitled to damages for the acts of the debtor which have deprived him of the use of the money, he may recover damages in lieu of interest although he did not expressly claim damages. [9] But in such a case, too, no more than six years' interest prior to the institution of the suit can be recovered.[10] The receipt of interest up to a certain date at one rate of interest does not amount to a waiver of any higher rate of interest to which under the terms of the contract the creditor may be entitled.[11]

Where money is advanced at interest and part is taken by the borrower in the shape of a bill of exchange, letter of credit or other negotiable instrument, the ordinary presumption is that interest on that part runs only from the date when the borrower obtains the money secured by the instrument. But if the parties so intend, the instrument may be regarded as the equivalent of cash

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416 ; *Mansab* v. *Golab*, I. L. R., 10 All., 85 ; *Narindra* v. *Khadim Husain*, I.L.R., 17 All., 581 ; *Badi* v. *Sami*, I. L. R., 18 Mad., 257; *Thayar* v. *Lakshmi*, I.L.R., 18 Mad., 331.

(1) *Mathura Das* v. *Narindar*, I. L. R., 19 All., 39, P. C.

(2) *Moti Singh* v. *Ramohari*, I. L. R., 24 Cal., 699, F. B.

(3) *Bikramjit* v. *Durga Dyal*, I. L. R., 21 Cal., 274.

(4) See *post*.

(5) *Vithoba* v. *Vigneshwar*, I. L. R., 22 Bom., 107 (decided on 24th March 1896).

(6) (The Privy Council case was decided on 31st July 1896).

(7) *Rama Reddi* v. *Appaji*, I. L. R., 18 Mad., 482; *Brij Bhukhan Krishna* v. *Varadarajulu*, *ib.*, 338, *note*.

(8) *Narindra* v. *Khadim Husain*, I. L. R., 17 All., 581 (overruled as to other points in *Mathura Das* v. *Narindar*, I. L. R., 19 All., 39, P. C.); followed in *Rikhi Ram* v. *Sheo Pershad*, I. L. R., 18All., 31; dissenting from *Bikramji* v. *Dyal Tewari*, I.L.R.,21 Cal., 74.

(9) *Jageshur* v. *Ghanshyam*, 5 C. W. N., 356 ; *Lalla Chhajmal* v. *Brij Bhukhun Lall*, 22 I. A., 199.

(10) Art. 120, Sch. II, Limitation Act.

(11) *Seshaiyar* v. *Krishniengar*, I. L.R., 24 Mad., 99.

paid at its delivery, in which case interest will commence to run from that date.(1)

2203. Compound Interest.—Since contracts are to be enforced according to their terms, it follows that stipulations as to the payment of compound interest cannot be avoided in law.(2) For in the words of the Privy Council "the condition of treating interest as principal, so as to carry interest if it were not paid by a date mentioned in the bond, is just as much one of the conditions of the bond as any other conditions therein."(3) But in the absence of stipulation no compound interest can be awarded,(4) since there is no presumption in favour of compound interest, and which cannot be made even from the previous course of dealings.(5) Indeed, where there is no stipulation in a mortgage no interest is recoverable.(6) Compound interest is calculated from the date when default is made in the payment of interest according to the agreement, in the absence of which interest is presumed to accrue due from day to day.(7) Although a stipulation to pay compound interest is as a rule not penal, there may be circumstances when the Court will interfere to reduce and even to disallow it. (§§ 2215—2220). But a mere delay on the part of the creditor is not such a circumstance. Nor is the mere fact that the debtor was in urgent need of money in itself sufficient to raise the presumption that the creditor took unfair advantage of his necessity so as to call in the aid of the Court.(8) The question, whether compound interest was stipulated for, is a question of construction, in which not only the covenant but the context would have to be looked at. Thus, where in a deed the mortgagor after having stipulated to pay compound interest, which was to come out of the usufruct of the property placed in possession of the mortgagee, proceeded to provide for the payment of any deficiency by adding "we will pay it with interest at the rate mentioned above at the time of redemption" the Privy Council held that the interest on the deficiency must be held to be paid at the compound rate, since the latter clause must be taken to be only a concise way of bringing into application the earlier clause as to the payment of interest.(9) A promise "I shall repay in three years the aggregate amount with interest at 1 per cent. per mensem, adding interest to principal once in twelve months and take back the document. In default you are entitled according to law to recover from the hypothecated properties the amount accruing at 1 per cent. per mensem for the outstanding period,"—must be construed to mean that compound interest was payable until realization, not only at the original rate of interest but also at the enhanced rate. Such clauses are inserted for the benefit of the mortgagee and their rational construction appears to be that the stipulation as to enhanced rate does not nullify the covenant to pay compound interest if once stipulated and not expressly provided against.(10) Where there

(1) *Mhd. Akbar Khan* v. *Kasturchand*, 2 Nag. L. R., 179.

(2) *Ganga Pershad* v. *The Land Mortgage Bank*, I. L. R., 21 Cal., 366, P. C.; *Surya Narain* v. *Jogendra Narain*, I. L. R., 20 Cal., 360.

(3) *Per* Lord Hobhouse in *Ganga Pershad* v. *The Land Mortgage Bank*, I. L. R., 21 Cal. 366 (373) P. C.; for cases under the Regulations limiting interests, see s. 58.

(4) *Mahomed* v. *Ezekiel*, 7 Bom. L. R., 772 (790); *Dada* v. *Dhondo*, (1887) B. P. J., 12 (14); *Hari* v. *Ramji*, I. L. R., 28 Bom. (377); following *Ganga Pershad* v. *The Land Mortgage Bank*, I. L. R., 21 Cal., 366, P. C., *Kedar Lal* v. *Bishen Pershad*, I.L.R., 31 Cal. 332, P. C.; *Mosse* v. *Salt*, 32 Beav., 269; *National Bank* v. *United Hand in Hand Co.*, 4 App. Cas., 409.

(5) *Mahomed* v. *Ezekiel*, 7 Bom., L. R., 772 (790).

(6) *Kuriumma* v. *Madhava*, 11 M. L.J.R., 186.

(7) S. 36, *ante*.

(8) *Umesh Chandra* v. *Golap Lal*, I. L. R., 31 Cal., 243.

(9) *Jawahir* v. *Someshwar*, I.L.R., 28 All., 225 (231), P.C.

(10) *Ramanathan* v. *Nur Muhamad*, 11 M. L.J.R., 183, F.B.

is a stipulation both for enhanced and compound interest in case of default, it is competent to the Court to disallow interest at the enhanced rate as a penalty, but that does not imply that compound interest is also to be disallowed or that the Court should not decree instead of such interest a reasonable compensation not exceeding the amount stipulated in the contract. *A* stipulated for the payment, on a specified date, of half the principal sum advanced, together with interest at the rate of 15 per cent., per annum. and for the payment, on another date, of the balance of the principal, together with interest at the same rate. In case of default in the payment of either instalment it was provided that the whole amount of principal then due was to become payable, together with interest at the rate agreed, and compound interest at the rate of 24 per cent. per annum on the whole amount. It was held that it was for the Court to consider whether an addition of 9 per cent. was an unreasonable sum to allow by way of compensation for the non-payment of principal; the stipulation for payment of compound interest being regarded as compensation for non-payment of interest alone and not for non-payment of principal.(1)

2204. Rule of Dam-dupat.—The doctrine of *Dam-dupat* is intrinsically a rule of Hindu law, and was thus stated by Manu:

> " 151. Interest on money received at once, nor month by month, or day by day as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time: on grain, on fruit, on wool or hair, on beasts of burden, lent to be paid in the same kind of equal value, it must not be more than enough to make the debt quintuple "
>
> " 152. Stipulated interest beyond the legal rate, and different from the preceding rule, is invalid; and the wise call it an usurious way of lending: the lender is entitled at most to five in hundred."(2)

This rule for a time served the purpose of the Usury laws of western countries, and though it has now but a limited operation, it still obtains in favour of the Hindu debtor,(3) in the Presidency of Bombay and within the original jurisdiction of the Calcutta High Court,(4) and which limits the arrears of interest recoverable at any one time so as not to exceed the principal remaining due at the time.(5) The rule can only be enforced as before stated, when the debtor is a Hindu. A Mohammedan debtor cannot enforce the rule against his Hindu creditor,(6) nor can a Hindu debtor avail himself of it against a non-Hindu creditor, but it has been held that where the Hindu mortgagor disposes of his equity of redemption to a Mohammedan, the rule would apply so long as the equity was in the hands of the Hindu, the ordinary rule as to interest prevailing from the date the Mohammedan acquired his interest.(7) But where the original debtor was a Mohammedan and his rights were assigned to a Hindu,

(1) *Annamali* v. *Veerabhadram*, I. L. R., 26 Mad., 111.

(2) Inst., Chap. VIII; see also Mayuko, Ch. v., s. 1, cl 7. The rule as to *Dam-dupat* has been enacted in certain local regulations, the words of which must then supersede the common law rule on the subject (*cf.* Reg. III of 1877, s. 33, Ajmere Laws) which restricts the rule only to cases in which payment of money is enforced by the mortgagee and not where the mortgagor seeks to redeem; *Nemichand* v. *Radha Ballabh*, I. L. R., 26 All., 354.

(3) *Dawood Durveshdas* v. *Vullubh*, I. L. R., 18 Bom. 227; *Hari Lal* v. *Nazar Jeyram*, I. L. R., 21 Bom., 38; *Sundarabai* v. *Jayavant*, I.L R., 24 Bom., 114 (119).

(4) *Deen Dyal* v. *Koylash*, I.L.R., 1 Cal., 92; *Surjya* v. *Sirdhari*, I. L. R., 9 Cal., 825; *Het Narain* v. *Ram Dein*, *ib.*, 87; *Nobin Chunder* v. *Romesh Chunder*, I. L. R., 14 Cal., 781, F.B.

(5) *Dagdusa* v. *Ram Chandra*, I.L.R., 20 Bom., 611. See this case explained in *Nusserwanji* v. *Laxman*, I, L. R., 30 Bom., 452.

(6) *Hari Lal* v. *Nazar Jeyram*, I. L. R., 21 Bom., 38.

(7) *Ali Saheb* v. *Shahji*, I. L. R., 21 Bom., 85.

the rule of *Dam-dupat* would not apply, since the assignee was not personally liable, and the original Mohammedan debtor having charged the bond with a debt, he could not by any assignment prejudice his creditor or reduce the amount due to him, nor could he by assigning his land to a Hindu free it from any charge that existed on it at the date of the assignment.(1) It was, however, implied in the case that if the Hindu assignee had consented to sell off the property, or where personally liable, the rule would then have been applicable. The doctrine has no application where an account of rents and profits has to be taken, as where the mortgagee is in possession, and does not take the rents and profits in lieu of the whole or part of the interest.(2) Nor does the rule apply where there is a liability to keep accounts, although accounts may not have been actually kept,(3) since the rule is confined only to this that *at the same time* interest in amount greater than the principal cannot be recovered.(4) Hence, if the principal remain outstanding and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount of interest which may be thus received from time to time. (5) In other words, all that the rule prohibits is that the creditor may not recover more than double of the amount at any time remaining due, as on the last balance struck. He is not prevented from recovering more than the double of what he has actually lent.(6) The rule does not forbid the conversion of interest into capital by subsequent agreement. Nor does it preclude recovery of interest because the principal sum lent has been paid off.(7)

2205. It is moreover inapplicable unless there is only an account to be taken of principal and interest due on the mortgage, and no account of rents and profits on the other side.(8) If therefore there is a running account of rents and profits received by a mortgagee in possession, the rule is inapplicable unless there was an express stipulation that the rents and profits are to be taken in lieu of a fixed portion of the interest. (9) It would even seem that where according to the terms of the mortgage-deed an account may be taken, in other words, if there is a liability to account, the rule would cease to be applicable. (10)

The rule has been held to apply equally to cases where interest was to be paid in cash or grain. (11) But it does not regulate the award of interest discretionary with the Court as under section 34 of the Civil Procedure Code,(12) nor would it apply if it was not applicable at the time when thedecree became final and binding. (13) But in taking the account the rule is applied to the interest accruing on the mortgage-debt, both previous to and during

(1) *Hari Lal* v. *Nazar Jeyram*, I. L. R., 21 Bom., 38.

(2) *Gopal* v. *Gangaram*, I. L. R., 21 Bom., 721, F. B., overruling *Shri Ganesh* v. *Keshavrav*, I. L. R., 15 Bom., 625; followed in *Dhondset* v. *Ravji*, I. L. R., 22 Bom., 86; see also *Nathubhai* v. *Mulchand*, 5 B H. C. R., 196; *Narayan* v. *Satvaji*, 9 B. H. C. R., 83; *Balkrishna* v. *Har Govind*, I. L. R., 15 Bom , 84; *Sundarabai* v. *Jayavant*, I, L. R., 24 Bom., 114.

(3) *Dhonset* v. *Ravji*, I.L.R., 22 Bom., 86.

(4) Colebrook's Digest, I. P., 63; *Nobin Chunder* v. *Romesh Chunder*, I. L. R., 14 Cal., 781, F. B.

(5) *Dhondu* v. *Nirayan*, 1 B. H. C, R., (A C.), 47 (49).

(6) *Sukalal* v. *Bapu*, I.L.R., 24 Bom., 305.

(7) *Nusserwanji* v. *Laxman*, I. L. R., 30 Bom., 582.

(8) *Narayan* v. *Satvaji*, 9 B. H. C. R., 83; *Vasudeo* v. *Bhagvan*, [1878] B. P. J., 32; *Daji* v. *Daji*, [1873] B. P. J., 74.

(9) *Shankar* v. *Babaji*, [1881] B. P. J., 291; *Rango* v. *Balaji*, [1886] B.P.J., 76.

(10) *Dhond* v. *Ravji*, [1896] B.P.J., 202.

(11) *Anand Rao* v. *Durga Bai*, I. L. R.,22 Bom. 761.

(12) Old s. 209 (Act XIV of 1882); *Dhondshet* v. *Ravji*, I. L. R., 22 Bom , 86; *Lall Behary Dutt* v. *Thacomoney Dassee*, I. L. R., 23 Cal., 99.

(13) *Ib.*; and see *Buggoban* v. *Pran Coomaree*, I. L. R., 23 Cal., 903, *note*; *Kanaye Lal* v. *Anand Lall*, I.L.R., 23 Cal., 903, *note*.

the six months allowed for redemption, notwithstanding the decree, but the rule would prevent the allowance of interest after it is in amount equal to the principal. (1) But in a more recent case it has been held that the rule exists only so long as the contractual relation of debtor and creditor exists, and not when the contractual relation has come to an end by reason of a decree. (2) According to this view the rule does not apply to proof of a claim in insolvency as it amounts to a decree; as also because it has been the uniform practice of the Court not to apply it in insolvency proceedings. (3)

2206. The rule as a provision of Hindu law was never applicable to the mofussil of Bengal, although a similar rule was enacted by Regulation XV of 1793, but since the latter was repealed by Act XXVIII of 1855 (4) the result has been that while in Calcutta the rule remains unaffected by the repeal of the usury law, in the mofussil of Bengal (5) no similar rule is now in force. (6) Similarly, in the Madras Presidency where also a similar rule was enacted by Regulation XXXIV of 1802, (7) no such rule now exists and since the final repeal of the Regulation by Act II of 1869, (8) the rule has also ceased to exist in the United and other Provinces to which one or the other Regulation formerly applied. (9)

In Bombay the rule of *Dam-dupat* has been held to remain unaffected by the enactment of this rule and the Transfer of Property Act (10), but in a Madras case it has been held that the Hindu rule of *Dam-dupat* has been abrogated in respect of mortgages governed by this Act, under which the mortgagee is entitled to a decree for interest at the rate contracted for. (11) It is conceded that the rule is in the Indian Contract Act saved by the words excepting the performance of a promise if it is excused "under the provisions of any other law." (12) But it is contended that the provisions of this section and of section 88, are more stringent and are not saved by section, 2, clause (*a*), and that the rule must be held to have been abrogated. (13) But in taking this view the Court appears to have overlooked the provisions of section 4, which in regard to contractual matters subordinates this Act to the Indian Contract Act, and the effect of which should be to leave the rule intact, if it is saved by the Indian Contract Act, as in fact it is.

2207. The rule of *Dam-dupat* may then be said to be subject to the three following fundamental rules :—

(1) The rule applies in all cases as between Hindu debtors and creditors, both in respect of simple as also of mortgage-debts.

(2) It does not apply where there is a liability to account, as where the mortgagee having been placed in possession, is accountable for profits received by him as against the interest due.

(1) *Ram Kanye* v. *Cally Churn*, I. L. R., 21 Cal., 840.

(2) In re *Hari Lall Mallick*, 10 C. W. N., 884.

(3) *Ib.*

(4) S. 1.

(5) *Ram Lall* v. *Haran Chandra*, 3 B.L.R. (O.C.), 130; *Hakma* v. *Keman*, 7 B.H.C.R., (O.C.), 19; *Khusal Chand* v. *Ibrahim*, 3 B. H.C.R. (A.C.), 23; *Kadrari* v. *Atmarambhat*, *ib.*, 11 (18); *Ram Connoy* v. *Johur Lall*, I. L. R., 5 Cal. 867; *Het Narain* v. *Ram Dein*, I.L.R., 9 Cal., 871.

(6) *Surjya Narain* v. *Sidhary Lal*, I.L.R., 9 Cal., 825; *Deen Doyal* v. *Koylas Chunder*, I.L.R., 1 Cal., 92; *Nobin Chunder* v. *Romesh Chunder*, I.L.R., 14 Cal., 781 (788), F.B.

(7) S. 4; see *Kakarlapudi* v. *Uppalapadi*, 4 M.H.C.R., 5.

(8) *Annaji* v. *Raghubai*, 6 M.H.C.R., 400.

(9) *Sheobart* v. *Dharee*, II Agra (Pt. II); 194.

(10) *Jeevanbai* v. *Manordas*, 12 Bom., L.R., 992.

(11) *Madhwa* v. *Venkataramanjulu*, I.L.R., 26 Mad., 662 (670, 671), *contra*.

(12) S. 37, Indian Contract Act, *cf.* also Preamble of the Act.

(13) *Madhwa* v. *Venkataramanjulu*, I.L.R., 26 Mad., 662 (670, 671).

(3) But it applies if the profits are by the terms of the bond received for only a portion of the interest on the mortgage-debt.[1]

Liability of Hindu grandson.

2208. Apart from the rule of *Dam-dupat*, reference is sometimes made to other texts of Hindu law as ordaining the curtailment of interest. These texts, however, all relate to the personal liability of the son or grandson of the debtor irrespective of the existence of assets.[2] The contrary was no doubt laid down in a Bombay case,[3] but the report of this decision does not give any reason for the view adopted, and its soundness is questionable, and has been questioned in an Allahabad case, in which the rule is rightly held to be inapplicable to secured debts.[4] And its application to even unsecured debts is problematical.

2209. Penal Interest.—A stipulation for interest would be void if it is obnoxious to the provisions of section 74 of the Indian Contract Act. Such a stipulation being deemed to be inserted *in terrorem* in contracts to insure their due performance and penalize their breach the Court looking to the intention more than the form, relieves the mortgagor by limiting the relief only to a fair compensation for the breach. The stipulation by way of penalty may assume any shape or form, it may provide for the payment of damages or compensation for the breach of contract or covenant, or it may be what is more usual —a covenant for payment of interest at an enhanced rate in case of failure to pay the interest primarily fixed when due. The enhancement may, again be agreed to take effect retrospectively as from the date of the deed, or it may commence from the date of default. In the former case the Courts are agreed that whatever the enhancement the stipulation is necessarily penal as the Privy Council observed ; "The Indian Courts have invariably held that where the stipulation is retrospective and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that view of the statute.[5] It was unnecessary for their Lordships to discuss the effect of the stipulation as to increase of interest running only from default. Even in the former case though the stipulation is penal, it does not follow that the mortgagee should not be awarded a reasonable compensation for his breach of contract.[6] This and the other allied questions of penalty depend upon the interpretation of section 74 of the Indian contract Act, by which the legality of all penal covenants must be tested. These may not only provide for (*i*) interest at enhanced rate either (*a*) retrospectively from the date of the mortgage or (*b*) prospectively from the date of default: (*ii*) they may also covenant for the payment of interest only in case of breach no interest being payable before, or (*iii*) they may provide for the payment of a sum (*a*) specified or (*b*) unspecified as compensation. Then again (*iv*) the stipulation may provide for interest at an enhanced rate as a substantive part of the contract, allowing a stated reduction in case of punctual payment. Lastly (*v*) other covenants may be devised to circumvent the rule, in which case authority must be found in the section for defeating them.

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(1) *Sundara Bai* v. *Jayawant*, I.L.R., 24 Bom. 114.

(2) Narada, s. 33, Sacred Books of the East, pp. 41, 42; Vrihaspati; *ib.*, p. 328; "The father's debt, on being proved, must be paid by the sons as if it were their own; the grandfather's debt must be paid by his son's (sons) *without interest*;" [*Katyayana* also says that "a debt of the grandfather shall be paid by his grandsons *without interest*" Colebr., Dig., Vol. p. 207; Bk. 1. Ch. v., 197.

(3) *Narasimharav* v. *Krishnarav*, 2 B.H.C. R., 64.

(4) *Lachman* v. *Khunnu Lal*, I. L. R., 19 All., 26 (F. B.).

(5) *Sunder Koer v. Rai Sham Krishen*, I. L. R. 34 Cal., 150 (157), P.C.

(6) *Ib.* p. 158.

Limits of penal enhancement.

2210. This section of the Act was formerly the subject of much controversy, and the several Courts were by no means agreed as to its operation in relieving against penal clauses often found inserted in mortgages. It has, however, recently been recast, and it has been now expressly provided in the explanation added to the section that "a stipulation for increased interest from the date of default may be a stipulation by way of penalty."(1) Thus, where *A* gives *B* a bond for the re-payment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent, from the date of default, this is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.(2) There can, of course, be no question but that an agreement in such a case to pay interest at the enhanced rate *from the date of the bond*, instead of from date of the breach, would be *a fortiori* penal and wholly unenforceable in law;(3) the reason being, that in such a case "an additional money payment becomes immediately payable by the mortgagor"(4) in consequence of the breach, and which is, therefore, a penalty, the result being that while a covenant for retrospective enhancement how little so ever *must* always be treated as penal, that for enhancement from the date of default *may* be a penal, the question in this case being one of fact to be decided upon the circumstances of each case. If the enhancement is reasonable so as to be a fair recompense for the debtor's default then the Court would decree it; but should it be far in excess of a reasonable compensation but was rather in the nature of a clause *in terrorem* inserted to penalize the debtor for his breach of promise, then the Court would treat it as such, but in so treating it, it could not disallow it altogether, but merely reduce it to reasonable proportions rejecting the exaggerated claim and allowing a reasonable sum which the parties undoubtedly stipulated to give and take in case of default. But the present Act, it must be noted, takes for its illustration a case where the enhancement, from 12 to 75 per cent., is flagrantly excessive. The section is, moreover, so worded as to leave room for obtaining enhanced interest, although, no doubt, there may be cases in which the enhanced rate stipulated for is either so egregiously high or otherwise so oppressive as to call for the interference of the Court in the interest of the debtor. The effect of the new amendment is thus to modify the law so as to make the question of penalty one of fact to be determined according to the circumstances of each particular case. In this view of the law, it coincides with the view previously maintained by the Calcutta and Bombay High Courts(5) and overrules the Allahabad cases and

(1) Act VI of 8899 (Indian Contract Amendment Act, 1899).

(2) S. 74, ill. (*d*), Indian Contract Amendment Act (IV of 1899).

(3) *Mackintosh* v. *Crow*. I. L. R., 9 Cal., 689 (693); *Sungut Lal* v. *Baijnath*, I. L. R., 13 Cal., 164; *Kalkachand* v. *Shib Chunder*, I. L. R., 19 Cal., 392, F. B.; overruling *Baijnath* v. *Shah Ali*, I. L. R., 14 Cal., 248; *Baid Nath* v. *Shamanund*, I. L. R., 22 Cal., 143; *Ramendra* v. *Serajuddin*, 2 C. W. N., 234; *Manno* v. *Durga*. 2 C. W. N., 333; *Pardhan* v. *Narsing*, I. L. R., 26 Cal., 300 (305); *Denonath* v. *Nibaran*, I. L. R., 27 Cal., 421; *Sundar Koer* (*Rani*) v. *Rai Sham Krishen*, 11 C. W. N., 249 (257); I.L.R., 34., Cal., 150, P. C.; *Umar Khan* v. *Sale Khan*, I. L. R., 17 Bom., 106; *Nanjappa* v. *Nanjappa*, I. L. R., 12 Mad., 161; *Gopaludu* v. *Venkataratnam*, I. L. R., 18 Mad., 175; *Brij Bhukhan* v. *Samiuddin*, I. L. R., 25 All., 169. This view is now taken in *Abbakke* v. *Kinbiamma*, I.L.R., 29 Mad., 491 (496).

(4) *Sundar Koer* (*Rani*) v. *Rai Sham Krishen*, I. L. R., 34 Cal., 150. P. C.

(5) *Pardhan* v. *Narsing*, I L. R., 26 Cal., 300 (310); *Abdul* v. *Nandlal*, I. L. R., 30 Cal., 15 (18); *Umar Khan* v. *Salekhan*, I.L.R., 17 Bom, 106, F. B. The *contra* in *Deno Nath* v. *Nibaran*, I. L. R., 27 Cal., 491, is overruled by the Act.

also some of those of the Madras High Court. The trend of the Calcutta and Bombay cases is to hold that no covenant to pay enhanced interest from the date of default can be regarded as *per se* penal, unless there is a question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations.(1) As was recently observed in a case, increased rate of interest upon default *may* be a penalty, but it is not necessarily so in all cases merely because the increased rate is an exorbitant one.(2) For it might easily happen that for special reasons a sum of money might be at first lent on unusually favourable terms providing for the payment of compound interest at an enhanced rate, should the debt be not punctually paid as stipulated, in which case it could not be refused if it does not amount to more than a fair indemnity against loss.(3) Indeed, a stipulation to pay interest at 75 per cent. is not in itself a penalty(4) though the Court might hold the rate to be exorbitant and so calling for its interference. (5) In other words, there is no question of penalty where there is no enhancement. Moreover, a stipulation for the payment of compound interest on failure to pay simple interest at the same rate as was payable upon the principal is not a stipulation by way of penalty, though its effect may be to generally augment interest. (6) But a stipulation by the mortgagor that should default be made in payment of interest for one calendar month after becoming due, then the principal and interest shall thereupon become due, is presumably not penal and would be enforced. (7) Indeed, the question of penalty was not even suggested in the case.

2211. A stipulation in a bond that the principal shall be repaid by instalments on specified date (no provision being made for interest) and that on default of such payments of principal being made, interest shall be chargeable as from the date of the bond, is not penal. Even where the stipulation is penal, the Court is not to reject the claim based thereon *in toto*, for the plaintiff may not be entitled to recover at the stipulated rate, and yet be entitled to a reasonable compensation which the Court should assess in each case. (8) But in doing so it would seem to be just and equitable to give effect to the stipulations of the parties perfectly understood and freely entered into." (9)

(1) *Surya Narain* v. *Jogendra Narain*, I. L. R., 20 Cal., 360; followed in *Pardhan* v. *Narsing Dyal*, I. L. R., 26 Cal., 300; *Umar Khan* v. *Salekhan*, I. L. R., 17 Bom., 106. To the same effect in *Sadhasheo* v. *Krishna*, 2 C. P. L. R., 9; following *Stern* v. *Berk*, 32 L. J. Ch., 682.

(2) *Per* Rampini, J., in *Pardhan* v. *Narsing Dyal*, I. L. R., 26 Cal., 300 (310). [In this case the original rate was fixed at 2 per cent., it being stipulated that on default of payment on the due date it should be enhanced to 6 per cent. This view is now held by the Privy Council in *Sundar Koer (Rani)* v. *Rai Sham Krishen*, I. L. R., 34 Cal., 150, P. C.

(3) *Appa Rau* v. *Suryanarayana*, I. L. R., 10 Mad., 203.

(4) *Prayag* v. *Shyam Lal*, I. L. R., 31 Cal. 138 (140).

(5) *Satish Chunder* v. *Hem Chunder*, I. L. R., 29 Cal., 823; *Prayag* v. *Shyam Lal*, I.L. R., 31 Cal, 138 (141)

(6) *Ganga Dayal* v. *Bachu Lal*, I. L. R., 25 All., 26; *Janki Das* v. *Ahmat Hussain*, I. L. R., 25 All., 159; *Rameshwar* v. *Rai Sham Kishen*, I. L. R., 29 Cal., 43 (51), *Satish Chunder* v. *Hem Chunder*, I. L. R., 29 Cal., 823. Contra in *Mangniram* v. *Rajpati* I. L. R., 20 Cal., 366; *Baidnath* v. *Shamanand*, I. L. R., 22 Cal., 143, doubted in *Rameshwar* v. *Rai Sham Kishen*, *supra*. In a Bombay case governed by the rule of *damdupat* a stipulation that on default of payment of any instalment interest at 24 per cent. should be charged from the date of the transaction on the amount of the loan was held to be penal—*Trimbak* v. *Bhagchand*, 4 Bom. L. R., 713.

(7) *Yeo Htean Sew* v. *Abu Zaffer Koreshi*, I. L. R., 27 Cal., 938, P. C.; *Prayag* v. *Shyam Lal*, I. L. R., 31 Cal., 138 (141).

(8) *Rameshwar* v. *Rai Sham Kishen*, I. L. R, 29 Cal., 43, O. A., *Sunder Koer (Rani)* v. *Rai Sham Krishen*, I.L.R., 34 Cal., 150, P.C.

(9) *Rameshwar* v. *Rai Sham Kishen*, I. L. R., 29 Cal., 43 (50), O. A.; *Chenna Venkatasami* v. *Pedda*, I.L.R., 26 Mad., 445, following *Chajmal* v. *Brij Bhukan*, I.L.R., 17 All., 511.

In making good a claim for this compensation, it is not necessary to prove any resultant actual damage, for the law in such cases presumes the withholding of payment as in itself carrying with it loss to the person to whom such money is due. (1) In Bengal interest at 1 per cent. is usual (2) and in one case where the amount due on the mortgage-deed for Rs. 300 carried interest at 6 per cent. per mensem with monthly rests and which swelled the amount in a little over six years to a sum of about Rs. 10, 000, the Court had no hesitation in upholding the transaction, holding that the mortgagor having entered into the bargain without any undue pressure or undue influence on the part of the mortgagee, a pleader of position and repute, he could not be relieved of his bargain merely because it may be a hard and foolish bargain. (3) But if it were a hard bargain the Court would have relieved against it. In another case the Court refused to uphold a stipulation for the payment of interest at the rate of 75 per cent. per annum from the date of the bond, on the debtor's failure to pay the principal amount in two instalments as stipulated by him. (4) But in another case interest which worked up to 33 per cent. per annum on substantial security was decreed against an adult mortgagor, though it was reduced to 12 per cent. as against the minor co-mortgagor. (5) In Bombay interest enhanced from 2 to 3 per cent. per mensem has been allowed. (6) In Madras cent. per cent. enhancement has been considered not unreasonable, (7) and in another case interest at one pie per rupee per diem or 180 per cent. from the date of default, no interest being previously payable, was upheld, and it was pronounced not to be an exorbitant rate of interest, (8) but in Bombay where a higher rate of interest is usual, (9) this was not permitted. (10) In the Central Provinces interest has been allowed to be enhanced up to 24 per cent. per annum, but interest at 50 per cent. upon a grain debt was disallowed as being extortionate. (11) But 18 per cent. interest is there considered as usual and by no means too high, (12) while interest at 1 per cent. is regarded as "very moderate." (13), Enhancement from 8¼ per cent. to 37 per cent. was considered penal in Bombay and so probably it would be anywhere. (14) In one case where interest was enhanced from 6 to 12 per cent., the Privy Council observed that "it was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at

(1) *Surja Narain* v. *Pratap Narain*, I. L. R., 26 Cal., (964, 965); following *London, Chatham and Dover Railway Co.*, v. *South-Eastern Railway Co*, S.R. [1893] App. Cas, 429; see also *Denonath* v. *Nibaran*, 4 C.W.N., 122; *Wallis* v. *Smith*, 21 Ch. D., 243.

(2) *Surja Narain* v. *Pratap Narain*, I. L R., 26 Cal., 955 (962); *Miajan* v. *Abdul Jubbar*, 10 C. W. N., 1026; *Chinan* v. *Pedda Kondiah*, I. L. R., 26 Mad., 445

(3) *Krishna* v. *Brojo Nath*, 7 C. W. N., 876.

(4) *Miajan* v. *Abdul Jubbar*, 10 C. W. N., 1026.

(5) *Abhiram* v. *Mukunda*, 5 C. L. J., 542 (548).

(6) *Dullabh Dass* v. *Lakshman Das*, I. L. R., 14 Bom., 200. In *Poma* v. *Gillespie*, 9 Bom. L. R., 143 (147). 2 P. C. was said to be the highest rate of interest allowable in Bombay. But this statement appears to be too wide.

(7) *Basavayya* v. *Subbarasu*, I.L.R., 11 Mad., 294.

(8) *Sankaranarayana* v. *Sankaranarayana*, I. L. R, 25 Mad., 343.

(9) *Poma* v. *Gillespie*, I. L, R., 31 Bom., 348 (352).

(10) *Joshi Kalidas* v. *Dada Abhe Seng*, I.L. R, 12 Bom., 555. In another case interest at 24 per cent. was decreed on a personal security, though the rate was held to be the maximum that any Court should allow; *Poma* v. *Gillespie*, 31 Bom., 348 (353).

(11) *Dinanath* v. *Dharmala*, 4 C. P. L. R., 146; *Narain* v. *Bhagwandin*, 5 C. P. L. R., 108 (wherein compound interest superadded to interest at 24 p. c. was disallowed). See also *Janki Prasad* v. *Moharaj Singh*, 3 C. P. L. R., 48; and *Anand Rao* v. *Balkrishna*, 8 C. P. L. R., 77 (where interest enhanced from 1 to 2 p. c. was disallowed but because *all* enhancements were then regarded as penal).

(12) *Jagmohan* v. *Tikairtrae*, 6 C. P. L. R., 11.

(13) *Harlal* v. *Raja Gokuldas*, 12 C. P. L. R., 18 (23).

(14) *Sajaji* v. *Maruti*, I. L. R., 14 Bom., 274.

12 instead of 6 per cent. per annum in a given state of circumstances."(1) No interest can be allowed upon money expended in improvements, nor compound interest upon the sum spent by the mortgagee in protecting the subject of the security. (2)

2212. Interest as Compensation.—Where the contract is silent, interest may be awarded if otherwise permitted by law, in addition to which it may be awarded under the Interest Act,(3) which saves all cases in which interest was payable before the passing of the Act. Now since under Hindu law interest is payable on every debt after demand, it follows that in the case of Hindus governed by the Mitakshara, interest may be awarded by way of damages for the withholding of a debt due but not paid after demand.(4) But Hindu Law does not apply unless both parties are Hindus.(5) The Act, again, does not affect usage. (6) In other cases interest may be awarded at the current rate if the debt be (*a*) payable under a written instrument, (*b*) at a certain time; or (*c*) if payable otherwise, then from the date of written demand if it gives notice to the debtor that interest will be claimed from the date thereof till payment, where, however, it was expressly agreed that no interest shall be charged on a mortgage, no interest shall be chargeable under the Act, on the ground that the Act having been enacted in the interest of the creditor the latter could waive its benefit.(7) In order to establish a case for interest under the Interest Act it is not necessary to prove any loss or damage caused to the creditor. If it is proved those interests will be recoverable as compensation under section 73 of the Indian Contract Act, (8) where in a mortgage deed there was no stipulation for payment of *post diem* interest, such interest could be recovered under the Interest Act, though the claim for interest by way of damages would be subject to Article 116 of the Limitation Act; (9) nor could compound interest be allowed.(10) If the debtor voluntarily agrees to pay interest or damages on sums used or retained, he cannot be afterwards heard to plead that the agreement was without consideration.(11)

Penalty a question of fact.

2213. The question, whether a stipulation to pay interest at an enhanced rate is or is not a penalty, is a question of fact, and so, whether enhanced rate is provided for as from the date of the breach or as from the date of the bond, it is in both cases open to the Court to relieve a party against such stipulation if it is found to be penal.(12) But a proviso for retrospective enhancement is generally regarded as penalty which should be relieved against; but a proviso for interest in the

(1) *Balkishen* v. *Run Bahadur*, I. L. R., 10 Cal., 305 (314), P. C.

(2) *Kishory Mohun* v. *Ganga Babu*, I.L., R., 22 Cal., 228, P. C.

(3) Act XXXII of 1839. This Act extends to India the provisions of the English Act (3 and 4 Will, 4 C. 42 and English cases on that Act may be referred to as aids to construction. *Thakur Ganesh* v. *Thakur Harihar* I.L.R., 26 All. 299, P.C.

(4) *Sannadanappa* v. *Shivbasawa*, I. L. R., 31 Bom., 354 (364, 365) *contra Subramania* v. *Subramania*, I.L.R., 31 Mad., 250. Hindu Law not binding in such matters as the payment of interest at the stipulated rate allowed though it is a hard bargain. *Krishna* v. *Brojo Nath*, 7 C. W. N. 876.

(5) *Haji Muso* v. *Haji Nur*, 1 S.L.R. 179.

(6) *Juggomohun* v. *Manickchund*, 7 M. I. A. 263.

(7) *Lachmi Narain* v. *Sheik Abdul*, 5 I.C. 285.

(8) *Seraja* v. *Pratap Narain*, I. L. R., 26 Cal., 955.

(9) *Moti Singh* v. *Ramohari*, I. L. R., 24 Cal., 699 F.B., *Thayar* v. *Lakshmi*, I.L.R., 18 Mad., 331.

(10) *Marshall* v. *Bengal Spinning and Weaving Co.*, 1 C.W.N., 219.

(11) *Ramjiban* v. *Dhiku Singh*, 16 C.L J. 264; 16 I.C. 246.

(12) *Pardhan* v. *Narsing*, I. L. R. 26 Cal., 300; *Abdul* v. *Nandlal*, I.L.R., 30 Cal., 15; *Prayag* v. *Shyamlal*, I. L. R., 31 Cal., 138 (140); *Bhagwant* v. *Ganpati*, 1 N. L. R., 9 (14). The rule applies equally as between professional money-lenders and agriculturists. —*Nandlal* v. *Mt. Radha*, 1 N. L. R., 76.

future cannot be construed in the same light unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be a part of the primary contract between the parties.[1] It may be generally laid down as a test that, where the enhancement would more than compensate the creditor, it is penal.[2] But a stipulation, that the principal sum shall be repaid by instalments on specified dates (no provision being made for interest) and that, on default of such payments of principal being made, interest shall be chargeable as from the date of the bond, is not in the nature of a penalty.[3] The cases then provide for three classes of contingencies: (*i*) Where interest being originally payable, agreement to pay at an enhanced rate is made from (*a*) the date of the contract, or (*b*) from the date of default; and (*ii*) where no interest being originally payable, interest is stipulated for on default, or the happening of a premeditated contingency. In all these cases the trend of the law has been to uphold the sanctity of covenant unless it be shown to have been extorted, extortionate, or obtained under circumstances which show that there was no real contract between the parties.

2214. The Amending Contract Act [4] does not touch the latter class of cases, that is, those in which there is no covenant for *increased* rate of interest, and, even in those cases which it deals with, it does not enunciate any new rule, but only makes verbal changes. If the section had extended to the latter class of cases, the following illustration would illustrate the case in point: *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due, with interest from the date of default. The fact that interest is payable from the date of default, does not in itself render the stipulation one by way of penalty.[5] Even to cases covered by the Act, it only applies to contracts in respect of which any suit is instituted, or which is put in issue in any suit after the commencement of the Act. The words of the Contract Amendment Act—"put in issue"—mean nothing more than "which is in issue," and, where there is an appeal, the contract is *in issue* in appeal. The words, "or which is put in issue in any suit," were intended to apply to cases where, although the suit is not instituted in respect of the contract, the contract is put in issue in the suit. The words, "contract in respect of which any suit is instituted," apply to cases where a suit is brought to enforce a contract, or to have a contract set aside. The words, "contract which is put in issue," apply to cases where it becomes necessary for the Court to adjudicate upon a contract, although the suit was not brought either to enforce it or to have it set aside.[6]

But, while a stipulation to pay a higher rate of interest in default, whenever it is payable from the date of the bond, has been treated as a penalty,[7] the same result may sometimes be attained without incurring the odium by a stipulation in favour of interest at a higher rate, the same being liable to be reduced in case of punctual payment.

2215. Hard Bargains.—In England the Courts as Courts of equity have always possessed inherent power to set aside or modify oppressive and

(1) *Umar Khan* v. *Sale Khan*, I. L. R., 17 Bom., 106, F. B.; *Abdul* v. *Nandlal*, I.L.R., 30 Cal., 15 (17, 18); *Brij Bhukhan Das* v. *Sami-ud-din*, I. L. R., 25 All., 169.

(2) *The Protector, Endowment Society* v. *Briece*, 9 L. J., Q. B., 812; *Bholanath* v. *Kamta Pershad*, 14 C. P. L. R., 53.

(3) *Chenna* v. *Pedda Kondiah*, I. L. R., 26 Mad., 445.

(4) S. 4, Act VI of 1899.

(5) *Sankaranarayana* v. *Sankaranarayana* I. L.R., 25 Mad., 343.

(6) *Ibid.*

(7) *Kalachand* v, *Shib Chuder*, I.L.R. 19 Cal., 392; *Rameswar* v. *Rai Sham Kishen*, I. L.R., 28 Cal., 43 (50); *Sauder Koer* v. *Sham Krishen* I.L.R., 34 Cal. 150. P.C.

extortionate securities on equitable terms, though the interference of the Court has been mainly confined to (*a*) cases, in which the mortgagee has stipulated for some undue collateral advantange beyond the security for his principal money and interest; and (*b*) to securities taken from expectant heirs, or reversioners, or persons in great straits for money, especially if in weak health.[1] They have exercised this power apart from the usury laws the repeal of which did not affect their jurisdiction. And now since the enactment of the Money-lenders Act 1900 [2] those powers have been further defined enabling them to relieve the debtor where the interest or the amount charged for expenses, fines, injuries, bonus, premium, renewals, or other charges is excessive, and the transaction is harsh and unconscionable: or is otherwise such that a Court of Equity would give relief, the effect of which is to enable the Court to give relief in a transaction "harsh and unconscionable" even though it is not "such that a Court of Equity would have given relief" before the Act.[3]

The Indian Courts do not appear to possess the same inherent jurisdiction as the English Courts and their power to interfere with the freedom of contracts is circumscribed by the provisions of the Indian Contract Act.[4] The fact that the contract is a hard bargain is not sufficient.[5] In order to justify interference it must fall within the first clause of section 16 of that Act which requires (*a*) that the relations subsisting between the parties must be such that one of the parties is in a position to dominate the will of the other; and (*b*) he must use that position to obtain an unfair advantage over the other. Urgent need of money on the part of the debtor does not itself place the creditor, in a position to dominate the will of the debtor [6] though it is one element facilitating his subjection to the will of the other. His consent to pay an excessive rate of interest is also evidence tending the same way.[7] Where added to these facts the creditor is shown to be the debtor's village money-lender and the debtor a blind man under his influence, it is then a case for the Courts' interference.[8] Except for fraud[9] or undue influence or a covenant amounting to a clog [10] there is then no room for a plea of hard bargain in this country[11] (§ 2220).

2216. The term hard bargain means an unconscionable bargain.[12] But as the Privy Council observed even "an English Court of Equity could not give relief from a transaction of contract merely on the ground that it was a hard bargain,"[13] Any one, therefore, who claims to be relieved from a hard bargain against which the Court has power to interfere, must in the first instance show that the relationship of the parties to the bargain, or the circumstances of his case were

(1) *Croft* v. *Graham*, 2 De. G. J. & S. 155, 46 E. R. 334.

(2) 63 and 64 Vict. C. 51.

(3) The words quoted are alternative. In re *Debtor*, [1903] 1 K.B. 705 (710); *Samuel* v. *Newhold*, [1906] A. C. 461 in footnote to which S. 1, of the Statute is set out *in extenso*.

(4) *Dhanipal* v. *Maneshar*, 28 All. 570 (581) P.C.; *Maneshar* v. *Shadi Lal*, I.L.R. 31 All. 386 (392, 393) P.C.; *Kesavalu* v. *Arithulai*, 22 I.C. (Mad.) 769; *Ranee Annapurni* v. *Swaminatha*, I.L.R. 34 Mad. 7 (10); *Nihal Chand* v. *Gulam Muhammad*, (1913) P.L.R. 235; 19 I.C. 856; *Sundar Singh* v. *Hunam Singh*, (1914) P.L.R. 219; 24 I.C 926; *Joti Pershad* v. *Hakim Ali*, (1914) P.L.R. 73; 22 I.C. 528.

(5) *Dhanipal Das* v. *Maneshar*, I.L.R., 28 All., 570 (583) P.C., *Bhagwant* v. *Ganpati*, 1 N.L.R., 9 (12); *Jagnanatha* v. *Babchand*, 4 N.L.R., 187.

(6) *Sundar Koer* v. *Rai Sham Krishan*, I. L.R., 34 Cal., 150 (156) P.C.; *Kali Prosonno* v. *Protap Singh*, 17 C. L. J., 221; 18 I.C. 965.

(7) *Kasavalu* v. *Arithulal*, I. L. R., 36 Mad., 533.

(8) *Bhola Singh* v. *Kishore Chand*, (1913) P.L.R., 147; 20 I.C. 8.

(9) § 2218.

(10) *Gayadin* v. *Harkaran*, 6 O.C. 267.

(11) *Satish Chunder* v. *Hem Chunder*, I. L. R., 29 Cal., 823; *Nihal Chand* v. *Gulam Muhammad*, (1913) P.L.R., 235; 19 I.C. 856.

(12) *Middleton* v. *Brown*, 47 L. J. Ch., 411.

(13) In *Dhanipal Das* v. *Maneshar*, I. L. R., 28 All., 570 (583), P. C.

such as to entitle him to claim exceptional protection, except perhaps where the extortion is so great as to be of itself evidence of fraud. For this purpose the Court may look to the reasonableness of the bargain, and if it finds that the rate stipulated was unconscionable, extortionate or grossly exorbitant, it may then modify the contract not because it is a hard bargain, but because it must have been brought about by the exercise of undue influence. But in one case the Privy Council interfered with a contract on the sole ground that it was a "hard bargain" and in support of their view they cited with approval the practice of the English Courts of Equity in the words of Jessel, M. R. who said: "The point to be considered is, was there a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside." (1) The case before their Lordships, however, was one in which the creditor stood in a fiduciary relation to the debtor, who, a pardanashin lady, had borrowed money from her own agent, money which he lent her *benami* on ample security at 48 per cent. per annum. The case again was decided in 1885 when the Courts might well have drawn upon the general principles of equity, justice and good conscience, but with the amendment of section 16 of the Indian Contract Act in 1899 (2) the Legislature has indicated the lines and limits of judicial interference with contracts, which are presumably exhaustive, excluding further excursion into the uncertain regions of equity. (3) At any rate the Courts now seldom interfere on the ground of hard bargain, and it may be doubted whether they have jurisdiction to do so on that ground alone. But while this is now the prevailing view (4) there are cases in which relying upon the general language of the Privy Council the Courts have assumed jurisdiction to relieve debtors of their onerous contracts on the ground of hard bargain (5) but of these latter cases there are many in which though the Courts professed to relieve the debtors of their hard bargains still there were other facts which would have justified their interference equally under the provisions of section 16 of the Indian Contract Act.(6) Similarly cases in which the Courts interfere to relieve against a covenant for enhanced interest on the ground of penalty are clearly distinguishable, for they fall under another provision of law (§ 2209).

What constitutes undue influence.

2217. These provisions appear to be sufficiently elastic to meet ordinary cases of hard and unconscionable bargain in which the Courts do and are bound to interfere. But, in their application the Courts have so often drawn upon the English precedents that the distinction between the English equity and the

(1) *Kamini Sundari* v. *Kali Prosunno*, I. L. R., 12 Cal., 225 (239), P. C.; following *Beynon* v. *Cook*, L. R., 10 Ch., 389, (391); *Lalli* v. *Ram Prasad*, I. L. R., 9 All., 74; *Miajan* v. *Abdul Jubbar*, 10 C. W. N., 1026.

(2) Act VI of 1899, s. 2.

(3) *Gokul Mandar* v. *Pudmanund*, I.L.R.,29 Cal., 707 (715), P.C.; *Dhanipal* v. *Maneshar*, I. L. R., 28 All., 570 (583) P. C.; *Chatring* v. *Whitchurch*, I. L. R., 32 Bom.,208 (212).

(4) *Deno Nath* v. *Nibram*, I.L.R., 27 Cal., 421 (427); *Satish Chunder* v. *Hem Chunder*, I.L.R., 29 Cal., 823; *Umesh Chandra* v. *Gopal Lal*, I.L R., 31 Cal., 233 (240, 241); *Abdul Kadir* v. *Bagdade*, 15 I.C., (Mad.), 377; *Hari* v. *Ramji*, I.L.R., 28 Bom., 371 (376); *Chatering* v. *Whitchurch*, I.L.R., 32 Bom. 208 (212); *Debi Sahai* v. *Ganga Sahai*, 6 I. C., (All.) 572; In *Dhanpal* v. *Maneshar*, I.L.R., 28 All. 570 (583) P.C., Lord Davey said: "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended section only,"

(5) *Kali Nath* v. *Tralokya Nath*, I. L. R., 26 Cal., 315 (321); *Kirpa Ram* v. *Samiuddin*, I. L. R., 25 All., 284, (286); *Balkrishan* v. *Madan Lal*, I.L.R., 29 All., 303; *Sankar* v. *Hardas*, 3 C.P.L R., 115; *Lalli* v. *Ram Prasad*, I. L. R., 9 All., 74; *Madho Singh* v. *Kashi Ram*, *ib.* 228 (229); *Chunni Kuar* v. *Rup Singh*, I.L.R., 11 All. 57.

(6) *Kirpa Ram* v. *Samiuddin*, I. L. R., 25

Indian enactment has at times vanished. Generally speaking, undue influence entitling a party to relief may be proved (*i*) by proof of general relationship which gives one a dominating position over the other and (*ii*) use of such position to obtain an unfair advantage over the other. But if the first is present and the contract appears unconscionable then the Courts are entitled to presume that the contract was unduly influenced. Now, the relationship conferring dominating influence may either be (*a*) where one holds a real or apparent authority over the other; such as master and servant, parent and child [1] husband and wife, priest and worshipper, landlord and tenant, or (*b*) where one stands in a fiduciary relation to the other, as in the case of solicitor and client, solicitor's managing clerk and client [2] but there is no such relationship between a creditor and debtor.[3] (*c*) Where the parties to a transaction are not on equal footing, as a person possessing normal faculties, contracts with one whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. This last class naturally bears the closest affinity to cases of hard bargains, since exorbitant interest can readily be ascribed to mind enfeebled by distress, but there still remain cases when it is agreed to, through sheer necessity, in which case the section lends no assistance and the Court can only offer redress if it possesses additional inherent power outside the Code. It cannot be argued that the two views in the end coincide, for the power of reduction of interest possessed by the English Courts is something wider and different to the power of intervention contemplated by the Indian Contract Act. It may be that the two rules may have the same purpose in view, but if so they seek to attain it by divergent means. But to a certain extent they take a parallel course, though they clearly part company as soon as undue influence ceases. Law would be no law if it did not discountenance the designs of calculating rapacity, and left a party innocent or weak to its own fate. Indeed, the rules of law have always been understood to be subject to this, that no man shall be permitted to aggrandize himself unduly at another man's expense, and while the Court is justly chary about interfering with contracts made by persons standing to each other on equal terms, the Court will unhesitatingly intervene where the contract bears manifest signs of fraud or unfair dealing. But, as already remarked, the mere fact that the debtor was in urgent need of money is not of itself sufficient to raise the presumption that the creditor took unfair advantage of his necessity, [4] though this fact would be relevant as tending to make the taking of undue advantage by the creditor possible.[5] A bargain as to compound interest in a mortgage-bond, which is not itself open to objection as hard and unconscionable cannot be held to have assumed that character by reason of the delay on the part of the creditor in suing on the bond.[6]

All., 284 (286); *Balkrishan* v. *Madan Lal*, I.L.R., 29 All., 303.

(1) *Lakshmi* v. *Bhoop Laul*, I. L. R., 30 Mad., 169; *vice versa*, *Ismail* v. *Hafiz*, I.L.R., 33 Cal., 773; P.C.

(2) *Harivalabbdas* v. *Bhai Jivanji*, I.L.R., 26 Bom. 689.

(3) *Meghraj* v. *Ganga Baksh*, 7 A. L. J., 729.

(4) *Umesh Chandra* v. *Golap Lal*, I. L. R, 31 Cal., 233; *Sundar Koer* v. *Rai Sham Krishan*, I. L. R., 34 Cal., 150 (156); P. C.; *Kali Prosonno* v. *Protap Singh*, 17 C. L. J., 221; 18 I. C. 965.

(5) *Cf. Per* Lord Davey in *Dhanipal Das* v. *Maneshar*, I. L. R., 28 All., 570 (583) P. C.

(6) *Umesh Chandra* v. *Golap Lal*. I. L. R., 31 Cal., 233. In *Madho Singh* v. *Kashi Ram* I.L.R., 9 All., 228, Oldfield and Tyrrell, JJ., laid down the contrary, but their judgment is meagre and beyond citing certain cases (*Kamini Sundari* v. *Kali Prosunno*, I. L. R., 12 Cal., 225, P. C.; *Beynon* v. *Cook*, L.R., 10 Ch., 389; *Lalli* v. *Ram Prasad*, I. L. R., 9 All., 74), discloses no reasons why a bargain should be held to be hard and unconscionable merely because the loan was made to meet a pressing necessity or that its recovery was delayed as in the case for nine years.

2218. When the interest charged in a mortgage-bond is very high and the debtor is of full capacity, the general rule is that the Court will not grant relief without proof of unfair dealing or undue pressure or influence on the part of the creditor, or that the creditor has taken unfair advantage of the debtor's weakness and necessities, or that the debtor has been overreached, tricked or deceived, or that he was ignorant of the unfair nature of the transaction.(1) For example, where a youth of 18, a spendthrift and a drunkard, gave a mortgage stipulating to pay interest at 2 per cent. with monthly rests, and which swelled the original sum of Rs. 900 advanced to over Rs. 5,000 in eight years, the Court was held justified in disallowing interest at the rate stipulated, and decreeing, instead, simple interest from the date of the bond. (2) "The real question in every case," in the words of Denman, J., "seems to me to be the same, ... that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside; sometimes great distress. Sometimes infancy has been imposed upon, and transactions, though ratified at the full age, have been set aside because of the original vice with which they were tainted. In every case the Court has to look to all the circumstances. In some cases may result the conclusion that there exists mere inadequacy of price, or exorbitance of interest charged, in which case the transaction will not be interfered with. But in others, taking the whole history together, it may present so many features of unconscientiousness, extortion, and unfair dealing on the one side and weakness on the other as to compel the Court to exercise its equitable jurisdiction, at all events, so far as to restrain the profits of the money-lender within fair and reasonable bounds." (3) But as applicable to this country, this statement of the law is too wide, (4) though acting upon it the Courts have erroneously refused to enforce even contracts, on their being shown to be iniquitous and unfair. (5) But, where these elements were wanting, the Court allowed interest even at 75 per cent. per annum, holding that the mere stipulation to pay interest at an inordinate rate did not render the transaction harsh and unconscionable, though it might become so if other circumstances contribute to that inference. In such case, one of the most important circumstances is, whether the debtor understood the transaction, and, without any misrepresentation or pressure by the creditor, had voluntarily agreed to pay the interest claimed. (6)

Relief against hard and penal bargains.

2219. Although, according to section 2 of Act XXVIII of 1855, which repealed all usuary laws, a man is free to contract to pay any rate of interest that he chooses on the money borrowed, and he may do so from any time, either prospective or retrospective, the Courts no doubt influenced by the course of decisions of the English Courts (§§ 2215—2216) for sometime maintained the view that the repeal of the usury law did not take away the equitable

The latter cannot retract on the original contract; and the former may at best be a circumstance to be taken into consideration.

(1) *Umesh Chandra* v. *Golap Lal*, I. L. R., 31 Cal., 233 (*Zebonnissa* v. *Brojendra*, 21 W. R., 352; *Mackintosh* v. *Wingrove*, I. L. R., 4 Cal., 137; *Magniram* v. *Rajpati*, I. L. R., 20 Cal., 366; *Surya Narain* v. *Jogendra Narain*, I. L. R., 20 Cal., 360; *Wilson & Co*, v. *Osborn* [1901], 2 K. B., 110,

(2) *Kirpa Ram* v. *Sami-ud-din*, I. L. R., 25 All., 284.

(3) *Nevill* v. *Snelling*, 15 Ch. D., 679 (702, 703).

(4) This is recognized by the Legislature and proceedings are pending before the Government of India who have taken advice on the strengthening of law to relieve against un conscionable bargains.

(5) *Shankar* v. *Hardass*, 3 C.P.L.R., 115.

(6) *Carrington* v. *Smith*, [1906] 1 K.B., 79.

jurisdiction of the Courts to relieve against a penalty.(1) A Court of Equity will, it was said, inquire whether the parties really did meet on equal terms; and if it be found that the obligor was in distressed circumstances,and that advantage was taken of that distress, it will avoid the contract. As observed by Story: "Law as a science, would be unworthy of the name if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity on one side, and of skill, avarice, cunning and a gross violation of the principles of morals and conscience on the other . . . . . The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud or oppression, or harsh and vindictive injury."(2) No Court will, it was said, countenance an act of imposition if it comes to its light. If then the money-lender takes advantage of the weakness or necessities of the intending debtor, and offers him money at usurious rates, the Court will certainly not enforce the contract to the disadvantage of the party imposed upon. This was the case of an illiterate cultivator who had agreed to pay, in addition to interest at 24 per cent., *dharta* of a yearly fine at the rate of one anna per rupee upon the sum remaining unpaid at the end of each year, with the result that the sum of Rs. 97 originally lent to him was swelled into a claim of Rs. 873 in ten years, when the Court held that, apart from section 74 of the Indian Contract Act, the stipulation was unconscionable and oppressive, and could not be enforced.(3) Similarly, where the defendant, being pressed in the Tehsil for immediate payment of revenue due, was compelled to agree to the payment of compound interest at 24 per cent. per annum notwithstanding that ample security was given by mortgage of landed property, and where the mortgagee wilfully delayed in enforcing his claim, it was held that the bargain was hard and unconscionable one, which the Court had undoubted power to refuse to enforce; and that, under the circumstances, compound interest should not be allowed.(4) So a contract to pay interest at the rate of 75 per cent. on arrears of rent which are a first charge on the tenant's holding was held to be an unconscionable one, and against which the Court granted relief.(5) But in other cases it was pointed out that since the repeal of the usury law the Courts possessed no power beyond that conferred on it by sections 16 and 74 of the Indian Contract Act to disallow interest merely because it was unconscionable and excessive.(6) As both these sections have now been amended and their scope enlarged,(7) they appear to be comprehensive enough to deal with all cases of penalty, and the only case not directly dealt with by them is that of a hard bargain (§ 2215). But though the Courts have not the power to relieve a party against hard and usurious bargain, it has an important bearing on the question whether the stipulation was a fair contract or a penalty.(8) The question in each case is one of fact.(9) A stipulation merely accelerating payment of the

(1) *Motaji* v. *Sheikh Husen*, 6 B H.C.R. 8; *Para* v. *Gobind*, 10 B.H C.R. 382; *Velchand* v. *Flagg*, I.L.R. 36 Bom. 164; *Chubammal* v. *Mir*, I.L.R., 2 All. 715; *Bánsidhar* v. *Bu Ali Khan*, I.L.R., 3 All. 260; *Kunj Behari* v. *Kali Baksh*, I.L.R., 6 All. 64; *Maya Ram* v. *Naubat*, (1885) A.W.N. 85; *Lalli* v. *Ram-Parsad*,I.L.R.9 All. 74; *Vythilinga* v. *Ravana* I.L.R.6 Mad, 167; *Kanai Lal* v. *Narayandas*, (1894) P. R. No. 99; *Miajan* v. *Abdul*, 10 C.W.N 1020; *Sanfrab* v. *Changu*, 7 N.L.R. 46.

(2) Equity Jurisprudence (11th Ed)., 1316, cited *Lalli* v. *Ram Prasad*, I.L.R., 9 All., 74 (77).

(3) *Lalli* v. *Ram Prasad*, I.L.R. 9 All 74.

(4) *Madho Singh* v. *Kashi Ram*, I.L.R., 9 All, 228; *Poma* v. *Gillespie*, I.L.R., 31 Bom., 348 (353); *Dinanath* v. *Dharmola*, 4 C P L.R. 146; *Puranchand* v. *Behari Lall*, *ib*., 144.,

(5) *Narendra Kumar* v. *Gorachand*, I. L. R., 33 Cal., 683 (688).

(6) *Arjan Bibi* v. *Asgar Ali*, I.L.R. 13. Cal., 200; *Gokul Chand* v. *Khaja Ali*, (1890) P. R. 32; *Sankaranarayana* v. *Sankaranarayana*, I.L.R. 25 Mad 348.

(7) Act VI of 1899, s. 4.

(8) *Khagaram* v. *Ram Sankar*, 21 C.L.J., 79 (85).

(9) In England it is stated to be one for the Judge and not for the jury—*Abrahams* v.

whole debt on default of payment of one or more instalments is not, by itself a penalty, (1) but a stipulation that on such a default being made, not only shall the whole balance become immediately exigible, but it shall also carry interest at 75 per cent. per annum would doubtless be regarded as penal, because it does not merely represent the damage caused to the creditor but is rather intended as an effective means to secure punctual performance of the contract.(2)

2220. The combined effect of the two sections of the Indian Contract Act justifies relief to a mortgagor only on the two following grounds (*i*) undue influence (*ii*) penalty to which must be added fraud, coercion and misrepresentation.

In a case decided by the ultimate Court of appeal, the debtor was a person disqualified from creating any charge upon or interest in his property, but he was personally free to contract. While labouring under this incapacity, of which fact the creditor had notice, the latter advanced two sums of money aggregating Rs. 5,750 at 18 per cent. compound interest, which their Lordships reduced to simple interest, regarding the charging of compound interest as "in the circumstances unconscionable."(3) In this case, however, as their Lordships explained in another case, "the borrower was a disqualified proprietor" under the Oudh Land Revenue Act, 1876, and his estate was under the management of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability, and the position of the parties was such that the lender was "in a position to dominate his will."(4) But where the borrower labours under no peculiar disability known to the creditor, and of which he may be presumed to have taken advantage, a mere urgent need of money on the part of the debtor would not by itself suffice to raise the presumption of undue influence.(5) In another case a person in solvent circumstances passed a promissory note for £ 3,300, on receiving £ 2,000, the amount being repayable in monthly instalments, the whole sum being at once recoverable on default in payment of any instalment. The debtor was a man of intemperate habits, and his business capacity had consequently become somewhat impaired, though the creditor knew nothing about it. The debtor having died from the effects of intemperance, his executor resisted the claim as harsh and unconscionable: and it was so held in the circumstances, and having regard to the absence of risk. (6) In another case the debtor was under arrest for non-payment of Government revenue, but had received temporary release to go to the creditor to raise a loan which he did at 37 per cent. compound interest. The fact of his arrest was known to the creditor who was bold to have dominated the will of the debtor justifying the reduction to 18 per cent. compound interest. (7) The relief given by the Courts on the ground of hard bargain must be distinguished from that given against a stipulation by way of penalty. In the one case, relief is given because the parties were not on level ground; but, in the other case, the parties may be on level ground, but relief is given because the covenant was never really intended to be enforced, as it was inserted *in terrorem*, or to ensure prompt performance.(8) In the one case there was an intention to pay, but it was coerced; in the other case there was no intention at all. The one is ordinarily a question of law;

Dimmock, (1914) W.N., 449.

(1) S. 74 *ill.* (*f*), Indian Contract Act.

(2) *Khagaram* v. *Ram Sankar*, 21 C.L.J. 79 (86).

(3) *Dhanipal Das* v. *Maneshar*, I. L. R. 28 All., 570 (583), P. C.

(4) *Sundar Koer (Rani)* v. *Rai Sham Krishen*, I. L. R., 34 Cal., 150, P. C.

(5) *Ibid.*

(6) *Saunders* v. *Newbold*, [1905] 1 Ch., 260 (275); *Balkishen* v. *Madan Lal*, I.L.R., 29 All., 303.

(7) *Baldeo* v. *Bulaki* 7, A.L.J. 591.

(8) *Bhagwant* v. *Ganpati*, 1 N.L.R., 9 (14).

but the other is always a question of fact, (1) though it may become a mixed question if its determination shews violation of some recognized canon of law.

2221. Costs.—Besides the principal and interest, the section also entitles the mortgagee to take into account his costs of the suit, if any, awarded to him. In the matter of costs, the Court is given full power to give and apportion them in any manner it thinks fit. (2) But, since the discretion given to it is a judicial discretion, it is not to be exercised arbitrarily, but subject to well-defined rules founded upon reason and practice. And the general rule is, that the party who has been driven to Court must obtain his costs from the defendant who has driven him to it, that is, in other words, the costs follow the result of the case unless there are special reasons to the contrary. And, similarly, it has been held in England in construing the rule (3) upon which section 220 of the Code of Civil Procedure is moulded, that, in giving full discretion to the Courts, the law does not give them power to deal with costs in a way contrary to the principles on which the Courts act, and which do not entitle the Courts to inflict them upon the successful party without reason founded upon some particular misconduct of the party. (4) Where costs are referred to the taxing master for assessment, he should in all cases shew to both parties the reasons he is prepared to submit to the Court for the disallowance of any item. (5) Amongst the items which go to make up costs are the money paid for court-fees on the plaint, process-fees, exhibits in the case, witnesses' diet-money and expenses, commissioner's or accountant's fee, cost of translations, and pleader's fee, the last being calculated *ad valorem* according to a fixed scale, irrespective of any private arrangements, between pleader and client. (6) Cost must be decreed only against the parties to the suit, (7) and where there are more than one plaintiff or defendant having distinct interest, the costs must be apportioned proportionately between them. (8) But, where the interests of the parties are separate and distinct, a separate set of costs may be allowed to each. (9) And the Calcutta High Court has allowed costs of two counsels engaged by a purchaser, against whom allegations of improper conduct were made by the other party. (10) The successful party is, however, not entitled to more than the necessary costs. If, then, the costs have been lavishly incurred, as in proving points admitted by the other side, or in adducing overwhelming, or irrelevant evidence, (11) it is a matter which the Court will look to when awarding them. Thus, where the defendant's pleader, who could have had the plaint rejected without trial, files a written statement raising a variety of defences, but not raising the very point which ultimately causes the shipwreck of the suit, it was held that the defendant ought to bear the loss which his pleader, by dint of care, might have avoided. "To hold otherwise

(1) *Bhagwant* v. *Ganpati*, 1 N.L.R., 9 (14).

(2) S. 220, Civil Procedure Code (Act XIV of 1882).

(3) Order lv, Rule 1, Judicature Act, 1873 (36 & 37 Vict., c. 66); Rules of the Supreme Court, Order lxv, Rule 1.

(4) In re *Mills Estate*, 34 Ch. D., 24 (25); *Dicho* v. *Yates*, 18 Ch. D., 76 (84); *Foster* v. *Great Western Railway Co.*, 8 B.D., 515; *Harnett* v. *Vise*, [1900] 1 Q. B., 35; *Bostock* v. *Ramsay Urban Council*, [1900] 2 Q. B., 616, in which instances of what has been considered good cause for depriving a successful party of his costs are discussed, and followed in *Ganesh* v. *Narayan*, 4 Bom. L. R., 106 (115). Maxwell on the Interpretation of Statutes (3rd Ed,). p. 115.

(5) *Dashwood* v. *Megniae*, [1892] W.N. 54.

(6) *Umrutonath* v. *Roghoonath*, 6 W. R. (Mis), 35; *Arimulla* v. *Secretary of State*, I. L. R., 15 Mad., 405; affirmed in *Muhammed Alim* v. *Secretary of State*, I.L.R., 17 Mad., 162.

(7) *Jointee Chunder* v *Anunto Lall*, 14 W. R., (O. A.), 1.

(8) *Bhup Singh* v. *Zain-ub-Abdin*, I. L. R., 9 All., 205.

(9) *Kossella Koer* v. *Beharee*, 12 W.R., 70; but see *Pyari Mohun* v. *Gazi*, 11 W. R., 270.

(10) In the matter of *Beer Nursing Dutt*, I.L.R., 24 Cal., 891.

(11) *Bishenmun Singh* v. *Land Mortgage Bank*, I. L. R., 11 Cal., 244 P. C.; *Raja of Pittapur* v. *Sri Raja Row*, 12 I. A., 22.

would be to make the plaintiffs answerable for the mistake of their adversary's vakil."(1)

2222. But the losing party must bear the costs of the successful party incurred through the error of the Court.(2) If the conduct of the plaintiff is found to be blameworthy, the Court mulcts him in costs. Thus, where, after a valid tender by the mortgagor, the mortgagee institutes a suit on the mortgage, he cannot be allowed his costs.(3) But if the whole amount due on the mortgage is not tendered, the mortgagee is justified in coming to the Court.(4) But his right to recover costs would still depend upon what is found actually due, and upon what matters the parties were at issue. Indeed, it is the practice of the Chancery Court to apportion the costs rateably between the issues,(5) and there is nothing technical in that practice that may not be followed in India. If the mortgagor was at an issue on a point or only a portion of the claim, there is no reason why he should be saddled with the full costs of the suit to the same extent as if he had disputed the whole claim. On the other hand, if the bargain made by the mortgagee is a usurious one,(6) or so extravagant that only a small portion of it is decreed,(7) the Court may refuse to grant any costs, and may, moreover, allow the defendant his costs if he was not to *blame* for the litigation.(8) And so where the plaintiff joins unnecessary parties, they must be discharged with costs upon him.(9) But a defendant, though unnecessarily joined, will forfeit his costs if he has resisted the claim on unsubstantial ground, and thus challenged issues.(10) But a successful defendant cannot be deprived of costs on the ground of improper conduct unconnected with the issue as between himself and the plaintiff, such as, for example, misrepresentation to the public.(11) A party acting with malice and malevolence has no right to obtain costs, (12) but, where the claim is an honest one, and mainly succeeds, full costs may be properly awarded.(13) It is inappropriate and contrary to the practice of the Court to investigate the merits of a case merely to determine the incidence of costs.(14) Where an application is made for a new trial, and the application is opposed and a new trial is granted, the question of costs must not be left to abide the result of the new trial. (15)

Where the relief sought in the plaint was not clearly stated, though it could not be stated that the plaintiff was incapable of being viewed as seeking for any relief of the sort claimed, the High Court remanded the case to the Court of first instance, but subject to the plaintiff-appellant paying all costs incurred up to date, for which a month calculated from the date of the receipt of the record by

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(1) *Seeta Patta* v. *Suryudamma*, I. L. R., 18 Mad., 128 (130) ; *Run Bahadoor* v. *Lucho Koer*, I. L. R , 6 Cal., 406 ; *Hari Das* v. *Gamble*, 12 B. H. C. R., 23.

(2) *Husaini Begam* v. *Collector*, I. L. R., 9 All., 11 ; in appeal I. L. R., 9 All., 665.

(3) *Dhondo* v. *Balkrishna*, I.L.R., 8 Bom., 190 (193) ; *Pitamber* v. *Cassibai*. I. L. R., 11 Bom., 272; *Ganesh* v. *Sidhakaram*, 13 C.P.L. R., 74 ; Robbin's Mortgage, p. 1178.

(4) *Vengideswara* v. *Chatu*, I. L. R., 3 Mad., 224.

(5) *Jenkins* v. *Jackson*, [1891] 1 Ch., 89 ; *Knight* v. *Pursell*, [1879] W. N. 182.

(6) *Carvalho* v. *Nurbib*, I. L. R., 3 Bom., 202.

(7) *Moseebun* v. *Muncorun*, 24 W. R., 69 ; *Ram Koomar* v. *Kali Krishna*, I. L. R., 14 Cal., 99, P. C. ; *Rajrup Kuar* v. *Abdul Hossein*, I. L. R., 6 Cal., 394.

(8) *Stalkartt* v. *Guru Das*, I. L. R., 21 Cal., 680.

(9) *Devarakonda* v. *Devarakonda*, I.L.R., 4 Mad., 134 ; *Shunt Buksh* v. *Lalla Nund Ram*, 11 W. R., 48; *Bishen Dyal* v. *The Bank of Upper India*, I. L. R.. 13 All,, 290 (295).

(10) *Heera Nand* v. *Rure Khan*, (1905) P. L. R., No. 72.

(11) *King & Co.* v. *Gillard & Co.*, [1905] 2 Ch., 7.

(12) *Kalee Pershad* v. *Ram Pershad*, 18 W. R., 14.

(13) *Sheo Dyal* v. *Bishonath*, 9 W. R., 61 ; *Ghanasham* v. *Moroba*, I.L.R, 18 Bom., 474.

(14) *Mitholal* v. *Chunlial*, 4 Bom. L.R., 816.

(15) *Hamilton* v. *Seal*, [1904] 2 K. B., 262.

the first Court was fixed, it being ordered that, in default of payment of such costs within the time allowed, the appeal should be dismissed. (1)

The uniform practice in the Madras Presidency is to award costs only on the amount decreed. (2) But it is in accordance with the view of the Privy Council that, if an appeal in substance fails, costs should generally be thrown on the appellant, notwithstanding that the decree has had to be partially modified. (3) An item of costs accidentally omitted from the schedule may be added even after the decree has been executed. (4)

Costs when personally recoverable.

2223. The costs awarded to the mortgagee are added to the mortgage-money and have the same priority; and, unless the mortgagor expressly or impliedly promises to personally pay them, they cannot be recovered from him personally. (5) But, under section 35, the Court has jurisdiction to decree costs to be paid by the mortgagor personally; (6) but, where it does so, the order must be clearly incorporated in the decree, for, if the decree is drawn up in the usual form, the implication would be, that the costs were not decreed to be recovered from the mortgagor personally. And it has been held that even the addition of a clause to the effect—"it is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court"—is not by itself enough to create a personal liability. (7) The claim which each party gets may be set off against the claim of the other, and, if the amount of the costs awarded to the mortgagor is larger than the mortgage-debt, he is entitled to redeem at once, and to recover the balance against the mortgagee. (8) Costs expressed in fluctuating currency must be deemed to have been allowed at the rate prevailing on the date of the order, and not the date when it is put in execution. So in a case decided before the recent currency legislation fixing the rate of exchange at Rs. 15 per sovereign, it was held that in converting into Indian currency the amount of costs expressed in sterling by the Privy Council, the rate of exchange should be taken to be the rate which prevailed at the time of the order. (9)

Interest on costs.

2224. The Court is empowered to give interest on costs at any rate not exceeding 6 per cent. per annum, and "may direct that cost, with or without interest, be paid out of, or charged upon, the subject-matter of the suit." (10) Interest awarded on costs will be calculated as from the date of the order unless otherwise directed. (11) If interest upon costs has not been allowed by the decree, it cannot be given in execution (12 unless by way of compromise. (13) And so, where the interest on costs is not

(1) *Forester* v. *Secretary of State*, L. R., 4 I. A., 137; *Dakhina* v. *Saroda Mohan*, I. L. R., 23 Cal., 357; *Tokhan Singh* v. *Girwan Singh*. 9 C.W.N. 372.

(2) *Velu* v. *Ghose Mahomed*, I. L. R., 17 Mad., 293.

(3) *Jafri Begum* v. *Syed Ali*, I. L. R., 23 All., 393 (393, 394), P. C.

(4) *Chessum & Son* v. *Gordon*, [1901] 1 Q. B., 694; s. 206, Civil Procedure Code.

(5) *Shri Ganesh* v. *Keshavrav*, I.L.R., 15 Bom., 625 (639).

(6) S. 35, Civil Procedure Code, 1908 (old, s. 220); *Rutnessur* v. *Jusoda*, I. L. R., 14 Cal., 185 (187); followed in *Damodar Das* v. *Budh Kuar*, I.L.R., 10 All, 179; *Saffar-Khan* v. *Satyanunda*, 13 C.W.N. 742 in which, however, the personal liability was presumed.

(7) *Magbul Fatima* v. *Lalta Prasad*, I. L. R., 20 All., 523, F. B.; overruling *Chiranji* v. *Moti Ram*, [1898] A.W.N., 33.

(8) *Sidu* v. *Bali*, I.L.R., 17 Bom., 32; see also s. 221, Civil Procedure Code; *Ishri* v. *Gopal Saran*, I.L.R., 6 All., 351; *Brijnath* v. *Juggernath*, I.L.R., 4 Cal., 742.

(9) *Mahomed Abdul Hye* v. *Gajraj*, I. L. R., 25 Cal., 283; following *Dakhina* v. *Saroda*, I L.R., 23 Cal., 357.

(10) S. 35, Civil Procedure Code.

(11) *Taylor* v. *Roe*, [1894] 1 Ch. 413.

(12) *Pillai* v. *Pillai*, 24 W. R., 193, P. C.; *Bhoza Raghubar Singh* v. *Bhoza Roy Singh*, I. L. R., 3 All., 319; *Edge & Son* v. *Gallon & Son*, (1899) W. N., 197.

(13) *Seth Gokul Das* v. *Murli*, I. L. R., 3 Cal., 602.

allowed by the Privy Council, no interest can be given by any Court in this country.(1)

Appeal against costs.

2225. An order as to costs may be appealed against on the ground of a misapprehension of fact and law, although the appellant complains of nothing else; and "Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts or violation of any established principle, or where there has been no real exercise of discretion at all."(2) Hence, where the Judge, in depriving a party of costs, assigns as the sole ground for the same some reason which is not open to him or is unsustainable, an appeal as to costs, will lie.(3) But there can be no appeal from an order allowing or disallowing costs unless the proceeding in which they were adjudged was in itself appealable,(4) though it is not necessary that the proceedings themselves should have been appealed against.(5) The High Court are usually loath to interfere in second appeal with the discretion of the Court below in the matter of awarding costs. (6) No suit will lie for costs where the Court had power to grant them in the original proceedings.(7)

2226. Form and Contents of Preliminary Decree.—Several points in connection with the preliminary decree call for notice. Clauses (*a*) and (*b*) are alternative and enable the Court either to reserve the taking of account till affect the preliminary decree or to take them beforehand and declare the amount found due in the preliminary decree. The latter course is usally followed; accounts being only reserved when owing to the conflict of interests and complicated accounts this course seems more convenient. In such case the day for payment must, of course, be fixed within six months from the date of declaring in Court the amount due and not from the date of the preliminary decree. (8) In this case again, the decree should contain no directions mentioned in clauses (*c*) and (*d*) till the amount due is ascertained. The rule is intended to provide for a case only as between the mortgagee and mortgagor. In other cases its form will have to be altered to suit the reliefs appropriate to the parties joined.

Successive periods for redemption when fixed.

2227. In a foreclosure-action where subsequent incumbrancers are joined, and there is no question of priority, it is the practice, although the contingency is nowhere provided for in the Act(9) to allow each incumbrancer upon his request a separate period of redemption.(10) But so far as the mortgagor is concerned, he is allowed to have one, and only one, time for redemption

(1) *Rammoy* v. *Prem Chand*, 5 C. W. N., 423 (426).

(2) *Ranchordas* v. *Bai Kasi*, I. L. R., 15 Bom., 676; followed in *Kushal* v. *Punamchand*, 1. L. R., 22 Bom., 164, *Tara Prosunno* v. *Satish Chandra*, 4 C. W. N., 90; *Amirul* v. *Khairunnessa*, I. L. R., 28 Cal., 567; *Dildar Ali* v. *Bhowani*, 5 C. L. J., 642; *Willmott* v. *Barber*, 17 Ch. D., 72; *Bew* v. *Bew*. (1899) 2 Ch., 467.

(3) *King & Co.* v. *Gillard & Co.* [1905], 2 Ch., 7.

(4) *The Secretary of State* v. *Marjum Hossein*, I. L. R., 11 Cal., 359; *Mushingan* v. *Mozari*, I. L. R., 12 Cal., 271; *Bunwari Lall* v. *Chowdhry*, *ib.*, 179; *Sidha* v. *Puran*, 2 Nag. L. R., 49.

(5) *Vasudev* v. *Bhuvan*, I. L. R., 16 Bom., 241; *Balkissen* v. *Luchmeeput*, I. L. R., 8 Cal., 91; and *cf.* *Carvalho* v. *Nurbibi*, I. L. R., 3 Bom., 202; *Kamat* v. *Kamat*, I. L. R., 8 Bom., 368; *Huxley* v. *The West London Railway*, 17 Q. B. D., 373; on appeal, 14 App. Cas., 26.

(6) *Perikaruppan* v. *Palaniappa*, 13 M. L. J. R., 210.

(7) *Mohram* v. *Ajudhia*, I. L. R., 8 All., 52; referred Cas., 3 M. H. C. R., 341.

(8) *Kartik Chandra* v. *Hara Gobind*, 21 C. L. J. 75.

(9) As a matter of fact the Bill did make provision for such cases, but the Select Committee cut it out with a form of decree proposed (Report of the Select Committee 19th February 1879, (§27).

(10) *Platt* v. *Mendel*, 27 Ch. D., 246; *Mutual*

"In a complicated case, where the mortgagor has so incumbered the equity of redemption as to give rise to questions of priority, it is clear and I take it to be settled after the decision in *Bartlett* v. *Rees*, (1) by Sir John Romilly, which has often been followed, that only one time is allowed for redemption and that is not merely as regards all the persons claiming to be incumbrancers, or shewn to be incumbrancers on the equity of redemption—incumbrancers, therefore, of the mortgagor; but the mortgagor himself has no further time allowed him to redeem, and there is only one time allowed as against all the defendants. . . . If, however, the defendants in a foreclosure-action have put in a defence. . . and there is no question of priority between them, it does appear that the course of the Court has been to make a judgment allowing successive periods for redemption. . . . In my opinion, the mortgagor is not entitled to ask at all for such a judgment. It is the right of the puisne mortgagees." (2) Thus, then, it seems to be well established that in foreclosure suits puisne incumbrancers may on application be allowed successive periods for redemption, but, in a case where sale is ordered, or where there is a question of priority, only one time is allowed for redemption both for the mortgagor and the puisne mortgagees. The reason for allowing only one period for redemption in cases where questions of relative priorities arise is, that in the same suit the Court cannot go into the conflicting claims of the defendants who are free to fight them out in another suit. (3) And in cases where sale is ordered, there being no question of any mortgagee being unduly prejudiced by the decree being made absolute in favour of any one mortgagee, successive periods for redemption need not be fixed. (4) So, in cases in which, owing to the conflict of relative priorities between the defendants, the respective rights of all the parties concerned cannot be adjusted in one suit, a similar practice is observed, leaving, however, the parties to fight out their priorities *inter se*. (5) Where only one time is fixed for all the defendants to redeem or be foreclosed, the decree should provide that it shall be without prejudice to the interest of any of the defendants as between themselves. This may be effected by adding a clause to the following effect: "But this order is to be without prejudice to any question which may arise as to the rights or interests of the said defendants as between themselves to or in the said hereditaments and premises; but, in default of the said defendants, or any or either of them, so redeeming the plaintiff by the time aforesaid, it is ordered that they do stand absolutely barred and foreclosed of and from all right, title, interest, and equity of redemption in and to the hereditaments and premises comprised in the said mortgage-securities;" etc. (6)

Form of decree in such a case.

2228. Where successive periods are fixed for redemption, the rights of the puisne mortgagees to redeem is regulated by sections 74 and 75, and must be provided for in the decree, which should make it clear that the second mortgagee may redeem the first mortgagee within the time fixed, and the second mortgagee being in turn redeemed by the third mortgagee, who may in his turn redeemed by the subsequent mortgagee and so on, the last person entitled to redeem being

Life v. *Longley*, 26 Ch. D., 686; 32 Ch. D., 460; *Lewis* v. *Aberdeen and Plymouth Co.*, 53 L. J. Ch., 741; *Auhindro* v. *Chunnoolall*, I. L. R., 5 Cal., 101.

(1) L. R., 12 Eq., 395.

(2) *Per* Chitty, J., in *Platt* v. *Mendel*, 27 Ch .D. 246 (248); followed in *Kissory Mohun* v. *Kally Churn*, I. L. R., 22 Cal., 100; *Smithett* v. *Hesketh*, 44 Ch. D., 161.

(3) *Bartlett* v. *Rees*, 12 Eq., 395.

(4) *Kissory Mohun* v. *Kally Churn*, I.L.R., 22 Cal., 100; *Lakhmi Chand* v. *Ganpati*, 14 C. P. L. R., 177 (180).

(5) *Edwards* v. *Martin*, 7 W.R. (Eng.), 30; *Bartlett* v. *Rees*, L. R., 12 Eq., 395 (396), in which the form of the decree is set out; *Lakhmichand* v. *Ganapati*, 14 C.P.L.R., 177.

(6) *Bartlett* v. *Rees*, L. R., 12 Eq., 395 (397).

the mortgagor or any one holding his equity of redemption. The decree so far determining the rights of the puisne incumbrances is a decree sanctioned by equity, for it is not one which the plaintiff seeks. It is really a composite decree consisting of many parts in which each part is independent of the other, and, in so far as it applies to a particular defendant, may be executed by him, and him alone, without touching the rest. But the decree must provide for each contingency as in the decree passed by North, J., in a case (1) in which the facts were as follows:—The plaintiffs in a foreclosure-action were first mortgagees, the second incumbrancer was a jointress; the plaintiffs were the third mortgagee, there were also several subsequent mortgagees. The decree provided that the jointress should have a period of six months from the date of the decree within which to redeem; that, in case she did not redeem, the subsequent incumbrancers should have one period of three months from the date of a fresh certificate as to what should be due to the plaintiffs within which to redeem; but that, in case the jointress did redeem, the plaintiffs should have a period of three months from the date of a certificate as to what should be due to the jointress within which to redeem subject to the jointure; and that the subsequent incumbrancers should have a further period of three months from a certificate as to what should be due to the plaintiffs or the jointress, as the case might be within which to redeem. (2) In a properly framed decree, the successive incumbrancers having had their time to redeem, only two parties remain ultimately—the representative of the creditor being either the mortgagee one who has redeemed all the other mortgagees, and the representative of the debtor being either the mortgagor himself or his assignee. In such cases, the following form with the necessary variations may be adopted:—

FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND MORTGAGOR.

1.—Account of what is due to the plaintiffs under and by virtue of their mortgage in the pleadings mentioned, and for their costs of action, to be taxed —" And let, upon the defendant *K* (*Second Mortgagee*) paying to the plaintiffs what shall be certified to be due to them as aforesaid, within six months after, &c., at such, &c., the plaintiffs reconvey the mortgaged hereditaments, free and clear, &c., and deliver all deeds and writings, &c., but, in default of the defendant *K* paying to the plaintiffs what shall be certified to be due to them as aforesaid, by the time aforesaid, the defendant *K* is from thenceforth to stand absolutely debarred and foreclosed, &c. 2—And, in case of such foreclosure, let the plaintiff's subsequent interest be computed, &c. And let their subsequent costs be taxed; and let, upon the defendants *W F* and *J F* (*Mortgagors*) paying to the plaintiffs what shall be certified to be due to them as aforesaid, together with such subsequent interest and costs as aforesaid within three months after (the master shall have made his subsequent certificate), at such, &c., the plaintiffs reconvey the said mortgage hereditaments, free and clear, &c., and deliver all deeds, &c., to the defendants *W F* and *J F* or as they shall appoint; but, in default of the said defendantspaying to the plaintiffs what shall be certified to be due to them as aforesaid by the time aforesaid, the said defendants *W F* and *J F* are from thenceforth to stand absolutely debarred, &c. But in case the defendant *K* shall redeem the plaintiffs (the said mortgaged hereditaments) let subsequent interests be computed on what the defendant *K* shall have so paid to the plaintiffs; and let an account be taken of what is due to the

(1) *Smithett* v. *Hesketh*, 44 Ch. D., 161 (167 note).

(2) *Smithett* v. *Hesketh*, 44 Ch. D., 161 (167); cf. *Narayan* v. *Pandurang*, I.L.R., 7 Bom., 526; *Narayan* v. *Ganoji*, I. L. R., 15 Bom., 692; *Tulsa* v. *Khubchand*, I. L. R., 13 All., 581.

defendant *K* under and by virtue of his mortgage in the pleadings mentioned, and for his costs of this action to be taxed, &c. And let, upon the defendants *W F* and *J F* paying to the defendant *K* what he shall have so paid to the plaintiff together with what shall be certified to be due to him in respect of such subsequent interest thereon as aforesaid, and also what shall be certified to be due to the defendant *K* on his said mortgage, and for his costs as aforesaid, within three months after, &c, at such &c, the defendant *K* reconvey, &c., and deliver all deeds, &c., to the defendants *W F* and *J F* or as they shall appoint; but, in default of the defendants *W F* and *J F* paying to the defendant *K* the amount paid to the plaintiffs and what shall be so certified to be due by the time aforesaid, the said defendants *W F* and *J F* are from thenceforth to stand absolutely debarred, &c." Liberty to apply.(1)

2229. Where a derivative mortgagee or a sub-mortgagee is joined, the decree should direct an account of what is due to the original mortgagee or his assignee and then what is due to the derivative or sub-mortgagee, and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of residue, if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor.(2)

2230. How may Decree be varied by Compromise.—The question, whether the procedure here and in the ensuing sections prescribed in cases of foreclosure or sale may be waived by mutual consent of the parties, is one upon which a few remarks seem necessary. There can be no doubt that, so for as the parties themselves are concerned, the procedure may be waived, as for example, the mortgagor may agree to a decree for immediate possession in favour of the mortgagee being passed, and which would be, so far as he himself is concerned, given effect to, but it is at the same time clear that he could not, by so doing, jeopardize the rights of other persons, such as those enumerated in section 91, to redeem the property.(3)

A mortgage-suit then differs from an ordinary suit in that, while a compromise of the latter would bind the parties' representatives, a compromise of the former has not necessarily the same result, since, apart from collusion or fraud, no mortgagor has the right of cutting off other people's way to redemption, for that is a right, which, having regard to the purpose for which it exists, should not be defeated by any action taken by the mortgagor.

2231. But, so far as the parties themselves are concerned a compromise-decree is final, and the question of its validity cannot be agitated on an appeal against it.(4) A decree so made can only be set aside by a suit or by a review of judgment.(5) Otherwise it will be strictly construed and literally enforced, the infringement of any of its terms being regarded as the breach of contract entailing appropriate penalty.(6) If a compromise-decree provides for the sale of property in case of default, its terms will be carried out though the decree may not be in accordance with this Act.(7) When

(1) 3 Seton on Decrees (6th ed.), 1979: This form is commended by the Privy Council in *Gopi Narain* v. *Bansidhar*, I.L.R., 27 All., 325 (330), P.C.

(2) *Narayan* v. *Ganoji*, I. L. R., 15 Bom., 692; *Gokul Das* v. *Debi Prasad*, 3 A. L. J. R., 548.

(3) *Ghulam Husain* v. *Dinanath*, I. L. R., 23 All., 467 (469).

(4) *Biraj Mohini* v. *Srimati Chinta*, 5 C. W. N., 877.

(5) *Chandra* v. *Tara*, I. L. R., 10 Cal., 612; *Biraj Mohini* v. *Srimati Chinta*, 5 C.W. N., 877 (880), citing *Sarat Chunder* v. *Kartik Chunder*, I. L. R., 9 Cal., 810; *Ashutosh* v. *Tara*, I. L. R., 10 Cal., 612.

(6) *Harendra Lal* v. *Maharani Dasi*, I. L. R., 28 Cal., 557, P. C.

(7) *Abir Paramanik* v. *Jahar Mahmud*, I. L. R., 34 Cal., 886.

a decree is once passed, it must be taken to be conclusive between the parties, and an agreement entered into between them before the date of the decree, and not embodied therein, cannot be given effect to in execution proceeding.(1) But a decree itself may be compromised by the parties, and so, if, after the making of a decree *nisi*, the parties compromise the suit, the mortgagee would be precluded from proceeding to get the decree made absolute.(2) Indeed, since the embryo on compromise is limited to preserving the rights of person to redeem the mortgaged property, there can be no objection to a compromise which leaves that right intact. A mortgage-suit may, for instance, be compromised, and the parties agree to a decree payable by instalments,(3) or to the inclusion of other than the mortgaged property in the decree, (4) in which case the Court will enforce the contract. So, on the other hand, the mortgagor may agree to pay interest although the decree gives none, and if he so agrees in the presence of the Court, he will not be permitted to retract his promise, and interest will be payable as from the date of his promise.(5) In Allahabad the Courts adhere to the English rule that a deed cannot be avoided except by a deed. And so it has been there held that, if a mortgage-deed duly registered provide for redemption after twenty-five years, and subsequently if, before the mutation officer, this term be waived by the mortgagee, who should agree to permit redemption in the Jeth of any year, it is a covenant which could not be availed of by the mortgagor, as the terms of a registered instrument could not be varied except by a registered instrument.(6) It was, however, conceded that the case would be otherwise if the compromise is incorporated in a decree.(7) As regards the necessity of registration of a covenant not embodied in a decree, reliance was placed in a case decided by the Privy Council (8) but that case is only an authority for holding that the terms of a compromise, *if reduced to writing* cannot affect immovable property unless that writing is registered, and this is as much as the Registration Act itself requires, (9) it does not support the further proposition that such a compromise must also be in writing: and the necessity of a deed to vary or annul another deed in England was a part of the common law (10) said to derive its support from the precept of equity,(11) but which has ceased to influence the Courts now in England itself where a parol dispensation of a contract under seal is permitted to be pleaded as a defence to an action upon the deed,(12) and it appears to be clearly the intention of section 92, proviso 4 of the Indian Evidence Act.

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(1) *Benode Lal* v. *Brojendra*, 6 C. W. N., 838 ; distinguishing *Laldas* v. *Kishordass*, I.L. R., 22 Bom., 463, F. B., where an agreement was made before an arbitration-decree.

(2) *Bhiku* v. *Shujat Ali*, I. L. R., 29 Cal., 25 (31).

(3) *Balshet* v. *Dhondo*, I. L. R., 26 Bom., 33 (34, 39).

(4) *Subharayudu* v. *Venkataratnam*, 17 M. L. J. 200 ; *Anantanarayana* v. *Abdul Karim*, 17 M.L.J. 255.

(5) *Narayan* v. *Raoji*, 6 Bom. L.R. 417.

(6) *Sudaruddin* v. *Chhaju*, 5 A.L.J.R., 717 F.B. ; following *Pranal* v. *Lakshmi*, I.L.R. 22 Mad., 508, P.C. ; to the same effect *Umedmal* v. *Davulbin*, I.L.R. 2 Bom., 547.

(7) *Raghubans* v. *Mahabir*, I. L. R. 28 All., 78 ; *Sudaruddin* v. *Chajju*, 5 A.L.J., 717 F.B.

(8) *Pranal* v. *Lakshmi*, I.L.R., 22 Mad., 508 (513) P.C.

(9) S. 17 Act III of 1877.

(10) Pothier Obligation, Nos. 471—509 ; *Spece* v. *Healey*, 8 Exch., 668 ; *Thames Iron Works and Ship Building Co.* v. *Royal Mail Steam Packet Co.*, 31 L.J.C.P. 169 ; *West* v. *Blakeway*, 3 Sc. N R., 199 ; *Sellers* v. *Bickford*, 1 Moo, 460 ; *Thomson* v. *Brown*, 1 Moo., 358, *Cardwent* v. *Hunt*, 2 Moo., 660 *Littler* v. *Holland*, 3 T.R. 592. *Gwynne* v. *Davy*, 1 M, & G. 857.

(11) The rule *nihiltam conveniens et naturali aequita suam unum quodque dissolvi eo ligmine quo legatum est* ("Nothing is so agreeable to natural equity as that a thing be unbound in the same manner it was bound")—appears to be merely hortatory; and not mandatory. At any rate, the Indian rule is as embodied in s. 92, proviso 4, of the Indian Evidence Act (I of 1872).

(12) *Smith* v. *East India Co.*, 13 Jur., 867 ; *Vezey* v. *Rashbigh*, (1904) 1 Ch., 634.

2232. It would seem that, while persons entitled to redeem remain unaffected by a compromise made by the mortgagor without their concurrence, they will have to maintain a separate suit for the purpose of enforcing their rights, for, unless they had been made parties to the suit, they cannot move to re-open it.

In England the Courts seldom make a decree absolute without in the first place passing a decree *nisi* and giving time for payment to the mortgagor[1] even though the suit may have had to be heard *ex parte*.[2] But, where both the parties agree, the Court is loath to intervene, and in a case where the defendant was a minor, the Court gave judgment for an immediate foreclosure absolute on being satisfied by evidence that the value of the property was not sufficient to pay the amount of the principal sum due on the mortgage, together with interest and the costs of the action, and that it would be for the benefit of the minor to give judgment in that form.[3]

2233. Instalments inadmissible—Except by way of compromise a mortgage-debt cannot be decreed as payable by instalments, since a mortgage-decree is not a decree merely "for the payment of money" within the contemplation of section 210 of the Code, which makes provision for ordering payment of a decretal sum in instalments. Prior to the passing of this Act, the point does not appear to have been readily conceded. For, in the earliest reported case,[4] the Court, composed of Turner and Oldfield, JJ., was divided in its opinion regarding the meaning of the clause "for the payment of money" as used in section 210 of the Code, Turner, J., holding that the clause only contemplated what are commonly known as money-decrees as contradistinguished from mortgage-decrees, while Oldfield, J., was of opinion that the clause was comprehensive enough to comprise both classes of decrees. This latter view was, however, subsequently abandoned in two cases decided by the same Court,[5] in one of which[6] Oldfield, J., took part. These precedents were subsequently followed in Bombay[7] but the point is now free from all ambiguity since the passing of the Act, for in the language of both section 88 and the present section, the decree can only order payment of *the principal and interest on a day* to be fixed by the Court within six months, which excludes all possibility of instalment payments. Moreover, since a mortgage is indivisible, and the right to foreclose or sell is co-extensive with the right to redeem, it follows that an instalment-decree would not only be opposed to the terms of the section, but would also break in upon the indivisible character of a mortgage-transaction. Then again, piece-meal payment, implying, as it would, piece-meal redemption, foreclosure, or sale, would be as unjust as in most cases it would be unsatisfactory and unprofitable to both parties. But there are cases in which there is legislative authority for decreeing a mortgage-claim as payable by instalments. In cases, for instance, arising under the Dekkan Agriculturists' Relief Act,[8] the Court is empowered to pass a mortgage-decree payable by instalments. But these are exceptional cases which are regulated by the special enactments which deal with them.

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(1) *Edwards* v. *Cunliffe*, 1 Mad., 287.

(2) *Patey* v. *Flint*, 48 L.J. Ch 696.

(3) *Wolverhampton, &c., Banking Co.* v. *George*. 24 Ch. D., 707.

(4) *Binda Prasad* v. *Madho Prasad*. I.L. R., 2 All., 129 (133).

(5) *Hardeo Das* v. *Hukam Singh*, I. L. R., 2 All., 320; *Bacchu* v. *Madad Ali*, *ib.*, 649.

(6) *Bacchu* v. *Madad Ali*, I. L. R., 2 All., 649.

(7) *Skankarapa* v. *Danapa*. I. L. R., 5 Bom., 604; *Mahadaji* v. *Hari*, I. L. R., 7 Bom., 332.

(8) Act XVII of 1897, s. 15 B. Under this section it has been held that the Court has jurisdiction to decree instalments even after the decree absolute for sale is made.—*Mancherji* v. *Thakardas*, I. L, R., 31 Bom., 120.

2234. Construction of Decree.—A decree passed under the Act must be construed according to its wording, and if ambiguous, the Court executing it must put its own construction on it, and, if possible, will construe it as a decree properly framed according to law; but, where there is no ambiguity, the executing Court is bound to execute it according to its terms, whether the decree be right or wrong;[1] to do otherwise is to re-hear the decree, not to execute it, and which would be "an error of procedure, and one of a substantial kind calculated to cause great irregularity in the conduct of suits."[2] Even in the case of ambiguity, the decree must be construed rather to make it accord with law than to make it conflict with it.[3] Indeed, if a decree goes beyond what the law allows, and leaves no doubt as to the construction to be placed upon it, the Court executing the decree has no option but to execute it for the sum decreed, even though it be a sum beyond what the law allows.[4] Except in the case of ambiguity or inconsistency, the duty of the executing Court is clearly to carry the orders into effect, as being conclusive between the parties, whether it may or may not be disputable in point of law.[5] But a decree must be construed in a fair and reasonable spirit so as to advance instead of impeding its execution.[6] In construing a decree it is permissible to look to the admissions in the course of the pleadings or in the course of the case, and the decree must be taken to negative the right which was conceded by all parties, with reference to which the Court was not called upon to make any adjudication and in respect of which there was no necessity, for the Court to make any specific reference in the decree provided such a construction does not infringe any statutary provision.[7] Indeed in construing pleadings, judgments, decrees and orders passed in this country the Courts are never technical, but strive to see what the real intention of the Court was if it was not properly expressed. In this respect a more latitude is allowed to the Courts in India[8] than would be allowed to the Courts in England. If the decree is in accordance with the judgment, it cannot be altered on an application under section 206 of the Civil Procedure Code, but it may be rectified if it varies from the judgment. In one case where in the plaint Rs. 4,475 was erroneously claimed, the amount really due being Rs. 4,775, the High Court permitted rectification of the decree in accordance with the amount really due.[9] For the purpose of ascertaining the meaning of a decree it is competent to the Court to refer, not only to the judgment, but also to the pleadings in the case.[10] There is no limitation for an application to amend the decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment.[11] The proper Court to amend the decree is the Court which passes the final decree, since decrees of the lower Courts merge into those in appeal.[12] A decree obtained by a second mortgagee

(1) *Pirbhu Narain* v. *Rup Singh*, I. L. R., 20 All., 397; following *Amolak Ram* v. *Luchmi Narayan*, I. L. R., 19 All., 174; *Badshah* v. *Hardi*, [1898] A. W. N. 17, *Parkit* v. *Chamra*, 15 C. P. L. R. 134.

(2) *Udwant Singh* v. *Tokhan Singh*, I. L. R., 28 Cal., 353 (360), P. C.

(3) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181 (190), P. C.

(4) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, [1898] A.W.N., 164, O. A.; I. L.R. 23 All., 181 (190), P. C

(5) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181 (190), P. C.; *Benode Lal* v. *Brajendrakumar*, I. L. R., 29 Cal., 810.

(6) *Ahilyabai* v. *Kashinath*, 5 Bom. L. R., 802.

(7) *Srinivasa* v. *Yamunabai*, I. L. R., 29 Mad. 84 (87).

(8) *KedarNath* v. *Kulenan.*, 5 C. L. R., 25 (26, 27).

(9) *Pherozsha* v. *The Sun Mills*, I. L. R. 22 Bom., 370; see also *Kali Krishna* v. *Secretary of State*, I. L. R., 86 Cal., 173, *S. C.*; *Sri Raja Rau* v. *Sri Raja Inuganti*, I. L. R., 21 Mad., 344, *Lakho Bibi* v. *Salamat Ali*, I. L. R., 20 All., 337.

(10) *Lachmi Narain* v. *Jwalanath*, I. L. R., 18 All., 344; *Amoluk Ram* v. *Lachmi Narain* I. L. R., 19 All., 174; *Srinath* v. *Hari Poda*, 3 C. W. N., 637.

(11) *Kalu* v. *Latu*, I. L. R., 21 Cal. 259.

(12) *Pichuvayyangar* v. *Seshayyangar*,

subject to the prior mortgage cannot be construed as compelling the decree-holder to redeem the prior mortgage before enforcing his own mortgage by foreclosure or sale. (1) Where interest is awarded in a decree for foreclosure, but it is not clear whether it is to run on until actual payment or only until the date fixed for payment, having regard to the language of this section, it must, strictly speaking, be held to run only up to the date fixed,(2) though this does not preclude the Court from awarding interest in accordance with the provisions of the mortgage-deed until actual payment. A decree provided for the payment of interest at the contract rate up to six months, there being no provision for its payment after that date up to realization. But both parties understood it to contain such a provision, and the defendant obtained enlargements making further payments of interest on that supposition. Later on when he discovered his mistake, he objected to the payment pleading coercion and want of sanction of the Court. But it was held that the defendant could not be heard to question the legality of payments from which he had substantially benefited.(3)

Illustrative cases.

2235. A decree ran thus: "Three months' time will be allowed to the defendants within which to pay up the whole sum . . . . failing which the plaintiff shall be put in possession of the immoveable and movable property specified in the bond sued upon, and in the plaint and schedule as provided in the terms of the bond." In spite of the objection of the mortgagors that the decree was neither in accordance with the terms of the bond, and was not a foreclosure-decree, it appears the mortgagees were put in possession. The mortgagor did not appeal from this order, but the case having subsequently gone up in appeal to the Privy Council, their Lordships observed: "The decree was not according to law. Mr. Mayne contends that the decree was intended as a foreclosure, and is so in effect. The only other kind of possession which can be suggested is usufructuary possession lasting until the debt is discharged by the profits of the estate; and Mr. Mayne urges that there is nothing in the judgment to suggest such a possession, and that 'the terms of the bond' do not warrant possession of any kind. All that is true; but it does not compel the inference that the decree amounts to a foreclosure. . . . . It is sufficient that the mortgagee not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. The mortgagee thereupon became mortgagee in possession; and, as such, he must submit to be redeemed." (4) It was once upon a time held that a decree in the following terms—"Decree for plaintiff in favour of his claim and costs against defendants"—could not be regarded as other than a money-decree, although passed on a mortgage-bond in which a mortgage-decree was prayed for. (5) And a decree was held to be no better when it decreed only the "claim as brought," (6) or "in accordance with" an agreement of compromise in which the defendant had agreed that, in the event of default, the plaintiff should be at liberty to bring such property to sale. (7) But these cases have now been overruled by the case in which "the claim of the plaintiff with costs of the suit. . . . be decreed" was in the light of the pleadings construed

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I. L. R., 18 Mad., 214; *Shivlal* v. *Jumak Lal*, I. L. R., 18 Bom., 542.

(1) *Aravamutha* v. *Kumaraswamy*, 7 M.L. T. 280; 5 I.C. 490.

(2) *Jamadas* v. *Bhangi*, 1 N. L. R. 43. But a similar language occurring in a mortgage deed would be differently construed (§ 843).

(3) *Gokhai* v. *Ganesh Lal*, 17 C.W.N. 565; 17 I.C. 936.

(4) *Sri Raja Papamma* v. *Sri Vira Pratapa*, I. L. R., 19 Mad., 249, P. C.

(5) *Thamman* v. *Ganga Ram*, I. L. R., 2 All., 342

(6) *Muluk Fukeer* v. *Manohar*, 2 N.W.P., 9; *Harsukh* v. *Meghraj*, I.L R., 2 All., 345.

(7) *Janki Prasad* v. *Baldeo Narain*, I. L. R., 3 All., 216, F.B.

to be not merely a money-decree, but one for the enforcement of a lien.(1) So also, where "the usual mortgage-decree" is directed to be made,(2) it was held that it could not but be regarded as a mortgage-decree though it was inartistically drawn up. But, where the decree, in addition to its prescribed contents, ordered "that the defendants do pay to the plaintiffs aforesaid the sum of Rs. 876-8, being the costs incurred by them in this Court," the clause was held insufficient to charge the mortgagor judgment-debtor with a personal liability.(3) If a decree is susceptible of a double construction, as where it only decrees interest without specifying the period up to which it is to run, the proper construction is to hold that the interest was allowed up to the date of realization, and not only up to the date fixed by the decree for payment of the mortgage-debt.(4) So where a mortgage-decree directed payment of interest up to "the date of payment" it was construed to mean the date on which payment is made, and not merely that fixed for payment.(5) A decree ran thus: "(*a*)The plaintiff's entire claim, (*b*) together with interest for the period of the pendency of the suit at the rate claimed on the amount of the principal and costs, be decreed, (*c*) and the plaintiff should receive on the decretal amount and costs further interest at 8 annas per cent. (*d*) that the defendant No. 1 should pay Rs. 3,00,000 principal, Rs. 47,657-9-4 interest included in the claim, Rs. 9,487-4 interest for the period of the pendency of the suit at annas 11 per cent., Rs. 781-14-6 future interest at annas 8 per cent., by 20th January 1886, and Rs. 10,826-6 interest for six months at the rate of annas 8 to 20th July 1886, together with costs of the suit within six months. . . ." Here there was no explicit provision made for the payment of future interest, and the question was, whether it was awarded by the decree. The judgment-debtor contended that the specifications in clauses (*b*), (*c*), and (*d*) left no doubt that no provision was made for payment of interest beyond six months. On the other hand the decree-holder contended that the general terms of clauses (*a*), (*b*), and (*c*) could not be whittled down by clause (*d*) which merely prescribed the date of payment. The High Court held that the specifications under head (*d*) were inconsistent with the earlier clauses, and that the word "entire" in clause (*a*) must be read in the light of the details which follow, and be governed in its meaning by them.(6) But the Privy Council held on appeal that the decree was unambiguous, and that the foundation of the decree being contained in clause (*a*), the remaining clauses must be read so as not to restrict the relief thereby given.(7)

2236. Of course as has been before remarked (§§ 2199—2203), the mere fact, that a certain sum, including interest, is ordered to be paid before a certain date, is no ground for holding that future interest was disallowed. Nor does the mere omission of a clause allowing interest to the day of payment necessarily have that effect if the intention be otherwise clear.(8) So, again, the Court is not justified in assuming that the mortgagee was not entitled to interest according to the terms of the mortgage-deed, from the mere fact that the decree was not drawn up in the form prescribed in the Act.(9) A decree

(1) *Debi Charan* v. *Pirbhu Din*, I. L. R., 3 All., 388, F.B.; see also *Ram Prasad* v. *Raghu Nandan*, I.L R., 3 All., 239; *Solano* v. *Moran & Co.*, 4 C.L.R., 11.

(2) *Chotoolall* v. *Miller*, 7 C. L. R., 267; *Nazir Munzoorad* v. *Mehidi Begum*, 7 C. L. R., 206.

(3) *Maqbul Fatima* v. *Lalta Prasad*, I. L. R., 20 All., 52; overruling *Chiranji* v. *Moti Ram*, (1898) A.W.N., 33.

(4) *Bakhat Sajjad* v. *Udit Narain*, I.L.R., 21 All., 361.

(5) *Radhika* v. *Brojendra*, 14 C. W. N. 125; 5 I.C. 61.

(6) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, (1898) A. W. N., 164 (166), O. A.; I. L R., 23 All., 181, P. C.

(7) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181 (190,), P. C.

(8) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181 (190, 191), P. C.

(9) *Hargovandas* v. *Mohan Bai*, 2 Bom. L. R., 225.

which provided that the plaintiff shall recover the amount due to him with costs and interest, adding that the decree shall be executed against the property specified in the bond, may be executed, either against the mortgagor personally, or against the mortgaged property. (1) Such decrees are obviously defective and illegal, but, if they present themselves before the executing Court, their construction becomes then a question of imperative necessity. So, where the decree ordered that the claim be decreed with costs with interest at 6 per cent. per annum, that the defendant do pay to the plaintiff the decretal money within two months, the Court held that, though irregular in form, it was in effect a decree for foreclosure, and that it must be executed as such. (2)

2237. It has been before observed that, before decision of the case, it is open to the parties to compromise their case and to enter into covenants which the Court will incorporate into the decree (§§ 2230—2232). After the decree is, however, once made, it is not open to the parties to shew that it is subject to an agreement made between the parties before the decree. Thus, where an instalment-decree was duly made, neither a plea of payment of a portion of the claim alleged to have been made before the decree, nor of an agreement that the payment of certain instalments would not be enforced, alleged to have been come to between the parties before the passing of the decree, could be inquired into. (3) So again the incident of executability cannot be imported into such a decree, which must be construed in accordance with its terms. If, therefore, it decreed a mortgage claim by instalments adding that the mortgaged property should remain charged with payment of the said instalments the Court held the decree incapable of execution and that the property charged could not be brought to sale otherwise than by a fresh suit instituted under section 67. (4) The question, whether the acceptance of an overdue instalment, does or does not operate as a waiver of the terms of the decree, is a question of fact, and not of law, which has to be decided upon the circumstances of each case. (5)

Where, in a foreclosure-suit, the decree is drawn up for the amount of principal and interest up to the date of the decree, and also for interest which will be due to the plaintiff up to the expiry of six calendar months from the date of the decree, the mortgagor cannot be allowed to redeem before the expiry of the six months fixed in it, on payment of the sum found due for principal and interest up to the date of the decree, with subsequent interest up to the date of payment only. (6)

It has been held in the case that a decree, allowing future interest simply without specifying the period until which it is payable, must be construed to allow interest only up to the period of grace allowed. (7) But this view takes no note of the fact that in deeds a covenant to pay interest simply has been over again construed to mean that interest shall run until liquidation. And there is no reason why a decree should receive a different construction. Moreover, there is a very good reason that an unsatisfied decree should carry interest for it is by way of compensation for deferring payment that interest is allowed, and it would be strange if the interest ceased though the decree was unsatisfied.

(1) *Luchmi Dai* v. *Asman Singh*, I. L. R. 2 Cal., 213; *Ram Baran* v. *Gobind Singh*, I. L. R., 28 All., 295.

(2) *Jogendra* v. *Rama Nath*, 4 C. L. J., 533.

(3) *Benode Lal* v. *Brajendra Kumar*, I. L. R., 29 Cal., 810; distinguishing *Laldas* v. *Kishordas*, I. L. R., 22 Bom., 468.

(4) *Aubhoyessury* v. *Gouri Sunkur*, I. L. R., 22 Cal., 859 (863).

(5) *Kashiram* v. *Pandu*, 4 Bom., L. R., 688, F. B.

(6) *Hill* v. *Rowlands*, [1897] 2 Ch., 36.

(7) *Ghasiram* v. *Gokuldas*, 17 C. P. L. R., 164; dissenting from *Bakhar Sajjad* v. *Udit Narain*, I. L. R., 21 All., 361, F. B.

2238. In the first instance interest is to be calculated under the section up to the date fixed for payment, but the judgment should provide for the interest allowed by the Court, so that, if the period of grace is extended, the mortgagee may know what he is to get under the decree. In other words a mortgage-decree may provide for the payment of interest at the contract-rate, not merely up to the date fixed for the payment, but up to the date of actual realization.(1)

2239. Where re-payment is less than interest, it should be presumed to have been made towards interest, and may be so appropriated.(2) Such appropriation may be made at any time so long as the creditor has not exercised his option.(3)

Set off.

2240. A decree under this section cannot be set-off against a decree for money passed against the mortgagee against whom the mortgagor has a right to execute it, section 247 of the Code being inapplicable to such decrees (4)

Clause (c).

2241. Delivery of Deeds, etc.—The clause as to the delivery of deeds to the mortgagor is inserted, because the mortgagor's title-deeds are, in the towns mentioned in sections 59 and 69 (*c*) usually deposited with the mortgagee to prevent their being otherwise charged; but in the mofussil where equitable mortgages by deposit of deeds are not permissible, the mortgagees seldom insist on the delivery of deeds as a part of their security. In that case the retention of the clause in the decree would be as superfluous as it might be misleading, the Court, should, therefore, ascertain whether (*a*) the mortgagee is in possession of any title-deeds; (*b*) whether the mortgagee has sub-mortgaged or assigned his interest to another, in which case the decree should contain the clause as to re-transfer of the property to the mortgagor free not only of the original mortgage but also of "all incumbrances created by the plaintiff or any person claiming *under him*, or where the plaintiff claims by derived title, by those *under whom he claims.*" Such persons comprise only those who hold under the mortgagee or under whom the mortgagee holds by reason of a transfer by which the mortgagor is not bound. If, therefore, the mortgagee has sub-let the property he is bound to deliver vacant possession, if the plaintiff was a derivative mortgagee, such as a sub-mortgagee or the main mortgagee's assignee, he must deliver the property free from the main mortgage. As the plaintiff sub-mortgagee claims by a derived title the decree should direct an account of what is due to the main mortgagee or his assignee and then of what is due to the derivative mortgagee, and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the main mortgagee, and on payment of the remainder if any of what is due to the main mortgagee, both of them shall reconvey the mortgaged property free &c., and deliver up all deeds &c., to the mortgagor, or as he shall direct (or appoint). In case of the mortgagor's default the mortgagor to be foreclosed. After which subsequent interest and costs to be computed on the plaintiff's derivative mortgage, who is ordered to re-convey to the main mortgagee on payment of that amount, and in default of payment he too is foreclosed.(5)

(1) *Krishnasawmi* v. *Shrinivasa*, 11 M. L. J. R., 7; *Rameshwar* v. *Mahomed*, I. L. R., 26 Cal., 39; *Gangaram* v. *Jaiballa*, I.L.R., 30 Cal., 953; *Bakhar Sajjad* v. *Udit Narain*, I. L. R., 21 All., 361.

(2) *Luchmeshwar Singh* v. *Lutf Ali*, 8 B. L. R., 110, P. C.

(3) *The Mecca*, [1897] A. C., 286 (294); *Seymour* v. *Pickett*, [1905] 1 K. B., 715 (723, 724).

(4) *Chhogmal* v. *Govind*, 16 C. P. L. R., 73.

(5) 3 Seton (6th Ed.) pp. 2078, 2079; Fisher, § 1945.

According to another form [1] an account is directed of what is due to the original and derivative mortgagees respectively, from which the sum due to the latter is deducted from what is due to the former, and payment is ordered to be made to each of, is due to him. Where only partial redemption is permitted, the decree should so direct and on payment the re-transfer shall expressly be subject to the rights of redemption of other persons interested.[2]

The necessity for re-transfer only arises if the mortgagor so requires it, in which case he must pay for the conveyance.

The delivery of possession is only necessary if the mortgagee was in possession and has no right to retain it. Where the mortgagor was himself in possession the clause is unnecessary and had better be cut out.

2242. Decree on the Mortgage of Moveables.—Although there is no statutory form to which a decree passed on the hypothecation of moveables should conform, still, having regard to the equity underlying the form here prescribed, a decree in similar terms would appear to be equally appropriate to the case of hypothecation of movables where the contract admits of it, that is to say, if there be merely a hypothecation with no indication of the creditor's remedy in case of the debtor's failure to repay the loan, then the remedy of the creditor is to obtain a decree for the money with a lien declared on the hypothecated property, and thereafter to attach and sell it, he being equitably bound to exhaust that property before looking elsewhere for his money. If the contract provides that the creditor should take possession of or foreclose the hypothecated property then the Court will decree possession or foreclosure as the case may be. In the case of the hypothecated property transferring hands since the mortgage, the mortgagee is entitled to follow it in the hands of a transferee without consideration or one with notice, though the notice in this case must be an actual one.[3] So, in a case where the agreement ran as follows—"We shall pay of the loan of paddy with increase at 50 per cent., in the month of Aghran of the current Shak. . . . If we do not pay the amount within the aforesaid time, we mortgage as security our bullocks. . . . If we do not satisfy the claim in respect of paddy within the aforesaid time you shall sell the bullocks and realize the same, etc." Default being made, the High Court passed the following decree :—

"That on re-placement within six months from the date of the order of the paddy still due (specifying the amount) the mortgage to be released, but that on default of re-placement of the paddy aforesaid within six months there should be sale of the surviving bullocks and proceeds should be applied towards re-placing the paddy aforesaid."

In such cases too a decree *nisi* should be passed in the first instance to be made final on the expiration of the six months, as on an ordinary mortgage of lands. The order should reserve liberty to apply in case the required amount is not realized. As six months are allowed the question of instalments does not arise.[4]

Where a certificate of shares is deposited with a person to secure a debt and interest, the creditor may bring an action for foreclosure and transfer of the shares in his name[5] and a similar decree would have to be passed.

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(1) 3 Seton (6th Ed.) p. 2081.
(2) *Ib.* p. 2077; *Pearce* v. *Morris*, L. R., 5 Ch. 227; v. *Tasu* v. *Turner*, 39 Ch. D., 456.
(3) S. 108, Indian Contract Act (IX of 1872); *Nanhuji* v. *Chemina*, 7 N. L. R. 72 (78-80).
(4) *Shivram* v. *Dhan*, 4 Bom. L. R., 577 (581).
(5) *Harrold* v. *Plenty*, [1901] 2 Ch. 314.

2243. Jurisdiction.—The High Courts are divided on the question whether a suit for foreclosure is a " suit for land" within the meaning assigned to that phrase in section 12 of the Letters Patent. According to the Bombay High Court such a suit is not a suit for land, and in this view the Court is held on its original side to possess jurisdiction to entertain such suits, although the property in question be situate outside the town and island of Bombay.(1) But the contrary has been held in Madras, where a suit for land is held to include any suit in which a decree is asked for operating directly upon the land.(2) This view accords with that taken in Calcutta.

Where a decree is passed without objection by a Court other than that in whose jurisdiction the mortgaged property was situate, the mortgagor was held precluded from objecting to the validity of the decree in the course of its execution provided that the Court that passed the decree, having regard to the nature and value of the suit, was competent to try it.(4) As both in a suit for foreclosure as well as for redemption the Court-fee is payable on the principal money secured, the jurisdiction of the Court will also be determined by the amount upon which the Court-fee is levied and not upon the sum actually due.(5)

2244. Court-fee.—The Court-fee payable for a suit to enforce a mortgage by conditional sale is *ad valorem* on the principal money expressed to be secured by the instrument of mortgage.(6) Now as the mortgagee is bound to unite all his mortgages in the same suit, it has been held in Madras, that the Court-fee payable by a mortgagee holding four mortgages should be calculated only on the aggregate amount of the four securities.(7) A puisne mortgagee suing out his own mortgage is entitled to pay the Court-fee leviable on his own claim irrespective of the other claims, but if he joins the prior mortgagee and sues to restrain him from executing his own decree to the plaintiff's prejudice because the latter was no party to it, he must pay an additional *ad valorem* Court-fee commensurate with the value of the relief sought, which must be reasonably valued and not arbitrarily under-valued.(8)

A plaint insufficiently stamped should not be dismissed before giving the plaintiff an opportunity to make good the deficiency.(9) The court-fee payable on appeal is not necessarily the same as is payable in suits, but need only be paid on the amount ascertained to be the value of the subject-matter of the appeal.(10) If, therefore, the principal sum secured by the mortgage be Rs. 6,000, and the suit be for Rs. 8,666, the court-fee payable in the first Court would be

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(1) *Venkoba* v. *Rambhaji*, 9 B.H.C.R. 12; *Holkar* v. *Dadabhai*, I. L. R., 14 Bom., 353; *Sorabji* v. *Rattonji*, I.L.R., 22 Bom., 701.

(2) *Nalun* v. *Krishnaswamy*, I. L R., 27 Mad., 157.

(3) In re *Leslie*, 9 B. L. R., 171; *Surji Prasad* v. *Macnaghten*, 4 C. W. N., xxxv; followed in *Baij Nath* v. *Binoyendra Nath*, 5 C.W.N., ccviii.

(4) *Gomatham* v. *Komadur*, I. L. R., 27 Mad., 118.

(5) S. 7 (IX), Court Fees Act (VII of 1870); See § 1571 and cases there cited.

(6) A. S. 70 of 1902; 12 M. L. J. (Short notes).

(7) *Kedar Singh* v. *Matabadal*, 5 A.L.J.R., 713; following *Kubair Singh* v. *Atmaram*, I. L. R., 5 All., 322; *Amanat Begam* v. *hajanlal*, I.L.R., 8 All., 438; *Deosthan of Sonegaon* v. *Makunda*, 14 C.P.L.R., 154.

(8) *Jageshra* v. *Durga Prasad*, I.L.R., 36 All., 500.

(9) *Manmatha* v. *Rohilli*, 2 A.L. J. R., 84

(10) *Nepal Rai* v. *Debi Prasad*, I. L. R., 27 All., 447; followed in *Reference under the Court Fees Act*, I.L.R. 29 Mad., 367; following *Lala Rup Kishore* v. *Mayaram*, All., S. A., No. 1225 of 1893; dissenting from *Parbhu* v. *Sitaram*, I. L. R., 13 All., 94; *Jageshra* v. *Durga Prasad*, I.L.R., 36 All., 500. Section 7 (9) of the Court Fees Act evidently refers only to suits and not to appeals. *Cf.* Sch. I in which a memorandum of appeal is distinctly mentioned. Now so held in *Reference under the Court Fees Act*, I. L. R., 29 Mad., 367; *Ramakrishna* v. *Kolta*, I. L. R., 30 Mad., 96, F. B.

on Rs. 6,000 but it would on appeal be payable on Rs. 8,666, provided, of course, the entire subject-matter of the decree is in appeal.(1) But the plaintiff is not bound to pay Court-fee on the relief granted by the Court, and which could not have been given without the amendment of the plaint.(2) This amount may or may not be equivalent to the principal money secured by the mortgage, and the fact that there may be a difficulty in ascertaining the value of the subject-matter is no ground for adopting a different scale of assessment. Where the mortgage-money exceeded a lac of rupees the principal being Rs. 60,000 and an auction-purchaser of the property for Rs. 2,500 was made a co-defendant, it was held that that sum represented the value of the property to him and he was not liable to pay court-fee on anything more on appeal though it affected the whole mortgage-decree.(3) Only a fixed fee of Rs. 10 need be paid on an appeal for recovery of future interest.(4) The court-fee payable by the mortgagor who sues, not for redemption but for cancellation of the deed on the ground that it was executed without consideration, would be not on the expressed consideration but on such value as the plaintiff may set on his relief, which would ordinarily be nominal.(5) Such a suit, however, is one for consequential relief, and not for a mere declaration.(6)

2245. Appeal.—The decree *nisi* passed under this section is not merely an interlocutory order, but a decree which may be appealed against subject to the ordinary rule of limitation and the appeal can be heard, even though, since the notice was served, the foreclosure had been made.(7) But if no appeal is made against the preliminary decree, it cannot be allowed to be questioned on appeal against the final decree passed under the next rule. (8) It was so laid down in Calcutta in a partition-suit in which similar decrees have to be made,(9) but in this respect the Court was apparently divided against itself since, while in some cases, the right of a party to impugn the preliminary decree was conceded, (10) there were cases in which that right was negatived. A close examination of these cases would, however, shew that the cases in which the preliminary decree was allowed to be questioned were mostly cases in which that decree was really an interlocutory order which did not purport to dispose of the cause.(11) In any case the question is now finally settled by s. 97 of the Procedure Code which precludes a party from disputing its correctness.

2246. Mortgagee's Interest under Preliminary Decree.—A mortgagee who has obtained a decree for foreclosure acquires sufficient interest in the mortgaged property to become entitled to repurchase it under section 310-A of the Code. (12)

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(1) In re *Mahadeo Prasad*, 5 A. L. J. R., 531; following *Nepal Rai* v. *Debi Prasad*, (1905) A.W.N., 40; *Reference under the Court Fees Act*, I.L.R., 29 Mad., 367.

(2) *Indar Sen* v. *Ridhi Singh*, I. L.R., 30 All., 103.

(3) *Jagatdhar* v. *Brown*, I. L. R., 33 Cal., 1133 (1149); *Ramakrishna* v. *Kolta*, I. L. R., 30 Mad., 96 F. B.; but *contra* held in *Dilawar* v. *Bhagwat*, 3 A. L. J. R., 130.

(4) *Bhawani* v. *Mt Kutubunnissa*, I. L. R., 27 All., 559.

(5) *Chinnammal* v. *Madarasa*, I. L. R., 27 Mad., 480; following *Samia* v. *Minammal*, I. L. R., 23 Mad., 490; *Guru Vajamma* v. *Venkatakrishnama*, I. L. R., 24 Mad., 34.

(6) *Parvatibai* v. *Vishwanath*, 6 Bom. L. R., 1125.

(7) *Smith* v. *Davies*, 51 Ch. D., 595; *Ba fatun* v. *Bilaiti*, I L. R., 30 Cal., 683.

(8) *Cf. Gunindra* v. *Baijnath*, I. L. R., 31 Cal., 370; the point is now settled by s. 97, C. P. C. (Act V of 1908).

(9) *Bolram* v. *Ram Chundra*, I. L. R., 23 Cal., 279; *Dulhin* v. *Radha Dulari*, I. L. R., 19 Cal., 463, F. B.

(10) *Hurry Persad* v. *Prosuno Chunder*, 1 Hay, 397; *Biswanath* v *Bani Kanta*, I. L. R., 23 Cal., 406; *Khadem* v. *Emdad*, 5 C. W. N., 617.

(11) *Cf Forbes* v. *Ameercoonissa*, 10 M. I. A., 340; *Sheonath* v. *Ramnath*. 10 M. I. A., 413.

(12) *Rakhal Chunder* v. *Dwarka Nath*, I. L. R., 13 Cal., 346; *Hamidul Huq* v. *Matangini*, 2 C. W. N., colviii; *Nityananda* v. *Hira Lal*, 5 C. W. N., 63.

Final decree in foreclosure-suit.

3. (1) Where, or on before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree :

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up and, if so required ;

(*b*) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(*c*) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property, and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Power to enlarge time :

Provided that the Court may, upon good cause shown and upon such terms (if any), as it thinks fit, from time to time postpone the day fixed for such payment.

Discharge of debt.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

2247. Analogous Law.—This rule was originally section 87 and which ran as follows :—

Procedure in case of payment of amount due.

"87. If payment is made of such amount and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

Order absolute for foreclosure.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order and may, if necessary, deliver possession of the property to the plaintiff :

Power to enlarge time.

Provided that the Court may upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129, for the words 'final decree' the words, 'decree absolute' shall be substituted."

The first two pargraphs of the rule are supplementary to rule 2. The third paragraph marks a departure from the English law under which foreclosure

decrees are allowed to be re-opened. This departure was designedly made. (1) The next paragraph relating to the discharge of the mortgage-debt upon foreclosure is also not in accordance with the English law.

This rule applies only to foreclosure-suits. Rules 5 and 8 similarly provide for a suit for sale.

2248. Principle.—This rule enables the mortgagee to foreclose the mortgage on expiration of the period of grace allowed to the mortgagor in accordance with the provisions of the last rule. If the mortgagor pays off the decree within the time allowed allotted to him by that rule, he is entitled to obtain reconveyance of the property from the mortgagee, if necessary, and also to obtain delivery of all documents of title in his possession or power. If the mortgagor fails to pay within the prescribed time, he may then apply for the enlargement of the period of grace, unless he acquiesces in the foreclosure, and in which case he need not further appear. After the foreclosure-decree is once made final the Courts in this country have no jurisdiction to re-open it, unless it was *ex parte* (2) or unless it be in the exercise of their extraordinary jurisdiction as on an application for the review of their order. (3) In England, however, the Courts wield jurisdiction to re-open the proceedings, "if the judgment has been obtained by false evidence, (4) or other fraudulent or collusive practice." (5) It would appear that under similar circumstances in this country, the remedy of the mortgagor lies in review or a separate suit for cancellation of the decree, but so far as regards the suit in which the decree has been made final against him he has no remedy. The final decree invests the suit with the finality which cannot be disturbed ever afterwards in the same proceeding. It seems that the Legislature in departing in this respect from the English law has acted wisely, for if the final decrees in foreclosure and redemption suits were allowed to be re-opened, it would have been setting a premium upon ruinously interminable litigation. It seems always desirable that while the Court should be slow to shut out either party from its just rights, it should not have power to deprive the successful party of the fruit of the final decree by re-opening its door to novel pleas and often baseless accusations.

2249. Meaning of Words.—"*Such amount and of such subsequent costs*:" Under this head are included costs connected with obtaining possession and the execution of the reconveyance, and probably also the costs of taking the accounts. (6) "*Shall be put into possession of the mortgaged property*:" In addition to which the mortgagor may also claim all documents relating to the mortgaged property as provided in rule 2. It will be noticed that while this clause enacts that on redemption the mortgagor *shall* be placed in possession, the next clause only provides that on foreclosure the Court *may* deliver possession to the mortgagee—a change evidently intended to meet the case where immediate delivery of possession may not be possible. For an example see below. (§§ 2274, 2275) "*Upon good cause shown*:" see below. (§ 2259) "*Shall be deemed to be discharged*":—*i.e.*, discharged by virtue of the clause even though not in fact.

2250. Payment of Debt.—"Under the last rule the Court is to fix "a day within six months from the date of declaring in Court" the amount

(1) Select Committee's Report 2nd February 1878, 38.
(2) O. 9, r. 12, Code of Civil Procedure.
(3) Act V of 1908, s. 114; O. 47, rr. 1-9.
(4) *Lloyd* v. *Mansell*, 2 P. Wms., 73.
(5) *Harvey* v. *Tebbutt*, 1 J. & W., 197; Fisher, § 1970.
(6) Macpherson's "Mortgage" (7th Ed.), p. 694.

payable by the mortgagor, on which the latter is to pay the amount in Court, payment out of Court being held inadmissible and insufficient to prevent the passing of the final decree [1] (§ 2266); though it may be used by the plaintiff for meeting the plea of limitation.[2] The first clause of this rule states the terms of the final decree following up on compliance with its terms. There is a slight verbal variation between the two rules, for while the last rule ordains payment *on* a day, this rule allows it to be made "on or before the day fixed," which is what was intended. In addition to the amount declared under the last rule the mortgagor must also pay the mortgagee's further costs as provided in rule 10. These must, of course, be assessed and awarded by the Court. On such payment the mortgagor becomes at once entitled to regain possession of the mortgaged property, which he is entitled to recover without being driven to a separate suit for it. The time given for redemption is to be calculated from the decree of the first Court, and not from the decree in appeal unless otherwise ordered. [3] The mere fact that an appeal has been preferred does not stay execution of the decree appealed against, or prevent its being executed, or enlarge the time for its performance. [4] In one case, however, it was maintained by Mahmud, J., that since the decree of the lower Court merges into that of the Appellate Court, the time allowed must be calculated from the date of the decree of the superior Court. [5] But this view is obviously untenable, and has been dissented from in later cases, [6] in which all the cases followed by Mahmud, J., were considered and disapproved. There can be no doubt, as observed by the Allahabad High Court, that if the law were as stated by Mahmud, J., then the mortgagor will, by merely appealing, gain time to which he may otherwise be not equitably entitled. [7] Moreover, though the decree of the trial Judge merges into that of the Court of appeal, merger does not entail variation of that decree where the appeal is merely dismissed. [8] It may then be taken to be now settled that upon expiration of the period of grace originally allowed, it is competent for the mortgagee to apply for an order making the decree absolute, whether an appeal be or be not pending against the decree sought to be enforced.

2251. It should be noted that as soon as a decree is passed, redemption can be permitted only on terms consonant with it. Hence even if payment be made before the date fixed for it, redemption can be permitted only on payment of the amount which would include interest up to that date. [9] This course gives the mortgagor six months to find the money, and the mortgagee equal time to find out another investment. [10] This course is then commended

(1) *Banarsi Das* v. *Nathumal*, (1913) P.R. No. 12; 16 I. C. 987. But see O. 21, rr. 1 (*b*); 1 (2).

(2) *Bardi Narayan* v. *Kunj Behari*, I.L.R. 35 All., 178.

(3) *Faijuddi* v. *Asimuddi*, 11 C. W. N., 697; *Bholanath* v. *Kanti Chundra*, I. L. R., 25 Cal., 311; distinguishing *Noor Ali* v. *Koni Meah*, I.L.R., 48 Cal., 13; *Daulat* v. *Bukandas*, I. L. R., 11 Bom., 172; and see *Palonji* v. *Ganu*, I. L. R., 15 Bom., 370; *Chandasama* v. *Ishwargar*, I. L. R., 16 Bom., 245.

(4) *Mahant Ishwargar* v. *Chandasama*, I.L. R., 13 Bom., 106.

(5) *Rupchand* v. *Shamsh-ul-Jehan*, I. L. R., 11 All., 346; following *Shobrat* v. *Bridgman*, I. L.R., 4 All., 376; *Luchman Persad* v. *Kishun Persad*, I.L.R., 8 Cal., 218; *Gober dhan* v. *Gopal Ram*, I. L. R., 7 All., 366; *Chowdhuri* v. *Koni Meah*, I.L.R., 13 Cal., 13; *Daulat* v. *Bhukandas*, I. L. R., 11 Bom., 172; see also *Kodari Singh* v. *Jaisri Singh*, I.L. R., 13 All., 376; *Wazir Khan* v. *Kale Khan*, I. L. R., 16 All., 126; *Mulu Singh* v. *Rahim Kuar* (1888), A. W. N., 22; *Jairam* v. *Shri Kishen*, (1890), A. W. N., 92.

(6) *Juggarnath* v. *Jokhu Tiwari*, I. L. R., 18 All., 223; *Chiranji Lal* v. *Dharam Singh*, *ib.*, 455.

(7) *Juggarnath* v. *Jokhu Tiwari*, I. L. R., 13 All., 223 (226).

(8) *Thathara* v. *Krishnammal*, 14 M.L. T., 194; 16 I. C. 799.

(9) *Hill* v. *Rowlands*, [1897] 2 Ch., 361 (365, 366); *Khuman Singh* v. *Bholanath*, 1 Nag; L R., 106.

(10) *Per* Lindley and Chitty, L., JJ., in *Hill* v. *Rowlands*, [1897] 2 Ch., 361 (365, 366).

both on the ground of mutual convenience as on the construction of the decree as formulated in the last rule which in its first paragraph enacts that the Court may either order the taking of accounts on the date fixed for redemption, or may itself on the date of the decree declare *the amount so due, i.e.*, the amount that will be due on the day fixed for redemption. Apart, however, from these words there would have been no legal impediment to the payment of interest only up to the actual date of tender. And this is perfectly justifiable if payment is made before a decree in the terms of the last rule is passed.(1)

2252. Procedure on Payment.—With the payment of the decretal amount and costs the mortgagor becomes entitled to demand compliance with the terms of clause (*c*) of the last rule which are reproduced in clauses (*a*) to (*c*) of this rule under which the mortgagee is bound to re-deliver the mortgagor's title-deeds, if any deposited with him to reconvey the mortgaged property free from the incumbrances mentioned in the last rule and if necessary to deliver possession of the property to him. Neither the last rule nor this, however, states what power the Court possesses and what procedure it is to adopt against a recalcitrant mortgagee, who may be, moreover, willing enough, though not able to comply with the terms of the rule. It is apprehended that in such case the Court would be at liberty to order discharge of all incumbrances created by the mortgagee out of the decretal amount and nothing would be paid to him out of the deposit made in Court until he is in a position to comply with his part of the decree. But in such a case the preliminary decree must contain appropriate direction, otherwise the Court could not import therein terms which are absent therefrom. There is no legal necessity to reconvey the property by a formal deed of conveyance, nor is it usually done ; but it is the mortgagor's right and if he so requires, the mortgagee is liable to reconvey the property as ordered in the preliminary decree.

Similarly it is not necessary to order re-delivery of possession in the case of a mortgage by conditional sale, but should the mortgagee be in possession the Court is empowered to restore it to the mortgagor. But it cannot dispossess third parties not being a party to the suit whether claiming under the mortgagee or by a title paramount to his own. The Court is held entitled to deliver possession even though it was not claimed.(2)

2253. Procedure on Non-payment.—The proper Court to which an application under this rule should be made is the Court which passed the decree,(3) and not the Court of appeal even though it may have varied the decree of the first Court.(4) If the business of that Court has been in the ordinary course transferred to another Court, then the application must be made to it. So if after the passing of the decree the property is transferred to another *Munsiffi*, the decree may be executed in either Court.(5) The person competent to apply is naturally the recorded decree-holder. But should the decree have in the meantime been assigned, the assignee would have to be brought on the record before he could apply for foreclosure. A person holding a general power-of-attorney which empowers him to receive moneys and grant receipts, but not to apply for execution, cannot execute a decree, and an application made

(1) In re *Alcock*, 23 Ch. D. 372 (375).
(2) Fisher, § 1983.
(3) *Khem Narain* v. *Mt. Ganesho Kuar*, 5 C. W. N., 287.
(4) *Shamuldhun* v. *Lakhimoni*, 13 C. L. J., 459 ; 6 I.C. 323.
(5) *Luchmun* v. *Muddun*, I. L. R., 6 Cal., 513.

by such a person is not "made in accordance with law" within the meaning of Article 179 of the Indian Limitation Act.[1] An application under this rule can be entertained only if it is made on expiration of the period of grace allowed to the mortgagor under the provisions of the preceding rule, as the period of six months is fixed in the interest of both the mortgagor and mortgagee, so that while the mortgagee cannot compel redemption, the mortgagor cannot redeem except on payment of the interest calculated up to the date fixed for payment.[2]

2254. A mortgage-decree may be rendered incapable of execution for several reasons. For instance, if the decree-holder's creditor has attached it in execution of his own decree against the mortgagee, the Court will abstain from executing it, and it cannot proceed with the execution by substituting the name of the attaching creditor for that of the mortgagee.[3] Secondly, the decree to be executed must be the decree of a competent Court and the executing Court can go behind the decree to ascertain if the Court that passed it had jurisdiction to do so, and if it finds that it had not, it may decline to execute it.[4] Other questions, some of them intricate, which formerly arose in execution, depended for their solution, upon the view, whether an application made under this section was or was not a step in execution within the meaning of section 244 of the Code. And this was a point upon which the High Courts were by no means agreed, for while in the Allahabad[5] and Madras[6] Courts, such an application was treated as an application in execution, a different view prevailed with the Judges of the Calcutta High Court.[7] According to them the application was not an application for execution of the decree, because until the final decree was made under, what is now, this rule, there was in fact held to be no decree capable of execution.[8] But the amendment of the sections relating to the procedure applicable to mortgage-decrees, and their transposition to the Procedure Code renders the controversy no longer of any moment beyond explaining the amendment of the present provisions which has been influenced by it. The rules as now enacted favour the view of the Calcutta High Court for they introduce terms, such as "preliminary decree" and "final decree" which have necessarily the effect of making all proceedings up to the final decree proceedings in the suit as distinct from their being proceedings in execution of the decree. That this was the intention

(1) *Murari* v. *Umrao*, 1. L. R., 23 Cal., 499.

(2) *Hill* v. *Rowlands*, [1897] 2 Ch., 361 (365, 366); *Khuman Singh* v. *Bholanath*, 1 N. L. R., 106. In *Chotoolal* v. *Miller*, 7 C. L. R., 267, Wilson, J., allowed redemption on payment of interest up to the date of tender only, but he admitted that the character of the application was exceptional.

(3) *Barhma Din* v. *Baji Lal*, I. L. R., 26 All., 91 (92, 93).

(4) *Bhagvantappa* v. *Vishwanath*, I. L. R. 28 Bom., 378; *Trimbakrao* v. *Badvantrao*, I. L. R., 30 Bom. 101 (108).

(5) *Kidar Nath* v. *Lalji*, I. L. R., 12 All., 61, F. B.; *Oudh Behari* v. *Nageshar*, I. L. R., 13 All., 278, F. B.; *Chunni Lal* v. *Harnamdar*, I. L. R., 20 All., 302; *Parmeshri* v. *Mohan Lal*, I. L. R., 20 All., 357; *Hira Lal* v. *Parmeshar*, I. L. R., 21 All., 356; *Bansidhar* v. *Gaya Prasad*, I. L. R., 24 All., 179 (183); *Ali Ahmad* v. *Naziran*, I. L. R., 24 All., 542; *Balkishanji* v. *Mithu Lal*, I. L. R., 25 All., 212; but *contra* in *Sham Sunder* v. *Mhd. Ihtisam*, I. L. R., 27 All., 501, F. B.

(6) *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244, F. B.; *Pandu* v. *Juje*, I. L. R. 27 Mad., 40; *Appiah* v. *Rame Reddi*, 16 M. L. J. 503.

(7) *Ajudhia Pershad* v. *Baldeo Singh*, I.L. R., 21 Cal., 818; *Tiluck Singh* v. *Parsotam* I. L. R., 22 Cal., 924; *Tara Prosad* v. *Bhobodeb*, *ib.*, 931 (934); *Akikunnissa* v. *Roop Lall*, I. L. R., 25 Cal., 133; *Hatem Ali* v. *Abdul Gaffur*, 8 C. W. N., 102; *Bhugwandas* v. *Ganguli*, 9 C. W. N., 171; *Fana* v. *Tekka* 2 N.L.R., 178; dissented from in *Bhagwandas* v. *Shridhar*, 3 N.L.R., 55; *Tara Podo* v. *Kamini*, I.L.R., 29 Cal., 644. This view is followed in the Central Provinces in *Kallo Singh* v. *Mt. Lachmi Bai*, 12 C. P. L. R., 82 (85); *Sitaram* v. *Dharma*, 16 C.P L.R., 111; but *contra* in *Chaitram* v. *Deodat*, 9 C. P. L. R., 5.

(8) *Ajudhia Pershad* v. *Baldeo Singh*, I.L. R., 21 Cal., 818 (823).

of the Legislature is further evidenced by the explanation appended to the definition of a "decree"(1) which runs as follows:—

"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

In England all proceedings of the decree *nisi* for making it absolute are regarded as proceedings in execution,(2) so that in this respect the present view of the law here must be held to be a departure from the English practice.

2255. In this view, strictly speaking, the defendant is not entitled to any notice of the plaintiff's application for the final decree, any more than he would be entitled of an adjourned hearing of the suit, but as a matter of practice a notice is invariably given,(3) and it would be necessary where the decree has been assigned (4) or other names have to be substituted for or added to that of the plaintiff. The word "plaintiff" as used here does not, then, necessarily mean the original plaintiff, including as it does also his assignee and legal representative. As soon as the plaintiff applies the Court is empowered to pass a final decree but before doing so the defendant may appear and shew cause against it, but if he does not appear, the Court will proceed to pass the final decree, which being necessarily *ex parte* is liable to be set aside at the instance of the defendant for reasons stated in O. 9, r. 13 of the Code of Civil Procedure and for other reasons which it may consider sufficient.(5) The Court is not bound to rip open the whole decree at the instance of a single mortgagor. No doubt where the decree is one and indivisible, it will have to be set aside in its entirety, but where it consists really of separate decrees against each of the defendants, only the portion affecting the party moving to set it aside, should be set aside.(6) Where the original mortgagor is dead, it can scarcely be doubted that his heirs are entitled to a notice of an application under this section,(7) but failure to give notice is never regarded as anything more than a mere irregularity and as such, by itself insufficient to set aside the final decree.(8) Moreover, if the mortgagee allows a considerable time to elapse before applying to make the decree final, the Court will require some explanation of the delay, and give notice of the application to the person entitled to the equity of redemption in order to hear what he might say.9

2256. Form of Application.—As regards the form of an application under this rule, it was formerly held in some cases that being an application independent of the Code it need not conform to the form, or supply the particularr required by s. 235 [now. O. 21, r. 11 (2)] of the Code.(10) On the othes hand, it was held in others that being an application under the Code, it must necessarily conform to the provision of that and other sections of the Code.(11)

(1) S. 2 (2); *Mohammed* v. *Jarao Bai*, 13 A.L.J., 307.

(2) O. LXIV, r. 13, Rules of the Supreme Court; *Blake* v. *Summersby*, (1889) A.W. N., 39.

(3) See now Form No. 10, Sch. I, App. D., Civil Procedure Code.

(4) O. 21, r. 16, Civil Procedure Code.

(5) *Lallaprasad* v. *Ram Karan*, I.L.R., 34 All., 426; *Maung Po* v. *C. Chaung Talk*, 15 I. C. (Bur.) 358.

(6) *Mahomed* v. *Tohurennissa*, I. L. R., 25 Cal., 155; *Ajodya* v. *Sheo Pershad*, 5 C. W. N., 58; *Monomohini* v. *Nara*, 4 C. W. N., 456; *Bhera* v. *Har Kishen*, I. L. R., 24 All., 383, F. B.

(7) *Datpat Rao* v. *Tarachand*, 6 C. P. L. R., 1.

(8) *Ram Jas* v. *Sheo Prasad*, I. L. R., 28 All., 193. *Cf Tassadduk Rasul* v. *Ahmad Husain*, I. L. R., 21 Cal., 66, P. C.; *Malkarjun Narhari*, I. L. R., 25 Bom., 337, P. C.

(9) *Prees* v. *Coke*, L. R., 6 Ch., 645 (650).

(10) *Ajudhia Persad* v. *Baldeo Singh* I. L. R., 21 Cal., 818; *Tiluck Singh* v. *Parsotam*, I. L. R. 22 Cal., 924; *Ranbir Singh* v. *Drigpal Singh*, I. L. R., 16 All., 23.

(11) *Oudh Behari* v. *Nageshar*, I. L. R., 18 All., 278, F. B.

But this divergence of views was the natural and necessary outcome of the two views in which an application for a final decree was then regarded. But in the view the Code now takes of such applications, the only point material is whether such an application should be verified. This would appear to be necessary, though there is nothing in the rule to make it indispensable.

In England, it is customary to make the decree absolute, as of course on motion, upon the affidavit of non-payment.(1) But if the application is delayed, the Court is loath to foreclose without notice to the mortgagor,(2) and it would, require as a rule some explanation of the delay.(3) But then in England the foreclosure may be opened on the ground of oppression or fraud, (4) or even on fresh evidence.(5) But in this respect the law in this country is different, and which dictates more preliminary precaution. An application for foreclosure must be stamped as an ordinary miscellaneous petition. It need not be accompanied by a copy of the preliminary decree, but it must contain sufficient information to enable the Court to consult its own record of the case and to summon the other party, if necessary. Indeed, apart from all legal aspect of the question, the Courts are always solicitous to hear the opposite party before foreclosing the decree, and, though the want of notice may not vitiate the order, it would not infrequently be regarded as injudicious. But the giving of notice is nevertheless an indulgence and not a right, and which the mortgagor should not presume upon. Indeed, it is observed in practice that having no hope of redemption, the mortgagor not seldom stoops to the subterfuge of evading service of notice in the hope that the evil day might thus be staved off, but this is a folly for which the forfeit may be an immediate foreclosure.

2257. Inquiry under the Rule.—Supposing, however, that the mortgagor adopts the rational course of putting in an appearance, he may then either suffer foreclosure or show cause against it One mode of showing cause is that provided for in the section, *i.e.*, he may ask for further time: another mode is by making the payment, but as to which the Courts are not in agreement (§§ 2262—2265). It should be noted that this section does not allow the Court to postpone the date of payment on the application of an outsider, since the provision regarding the power of the Court to postpone the date of payment relates to matters as between the mortgagor and mortgagee. Hence where the lower Court declined to make a preliminary decree final upon the application of a third party, who sought in a separate suit to establish his right to redeem the mortgaged property, it was held that the Court had acted without jurisdiction in passing such an order. (6) Having regard to the wording of the rule, this is clearly the correct view. For the wording shows that if the payment provided for in the preliminary decree be not made within the time allowed, the plaintiff may apply for foreclosure, and "the Court *shall* then pass (such) a decree," which makes it imperative on it to pass a decree for foreclosure. It has no jurisdiction to stay the proceedings.

2258. Enlargement of Time.—Assuming, however, that the mortgagor himself appears and prays for more time, the Court is then empowered to extend it "upon good cause shown upon such terms, if any, if it thinks fit." It has then no power to extend time as a matter of course to enable the mortgagor to redeem the mortgage, for before he can be permitted to redeem after the due

(1) *National &c., Building Society* v. *Raper*, [1892] 1 Ch., 54 (57).
(2) *Prees* v. *Coke*, L. R., 6 Ch., 645 (650).
(3) *Ib.*
(4) *Burgh* v. *Langton*, 5 Bro. P. C., 213; *Morley* v. *Elways*, 1 Ch. Ca., 107.
(5) *Cocher* v. *Bents*, 1 Ch. Ca., 61; *Ismoord* v. *Claypooll*, 1 Ch. Rep., 189.
(6) *Akshaya Kumar* v. *Surja Kumar*, 6 C. W.N., 654.

date the Court must be satisfied that he had a good reason for not redeeming before, (1) and in any case if it permits redemption on a subsequent date it must put the parties on terms by compensating the mortgagee for the loss of his interest and for the waiver of his right to foreclosure. The power to enlarge time is conferred by this section to enable the executing Court to extend time without modifying or amending the decree. Without such power an order for postponing the date originally fixed would have involved an amendment of the decree. (2) An order enlarging time presupposes the existence of an application on the part of the mortgagor praying for extension on some specified grounds stated therein which must be supported at least by an affidavit. For bare avowals, however forcibly made, can hardly take the place of proof. At the same time such inquiry is intended to be necessarily summary and it must not be elaborated into a trial. An application for extension need not necessarily be in writing, and it may be presumed from the order of the Court granting time. (3) The cause required to be shown must be good and sufficient cause to convince the legal mind of the propriety of enlargement. But on this point if the order of the first Court is *prima facie* right, it is scarcely likely that the appellate Court will lightly interfere with the discretion deliberately exercised by the lower Court. (4)

The proper Court to hear an application to extend the time for payment of the amount due to a mortgagee decree-holder, is the Court of first instance, (5) but an Appellate Court has also jurisdiction to extend the time in a case in which there has been an appeal. (6)

2259. Grounds for Enlargement or Otherwise.—The order enlarging time is under the rule entirely in the discretion of the Court. But it must be remembered that the discretion which the Court is to exercise is a judicial discretion, which will not be arbitrarily used to the prejudice of either party. Of course, the exercise of discretion greatly depends upon the circumstances of each case. In the words of Land Cranworth (7) you cannot lay down a general rule for every case. But there are certain rules which are intelligible to everybody. For instance, the mortgagor seeking to redeem must apply with reasonable promptness. To determine what is reasonable promptness regard must be had to the magnitude of the debt, season and the nature of the property. If the amount of the decree is considerable, and local disturbances had crippled the power of the mortgagor, it would be equitable to make a concession which under normal circumstances would be inadmissible. So where an estate worth Rs. 50,000 is being foreclosed for Rs. 5,000, the mortgagor will have longer time than where the property was worth Rs. 5,100 and he is being foreclosed for Rs. 5,000. Again, regard may also be had to the ancient character of the property apart from its intrinsic value and to other favourable circumstances entitling the mortgagor to a chance of redemption. (8) But while the Court is directed to look with tender regard to the interests of the mortgagor, (9) the latter must evince something more than an idle hope of his ability to redeem the property. He must not only show that he has been making earnest

(1) *Laxmi Bai* v. *Ramchandra*, 3 N. L.R., 146.

(2) *Vedapuratti* v. *Vellabha*, I. L. R., 25 Mad., 300 (313), F.B.

(3) *Trimbak* v. *Kashi Nath*, I. L. R., 22 Bom., 722; *Rango* v. *Bhomshetti*, I.L.R., 26 Bom., 121 (126).

(4) *Cf. Jaipal* v. *Indar Bahadur*, I. L. R., 26 All., 238, P. C.; *Ramchandra* v. *Balmukund*, 1.L.R., 19 Bom., 71 (73).

(5) *Sheo Narain* v. *Chunilal*, I. L. R., 23 All., 88.

(6) *Babu Prasad* v. *Khiali Ram*, 3 A. L. J. R., 828.

(7) *Thornhill* v. *Manning*, 1 Sim. (N. S.), 451 (454).

(8) *Cf. Campbell* v. *Holyland*, 7 Ch. D., 166 (172, 173).

(9) *Keshav* v. *Bazi*, 9 C.P.L.R., 75 (77).

endeavours to liquidate his debts in the past, but also that he will be able to redeem if further time is given him. Past illness or accidental inability to travel, the falling off of a negotiation for raising money, an honest mistake as to the effect of an order of the Court fixing a date for redemption,(1) and other similar causes, unavoidable, or not within his control have been held to be causes sufficient to justify the extension.(2) On the other hand, if the mortgagor has made no profitable use of the original grace and is only arousing himself out of his torpor on receiving notice, the Court should be loath to allow further time, unless it is satisfied that the mortgagor has some prospect of redeeming the property, by the end of the extended period.(3)

But the indulgence cannot be granted unless it appears or is shewn that the property is an ample security for the debt.(4) Proof of the sale of other shares of the same property at a certain price is good evidence to indicate the approximate value of the mortgagor's property.(5) If it is shown that the mortgagor had been prevented from raising fund by the mortgagee, the Court may grant a fair allowance of time even though the security be insufficient.(6) If it is not, the Court can enlarge the time, but only upon prepayment to the mortgagee such sum as he will lose by the enlargement.(7) And should future interest be ordered the mortgagor should be made personally liable for its payment.(8) In no case can the Court enlarge time as, of course, even upon a first application. Some reason, though not a very strong one, must be given, as that the applicant has been, or is negotiating for a loan, or sale of the property, and that if time is given, there is a reasonable hope of getting the money.(9) But each subsequent application must be supported with stronger and stronger reasons.(10) The mere fact that an appeal from the decree is pending is no reason for enlarging the time,(11) nor is an enlargement implied by the mere fact of an appeal having been filed against the decree. Where, therefore, the Court made its decree final because the defendant had failed to deposit the money or obtain an extension before the due date he was held disentitled to redeem afterwards.(12) In any case, no time can be extended without inquiry into the sufficiency of the cause alleged, and for which purpose evidence should be taken, if necessary, And if the Court enlarges time the question of putting the parties on terms should not be overlooked.(13) The usual condition for enlargement of time is payment of the interest and costs due up to date,(14) to which are added the costs of the application which must be immediately paid.(15) But if the mortgagor can give satisfactory reason for his default the Court may dispense with the payment of interest and costs.(16) But before enlarging time the Court must be satisfied that the security is ample, (17) unless the default be due to some act

(1) *Collinson* v. *Jeffery*, [1896] 1 Ch. 644.
(2) *Patch* v. *Ward*, L. R., 3 Ch., 203 (212); *Collinson* v. *Jeffery* [1896] 1 Ch., 644.
(3) *Whatton* v. *Cradock*, 1 Keen, 269; *Brewin* v. *Austin*, 2 Keen, 211; *Coombe* v. *Stewart*, 13 Beav., 111; *Holford* v. *Yate*, 1 K. & J., 677.
(4) *Eyre* v. *Hanson*, 2 Beav., 478; *Nanny* v. *Edwards*, 4 Russ., 124; *Jones* v. *Creswicke* 9 Sim., 304; *Boothe* v. *Creswicke*, Cr. & Ph., 361.
(5) *Sheo Ratan* v. *Net Lal Singh*, I.L.R., 30 Cal., 1 (8, 9).
(6) *Geldard* v. *Hornby*, 1 Hare, 251.
(7) Seton on Decrees (5th Ed.), 1655.
(8) *Mukundlall* v. *Seth Mangaljeet*, 12 C.P. L.R., 78.
(9) Fisher § 1958, *Nanny* v. *Edwards*, 4 Russ, 124; 38 E.R., *Eyre* v. *Hanson*, 2 Beav., 478; 48 E.R., *Quarles* v. *Knight*, 8 Price 630.
(10) *Govindav. Gangaram*, 2 C.P.L.R., 29. *Balkrishan* v. *Atmaram*, 10 N.L.R, 150.
(11) *Ishwargar* v. *Chudasama*, I. L. R., 13 Bom., 106 (109); *Aminabi* v. *Sidu*, I. L. R., 17 Bom., 547.
(12) *Ghanshimlall* v. *Ram Narain*, I. L. R., 31 All, 379.
(13) *Ishwar* v. *Gopal*, 5 Bom. L.R., 719.
(14) *Eyre* v. *Hanson*, 2 Beav., 478; *Edwards* v. *Cardiffe*, 1 Mad., 287.
(15) *Holford* v. *Yate*, 1 K. & J., 677; *Finch* v. *Shaw*, 20 Beav., 555.
(16) *Edwards* v. *Cunliffe*, 1 Mad., 287.
(17) *Nanny* v. *Edwards*, 4 Russ., 124; *Eyre* v. *Hanson*, 2 Beav., 478; *Jones* v. *Creswicke*, 9 Sim., 304; *Boothe* v. *Creswicke*, Cr. & Ph. 361.

of the mortgagee, in which case the Court enlarged time, though the sufficiency of the security was doubtful.(1)

2260. The maximum time allowed under the decree is six months, which may, however, be enlarged by consent,(2) but no limit has been fixed for subsequent enlargement. But in practice more than six months are never allowed. "The period," says Fisher, "granted upon the first application is usually six months, and it does not appear that any longer time has been granted at one. The like period has also been given on a subsequent application, but the period has been varied from five to three months according to the circumstances."(3) As a rule no further enlargement is made after time has been once enlarged by consent.(4) But the Court appoints a new day for payment in a case in which a mortgagor had died in the meantime.(5)

There is a clear distinction between an extension applied for before and after the due date, and still more after the decree is made final. As Rolt, L.J. said "Slight circumstances will induce the Court to enlarge the time before the day arrives, but after the order for foreclosure has been made absolute, it must be shown that the person who seeks to set it aside, or to have it discharged fully intended and was prepared to pay the money on the day, but was stopped by some accident from complying with the exigencies of the order."(6)

Terms of extension.

2261. Since the extension of time to enable the mortgagor to redeem is an indulgence, the Court makes it a condition that a certain sum usually the interest and costs of the foreclosure-suit are deposited within a month or other short period to be fixed for the purpose, (7) in addition to which if the decree does not carry interest, the Court allows interest for the extended period, ordinarily at 6 per cent. per annum,(8) the mortgagee being also allowed his costs of the motion. There is one panacea, said a learned Judge, "which heals every sore in litigation, and that is costs."(9) If there be any doubt as to the sufficiency of the security, the Court insists on immediate payment of interest to accrue down to the date of extension.(10) But the mortgagee cannot demand interest where the delay was due to his own appeal.(11) In England where time is sought to prosecute an appeal, the Court receives and invests the deposit or takes security from the mortgagee for its refund if considered necessary.

2262. Redemption after due Date.—The question whether the mortgagor can as of right redeem after expiration of the period of grace and before the decree is made final, is one upon which the Courts are by no means agreed. According to the English practice redemption is open so long as it is not barred by an order passed under this rule (12) and this would also appear to be the effect of section 60, which is the mortgagor's *magna charta*, though the Courts are by no means agreed on his right to avert an order under this rule by a mere unexplained tender of the mortgage-money after the due date. According to the view taken by the Calcutta High Court the mortgagor may redeem at any time before the decree

(1) *Geldard* v. *Hornby*, 1 Ha., 251.
(2) *Rafikunnessa* v. *Tarini*, I. L. R., 20 Cal., 279.
(3) **Fisher**, § 1959.
(4) *Campbell* v. *Moxhay*, 18 Jur., 641.
(5) *Blackburn* v. *Caine*, 22 Beav., 614.
(6) *Patch* v. *Ward*, L. R., 3 Ch 203
(7) *Eyre* v. *Hanson*, 2 Beav. 478; *Geldord* v. *Hornby*, 1 Hare 251.
(8) *Joshyam* v. *Uppu*, (1913) 13 M.L.T. 212; 18 I. C. 362.
(9) *Per.* Bowen L. J. *in Cropper* v. *Smith*, 26 Ch. D. (711).
(10) *Tarachand* v. *Brojo Gopal*, 17 C.W.N. 457; 18 I. C. 747.
(11) *Geldari* v. *Hornby*, 1 Hare. 251.
(12) *Campbell* v. *Holyland*, 7 Ch. D., 166 (171, 172); *Beaton* v. *Bolton*, (1891) W. N., 30; *Colinson* v. *Jeffrey*, [1896] 1 Ch. 644.

is made absolute,and so the mortgagor need not invoke the aid of the clause so long as the mortgagee does not choose to apply for foreclosure.(1) But since a notice to the mortgagor is according to this Court not a *sine qua non* of a valid order under the section, the mortgagor runs the risk of having the mortgage foreclosed behind his back, if he does not come up in good time to obtain an extension. This case follows a Madras precedent in which a similar view was taken.(2) But in Madras the cases are by no means inconsistent, for while in some(3) the Calcutta view is acceded to, there are other cases in which the contrary view has been maintained.(4) But in the Full Bench case the learned judges were not unanimous in their reasons on the point. (5) For while Collins, C. J., upheld the earlier decision,(6) and held that the mortgagor was not entitled to execute the redemption-decree after the expiry of the period limited thereby,(7) Parker, J., exhaustively reviewed the law on the subject and observed: " I find it impossible to reply to the question referred to the Full Bench by a simple affirmative or negative. If by the question is intended ' Is the mortgagor precluded from executing the decree ? ' I would answer in the affirmative ; but if the question be ' Is he precluded from redeeming the property ? ' the answer seems to be that it all depends upon the circumstances of the case : Provided the mortgagor's right of redemption be not extinct, he can bring a fresh suit, or he can redeem if the mortgagee applies for sale ; but he cannot himself apply for execution of the decree after the expiration of the time limited." Shepherd, J., was also of the same opinion, for he observed :—"It is quite clear, as was pointed out in *Elayadath* v. *Krishnan*,(8) that the proviso (to section 93) cannot be intended to operate except in cases where the decree for redemption contains a clause similar to that prescribed by the last paragraph of the 92nd section. Reading the 87th section and the 93rd section together, I also think that the proviso was only intended to come into play when an application has been made by the mortgagee for the final order to which he may be entitled." (9) It may be noted that the cases considered by the Full Bench were curiously all redemption cases, and therefore the point decided by the Calcutta Judges has not directly come up before the Madras High Court.

2263. So far then as the question may be said to have been decided at all by the Madras Court, the view there taken seems to be that after the expiry of the time allowed, the mortgagor cannot redeem ; but if the mortgagee applies for an order under the section, it is then open to him to apply for an enlargement of the time. In Allahabad the earlier cases take the same view. " So far," observed Edge, C. J., and Blair, J.," as the power of a Court to extend the time in a suit for redemption or in a suit for foreclosure in India is concerned, the power and jurisdiction of the Court are limited, in the case of foreclosure, by section 87, and, in the case of redemption, by section 93 of the Transfer of Property Act, and in that respect the two suits are placed on exactly the same basis ; in neither

(1) *Poresh Nath* v. *Ramjadu*, I. L. R., 16 Cal., 246 ; *Ajudhia Persad* v. *Baldeo Singh*, I. L. R., 21 Cal., 818 (824) ; *Somesh* v. *Ram Kriehna*, I. L. R., 27 Cal., 705 (708); *Alimea* v. *Roshan Ali*, 3 C. L. J., 533 ; *Tarapada* v. *Kamini*, I. L. R., 29 Cal. 644, *Bepin Behary* v. *Makunda*, I. L. R., 36 Cal. 122 (127, 128).

(2) *Narayana* v. *Papayya*, I. L. R., 22 Mad., 133.

(3) *Ramunni* v. *Brahma*, I.L. R., 15 Mad., 366; *Kanara* v. *Govinda*, I. L. R., 16 Mad., 214 (219) ; *Narayana* v. *Papayya*, I. L. R., 22 Mad., 133.

(4) *Elayadath* v. *Krishnan*, I.L.R.,13 Mad., 267; *Manavikraman* v. *Unniappan*, I. L. R., 15 Mad., 170; *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40, F. B.

(5) *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40, F. B.

(6) *Elayadath* v. *Krishnan*, I, L. R., 13 Mad., 267.

(7) I. L. R., 19 Mad., 40 (47, 48), F. B.

(8) I. L. R., 13 Mad., 267 (268).

(9) *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40, (48), F. B.

case has a Court, which is bound to obey the law of the Transfer of Property Act, 1882, power to extend the time for payment except on good cause shown."(1) But in later cases, other Judges of the same Court followed the Calcutta view,(2) without referring to the earlier case, which had laid down the contrary. In a still more recent case not only did the Court accede to the same doctrine, but it even held that the mere fact that the mortgagee is put in possession of the property, by an order of the Court not being an order under this section does not deprive the mortgagor of his right to redeem, which can only be extinguished by a final decree under this rule. (3) Hence where a preliminary decree was made for foreclosure, and on the failure of the mortgagor to satisfy the decretal amount within the fixed time an order was erroneously made that the "order for sale" be made absolute, and after such order the money was paid into and accepted by the Court, and the Court thereafter on the application of the mortgagee amended the said order for sale as intended to mean an "order for possession," and directed the order for possession to be made absolute and to have a retrospective effect, it was held that there being nothing in the order making the decree absolute to debar the right to redeem, and further the order not being in conformity with the form given in Schedule IV of the Civil Procedure Code, nor with the language of section 87 (now replaced by this rule) the payment into Court by the mortgagor was good payment, and he was entitled to be restored to possession.(4) In Bombay the earlier cases follow the view taken in *Elayadath* v. *Krishnan*. (5) And in one case (6) it was even maintained that on the failure by the defendant to pay within the limited time, the foreclosure decree executed itself and the debtor could not then apply for the extension of time. "No second order is jurally necessary when a condition has been fulfilled which has made a prior order operative." (7)

2264. It would appear from the several decided cases reiterating the same view that prior to the extension of the Act, this view was currently entertained by the Bombay High Court. (8) But a different note was struck in a later case, in which the Calcutta case was cited presumably with approval, it being maintained contrary to its former decisions that under the proviso to section 93 (O. 34, r. 8) of the Act an application to extend the time for redemption fixed by the original decree may be made at any time before the decree absolute is made. (9) In the Central Provinces it has been held that while it is doubtful whether a mortgagor has an absolute right of redemption at any time before an order absolute for foreclosure is made, it is certain that a Court has discretion to

(1) *Ram Lal* v. *Tulsa*, I. L. R., 19 All., 180 (183, 184); dissenting from *Poresh Nath* v. *Ramjadu*, I. L. R., 16 Cal., 246; distinguishing *Kanara* v. *Govinda*, I. L. R., 16 Mad., 214, on the ground that there was no decree in that case, under s. 92, as to what should happen in case payment was not made within the time fixed.

(2) *Rahaman Ilahi* v. *Ghasita*, I L. R., 20 All., 375 (377): *Nihali* v. *Mitter Sen*, I. L. R., 20 All., 446; *Saligram* v. *Muradan*, I. L. R., 25 All., 231; *Pardas* v. *Dwarka*, 7 A.L. J., 953.

(3) *Saligram* v. *Muradan*, I.L.R., 25 All., 231.

(4) *Somesh* v. *Ram Krishna*, I. L. R., 27 Cal., 705: *Alimea* v. *Roshun Ali*, 3 C. L. J., 533.

(5) I. L. R., 18 Mad., 267.

(6) *Sadu* v. *Babaji*, I. L. R., 7 Bom., 532.

(7) *Per* West, J., in *Sadu* v. *Babaji*, I. L.R., 7 Bom., 532 (534).

(8) *Bhanushankar* v. *Raghunath*, 2 B.H.C. R. (A. C.). 101; *Sakwar* v. *Mukund* (1887); B.P.J., 324; *Gan Savant* v. *Narayan*, I. L. R., 7 Bom., 467; *Sheik Budan* v. *Ram Chandar*, I. L. R., 11 Bom., 537; *Mahant Ishwargar* v. *Chudasama*, I. L. R., 13 Bom., 106; *Subbanna* v. *Krishna*, I.L.R., 15 Bom., 644

(9) *Nandram* v. *Babaji*, I. L. R. 22 Bom. 771: citing Seton on Decrees, 4th. Ed, Pt. IV, Ch. XXV. s. 4 and *Patch* v. *Ward*, L. R., 3 Ch., 203: *Ganu Narayan*, 5 Bom., L.R., 540; *Rango* v. *Bhomshetti*, I.L.R., 26 Bom., 121; *Ishwar* v. *Gopal*, I.L.R., 28 Bom. 102.

enlarge the time so as to allow redemption at a very late stage.(1) In later cases, however the view taken is conflicting, for while in some the Calcutta view was fully adopted, and it was even held that a decree could not be made absolute if payment is made before the application to foreclose, though made after the date fixed for payment,(2) in other cases, the view taken is that having regard to the imperative language of the second paragraph, and the duty of the Court obliging it, in case of non-payment, to make the decree absolute, the mortgagor cannot, as of course, avert that order by merely paying up the amount, though if with the payment he shows good cause for the delay, the Court is not debarred from ordering a retrospective extension and then allow redemption.(3) But in any case, it is there agreed that the interim decree does not execute itself unless it is made absolute under the section,(4) though that fact alone scarcely affords solution to the further question whether the mortgagor may be permitted to redeem merely on payment of the amount due without assigning any good cause for the delay. It must be confessed that the language of the rule certainly does not favour the opinion upon which the Indian High Courts are more or less agreed, and whose view is, moreover, in accordance with the English practice by which redemption is permitted at any time before the final order.(5) Of course, in England, foreclosure may in certain cases be even re-opened, but as has been before stated, this cannot be done in this country. But this difference hardly justifies a departure in practice.

Postponing date of redemption.

2265. Nevertheless the language of the rule would not bear too strict a construction. For, as it runs, on the mortgagor's failure to make such payment (as is referred to in section 86), the mortgagee may apply for foreclosure, " and the Court *shall* then pass such order," which gives the Court no option in the matter. It has been suggested that this is by no means the case, since the third paragraph enables the Court to " postpone the day appointed for such payment." Now the word *postpone* implies an order passed before the appointed day has passed. It could not well *postpone* a day that has already passed. On the other hand, until the Court passes an order for foreclosure in the terms of this section, there is no reason why the property should be past redemption. But this view, though it is sound and consonant with the English practice, could not be successfully defended on the close construction of the section, viewed apart from its underlying principle. But a certain degree of elasticity has been now introduced in the working of the rule by the enactment of the following general provision :—

S. 148. " Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

This provision widens the operation of the present proviso which, strictly speaking, only permits the *postponement* of the day fixed for such payment, and which would *prima facie* exclude a retrospective extension. It was, indeed, so suggested but there can be no doubt that the Court now does posses such a power, but all the same it is a power which must be used judiciously and subject to the good cause shown (§§ 2259, 2260).

(1) *Keshav Rao* v. *Baxi*, 9 C. P. L. R., 75; *Buddhu Lal* v. *Buldeo Prosad*, 9 C. P. L. R., 78; *Nandlal* v. *Ramratan*, 2 N. L. R., 137; *Bhagwandas* v. *Shridahar*, 3 N. L. R., 55.

(2) *Dharani* v. *Sudarshan*, 12 C. P. L. R., 101; following *Poresh Nath* v. *Ramjadu*, 1. L. R., 16 Cal., 246.

(3) *Nandlal* v. *Ramratan*, 2 N. L. R., 135; *Bhagwandas* v. *Shridhar*, 3 N. L. R., 55; *Laxmi Bai* v. *Ramchandra* 3 N. L. R., 146; *Bakishau* v. *Anmaram*, 10 N. L. R., 150.

(4) *Madho* v. *Jagannath*, 8 C. P. L. R., 109; *Kushal Singh* v. *Shrinivas*, 2 C. P. L. R., 94.

(5) *Compbell* v. *Holyland*, 7 Ch. D., 166 (171, 172); *Beaton* v. *Bolton*, (1891) W. N., 30; *Collison* v. *Jeffery*, [1896] 1 Ch., 644.

2266. Questions for Consideration.—The Court to which an application under this section is made, is not necessarily bound to enter into an account of what balance of the mortgage-money is really outstanding against the mortgagor, if the latter has no money to pay and the Court has to foreclose the mortgage. But it has full power to ascertain this amount, and in an application under rule 5, it should make the order absolute for realization of that amount only.(1) In making this inquiry the Court will not now be fettered by the provisions of O. 21, rr. 1, 2, of the Code, for the rule is now explicit as regards the payment which must be made into Court, and this change was advisedly made, the Select Committee thinking it better "that in every case he should pay it into Court,"(2) which has been held to preclude an inquiry into any settlement or payment made out of Court,(3) but does not seem to be the necessary effect of a direction not accompanied by any penalty for non-compliance. Moreover, this rule cannot be held to abrogate the other rules of the Code which authorize the payment of any money payable under a decree out of Court to the decree-holder.(4) Formerly, the question was held to depend upon whether the proceedings under this section were(5) or were not regarded as proceedings in execution.(6) Where, the mortgage-money has not been paid, the Court may have to decide how far the conduct of one party has prevented the other party from paying off the debt. Thus where a compromise-decree was made for Rs. 49,855, but a clause therein provided that if before a certain date Rs. 35,000 was paid, the whole decree should be satisfied, another clause providing that, should the mortgagor desire to sell any of the mortgaged properties with a view to raise funds to pay off the decree, he should give the particulars of the property to be sold to the mortgagee who should then appraise the same within thirty days, and after crediting the proper price against the mortgagor's debt, should execute a deed of release, or of consent, and the mortgagee refused to appraise the properties when asked to do so, and the decree could not consequently be satisfied, it was held that the mortgagor must be presumed to have done what he was willing to do, and was prevented from doing by the mortgagee, and that his offer of the property was a good tender made, from which date interest should cease to run, and that the tender having been made when according to the covenant Rs. 55,000 would have been sufficient to pay off the decree, the mortgagee was entitled to no more than that sum.(7) A mortgage-decree passed against a person governed by the Mitakshara law may, after his death, be executed against his son, though the latter may have inherited the property by survivorship and though he was no party to the suit in which the decree was obtained. But the son would in such a case be entitled to have the question as to the immorality and illegality of the debt tried under section 47 of the Code.(8)

Payment or non-payment of decretal amount.

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(1) *Banarsi* v. *Nathumal*, (1913) P. R. No. 12 ; 16 I. C. 987.

(2) Notes on clauses.

(3) *Hatem Ali* v. *Abdul Gaffur*, 8 C. W. N., 102, *Bomarsi* v. *Nathumal*, (1913) P. R. No. 12 ; 16 I. C. 987 ; but it may be used by the plaintiff to save limitation ; *Bardi Narayan* v. *Kunj Behari*, I. L. R. 35 All 178.

(4) O. 21 rr. 1 (*b*) 1 (2).

(5) *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244, F. B. ; *Ali Ahmed* v. *Naziran*, I. L. R., 25 All., 542; and cases cited *supra*.

(6) *Hatem Ali* v. *Abdul Gaffur*, 8 C. W. N., 102 ; *Ajudhia Persad* v. *Baldeo Singh*, I. L. R , 21 Cal., 818 ; *Tiluck Singh* v. *Parsotam* I. L. R , 22 Cal., 7924 ; *Akkunnissa* v. *Roop Lall*, I. L. R., 25 Cal., 33 ; *Kedar Nath* v. *Kali Churn*, I. L. R., 25 Cal., 103 ; *Sitaram* v. *Dharama*, 16 C. P. L. R., 111.

(7) *Harendra Lal* v. *Maharani Dasi*, I. L. R., 28 Cal., P. C. 557.

(8) *Chander Pershad* v. *Sham Koer*, I. L. R., 33 Cal., 676; *Umed Hathising* v. *Goman* I. L, R., 20 Bom., 385.

2267. Form and Effect of Final Decree for Foreclosure.—The provision here made for a final decree under this rule is substantially the same as was enacted in section 87, that on satisfaction of the mortgage-decree, the Court shall, if so required, order the mortgagee to retransfer the mortgaged property as directed in the said decree. The clause was necessary in view of the provisions of section 86 (now rule 2), but the insertion of the words "if necessary" dispenses with the necessity of a retransfer as a *sine qua non* for revesting the estate in the mortgagor. Indeed, as was pointed out in the last edition of this work, the retransfer on redemption was seldom required in the mofussil and the Select Committee considered it inexpedient to alter this practice.(1) Consequently, it is not a legal necessity, but a right of the mortgagor to require the mortgagee to re-convey the mortgaged property to him, and to deliver up possession of it, if he was in possession on the strength of the mortgage, and in any case to deliver up to him all documents of title relating to the mortgaged property. In this respect also the practice in the Mofussil differs from that obtaining in the towns where these documents might be used to create an equitable mortgage, and which dictates the necessity of their being taken possession of by the mortgagee and re-delivered to the mortgagor on redemption. From the wording of clause 2, it is clear that the final decree for foreclosure must follow its terms, otherwise there may be loopholes in the decree which may render it liable to be unravelled. Where, for example, the decree was for foreclosure under section 86, but the Court erroneously recorded an order absolute for sale under section 89, the Court was on the motion of the mortgagor constrained to concede that the order so passed could not have the effect of shutting off the mortgagor's right to redeem, for which an order in the terms of clause 2 of this rule was necessary.(2) But while the Courts have thus enjoined strict compliance with the provisions of this section they have not carried their strictness to the construction of section 89 (§ 2320), under which a corresponding order in the terms of that section is held as by no means essential to a valid sale. Probably the differentiation was suggested by the fact that while a final decree for foreclosure closes all doors to redemption, a final decree for sale does not necessarily entail the same consequence.

2268. Final Decree and Its Consequences.—If the Court passes the final decree as provided in the second paragraph, the third clause declares that with the order absolute "the debt secured by the mortgage shall be deemed to be discharged." The mortgaged property is then the only security which the mortgagee must look to for the satisfaction of his debt. There is no covenant on the part of the mortgagor by conditional sale to indemnify his creditor for the inadequacy of his security, and, on the other hand, the mortgagee is not bound to account to the mortgagor for the value of the property foreclosed to him.(3) In England, however, the debt is not necessarily discharged by foreclosure, for there such a mortgage imports also a personal security, the claim in respect of which he is at liberty to join with a claim for foreclosure;(4) or he may first exhaust one security and then fall back upon the other.(5) But if he proceeds first upon his covenant or bond, and obtains part-payment of his debt, he is allowed to foreclose for his residue; but if he proceeds by foreclosure first, and

Discharge of the debt.

(1) Notes on clauses.
(2) *Alimea* v. *Roshun Ali*, 3 C. L. J., 533.
(3) *Balkishen* v. *Legge*, I. L. R., 22 All., 149, P. C.
(4) *Earl Poulett* v. *Viscount Hill*, [1893] 1 Ch., 277.
(5) *Palmer* v. *Hendrie*, 27 Beav., 349; *Perry* v. *Baker*, 8 Ves., 527*a*; *Thornton* v. *Court*, 3 DeM. & G., 293; *Walker* v. *Jones*, P. C. 50.

then finding the estate insufficient to satisfy the debt, goes on to sue upon his covenant for the deficiency, he can be allowed to do this, but only upon giving a new right of redemption to the mortgagor. (1) "For if the mortgagee takes his legal remedy first, the mortgagor retains his right to redeem, and the mortgagee ought not, by electing to take the estate first, be able to get both it and the debt." (2) But since the rights of the mortgagor and mortgagee are correlative and mutual, the latter is not entitled to proceed for the deficiency after foreclosure, if by his own act, as by selling the estate to a stranger, he has prevented the mortgagor from redeeming it; (3) the case being of course different if the mortgagee is prevented from restoring the estate through no fault of his own, as if he had himself been ejected or redeemed by a third party.(4) On a somewhat similar principle a question was raised in this country whether the mortgagee obtaining two successive bonds from the same mortgagor in respect of the same property can be permitted to foreclose the first mortgage, and then proceed against the mortgagor personally on the second mortgage on the strength of section 68. The real objection to these suits, observed Garth, C.J., "in an equitable point of view appears to be this—that the plaintiff who is the beneficial owner of Alampur, subject to the mortgages, and as such, liable conjointly with the owners of the other mortgaged properties, to pay his proportion of the entire mortgage-debts, has attempted to foreclose Alampur and the other properties comprised in the first mortgage, for a part only of the mortgage debts (that part which was due under the first mortgage), and has then sued the defendant personally for the remainder, to the payment of which he himself, as the owner of Alampur, is bound to contribute. We have great doubts whether, under such circumstances, he had any right to foreclose at all under the first mortgage. Grish Chunder, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage-debt, and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage and so deprive the defendant of that which both the parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage." (5) It was held in that case that at any rate the holder of two mortgages could not foreclose the first mortgage and then be allowed equitably to sue the defendant personally for the debt due upon the second mortgage. And on similar facts it has been held by the Bombay High Court that the mortgagee cannot foreclose his first mortgage without treating the entire mortgage-debt as satisfied. And if in the first suit the mortgagor omits to plead that the plaintiff cannot foreclose except upon the abandonment of his second mortgage, he cannot be deprived of his right to insist that the mortgagee should either be precluded from suing on the second debt, or that the foreclosure should be re-opened. (6)

2269. And it was accordingly held by the Courts which regarded the application as in continuation of the suit, that though the mortgagee should as a rule apply for possession at the same time as he applies for foreclosure, still he is not precluded from maintaining a separate suit if he be so advised.(7)

(1) *Per* Lord Landale in *Lockhart* v. *Hardy*, 9 Beav., 355, cited by Stirling, J., in *Kinnair* v. *Trollope*, 39 Ch. D., 636 (642).

(2) Fisher, § 1697.

(3) *Ib.* § 1968, *Lockhart* v. *Hardy*, 9 Beav. 349.

(4) Re *Burrel*, L. R. 7 Eq. Q. 399.

(5) *Kali Prosonno* v. *Kamini Sundari*, I. L. R. 4 Cal., 475 (481).

(6) *Bapu Ravji* v. *Ramji*, I. L. R., 11 Bom., 112; *Godha* v. *Sakal* (1907), A. W. N., 83.

(7) *Bapu* v. *Govind Rao*, 16 C. P. L. R., 107; *Jaka* v. *Mt. Jamna*, 16 C.P L.R., 114; *Nathuram* v. *Gokuldas*, 11 C. P. L. R., 141; *Pugh* v. *Heath*, 7 App. Cas. 235. (The judgment of Cairns, L. C., however, shows that the question decided mainly turned upon the Statute of Limitation. See p. 238.)

And so since the term "decree" now includes as much a preliminary decree passed under the last rule, as well as the final decree passed under the present rule, it follows that the mortgagor may move to set aside either decree by an application made under section O. 9, r. 13 of the Code.(1) But formerly this was by no means clear, and it was held that order is regarded as falling within the scope of section 244 of the Code, although it has the force of a decree, it cannot on that account be similarly, set aside,(2) though the order may be appealed against,(3) and subject to certain restrictions, be set aside in a regulare suit. But the cases on this point were by no means consistent, since the contrary view was also maintained by the Calcutta High Court(4) following several cases of its own Court.(5) And it was held in the Central Provinces that an appeal against an order absolute for foreclosure or sale was not chargeable with an *ad valorem* Court-fee, but must be treated as an application under Schedule II, Article I of the Court Fees Act.(6) Now since the same Court had more than once expressed its concurrence with the Calcutta view that an application under what is now this rule or rule 5 was not an application for execution of a decree, and as such did not fall within the scope of section 244 (now s. 47) of the Code, the question of court-fee was a natural one to arise. And it is plain that if an order under the two sections be outside the scope of section 47 of the Code, it may be a question whether the full court-fee would not then be chargeable on appeal. For if the final decree is a decree within the meaning of the Code, it is equally a decree within the meaning of the auxiliary Act which provides for the valuation and payment of court-fee on appeals allowed by the Code. It cannot be assumed that the term "decree" may convey two different meanings in the two Acts as is suggested in the case. Such an assumption would not be warranted by any rule of construction. The effect of the present amendment may then be to necessitate the payment of *ad valorem* Court-fee on an appeal against an order making the decree final.

2270. This section confers upon the Courts no power to re-open a foreclosure. But in England the Courts possess this power, and the Money Lenders Act, 1900,(7) extends to all Courts the same power which the Courts of Equity possessed to re-open a closed transaction with a view to satisfy itself as to its reasonableness, and in doing so, the Courts are empowered to set off sums found to be overpaid against any future sums that may be found due against the debtor. The drastic provisions of this Act have been, however, construed, to be limited, only to a case when the transaction closed in some way connected with the subsequent transaction.(8) In other words, the account re-opened must be relevant to the transaction in respect of which the action is brought.

2271. Effect on Right of Privies:—Where the mortgagor fails to satisfy the decree by failing to pay the whole or any part of it, the mortgagee is entitled to apply to the Court for a decree that "the defendant and all persons

(1) *Amolachand* v. *Jowahir*, 16 C. P. L. R., 92.

(2) *Akramnissa* v. *Vali-ulnissa*, I. L. R. 18 Bom., 429; *Dhonkal Singh* v. *Pakker Singh*, I.L.R., 15 All., 84; but *contra* in *Gaurmohun* v. *Tarachand*, 3 B. L. R. (A. C.), 17; *Ram Kristo* v. *Taradas*, 12 C. L. R., 449. In *Pandu* v. *Juje*, I. L. R., 27 Mad., 40, the point was not raised.

(3) *Nihalchand* v. *Rameshri*, I.L.R., 9 Cal. 214; *Rahima* v. *Nepal Rai*, I. L. R., 14 All., 520 (appeal against extension of time).

(4) *Akikunnissa* v. *Rooplall*, I. L. R., 25 Cal., 133.

(5) *Ajudhia Pershad* v. *Baldeo Singh*, I. L. R., 21 Cal., 188; *Tiluck Singh* v. *Parsotam*, I. L. R., 22 Cal.., 924; *Tara Prosad* v. *Bhobodeb*, *ib.*, 931 (934).

(6) *Balmukund* v. *Haji Hasan Ali*, 14 C. P. L. R., 100.

(7) 63 & 64 Vict., c. 51, s. 1.

(8) *Saunders* v. *Newbold*, [1905] 1 Ch., 260 (267).

claiming through or under him be debarred from all right to redeem the mortgaged property, and also, if necessary, ordering the defendant to put the plaintiff in possession of the property." An order passed in these terms was before the amendment of section 87 designated an order absolute for foreclosure. It is now the final decree of foreclosure. But its legal effect remains the same. It entitles the mortgagee to be put in possession of the property, and it finally debars the mortgagor and those "claiming through or under him" from redeeming the property. In other words, the conditional sale then becomes an absolute sale binding upon both the mortgagor as well as his privies, for it equally debars all persons "claiming through or under him," excluding only those who claim adversely or by a title paramount to him. The words "claiming through or under him" may raise a question whether such persons are debarred of their right to redeem even though the mortgagee had not impanelled them in accordance with the requirements of rule 1. It will be observed that these words are even stronger than those which define the extent of the rule of *res judicata*, which, under section 11 of the Procedure Code, besides the actual parties binds only those who claim *under* them, whereas persons who whether they claim under or through the mortgagor equally have their right of redemption hushed by this decree. Who are then such persons? A Mitakshara son might in one sense be said to be one such person, for consanguinity or *sapinda* relationship arising through his being connected by particles of the one body is the sole claim for his heirship to his father's property whether ancestral or self-acquired. (1) In this sense he may be said to be bound by this decree even though he had not been expressly joined, as required by rule 1. But such is evidently not the case. For, according to the view taken in Allahabad, such a person does not acquire an interest in the ancestral property *under* his father, but independently of him and by reason of his birth, his right being one which he is legally entitled to enforce even against his father (2): consequently, the annihilation of the father's right to redeem does not affect his right which he may enforce till it is legally foreclosed (3) (§ 2160). It has been said that only such persons can be said to claim under the mortgagor as derive their title through him by assignment, grant or otherwise. (4) Their interest may be co-extensive with that of the mortgagor, or it may be held in subordination to his, as in the case of a lease. But, in any case, the privity between them and him must be one of estate and not of personal relation. Such an interest is, for example, possessed by a beneficiary who is ordinarily bound by a decree obtained against his *benamidar*, (5) and so a decree obtained against a Hindu widow has been held to bind the reversioner. (6) But the latter cannot be said to claim under the former, any more than one reversioner claims through or under another, and it being so, a decree obtained against one does not affect the interest of the other. (7) What other persons are intended to be excluded by this clause has not been the subject of judicial consideration. But it is evident that lessees and under-tenants created since the mortgage have their estates determined *ipso facto* on the passing of this decree. But the clause may have the far-reaching effect not contemplated by those who evolve a continued right to redeem out of the exhortation to join in a suit all persons having an interest in the mortgaged property, and the non-compliance with which is held to invest

(1) See *Lallubhai* v. *Mankubarbai*, I. L. R., 2 Bom., 425.

(2) *Ram Narain* v. *Bssheshar Prasad*, I. L. R., 29 All., 41.

(3) *Sundarlal* v. *Chitar Mal*, I. L. R. 29 All. 8

(4) *Ib.*

(5) *Sheikh Mahomed* v. *Jamaluddin*, 10 Bom. L. R., 385.

(6) *Katama Nachiar* v. *Srimut Rajah Moottoo*, 9 M. I. A., 539 (604); *Tribhuban* v. *Srinarain Snigh*, I. L. R., 20 All., 341; *Lackmi Narain* v. *Ramchandra*, 4 A. L. J. R., 117.

(7) *Chhiddu* v. *Singh Durga Dei*, I. L. R., 22 All., 382.

the title obtained by the decree with an insecurity due to the outstanding right of other persons to redeem the property (§§ 2163—2170).

2272. Limitation for Application—The limitation for an application under this as well as under rule 5, would, in the case of a decree of the original side of a chartered High Court, be twelve years as prescribed in Art. 183 (1); the decrees of other Courts being now subject to Article 181, Schedule II of the Limitation Act, and not to Article 182. In England the practice is to obtain an order absolute for foreclosure, as of course, on motion upon an affidavit of non-payment of the money, at the appointed time and place or subsequently, to the person to whom it is directed to be paid, or his agent, without notice to the opposite party.(2) And while foreclosure may be re-opened upon sufficient grounds, want of notice is not such a ground entitling the mortgagor to re-open it.(3) Under the section there is no need to support the application with an affidavit. The question whether an application under this section was subject to any limitation was, however, formerly one the answer to which depended upon the view in which the preliminary decree was regarded. Article 179 of the old Limitation Act (now Art. 182) allowed three years for the execution of a decree or order passed by a Civil Court,(4) and it was, consequently, obvious that this article would be held applicable only where there was a decree or order capable of execution at the starting point.(5) For the decree or order referred in the first paragraph of that article (the other paragraphs being inapplicable) must be a decree or order which is immediately capable of execution, and since the *terminus a quo* under that paragraph is manifestly not a date on which the decree or order which is not executable, that article would seem to be inapplicable to an application for foreclosure.(6) The only other article which could then apply was Article 178 (now Art. 181) which allows the same period for "an application for which no period of limitation is provided elsewhere in this schedule or by the Code of Civil Procedure, section 230 (now section 48)" calculated from "when the right to apply accrues."(7) It is agreed that this article applies only to applications made under the Code of Civil Procedure,(8) and the suitability of this article was then naturally regarded as dependent upon the question whether an application under this and rule 5 could be regarded as applications under the Code. That it could be so regarded was the view taken in Allahabad where it was said that though the application is made under the specific provisions of this section, "but it is to the Code of Civil Procedure to which we must look for

(1) *Abdul Majid* v. *Jawalier*, 18 C.W.N. 963 (967) P. C.; *Batuk Nath* v. *Munni Dei*, *ib.*, 740 P. C. *Munnalal* v. *Sarat Chunder*, 19 C. W. N. 561. P.C.

(2) Coote's Mortgage (5th Ed.), p. 1106; Seton on Decrees (4th Ed.), 1091; Fisher, § 2050.

(3) *Tarapado* v. *Kamini*, I. L R., 29 Cal., 644; see Fisher, §§ 1955-1975; dissented from on another point in *Bibi Tarhiman* v. *Harihar* I. L. R., 32 Cal., 253 F. B.

(4) Art. 182, Act IX of 1908.

(5) *Muhammad Suleman* v. *Mhd. Yar Khan*, I. L. R., 17 All., 39; *Chedda* v. *Lalu*, I. L. R., 24 All., 300; *Ali Ahmad* v. *Naziban*, I. L. R., 24 All., 542 (545).

(6) *Ali Ahmad* v. *Naziban*, I.L.R., 24 All., 542 (545); explaining *Chunni* v. *Harnam*, I. L. R., 20 All., 302, in which the question of limitation did not arise; and *Parmeshri* v. *Mohan Lal*, I. L. R., 20 All., 357, in which too the question was not *res integra*, though the language of Burkitt, J., is inapt, and which he explained away in *Ali Ahmad* v. *Naziban*, I. L. R., 24 All., 542 (545, 546); *Muhammad* v. *Zinat Begam*, I. L. R., 25 All., 385; *Troylokya Nath* v. *Jycti Prokash*, I. L. R., 30 Cal., 761.

(7) Art. 178, Act XV of 1877: now Art 181, Act IX of 1908.

(8) *Bai* v. *Manekbai*, I. L. R., 7 Bom., 213; *Ranbir Singh* v. *Drigpal*, I. L. R., 16 All. 23; *Connell* v. *The Himalaya Bank*, I. L R., 18 All., 12; *Tiluck Singh* v. *Parsotam*. I. L. R., 22 Cal., 924; *Rahmat* v. *Abdul*, I. L. R., 34 Cal., 672; *Dinanath* v. *Iswar Chandra*, 3 C. W. N., ccoxxxii; *Tallappa* v. *Dattu*, 5 C. P. L. R., 61; *Jaka*, v. *Mt. Jamna*, 16 C. P. L. R. 114; *Nathuram* v. *Gokuldas*, 11 C. P. L. 141.

the procedure by which it is governed."(1) But it might have been contended that that alone did not convert it into an application made under the Code. However, the Allahabad and Madras Courts were agreed that the article to apply was Article 178 (now Article 181) and not article (now Article 182).(2) But this was not the view assented to by the Calcutta Court which having held that a foreclosure-application was not under the Code, and that Article 178 only referred to an application made thereunder was bound to hold that such an application was subject to no limitation,(3) though it must be made within a reasonable time. But in view of these rules being made an integral part of the Code, the view of the Calcutta High Court can no longer be maintained, and the limitation prescribed by Article 181 would now clearly apply to such applications, which, in fact is now recognized, (4) though it is held there an application made under this or rule 5 in respect of a preliminary decree passed prior to the enactment of the Procedure Code of 1908, would still be governed by the old practice of the Court, and be subject to no statutory bar of limitation (5). But the contrary has been maintained in Bombay and with reason.(6) The Calcutta view proceeds on the assumption that a right of suit is a vested right, (7) but it undoubtedly is, but then an application under this rule is not a suit but in a suit, and must therefore, necessarily be subject to Article 181 of the Limitation Act.

2273. But another question still remains. It is enacted by section 48 (old section 230) of the Code of Civil Procedure that "where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years" from certain dates there specified. The application of this section turns upon whether a mortgage decree is a decree "for the payment of money or delivery of other property." According to the Calcutta High Court it is not, (8) except when the decree also orders payment by the defendant personally. (9) Hence, where a combined decree under this and section 90 (now rule 6) is passed, and the decree-holder proceeds to execute it for the realization of the balance after the mortgaged property has been sold, the provisions of section 230 of the Civil Procedure Code would apply and bar an application for execution after the expiry of twelve years from the commencement of proceedings against the person and other property of the judgment-debtor.(10) A similar view is taken in Allahabad where it is said that a decree with respect to immoveable property "ordering its sale" in accordance with the provisions of the next section is not the same as "for the payment of moneyor delivery of property"—expressions used in the Code.(11)

(1) *Ali Ahmad* v. *Naziban*, I. L. R., 24 All., 542 (546); following *Ram Sarup* v. *Ghaurani*, I. L. R., 21 All., 453; dissenting from the contrary held in *Ranbir Singh* v. *Drigpl Singh*, I.L.R., 16 All., 23, on the ground that it was a decision by a single Judge.

(2) *Ram Sarup* v. *Chaurani*, I.L.R., 21 All., 453; *Ali Ahmad* v. *Naziban*, I.L.R., 24 All., 542; *Rungiah* v. *Nanjappa*, I.L.R., 26 Mad., 780.

(3) *Poresh Nath* v. *Ramjadu*, I.L.R., 16 Cal., 246; *Ajudkia Persad* v. *Baldeo Singh*, I.L.R., 21 Cal., 818; *Troylokya Nath* v. *Jyoti Prokash*, I.L.R., 30 Cal., 761; *Mashab Mone* v. *Lambert*, 12 C.L.J. 328; 6 I.C. 537; *Jaka* v. *Jamna*, 16 C.P.L.R., 114.

(4) *Kista Bar* v. *Banamoyi*, 19 C.W.N. 470.

(5) *Kista Bar* v. *Banamoyi*, 19 C.W.N. 470; following *Kaunsilla* v. *Shri Singh*, 7 A.L.J. 420; dissenting from *Datto* v. *Shankar*, I L. R., 38 Bom. 32.

(6) *Datto* v. *Shankar*, I.L.R. 38 Bom. 32.

(7) *Kista Bar* v. *Banamoyi*, 19 C.W.N. 470 following *Gopeshur* v. *Jiban Chandra*, 18 C. W.N. 804.

(8) *Fazil Howldar* v. *Krishna*, I. L. R., 25 Cal., 580 (582); *Kartick Nath* v. *Juggernath*, I. L. R., 27 Cal., 285 (288).

(9) *Hart* v. *Tara Prasanna*, I. L. R., 11 Cal., 718; *Jogemaya* v. *Tackomoni*, I. L. R., 24 Cal., 473; explained in *Fazil Howldar* v. *Krishna*, I. L. R., 25 Cal., 580 (582, 583).

(10) *Chandi Charan* v. *Ambika Charan*, I. L. R., 31 Cal., 792.

(11) *Ram Charan* v. *Sheobarat*, I. L. R., 16 All., 418 (420); *Jugul Kishore* v. *Cheda Lal* (1893), A. W. N. 184.

This view was, however, controverted in Madras, where it was held that so long as a decree directs payment it is a money-decree, and does not lose its character because it declares the mode and the order of the procedure by which it is to be realized.(1) Whatever may be said of a decree for sale under rule 4, a decree for foreclosure has never been held to be a decree for money within the meaning of section 48 of the Code.

2274. Re-transfer of Possession.—The necessity for change of possession may arise in the two cases contemplated by the section. If the mortgagor redeems the property, it may be necessary to reinstate him in possession, and in such a case the first clause makes it obligatory on the Court to put him in possession of the mortgaged property. Of course, such a necessity can only arise where the mortgagee has been put in possession by virtue of his mortgage, though it may not be necessarily by virtue of its terms. For if the mortgagee is otherwise entitled to possession, mortgagor cannot oust him on redemption. On the other hand, if the mortgage is foreclosed, the Court is empowered also to deliver possession of the mortgaged property to the mortgagee. It will be noticed that on redemption the mortgagor *shall* (if necessary) be put into possession, whereas on foreclosure the Court *may* deliver possession of the property to the mortgagee. In other words, while on redemption the Court *must*, on foreclosure the Court *may*, order re-transfer of possession. The reason for this discrimination is apparent, for while the mortgagor is always entitled to get back the property mortgaged as soon as the mortgage itself is extinguished, it is not always that the mortgagee can demand actual possession on foreclosure. If, for instance, the property forclosed is in the possession of tenants or is an undivided co-parcenary share, the Court cannot place the mortgagee in physical possession of the share, though the mortgagee may in the former case sue to eject the tenants, and in the latter case for partition.(2) And in such a case it would seem that it is after partition that the right of pre-emption would accrue.(3) But the mortgagee's title as owner accrues from the date of foreclosure.(4)

2275. It is not necessary that the mortgagee should apply for possession at the same time as he applies for foreclosure. He may wait till he obtains foreclosure, and may then apply for possession, which the Court may deliver after notice to the mortgagor.(5) The mortgagee may, however, elect to maintain a separate suit which is not thereby barred.(6) Indeed, it may be that sometimes the Court is unable to give anything more than a mere formal possession, in which case the mortgagee may have to sue for recovery of actual possession, for which he may maintain a suit within twelve years from the delivery of symbolical possession.(7) On the other hand, after the property is foreclosed, the mortgagor cannot sue for recovery of its possession on the ground that the decree was obtained by fraud, without also suing to set aside the decree.(8) With the re-transfer of possession the mortgagee is, of course, liable

(1) *Kommachi* v. *Pakker*, I. L. R., 20 Mad., 107 (110).

(2) *Ramchandra* v. *Balkrishna*, 17 C. P. L. R., 62.

(3) *Ran Bahadur* v. *Parmeshar*, I. L. R., 24 All., 493.

(4) *Pugh* v. *Heath*, 7 App. Cas., 238; *Chabildas* v. *Mowji*, 3 Bom. L. R., 456 (460).

(5) *Le Bas* v. *Grant*, (1895) W. N., 98; *Keith* v. *Day*, 89 Ch. D., 452; *Bapu* v. *Govind Rao*, 16 C. P. L. R., 107.

(6) *Pugh* v. *Heath*, 6 Q. B. D., 345, O. A., 7 App. Cas. 235; *Bapu* v. *Govind Rao*. 16 C. P. L. R., 107; *contra* in *Arjun Singh* v. *Machabal Singh*, 8 A. L. J. R. 601.

(7) *Shama Charan* v. *Madhub Chandra*, I. L. R., 11 Cal., 93; *Hari Mohan* v. *Baburali*, I. L. R., 24 Cal., 715; *Mangli* v. *Debi Din*, I. L. R., 19 All., 499; *Jagannath* v. *Milap Chand*, I. L. R., 28 All., 722.

(8) *Ramcharan* v. *Rameshwar*, 16 C. P. L. R., 181 (184); following *Seetaram* v. *Nilu*, 1 C. P. L. R., 75. Such a suit will be governed by Art. 95 of the Indian Limitation Act.

to return all the title-deeds of which he held possession as mortgagee. Indeed, it is a term of the decree under the last section which the mortgagee is bound to comply with.(1)

Incidents of possession.

2276. It has been before noted that the mortgagee entering into possession is entitled to the standing crops with the land foreclosed (§ 347). Other incidents passing on re-transfer will be also found discussed elsewhere (§§ 348-364).

2277. The principle of the case has been followed in Allahabad.(2) And so in an English case,(3) where the mortgaged property had passed out of the hands of the mortgagee, it was observed: "The question is, whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against the mortgagor to recover the amount of the mortgage-money. He can, undoubtedly, at law, sue upon the covenant, but the mortgagees must perform their reciprocal obligation; they are bound, on payment, to restore the property to the mortgagor, and if it appear, from the state of the transaction that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law." It should, however, be added that this clause is no authority for supporting the contention that on foreclosure of a mortgage all outstanding mortgages between the parties shall be deemed to be discharged. Indeed the only thing discharged is *the* debt secured by *the* mortgage on which a decree under the last section was passed. Even in this view it has been held in Allahabad that if the mortgagee obtains an order absolute in respect of property decreed by the first Court, during the pendency of his appeal as regards the property released from the mortgage, and his appeal is afterwards decreed, it will avail him nothing, as there cannot be a second order of foreclosure in the same case. This view is supported on the strength of the language used in this rule which provides that upon the passing of an order under paragraph 2, *the debt secured by the mortgage shall be deemed to be discharged.*(4) But it may be submitted against this view that as the appellate decree becomes a part of the original decree and speaks as from that date, a second order for foreclosure may well be deemed to be a continuation of the original order.

2278. Another consequence of the final decree may be to extinguish a party's right to redeem under another mortgage if it comes in for adjudication in the suit. The same property was mortgaged to *A* and afterwards again to *A* and *B*, who sued on their later mortgage and obtained a foreclosure-decree which was made absolute, both *A* and *B* being placed in possession of the property. In this suit it was, however, held that the mortgage of *A* and *B* took priority over the earlier mortgage in favour of *A*, on the ground that its consideration was used to pay off an earlier mortgage. This finding was acquiesced in by *A* who did not contest it in appeal. *A*, however, sued to enforce his own earlier mortgage offering to pay to *B* one-half of the amount of their joint decree, and for the foreclosure of his share. But the Court dismissed his suit on the ground that in the joint suit *A's* mortgage having been found to be later, it was for him *then* to redeem *B*, and as he did not do so but suffered the decree to be made absolute, he could not afterwards enforce a right which had become

(1) *Ram Nath* v. *Gopal*, 5 C. L. J., 12 *n*.
(2) *Ballam Das* v. *Amar Raj*, I. L. R., 12 All., 537; see also *Ahmed* v. *Bakar Husain*, (1883) A. W. N., 61; *Khwaja Baksh* v. *Imaman*, (1885) A. W. N., 210.
(3) *Palmer* v. *Hendrie*, 27 Beav., 349; 28 Beav., 431.
(4) *Sham Sunder* v. *Mhd. Ihtisham*, I.L. R., 27 All., 501, F.B.

extinguished by the order. In such a case, however, if there had been no finding as to the rank of *A's* mortgage in the first suit, *A's* second suit would not have been barred.(1)

2279. Since the mortgage is extinguished on foreclosure the mortgagee's title as owner dates as from that date, and it is then that he is entitled to be placed in possession of the property.(2) And whatever may be the date of his actual entry, it is from the date of the final decree that his rights and liabilities are determined. In other words his actual entry relates back to the time of the legal right to enter.(3)

But though the mortgagee's title is as from that date adverse, it does not follow that he is precluded from relying on the security and hold it up as a shield against the claims of a subsequent incumbrancer, and which he may do whether the title acquired by him is by foreclosure or by sale. This rule is founded upon the principle that, where a first mortgagee purchases at a sale in execution of a decree on his mortgage, equity regards the mortgage as the foundation of his title, so that the purchaser may justifiably fall back upon the mortgage if he fails to uphold his priority on the strength of the sale.(4)

Germination of other rights.

2280. Debt discharged.—The effect of an order under this rule is to put an end to the relationship of creditor and debtor created by the mortgage contract, so that the former cannot sue the latter again for recovery of "the debt secured by the mortgage." He takes the security for whatever it may be worth in lieu of the debt; but this does not mean that he purchases a pig in a poke and that if the mortgagor has passed on to him a worthless title he has remedy. For instance, it may be that he is evicted by the superior landlord, or by one claiming under a title paramount to his own, in which case though he cannot sue for the debt he is entitled to sue for compensation for the loss of his property. In this respect his rights and obligations are similar to those of the purchaser of property. Indeed, the fact that the conditional sale becomes an absolute sale only after a prescribed procedure undergone by the mortgagee does not affect his rights after his title is confirmed by the passing of a final decree. This is the rule in England, where, however, it appears to be the corollary of the rule before discussed, that in a mortgage suit the object of foreclosure being to bar the right of redemption, parties are not at liberty to debate their title (§ 2101). But as this rule has never been extended to this country, the mortgagee would do well to make sure of his title before he forecloses his mortgage.(5)

[See the subject further discussed under s. 101.]

2281. Final Decree when re-opened.—Though a final decree for foreclosure or sale cannot be re-opened in this country on any of the grounds

(1) *Ram Lal* v. *Lakhpat Rai*, 3 A.L.J.R., 240.

(2) *Pugh* v. *Heath*, 7 App. Cas., 238; followed in *Chabildas* v. *Mowji*, 3 Bom. L. R., 456 (460); *Sham Sunder* v. *Mohamed Ihtisham Ali*, I. L. R., 27 All., 501 (504) F. B.; *Ghinarain* v. *Ram Monaruth*, I.L.R., 6 Cal., 566 *n*; *Bhobomoyee* v. *Jugobandhu*, I. L. R., 6 Cal., 564; *Ramjan* v. *Chunder Mohan*, 7 C.L.J., 640; following *Brojonath* v. *Khetut Chunder*, 16 W. R., 33 P.C.; cf. also *Parmanandas* v. *Jumnabai*, I.L.R., 10 Bom., 49; *Raja Kishen Datt* v. *Mumtaz*, 6 I.A., 160.

(3) *Ocean Accident, &c., Corporation* v. *Ilford Gas Co.*, [1905] 2 K B., 493; *Thorpe* v. *Stallwood*, 5 Man. & G., 760; *Barnett* v. *Guilford (Earl)*, 11 Ex., 19; *Anderson* v. *Radcliffe* 29 L. J. (Q. B.), 128; but see In re *Loom*, [1910], 2 Ch. 230, in which the mortgagee was not held liable for the covenant of a lease to repair because though he had foreclosed the mortgagor he had not entered into possession, and the covenant to repair was personal to the mortgagor.

(4) *Bhawani Koer* v. *Mathura Prasad*, 7 C.L.J., 1 (31).

(5) Fisher, (§§ 1968-1975).

upon which it may be set aside in England, still there is no reason why it should not be set aside if it was procured by fraud or passed by mistake. So where a suit for foreclosure was compromised by the mortgagee agreeing to give the mortgagor six months' time to pay up the amount found due, but the Court by mistake passed a decree *nisi* allowing only three months' time, and of which the mortgagee took advantage and obtained a final decree, it was held that the Court was entitled to set aside its decree.(1) There was no express statutory authority justifying this course prior to the enactment of the present Code of Civil Procedure, which, however, now contains express provisions for righting the wrong.(2)

2282. Appeal.—Prior to the present enactment the Courts were divided on the right of appeal against an order passed under section 87 or 89 granting or refusing an extension of time. According to the view taken in Allahabad and Madras an order granting or refusing an extension of time was an order falling within the scope of section 244 (*c*) of the Code, and was, as such, appealable.(3) But in order to be appealable the order must have been a judicial and not merely a ministerial one, as where the Court allowed deposit of the mortgage-money some days after the expiry of the time prescribed for payment,(4) in which case it was held that there was no appeal. So if the order absolute were suffered, the judgment-debtor could not object to the delivery of possession as a necessary consequence, nor was that the stage at which the illegality of the order making the decree absolute could be canvassed.(5) The present Code now expressly provides for an appeal against an order passed under this rule or rule 8 *refusing* to extend the time for the payment of mortgage-money.(6) And as to this clause the Select Committee said: "The extension of time for the payment of mortgage-money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing, but not from an order granting an extension of time."(7) So far then the present clause curtails the pre-existing right of appeal. For section 104 of the Procedure Code prohibits an appeal from an order passed under the Code save as expressly provided therein or by any law for the time being in force. And as there is no such law at present, it follows that the mortgagee cannot complain of extension though the mortgagor may do so of its refusal. But these are not the only orders possible under this rule, for it may have not only granted an arbitrary extension, but granted it without putting the mortgagee upon terms, and in which case he may be seriously prejudiced. Again, while it is no doubt true that the mortgagor should not spend the extension granted to him in suspense, still it is equally true that there may be cases of extension which would sadly miss the salutary corrective of an appeal. But an order passed by the Court may be a part of the decree, in which case the party aggrieved would be entitled to impugn the order by appealing against the decree. Such for example, would be the case if the Court passes a decree discharging the mortgage when the mortgagor had not paid the amount legally claimed to be due to the mortgagee, or where document or possession is erroneously transferred, or the like. An application for amendment of a final decree so as to bring it in conformity with the judgment,

(1) *Baishnab Charan Laha* v. *Basunta*, 13 C.W.N., 300.
(2) Ss. 151, 153.
(3) *Hulas Rai* v. *Pirthi Singh*, I. L. R., 9 All., 502 (*note*); *Kedar Nath* v. *Lalji*, I. L. R., 12 All., 61 F. B.; *Rahima* v. *Nepal Rai*. I. L. R., 14 All., 520.
(4) *Hulas Rai* v. *Pirthi Singh*, I. L. R., 9 All., 502 (*note*); *Bandhu* v. *Shah Mahammad*, (1888) A. W. N. 119.
(5) *Jogendra* v. *Rama Nak*, 4 C. L. J., 538.
(6) O. 43, *r.* 1 (*o*).
(7) Notes on clauses.

is an application for amendment under section 152 of the Code, and not an application for review of judgment.(1) It is consequently not appealable.

An *ex parte* order passed under this, or rule 8, in favour of the mortgagee may be set aside at the instance of the mortgagor.(2) But the Court cannot re-open foreclosure on grounds upon which it may be re-opened in England.(3)

2283. Effect of Erroneous Decree.—The effect of a decree passed under this rule, as regards its validity and effect, must follow the general principles applicable to all decrees. But the procedure to be adopted by the Court in mortgage suits when its decree is discovered to be erroneous may briefly be noticed here. It has been held that where the Court delivers possession under a decree prematurely made final, in setting it aside the Court must make restitution on the principle explained by the House of Lords.(4) For one thing he is not liable to account as a mortgagee in possession. As Lord Cranworth said, "I think that it is perfectly clear law, that when a person becomes possessed of property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default."(5) He is consequently liable to account only in the ordinary way for the rents and profits actually realized,(6) it being assumed that what he did not receive he could not receive.(7)

Preliminary decree in suit for sale.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (*a*), (*b*) and (*c*) of rule 2, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff, as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Power to decree sale in foreclosure suit.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit

(1) *Daya Kishan* v. *Nanubi Begum*, I. L. R., 29 All., 304; *Gul Bibi* v. *Dakhini*, 2 A. L. J. R., 287 (291); but *contra* in *Kali Prosunno* v. *Lal Mohan*, I. L. R., 25 Cal., 258.

(2) *Bibi Tulsman* v. *Barihar*, I. L. R., 32 Cal., 253, F. B. The power to set aside an *ex parte* order is one which the Court possesses as inherent power apart from Statute, *ib.* This is now recognized by s. 151 of the Procedure Code.

(3) See § 2248; *Shanger Rao* v. *Ganasha*, 13 C. P. L. R., 177.

(4) *Per* Lord Chelmsford, L.C. in *Parkinson* v. *Hanbury*, L.R., 1 H.L. 1 (10); followed in *Kartik Chandra* v. *Hara Gobind*, 21 C. L. J., 75 (78).

(5) *Parkinson* v. *Hanbury*, L.R., 1 H. L., 1 (13, 14).

(6) *Ib.* p. 14.

(7) *Ramji* v. *Chinto*, 1 B. H. C. R., 199; *Anandra* v. *Ravji*, 2 B.H.C.R., 214; *Ramalet* v. *Pandhari*, 8 B.H.C.R., 296.

including the deposit in Court of a reasonable sum, fixed by the Court to meet the expenses of sale and to secure the performance of the terms.

2284. Analogous Law.—This rule was section 88 of the Act and ran as follows:—

"88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Decree for sale.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court to meet the expenses of sale and to secure the performance, of the terms."

Power to decree sale in foreclosure-suit.

The rule provides for simple and English mortgages, rule 2 meets the case of a mortgage by conditional sale. These provisions are supplemented by Rule 12 of the Calcutta High Court framed under section 104, which lays down that "every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant (if the original mortgagor) shall personally (or if the representative in estate of the original mortgagor shall out of his estate) pay the amount of the deficiency." The second paragraph is taken from section 25 of the English Conveyancing Act, 1881.(1)

2285. Principle.—This section is divided into two paragraphs, the first under which the Court *shall* pass a decree for sale, and the second under which such a decree *may* be passed in the case of certain specified mortgages.

A decree for sale can only be obtained by a simple mortgagee, an English mortgagee or a usufructuary mortgagee under certain circumstances.(2) The holder of a charge under section 100 has also the same right. But an equitable mortgagee and a mortgagee by conditional sale have no right to sue for sale.(3) Where the mortgagee is entitled to a personal decree in addition to a decree for sale, he must sue for it in the same suit, and the decree should direct recovery of the decretal amount from the mortgagor personally, in the event of the mortgaged property being found to be insufficient. The decree made under the section is of the same kind as in a foreclosure-suit. After paying the mortgagee the surplus may be directed to be distributed amongst the puisne mortgagees, if any, according to their priority, the balance being paid to the mortgagor. The second paragraph enables the Court to pass a decree for sale in mortgages other than those by conditional sale. A decree for sale under the section is entirely in the discretion of the Court which will direct it only when it is satisfied that it would be for the benefit of the persons interested in the property.

2286. Meaning of Words.—"*If the plaintiff succeeds*," *i.e.*, if the debt is proved and the plaintiff is entitled *to a decree for sale.* "*The mortgaged property or a sufficient part thereof.*" This is important, inasmuch as it enables the Court to exclude from sale a portion of the property if the security is ample,

(1) 44 & 45 Vict., c. 41; *Venkatasami* v. *Subramanya*, I.L.R. 11 Mad. 88 (90).

(2) *Venkatasami* v. *Subramanya*, I. L. R. 11 Mad. 88.

(3) *See* s. 67 and § 1554. As to Equitable Mortgagee, see § 1337 *ante*.

and the decree can be satisfied from sale of only a fraction of the property. "*At the instance of the plaintiff*," *etc.*: The Court cannot in a foreclosure-suit decree sale *suo motu*. "*Person interested... in the mortgage-money*:" *e.g.*, the other mortgagees, sub-mortgagees, as well as charge-holders. "*Person interested ...in the right of redemption*:" These are persons referred to in section 91 clause (*b*). "*Pass a like decree*:" *i.e.*, a decree for sale.

2287. Who may obtain a Decree for Sale.—The right to obtain a decree for sale under this rule is one which depends upon the nature of the security and the covenant made therein. Ordinarily, such a right belongs to an English and simple mortgagee,(1) but the mortgagee in other cases may also acquire a right to bring the mortgagor's property to sale. (2) This rule provides a form of decree applicable to all cases in which whether from the nature of the mortgage (3) (§§. 1543-1563, 1611) or the nature of the mortgagor's covenant (4) (§ 1601) or otherwise. (5) (§§ 1555-1558, 1582, 1602) the mortgagee is entitled to sue for sale. According to the Madras High Court a sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest, in cases and circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. (6) This right was, however, denied in Allahabad where the term "property" was at one time restricted to denote only physical object as distinguished from mere rights relating thereto.(7) It was animadverted upon in the second edition of this work as presenting a view which was at once too narrow and unsupported by the Act (8) and it has since been overruled.(9) In Bombay the right of sale is denied on the ground that there is no privity between the original mortgagor and the sub-mortgagee,(10) but this right necessarily follows from the original mortgagor's undeniable right to redeem as against the sub-mortgagee. (11) From the peculiar view of property once entertained in Allahabad it followed that a puisne mortgagee had also no right to obtain a decree for sale without offering to redeem all the prior existing incumbrances, and it was so held therein in several cases. (12) In one case the Court seems to have carried this doctrine to the extent of holding that the plaintff's suit would be imperilled if he sued without offering to redeem the prior mortgages. (13) But later cases did not countenance such extreme measures, but nevertheless maintained that the plaintiff should be given an opportunity, if necessary, by allowing an amendment of the plaint, to redeem the prior mortgages, and that his suit should not be dismissed, merely because he had failed to offer to redeem the prior incumbrances. (14) This was, however, a view not commended in Madras where the puisne mortgagee was allowed to obtain a decree for sale subject to the right of the prior incumbrancer. (15) And the same view obtained in Calutta.(16)

(1) Ss. 67, 69.
(2) S. 68.
(3) Ss. 67, 69, 98. 100.
(4) S. 68 (*a*).
(5) S. 68 (*b*) (*c*).
(6) *Muthu Vijia* v. *Venkatachellam*, I. L. R. 20 Mad. 85. See §§ 1207-1209, 1553.
(7) *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432, F. B.; *Ganga Prasad* v. *Chunni Lal*, I. L. R., 18 All. 113; *Ajudhia* v. *Man Singh*, I.L.R., 25 All., 46.
(8) Law of Transfer (2nd Ed.), §§ 133, 134.
(9) *Ram Shankar* v. *Ganeshi Pershad*, I.L.R., 29 All., 385, F.B.
(10) *Padgaya* v. *Baji Babaji*, I. L. R., 20 Bom., 549.
(11) *See* s. 60, *ante*, ss. 823, 824.
(12) *Saligram* v. *Har Charan*, I. L. R., 12 All., 548; *Kalicharan* v. *Ahmad Shah*, I.L. R., 17 All., 48, *Muhmmad* v. *Ghaffar*. I. L. R, 21 All., 272.
(13) *Saligram* v. *Har Charan*, I. L. R., 12 All., 548.
(14) *Kalicharan* v. *Ahmad Shah*, I. L. R., 17 All., 48; *Muhammad* v. *Ghaffar*, I.L.R., 21 All., 272.
(15) *Venkatachella* v. *Panjama*, I. L. R., 4 Mad., 213; *Gangadhara* v. *Shivarama*, I.L. R., 8 Mad., 246.
(16) *Kanti Ram* v. *Kutubuddin*, I. L. R., 22 Cal., 33 (45). See the question further discussed under O. 34, r. 1, *ante*.

Indeed, the dissentient view of the Allahabad Court was the necessary outcome of the view it took of property—a view which it had abandoned prior to the present enactment which has, however, now left the matter no longer one for controversy.(1) In certain kinds of property a decree for sale would alone seem to be appropriate.(2) Where the mortgagee is entitled to the rents and profits in lieu of interest he can only sue to take possession, but cannot obtain a decree for sale.(3)

The second paragraph instances other cases in which such a decree might be given.

2288. Rights of a Sub-mortgagee.—A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage, to claim such relief.(4) The legal position of a sub-mortgagee has been already set out, (§§ 1206—1209). A sub-mortgagee by virtue of his assignment is not only entitled to the usual remedies against the mortgagor, but is also entitled to a remedy against the original mortgagee, becoming that of a surety, the sub-mortgagee becoming the creditor and the original mortgagor continuing to remain the debtor. After the original mortgagee has made an assignment by way of sub-mortgage, he is not entitled to exercise a power of sale against the mortgagor. The original mortgagor, if he has notice of the sub-mortgage, is bound to pay to the sub-mortgagee, otherwise he is entitled to obtain discharge by payment only to his mortgagee. The sub-mortgagee is not in any way bound by the result of any suit brought by the original mortgagee, for the operation of the sub-mortgage is to transfer to the sub-mortgagee all the rights and remedies which the original mortgagee had against the mortgagor and if the original mortgagee has merely obtained a decree on his mortgage, which he has failed to execute within limitation, there is no bar to the exercise of the mortgagee's right to the sale of the mortgaged property. But to enable the sub-mortgagee to sue the mortgagee, it is not enough for the mortgagee to execute a sub-mortgage transferring his rights as mortgagee, but he must assign his mortgage to him, otherwise he can at most get only a money-decree against the mortgagee(5) (§§ 1014, 1015). In a suit for redemption of land which has been sub-mortgaged by the mortgagee, in which suit the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of what is due to the original mortgagee and then of what is due to the sub-mortgagee and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee, both shall reconvey to the mortgagor.(6) Where a mortgagor without actual notice of a sub-mortgage makes payments to his mortgagee, the payments will be credited to his account, it being settled that as between the mortgagee and the persons claiming under him without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal.(7) The principle is conceded in Bombay even in the case where the sub-mortgage was registered, it being held that registration may

(1) O. 34, r. 1, *Exp.*
(2) S. 67, *ante*, and Comm.
(3) *Mahadaji* v. *Joti*, (1892) B.P.J., 280.
(4) *Muthu Vijia* v. *Vencatachellum*, I. L. R., 20 Mad., 35; *Zaki Hasan* v. *Deo Nath* 10 C. L. J. 470; 4 I. C. 433; *Abidjan* v. *Rambaran*, 7 I. C. Cal. 166; *Kanhai Lal* v. *Nahadeo*, 18 I. C. (Oudh) 389.
(5) *Ganga Prasad* v. *Chunni Lal*, I. L. R. 18 All., 113.
(6) *Narayan* v. *Ganoji*, I. L. R., 15 Bom. 692; citing Coote's Mortgage (5th Ed.), pp. 1178-79; Seton on Decrees (4th Ed.), p. 1153; followed in *Gokul Das* v. *Devi Prasad*, I. L. R., 28 All., 638.
(7) *Mathews* v. *Walwyn*, 4 Ves., 119-128; *William* v. *Sonell*, 4 Ves., 389; *Sahadev* v. *Shek Papa*, 6 Bom. L.R. 836.

operate as notice for some purposes, but it cannot operate as notice to vitiate payments so made.(1)

2289. Discretionary Power to decree Sale,—In a suit for foreclosure upon an English or an equitable mortgage the Court may, under the second paragraph, order sale instead of foreclosure. In Daniell's Chancery Practice (2) the instances in which the Court should exercise such discretion are thus stated:—"A sale was only directed where the Court was satisfied that it was for the benefit of the person interested in the property. Thus, a sale would be directed where there was such a complication that the common decree could not be conveniently worked out, but not where it would be oppressive; as where it would deprive the mortgagor of an old family estate. Where it was for his benefit, the sale of the estate of an infant mortgagor might be directed. A sale might be directed, though the mortgagor or some of the incumbrancers did not consent, but was refused when the plaintiff, who was a judgment-debtor, insisted on a foreclosure. When the mortgaged property consisted of lease-holds, a sale was ordered at the instance of first mortgagors, the property being unproductive. A sale was directed at the instance of an equitable mortgagee by deposit of title-deeds when the deposit was accompanied by an agreement to execute a legal mortgage. The sale was usually directed to take place in the event of default being made in payment of what was found due by the chief clerk's certificate, within a limited time (usually six months) after the date of such certificate; but by consent, or where it was for the benefit of all parties, the sale would be directed to take place within a shorter period, or even immediately. If the sale was directed at the request of a subsequent mortgagee or of the mortgagor, the Court could not, except by consent, dispense with a deposit which must have been enough to cover the possible expense of a sale. Where the sale was directed at the request of the subsequent incumbrancer, or of the mortgagor, a reserved bidding was fixed of sufficient amount to cover what was due to first mortgagee. Where a sale was directed in a suit in which a subsequent incumbrancer was plaintiff, the conduct of sale was given to the first mortgagee.

Clause (2).

2290. In Ireland, and in some of the British Colonies, it is customary to pray for sale instead of a foreclosure, the surplus arising out of sale being paid over to the mortgagor, who is then liable to make good the deficit.(3) The power of the Court to decree sale in a foreclosure-action was for the first time recognized by the Chancery Amendment Act,(4) but in the case of a reversion,(5) or of an advowson(6) the mortgagee was permitted to foreclose or sell. An equitable mortgagee is entitled to obtain an order for sale.(7) In England an order for sale may be obtained at any time before hearing (8) or after the passing of even the decree *nisi*.(9) But an order for immediate sale cannot be taken except on compromise or under other special circumstances,(10) such as the unproductive nature of the property,(11) as where the income therefrom is insufficient or keep down the interest (12) or where the arrears of interest are considerable, (13)

(1) *Sahadev* v. *Shek Papa*, 6 Bom. L. R., 886.
(2) Pp. 1409-1411.
(3) *Perry* v. *Baker*, 13 Ves., 205; *Wilson* v. *Dunsany*, 18 Beav., 293; *Gordon* v. *Horsfall*, 5 Moo. P. C., 393.
(4) 15 & 16 Vict., c. 86, s. 48, repealed and re-enacted in s. 25, Conveyancing Act, 1881, (44 & 45 Vict., c. 41).
(5) *Howe* v. *Vigures*, 1 Ch. R., 18.
(6) *Mackenzie* v. *Robinson*, 3 Atk., 559.
(7) *Cripps* v. *Wood*, 51 L. J., Ch., 584.
(8) 44 & 45 Vict., c. 41, s. 25.
(9) *Union Bank* v. *Ingram*, 20 Ch. D., 463
(10) *Green* v. *Biggs*, (1885) W.N., 128.
(11) *Foster* v. *Harvey*, 4 DeG. J. & S., 59.
(12) *Phillips* v. *Gutteridge*, 4 DeG. & J., 531.
(13) *Smith* v. *Robinson*, 1 Sm. & G., 140; *Newman* v. *Selfe*, 33 Beav., 522.

But in no case can sale be decreed without notice to the mortgagor.(1) As a rule a period up to six months is allowed to the mortgagor for redemption before ordering sale.(2) No party's consent is required to justify an order for sale which is absolutely within the discretion of the Court, but the Court will not make such an order as a matter of course without good reason being assigned for ordering it instead of foreclosure.(3)

Moreover, no sale will be ordered where it will be oppressive to any person interested.(4) For instance, the Court will refuse sale at the instance of the second mortgagee where the present value of the property is insufficient to cover the first mortgage, but its value is likely to (5) increase. But in this as in any case, if the mortgagee applying for sale pays in the amount required to satisfy the dissenting incumbrancer, the Court has then the power to order sale free from his incumbrance.(6)

2291. Form of Decree.—This section lays down the form of decree in mortgage-suits for sale. The procedure to be followed by the mortgagee obtaining a decree under this section is the same as in foreclosure-suits. But in drawing up the first clause as it stood as a part of section 87, the difference between the foreclosure and sale was overlooked, and consequently, it was held not to bear too literal a construction. It was, indeed, sought to be so construed in an Allahabad case,(7) in which it was held that the Court had no power to allow interest beyond the date which has to be fixed within six months from the date of the decree.(8) This case was, however, animadverted upon by the Privy Council who remarked: "It must be admitted that the language of section 88 is calculated to cause difficulty, and a sort of difficulty which is a common cause of conflict in judicial interpretations of new Statutes. It looks as if the draftsman of the Transfer of Property Act had overlooked the difference between a foreclosure and a sale, and had forgotten that in the former case, interest stops because the mortgage gets the property in lieu of his debts, whereas a sale must be subject to long delays. However that may be, there is the difficulty, and if section 88 could be looked at as an isolated enactment quite detached from other legal consideration, it would be hard to consider it otherwise than was done by the Allahabad Court in the case of *Amolak Ram*. But considering the universality of the long-established practice, its continuance for years after the Transfer of Property Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting it, the conformity with it of section 97, which is in *pari materia* with section 88, the presumption that section 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternately, and the form of suit sanctioned by the Procedure Code, their Lordship have no hesitation in expressing their concurrence with the Courts of Calcutta and Madras and with the ultimate decision of the Court at Allahabad."(9) In

(1) *South Western Bank* v. *Turner*, 31 W. R. (Eng.), 113.

(2) *Smith* v. *Robinson*, 1 Sm. & G., 140; *Lloyd* v. *Whittey*, 17 Jur., 754; *Whitfield* v. v. *Roberts*, 5 Jur. (N.S.). 113

(3) *Heath* v. *Crealock*, L.R., 10 Ch., 22.

(4) *Hurst* v. *Hurst*, 16 Beav., 372; *Nawab Saiyad Baquar* v. *Babu Balak Ram*, 18 I. C. (Oudh) 24.

(5) *Merchant Banking Co.* v. *London & Hanseatic Bank* (1886), W.N., 5.

(6) Seton, Decrees (5th Ed.), 1589; *Woolley* v. *Coleman*, 21 Ch. D., 169.

(7) *Amolak Ram* v. *Lachmi Narain*, I. L. R., 19 All., 174.

(8) *Amolak Ram* v. *Lachmi Narain*, I. L. R., 19 All., 174, at p. 178.

(9) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I.L.R., 23 All., 181 (193), P. C. As observed by the P.C., the view taken in *Amolak Ram* v. *Lachmi Narain*, I.L.R., 19 All., 174, has been disowned in the subsequent case of *Bakhar Sajjad* v. *Udit Narain Singh*, I.L.R., 21 All., 361. The Calcutta and Madras cases approved by the P. C., are *Achalabala* v. *Surendra Nath*, I. L. R., 24 Cal., 766; *Subbaraya* v. *Ponnusami*, I.L.R., 21 Mad., 364.

deference to this view the words "together with such subsequent interest and subsequent costs" have been inserted in the first clause, but the amendment is insufficient and does not provide for the insertion of an order for payment of interest upto the date of sale, which is what their Lordships indicated should have been done, but which has, however, been done in the form of the decree prescribed in Appendix D, Form No. 4, of the Code of Civil Procedure. But as the clause now stands what the Court may do is to fix a day within six months from the date of its preliminary decree for redemption of the mortgage calculating interest only up to that date—all future interest being left to subsequent arrangement as in the case of foreclosure.

It will be noticed that the first clause further proceeds to enact that the decree shall also provide that "in default of the defendant paying as therein mentioned (*i.e.*, as mentioned in rule 2), the mortgaged property or a sufficient part thereof (shall) be sold." This clause follows the lines laid down in the last clause under rule 2, and is likewise of its own force insufficient to justify a sale without an order passed in accordance with the provisions of the next rule. It has, however, been held in Calcutta that an order absolute is not indispensably necessary, provided that an order for sale is passed on the motion of the decree-holder.(1) The question will have to be re-discussed under the next rule.

2292. A decree under this section may either declare the amount due on the mortgage at the date of such decree, or direct that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day which is to be fixed by the decree itself.(2) Although the section follows the analogy of a foreclosure-decree, still there is a difference between the two, for while in a foreclosure-suit the mortgagee cannot obtain a personal decree in addition to the decree on his mortgage, the mortgagee may, under this section couple the two reliefs together; but where he is so entitled, he must sue for them in one suit, as the mortgagee is not entitled to maintain a separate action for the balance, after the sale-proceeds are found to be inadequate. (3) But a mortgagee asking for a decree for sale as well as for a personal decree may, subsequently if he is so advised, relinquish his claim for sale of the mortgaged property, and ask merely for a simple money-decree, but such a course may bring his execution in collision with the provisions if he subsequently elects to attach the relinquished property. Where a mortgagee sued for a decree for sale on his mortgage "or any other relief to which the plaintiff might be entitled," and the mortgage contained a personal covenant, it was held that the mortgagee could, if he was subsequently so advised, relinquish his claim for sale of the mortgaged property and claim instead a simple money-decree. (4) On the other hand if the mortgagee omits to claim and obtain a personal decree against the mortgagor, although such a decree might have been passed under the mortgage, he may resort to the special provisions of section 90 which enables the Court to pass what is in effect a supplementary decree. (5) A decree under the section is a *decree nisi* or conditional decree, and cannot be executed unless it is made absolute by an order obtained under the next section. (6) And if it provides for sale after the period allowed therein for redemption, it cannot be made absolute or executed before its

(1) *Siva Pershad* v. *Nundo Lal*, I.L.R., 18 Cal., 199; *Tara Prosad* v. *Bhobodeb*, I.L.R., 22 Cal., 931; *Phulchand* v. *Nursingh*, I.L.R., 28 Cal., 73 (77).

(2) *The Aryan Bank* v. *Venkata*, 13 M. L. J.R., 212.

(3) *Batak Nath* v. *Pitambar*, I. L. R, 13 All., 360 (361).

(4) *Sukhdeo* v. *Lachman*, I. L. R., 24 All., 456.

(5) *Sonatan Shah* v. *Ali Newaz Khan*, I.L. R., 16 Cal., 423; *Lala Tirhini* v. *Lala Hurruck*, I.L.R., 21 Cal., 26.

(6) *Ram Lal* v. *Narain*, I. L. R., 12 All., 539; followed in *Tara Prosad* v. *Bhobodeb*, I. L.R., 22 Cal., 931.

expiration.(1) And if a decree contains, as it ought to contain, a direction for sale of the mortgage premises, the proceeding under such a decree by attachment of the property prior to sale would seem to be unnecessary as it would be expensive and dilatory. "Neither in this Court at its original jurisdiction side, nor in the English or Irish Court of Equity is or has been any such procedure resorted to for the enforcement of decree directing a sale. The direction for sale in the decree (2) is in itself sufficient authority for sale. That direction is founded on the specific lien or charge on the premises created by the contract of mortgage, and not on the execution clauses in Code of Civil Procedure."(3)

2293. There is nothing in this section to prevent the holder of two mortgages from bringing the mortgaged property to sale in execution of his decree obtained on the second mortgage reserving his right under the prior mortgage. But this was not permitted in Allahabad, where a puisne mortgagee was held disentitled upon his own mortgage subject to the rights of the prior mortgage. But this procedure may sometimes conduce to a curious result. For suppose a person to hold two mortgages—the first a usufructuary mortgage and the second a simple mortgage. Now as the usufructuary mortgagee obviously cannot bring the property to sale, and as he cannot sell on his second mortgage subject to his rights under his first mortgage, it follows that he cannot sell at all. (4) But this *impasse* created by the wrong notion of property which held away in that Court ever since the decision in *Matadin's case* (5) has since been removed by overruling that precedent (6) bringing the decisions of that Court in line with those of the other High Courts.

2294. Interest.—Whatever may be the power of the Court to decree interest in a suit for foreclosure (§ 2199) it is now settled that this section does not preclude the Court from awarding interest up to the date of realization, and that its power is not limited to awarding interest only up to the date fixed for payment. (7) And in such cases the tendency of the Court is to presume continuance of the interest after the due date even though the Court simply ordered that a certain sum, 'with future interest at 7 per cent. per mensem from the date of the suit' shall be paid on or before a certain date (fixed in accordance with this section. (8) So a decree for sale with "future interest to 20th July 1886, at 6 per cent." does not imply that if the property is not redeemed by that date, interest shall cease. On the other hand, having regard to the fact that the Court fixes that date for the mortgagor to redeem his failure to do so is no reason for cessation of interest, simply because the Court did not at the time of drawing up the decree contemplate the subsequent delays which may have since become inevitable. (9)

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(1) *Haradyal* v. *Chadami Lal*, I. L. R., 7 All., 194.

(2) See form No. 128 in Schedule IV of the Civil Procedure Code (Act XIV of 1882).

(3) *Daya Chand* v. *Hem Chand*, I. L. R., 4 Bom., 515 (520); *Venkatanarasimma* v. *Ramiah*, I.L.R., 2 Mad., 112.

(4) *Bhagwan Dass* v. *Bhawani*, I.L.R., 26 All., 14.

(5) *Matadin* v. *Kazin Husain*, I. L. R., 13 All., 492, F. B.

(6) *Ram Shankar* v. *Ganesh Prosad*, I. L. R., 29 All., 385, F. B.

(7) *Bakhar Sajjad* v. *Udit Narain*, I.L.R., 21 All., 361, F.B.; *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I.L.R., 23 All., 181, P. C.; *Balwant Singh* v. *Amolak Ram*, I. L. R., 28 All., 223, P. C. See App. D, Form 4, C. P. C. (Act V of 1908).

(8) *Gokuldass (Raja)* v. *Ghasi Ram*, I. L. R., 35 Cal., 221 P. C.; following *Bakhar Sajjad* v. *Udit Narain*, I. L. R., 21 All., 361, F. B.; *Maharajah of Bharatpur* v. *Rani Kanno Dei*, I; L. R., 23 All., 181, P. C.; *Sunder Koer (Rani)* v. *Rai Sham Krishen*, I. L. R., 34 Cal., 150, P. C.

(9) *Bakher Sajjad* v. *Udit Narain*, I. L. R., 21 All., 301; *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181 (192), P. C.

2295. Costs.—In a mortgage suit for sale the mortgagor is not personally liable for costs even in a decree passed under this section. He is no doubt personally liable but his liability is contingent upon the sale-proceeds of the mortgaged property proving insufficient. (1) In one case where the decree contained even a direction for personal recovery of costs, the Court held that the direction could not be enforced against the mortgagor personally except by an application under section 90. (2) But the question in such cases is one of construction to be presently considered. But in a decree properly worded the direction should be clear that the costs no less than the rest of the mortgage-money shall first be recoverable out of the sale proceeds of the mortgaged property and that any balance if still due shall then be payable by the mortgagor personally in accordance with the provisions of rule 6.

Succession certificate.

2296. The provisions of the Succession Certificate Act (3) have been held to be inapplicable to the representatives of a deceased mortgagee in a suit for sale, where no personal decree is demanded. But this view taken in Calcutta, (4) Bombay (5) and Madras, (6) has not been followed in Allahabad, where a Full Bench has maintained the contrary view. (7)

The question really turns upon the language of this rule and of section 4 of the Succession Certificate Act, (8) which provides that "no Court shall pass a decree *against a debtor* for payment of his debt" without a succession certificate. And the sole question is therefore reduced to this: Is a decree passed under this section a decree passed against a debtor for payment of his *debt*? It is conceded in Allahabad that a decree for foreclosure is not such a decree, and if so, there would seem to be scarcely room for discrimination, for the form here prescribed is not different; but, of course, the decree may be varied by the addition of a clause for personal recovery of the balance, if any, remaining due after appropriation of the proceeds of sale of the mortgaged property. Even in such a case though the decree can hardly be described as a decree "against a debtor," the fact that the balance is a debt personally recoverable from the debtor may justify the application of section 4 of the Succession Certificate Act. (9) Such a decree is, however, not a decree under this rule, but a combination of decrees under this and rule 6. It has been held in Allahabad that such a decree is not a decree for money to which the rule of limitation laid down in section 230 (now s. 48) of the Code is applicable. (10)

In any view a succession certificate is not necessary where the money claimed in the suit was no part of the estate of the deceased at the time of his

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(1) *Kamalamma* v. *Narasimhacharlu*, 17 M.L.J.R., 317.; s.c., *Sub-non Kamalamma* v. *Kamandur*, I. L. R., 30 Mad., 464. This is in accordance with the English practice; *Sharples* v. *Adams*. 32 Beav., 213; *Liverpool Marine Credit Co.* v. *Wilson*, L.R., 7 Ch. 507.

(2) *Maqbul* v. *Lalta Prasad*, I. L. R., 20 All., 523; *Rajkumar* v. *Sheo Narain*, I. L. R., 35 Cal., 431.

(3) S. 4 Act VII of 1889.

(4) *Kanchan* v. *Baij Nath*, I. L. R., 19 Cal., 336; *Baidnath* v. *Shamanand*, I. L. R., 22 Cal., 143; *Mahomed Yusuf* v. *Abdur Rahim*. I. L. R., 26 Cal., 899.

(5) *Nanchand* v. *Yenawa*, I. L. R., 28 Bom., 630.

(6) *Subramania* v. *Rakka*, I. L. R., 20 Mad., 232; *Palanyandi* v. *Veerammal*, I. L. R., 29 Mad., 77.

(7) *Fateh Chand* v. *Muhammad Buksh*, I. L. R., 16 All., 259, F. B.

(8) Act VII of 1889.

(9) *Nanchand* v. *Yenawa*, 6 Bom. L. R., 582 (585).

(10) *Jogul Kishore* v. *Cheda Lal*, (1893) A. W.N., 184; *Jadu Nath* v. *Jagmohun*, I.L.R., 25 All., 541; *cf.* also *Delhi and London Bank* v. *Kunwar Partap Singh*, I. L.R., 28 All. 771, F.B.

death (1) nor where the debt was due to a Mitakshara family, though the security stood only in the name of deceased member of the family.

Is the decree final?

2297. As this rule originally stood, the Courts were confronted with the question whether the decree passed thereunder was or was not the final decree, so that all subsequent proceedings should be treated as proceedings in execution. This question has now been set at rest by the amendment, the effect of which has been already set out. In that view the party aggrieved might have appealed both against the preliminary decree passed under this rule, as well as the final decree passed under the next rule, but for the following provision of the Procedure Code which enacts that "where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree." (2) Consequently all matters disposed of by the preliminary decree should be appealed against on the passing of that decree, the appeal against the final decree being then confined to such matters as have been decided since the first decree. In this respect the procedure formerly was somewhat similar, it being held that a party aggrieved by the improper passing of a decree for sale need not wait till it is made absolute, but may at once sue to set it aside. (3) But he must now appeal from the preliminary decree or not at all. Where a decree had been obtained against a minor defendant who was not properly represented in the suit by a guardian *ad litem*, or was only represented by one not lawfully constituted, or who was disqualified to act as such, it was held that it was not necessary that the minor should have appealed against such a decree or have moved to set aside by an application, before instituting a separate suit, to maintain which it was not necessary to aver fraud or collusion.(4) Thus, for instance, a married woman being incompetent to act as a guardian *ad litem* to her minor son, (5) a decree obtained against him as represented by her could be impugned in a separate suit instituted to set it aside.(6)

2298. An alienation of the mortgaged property after the passing of the decree *nisi* and before it is made final is bad being *made pendente lite*, but the alienee being the assignee may be impleaded in appeal by the mortgagee under O. 22, r. 10 of the Code of Civil Procedure. But such an assignee is not a necessary party to the appeal and would be bound by its result even if he is not impleaded. Hence his addition, even when made, does not initiate as regards him a new proceeding and from which it follows that he can only take such pleas as his assignors could have raised and cannot introduce any new defence, such as a plea of limitation to the appeal, which could not be raised by his assignors.(7) Of course, the *lis* must be deemed as pending until the completion of the sale.(8)

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(1) *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad, 244 (256), F.B.

(2) S. 97, Act V of 1908.

(3) *Sham Lal* v. *Ghasita*, I. L. R , 23 All. 459 (460).

(4) *Sham Lal* v. *Ghasita*, I. L. R., 23 All., 459 ; following *Durga Pershad* v. *Kesho Pershad*, I. L. R., 8 Cal., 656, P.C. ; *Mugniram* v. *Mohunt*, 16 I.A., 195 ; *Vishnu* v. *Ram Chandra*, I. L. R., 11 Bom , 130 ; *Daji* v. *Dhiraj Ram*, I. L. R.. 12 Bom., 18 ; *Nawab Mahomed* v. *Har Charan*, 6 N. W. P. H. C. R., 98 ; *Daulat Singh* v. *Raghubir*, [1894] A W.N., 141 (in which, however, the guardian being found to have been lawfully appointed, the previous decree was upheld).

(5) S. 457, Code of Civil Procedure ; *Guru Pershad* v. *Gossain*, I. L. R., 11 Cal., 733; *cf. Asirun* v. *Sahrip*, I. L. R., 17 Cal., 488.

(6) *Sham Lal* v. *Ghasita*, I L. R., 23 All. 459 (460).

(7) *Chunni Lal* v. *Abdul Ali*, I. L. R., 23 All., 331 (336, 338).

(8) *Ibid.*, p. 334.

2299. Position of Decree-holder as against Third Parties.—The question, whether a simple mortgagee is entitled to have a sale made in execution of a decree set aside, under the provisions of section 310-A (O. 21, r. 89) of the Code is one, the answer to which naturally depended upon the language used in that section which conferred the right of re-purchase upon" any person whose immoveable property has been sold." The question then resolved itself into this: Could it be predicated of a simple mortgagee that a sale of the mortgaged property was the sale of *his* property ? It is evident that this could not be said of a simple mortgagee who was a mere mortgagee and nothing more.(1) That section was, however, applied to mortgagees,(2) though it did not apply to an under-tenant or under-ryot.(3) And this view has now been affirmed by the Legislature in O. 21, r. 89, which enables not only the owner but also one " holding an interest therein by virtue of a title acquired before such sale " to re-purchase the property by having the sale set aside. This would even include a puisne mortgagee who had formerly no right to apply under section 310-A to set aside the sale held in execution of a decree obtained by a prior mortgagee, but to which he was not a party.(4) It may be added that neither section 310-A nor its present equivalent (O. 21, r. 89) has any application to sale of mortgage-decrees. (5)

As regards the right of the mortgagee to appeal it was formerly held that an order passed under section 310-A of the Code was appealable, being one passed under section 244 (*c*) of the Code.(6) And so it was held in Bombay that it was appealable only when it fell within the terms of that clause, but not otherwise.(7)

2300. Enforcement of Charge.—In England a charge or a lien may be enforced only by sale, and not foreclosure.(8) Where a decree merely creates or declares a charge, a suit would have to be instituted under section 67 to enforce the charge,(9) and a decree may then be made in the terms of this rule. But if the decree declaring the charge further directs that in case of non-payment, the money shall be realized by execution and sale of the property, no suit or subsequent decree under this rule would then be necessary.

Where a mortgaged property, being a revenue-paying estate, is sold free from all incumbrances for arrears of revenue, the lien of the mortgagee is on the principle of substituted security transferred from the property itself to the balance of the sale-proceeds which remains after satisfying the Government demand.(10) And so where after a declaration made by Government for the acquisition of property under the Land Acquisition Act, the owner executed mortgage, it was held that the mortgagee could execute his decree obtained upon such mortgage by attaching the compensation-money in the hands of the collector to which the mortgage-lien became transferred.(11) But according to Aikman, J., the proper remedy in such a case is to apply to the Collector under section 9 of the Land Acquisition Act.(12) Consequently, where a portion of the

(1) *Nitya Nanda* v. *Heera Lall*, 5 C.W.N., 63.

(2) *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244, F.B.

(3) *Ahed Mollah* v. *Diljan*, 6 C. W. N., clxxv.

(4) *Ibid.*

(5) *Phul Chand* v. *Nur Singh*, I.L.R., 26 Cal., 73 (78).

(6) *Phul Chand* v. *Nur Singh*, I. L. R., 28 Cal., 73 ; *Kripa Nath* v. *Ram Lakshmi*, 1 C. W. N. 703.

(7) *Murlidhar* v. *Anand Rao*, I. L. R., 25 Bom., 418; *Pandurang* v. *Krishnabai*, 1 Bom. L.R , 74.

(8) *Tennant* v. *Trenchard*, L. R., 4 Ch., 537 (542).

(9) *Aubhoyessury* v. *Gouri Sunkur*, I. L. R., 22 Cal., 859; *Matangini* v. *Chooney-money*, I.L.R., 22 Cal., 903.

(10) *Kamala Kant* v. *Abul Barkat*, I. L. R., 27 Cal., 180; distinguishing *Ram Din* v. *Kala Prasad*, I.L.R., 7 All., 502, P. C.; *Miller* v. *Runga Nath*, I.L.R., 12 Cal., 389.

(11) *Jotoni Chowdhrain* v. *Amor Krishna*, 13 C.W.N., 350.

(12) Act X of 1870; *Basa Mal* v. *Tejammal*, I.L.R., 16 All., 78 (79).

mortgaged property is acquired by Government under the Land Acquisition Act and in response to the notification under that Act, the mortgagee does not put in any claim, he cannot afterwards attach the money in execution of his decree for sale.(1) In a suit for sale an account would have to be taken in the same way as in an action for foreclosure, and if there is an equity entitling the mortgagor to have a general account taken he is bound to set it up, and cannot insist on it in a fresh action.(2) When property is sold under a decree on the first mortgage, the right of a puisne incumbrancer, who was a party to the decree, to follow the surplus sale-proceeds is an equitable right, equity regarding his right not as extinguished or discharged by the sale, but as transferred thereby to the surplus sale-proceeds which would be treated as a part of his mortgage-security and his right to follow the money or the nature of the suit to enforce such right cannot be affected by the fact that the money had been withdrawn from the Court by a party having notice of the plaintiff's right.(3) Certain property was sold under a decree on the first mortgage, the second mortgagee whose mortgage had then matured, being a party to the decree. Subsequently, the first mortgagee, who had a third mortgage on it, obtained a decree thereon, the second mortgagee being no party, and withdrew the surplus sale-proceeds in part satisfaction of the latter decree. The second mortgagee afterwads sued on his mortgage, claiming *inter alia* to recover the surplus proceeds so withdrawn with interest. It was held that the plaintiff could only establish his right to the money not as owner, but as part of his mortgage-security proving an existing right under his mortgage and the suit so far as it related to the claim to recover the surplus sale-proceeds with interest, being one to establish the plaintiff's right as mortgagee, was a suit to enforce payment of money charged upon immoveable property within the meaning of Article 132 of schedule II of the Limitation Act, and not one for money had and received, the second mortgage not having been proved in the first suit and no order having been made therein declaring the second mortgagee entitled to the sum in dispute.(4)

2301. Construction of Decree.—There is no difficulty in construing a decree drawn up in the form prescribed for the purpose in the Code of Civil Procedure. But decrees are often drawn up in a crude and inartistic form. It becomes then necessary to construe them. Ordinarily, a decree must be construed as it is, for the rule is that, a claim made but not decreed is presumed to have been refused. But a party benefiting by a particular construction of the decree is not debarred from showing it. And it is now authoritatively held by the Privy Council that a decree may be construed in the light of the judgment, and even the plaint and the pleadings may be looked at for the purpose of ascertaining its true meaning.(5) A mortgage-decree for sale is not absolutely bad for being not worded in the prescribed form. Thus, for example, where in a case on a hypothecation-bond for payment of the secured debt, the decree contained the following words : "The property hypothecated in the bond being also held liable for the whole amount thus

(1) *Basa Mal* v. *Tajammal*, I.L.R., 16 All., 78; but see *Armugam* v. *Sivagnana*, I. L. R., Mad., 389.

(2) *Mahabir Pershad* v. *Macnaghten*, I.L. R., 16 Cal., 682, P.C.

(3) *Berhamdeo* v. *Tarachand*, I. L. R., 33 Cal., 92.

(4) *Berhamdeo* v. *Tarachand*, I. L. R., 33 Cal., 92 ; following the principle in *Raja Kishen Dutt* v. *Raja Mumtaz Ali*, I. L. R., 5 Cal., 193, P. C.; *Kamala Kant* v. *Abul Barkat*, I. L. R., 27 Cal., 180; *Jageshur* v. *Ghanasham*, 5 C. W. N., 356; *Padmanabh* v. *Khemu*, I. L. R., 18 Bom., 684.

(5) *Sri Raja Rao* v. *Sri Raja Innuganti*, I. L. R., 21 Mad., 344, P. C.; *Lachmi Narain* v. *Jwalanath*, I. L. R., 18 All., 344; *Amolak Ram* v. *Luchmi Narain*, I. L. R., 19 All., 174.

awarded," it was held that the decree was in reality a decree for sale, and could be executed as such.(1) So again, a decree that the claim of the plaintiff with costs of the suit and future interest at eight annas per cent. per mensem be decreed has been construed in the light of the claim, by the majority of the Allahabad Full Bench to be a decree for the enforcement of a lien.(2) Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage-deed, and this fact was apparently overlooked by the defendant who defended the suit, and where while the judgment declared "that a decree be given against the hypothecated estate" the property affected was described in the decree as "the property specified in the plaint." It was held that the decree must be held to refer to the hypothecated property mentioned in the plaint, and that neither section 13 nor section 244 of the Code of Civil Procedure excluded the defendant from subsequently suing to recover the property wrongly included in the plaint.(3) Where a decree though not containing a direction for sale of property is construed by order in execution as containing such a direction, such orders will operate as *res judicata* and estop the judgment-debtor from afterwards raising contentions inconsistent with such orders.(4)

2302. Ordinarily, if a decree passed under the Act is ambiguous, the Court executing it must put its own construction on it, and, if possible, will construe it as a decree, properly framed according to law; but where there is no ambiguity in the decree the executing Court is bound to execute it according to its terms whether the decree be right or wrong.(5) It has been held in Calcutta that the executing Court cannot go behind it or question its validity,(6) but the contrary has been maintained in Bombay where it has been held that the executing Court is entitled to see that the decree it is called upon to execute is of a Court competent to pass it.(7) When there is nothing in the circumstances of a case to justify a particular construction, the Court cannot import into the decree what might have been ordered by it. Thus in a case upon a simple mortgage where the decree ordered that "the amount claimed together with costs be caused to be paid by the defendants to the plaintiffs in this way, that the property pledged under the bond be held bound by the decree, and that the decree be realized by the sale of the pledged property," no provision being made for realization from the other estate of the judgment-debtor, it was held that, under the circumstances, it must be presumed that the Court meant to limit the right of the plaintiff to recover to the mortgaged property, and to that alone, and that therefore the decree-holder could not proceed against any other property of the judgment-debtor.(8) A decree given "according to the terms of the judgment-debtor's written statement" should be construed in the light of that statement.(9)

2303. But it has been observed in a case, that while "it may have been right at a time when the provisions of the Transfer of Property Act were novel and unfamiliar to the Court to put an indulgent

(1) *Anna Pillai* v. *Thangathammal*, I. L. R., 20 Mad., 78.

(2) *Debi Charn* v. *Pribhu Din*, I. L. R., 3 All., 388, F. B.; see also *Ram Prasad* v. *Raghunundun*, I. L. R., 3 All., 239.

(3) *Ram Chander* v. *Kondo*, I. L. R., 22 All., 442.

(4) *Atmakuru* v. *Atmakuru*, 15 M. L. J. R., 418.

(5) *Pirbhu Narain* v. *Rup Singh*, I. L. R., 20 All., 397; *Maharajah of Bhartpur* v. *Rani Kanno Dei*, I.L.R., 23 All., 181, P.C.; *Parkitt* v. *Chandra*, 15 C. P. L. R., 134.

(6) *Chhoti Narain* v. *Mt. Rameshwar*, 6 C. W.N., 796. *Kashi* v. *Jamuna*, I.L.R. 31 Cal., 922; *Rama* v. *Anukul*, 20 C.L.J. 512.

(7) *Bagwantappa* v. *Vishwanath*, I.L.R. 28 Bom. 378; *Trimbak Rao* v. *Balwant Rao*, I.L.R. 30 Bom. 101, (108).

(8) *Solano* v *Moran & Co.*, 4 C.L.R., 113.

(9) *Ram Nandan* v. *Lal Dhar*, I. L.R., 3 All., 775.

construction on their decrees,'' but the same indulgence should not be shown to a decree passed, as for example, in 1889, *i.e.*, seven years after the passing of the enactment. It was further said that where the elements which are requisite to make a proper decree for sale at the suit of a mortgagee are wholly wanting, the Court will not put upon it an interpretation favourable to the party whose business it was to see that he got a proper decree.(1) In construing a decree vague and indefinite clauses are to be ignored. The order for costs if made payable personally by the mortgagor must be expressly made. A clause to the effect: "It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court"—is not by itself sufficient to entitle the decree-holder to recover the amount from the mortgagor personally. (2) Thus again in a case where the decree ran thus: "Plaintiffs should pay the sum of Rs. 733 to the defendants within a month of this date; in case they do not pay the money then in the year in the month of Chaitra in which they pay the money, the defendants should give back to them possession of the land; till that time the defendants should pay the Government assessment and enjoy the produce in lieu of interest;" it was held that the words of the decree were vague and indefinite, and were to be considered as really mentioning no time for payment. The decree was, therefore, to be taken as operating from its date, there being really no difference between a decree which says, "the money shall be paid," and one that says, "money shall be paid in future years." Both are equally indefinite and must be considered as really prescribing no time for payment.(3)

This section only determines the time for redemption or sale alternatively of the mortgaged property and does not limit the right of the Court to grant interest only up to the date fixed for payment, rather than up to the date of realization.(4)

Meaning of "decree with costs."

2304. It has been stated before that the costs of the mortgagee's suit are ordinarily recoverable first from the sale proceeds, the balance, if any, being payable by the mortgagor. But though such should be the directions of a mortgage decree for sale, cases are found in which the use of ambiguous expressions, sometimes leads to the contention that the mortgagor was made unconditionally liable for costs. So where the first Court disallowed sale which was decreed "with costs and interest" but the decree had not been drawn up in the form sanctioned by this rule, the question was whether the costs were recoverable without recourse to section 90, which the Court held they could by adding that "in cases of this kind what we have to see is not what decree the Court ought to have passed, but what decree the Court has passed."(5) But it is submitted that the latter question cannot be viewed except in the light of the former, since it is an elementary rule of construction that an ambiguous decree must be construed so as to make it conform with, rather than contravene the law.(6) If as in the last case, the first Court dismissed the suit which is decreed on appeal with costs, it will be presumed that the decree passed was in accordance with this rule. On the other hand, where a decree in the terms of this section is passed

(1) *Muthuraman* v. *Ettappasami*, I. L.R., 22 Mad., 372 (375).

(2) *Maqbul* v. *Lalta Prasad*, I. L. R., 20 All., 523, F.B.; *Chiranji* v. *Moti Ram*, (1898) A.W.N., 33, overruled.

(3) *Maruti* v. *Krishna*, I. L. R., 23 Bom., 592.

(4) *Maharaja of Bharatpur* v. *Rani Kanno Dei*, I. L. R., 23 All., 181, P. C.

(5) *Mohunga Ojha* v. *Ram Bahadur*, 16 C. W. N. 73, 15 I. C. 23.

(6) *Cf. Bans Gopal* v. *Rup Narain*, 19 I. C. (All.) 84.

in the first instance, and the mortgagor's appeal is merely dismissed with costs, the latter would be recoverable from the person of the mortgagor.(1)

2305. How much Property may be sold.—The sale contemplated by this section is the sale of the whole, or of a sufficient portion of the mortgaged property. It would thus appear that the only discretion the Court has in the matter is to order that only property sufficient to pay off the mortgage-decree and not the whole of the mortgaged property shall be sold. But is the Court bound to order this, even in a case where the mortgagee has released a portion of it from his mortgage? There can be no doubt that the mortgagee may release any portion of the mortgaged property from his debt, and in that case the residue would be the mortgaged property which the Court will have to deal with under this section. But while the mortgagee may release any portion, he cannot by so doing impose upon the mortgagor a personal liability to him to which otherwise he would not be subject. If, therefore, the mortgagee releases a substantial portion of the mortgaged property without the consent or acquiescence of the mortgagor, the latter may well object on the ground that the mortgagee could not without his consent increase his personal liability.(2) And since all portions of the mortgaged property should equitably bear their share of the burden (3) it follows that the mortgagor has even a stronger case when the portions released are those in which the equity of redemption had passed out of his hands to other persons. Where, therefore, the plaintiff mortgagee released the purchaser defendants from all liability by receiving from them a consideration which did not represent the full and true value of the property in their hands, and the Court passed a decree for sale of the remainder which being found to be insufficient to discharge the debt, the Court refused the mortgagee's application for a supplementary decree holding that the mortgagor was still entitled to claim to have the excluded property sold before a decree can be passed against him under section 90 (now r. 6).(4) But whether it is so or not, it is clear that the mortgagee has not the unqualified right to give up any portion of the mortgaged property, though the Court is, on the other hand, not bound to order sale of the entire property mortgaged, but may order sale of only so much as will be sufficient to satisfy the mortgage.(5) The Court may by consent allow a sale out of Court if it will be conducive to the convenience or interest of the parties, but the purchase-money must even then be paid into Court.(6) The Court will distribute the sale-proceeds amongst the several incumbrancers according to their respective rights and priorities, the surplus, if any, being paid over to the ultimate owner of the equity of redemption.(7) Such distribution may be made, without an account upon affidavits of the incumbrancers specifying their respective claims.(8)

It is apprehended that where in a foreclosure-suit sale is ordered, the decree must be framed as prescribed in this section, and in all other respects the suit thereafter will be treated as one for sale.

2306. Limitation.—A suit which admits of a decree for sale is, as regards limitation, governed by the rule which is now no longer the subject of controversy. The subject has already received due attention in the foregoing

(1) *Bans Gopal* v. *Rup Narain*, 19 I. C. (All.) 384.
(2) *Ram Ranjan* v. *Indra Narain*, I. L. R., 33 All., 890.
(3) S. 82 and Comm.
(4) *Ram Ranjan* v. *Indra Narain*, I.L.R., 33 Cal., 890; *contra* in *Sheo Prasad* v. *Behari Lal*, I.L.R., 25 All., 79.
(5) *Wade* v. *Wilson*, 22 Ch. D., 235.
(6) *Ralph* v. *Horton*, 19 W.R. (Eng.), 220; *Davies* v. *Wright*, 32 Ch. D., 220.
(7) Seton, Decrees (5th Ed.), 1593.
(8) *Bigham* v. *King*, 14 W. R. (Eng.), 414.

pages to which reference should be made for more particular information (§§1222-1226). Where a prayer for personal relief is joined in the suit, the limitation allowed to recover personally is the same as if a separate suit had been brought for it. That there is a personal liability upon an instrument charging a debt upon immoveable property, does not carry with it the effect of extending the period of limitation fixed for personal demands. Hence where a mortgagee of land sought, after the lapse of more than six years from the date when the mortgage-money was payable, to enforce two distinct remedies, the one against the property mortgaged and the other against the mortgagor personally, on the contract to repay it, it was held that Article 132 of the Limitation Act(1) applied only to suits to raise money charged on immoveable property out of that *property ;* and that the twelve years' rule did not apply to the personal remedy as to which the shorter period prescribed in Article 65 of the same Act was applicable.(2) Similarly while a suit for sale of pledged goods may be instituted within six years under Article 120 of the Limitation Act, a suit for personal decree would be barred after three years under Article 57 (3) where a mortgagee in possession sold the mortgaged property, and the mortgagor instituted a suit both against the purchaser and the mortgagee, but after twelve years from the sale, his claim was held to be barred as against the purchaser under Article 134, Schedule II of the Limitation Act, although the mortgagee's possession was under a decree entitling him to hold possession until the payment of the mortgage debt. It was held in the case that the absence of *bona fides* as distinguished from actual knowledge of the vendor's title did not prevent the purchaser from claiming benefit of the Limitation Act. In order to give the purchaser the benefit of Article 134, the purchase need not be *bona fide* in the sense of being without constructive notice " of the restricted nature of the vendor's title, but by the term " purchaser " in that article is meant a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title.(4) Although charge-holders may sue for sale, the limitation governing the enforcement of a charge is twelve years as provided by Article 132 of the Limitation Act ; (5) Article 147 being now held applicable only to mortgage-suits for foreclosure or sale (§ 1222—1226). The order for sale may be made at any time before a decree for foreclosure is made absolute. In a case the mortgagor obtained the extension he had prayed for on condition that the mortgagee should immediately obtain and continue in possession until payment was made by the mortgagor. The time fixed expired, but the mortgagor did not pay the amount ; and the mortgagee held possession for more than twelve years, after which the mortgagor sued for redemption. But the Court held that the mortgagee could not be ousted, as his title had become indefeasible by adverse possession.(6)

Where a higher rate of interest allowed by the decree was afterwards reduced on the motion of the judgment-debtor, who became thereupon entitled to a refund, his application for that purpose was treated as an application under section 244 of the Code, and as such, subject to Article 178 (now Act 181) of the Limitation Act calculated from the date of the amendment of the decree.(7) For

(1) Act XV of 1877 ; now see Act IX of 1908.

(2) *Ramadin* v. *Kalka Prasad*, I. L. R., 7 All., 502, P.C.; *Girwar Singh* v. *Thakur Narain*, I.L.R., 14 Cal., 730, F.B. ; *Bulakhi Ganu* v. *Tukaram*, I.L.R., 14 Bom., 377.

(3) *Mahalinga* v. *Ganapatti*, I. L. R., 27 Mad., 528, F.B.

(4) *Pandu* v. *Vithu*. I. L. R., 19 Bom., 140.

(5) *Khemji* v. *Rama*, I. L. R., 10 Bom., 579 ; *Kamala Kant* v. *Abul Burkat*, I.L.R., 27 Cal., 180.

(6) *Makhan* v. *Bhagirath Prasad*, (1905) O. C., 33.

(7) *Harnam* v. *Mahd. Yar Khan*, I. L. R, 27 All., 485.

the purpose of this rule, an appropriation by creditor of a payment towards interest may suffice to extend the period under section 20 of the Limitation Act,[1] if such appropriation was in accordance with the terms of the mortgage-deed, though it may not have been otherwise expressly authorized.[2]

2307. Decree on Award.—This and the following section would apply to a decree obtained on the award of arbitrators filed in Court,[3] or a compromise effected in pursuance of section 44 of the Dekhan Agriculturists' Relief Act.[4]

2308. Court-fee.—A suit for sale of the mortgaged property even when no personal decree is sought against the mortgagor must be stamped with an *ad valorem* court-fee on the principal and interest claimed and not as in the case of foreclosure, on the principal amount merely.[5] For the Court-fee payable on appeal, reference should be made to rule 2 (§ 2244).

2309. Appeal.—A preliminary decree for sale like a similar decree for foreclosure is not an inchoate decree but one which is final as to the rights thereby determined. As such it is appealable and should be appealed against, otherwise, rights decided thereby cannot be raised in an appeal against the final decree. Where a party appeals against the preliminary decree, the Court has no jurisdiction to dismiss the appeal merely on the ground that the decree had since been made final. On the other hand, if the preliminary decree is reversed on appeal, the final decree being dependent upon, it will, *so facto* become inoperative.[6] Where however, before the preliminary decree is appealed against, the decree is made final, there should be only one appeal against the final decree, and if the appeal be made only against the preliminary decree, the Court should order amendment of the appeal so as to convert it into an appeal against the final decree. It should not and could not dismiss the appeal.[7]

2310. Not a Money Decree.—A decree passed on a mortgage for sale of the property is not a money decree and cannot be executed as such, nor can the mortgagee be permitted to execute it otherwise than in accordance with the procedure applicable to such decrees.[8]

2311. Assignment of Mortgage Decree.—It has already been stated before (§65) that a mortgage decree for sale of land is not immoveable property within the meaning of section 17(*b*) of the Indian Registration Act, and that as such its assignment is not compulsorily registrable.[9]

Final decree in suit for sale.

5. (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

(1) Act IX of 1908.
(2) *Gopi Nath Singh* v. *Hardeo Singh*, 6 A.L.J.R., 207.
(3) *Tara Prosad* v. *Bhobodeb*, I. L. R., 22 Cal., 931.
(4) Act XVII of 1879; *Bhagwan Ramji* v. *Ganu*, I. L. R., 23 Bom., 644.
(5) *Nama* v. *Hari*, 7 Bom. L. R., 194.
(6) *Kuppusami* v. *Raguma*, 24 M. L. J., 190; 18 I. C. 730.
(7) *Subramania* v. *Sadasiva*, (1913) M. W. N. 140; 16 I. C. 880.
(8) *Surja Kumar* v. *Pramada*, 17 C. W. N. 1039; 20 I. C. 829.
(9) *Mumtaz* v. *Sri Ram*, I. L. R., 35 All., 524.

and, if so required,

(*b*) ordering him to re-transfer the mortgaged property as directed in the said decree,

and also, if necessary,

(*c*) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of sale be dealt with as is mentioned in rule 4.

2312. Analogous Law.—This rule was section 89 of this Act, and which ran thus:—

"If in any case under section 88, the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any awarded to him and such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished."

Procedure when defendant pays amount due.

It prescribes the proceedure in the case of a decree for sale passed under rule 4, upon the lines of rule 2, which similarly lays down the procedure as regards a foreclosure-decree passed under rule 1. The section must be read subject to the provisions of rule 10.

It should be noticed that unlike rule 3 this rule makes no provision for postponement of the final decree for sale, and from which it is evident that the Court does not possess the same power to enlarge time as it does in the case of foreclosure.(1)

The Calcutta High Court does not consider an order under this section as a necessary *sine qua non* to a valid sale though it contemplates the Court to pass some order for sale.(2) The High Courts were at one time divided on the question whether proceedings under this section constituted a step in execution. The subject has been discussed under rule 3 (§ 2256).

2313. Principle.—The procedure prescribed by this section applies to all cases where the mortgagor or any one entitled to redeem pays the amount due on the mortgage. In this respect the first half of the section is the same as the first paragraph of rules 3 and 8, and which is particularly directed to persons entitled to redeem under section 91, and in which case the decree prescribed in rule 7 should be passed. In all these cases if the payment is made, the mortgage is satisfied, and the party paying is, if necessary, entitled to be put in possession of the property. If the defendant, however, does not pay, the plaintiff may

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(1) *Taniram* v. *Gajanan*, I. L. R., 24 Bom., 800.

(2) *Siva Pershad* v. *Nundo Lall*, I. L. R., 18 Cal., 139; *Tara Prosad* v. *Bhobodeb*, I. L. R., 22 Cal., 931; *Phul Chand* v. *Nur Singh*, I. L. R. 28 Cal., 73 (77).

under rule 3 apply for a final decree for foreclosure, and under this rule for a final decree for the sale of the mortgaged property, and under rule 8 for either the former or the latter according to the nature of the mortgage. There is, however, one noticeable difference between this rule and rule 3, which is that while under the latter rule the final decree extinguishes the debt, no such provision is made in the case of a decree for sale, and, therefore, although the mortgaged property may be sold, the mortgagee may still pursue his remedy against the person or other property of his debtor under circumstances detailed in the next rule. But if the mortgagee has in the meantime acquired any portion of the mortgaged property, it may be a question whether he is still entitled to enforce his security against the portion subject only to his mortgage. The question will be found discussed below.

2314. Meaning of Words.—"*And the Court shall then pass an order, &c.,*" the Court has then not the same power to enlarge time which it possesses under rule 3. "*Or a sufficient part thereof:*" who is to decide this? and on what evidence? Though the Court has to decide, the mortgagee would have the commanding voice in the matter of sale. "*And thereupon the defendant's right to redeem, &c.:*" see rule 3 and the commentary thereunder. It is only the mortgagor's right *to redeem* as defined in section 60 that is extinguished. It does not thence follow that the mortgagor may not then pay off the decree and thus avert sale. "*And the security shall be. . . . extinguished:*" that is, the mortgagee cannot resort to the same property even though it may go back to the mortgagor as where he may purchase it in the auction-sale. But though the security is exhausted by the sale, the debt may still remain, in which case the mortgagee may still proceed under rule 6. The meaning of the clause "the security is extinguished" appears to be that once the order for sale is passed the mortgagee has only the right to bring the property to sale. He has then no further right left on the strength of his mortgage. Nor can he resort to the same property after sale for the satisfaction of his debt, even should it come into the hands of the mortgagor. But while so far the security is extinguished, it does not do so for all purposes: were it so, the position of the mortgagee would, after the order for sale, be of a mere money-decree-holder in which case his troubles might begin as soon as he obtains such an order. This is certainly not then what the Legislature contemplated, and what the framers meant by the expression "the security shall be extinguished" which was probably intended to mean that the security shall then be spent and be no longer enforceable against the mortgagor: in short, the relationship of mortgagor and mortgagee shall terminate with the order (§ 2280).

2315. Plaintiff's Application for final Decree.—If the mortgagor fails to pay off the requisite amount within the time allowed, the mortgagee is then entitled to apply for the final decree for sale of the mortgaged property. It should be noted, that in a case of foreclosure the application to make would have been for the final decree debarring the mortgagor of all right to redeem the property, and for delivery of possession, if necessary. Here, however, no such order need be made, and hence it may be contended that the mere making of the final decree for sale cannot have the effect of debarring the mortgagor of his right to redeem the property. The subject is one which will have to be taken up hereafter.

2316. A large number of cases decided under this rule when it was section 89 are concerned with the question whether the application for the final decree for sale is an application for execution of the decree passed under

the last rule, or whether it is one made in course of the suit. These cases are now no longer of any practical value, since the question has been set at rest by the present amended law. But the Courts were formerly much concerned about that question, the view of the Calcutta High Court being [1] that an application under this and what is now rule 3 being not an application under the Civil Procedure Code, and that, therefore, any question arising thereon and relating to the execution, discharge or satisfaction of the decree was not a question which could be regarded as falling within the purview of section 244 of the Code. But the contrary view was taken in two Full Bench cases [2] of the Allahabad High Court subsequently followed in other cases, and the same view was propounded by the Madras High Court. [3] In Bombay [4] and in the Central Provinces the question was answered in accordance with the view of the Calcutta High Court. [5] In one case the Allahabad Court ventured the view acceptable to the Calcutta High Court, but this case [6] though, of course, it was approved in Calcutta, [7] was soon afterwards overruled. [8]

2317. Consistently with its view, the Calcutta High Court ruled that an application for making the decree absolute need not contain the particulars prescribed by section 235 of the Code, [9] and that article 178, schedule II of the Limitation Act, which limits executions taken only [10] under the Civil Procedure Code, did not apply to applications made under section 87 or this section. [11] According to the Calcutta view then, an application for making the decree absolute could be made at any time, since the Limitation Act did not apply to such applications, but that did not mean, as observed by the Judges in deciding the case, that, in dealing with such matters, the Court would not be guided by considerations as to whether any delay on the part of the mortgagee was not unreasonable, so as to bring it within the rules applied in such cases by the Courts of Equity. And since the application for making the decree absolute was there held not to be an application for execution, its non-verification did not vitiate it, although by the rules framed under the section, [12] a motion to make the decree absolute must have been made by a verified petition. The reason given by the Calcutta Court in support of their view was that the preliminary decree being, so to speak, only a decree *nisi* could not be executed, until it is made absolute under section 87 or this section. Hence there being no execution of an inchoate decree, the application to make the decree absolute could not be regarded as one made in the execution of that

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(1) *Ajudhia Pershad* v. *Baldeo Singh*, I. L. R., 21 Cal., 818; *Tiluck Singh* v. *Parsotam*, I. L. R., 22 Cal., 924; *Tara Prosad* v. *Bhobodeb*, *ib.*, 931 (934); *Akikunissa* v. *Rooplal*, I. L. R., 25 Cal., 133.

(2) *Kedar Nath* v. *Lalji*, I. L. R., 12 All., 61, F. B.; *Oudh Behari Lal* v. *Nageshar Lal*, I. L. R., 13 All., 278, F. B.; followed in *Chunni Lal* v. *Harnam Das*, I. L. R., 20 All., 302; *Parmeshri Lal* v. *Mohan Lal*, I. L. R., 20 All., 357; *Liladhar* v. *Chaturbhuj*, I. L. R., 21 All., 277, and cases cited under s. 87.

(3) *Narayana* v. *Papayya*, I.L.R., 22 Mad., 133; *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244, F. B.; *The Aryan Bank* v. *Venkata*, 13 M. L. J. R., 212.

(4) *Mahomed* v. *Bai Cooverbai*, 6 Bom. L. R. 1043.

(5) *Kallo Singh* v. *Mt. Lachmi Bai*, 12 C. P. L. R., 82.

(6) *Ranbir Singh* v. *Drigpal*, I. L. R., 16 All., 23.

(7) *Akikunnissa* v. *Rooplal*, I.L.R., 25 Cal., 133.

(8) *Chunni Lal* v. *Harnm Das*, I. L. R., 20 All., 302.

(9) *Ajudhia Pershad* v. *Baldeo Singh*, I.L. R. 21 Cal., 818; but an application so framed would be treated as an application for an order absolute so as to save limitation; *Baldeo Prasad* v. *Ibn Haidar*, I. L. R., 27 All., 625.

(10) *Baimanekbai* v. *Manekji*, I. L. R., 7 Bom., 213.

(11) *Tiluck Singh* v. *Parsotam*, I. L. R., 22 Cal., 924; following *Rambir Singh* v. *Drigpal*, I. L. R., 16 All., 23; a case overruled by *Chunni Lal* v. *Harnam Das*, I. L. R., 20 All. 302.

(12) Printed, *post*.

decree.[1] In Allahabad, on the other hand, it was contended that the conditional decree could not be regarded as a decree *nisi* as under it the mortgagor could make payment, and, if necessary, recover his property. "It would," said Straight, J., "be a misnomer, if payment is made, to describe such payment as other than one made in execution of decree."[2] According to this view then, the application for making the decree absolute must have been made within three years as provided in articles 178 and 179 of the Limitation Act.[3] In Bombay it was at one time held that Article 179 and not Article 178 governed such cases.[4] But in a subsequent case, the Court held that the application being one made under the Act and not the Code, was subject to no period of limitation.[5] It was held in Madras that a decree for sale under the last section was subject to the limitation prescribed in section 230 (now s. 48) of the Code,[6] but that the starting point for limitation would in any case be from the date of the granting of the order absolute and not from the date of the decree itself.[7]

2318. All these controversies have now been buried with the last Code of Civil Procedure. For as observed before, both section 87 as well as section 89 of the Transfer of Property Act along with other sections relating to procedure having been transposed to the new Procedure Code, an application made under either section would naturally be an application made under the Code, and as such be subject to Article 178 of the Limitation Act. At the same time, being an application made under a special rule and relating as it does to a preliminary decree being made final, it is not an application for the execution of a decree, and as such need not conform to the requirements of section 235 (now O. 21, r. 11), though it would have to be necessarily verified.

Notice.

2319. But as regards notice to the defendant, there is nothing in the rules to make it obligatory, though the Courts conform to the rule *audio alteram partem*[8] and insist upon hearing the opposite party before making the decree final. This was the procedure adopted before the present enactment, though the notice was held justifiable on the ground that the provisions of the Code of Civil Procedure and the Act were to be read together so far as they related to procedure.[9] As a natural consequence of this view a notice was held to be necessary to the mortgagor before the decree could be made final at any rate, if more than one year elapsed between the date of the decree and the application for its execution.[10] Indeed, it was held in Madras that a notice in every case was a pre-requisite of an order shutting out the mortgagor from redeeming, and if the order is passed without notice to him, he is entitled, as soon as he becomes aware of the *ex-parte* order passed

(1) *Ajudhia Pershad* v. *Baldeo Singh*, I. L. R., 21 Cal., 818 (823).

(2) *Oudh Behari* v. *Nageshar*, I. L. R., 13 All., 278 (280, 281), F. B.; but see *contra* in *Sham Sunder* v. *Mhd. Ibtisam*, I.L.R., 27 All., 501 F. B.

(3) *Ghunni Lal* v. *Harnam Das*, I. L. R., 20 All., 302; *Baldeo* v. *Ibn Hydar*, 2 A. L. J., 371. A similar view was taken in an application for foreclosure under s. 87. *Ali Ahmed* v. *Naziran*, I. L. R., 24 All., 542.

(4) *Bhagwan* v. *Gannu*, I. L. R., 23 Bom. 644 (650.)

(5) *Ganu* v. *Narayan*, 5 Bom., L. R., 540.

(6) *Vaidhinathasamy* v. *Somasundram*, I. L.R. 28 Mad., 473 F.B.; following *Kommachi* v. *Pakker*, I. L. R., 20 Mad., 107; overruling *Mallikarjunudu* v. *Narasimha*, I. L. R., 24 Mad., 412, F. B.; in which the contrary was held, and s. 230 of the Code was held to be inapplicable.

(7) *Mulchand* v. *Mukta*, (1896) A. W. N. 100; *Mahabir* v. *Sital*, I. L. R., 19 All., 520; *Sham Sunder* v. *Mhd. Ibtisam*, I.L.R., 27 All. 501, F. B.

(8) "Hear the other side."

(9) *Bhagwan* v. *Ganu*, I. L. R., 23 Bom., 644 (651).

(10) S. 248 (O. 21, r. 22), Civil Procedure Code.

against him, to apply to have it set aside, and ask, if necessary, for the extension of time.[1] This is, however, the view, which is not universally accepted,[2] and it would appear that stated in the unqualified manner it has been by the Madras High Court, the dictum is scarcely equitable to the decree-holder in all cases. No doubt where the mortgagee applies for a final decree after culpable delay or under circumstances which render it expedient for the judgment-debtor to know of it, notice will be ordered, as it should be, but there may be circumstances when it would be not only useless but positively mischievous to order it. Thus if the debtor after obtaining repeated extensions fails to redeem and the property is scarcely worth the incumbrance upon it, it would be futile to order notice. But where there appears a reasonable hope of saving the property to the mortgagor, notice to him might enable him to save his property. No rigid rule should therefore be laid down in this respect. The Court may, if it thinks fit, issue notice, but if it does not, its proceedings are not on that account vitiated unless they offend against some explicit provision of the Code.[3] An application for sale of the mortgaged property may be treated as one made under this rule for an order absolute for sale, though the application may not in specific terms ask for such an order.[4]

An application under the section need not be necessarily made to the Court which had passed the decree,[5] although this is insisted on by the Calcutta High Court,[6] and no attachment is necessary if the decree is properly worded.[7] The question of limitation regarding such applications has already been before discussed (§ 2272).

2320. Power to enlarge Time.—It s noticeable that while rule 3 confers upon the Court the power to enlarge time for payment of the mortgage-money before passing the order absolute for sale, this section contains no such provision and from which it has been inferred that the Court is precluded from considering such an application or to grant an extension of time.[8] There can be no doubt that without such power it is not within the competence of the executing Court to entertain an application for extension of time; to do otherwise would be to rehear the decree, not to execute it.[9] The mere fact that the mortgagor had filed an appeal which was pending decision, does not then justify the Court in refusing to make the decree final, nor to enlarge time for redemption.[10] But although the Court has no power to postpone the making of a final decree, in a case arising under section 291 (O. 21, r. 69) of the Code and which has been extended by virtue of the powers conferred on the High Courts under section 104 of this Act, the Court may postpone the sale[11]

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(1) *Narayana* v. *Papayya*, I. L. R., 22 Mad., 133.

(2) *Dalpat Rao* v. *Tarachand*, 9. C. P. L. R., 5.

(3) It has now been held in *Mahomed Taki* v. *Thomas*, 4 C. L. J., 317, that no notice is required under this section.

(4) *Baldeo* v. *Hydar*, 2 A. L. J. 371.

(5) *Oudh Behari Lal* v. *Nageshar Lal*, I. L. R., 13 All., 278, F. B.

(6) *Bachu Koer* v. *Golab Chand*. I. L. R., 27 Cal., 272; citing *Kali Pado* v. *Dino Nath*, I. L. R., 25 Cal., 315; *Jagernath* v. *Dip Rani*, I. L. R., 22 Cal., 871 (874, 875).

(7) *Venkatanarsammah* v. *Ramiah*, I. L. R., 2 Mad., 108 (112); *Dayachand* v. *Hemchand*, I. L. R., 4 Bom., 515 (520), F. B.

(8) *Raja Ram Singhji* v. *Chunni Lal*, I. R., 19 All., 205 (207); *Taniram* v. *Gajanan*, I. L. R., 24 Bom., 300; dissented from in *Shyamkishen* v. *Sundar Koer*, I. L. R., 31 Cal. 373 (378), but in which, however, the point did not arise; *contra* assumed in *Ram Golam* v. *Chowdhry Babu*, 10 C. W. N., 910 in which too point did not arise.

(9) *Udwant Singh* v. *Tokhan Singh*, I. L. R., 28 Cal., 353 (361), P.C.

(10) *Ram Golam* v. *Chowdhry Babu*, 10 C.W.N., 910.

(11) *Raja Ram Singhji* v. *Chunni Lal*, I. L.R., 19 All., 205; *Harjas Rai* v. *Rameshra*, I. L. R., 20 All., 354 (356); *Shyamkishen* v. *Sungar Koer*, I.L.R., 31 Cal., 373.

for proper reasons. (1) This question has given rise to the discussion as to whether the application of section 291 of the Code by an order made under section 104 of the Act is not *ultra vires* inasmuch as it has the effect of modifying the provisions of this rule, which enacts that and thereupon " the defendant's right to redeem and the security shall both be extinguished." It has, however, been held that the extension of section 291 of the Code to mortgage-sales held under this section does not collide with the clause barring redemption, inasmuch as the words " *and thereupon*," etc., do not relate to the passing of the order absolute for sale only, but rather to the actual sale and the distribution of the proceeds, and not merely to the order passed for the purpose. (2) In this view the making of an order absolute does not put an end to the mortgagor's right to redeem, which continues to subsist till the sale is made and even after that till the application of section 310-A (now O. 21, r. 89) becomes impossible. In other words, although the decree for sale may be made final under this rule, it does not preclude the mortgagor from paying up the decretal amount with costs, upon which further proceedings would cease and sale no longer proceeded with, since the object for which the sale had been ordered had ceased to exist. (3)

2321. For What Payment Sale may be ordered.—The amount for the recovery of which the Court is empowered to order sale is "the amount due as aforesaid, together with such subsequent costs as are mentioned in rule 10," the latter clause referring to subsequent costs incurred since the decree for sale up to the time of actual payment. (4) The mortgagee cannot then have execution of the agreement by which time was given. (5) A Court to which an application is made under this rule has full power to ascertain what balance of the mortgage-debt is really outstanding at the time of the application and to make the decree final for the realization of that amount only. (6) Where a decree was passed in favour of more than one decree-holder, one decree-holder alone cannot certify satisfaction of the decree beyond his own interest therein, so as to bind the other decree-holders. (7)

2322. To What Property the final Decree may relate.—The mortgagee may apply for sale of entire mortgaged property, but it is optional with Court to pass a final decree for sale of only a portion. In such a case if the sale-proceeds prove insufficient to satisfy the decretal debt, there is nothing in law to prevent the decree-holder from obtaining a further order to sell another portion of the mortgaged property, provided that his application is in view of the Allahabad High Court within limitation. (8) Certain mortgagees, in whose favour a decree for sale of the mortgaged property had been passed, obtained an order absolute for sale of a portion of the mortgaged property. The judgment-debtors appealed from the decree for sale, and pending the appeal, the amount realizable by sale of the mortgaged property was increased by the accrual of interest. The judgment-debtors lost the appeal, and thereupon the decree-holder applied for a further order absolute for sale of the whole of the mortgaged

(1) *Janookeenath* v. *Radha Mahun*, 20 W. R., 130.

(2) *Bibijan* v. *Sachi*, I.L.R., 31 Cal., 836, F.B.; *Shyamkishen* v. *Sundar Koer*, I.L.R., 31 Cal., 373.

(3) *Misri Lal* v. *Mithu Lal*, I. L. R., 28 All., 28.

(4) S. 94, *post*.

(5) *Kashi Prasad* v. *Sheo Sahai*, I.L.R., 19 All., 186 (188); *cf.* s. 257-A., Civil Procedure Code.

(6) *Hatem Ali* v. *Abdull Gafur*, 8 C.W.N., 102.

(7) *Tamman Singh* v. *Lachmin*, I. L.R., 26 All., 318.

(8) *Balkrishanji* v. *Mithu Lal*, I. L. R., 15 All., 212.

property for an amount including the interest accrued due since the passing of the first order, and it was held that the order applied for could be made.(1) One order absolute does not then bar another, and the Court may from time to time make such orders absolute for sale of portions of the mortgaged property as it may find necessary. This is now made clear by the omission of the concluding words of section 89 and " thereupon the defendant's right to redeem and the security shall both be extinguished." As to this clause the present writer has remarked : " As regards the extinguishment of the mortgagor's right to redeem, the provision appears to be uncalled for." For, as observed before, the sale is ordered to satisfy the mortgage, and if the mortgagor is able to satisfy the decree, there is then no object gained in persisting in the sale.(2) As regards the extinguishment of the security, the expression appears to convey that the security created by the mortgage shall cease to be enforceable against the same property even if it comes into the hands of the mortgagor after sale, for there is nothing to debar the mortgagor from purchasing the property if he is so inclined. Obviously, there can be no extinguishment of the security for *all* purposes, for if that were so, the passing of the order for sale would have the effect of converting the mortgagee-decree-holder into a mere money-decree-holder, in which case not only would he forfeit his own priority but confer priority on puisne incumbrancers(3) subject to whose interest the property would then be sold—a result which is not only absurd in itself, but will lead to greater absurdities."(4) The clause has now been omitted, and the result then is that the passing of the final decree for sale does not destroy the security, though the auction-purchaser of the property would naturally take it freed from the mortgage-lien, which though destroyed *pro tanto* is not absolutely annihilated, but may be used as a shield to protect the purchaser's title against the claim of a subsequent incumbrancer.(5)

2323. What Property may be sold.—Ordinarily, when sale is ordered, it is for the Court to decide what property and how much of it should be sold in the first instance to pay off the mortgagee. But where the mortgagee has besides a general lien on the several properties comprised in the mortgage and a separate lien on each of them, it is then within his option to bring to sale whichever of the properties he thinks most likely to satisfy his claim.(6) Indeed, the mortgagee has always the commanding voice in the matter of sale.(7) A mortgagee cannot, by the act of the parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage so long as he has not released or relinquished it, and so long as that mortgage is legally enforceable.(8) A holder of two independent mortgages over the same property may, in the absence of any covenant restraining him, obtain a decree for sale on each of them in a separate suit.(9) It was, at one time, held in Allahabad that where there exists a prior usufructuary mortgage, a subsequent mortgagee of the same property cannot bring the mortgaged property to sale in

(1) *Sat Narain* v. *Radha Kishen*, I. L. R., 25 All., 264.

(2) *Prem Chand* v. *Purnima*, I. L. R., 15 Cal., 546 ; *Misri Lal* v. *Mithu Lal*, I. L. R., 28 All., 28 ; *Harjas* v. *Rameshwar*, I.L.R., 20 All., 354 ; *Raja Ram* v. *Chunni Lal*, I.L.R., 19 All., 205 ; *Behari* v. *Ganpat*, I. L. R., 10 All., 1.

(3) *Valmikalinga* v. *Chidambara*, I. L. R., 29 Mad., 37 (40) ; *Shyam Lal* v. *Bashiruddin*, 3 A. L. J. R., 630 (632). In these cases the clause was held to be obscure. So in a sense it is, but if it be construed in the light of the text it will be intelligible.

(4) 2 Law of Transfer (2nd Ed.), § 1490.

(5) S. 101, Comm.

(6) *Hoolas Kooeree* v. *Mhd. Hubeeboollah*, 8 W.R., 379 ; *Bhikari Das* v. *Dalip Singh*, I. L. R., 17 All., 434.

(7) *Khub Lal* v. *Navabi*, 9 C.W.N., cxcvii.

(8) *Chinnery* v. *Evans*, 11 H.L.C. 115 ; *Krishna Chandra* v. *Bhairab Chandra*, 9 C. W. N., 868.

(9) *Sundar Singh* v. *Bhotu*, I.L.R., 20 All. 322.

virtue of his own mortgage until such time as the usufructuary mortgage is ripe for redemption.(1) But the unsoundness of this view has become manifest since that Court overruled its leading precedent, of which it was a natural corollary.(2) It has been held in Allahabad that where the property mortgaged was wrongly described in the mortgage-deed and a decree for its sale passed without discovering the error, the mortgagee was entitled to have the error corrected in execution and to bring to sale the property which was really intended to be mortgaged.(3) This may be now justified by the general powers of the Court to correct errors in any proceeding in a suit.(4) A decree obtained before the passing of this Act would have to be construed according to its terms. A decree, for example, against the mortgagor generally coupled with a provision that the decree should be executed against the property specified in the bond would entitle the mortgagee to proceed either against the person of the mortgagor and his property, or against only the mortgaged property.(5) The rule here enacted that in such a case the personal security is only a secondary security to be resorted to on exhaustion of the primary security which is the mortgaged property would be inapplicable.

2324. Procedure in a Decree for Sale.—After obtaining a decree for sale under rule 4, the mortgagee has to wait for the time allowed to the mortgagor to redeem. He cannot obtaine a final decree for sale before the expiration of the period allowed by the decree, and cannot execute his decree *nisi* until it is made absolute.(6) But it has been held in Calcutta that an order absolute, as prescribed in this section, is not indispensably necessary, and it is sufficient that there is an order for sale passed on the motion of the decree-holder, (7) and so it has been held in Bombay that the mere omission on the part of the mortgagee to apply for the making of the decree absolute as a preliminary to its sale, and the consequent omission on the part of the Court to make it absolute, does not invalidate an order for sale if it does not affect the merits of the case.(8) A similar view has been taken in Madras, where it is held that, although an order absolute for sale of mortgaged properties is in strictness necessary, still, where the judgment-debtor was aware of the intended sale, and even applied for an adjournment of it, but did not object till after it had taken place, the sale could not be set aside, especially as there was no allegation of damage.(9) And *a fortiori*, where the sale is made after formal notice to the debtor and due proclamation in conformity with the procedure prescribed in the Code, the judgment-debtor could not object to the validity on the ground that the sale was made without the decree being made absolute.(10) This view may be justified on the principle that a party who has omitted to take a plea

(1) *Akhra* v. *Suba Lal*, I. L. R., 18 All., 83.

(2) *Matadin* v. *Kazim Husain*, I. L. R., 13 All., 432, F.B.; overruled in *Ramshankar Lal* v. *Ganesh Proshad*, I.L.R., 29 All., 385, F. B.

(3) *Hukam Chand* v. *Shaikh Nasrullah*, 2 A. L. J. (S.N.), 45.

(4) Sections 152, 153, Act V of 1908.

(5) *Luchmi Dai* v. *Asman Sing*, I. L. R., 2 Cal., 213 (220, 221); *Ram Baran* v. *Gobind Singh*, 2 A. L. J. 95.

(6) *Ramlal* v. *Narain*, I.L.R., 12 All., 539; *Prosad* v. *Bhobodeb*, I. L. R., 22 Cal., 931; distinguishing *Siva Pershad* v. *Nundo Lal*, I. L. R., 18 Cal., 139; *Subramanyan* v. *Narayana*, 9 M.L.J. 349; *Bansidhar* v. *Abu Talib*, (1905) O. C., 75. [The obtaining of an order absolute is not a mere formality, but is a *sine qua non* to a valid sale.] *Contra* in *Baldeo* v. *Abhiman*, 12 C. P. L. R. 103.

(7) *Phulchand* v. *Nur Singh*, I. L. R., 28 Cal. 73 (77).

(8) *Mancherji* v. *Thakordas*, 5 Bom. L. R., 389.

(9) *Rayilu* v. *Narayana*, 10 M. L. J., 205; *Venkatarazu* v. *Chinna*, I. L. R., 24 Mad., 695 (702). To the same effect *Gunindra* v. *Baijnath*, I.L.R., 31 Cal., 370; *Appa Rao* v. *Krishna*, I.L.R., 25 Mad., 537 (539).

(10) *Venkatarazu* v. *Chinna*, I. L. R., 24 Mad., 695 (702).

in execution suffers the same consequences as if he had omitted to raise it in the original suit.(1) But an order for sale passed before expiration of the period allowed for redemption would be no more legal than a final decree made before that day. For, according to the wording of the rule, if "the defendant pays into Court *on or before the day fixed* the amount declared due as aforesaid," the Court must permit redemption, and replace the mortgagor in possession, which precludes the passing of a final decree for sale of the property. The day to be fixed must be a day within six months "from the date of declaring in Court the amount so due." This date need not necessarily coincide with the date of the decree; for, if the Court does not pass a decree for a specific sum, but merely "orders that an account be taken of what will be due to the plaintiff,"(2) then the day for redemption should be fixed so as to count from the latter date, that is, the date of declaration. Of course, the procedure here prescribed applies to the case of a normal decree passed in accordance with the provisions of the last rule. If, therefore, the decree passed is varied by compromise, the terms of the compromise, and not the terms of this section, must regulate the procedure. Where, for instance, the defendant had, under the terms of a deed of compromise, agreed to pay the decretal amount in certain instalments stipulating for the sale of the mortgaged property in case of default, it was held that, on default, the decree-holder had the right to bring the mortgaged property to sale without obtaining an order under this section.(3)

Payment out of Court invalid.

2325. Under section 89 it was enacted that the decretal amount could be paid to the plaintiff, that is, out of Court, in which case it was held to be subject only to the provisions of section 258 of the Procedure Code. So it was held in Madras that section 258 of the Code applied to a decree for sale when it contained a direction for the recovery, personally from the mortgagor, and from his other property, of what may remain undischarged by the sale-proceeds of the mortgaged property.(4) It applied even to a decree which only contained a direction for sale of the mortgaged property,(5) inasmuch as, in either case, payment of money would be a complete satisfaction of the real purpose of the decree. But a mortgagee in possession receiving usufruct did not receive payment of "money payable under a decree," within the meaning of section 258, though such appropriation is payment within the meaning of section 22 of the Indian Limitation Act. All these questions have been rendered immaterial by the amendment of the law under which the Court is precluded from recognizing any payment made out of Court, and which it cannot even certify under O. 21, r. 2, for it is not a payment authorized by law. Consequently, the mortgagor may recover it by an independent suit, but he cannot insist upon its being taken into consideration as a payment in satisfaction of a mortgage-decree. But, if, suppose in such a case, the mortgagee files a receipt, could the Court refuse to recognize it as a substantial compliance with this rule? It is apprehended that it should be so if only on the principle *cessante ratione cessat, ipse lex*, though it is not a procedure which would be tolerated only in "hard cases.

(1) S. 13, Civil Procedure Code; *Subbarama* v. *Nazammal*, I.L.R., 24 Mad., 683; following *Ram Kirpal* v. *Mt. Rup Kuari*, I.L.R., 6 All., 269, P.C.; *Mungal Pershad* v. *Girja Kant*, I.L.R., 8 Cal., 51, P.C.; *Gunindra* v. *Baijnath*, I.L.R., 31 Cal., 370; *Venkata Narasimha* v. *Papammal*, I.L.R., 19 Mad., 54; *Hari* v. *Yamnabai*, I.L.R., 23 Bom., 35.

(2) S. 86, para. 1.

(3) *Abir* v. *Jahar Mahammad*, 6 C. L. J., 95.

(4) *Vaidhinathasamy* v. *Somasundram*, I L.R., 28 Mad., 473, F.B.; overruling *Mallikarjunadu* v. *Narasimha*, I. L. R., 24 Mad., 412, F.B.

(5) *Vaidhinathasamy* v. *Somasundram*, 15 M. L. J. R., 126 F.B.; following *Hart* v. *Tara Prasanna*, I.L.R., 11 Cal., 718.

The obligation of the Court to put the mortgagor in possession of the mortgaged property issues out of the fact that with the payment is extinguished the security which alone rendered the mortgagee's possession lawful. Cases in which the mortgagor may put in force this clause may arise in an English mortgage, a simple mortgage—usufructuary or other mortgages dealt with in section 98. In a simple mortgage the clause would have no application, because there is no transfer of possession, and, in a usufructuary mortgage, the clause is equally inapplicable, because there can be no decree for sale. (1)

2326. Finality of Decree.—It has been observed before that a preliminary decree may be set aside at the instance of one or more of the defendants, and that it is open to the Court to set aside the decree as against one or more defendants. Where the Court sets aside the decree at the instance of only some of the defendants, and different sums are decreed against separate defendants, the executing Court has to see that the terms of the decree are fulfilled without its being oppressive to any defendant. A mortgagee obtained a decree for sale against three mortgagor-defendants for Rs. 2,270, and subsequently one of the defendants, against whom the decree was *ex parte*, got the decree set aside only as against himself, and a new decree for only Rs. 1, 556-15 was passed against him. The decree-holder then applied for an order absolute for sale of the property but the Court ordered an order absolute for sale of all the mortgaged property, but it directed that the property belonging exclusively to the judgment-debtor against whom the smaller amount was due should not be sold unless and until the mortgaged property belonging to the others had been sold, and had failed to realize a sum sufficient to satisfy the smaller decree. (2) The effect of this judgment is, that if, on a mortgage, executed by *A*, *B*, and *C*. there be a decree for Rs. 1,000 against *A* and *B*, and for Rs. 800 against *C* the property of *A* and *B* should be first sold to the exoneration of *C's* property, the latter being only liable if the proceeds from the sale of the property of *A* and *B* is insufficient. In other words, if *A* and *B*'s property is sufficient to pay off the decree, *C* escapes scot-free from all liability. The inquity of such a course is manifest, and it must be confessed that the Allahabad Court gave no intelligible reason for their view. Indeed, the obvious course in such a case would have been to direct sale of *A* and *B*'s property exclusively only to the extent of their separate liability. Where, on a decree passed on a compromise, the mortgagor was ordered to pay Rs. 770 to the mortgagee within a year, and in default of payment, the amount was to be recovered by sale of the mortgaged and other property, the executing Court must give effect to the terms of the decree so made, and the fact, that the mortgagee had taken possession in lieu of interest in accordance with the terms of the mortgage-deed, but on which the decree is silent, does not enable the Court to take an account to ascertain whether the decree has been satisfied. (3)

It has been noted before that a final decree is not indispensable to a valid sale under this section (§ 2319). The Court may, however, treat an application for sale as an application for a final decree for sale. (4)

2327. In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the mortgagee obtained a decree for sale conditioned on his redeeming the prior mortgages within two months, which he failed to do, but,

(1) S. 67.
(2) *Shaida Husain* v. *Hub Husain*, I.L.R. 25 All., 42 (45).
(3) *Appa Rao* v. *Krishna*, I. L.R., 25 Mad., 537 (539).
(4) *Appa Rao* v. *Krishna*, I. L. R., 25 Mad., 537 (538); *Baldeo* v. *Ibn Hyder*, 2 A. L. J. R., 37.

about four months after the date of the decree, he deposited the money due on the prior mortgages into Court. He then applied for an order absolute for sale but was resisted on the ground that the condition of the decree as to payment within two months not having been satisfied, the mortgagee was not entitled to an order absolute, but it was held that the prior mortgages having been paid off before the application for an order absolute, the decree-holder was entitled to the order prayed for. (1) In holding this view, the Court appears to have implied that an order for redemption made in a mortgage-decree for sale could stand on no higher ground than a decree for redemption, and that, since a decree for redemption may be satisfied till an order is made precluding payment, an order for redemption could not be otherwise construed. (2)

2328. Procedure on Sale.—The procedure applicable to a sale held in execution of a decree passed under this rule would now be governed by the Procedure Code, of which these rules are now an integral part. But prior to the present enactment, the view of the Calcutta High Court was that no section of the Code of Civil Procedure applied to a sale made in execution of a mortgage-decree unless, under the powers conferred on the High Court, some specific sections were expressly made applicable to it. Accordingly, it was held there that section 258 of the Code was inapplicable to an application under this section, and consequently Article 173-A of Schedule II of the Limitation Act did not apply to a payment made before the decree absolute was made. (3) But on the general question, the contrary was affirmed in Allahabad, (4) Madras (5) and Bombay, (6) it being held in the last-cited case that, in the absence of any rules made under section 104 of the Act, the provisions of sections 304 to 319 of the Code of Civil Procedure expressly applied to all sales of immoveable property. (7) And so it was held both in Madras (8) and Allahabad (9) that section 291 of the Code which empowers the Court to adjourn a sale in execution of a decree, also applied to a mortgage-decree. So was section 311 held to be applicable, inasmuch as there was nothing in that section which conflicted with the special provisions of the Act. (10) The question was again one which formerly turned upon the thorny question whether proceedings under this section were proceedings in execution, or were in continuation of the original suit. But now that this question has been settled, the other questions dependent thereupon need no longer present any difficulties. As regards the applicability of section 258 (or what is now O. 21, r. 2), it has already been observed that the present amended rules authorize no payment out of Court (§ 2266), and consequently

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(1) *Debi Prasad* v. *Jai Karan*, I. L. R., 24 All., 479.

(2) *Raham Ilahi* v. *Ghasita*, I. L. R., 20 All., 375; *Sita Ram* v. *Mado Lal*, I. L. R., 24 All, 44, F. B.

(3) *Pramatha* v. *Khetra Mohan*, I. L. R., 29 Cal., 651; *Hatem Ali* v. *Abdul Gaffur*, 8 C. W. N., 102; following *Kedar Nath* v. *Kali Churn*, I. L. R., 25 Cal., 703; *Akkunnissa* v. *Roop Lal*, I. L. R., 25 Cal, 133; *Tiluck Singh* v. *Parsotam*, I. L. R., 22 Cal., 924; *Ajudhia* v. *Baldeo*, I. L. R., 21 Cal., 818; followed in *Sitaram* v. *Dharmu*, 16 C. P. L. R. 111.

(4) *Kedar Nath* v. *Lalji Sahai*, I. L. R., 12 All., 61 F. B.; *Ram Lal* v. *Narain*, I. L. R, 12 All., 539; *Oudh Behari* v. *Nageshar*, I. L. R., 13 All., 278, F. B.; *Raja Ram Singhji* v. *Chunni Lal*, I. L. R., 19 All., 205.

(5) *Srinivasa* v. *Ayyathorai*, I. L. R., 21 Mad., 416. It is rather assumed than decided that s. 310-A of the Code was applicable to mortgage sales [*Tirumal* v. *Syed Dastaghiri*, I. L. R., 22 Mad., 286; *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244, F. B.; *Vedaputti* v. *Vallabha*, I. L. R, 25 Mad., 300 (316), F. B.]

(6) *Krishnaji* v. *Mahadeo*, I. L. R., 25 Bom, 104 (107).

(7) *Per* Ranade, J., in *Krishnaji* v. *Mahadev*, I. L. R., 25 Bom., 104 (107).

(8) *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244 (256), F. B.

(9) *Raja Ram Singhji* v. *Chunni Lal*, I. L. R., 19 All., 205: *Harjas Rai* v. *Rameshar*, I. L. R., 20 All., 354.

(10) *Mallikarjunadu* v. *Lingamurti*, I.L. R., 25 Mad., 244 (258), F. B.

there is no occasion for bringing into requisition section 258. And, as regards the application of sections 304-319 (now O. 21, rr. 82-96), the sale being now held in execution of a decree passed under this Code, those rules become necessarily applicable to it.

And so does O. 21, r. 89, corresponding to section 310-A of the old Code, about which the decided cases similarly presented a noticeable want of harmony.

S. 310-A (now O. 21 & 89) of the Code.

2329. Provision for Re-purchase.—This section, which was introduced by an Amending Act (1) of the Code in 1894, was designed to obviate the hardships arising from the fact that immoveable property sold by auction in execution of a decree seldom realized an adequate or even a reasonable price, and it was therefore considered desirable to permit persons whose property was sold to re-purchase the property by refunding the price for which the property was sold, together with a fair compensation for loss of the bargain. In pursuance of the policy which dictated its enactment, the right of the owner to re-purchase was held to accrue on the date the property is sold, and from which day he was allowed to redeem it within thirty days. (2) Now this enactment may, at first sight, appear to conflict with the special provisions of this rule, and it was so held by a Full Bench of the Calcutta High Court. (3) But the other High Courts had laid down otherwise on the ground that, being a section relating to execution, it must be applicable to all executions, including the execution of a mortgage-decree. (4) But the Calcutta Full Bench took its stand on the ground that section 310-A of the Code was inconsistent with the operation of section 89, inasmuch as it had the effect of re-opening an order deemed to be final under the Act. (5) But what order is final under the Act? The Calcutta Court conceded that an order absolute was not such an order inasmuch as it did not debar the mortgagor from redeeming the property. (6) It was only after the actual sale and distribution of the proceeds that the mortgagor was precluded from redeeming the property. And since there could be no distribution of the proceeds till the sale was confirmed, and, as a rule, no confirmation till after thirty days from the date of the sale,(7) the working of section 310-A was not necessarily inconsistent with the scheme of the section. But, at the same time it must be confessed that the words "and thereupon" in the unamended section might have as much meant "on the order absolute for sale being passed" as "on the sale having been completed." Indeed, it might even have been conceded that the latter sense was not readily suggested by the words. It was observed in the last edition of this work that an amendment of the section could alone put an end to ambiguity.(8) And this has been now done by deletion of the clause which was otherwise misleading. The amendment of what was section 310 A (now O. 21, r. 89) makes this point further clear, for it enables now, not only the owner of such property, but also a person "holding an interest therein by virtue of a title acquired before such sale," to apply for re-purchase of the property so sold.

(1) Act V of 1894.

(2) *Chowdry* v. *Giant Roy*, I. L. R., 29 Cal., 626 (628).

(3) *Kedar Nath* v. *Kali Churn*, I. L. R., 25 Cal., 703, F. B.

(4) *Tirumal* v. *Syed Dastaghiri*, I. L. R., 22 Mad., 286; *Mallikarjunadu* v. *Lingamurti*; I. L. R., 25 Mad., 244, F.B. : *Krishnaji* v. *Mahadev*, I.L.R., 25 Bom., 104 : *Murlidhar* v. *Anandrao*, I.L.R., 25 Bom., 418 : *Magan Lal* v. *Doshi*, I. L. R., 25 Bom., 631 ; *Raja Ram Singhji* v. *Chunni Lal*, I. L. R., 19 All., 205.

(5) *Kedar Nath* v. *Kali Churn*, I.L.R., 25 Cal., 703, F. B.

(6) *Bibijan* v. *Sachi*, 8 C. W. N., 684, F. B.

(7) Art. 166, Limitation Act (XV of 1877).

(8) 2 Law of Transfer (2nd Ed.), § 1488.

Who may repurchase.

2330. Assuming then O. 21, r. 89, to be applicable to mortgage-decrees as well, the next question to be determined is as to the persons entitled to avail themselves of it. The last owner of the equity of redemption has unquestionably the right to apply. But is a simple mortgagee also entitled to resort to the provisions of that section for the purpose of setting aside a sale held in execution of a rent-decree against the mortgagor? As the section (310-A) originally stood, it was not easy to designate a simple mortgagee as one "whose immoveable property has been sold," and only such a person could then apply under section 310-A of the Code. Of course, if the interest of a mortgagee regarded as comprised in the term "immoveable property," then no doubt the section would have extended to a mortgagee. Now "immoveable property" is described in the Act,(1) and it is defined in the General Clauses Act,(2) which was in force both when, the Civil Procedure Code was enacted as well as when section 310-A was added to it. According to this definition, the term is, among other things, defined to include "benefits to arise out of land." The question was then narrowed down to this—whether a mortgagee's interest as such was a benefit to arise out of land. The majority of the Calcutta Judges composing the Full Bench held that it was so, but Rampini, J., was of a different opinion. It appears that the clause, "benefits to arise out of land," primarily means only *profits a prendre*, such as rights of fishery and the like. In this sense a mortgagee's interest could scarcely be said to be a *benefit* arising *out of* land, and so much was indeed conceded by the Full Bench, but the Court held that the section should be liberally construed so as to include also an interest, whether partial, qualified or absolute, in land.

2331. In this view the Court held that interest of a mortgage, whether simple or by conditional sale, must be deemed to be included in the term, and that section 310-A should be held to be applicable to it.(3) And the present rule has been amended to give effect to this view. Such a mortgagee is then now, undoubtedly, entitled to apply for setting aside a sale made in execution of a rent-decree, and this he may do even though he may be a mere *benamidar*.(4) Of course, it would be to the interest of the mortgagee to apply under O. 21, r. 89 of the Code, only in a sale held free from his mortgage. In a sale made subject to all previous incumbrances, the mortgagee has no interest in the subject-matter of the sale, and consequently no right to apply under the section.(5) In this view then the question, whether a mortgagee, can apply under O. 21, r. 89, depends, not upon the nature of the mortgage, but upon the nature of the execution-sale. For, if the sale is not subject to, but is free of, the mortgage, the interest of the mortgagee is sold in the sense that it is affected by the sale, and he has then the right of re-purchasing the property to which that interest is annexed. It has been held in Bombay that a judgment-debtor whose property has been sold in execution by private sale is equally entitled to avail himself of the benefit of section 310-A.(6) As to the rights of a third party adducing funds to enable the mortgagor to set aside the sale under section 310-A of the Code, it is the view taken in Madras and Allahabad that he has

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(1) S. 3. *ante*.

(2) Act I of 1868 (See now Act X of 1897).

(3) *Paresh Nath* v. *Nobogopal*, I. L. R., 29 Cal., 11 F. B.; following *Basi Poddar*, *Ram Krishna*, 1 C. W. N., 135.

(4) *Paresh Nath* v. *Nobogopal*, I. L. R., 29 Cal., 1, F. B.; following *Hamidul Huq* v. *Matangini*, 2 C. W. N., cclviii; *Srinivasa* v. *Ayyathorai*, I. L. R., 21 Mad., 416 overruling *Nityananda* v. *Hiralal*, 5 C. W. N., 69.

(5) *Per* Banerji, J., in *Paresh Nath* v. *Nobogopal*, I. L. R., 29 Cal., 1 (9), F. B.

(6) *Magan Lal* v. *Doshi*, I. L. R., 25 Bom., 631 (636).

the right to treat the incumbrance as enuring in his favour.(1) This view is in entire harmony with the rule as it is now worded, but it was possibly incompatible with the concluding words of the section as it originally stood, and which declared that, on the passing of an order absolute for sale, the security shall be extinguished, though it is probable that these words referred to the security in the hands of the mortgagee, and had no reference to a person who might acquire rights by subrogation. The Allahabad High Court, however, confronted this clause from another standpoint. In their view the clause was unintelligible, and they therefore sought to circumvent it by holding that the order for sale being passed at the instance of the creditor, with the sole object of paying off his debt, it must be held to be vacated the moment the decree was otherwise satisfied.(2) According to the Calcutta High Court the concluding words referred to the actual sale and distribution of the proceeds, and not merely to the passing of the order absolute for sale,(3) a view which, it must be confessed, rather overstrained the language, the meaning of which was by no means so obscure. Anyhow the clause is no longer a part of the rule, and the view taken by the Courts has not to overcome any difficulty of reconciling it with the language of this rule.

The propriety of a refusal to set aside a sale under O. 21, r. 89, of the Code, and its subsequent confirmation under O. 21, r. 92, cannot be subsequently impeached in a separate suit which is not then maintainable.(4)

2332. Conduct of Sale.—The Code of Civil Procedure prescribes rules for the conduct of sale and delivery of property in execution of decree.(5) But these sections of the Code could only apply to a sale of mortgaged property on the assumption that it is made in execution of a decree passed under the last section. But this was at one time a battle-ground for judicial controversy, though it is no longer so, since the present enactment which places the holding of all sales on the same footing. But, even formerly, the procedure to be followed in holding sales under the section was that prescribed by the Code of Civil Procedure, and the Calcutta High Court had accordingly so directed in the rules framed by it, and which ran follows:—

> "(1) An application under this section shall be made by means of a verified petition stating the facts.
>
> (2) If the Court passes an order directing that the property, or any part thereof shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamations regarding the sale of immoveable property.
>
> (3) Sections 286 to 294, both inclusive, of the Code of Civil Procedure shall apply to such sales.
>
> (4) Sections 304 to 319, both inclusive, and sections 328 to 335, of the Code of Civil Procedure, shall apply to proceedings subsequent to sale under a mortgage.
>
> (5) The procedure to be followed in the execution of decree passed under section 90 of this Act is that prescribed by the Code of Civil Procedure." (6).

These rules in effect provided the same procedure as is prescribed by the Civil Procedure Code for the conduct of sales under decrees of Civil Courts, and

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(1) *Vamnikalinga* v. *Chidambara*, I. L. R., 29 Mad., 37; *Shyam Lal* v. *Bashiruddin*, I. L. R., 28 All., 778 (780).

(2) *Shyam Lal* v. *Bashiruddin*, I. L. R., 28 All., 778; *Vamnikalinga* v. *Chidambara*, I. L. R., 29 Mad., 37.

(3) *Bibijan* v. *Sachi*, I. L. R., 31 Cal., 863, F. B.

(4) *Damodar* v. *Vinayak*, I. L. R., 26 Bom. 40.

(5) O. 21, rr. 65-73.

(6) *Calcutta Gazette*, Pt. I, p. 414, 18th April 1892; *Assam Gazette*, Pt. III, p. 272, 16th April, 1892.

it has been accordingly held in Allahabad that this section must be deemed to have been modified by section 291 of the Code, which, along with section 310-A, has been held to be applicable to a sale held in virtue of an order absolute for sale passed under this section, although no power is given under the Act to postpone its operation. (1)

But since a sale under the mortgage is made under the decree, and there is no necessity to attach the property before sale, it follows that proceedings by way of claim are wholly inadmissible. (2) Nor is it open to persons made parties to the execution-proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. The representatives may, however, impeach the decree in a separate suit. (3)

2333. Mortgagee may bid.—The decree-holder may bid at the sale by express permission of the Court taken beforehand (4) and in one case it was maintained by the Calcutta High Court that, when permission is given to him, he is bound to exercise the most scrupulous fairness in purchasing the property; and if he or his agent dissuades others from purchasing at the sale, that of itself is regarded as a sufficient ground to set aside the sale if made in his favour. (5) But this view has since been condemned by the Privy Council who have laid down that a mortgagee bidding at a sale is in no way under any greater disability than a stranger. (6) He is not bound to proffer any information regarding the nature of the property sold, nor is he bound to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. But, if the information is invited from him, or if he professes to give it to the Court with a view to guide its discretion and obtain its approval of the proposed sale, he is then bound to lay before it all the material information he possesses on that particular subject. A decree-holder bidding at a sale is not even precluded from entering into an agreement with another to dissuade others from purchasing or from adopting means of an innocent character to discourage bidding. Every purchaser is entitled to adopt means in order to make a good bargain, and it cannot be said that a conduct which has the effect of dissuading bidders is *per se* fraudulent, or that it could constitute an irregularity to justify the setting aside of a sale. (7) But a purchaser incurs a greater risk if he bids at the sale without obtaining permission, or bids through another after the permission is refused to him. (8)

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(1) *Raja Ram Singhji* v. *Chunni Lal*, I L. R., 19 All., 205.

(2) *Deefholts* v. *Peters*, I. L. R., 14 Cal., 631; *Joy Prokash* v. *Abhoy Kumar*, 1 C. W. N., 701; *Himat Ram* v. *Khushal*, I. L.R., 18 Bom., 98; *Sanwal Das* v. *Bismillah*, I. L.R 19 All., 480; *Sunoo* v. *Latkari*, 1 Nag. L. R., 142.

(3) *Liladhur* v. *Chaturbhuj*, I. L. R., 21 All., 277.

(4) *Ibid*, p. 294; *Martand* v. *Dhondo*, I.L. R., 22 Bom., 624; *Genu* v. *Sakharam*, *ib.* 271.

(5) *Woopendra Nath* v. *Brojendra Nath*, I. L.R., 7 Cal., 246; *Sheonath* v. *Janki Prosad*, I.L.R., 14 Cal., 132; distinguishing *Hari* v. *Tara Prosanna*, I.L.R., 11 Cal., 718. Both these cases were animadverted upon by the Privy Council in *Mahomed Mira* v. *Savvasi Vijaya*, I.L.R., 23 Mad., 227, P.C.

(6) *Mahomed Mira* v. *Savvasi Vijaya*, I. L. R., 23 Mad., 227, P.C.

(7) *Mahomed Mira* v. *Savvasi Vijaya*, I.L.R., 23 Mad., 227 (236, 237), P.C.; following *Cooks* v. *Boswell*, 11 App. Cas., 232; see also *Hari Balkrishna* v. *Naro*, I. L. R., 18 Bom., 342.

(8) *Mahomed Gazee* v. *Ram Lall*, I. L. R., 10 Cal., 757; *Narayan* v *Anaji*, I. L. R., 5 Bom. 130; *Aghore Nath* v. *Ram Churn*, I.L. R., 23 Cal., 805.

Leave to bid when granted.

2334. On the question of permission to a mortgagee to bid, it has been in some cases held that it should be very cautiously granted, and only when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry that the sale-proclamation has been duly published. The reason why the Courts should be cautious in not granting sanction to bid as a matter of course, was said to be the reason of the prohibitory rule that it would be improper to place a person in a situation in which his interest, as intending purchaser, might conflict with his duty to secure the highest price for the property to be sold.(1) But, in a recent Privy Council case, it was held that "these conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are applicable to a system under which the decree-holder has the conduct of the sale."(2) According to their Lordships, then, permission to the mortgagee decree-holder should be given as a matter of course, unless there are reasons for withholding it.

Purchase without leave.

2335. In several cases where the purchase was made without permission, it has been held that the sale was not *ipso facto* void, but was valid until set aside by an application made under section 311 of the Code of Civil Procedure, and in which case the ground constituting the claim to impeach the sale must be clearly averred. And though it is not easy to formulate a rule which will fit every case, still the principle is clear enough that a party shall not be condemned in Court on allegations which turn on evidence, and which he has not been led to rebut by evidence.(3) The consideration which guide the Court in setting aside sales once held is the misconduct of the bidder or his agent as in dissuading other intending buyers(4) or openly depreciating the property in a manner amounting to fraud or positive misconduct, (5) or, apart from misconduct, his purchasing it at an inadequate price.(6) And it is laid down that, while depreciatory remarks regarding the property made by the decree-holder would vitiate the sale in his favour, similar remarks made by by-standers, although calculated to deter intending purchasers from bidding for the property, would not render the sale liable to be on that account set aside.(7) But these cases must now be read as subject to the dictum of the Privy Council, according to which dissuasion and depreciation of the property are not, apart from fraud, sufficient to vitiate a sale otherwise properly made. But the purchase of property by the decree-holder in the name of another, at a price less than that at which the decree-holder obtained permission to bid, constitutes fraud which would vitiate the sale.(8) In fact, purchase of a property by a partner of the mortgagee, or by his agent, manager or other employee suggesting the mortgagee's complicity therein, should be regarded as purchase by the mortgagee himself.(9) An application for leave to bid,(10) and for setting the sale aside,(11) and all other disputes arising out of the purchase by the mortgagee without permission,

(1) In re *Boyle's Trusts*, 1 Mac. & G., 488; *Mahomed Mira* v. *Savvasi Vijaya*, I. L. R., 23 Mad., 227 (237, 238), P C.

(2) *Mahomed Mira* v. *Savvasi Vijaya*, I.L. R., 23 Mad., 227 (237, 238), P.C.

(3) *Ib.*

(4) *Woopendra Nath* v. *Brojendra Nath*, I. L.R., 7 Cal., 346.

(5) *Rukhmini* v. *Brojonath*, I.L R., 5 Cal. 308.

(6) *Mathura* v. *Nathuni*, I. L. R., 11 Cal., 731.

(7) *Lalmohun* v. *Nanu Mohamed*, I. L. R., 17 Cal., 152.

(8) *Saratkumari* v. *Nimai Churn*, 5 C. W. N., 265.

(9) *Khairajmal* v. *Diam*, I. L. R., 29 Bom., P C.; 9 C. W. N., 201, P. C.

(10) *Bansi* v. *Sikree Mal*, I. L. R., 13 All. 211.

(11) *Vallabhan* v. *Pangunni*, I.L.R. 12 Mad., 454.

are questions, which must be determined under section 47 of the Code, (1) and it has been held in Calcutta (2) and Bombay (3) that the judgment-debtor cannot impeach the sale in a separate suit even on the ground of fraud. And so it has been held in Allahabad that the judgment-debtor impeaching a sale on the ground that the sale-proceedings had been secretly brought about without the knowledge of the mortgagor, and that the certified auction-purchaser was a *benamidar* of the decree-holder who had not obtained permission to purchase, must do so by applying in execution, and not by a regular suit.(4)

But the Court may, in the exercise of its discretion, treat a plaint as an application under section 47 of the Code.(5) But this implies that the plaint is filed within the period in which an application should be put in, and that the suit is instituted in the Court in which the application would have to be filed.(6)

The aid of section 47 of the Code may be invoked by a stranger-purchaser, who may move to set aside the sale on the ground of fraud.(7)

2336. Position of Mortgagee-purchaser.—As has been before remarked, the position of a mortgagee who has obtained a mortgage-decree, and, after obtaining permission to bid at the sale held in execution of such decree, has become the purchaser, is not of a fiduciary character towards his mortgagor.(8) As observed by the Privy Council: "Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."(9) He cannot then be regarded as a trustee of the mortgagor, and is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold. He is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.(10)

It has been held in some cases that the purchase of the equity of redemption by the mortgagee does not free him from his liability to be

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(1) *Viraraghava* v. *Vencatacharyar*, I. L. R., 5 Mad., 217.

(2) *Mohendra Narain* v. *Gopal Mondul*, I.L.R., 17 Cal., 769 F B. ; *Siva Pershad* v. *Nundo Lal*, I. L. R., 18 Cal., 139, distinguished in *Tara Prosad* v. *Bhobodeb*, I.L.R., 22 Cal., 931.

(3) *Paranjape* v. *Ranade*, I. L. R., 6 Bom., 148 ; *Sakharam* v. *Damodar*, I. L. R., 9 Bom., 468 ; *Damodar* v. *Vinayak*, I. L. R., 26 Bom., 40.

(4) *Durga Kunwar* v. *Balwant*, I L. R , 23 All., 478, citing *Viraraghavan* v. *Venkatacharyar*, I. L. R., 5 Mad., 217 ; *Viraraghava* v. *Venkata*, I. L. R., 16 Mad., 287 ; *Chintamanrav* v. *Vithabai*, I. L. R., 11 Bom., 588 ; *Genu* v. *Sakharam*, I. L, R , 22 Bom., 271 ; *Prosunno* v. *Kali Das*, I. L. R., 19 Cal., 683, P. C., and distinguishing *Subbarayudu* v. *Kotayya*, I.L.R., 15 Mad., 389 ; *Mahomed* v. *Ram Lall*, I. L. R., 10 Cal., 757, and dissenting from the contrary view taken in *Mohendra* v. *Gopal*, I. L. R., 17 Cal., 769, which is practically overruled by *Prosunno* v. *Kali Das*, I. L. R., 19 Cal., 683, P. C. ; and *cf. Bhuban* v. *Nunda Lal*, I L. R., 26 Cal., 324. But a sale made under the Public Demands Recovery Act (Beng. Act VII of 1880), s. 19, may be impeached in either an appeal or a separate suit.—*Ram Taruck* v. *Dilwar Ali*, I. L. R., 29 Cal., 73 (89), F. B. ; but the question, whether the suit was not barred by ss. 244 and 312 of the Code, was not allowed to be raised in appeal, *ib.*, p. 90.

(5) *Mdthura Das* v. *Lachman Ram*, I. L. R., 24 All., 239 ; *Lalman Das* v. *Jagannath* I. L. R., 22 All., 376 ; *Baru Mahata* v. *Shyama Churn*, I.L R , 22 Cal., 483 ; *Mayan* v. *Pakuran*, 9 M. L. J. R., 98.

(6) *Lalman Das* v *Jagannath*, I. L. R., 22 All., 376.

(7) *Mathura Das* v. *Lachman Ram*, I.L R., 24 All., 239 ; *Prosunno* v. *Kali Das*, I. L. R., 19 Cal., 683, P. C. ; *Bhubon* v. *Nunda Lal*, I. L R., 26 Cal., 324 ; *Moti Lal* v. *Russick Chundra*, I. L. R., 26 Cal., 326.

(8) *Sheonath* v. *Janki Prosad*, I. L. R , 16 Cal., 132 ; *Aimadar* v. *Makhan Lal*, 10 C.W.N., 904.

(9) *Mahabir Pershad* v. *Macnaghten*, I. L. R , 16 Cal., 682 (690), P.C.

(10) *Sheonath* v *Janki*, *Prosad*, I.L.R., 16 Cal., 132 ; *Gunga Pershad* v. *Jawahir*, I.L.R., 19 Cal., 4 ; *Parbati* v. *Gobinda*, 4 C. L. J., 246 (253) ; *Muhammad Husen Ali* v. *Thakur Dharam*, I.L.R., 18 All., 31.

redeemed [1] but it has been held in Allahabad, and with reason, that there is no reason why it should not, if the purchase was carried out in good faith, and no advantage was taken by the mortgagee of his position as mortgagee.[2]

Again, the fact that the mortgagee has purchased the property in execution of his prior mortgage-decree would not create in him an indefeasible title against the claims of puisne mortgagees not parties to his suit, and who may put in force their own mortgage, and bring the property to sale. For instance, where certain property was mortgaged to *A*, and afterwards it was mortgaged to *A* and *B*, and, then, again to *C*, *A* put in force his own mortgage, and himself purchased the property. *A* and *B* then sued on the second mortgage making *C* a party to their suit. They then applied for an order absolute for sale, which was resisted by *C* on the ground that, *A* having already brought the property to sale, he could not again bring it to sale. But it was held that the effect of the prior sale could not extinguish the two subsequent mortgages, and that therefore the property was liable to be again sold in execution of the decree on the second mortgage. [3] But, where a prior mortgagee sued his mortgagor and second mortgagee on foot of his mortgage, and obtained a decree for sale in execution of which the mortgaged property is sold, the extinguishment of the second mortgage depends upon who is the auction-purchaser. If a stranger purchases the property, then the second mortgage is extinguished except that the holder thereof has a charge on the surplus proceeds, if any. But, if the purchaser be the mortgagor himself, then his liability to the second mortgagee would continue in spite of his purchase, for his purchase would then be regarded as made for the benefit of subsequent incumbrances created by himself against which he could not set up the prior debt.[4]

Marshalling of properties.

2337. But it has been held on the principle of marshalling that a mortgagee purchaser cannot proceed further against the mortgagor or claim rateable distribution under section 73 of the Code, without proving that the property sold and purchased by him has realized a fair amount, the mere fact of the property having been sold at auction not being alone sufficient to prove its value ; and this ought to be enquired into most carefully by the Court to which an application is made to further execute the decree or to share rateably under section 73.[5]

But in one case the Allahabad High Court went so far as to intimate as its opinion that, where a person, holding two incumbrances against one and the same property, brings to sale the incumbered property in enforcement of his first mortgage, and purchases it himself, he cannot, subsequently to such purchase, either claim enforcement of the later lien, or sue for recovery of money due upon such later lien by enforcement against some property of the judgment-debtor other than that which the incumbrancer has already purchased in execution of the decree which enforced his prior deed.[6] The principle so

(1) *Martand* v. *Dhondo*, I.L R., 22 Bom. 624 ; *Sheodeen* v. *Ram Saran*, I. L. R., 26 Cal., 164.

(2) *Mohammad Abdul* v. *Dilsukh*, 2 A. L. J. R., 210.

(3) *Murlidhar* v. *Sher Singh*, 3 A.L.J.R., 338 ; *Bhaja Chowdhury* v. *Chunnilal*, 5 C.L. J., 95.

(4) *Otter* v. *Lord Vaux*, 2 De G. M. & G., 638 ; *Johnson* v. *Webster*, 4 De G. M. & G, 474 ; *Bevan* v. *Habgood*, 1 Joh. and Hem., 222 (228) ; *Platt* v. *Mendel*, 27 Ch. D., 246 (251) ; In re *Cork Harbour Docks Co.*, I. L. R., 17 Ir. 515 (527) ; In re *Howard*, L. R. 29, Ir , 266 ; *Bhaja Chowdhury* v. *Chunnilal*, 5 C L.J., 95.

(5) *Hart* v. *Taraprasanna*, I. L. R., 11 Cal., 718 ; distinguished in *Shronath* v. *Janki Prosad*, I. L R., 16 Cal., 192 (196) ; and see *Mahomed Mira* v. *Savvasi Vijaya*, I. L.R., 23 Mad., 227, P.C

(6) *Ballam Das* v. *Amar Roj*, I. L. R., 12 All., 537 ; following *Ahmad Ali* v. *Bakar Husain*, (1883) A. W. N., 61, overruled by

stated is, however, hardly reconcilable with the independent position given to the mortgagee-purchaser by the Privy Council, and the case has been, in subsequent cases, sought to be distinguished. Thus, in a later case.[1] Banerji, J., took what would appear to be the more equitable view of the application of the doctrine of merger in such cases. Says he: "Where, however, the mortgagee himself purchases at auction a portion of the mortgaged property which is sold subject to his mortgage, the case becomes different. Such purchase has, in some instances, the effect of discharging the whole of the mortgage-debt; but I am unable to hold that it has that effect in every case, however insignificant the portion purchased may be, and whatever value may have been paid for it." The learned Judge then went on to say that, if the mortgagee has purchased the property at its fair value, "the purchase of such property cannot make any difference so far as the question of the satisfaction of the mortgage-debt is concerned. Where, on the other hand, the portion of the mortgaged property purchased by the mortgagee is of a value higher than the amount of the mortgage and the difference between that value and the price paid by the mortgagee is equal to, or exceeds, the amount of the mortgage, the purchase has the effect of fully discharging the mortgage. For, in such a case, the mortgagee cannot, in equity, be allowed to benefit by his purchase, and, whilst retaining in his own hands so much of the actual value of the property as is represented by the amount of the mortgage, to realize that amount by a sale of the remainder of the mortgaged property.

2338. If, however, the mortgagee has paid for the property its full value, that is, the value which it would have fetched had it been sold as unincumbered property, the mortgagor or any other person holding the remainder of the mortgaged property has not at all been damnified, and the property other than that purchased by the mortgagee must be held liable for a proportionate part of the mortgage-money. Similarly, if the property purchased by the mortgagee is of a value smaller than the amount of the mortgage, and the mortgagee has paid for its full value, the remainder of the mortgaged property must contribute the proportion of the mortgage-debt chargeable on it. If, in the case of such property, the price paid by the mortgagee is less than the full value, the difference must be held to discharge the mortgage *pro tanto*.....To hold that every purchase by the mortgagee of a portion of the mortgaged property discharges the mortgage in full would lead to iniquitous results.....In the case of *Ballam Das* v. *Amar Raj* [2] the value of the property was more than the amount of the two decrees held by the mortgagee-purchaser. That case is, therefore, consistent with what I have said above."[3] This case was subsequently followed by a Full Bench of the Court,[4] in which an earlier case[5] relied upon in *Ballam Das* v. *Amir Raj*[6] was overruled, and the correct rule was laid down, namely, that the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money, or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible

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Nand Kishore v. *Raja Hariraj Singh*, I. L. R., 20 All., 23, F B.; *Khewja* v. *Imaman*, (1885), A.W.N., 210; *Bapu* v. *Ramji*, I. L R., 11 Bom. 112.

(1) *Chunni Lal* v. *Anandi Lal*, I.L.R., 19 All., 196.

2) I. L. R., 12 All., 537.

(3) *Per* Banerji, J., in *Chunni Lal* v. *Anandi Lal*, I L.R., 19 All., 196 (198).

(4) *Nand Kishore* v. *Raja Hariraj Singh* I.L R., 20 All., 23 F.B.

(5) *Ahmad Ali* v. *Bakar Husain*, (1883), A.W.N., 61.

(6) I.L.R., 12 All., 537.

that, under some circumstances, such purchase may have the effect of extinguishing the mortgage. This view of the law is, it is conceived, perfectly sound, and can be deduced as a corollary from section 82. As observed by Banerji, J., in the Full Bench case above cited: "Where several properties are mortgaged to secure one debt, such properties are, under section 82 of Act IV of 1882, liable, in the absence of a contract to the contrary to contribute rateably to the debt, the extent of the liability of each property being proportionate to its value at the date of the mortgage. If the mortgagee himself purchases one of the properties liable to contribute rateably to the mortgage-debt, he must bear a rateable share of the debt, and he cannot be allowed to benefit himself and to prejudice the mortgagor or the owner of the remainder of the property by throwing on it the whole burden of the debt, and making that property solely responsible for the debt. He must bring into account the value of the property purchased by himself."(1) But there can, of course, be no contribution where all the debt is equally a charge on every part of the property. Such a case may arise where the mortgagee purchases a part of the mortgaged property in execution of his own mortgage-decree, in which case the remainder of the property would still remain liable for the balance of the mortgage-money whatever may have been the intrinsic value of the property purchased by the mortgagee.(2) On the other hand, if the purchase had been made by the mortgagee not in execution of his own decree, but in execution of a decree obtained by a third party, then there would have been rateable exoneration of the mortgage-debt in accordance with the principle before enunciated.(3) So, where sixteen villages were mortgaged to the same mortgagee under two deeds of mortgage of different dates, and the mortgagees brought a suit for sale on the earlier mortgage, sold ten of those villages, and purchased them himself, it was held that the villages so purchased must be deemed to be withdrawn from the operation of the mortgage by title paramount, and that the remaining villages alone were then liable to satisfy the whole of the subsequent mortgage.(4)

2339. Objections to Sale.—It is within the power of the mortgagor to object to a sale being held if it is objectionable on any ground sufficient to vitiate it. He may also designate the property to be first sold, though he has not the right to demand that the mortgaged properties shall be sold in a stated order.(5) So, where an order was obtained with the consent of the mortgagee for the sale of property free of the mortgage in execution of a money-decree, the decree-holder cannot, without notice to the mortgagee or the judgment-debtor, get the order revoked, and proceed to sell the property subject to the mortgage.(6) A mortgagor, whose property has been sold under a decree absolute on the mortgage, may come in and question the validity of the sale, although his right to redeem may have been long since extinguished by the

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(1) *Per* Banerji, J., in *Nand Kishore* v. *Raja Hariraj Sing*, I.L.R., 20 All., 23 (31, 32), F.B.; see also *Sumera Kuar* v. *Bhagwan Singh*, (1895) A.W.N., 1.

(2) *Jugal Kishore* v. *Harbans*, I. L. R., 28 All., 700 (704, 705).

(3) *Bisheshur Dial* v *Ram Sarup*, I.L.R., 22 All., 284, F B.; explained and distinguished in *Jugal Kishore* v. *Harbans*, I.L R., 28 All., 700 (704, 705); *see* s. 82 and Comm.

(4) *Raghunath* v. *Jamuna*, 4 A.L.J., 66; *Bohra Thakur Das* v. *Collector*, 3 A.L.J., 435; *Zahir Singh* v. *Beni Singh*, unrep., All. (No. 63 of 1903).

(5) *Mahomed* v. *Ram Lal*, 7 I.C., (Cal.) 4; doubting *contra* in *Amir Chand* v. *Bakshi*, I.L.R., 34 Cal., 13 (17) in which the decree-holder was held to possess the option; which he certainly has though it is subject to the contract of the Court. For instance, he cannot be driven to sell a property exposed to hostile claims—*Kasi Krishnamma* v. *Bagiammal*, (1911) 2 M.W.N. 355.

(6) *Sinnu* v. *Subramania*, 13 M. L. J., 227.

decree; and a person to whom he has transferred his interest may also do the same.(1) According to the view taken in a Calcutta case, a claim for contribution cannot be appropriately inquired into in execution, it being enforceable in a separate suit properly framed, and in the presence of all necessary parties.(2) But this view is not shared by the other Benches of the same Court, (3) and, apart from the absence of a necessary party or other causes, it has no merit to support it. But neither the mortgagor nor any other person standing in his shoes can in execution raise any question affecting the validity of the decree.(4) His objections may relate to its construction or to the sale thereby directed, but no matter antecedent to the decree can be permitted to be canvassed in execution. The grounds upon which a sale may be set aside are those of fraud, substantial injury and non-compliance with the procedure laid down in the Code.(5) The sale of property grossly under value, as where property worth Rs. 90,000 is sold for Rs. 40,000, is sufficient to show that the mortgagor had suffered substantial injury.(6) The representative of the mortgagor, in respect of whose estate an administration-suit is pending, and the administration has not been completed, is not entitled to the property mortgaged, and cannot consent to its sale by the Receiver even though such a procedure may be assented to by all the parties, and may be otherwise convenient, unless at least all the charges which affect the property have been ascertained in the administration-suit, and are provided for.(7) A decree for sale cannot be executed against a person whose name does not occur in the final decree for sale under this section.(8)

In a mortgage-decree for sale, it is a convenient course to place the assignee of the decree on record, even after confirmation of the sale, to enable the Court to make equitable distribution of the funds. But, in such a case the judgment-creditor's name should not be expunged from the record.(9)

Execution-proceedings commenced by the mortgagee decree-holder since deceased may be continued by his legal representatives without obtaining a succession certificate under section 4 of the Succession Certificate Act.(10) But it would be otherwise if the decree-holder dies before suing out execution. (11) The mortgagee who has purchased the mortgaged property in execution of his own decree is not a representative of the mortgagor within the meaning of section 47 of the Code, and he could not, therefore, object to the execution of the decree of another mortgagee against the same property. (12)

2340. Where the jurisdiction of the Court has been complete throughout a judicial sale is not a nullity, and cannot be treated as invalid notwithstanding that there has been a material irregularity. So, where the sale was held after

(1) *Golam* v. *Judhisthir*, 7 C.W.N., 305.

(2) *Ameerchand* v. *Bakshi Shiva Prasad*, I. L. R., 34 Cal., 13; *Nafar Chunder* v. *Baikanto*, 4 C.L.R., 154.

(3) *Harendra* v. *Dindayal*, 4 C. L. J., 195; *Mhd. Taki* v. *Thomas*, 4 C.L.J. 317.

(4) *Samval Das* v. *Bismillah*, I. L. R., 19 All., 480; *Laladhar* v. *Chaturbhuj*, I. L. R., 21 All., 277; *Akikunnissa* v. *Kooplal*, I. L. R., 25 Cal., 133; *Khetrapal* v. *Shyama Prosad*, I. L. R., 32 Cal., 265; *Kumaretta* v. *Sabapatty*, I.L.R., 30 Mad., 26.

(5) S 311, Code of Civil Procedure.

(6) *Moti Lal* v. *Bhagamani Kumari*, 6 C. W.N., 896.

(7) *Neta Chand* v. *Ashutosh*, 5 C. W. N., 408.

(8) *Bhagwan Das* v. *Manoumrat Das* (1901), A.W.N. 23; *Mahabir* v. *Sital Singh*, I.L.R., 19 All., 520.

(9) *Khetter Nath* v. *Manick Lall*, 5 C. W. N., cxciii.

(10) Act VII of 1889.

(11) *Khaja Mohammad* v. *Abdur Rahman*, 4 C. W. N., 558; following *Raghunath* v. *Poresh Nath*, I. L. R., 15 Cal., 541; *Kanchan* v. *Baijnath*, I.L.R., 19 Cal., 636; *Baid Nath* v. *Shamanand*, I.L.R., 22 Cal., 443; dissenting from *Fateh Chand* v. *Muhammad*, I.L.R., 16 All., 259.

(12) *Baldeo Prosad* v. *Madan Mohan*, (1900) A. W. N. 42; *cf. Sabhajit* v. *Sri Gopal*, I. L. R., 17 All., 222.

notice to a person wrongly held to be the debtor's legal representative, and the heir of the mortgagor subsequently sued to redeem his mortgage, ignoring the execution-sale, it was held by the Privy Council that the heir could not succeed in the redemption-suit unless he first brought a suit to set aside the execution-sale. A party seeking relief inconsistent with a previous sale must pray to have the sale set aside.(1) But, where the sale is held by a Court without jurisdiction, the sale is a nullity, and there is then no need to set it aside.(2) A mortgage-decree, though finally passed by the Appellate Court, should be executed only by the Court of first instance, although its execution by the Appellate Court will not be without jurisdiction. It is not, however, convenient or in accordance with the invariable practice of the Courts.(3)

Where, under a decree upon a mortgage, the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether it has been rightly made.(4) So the Privy Council observed in a case: "If he (*i.e.*, purchaser) is to be held bound to inquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do."(5)

2341. Distribution of Sale-proceeds.—The proceeds of sale made under this section would be distributed "as is mentioned in rule 4," that is to say, the proceeds shall be primarily appropriated to payment of the mortgage-money and costs decreed in favour of the mortgagee. In this respect a sale held in execution of a mortgage-decree differs from that made in execution of a money-decree, the proceeds of which are liable to a rateable distribution among the unsecured creditors of the defendant. Even a mortgagee consenting to a sale free from his lien may claim rateable distribution,(6) but no such privilege is accorded to an unsecured creditor who cannot share the sale-proceeds with the mortgagee, who has priority by virtue of his mortgage, the unsecured creditors being only entitled to a rateable distribution of the balance if any remaining after satisfaction of the mortgage-decree. It is not, therefore, illegal for the Court to continue the sale after the lot put up for sale has fetched an amount sufficient to pay off the mortgage-decree, especially where the unsecured creditors had attached the same property, and applied for a rateable distribution though they had not obtained an order for sale.(7) But, obviously, such a case must be regarded as exceptional.

The order for distribution is a step in an execution-proceeding of the sale-decree.(8) Where the mortgagee has himself purchased the property under his decree, he cannot proceed against the other property of the judgment-debtor

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(1) *Malkarjun* v. *Narhari*, I. L. R., 15 Bom., 337 P. C.

(2) *Baswantapa* v. *Ronu*, I. L. R., 9 Bom., 36; explained by P. C. in *Malkarjun* v. *Narhari*, I. L R., 25 Bom , 337 (348), P. C.

(3) *Venkatakrishna* v. *Thiyagaraja*, I. L. R., 23 Mad., 531; *Oudh Behari* v. *Nageshar*, I. L. R., 13 All., 278.

(4) *Kaunsilla* v. *Chunder Sen*, I. L. R., 22 All., 377; *Hargulal* v. *Gobind Rai*, I. L. R., 19 All., 541; *Rewa Mahton* v. *Ram Kishen*, I.L.R., 14 Cal., 18, P. C.

(5) *Malkarjun* v. *Narhari*, I. L. R., 25 Bom., 337 (347), P. C.

(6) S. 295. Code of Civil Procedure; *Jagat Narain* v. *Dhundley*, I. L. R., 5 All., 566.

(7) *Venkatarama* v. *Mangalathammal*, 17 M. L. J., R., 80.

(8) *Cf. Shankar Sarup* v. *Mejo Mal*, I. L. R., 23 All., 313 (323), P. C.

to the prejudice of the other creditors, without showing that he had purchased the mortgaged property at a fair price.(1)

2342. Private Sale.—The Code of Civil Procedure empowers the Court to authorize a private sale of the debtor's property, (2) but it has been doubted if this power extends to execution of a mortgage-decree, (3) although the right appears to have been conceded in a Bombay case. (4) No doubt the language of the section does not discourage this view, but at the same time as is now expressly provided by O. 21, r. 83(3) the Court has no further power to refuse sale, as it may do under that rule in the case of the sale of property in execution of all unsecured decrees.

2343. Position of a Stranger-purchaser.—Having briefly reviewed the position of a mortgagee-purchaser of property sold in execution of a mortgage-decree, it should be here convenient to delineate the position of a purchaser who was a stranger to the suit. That there is a distinction between the decree-holder purchaser and a third party would be manifest from the fact that, while, in the former case, the sale would fall through if the decree is afterwards reversed on appeal, whereas, in the latter case, the sale would hold good notwithstanding the subsequent reversal of the decree. (5) In this respect there is no real distinction between a sale held in execution of a money or a mortgage-decree. The mere fact, that the order for sale in the one case is distinct from the decree which it is not in the other case, would make no difference, since the order is a valid order as long as the decree remains unreversed, and, in both cases, it would lose its force upon reversal of the decree. (6) A subsequent mortgagee purchasing the property in execution of a decree upon the first mortgage, in this respect, stands in as advantageous a position as a stranger. He would, for example, take the property free of the right of redemption by the mortgagor in the same way as a stranger would have done; and his right to realize his mortgage-debt by a sale of the other items of property comprised in his mortgage is in no way affected.(7)

Where a first mortgagee purchased the properties in execution of his mortgage-decree, and obtained possession of the same, without making the second mortgagee a party to his suit, and the second mortgagee having instituted a suit to which he made the purchaser a party, and obtained a decree for sale subject to the rights of such purchaser, and purchased the very same properties in execution of his decree, it was held that the rights of the first mortgagee-purchaser, subject to which the properties were directed to be sold, included the right to remain in possession until redeemed in a proper suit framed for the purpose, and that the second mortgagee-purchaser was not entitled to obtain possession of the property in execution. The first mortgagee's right to possession could not be forfeited by a sale made in favour of the second mortgagee, who could not have claimed more than a right to redeem

(1) *Hart* v. *Tara Prasanna*, I. L. R., 11 Cal., 718; *Seo Nath* v. *Janki*, I. L. R., 16 Cal., 132 (136).

(2) S. 305, Civil Procedure Code.

(3) *Oomda* v. *Raj Roop*, 1 C. L. R, 205.

(4) *Danoppa* v. *Yamnappa*, 4 Bom. L. R, 61.

(5) *Zain-ul-Abdin* v. *Muhammad*, I. L. R., 10 All., 166, P. C.; *Rewa Mahton* v. *Ram Kishen*, I. L. R., 14 Cal., 18, P. C.; *Mukhoda* v. *Gopal Chunder*, I. L. R., 26 Cal., 734 (736); *Ram Gulam* v. *Barsati Singh*, I.L.R., 36 Cal. 336 P.C.

(6) *Mukhoda* v. *Goval Chunder*, I. L. R., 26 Cal., 734 (736): *Kudrat-ullah* v. *Kubra Begum*, I L. R., 23 All., 25 (30).

(7) *Sesha Aiyar* v. *Krishna*, I L.R., 24 Mad., 96 (113); *Shaw* v. *Bunny*, 2 DeG.J. & S., 468. This case is not reconcilable with *Erusava* v. *Commercial Land Mortgage Bank*, 10 M.L.J., 91.

the first mortgage, had he been impleaded in the first suit, and which right he had acquired by purchase in his suit.(1)

There is a difference between the sale of mortgaged property in execution of a mortgage-decree obtained by the mortgagee and one held in execution of a money-decree obtained by the mortgagee against the mortgagor. In the former case, the purchaser acquires the interest of both the mortgagor and mortgagee, but in the latter case all that passes to the purchaser is the interest of only the mortgagor.(2

The question, how far the purchaser of property sold in execution of a mortgage-decree for sale acquires the rights of the mortgagee, is one which cannot be answered without some difficulty. Suppose a property is charged with two separate incumbrances, and the holder of a money-decree brings to sale and himself purchases the property comprised in the mortgage-decree for sale obtained by the prior of the two mortgagees, and subsequently this mortgagee assigns away his interest to another, who claims the redemption-money paid by the puisne mortgagee, the question would arise whether the purchaser is entitled to the whole of the amount, or to only so much of it as he had paid for the property at the execution-sale. The solution of such a problem depends upon what rights belonging to the mortgagee are transmitted to an auction-purchaser.

2344. Of course, it cannot be contended that the mortgagee in every case loses all rights under his mortgage by the fact of the sale of the mortgaged property. No doubt, by the fact of the sale, he transmits to his purchaser all the rights he has in the *property*, but, since the mortgagee has in a simple mortgage also a personal remedy against the mortgagor, his mortgage-rights do not suffer extinguishment by the sale of one of the two securities open to him. No doubt, if the purchaser has paid money sufficient to satisfy the amount of the mortgage, the mortgagee has then no equity which he could enforce against the puisne mortgagee. But if, on the other hand, the purchase-money paid by such purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole of the amount of the prior mortgage. No doubt the subsequent mortgagee would have to pay the full amount due upon the prior mortgage, but that amount would be apportioned between the purchaser, whose purchase-money satisfied the mortgage in part, and the mortgagee to whom the balance of mortgage-money is due.(3) As Banerji, J., observed: "There can be no doubt that if the first mortgagee himself has purchased the mortgaged property, he alone is entitled to the mortgage-money. It is also beyond question that, if a stranger, *i.e.*, a person other than

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(1) *Muhammad* v. *Abdulla*, I.L.R., 24 Mad., 171; following *Venkata* v. *Ramiah*, I. L.R., 2 Mad., 108 (112); *Venkata* v. *Kannam*, I.L.R., 5 Mad., 184 (188); *Nanak Chand* v. *Teluckaye*, I.L.R., 5 Cal., 265 (268); *Baldeo Singh* v. *Jaggu Ram*, I.L.R., 23 All., 1 (3). The case of *Rangaya* v. *Parthasarathi*, I.L. R., 20 Mad., 121 is no authority for maintaining the contrary, for the point actually decided in that case had regard solely to the sufficiency of the decree made in favour of the second mortgagee. There was no question in that case as to the first purchaser's right of possession, and the decree did in fact completely protect the right of the first mortgagee, who had brought (*per* Shepherd, J., in *Mahomed Karim* v. *Abdullah*, I.L R., 24 Mad., 171 (175); *Narayanasami* v *Narayana*, I.L.R., 17 Mad., 63, turned upon the special facts of the case) and different reasons were given by the two learned Judges for the conclusions at which they arrived.

(2) *Kishevrav* v. *Lingaya*, I.L.R., 5 Bom., 2; *Seshagiri* v. *Salvaaar*, *ib.*, 5; *Maganlal* v. *Shankra*, I.L.R., 22 Bom., 945; *Shyama Churn* v. *Ananda*, 3 C.W.N., 328; but see *Hussein* v. *Shankargiri*, I. L. R., 23 Bom., 119.

(3) *Dip Narain* v. *Hira Singh*, I. L. R., 19 All., 527; *Wahid-un-nissa* v. *Gobardhan*, I. L. R., 22 All., 455 (459); *Balden* v. *Hushiar Singh*, (1895) A.W.N., 45.

the mortgagee, becomes the purchaser, and the price paid by him fully satisfies the amount of the mortgage-debt, the whole of the mortgage-money should go to him alone, the mortgagee having no longer any right to the money. But, if such other person had paid only a part of the debt due to, and received by, the mortgagee . . . I fail to see under what principle of law or equity he would have the right to appropriate any sum in excess of the amount paid by him. If the appellant's contention is correct, such person would be entitled to the whole of the money paid for redemption. As, however, in the case supposed, a part only of the debt due to the first mortgagee had been discharged, the right of the first mortgagee to recover the balance due to him would still subsist. When, therefore, he realizes the amount of the balance, as he is entitled to do, the result will be that the amount of the same debt will have been recovered twice over—a result which no Court of Justice should countenance or sanction."(1)

A person in possession of property is entitled to apply for an adjudication under section 332 (O. 21, rr. 100, 101, 103) of the Code as against a person put in possession of property under this or rule 3.(2)

The purchaser may claim possession of the title-deeds on payment of the purchase-money and before its distribution.(3) And the mortgagee is not to draw out the purchase-money before he has delivered the sale deed duly executed by all the necessary parties, or, in their default, by the Court. An incumbrancer paid off out of the proceeds of the sale may be compelled to join, if required, in the conveyance, though he is not bound to assign his security to the purchaser.(4) A mortgagee purchasing the mortgaged property is bound to pay the arrears of rent due thereon, and he cannot hold the mortgagor liable to reimburse him for the payment so made.(5)

Effect of misdescription.

2345. Generally speaking the purchaser cannot acquire a higher interest than his vendor himself had in the property. Consequently where the description of property comprised in a mortgage or sale certificate granted by Court is wrong either in extent or boundaries, and there is evidence as to what the document really meant to convey, the mortgagor or vendor cannot set up the misdescription against the mortgagee or vendee contrary to what has been found to be the real intention of the parties, and a subsequent purchaser can claim no better title than his vendor, in the absence of a special countervailing equity in his favour.(6)

2346. Purchase by Co-mortgagor.—Where a mortgagor judgment debtor, who is interested in half of the mortgaged property, obtains an assignment of the decree from the mortgagee-decree-holder, he should equitably be allowed to obtain an order absolute for sale in respect of the other half of the property to realize half the decretal amount as against his co-judgment-debtor.(7)

(1) Against the mortgagor.

2347. Mortgagee's Remedy after Sale.—It is noticeable that, while rule 3 enacts that, on the passing of a final decree under that rule, "the debt secured by the mortgage shall be deemed to be discharged," the consequence entailed by a

(1) *Wahid-un-nissa* v. *Gobardhan*, I. L. R., 22 All., 453 (459) : Aikman, J., *dissentiente*, *ib.*, p. 469.

(2) *Mithiram* v. *Somanatha*, I.L.R., 24 Mad., 397 (400).

(3) *Fowler* v. *Scott*, 25 L.T., 784.

(4) *Farrell* v. *Irwin*, 2 Moll., 511 : *Anon.* 3 Moll., 505.

(5) *Maharani Dasya* v. *Harendra Lal*, 1 C. W.N., 458 ; *Peary Mohan* v. *Sreeram*, 6 C.W. N., 794 ; *Manindra* v. *Jawahir*, I. L. R., 32 Cal., 643.

(6) *Karnam* v. *Tangatur*, 14 I. C. (Mad.,) 585.

(7) *Lekha* v. *Jai Mul*, 3 A. L. J. 65 (S. N).

mortgage-sale is not stated, though it was formerly stated to extinguish the security, though not the debt. But it is evident that the sale of the mortgaged property has necessarily that effect so far as the mortgagee and purchaser are concerned, for the latter takes freed from the former's lien created by the mortgage in execution of which the sale was made, but it has no further effect. And, so far as the mortgagor is concerned, his liability may still continue, for, as in the case of a simple mortgage, the sale of the property cannot extinguish his *personal* security, which remains unimpaired so long as the whole debt is not discharged. But, of course, if, by the sale of the property, the mortgagee has been fully paid, then in that case, both the security and the debt would be necessarily extinguished. But, this is rather because the debt has been paid off than that there was a sale of the mortgaged property.(1) It has been sometimes held that a mortgagee holding two mortgages for the same property, cannot enforce his second mortgage by sale of the mortgagor's other property if, in execution of his decree on the other mortgage, he has purchased the property himself,(2) even though the surplus of the sale-proceeds may have been, distributed among other creditors.(3) Such a principle might, and indeed would, be applicable in a case of foreclosure where the effect of an order for foreclosure would be not only to extinguish the original debt, but also a further advance for which the same property was the security.(4) And so the purchase, subject to his mortgage by a mortgagee of the mortgaged property in execution of another decree may extinguish his own debt(5) by reason of merger(6) if it would be to his benefit.(7) But it would be a rule founded on no intelligible equity to maintain that the mere purchase of the mortgaged property by the mortgagee has necessarily the effect of extinguishing his debt.(8) For it must depend upon the price paid by him and the value of the property which, as it is now held, the mortgagee must bring into account in any suit brought upon the mortgage. In this view the question, whether the purchase of the mortgaged property by the mortgagee has or has not the effect of extinguishing the debt, depends upon the value of the property purchased by him and not upon its price.

(2) Against third parties.

2348. As against third parties the mortgagee-purchaser has the same rights as any other auction-purchaser. So where on purchase, his possession was resisted by a third party on the strength of his prior purchase from the mortgagor, which was unknown to the mortgagee, he was held entitled to sue the stranger in ejectment or for possession with liberty to the defendant to redeem.(9)

2349. Limitation.—The limitation applicable to execution of a mortgage-decree for sale is that prescribed in Article 182, Schedule II of the Limitation Act,(10) which allows three years calculated from the date of an

(1) *Nand Kishore* v. *Raja Hariraj*, I.L.R., 20 All., 23 F. B.: *Wahid un-nissa* v. *Gobardhan*, I.L.R., 22 All. 453 (466).

(2) *Ahmed Ali* v. *Bakar Husain*, (1883) A. W.N., 61; *Khwajah Baksh* v. *Imaman*, (1885) A.W.N., 210; *Ballam Das* v. *Amar Raj*, I. L.R., 12 All., 527; *Bapu* v. *Ramji*, I. L.R., 11 Bom., 112.

(3) *Ballam Das* v. *Amar Raj*, I. L. R., 12 All., 537.

(4) *Bapu* v. *Ramji*, I.L R., 11 Bom. 112.

(5) *Ahmed Ali* v. *Bakar Husain*, (1883) A. W.N., 61.

(6) *Khwaja Baksh* v. *Imaman*, (1885) A. W N., 210, but see s. 101, *post*, and Comm.

(7) *Gunindra Prosad* v. *Baijnath*, I.L.R., 31 Cal., 370.

(8) *Nand Kishore* v. *Raja Hariraj*, I. L.R. 20 All. 23 F B.

(9) *Gouri Churu* v. *Sita*, 14 C W.N. 346; 5 I. C. 710; *Badam Kumari* v. *Hari Dasi*, 11 I. C. (Cal.) 74.

(10) Act IX of 1908; *Troylokya Nath* v. *Jyot Prokash*, I. L. R., 30 Cal., 761 (768). In *Venkatarazu* v. *Chinna*, I. L. R. 24 Mad. 695 (702), the Court refrained from expressing their views on the question.

application for execution.(1) Now, since a decree passed under the late rule cannot be regarded as the final decree, an application under this rule cannot be construed to be an application in execution. On the other hand, since the decree under that rule must be regarded as inchoate till it is made final and capable of execution by the final decree under this rule, an application to make the decree for sale final must fall under Article 181 of the Limitation Act, (2) though according to the view taken in Calcutta it is subject to no limitation.(3) But, then, in any case, as soon as the decree is made final, it will be subject to some limitation, for it is then at all events capable of execution. And it has been held by all the Courts that an application for sale being a step in execution, is subject to the limitation prescribed in Article 182 of the Limitation Act, calculated from the date of the application, and not the date on which it is disposed of. (4) Such an application may be oral, and would be presumed from the order for sale. (5) On the subject of the applicability of Article 182 of the Limitation Act, the Courts at Madras (6) and Allahabad (7) have held that an application to execute a sale-decree is governed by Article 181, and not Article 182. But, as observed by the Madras Court, it cannot be laid down as an inflexible rule that all applications are subject to Article 181, for, as soon as an application answers the requirements of Article 182, it would be necessarily applied. Thus, for instance, though the decree may not be enforceable at the date of the original decree, yet, if, at the date of the appellate decree, becomes enforceable, even the first application for sale made after the appellate decree will be governed by Article 182, paragraph 2, and not by Article 181, the time being reckoned from the date of the appellate decree. (8) If the application in question has been preceded by another application made in accordance with law for execution, or to take some step in aid of execution the article applicable will, as a general rule, be 182, paragraph 5, and not Article 181. Similarly, if a notice has been issued under O, 21, r. 22 of the Code, prior to the application in question, Article 182, paragraph 6, should apply. Whether Article 182 or Article 181 is applicable to a particular application will depend upon the nature and portion of the decree sought to be executed, and whether the application that is made is the first application or a subsequent application. The true criterion in determining whether Article 182 or 181 applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of Article 182 is applicable to it and, if none of them is applicable, it is only then that Article 181 will apply. (9) In this connexion it may be well to add that a decree which directs the sale of mortgaged property in default of payment of the mortgage-money

(1) *Tarachand* v. *Kasinath*, I. L. R., 10 Bom., 62; *Chunder* v. *Bhogobutty*, I. L. R., 3 Cal., 235; *Troylokya Nath* v. *Jyoti Prokash*, I.L.R., 30 Cal., 761; *Prabahacar* v. *Pattannah*, I.L.R., 2 Mad. 1.

(2) *Datto* v. *Shankar*, 15 Bom. L.R, 841: 21 I. C. 318; *Thathara* v. *Krishnammal*, 14 M.L.T., 194; 16 I.C., 799.

(3) *Madhab* v. *Pamela*, I.L.R., 37 Cal., 796; *Mg Pe* v. *Ma Baw*, 4 L. B. R., 83; *Ahmad Ali* v. *Maung Tou*, 3 Bom. L.R., 142; 8 I.C., 986. *contra Thathara* v. *Krishnammal*, 14 M.L.T., 194; 16 I.C., 799. *Datto* v. *Shankar*, 15 Bom.L.R., 841; 21 I C., 318.

(4) *Fakir Muhammad* v. *Ghulam Husain*, I.L.R., 1 All., 580, F.B.; *Sarat Kumari* v. *Jagat Chandra*, 1 C. W. N., 260; *Troylokya Nath* v. *Jyoti Prokash*, I.L.R., 30 Cal. 761.

(5) An oral application for execution is now recognized.—O. 21, r. 11, C.P.C. (Act V of 1908). *Trimbak* v. *Kashinath*, I. L. R., 22 Bom., 722; *Dharanamma* v. *Subba*, I. L. R. 7 Mad., 306

(6) *Rungiah* v. *Nanjappa*, I. L. R., 26 Mad., 780 (789).

(7) *Thakur Das* v. *Shadi Lal*, I. L. R., 8 All. 56; *Ali Ahmad* v. *Naziran*, I. L. R., 24 All., 542; distinguishing *Chunni Lal* v. *Harnam Das*, I. L. R.; 20 All, 302; *Parmeshar Lal* v. *Mohan Lal*, I.L.R., 20 All. 357.

(8) *Rungiah* v. *Nanjappa*, I. L. R., 26 Mad, 780 (789).

(9) *Rungiah* v. *Nanjappa*, I.L.R., 26 Mad., 780 (789); but Art. 181 has been held to apply only to applications under the Code of Civil Procedure, see § 1848.

declared due on or before the date fixed in the decree is not a decree directing the payment of the amount to be made at a certain date within the meaning of paragraph 7, column 3, Article 182. If, however, there is also a personal decree against the mortgagor, and the application is to execute the decree as such, limitation will run from the date of the decree, (1) or from the future date (2) whenever the payment could be enforced. (3)

2350. Title of Auction-purchaser.—The Code of Civil Procedure has effected a material change on the starting point of the purchaser's title. Under the last Code of 1882 the property was declared to vest in the purchaser from the date of the certificate of sale and not before ; (4) but under the corresponding provision of the present Code his title dates " from the time when the sale becomes absolute " (5) or he obtains the sale certificate. Consequently, while under the last Code the purchaser could not claim the rents and profits accruing due before the date of his certificate, (6) the purchaser now can claim them as from the date of his sale.

2351. Appeal.—It was formerly conceded that whether the proceedings under this section be regarded as proceedings in continuation of the original suit or those in execution, there was an appeal, in the former case, as from an original decree,(7) and in the latter case, under section 244 (*c*) of the Code. (8) An order making or refusing to make a decree absolute were thus both appealable. (9) And an order refusing to set aside a sale might have been appealed against, but only so far as it fell within the scope of section 244 (*c*) of the Code. But in view of the Calcutta High Court, " the fact is that the question whether or not an order under section 310-A (of the Code) is subject to appeal or revision under section 622 (of the Code) is one which depends upon the circumstances of the particular case. Where the purchaser has been the decree-holder himself, and the question has been between him and the judgment-debtor, an appeal will lie." (10) On the other hand, where the auction-purchaser is a stranger, the Calcutta Court has proceeded under section 622, holding that there was no appeal. (11) If the proceedings fell within the purview of section 244 (*c*) of the Code, there was undoubtedly an appeal. (12) It was, however, clear that no separate suit will lie to set aside an order confirming sale or refusing the judgment-debtor's application under section 310-A.(13) There was, moreover, no appeal from an order refusing to accept a deposit tendered under that section on the ground that it was made too late.(14)

2352. An order determining the right to possession of properties as between the mortgagee-purchaser of property in execution of his own decree and a party to

(1) Art. 179, para 1, Indian Limitation Act.

(2) *Ibid.*, Art. 182, para. 7.

(3) *Rungiah* v. *Nanjappa*, I. L. R., 26 Mad., 780 (784).

(4) S. 316.

(5) S. 65.

(6) *Shiam Lal* v. *Nathe Lal*, 7 I. C. (All.) 65; *Juggilal* v. *Hukumchand*. 9 I.C. (All.) 25.

(7) *Pramatha* v. *Khetra Mohan*, I. L. R., 29 Cal., 651. Sir A. White, C.J., and Moore, J., *dissentiente* in *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244, F. B.

(8) *Magan Lal* v. *Doshi*, I.L.R., 25 Bom. 631 (635); *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244, F. B.

(9) *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244 (276), F. B.

(10) *Kedar Nath* v. *Uma Charan*, 6 C. W. N., 57 (60) ; following *Chundi Charan* v. *Banke Behary*, I. L. R., 26 Cal., 449, F. B.

(11) *Kedar Nath* v. *Uma Charan*, 6 C. W. N., 57 (60) ; following *Bungshidhar* v. *Kedar Nath*, 1 C.W.N., 114 ; *Jogodanund* v. *Amrita Lal*, I. L. R., 22 Cal., 767, F. B.

(12) *Kripanath* v. *Ram Lakshmi*, 1 C. W. N., 703 ; *Srinivasa* v. *Ayyathorai*, I. L. R., 21 Mad., 416.

(13) *Damodar* v. *Vinayak*, I. L. R., 26 Bom., 40,

(14) *Bashiruddin* v. *Jhori Singh*, I. L. R., 19 All., 140,

the suit was held to be an order within the meaning of section 244 of the Code and was, as such, appealable. But a similar order made between him and one who had purchased the property from the mortgagor judgment-debtor after the decree for sale was held as not falling within that section so as to be appealable. (1)

An order confirming or setting aside a sale being clearly an order relating to the execution of a decree, (2) the question of appeal depends upon the state of the law enacted in the Code of Civil Procedure, under which the judgment-debtor was not entitled to appeal as against a stranger-purchaser from an order refusing to set aside a sale or against either purchaser or the decree-holder for the restoration of his application for setting aside the sale on the ground of material irregularity, dismissed in default. (3) If the case fell under section 312 of the Code, it was however clearly appealable. (4) These questions are not now merely of historical interest; for they lend valuable assistance in ascertaining how far the present enactment has preserved the antecedent law, and how far it has modified it. There can be no doubt that, so far as regards questions formerly appealable under section 244 (*c*) of the Code, they are appealable still, for the determination of a question under section 47 is now expressly declared to be a decree. (5) And so an order setting aside or refusing to set aside a sale is appealable as an order (6), subject to the restrictions already set out.

Court-fee.

2353. It has been held by a Full Bench of the Allahabad High Court that an *ad valorem* court-fee is payable on an appeal against the final decree passed under this rule. (7) This view proceeds upon the assumed change effected by the transposition of the rule to the Procedure Code and the alteration of the designation of what was once an "order absolute" into a "final decree." But these reasons do not justify an *ad valorem* court-fee and in practice a fixed fee of Rs. 10 is levied in the other Courts. (8) As it is in a simple mortgage including the supplementary decree passed under the next rule three decrees are possible, and if appeals therefrom were all chargeable with *ad valorem* court-fees, the number of fees leviable would at times parallel the proverbial Kazi's justice.

Recovery of balance due on mortgage.

6. When the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

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(1) *Kashinatha* v. *Uthumansa*, 12 M. L. J. R., 1 ; following *Moti Lal* v. *Mukund Singh*, I.L.R., 19 All., 477 ; *Sariatoula* v. *Rajkumar*, I.L.R., 27 Cal., 709 ; *Lakshmanan* v. *Kannamal*, I. L. R., 24 Mad., 185.

(2) *Monmohini Dasi* v. *Lakhinarayan*, I. L. R., 28 Cal., 116 (118).

(3) *Nigappa* v. *Gangawa*, I L. R., 10 Bom., 433 ; *Jang Bahadur* v. *Mahadeo*, 8 C. W. N., 160; *Raja* v. *Srinivasa*, I. L. R. 11 Mad., 319, *contra* in *Sami Pillai* v. *Krishnasami*, I. L. R., 21 Mad., 417, but it gives no reason for the view, and does not refer to the earlier cases.

(4) S. 588 (16), Civil Procedure Code (as amended by Act VI of 1888, s. 55), prior to which appeal was limited to cases arising under the first paragraph only. See now O. 43, r. (J), C. P. C. (Act V of 1908). *Buro Soonduree* v. *Punchool*, 24 W. R., 225 ; *Sakharam* v. *Dhiku*, I. L. R., 11 Bom., 603.

(5) S. 2 (2), Act V of 1908.

(6) O. 43, r. 1 (J).

(7) *Bajrangi* v. *Mahabir*, I. L. R., 35, All. 476. B ; 21 I. C. 498 F. B.

(8) Sch. II, 17 (vi) Court Fees Act (VII of 1870).

2354. Analogous Law.—This rule, which is supplementary to the last, was section 90 of this Act, and which ran thus :—

"90. When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

It may be compared with Form No. 109 of plaint given in the old Code of Civil Procedure, and App. A, Form No. 45 of the new Procedure Code, which contains the following prayer with reference to this rule :—

"(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance."

The rule was originally taken from the American law, and(1) before it was enacted as section 90 of this Act, it was drafted as follows :—

89. When the net proceeds of any such sale are insufficient to pay the amount due for the time being due on the mortgage, the balance, if legally recoverable from the defendant otherwise than out of the property sold, may be recovered either (if the Court thinks fit) in the same manner as under a decree for money, or by any other legal process open to the mortgagee.

2355. Principle.—This rule enables the Court to pass a personal decree only against the mortgagor in addition to a decree upon the mortgage. The section is clearly intended to apply only to a mortgage implying an unconditional promise to pay carrying with it a personal liability justifying the passing of a supplementary decree,(2) after the net proceeds of any such sale as may have been ordered by the substantive decree prove insufficient. Usually the additional relief may be claimed by the mortgagee on the execution-side. A new suit on the same cause of action is clearly not authorized by the rule, as it would be wholly inadmissible under the Civil Procedure Code.(3) And, if the Legislature had intended to empower the mortgagee to claim the relief by virtue of the rule by instituting a second suit, it is apprehended that the provisions of the Code in bar of a second suit would have been expressly saved as they have been in section 99. Indeed, in the earlier stages of the Bill a provision was proposed to be inserted to the effect that the balance may be recovered (if the Court think fit) in the same suit in the same manner as under a decree for money, or by any other legal process open to the mortgagee. But it appears that subsequently this section was recast in its present form without any explanation of the change being given.(4) And by the Procedure Code, 1908, it was transposed to that Code after some verbal alterations, which do not, however, vary it sense.

2356. As this rule contemplates the making of a supplementary decree only in the special case provided for by it, namely, when the net proceeds of any sale of the mortgaged property prove insufficient to pay the amount due for the time being on the mortgage, it would be inapplicable to a case where the original decree is a personal one against the mortgagor, under which the mortgagee can in execution proceed against any property of the mortgagor other than that comprised in the mortgage. No supplementary decree is then necessary.(5) A decree—"that a certain sum be paid by the defendant, and on default, the decretal debt be realized by sale of the property under mortgage, and that the defendant to pay the said sum"—is a decree in which a

(1) Kent's Comm., 207, which is cited in the marginal note to the section in the Bill.

(2) *Ram Kishore Gir* v. *Surajdeo*, 13 C. W. N., 138.

(3) O. 2, r. 2, Civil Procedure Code (Act V of 1908).

(4) Select Committee's Final Report, dated 24th January, 1882; Macpherson's "Mortgage" (7th Ed.), 699.

(5) *Dina Nath* v. *Bejoy Krishna*, 7 C. W. N., 744.

supplemental decree is unnecessary.(1) On the other hand, in a decree drawn up in the terms of rule 4, a supplementary decree would be necessary under the circumstances here specified (§ 2369).

2357. Meaning of Words.—*Net proceeds*," *i.e.*, the amount remaining due after defraying the expenses of the sale.(2) "*Such sale*," *i.e.*, which had been directed under the previous rules.(3) But the phrase need not be construed too literally, as probably its provisions were intended equally to apply to a sale under rule 8. It, however, means only all the property *ordered to be sold*, and not all the property *mortgaged*. "*Amount due for the time being*" means the decretal amount *with costs* of the suit and subsequent proceedings. "*If the balance is legally recoverable otherwise, etc.*:" This is possible (*i*) where the mortgagor has made himself personally liable, and (*ii*) where the mortgagee can legally hold him so liable, as where his security is destroyed under the circumstances mentioned in section 68. "*From the defendant*" means mortgagor-defendant.(4)

2358. Case for a Supplementary Decree.—Although the rule is so worded that it is by no means clear whether for the balance the Court is to pass a decree in the *same* suit or in another suit, it has been held both by the Calcutta and the Allahabad High Courts that the decree contemplated by the rule is in fact an order to be obtained in execution of a decree for sale,(5) though it cannot be so regarded for all purposes (§ 2376). Hence it follows that, where the decree made is substantially one under the provisions of rule 4, and, moreover, provides for the recovery of the balance from the person of the mortgagor, there is no necessity to have recourse to the provisions of this rule. It is only when the decree assumes the form provided in Form 128 (now App. D, Form 4) of the Code, which does not expressly give the mortgagee any right against any other property or the person of the judgment-debtor that it becomes necessary for him to apply under the section for a decree or order for the balance. (6) An application made under this rule and struck off in default cannot, according to the view taken in Calcutta, be revived, for, if the proceedings under this rule is a proceeding in suit, it follows that a fresh application would be barred under section 103 (O. 9, r. 9) of the Code. (7) But such an exceptional provision of law, could scarcely be regarded as falling strictly within the procedure of the Code. Of course the order passed under this rule is designated a decree, but that is by itself no reason for holding that the application which precedes it is necessarily the plaint: it is more in the nature of a *post*-decretal application for execution than an application in the mortgage-suit. (8)

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(1) *Dina Nath* v. *Bejoy Krishna*, 7 C. W. N., 744.

(2) See r. 4, para. (1).

(3) *Sheo Prasad* v. *Behari Lal*, I. L. R., 25 All., 79 (82).

(4) *Ram Lal* v. *Silchand*, I. L. R., 23 All., 139 (140).

(5) *Sonatun Shah* v. *Ali Newaz Khan*, I. L. R., 16 Cal., 423; *Bunseedhur* v. *Sujat Ali*, *ib.*, 540; *Lalla Tirhini Sahai* v. *Lalla Hurrak Narain*, I. L. R., 21 Cal., 26; *Durga Rai* v. *Bhagwat Prasad*, I.L.R., 13 All., 356; *Butak Nath* v. *Pitamber*, *ib.*, 360; *Musaheb Zaman Khan* v. *Inayat-ul-lah*, I. L. R., 14 All., 513; *Lalji* v. *Barber*, I. L. R., 15 All., 334; *Sheo Charan* v. *Lalji Mal*, I. L. R., 18 All., 371; *Ram Sarup* v. *Ghaurani*, I. L. R., 21 All., 453; *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244 (287), F. B., *contra* in *Ramdayal* v. *Mohd Ghose*, 1 N. L. R., 143.

(6) *Lalla Tirhini Sahai* v. *Lalla Hurrak Narain*, I. L. R., 21 Cal., 26 (28).

(7) *Ramdayal* v. *Mohd. Ghouse*, 1 N. L.R. 143; following *Raj Singh* v. *Parmanand*, I. L. R., 11 All., 468; *Musaheb Zaman* v. *Inayat-ul-lah*, I. L. R., 14 All., 513.

(8) *Ram Sarup* v. *Ghaurani*, I. L. R., 21 All., 453; *Mallikarjunadu* v. *Lingamurti*, I. L. R., 25 Mad., 244 (287), F. B.

It is not within the competence of the mortgagor to challenge the validity of the previous sale in answer to the mortgagee's application under this rule. (1)

(1) Previous sale necessary.

2359. In order to make the remedy here provided available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under the rule. But, where, after the mortgaged property had been advertised for sale, the decree-holder, with the consent of the judgment-debtor, sold a portion of the property by private sale, the same being notified to the Court which postponed its own sale, and the remaining property was then sold by auction, it was held that the provisions of this rule had been duly complied with so as to admit of a supplemental decree being passed, it being immaterial whether the property was sold by auction or private sale. (2) The same view was held in another case in which certain railway shares, in respect of which a decree had been passed under rule 4, were, by consent of parties, sold through brokers in England. (3) The rule does not apply where the mortgaged property has been sold under a decree held *by some other person.* (4) Again, a decree under this rule will be passed only after the sale of the whole of the mortgaged property is found to be insufficient to satisfy the mortgagee's claim. (5) In short, in order to enable the mortgagee to avail himself of the rule, it must be shown that (*i*) the mortgaged property has been sold, (*ii*) that the proceeds of the sale are insufficient, and (*iii*) that the balance is personally recoverable from the mortgagor or his other property. (6) If these conditions are fulfilled, it is not material that the mortgagee had failed to sue for the personal remedy. Indeed, as has been held in Allahabad, every suit on a mortgage containing an express or implied covenant to pay the mortgage-money otherwise than out of the mortgaged property must be regarded as impliedly, if not expressly, a suit claiming such relief, the point being that the plaintiff, instead of being obliged to include a prayer for such relief in the plaint, may wait until it appears that the sale-proceeds are insufficient, and then make the prayer in an application under this rule. A mortgagee, holding a simple mortgage by which certain immoveable property was mortgaged, sued for and obtained a decree for sale of part only of the mortgaged property. Such portion having been sold, and the net proceeds of the sale having proved insufficient to satisfy the mortgage-debt, the decree-holder applied for a decree under this section against the unhypothecated property of the mortgagor. (7) It was held that, whether rightly or wrongly, the original decree having been in fact passed for sale of a part only of the mortgaged property, and the sale of that part having realized an amount not sufficient to satisfy the mortgage-debt, there was, under the circumstances,

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(1) *Durga* v. *Bhagwan Das*, 1 A. L. J. 486; *Parbati* v. *Gobinda*, 4 C. L. J., 246 (253, 254).

(2) *Udit Narain* v. *Bagar Sajjid*, 2 A. L. J. 353; *Jagadhur* v. *Alliance Bank*, I. L. R., 28 All., 660; *cf.* s. 305, Civil Procedure Code.

(3) *Gajadhur* v. *Alliance Bank*, I. L. R., 28 All., 660.

(4) *Muhammad Akbar* v. *Munshi Ram*, (1899), A. W. N., 208; followed in *Badri Dat* v. *Inayet Khan*, I. L. R., 22 All., 404.

(5) *Badri Das* v. *Inayet Khan*, I.L.R., 22 All., 404; *Musaheb* v. *Inayat-ul-lah*, I.L.R., 14 All., 513; *Bunseedhur* v. *Sujaat*, I.L.R., 16 Cal., 540.

(6) *Purna Chandra* v. *Radha Nath*, I.L.R., 33 Cal., 837; *Dinabandhu* v. *Mathuda*, 16 C.L.J. 318; 17 I C., 263; *Surja Kumar* v. *Pramada*, 17 C.W.N. 1039; 20 I.C., 829, *Komandur*, v. *Komandur*, (1913) M.W.N. 139; 17 I.C., 244.

(7) *Badriman* v. *Raja Ram*, (1899) A.W.N., 22; *Musaheb Zaman* v. *Inayat-ul-lah*, I.L.R., 14 All., 513; *Bageshi* v. *Muhammad Nagi*, I.L.R., 15 All., 331; *Hamiduddin* v. *Kedar Nath*, I.L.R., 20 All., 386; *Chattar Mal* v. *Thakuri*, (1898) A.W.N., 138.

no objection to the mortgagee obtaining a decree under this section.(1) Similarly, where the Court erroneously decrees sale of only a portion of the mortgaged property under rule 4, that order is final and cannot be questioned under this rule; consequently, the mortgagee-decree-holder is entitled to a decree under this rule as soon as he has sold the property, the sale of which was decreed, though it may not be all the property mortgaged.(2) So again, where the property mortgaged was the *malikana* rights in a zemindari, but the decree erroneously passed was for sale of the zemindari itself, the mortgagor could not point to the mistake to defeat the mortgagee proceeding under this rule.(3) But, where, in a suit instituted against a Hindu father without joining his son, the mortgagee obtained a decree, and the son afterwards obtained a declaration exonerating his share from the sale, the mortgagee was held disentitled to proceed under this rule without first suing the son and bringing his share to sale.(4) The Court has no jurisdiction to accede to the mortgagee's application for an order to be allowed to execute the mortgage decree as a money decree by attachment of some other property, or for the passing of a supplementary decree for the purpose, but at the same time reserving his rights under the mortgage decree, on his giving an undertaking not to take any steps as against the mortgaged property till he has exhausted the other property.(5)

2360. It would seem that a mortgagee may well relinquish his claim to a part of the property, but he does not thereby forfeit his right under this rule. "For example, that a portion of the property was heavily incumbered; it might also be that the mortgagor's title to a portion of the property was in dispute, in either of these cases the result of endeavouring to sell the portion so incumbered, or the portion, the title to which was in dispute, might entail heavy expenses and protracted litigation. Therefore, there seems no reasonable objection under these circumstances to the abandonment by a mortgagee of his claim in respect of a part of his security, and to his seeking relief by sale of the remaining portion."(6) In another case a mortgagee held a decree for a sale and an order absolute for sale of the property comprised in his mortgage. Before, however, the sale could be carried out, a third person succeeded in establishing his title to one-half of the property mortgaged. The decree-holder brought to sale the remaining half of the property covered by his decree, but the amount realized proved insufficient to satisfy the mortgage-debt. It was held that, under such circumstances, there was no bar to the decree-holder obtaining a decree over against the unhypothecated property of the mortgagor under this rule.(7) Indeed, it is not even in every case indispensable that a sale should precede an application under this rule though the words "such sale" would seem to favour that construction. But it is conceivable that, after a decree under rule 4, a sale may be rendered impossible or ineffectual,

(2) Relinquishment immaterial.

(1) *Sheo Prasad* v. *Behari Lal*, I.L.R., 25 All., 79; *Ghafur Hasan* v. *Mhd. Kifayatullah*, I.L.R., 28 All., 19; *Sham Sunder* v. *Ganesh Prasad*, 8 A.L.J., 463.

(2) *Ghafur Hasan* v. *Mhd. Kifayatullah*, I. L R., 28 All., 19; *Sheo Prasad* v. *Behari Lal*, I.L.R., 25 All., 79 (82).

(3) *Sham Sundar* v. *Ganesh Prasad*, I.L. R., 28 All., 674.

(4) *Kalyan* v. *Dwarka Prasad*, 2 A.L.J., 20 (S.N.).

(5) *Surja Kumar* v. *Pramada*, 17 C. W. N. 1039; 20 I.C., 829.

(6) *Per* Stanley C. J., and Burkitt, J., in *Sheo Prasad* v. *Behari Lal*, I. L. R., 25 All., 79 (82); *Kedar Nath* v. *Chandumal*, I.L.R., 26 All., 25; *Ghafur* v. *Mhd. Kifayatullah*, I. L. R, 28 All., 19; *Pirbhu* v. *Amir Singh*, I. L.R, 29 All., 369; *Zalim Gir* v. *Ram Charan*, I.L.R., 10 All., 629; *Shanmuga* v. *Ramanathan*, I.L,R., 17 Mad., 309 (314, 315.)

(7) *Kedar Nath* v. *Chandu Mal*, I.L.R., 26 All., 25; distinguishing *Muhammad* v. *Munshi Ram*, (1899).....N., 208; *Badri Das* v. *Inayat Khan*, I.L.R., 22 All,, 404.

and in which case the mortgagee may legitimately invoke the aid of this rule.(1) It is then not necessary to sell the whole of the mortgaged property before the mortgagee could apply under this rule.(2) But though it is so, the mortgagee cannot capriciously refuse to dispose of all the available mortgaged property, and file an application under this rule. For, when it is said that he need not exhaust the mortgaged property before applying under this provision, what is meant is, that he need not take the unnecessary risk in waiting to dispose of the mortgaged property. If, therefore, he gives up a portion of the property without sufficient cause, the mortgagor would be justified in resisting his application on that ground. But the Calcutta High Court has held that the mortgagee cannot relinquish a portion of the mortgaged property to the detriment of the mortgagor so as to impose upon him a personal liability to which otherwise he would not be subject.(3) This view proceeds upon literal construction of the preceding rule which, however, contemplates only a sale of the whole or a sufficient part of the mortgaged property.

Again, where the mortgaged property was itself non-existent, the mortgagee could not invoke the aid of this rule, since if there was no property at all that could have been sold reached in the suit, the sale-decree passed would be illusory, and the Court would not then pass a supplementary decree to make good this defect.(4) As Knox, J., remarked: "The remedy given by section 90 is an extraordinary remedy, and must, therefore, be applied with great care and jealousy."(5)

(3) When no sale.

2361. But, where the mortgagee sued and obtained a decree on his mortgage, and it afterwards appeared that the property mortgaged did not belong to the mortgagor, he was held precluded from bringing another suit for the recovery of the money.(6) In such a case, of course, a decree under this section is out of the question.

(4) To pay what amount decree given.

2362. The section originally provided that a decree over may be passed to "pay the amount due for the time being on the mortgage"—words which engendered some ambiguity in consequence of which the present rule amends the clause confining the decree over to realization of a sum only sufficient "to pay the amount due to the plaintiff." It will be observed that the amount so due need not be the subject of a decree. A decree ordering that the defendant do pay a sum named within a certain time, and that in default certain mortgaged property be sold, is one which is capable of execution against the other property of the other defendant, although there may be a direction in such decree that the defendants are not personally liable for the decree.(7) But, where a puisne mortgagee of certain property sued the prior mortgagees for redemption, a decree was passed for redemption or sale. The puisne mortgagee having failed to pay the amount decreed, the property was sold, but it failed to realize the amount due to the prior mortgagees, whereupon the latter sought to put in force the provisions of this section, but the Court refused to act on the ground that the puisne mortgagee was not personally liable.(8) So far the change of phraseology is immaterial. But the use of the phrase, "due on the mortgage,"

(1) *Gulam Abbas* v. *Brijbhan*, 1 Nag. L.R., 39.

(2) *Ghafur Hassan* v. *Mhd. Kifagatullah*, I.L.R. 28 All., 19; *Pirbhu* v. *Baldeo*, I. L. R. 29 All., 369.

(3) *Ramranjan* v. *Indra Narain*, I. L. R., 33 Cal., 890; dissenting from *Sheo Prasad* v. *Behari Lal*, I.L.R., 25 All., 79.

(4) *Pirbhu* v. *Baldeo*, I.L.R., 29 All., 260.

(5) *Ib.*

(6) *Lakshmana* v. *Krishniah*, 14 M.L.J., 490.

(7) *Mutana* v. *Kumarasami*, 15 M.L.J., 6.

(8) *Mata Ambar* v. *Sridhar*, I. L. R., 26 All., 507.

was calculated to create difficulty, and, at any rate, it was held in Allahabad that the word 'mortgage' though used in the singular, could not be relied upon as restrictive, and that it included plurality of mortgages.(1) So, where a puisne mortgagee of property, upon which there existed several prior incumbrances, obtained a decree for sale after redemption of the prior incumbrances, it was held that the puisne mortgagee could resort to this section, obtain a decree for sale of the mortgagor's property sufficient to realize, not only the amount of his own mortgage, but also the sum paid by him to redeem the prior incumbrances, since this amount was also due for the time being on the mortgages against the mortgagor. This construction of the clause was questioned in the last edition of this work,(2) but the Allahabad Court arrived at the same conclusion by a different train of reasoning. Referring to section 65, they held that, inasmuch as the mortgagor is deemed to contract with a puisne mortgagee that he will pay the interest and principal due on the prior incumbrances,(3) his mortgage-security is a security, not merely for the principal sum and interest advanced by the puisne mortgagee, but also a security in respect of any loss which the puisne mortgagee may sustain by reason of the breach of the implied covenants. And this being the case, the puisne mortgagee, having been obliged to pay off the prior incumbrances, became entitled to the amount which, he has been obliged to pay off in addition to the principal sum due to him on his own mortgage.(4) It is apprehended that the effect of the amendment is to restrict the decree over to realization of only such amount as is sufficient to discharge the amount of the decree as distinct from any other amount to which the plaintiff may be equitably entitled, but which was not covered by the decree. In this view the word "due" must be understood to mean "due" under the decree for the satisfaction of which the supplementary proceedings under the rule were instituted.

(5) Instalments allowable.

2363. As the supplementary decree is one for personal recovery the Court may decree the amount as payable by instalments.(5)

(6) No bar by res judicata.

2364. It may be added that a party cannot be refused a relief under this rule on the mere ground of delay or hardship to the defendant.(6) Nor is the plea of *res judicata* any answer to any application under this rule, it being immaterial whether the plaintiff had or had not claimed the subsequent relief originally in his suit, provided that it had not been allowed or disallowed by the Court, since the time for adjudication on the claim for the subsequent relief does not arise until the decree under rule 4 is exhausted.(7) But the case would, of course, be otherwise if the claim for personal decree had been negatived on the ground of non-liability, either in the main suit or in any previous litigation between the parties.(8) A decree under this rule may be made to supplement an incomplete decree passed under rule 4;(9) but no order can be passed under this rule which would have the effect of assailing the decree made under

(1) *Ali Jan* v. *Mariam Bibi*, I.L.R., 26 All., 93 (95).
(2) 2 Law of Transfer (2nd Ed.) §. 1464.
(3) S. 65 (*e*).
(4) *Ali Jan* v. *Mariam Bibi*, I.L.R., 26 All., 93 (94, 95).
(5) *Bidhu* v. *Sudhury*, 15 C.W.N., 1088.
(6) *Miller* v. *Digambari*, (1890) A. W. N., 142.
(7) *Uttam Ishlok* v. *Ram Narayan*, I. L. R., 28 All., 365; overruling *Uttam Ishlok* v. *Phulman*, 2 A. L. J., 379; distinguishing *Musaheb Zaman* v. *Inayat-ul-lah*, I.L.R., 14 All., 513; following *Digambari* v. *Debaya*, (1890) A. W. N., 142.
(8) *Uttam Ishlok* v. *Ram Narayan*, I.L.R., 28 All., 365; overruling *Uttam Ishlok* v. *Phulman*, 2 A. L. J., 397.
(9) *Kanak Mal* v. *Sheo Pershad*, 13 C. P. L. R., 110 (112).

that rule.[1] For instance, if, in a mortgage with a personal covenant, the decree passed is only in the terms of rule, an additional decree may be passed under this section by adding thereto appropriate words, such as the following: —"If the proceeds of the sale shall not be sufficient to satisfy the decree, the defendant shall personally pay the amount of the deficiency, and that the same may be recovered by sale of any other property of the defendant." This suggestion made in the previous editions of this work[2] has since been carried out, the clause suggested being now made a part of the preliminary decree passed under rule 4.[3] It was, however, formerly held in Calcutta [4] and Bombay [5] that such a decree would be contrary to the procedure prescribed by the Act, but according to the Allahabad Court, it was held to be unobjectionable.[6] The amendment has then the effect of overruling the precedents of the two first mentioned High Courts and re-affirming the view taken in Allahabad. Such a decree looks simple enough, but it may at times raise knotty points for solution, and which will have to be presently considered. There can be no doubt that property affected by a decree passed under this section, and not, forming a part of the mortgaged property, must be attached before its sale. In this respect property comprised in a decree passed under the preceding rules differs from that ordered to be sold under these provisions. A decree passed under this rule must then be executed in the ordinary manner as a money-decree.[7]

(7) Order for decree made in the same suit.

2365. A decree under this rule must be made in the same suit in which the decree for sale was passed. No fresh suit is necessary.[8] And an order under this rule 4 was held to be unnecessary if a decree made under rule 4 expressly provides for realization of the debt from the mortgagor's other property, should the mortgaged property not realize sufficient to satisfy the decretal amount.[9] In such a case, since it is immaterial that an application under this section should be made, so it is equally immaterial that an application under this section was made and rejected.[10] The Court cannot refuse to make an order under this section simply because no provision is made for it in the decree for sale.[11] Nor is it always necessary that the mortgagee shall exhaust the mortgaged property before he could put in force this rule. Ordinarily, no doubt, this should be the case, and it would be in accordance with the direction of the decree. But it is by no means an invariable rule, for there may be cases in which the attempt on the part of the mortgagee to bring the mortgaged-property to sale may involve him in costly litigation. The

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(1) *Gulam Abas* v. *Brijbhan*, I. L. R., 39 (43).

(2) 2 Law of Transfer (2nd Ed.), § 1465.

(3) App. D. Form No. 4, C. P. C. (Act V of 1908.)

(4) *Chandi Charan* v. *Ambika Charan*, I. L. R., 31 Cal., 792 (796).

(5) *Damodar* v. *Vyanku*, I. L. R., 31 Bom., 244 (248).

(6) *Jadunath* v. *Jagmohan*, I. L. R., 25 All., 541.

(7) *Gopal Das* v. *Ali Muhammad*, I.L.R., 10 All., 632.

(8) *Sonatun* v. *Ali Newaz*, I. L. R., 16 Cal., 423 (425); *Lalla Tirhini Sahai* v. *Lalla Hurrak Narain*, I. L. R., 21 Cal., 26 (28); *Raj Singh* v. *Parmanand*, I. L. R., 11 All., 486 (488); *Ramdayal* v. *Mhd. Ghouse*, 1 N. L. R., 143.

(9) *Batak Nath* v. *Pitamber*, I. L. R., 13 All., 360; *Sadho Singh* v. *The Maharajah of Benares*, I. L. R., 29 All., 12; *Bisheshur* v. *Debi Baksh*, 17 O.C. 153; 25 I.C. 121; *Lalla Tirhini Sahai* v. *Lalla Hurrak*, I. L. R., 21 Cal., 26 (28); *Periasami* v. *Muthia*, 15 M. L. T. 232; 23 I. C. 515; *Kumar Venkata* v. *Velayuda*, 27 M. L. J. 25; 24 I. C. 195; *Cheruvalath* v. *Theyyatath*, (1914) M. W. N. 497; 25 I. C. 50.

(10) *Sadho Singh* v. *The Maharajah of Benares*, I. L. R., 29 All., 12. But see *Damodar* v. *Vyanku*, I. L. R., 31 Bom., 244.

(11) *Sonatun* v. *Ali Newaz*, I. L. R., 16 Cal., 423; *Musaheb Inayat-ul-lah*, I. L. R., 14 All., 513; *Malia* v. *Nachiappa*, 5 M. L. J. 294.

direction is binding only so far as it does not compel him to invade the rights of third parties who were not parties to the decree.(1) If, for example, the mortgagee can show that a portion of the mortgaged property not brought to sale belongs to the mortgagor's divided brother, the Court would not compel him to attack that title before proceeding against the mortgagor's other property.(2) On the other hand, it is, of course, entirely in the option of the mortgagee to avail himself of the provisions of this rule, and he cannot be compelled to resort to them before preferring any other remedy. So, where, after the mortgage, a portion of the mortgaged property was sold to a third party, and the mortgagee sued both the mortgagor and purchaser for sale of the mortgaged property, but the suit against the purchaser was dismissed as premature, it was held open to the mortgagee to institute a fresh suit against the purchaser if, on sale of the property previously decreed, his mortgage-debt was not satisfied.(3)

2366. An application made under this rule and struck off in default cannot, it is said,(4) be revived, for, if a proceeding under this section be regarded, as it has been, in Calcutta, as a proceeding in suit, it is clear that a fresh application would be barred under the provisions of section 103 (now O. 9, r. 9), though, of course in such a case an application for restoration of the original application would lie.

(8) Sale without decree.

2367. It has been held in Calcutta that, where the executing Court was competent to pass a decree under this section, but, without passing a decree, it proceeded to attach and order the sale of the mortgagor's other property in accordance with the mortgagor's application for execution, and the mortgagor, notwithstanding the service of notice upon him, raised no objection to the execution, he was estopped, from afterwards urging the plea upon a fresh application. In such a case the order of the Court allowing execution to proceed against other properties of the judgment-debtor should be taken to have the effect of a decree under this rule.(5)

2368. Rights under Supplementary Decree.—A mortgagee proceeding on a decree obtained under this rule is entitled to proceed both against the person and other property of the mortgagor. In so far as his decree is a personal decree against the mortgagor, he possesses the rights of an unsecured creditor, and his decree is subject to the limitation applicable to money-decrees. (§§ 2372—2375). Such a decree-holder may then come in for a rateable distribution of the assets realized by a simple or money decree-holder in execution of his decree. And it has been held in Calcutta that he is so entitled even where his decree is against two or more judgment-debtors and the assets have been realized in execution only as against a simple judgment-debtor. (6) Where the decree for sale was passed against the heirs of the mortgagor, a supplementary decree under the provisions of this rule can be obtained only against the assets of the deceased mortgagor, in the hands of his heirs and not accounted for. (7) A decree against the "assets of the mortgagor which might be in the hands of his sons" may be executed against property acquired by them by survivorship excluding only that which is their self-acquired property.(8) Since

(1) *Shanmuga* v. *Ramanathan*, I. L. R., 17 Mad., 309 (315).
(2) *Ibid.*, p. 315.
(3) *Gangaram* v. *Kunhaiya Lal*, I. L. R., 27 All., 254.
(4) *Ramdayal* v. *Mohamad*, 1 N. L. R. 143.
(5) *Madhu Sudan* v. *Kailash Chunder*, 2 C. W. N., 254 (256).
(6) *Ganesh* v. *Shiva*, I.L.R., 30 Cal., 583, F.B.; *Gatti Lal* v. *Bir Bahadur*, I.L.R., 27 All., 158.
(7) *Murlidhar* v. *Nand Ram*, 3 A.L.J. 44 (S.N.).
(8) *Ram Lal* v. *Maharajah*, 11 C. L. J. 362; 5 I. C. 146.

the Court has to pass a *decree* under this rule, a mere order for recovery for the balance of the decretal amount to be recovered cannot be executed till a decree is passed, and where a decree is drawn up subsequently to an order, an application for execution may be made within three years counted from the date of the decree, and not from the date of the order. (1)

2369. Limits of the Rule.—As the Court is empowerd to pass a supplementary decree only when "the net proceeds of any *such* sale are found to be insufficient," it has been held in Allahabad that no decree can be validly passed under this section unless the sale was made in execution of a decree passed under the provisions of the foregoing sections. (2) If, therefore, the sale was made in accordance with a decree passed under rule 8, a supplementary decree would not be justified by the language of this rule, though a decree passed to enforce a charge would probably be construed as a decree within the terms of the rule. (3) So, where a puisne mortgagee of certain property sued the prior mortgagees for redemption, and a decree was passed for redemption or sale, and the puisne mortgagee having failed to pay the amount decreed, the property was sold, but it failed to realize the amount due to the prior mortgagees, the latter sought to put in force the provisions of this rule, but the Court refused to act on the ground that the puisne mortgagee was not personally liable, and that this rule was not intended to cover cases of such sales (4) (§ 2356).

2370. After the decree is passed in the terms of rule 4, any question that might arise under this rule does not become *res judicata*: "Taking section 88 and reading it in conjunction with section 90, it is clear that there are two distinct decrees to be passed—the decree under section 88 in the suit for sale and the decree under section 90 upon the application of the decree-holder in accordance with the terms of that particular section." (5) And it was held by the same Court that an application under this section was an application in execution, but not in execution of the decree made under section 88.(6) This view was accepted in Madras,(7) and was not opposed to that taken in Bombay,(8) though it was dissented from in Calcutta, (9) where such an application has been regarded as in continuance of the suit.(10) And this now is the view enacted in the Code which widens the scope of the term "decree" by subdividing into a decree preliminary and final, and adding to its definition the following explanation: "A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final." (11) But, though it is so, the time for

(1) *Madan Mohan* v. *Nobin Kishore*, (1906) 3 C.L.J., 291.

(2) *Muhammad Akbar* v. *Munshi Ram* (1899), A.W.N., 208; *Badri Das* v. *Inayat Khan*, I.L.R., 22 All., 404; *Ram Lal* v. *Silchand*, I. L. R., 26 All., 439 (440); *Mata Ambar* v. *Sridhar*, I.L.R., 26 All., 507. "The defendant means mortgagor-defendant."—*Sheo Prasad* v. *Behari Lal*, I. L. R., 25 All., 79 (82); To the same effect *Varadiah* v. *Raja Kumara*, 26 M. L. J. 83; *Srinivasa* v. *Chundasami*, 26 M. L. J. 375; 23 I. C. 544.

(3) *Mastulla* v. *Jan Mamud*, I. L. R., 28 Cal., 12 (17).

(4) *Mata Ambar* v. *Sridhar*, I. L. R., 26 All., 507.

(5) *Per* Straight, J., in *Hafiz-ud-din* v. *Damodar*, (1889) A.W.N., 149; followed in *Musaheb Zaman Khan* v. *Inayat-ul-lah*, I.L. R., 14 All., 513 (516).

(6) *Durga* v. *Bhagwant*, I. L. R., 13 All., 356; *Musaheb Zaman Khan* v. *Inayat-ul-lah*, I.L.R., 14 All., 513; *Ram Sarup* v. *Ghaurani*, I.L R., 21 All., 453.

(7) *Mallikarjunadu* v. *Lingamurti*, I.L.R., 25 Mad., 244, F.B.

(8) *Bhagwan* v. *Ganu*, I. L. R., 23 Bom., 644.

(9) *Purna Chandra* v. *Radha Nath*, I.L.R. 33 Cal., 867.

(10) *Purna Chandra* v. *Radha Nath*, I.L.R. 33 Cal., 867; *Ramdayal* v. *Mhd. Ghouse*, 1 Nag. L.R., 143.

(11) S. 2, expl. C.P.C. (Act V of 1908).

making an application under this rule and for the Court making a decree under it does not arrive until the remedies under section 88 (rule 5) have been exhausted. "When the decree passed under rule 4, which is ordered to be executed under section 89, has failed to discharge the money due at the time under the mortgage, then, for the first time, in the suit for sale the Court has power to decree the sale of non-hypothecated property." (1) According to the Allahabad case the decree for sale under rule 4 is limited to the hypothecated property, but this is not the view taken in Calcutta, where, under rule 4, personal relief may as well be decreed in the same decree. The Calcutta view is certainly opposed to the view now enacted in the prescribed form in which the only liberty reserved to the plaintiff is to *apply* for a personal decree for the amount of the balance.(2)

2371. Where the general costs of a mortgage-suit are decreed against the defendants comprising a puisne mortgagee, and the mortgagor, and the proceeds of the sale of the mortgagor's property have not been sufficient to discharge the amount decreed, can the mortgagee apply under this rule for sale of the puisne mortgagee's property? It would appear not; for, in view of the Allahabad High Court, in the first place, the rule is strictly limited in its scope to "amounts due for the time being *on the mortgage*," and, secondly the term "defendant" in the section would seem clearly to mean the mortgagor-defendant, and the money recoverable under the section is money recoverable by reason of the proceeds of the mortgaged property proving insufficient to pay off the decree passed under rule 5, from the person whose property had been mortgaged, and, sold, if legally recoverable from him.(3) But the first point was by no means conceded by the other Courts, and it has been now overruled by the amendment.

2372. Personal Remedy must be within Limitation.—The rule, it needs scarcely be said, would only apply to cases where the balance is "legally recoverable otherwise than out of the property sold." According to the Allahabad High Court these words mean "that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold, or a balance the recovery of which is not barred by limitation, *e.g.*, the suit might have been brought at a period of time when, if the plaintiff was relying on his personal remedy against the defendant, his suit for the personal remedy would be barred by time, although within time as a suit for sale on the mortgage."(4)

2373. Limitation.—As regards the starting point for limitation, it has been held that time begins to run from the date on which the mortgage money was repayable. Thus, where, in a usufructuary mortgage, it was covenanted that if the mortgagee was not given possession, he should have a right to obtain the sale of the mortgaged property, the mortgage-debt meanwhile being payable on a certain specified date, it was held that, in respect of an application under this section, limitation began to run only from the breach of the covenant to pay on due date, and not from the breach of the covenant to put the mortgagee in possession.(5) Similarly, in another case where the debtor empowered the

(1) Starting point of limitation.

(1) *Musaheb Zaman Khan* v. *Inayat-ul-lah*, I. L. R., 13 All., 513 (517). But now see *Sadhu Singh* v. *The Maharajah of Benares*, I.L.R., 29 All., 12; in which the Calcutta view was tacitly accepted.

(2) App. A. Form X (10), (45); *Cf.* (6) (2); App. D. Form No. 4, C. P.C. (Act V of 1908).

(3) *Ram Lal* v. *Silchand*, I. L.R., 23 All., 439.

(4) *Musaheb Zaman Khan* v. *Inayat-ul-lah*, I. L. R., 14 All., 513 (518).

(5) *Sheo Charan* v. *Lali*, I.L.R., 18 All., 371.

pledgee to sell the pledged property, undertaking to make good any difference between the proceeds and the amount of the loan, it was held that the cause of action in respect of the whole of the debt accrued, not when the securities were sold, and the deficiency ascertained, but when the debt was repayable. In such a case the promise to pay the deficiency does not create a new obligation to pay; it only applies the old obligation to a reduced sum.(1) As Herschell, L. C., observed: "The second clause of the document did not create a new debt, but only prescribed what should be done in the event of realization."(2) In short, the right of realization does not give a separate and independent cause of action. This view is in harmony with the Indian law.(3) So, where the mortgagor covenanted that, "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally, and from their other property," it was held that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage-debt, but that the cause of action for both the remedies was one and the same, and accrued when the covenant to pay was broken.(4) The time to be looked at in considering whether the balance sought to be recovered is legally recoverable from the mortgagor is then the date of the institution of the suit, and not that of the making of the application. (5) In determining the question of limitation, the personal remedy provided in the mortgage may become barred, although the other remedy may still be open to the mortgagee. And this is possible even though the two remedies may be separately undertaken, but since the debt is one and the same, the personal liability of the debtor co-exists with the liability of the property. Thus, in a case where the bond provided for the payment of the amount of the mortgage-debt, immoveable property mentioned therein being given as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally, and from their other property;" it was held that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage-debt, but that the cause of action for both remedies was one and the same, and accrued when the covenant to pay was broken. Hence, the suit for sale of the mortgaged property having been brought more than ten years after the date of the mortgage, the balance due upon the mortgage was not legally recoverable otherwise than out of the property sold, and an application for a decree under the rule was not maintainable. (6) A similar view was also taken at Calcutta. And so in an English case, (7) it was said that the debt being one, and one debt only, the different modes in which it could be realized did not create separate causes of action. As observed by Herschell, L.C.: "I cannot say that that right of realization gave

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(1) *Per* Lindley, L. J., in *McDermott* v. *McHenry* (Baker's claim), [1894] 3 Ch., 290 (295).

(2) *Ibid.*, p. 293.

(3) *Chattar Mal* v. *Thakuri*, I. L. R., 20 All., 512; *Miller* v. *Runga Nath*, I. L. R., 12 Cal., 389.

(4) *Chattar Mal* v. *Thakuri*, I. L. R., 20 All., 512.

(5) *Hamid-ud-din* v. *Kedar Nath*, I. L. R., 20 All., 386; *Bageshri* v. *Muhammad Naqi*, I. L. R., 15 All., 331; *Malia* v. *Nachiappa*, 5 M. L. J. R., 294; *Purna Chandra* v. *Radha Nath*, I. L. R., 33 Cal., 867; *Rahamat* v. *Abdul*, I. L R., 34 Cal., 672.

(6) *Chattar Mal* v. *Thakuri*, I. L. R., 20 All., 512.

(7) *Miller* v. *Runga Nath*, I. L. R., 12 Cal., 389.

a separate and independent cause of action, so that the statutory period did not begin to run until that date."(1)

(2) Period of Limitation.

2374. The period for the recovery of the mortgage-debt from the person of the mortgagor is six years.(2) But, in a Full Bench ruling of the Bombay High Court, Article 132, Schedule II of the Limitation Act has been held to apply,(3) but, in view of the decision of the Privy Council in a subsequent case, (4) the Bombay decision must be regarded as no longer authoritative. Every mortgage does not in India imply a personal liability, although on the point the Allahabad High Court has, following the English law, held otherwise. (5) But the English law is clearly departed from in section 68, and the majority of rulings are opposed to the view taken at Allahabad, (6) which has been discountenanced even by the Privy Council.(7)

2375. It has been held in Allahabad (3) and Madras (8) that an application under this section is subject to the limitation prescribed in Article 178 (now Art. 181) of the Limitation Act; (9) but in certain other cases Article 179 (now Art. 182), and not Article 178, was held applicable.(10) In the view of the Calcutta High Court, Article 178 only refers to applications made under the Code of Civil Procedure, and it has no reference to an application made under this section.(11) Apparently, according to this view, if the application for personal recovery would have been within time at date of the institution of the suit, there is then no question of limitation.

Does S. 48, C.P.C. apply ?

2376. A decree passed under this rule or rule 4 is not subject to the restrictive prohibition of section 48 of the Code of Civil Procedure.(12) But this view was not accepted in a recent case decided in Calcutta where the contrary was laid down. (13) But this precedent appears to be clearly inconsistent with the new definition of "decree" under which an application under this rule is in continuation of the suit and not in execution of any decree to which alone is section 48 confined (§ 2358). According to the Calcutta High Court, a combined decree partakes of a double character. It is a mortgage-decree in so far as it orders sale of the mortgaged property, and a personal decree in that it allows sales of other property in the

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(1) In re *Baker's claim*, (1894) 3 Ch., 290 (293).

(2) *Miller* v. *Runga Nath*, I L.R., 12 Cal., 299; *Ramdin* v. *Kalka Pershad*, I. L. R., 7 All., 502, P.C.

(3) *Lallubhai* v. *Naran*, (1882) I. L. R., 6 Bom. 719, F. B.

(4) *Ramadin* v. *Kalka Prasad*, (1884) I. L. R., 7 All., 502, P. C.

(5) *Musaheb Zaman Khan* v. *Inayat-ul-lah* I. L. R., 14 All, 513 (549); following *Sutton* v. *Sutton*, 22 Ch. D., 515, §§ 1290—1295.

(6) See s. 68 Comm.

(7) *Balkishen* v. *Legge*, I. L. R., 22 All., 149, P. C. ["It is not necessary in a mortgage by conditional sale '*Kutkubala* or *bye-bil-wufa*' that the mortgagor should make himself personally liable for the repayment of the loan.—*Ib.*, p. 159.]

(8) *Durga* v. *Bhagwant*, I. L. R., 13 All., 356; *Musaheb Zaman Khan* v *Inayat ul lah*, I.L.R., 14 All.,513 (516); *Ram Sarup* v. *Ghaurani*, I. L. R., 21 All., 453; *Azi Ahmad* v. *Nazir an*, I. L. R., 24 All., 542; *Rahamat* v. *Abdul*, I. L. R., 34 Cal., 672.

(9) *Rama* v. *Shanmugam*, (1913) M.W.N. 867; 21 I. C. 530.

(10) *Chunnilal* v. *Harnam Das*, I. L. R., 20 All., 203; *Parmeshri Lal* v. *Mohan*, I.L.R., 20 All., 357.

(11) *Purna Chandra* v. *Radha Nath*, I. L. R., 33 Cal., 867; *Rahamat* v. *Abdul*, I.L.R., 34 Cal., 672; following *Tiluk Singh* v. *Parsotein*, I. L. R., 22 Cal., 924.

(12) *Kartick Nath* v. *Juggernath*, I. L. R., 27 Cal., 285; following *Ram Charan* v. *Sheobarat*, I.L.R., 16 All., 418; *Fasil* v. *Krishna*, I. L. R., 25 Cal., 580; dissenting from *Kommachi* v. *Pakker*, I. L. R., 20 Mad., 107; *Jadu Nath* v. *Jagmohun*, I. L. R., 25 All., 541.

(13) *Chandi Charan* v. *Ambika Charan*, I. L. R., 31 Cal., 792; *Jnanendranath* v. *Khulna*, 18 C.W.N. 492; 24 I. C. 35.

event of the mortgaged property failing to realize the decretal amount. So far then, as it is a money-decree it will be subject to the twelve years' limitation prescribed in section 230 (now s. 48) of the Civil Procedure Code, and such limitation will commence to run at the latest from the date of the order for attachment and sale of the other property.(1) In view of the Calcutta High Court the plaintiff cannot emancipate his decree from the operation of limitation prescribed in section 230 by getting the money-decree incorporated in the mortgage-decree. On this point the Allahabad Court hold differently on the ground that a composite decree combining the reliefs allowed under this section and section 88, is not a decree for "payment of money" so as to be subject to the twelve years' rule under section 230 of the Code. (2) The Allahabad Court were evidently influenced by the *stare decisis*, for it is otherwise difficult to see why a money-decree should lose its identity by being made part of a mortgage-decree. According to the view prevailing in Allahabad a composite decree under section 88 and this section, would be subject to the limitation prescribed in Article 179 (now Art. 182) of the Limitation Act. Hence where the decree was passed on the 2nd December 1885, and on the 29th November 1897, the decree-holder applied for sale of the non-mortgaged property, but this application was dismissed on the ground that he had not then exhausted the mortgaged property, his subsequent application for the same relief made on the 26th August 1901 was rejected as time-barred, the Court holding his penultimate application not made "in accordance with law" to extend limitation, inasmuch as it was not an application to do something which by law the Court was competent to do.(3) But it is submitted that this view assumes that the executing Court was *incompetent* to order sale of non-hypothecated property so long as some of the hypothecated property remained unsold, but this is not the trend of opinion of the Courts, not for that matter, would that fact alone bar the right of the decree-holder to resort to the exceptional provisions of this rule.

But a simple attaching creditor cannot bring a suit against a person attaching property in execution of a decree passed under this rule, to obtain a declaration that the property was not saleable under the latter's decree inasmuch he had obtained the decree without first exhausting the mortgaged property. But it would seem that the same pleas may be inquired into in a suit to set aside the decree. But a judgment-creditor cannot successfully assail such a decree *merely* on the ground that it had been passed erroneously.(4)

2377. Costs may be so recovered.—Formerly, the only amount recoverable under this rule was the "amount due on the mortgage," and which, of course, meant the principal and interest secured by the mortgage. But did it also include the costs awarded in the suit? On this point the Allahabad High Court had decided that the costs awarded could not be considered as forming part of the money due upon the mortgage, (5) and if so, it followed

(1) *Chandi Charan* v. *Ambika Charan*, I. L.R., 31 Cal., 792 (795, 796); distinguishing *Fasil* v. *Krishna*, I. L. R., 25 Cal., 580, in which the point above raised was not mooted. In *Kartick Nath* v. *Jaggernath* (I. L. R., 27 Cal., 285), the decree was only nine years old at the time of execution.

(2) *Ram Charan* v. *Sheobarat*, I. L. R., 16 All., 418; *Jogul Kishore* v. *Cheda Lal*, (1893) A. W. N., 184; *Jadu Nath* v. *Jagmohun*, I. L. R., 25 All., 541 (543).

(3) *Munawar Hussain* v. *Jani Bijai*, I. L. R., 27 All. 619.

(4) *Lachmindayal* v. *Harduni Lal*, Unrep. All., S. A., No. 732 of 1902; cf. *Moti Lal* v. *Karrabuldin*, I. L. R., 25 Cal., 179 (185), P.C.

(5) *Damodar* v. *Budhkuar*, I. L. R., 10 All., 179; *Ram Lal* v. *Silchand*, I. L. R., 23 All., 439; dissented from in *Kushal Singh* v. *Shrinivas Rao*, 2 C. P. L. R., 94; *Mukundlal* v. *Seth Mangaljeet*, 12 C. P. L. R., 78 (81).

that they could not be recovered under the section. But this view appears to have been subsequently abandoned, for it was subsequently held by the majority of the Full Bench that a decree drawn up strictly in accordance with the provisions of rule 4 could not direct the costs of the suit to be recovered otherwise than out of the mortgaged property. It then follows that under a decree so framed, the costs adjudged must be regarded as forming a portion of the mortgage-money. And this view is in consonance with that taken by the Calcutta High Court which has maintained that while the Court has no doubt power under section 220 of the Code of Civil Procedure to give the costs against the mortgagor personally, yet it by no means follows that this is to be presumed in every case: the question is essentially one of the construction of the decree, which should adjudge how the costs are to be recovered. Thus in a Calcutta case where the decree ran thus: "It is ordered that the defendant shall pay to the plaintiffs the sum of Rs. 2,550 claimed and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree.....If the defendant do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiff;" it was held that reading the decree as a whole both sums of money were payable by the judgment-debtor, and that, therefore, the decree-holders were entitled to their costs of the suit from him personally, or from his properties other than those mortgaged.(1) But in a case where a decree in addition to the usual clauses contained a clause to the following effect—"it is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court," it was held that the words were not by themselves sufficient to create a personal liability.(2)

There can be no doubt that the term "amount due on the mortgage" was intended to also the costs awarded by or incurred after the decree.(3) This was clear from the language used in section 92, paragraph 1 (now r. 7), and section 94 (now r. 10). And indeed an express provision has been made to that effect in section 86 (r. 2). But all the same the clause was not commendable for its perspicacity and its present substitute "the amount due to the plaintiff" is an improvement made to enable the plaintiff to apply for the recovery of not only the balance of the mortgage-money, but also the interest and costs decreed in the mortgage-suit.

2378. Does the Section extend also to Charges.—The question whether the provisions of this rule apply also to charges defined in section 100 is one upon which the Judges are divided. According to Banerji, J., the section is wide enough to include also charges, in view of the provisions of section 100, which confer on a charge-holder the same remedies as are open to a mortgagee. But this view was combated by Richards, J., on the ground that a charge does not necessarily carry with it a personal liability which is the foundation of a proceeding under this section.(4)

Succession certificate.

2379. Whatever may be the view of a claim arising out of a mortgage and enforced by foreclosure or sale of the mortgaged property, there can be no doubt, but that the amount recoverable under this section is a debt within the meaning

(1) *Rutnessur* v. *Jusoda*, I. L. R., 14 Cal., 185.

(2) *Maqbul Fatima* v. *Lalta Prasad*, (1898) I. L. R., 20 All., 523, F. B.; *Chiranji* v. *Moti Ram*, (1898) A. W. N., 93, overruled.

(3) *Ganesh* v. *Sidhakaran*, 13 C. P. L. R., 74.

(4) *Uslam Ishlok* v. *Palman*, 2 A. L. J. 370 (385).

of the Succession Certificate Act, and for the recovery of which a succession certificate is necessary.(1) So it has been held that a Hindu son applying for a supplementary decree under this rule on the death of his father is bound to produce a succession certificate, as on exhaustion of the mortgagee's property his right for personal recovery amounts to a "debt" within the meaning of section 4 of the Succession Certificate Act.(2)

2380. Order when set aside.—The last Code of Civil Procedure contained no provision for setting aside an erroneous decree passed under this section. But it was held that the Court possessed inherent jurisdiction to set aside an *ex parte* decree passed under this section.(3) The present Code adopts this view by expressly saving without defining such inherent powers of the Court to prevent abuse and promote justice.(4)

2381. Appeal.—A decree passed under this rule though "supplementary" is nevertheless a decree within the meaning of the Code and is therefore appealable. (5)

2382. Court-Fee.—A decree under this rule being, as it is designated, merely supplementary to that passed under rule 5, and in the nature of execution (§§2358, 2376) may be obtained on an application; But an appeal therefore must it is said, be stamped with an *ad valorem*-court fee; (6) But the Court Fees Act contains no express direction for such payment.

Preliminary decree in redemption-suit.

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

(*a*) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any), awarded to him on the day next hereinafter referred to, or,

(*b*) declaring the amount so due at the date of such decree, and directing—

(*c*) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the property; but

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(1) *Sahadev* v. *Sakhawat Hossain*, 7 C. L. J., 658.
(2) *Ib.*
(3) *Bibi Tashman* v. *Hari Satya Bhushan*, I. L. R., 32 Cal., 253, F. B.; *Abdul Sattar* v. *Satya Bhushan*, I. L. R., 35 Cal., 767.
(4) S. 151, C. P. C. (Act V of 1908).
(5) *Lakhi Narain* v. *Chowdhury*, 18 C. L. J., 133, 19 I. C., 971.
(6) *Lakhi Narain* v. *Chowdhury*, 18 C. L. J., 133; 19 I. C., 971.

(*d*) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary, be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

2383. Analogous Law.—The form of plaint in a redemption-suit is prescribed in Appendix A, Form 46 of the Civil Procedure Code. The first paragraph of the rule closely corresponds with the first paragraph of rule 2, and the second paragraphs of the two sections are also correspondingly correlated to each other. The last paragraph provides for foreclosure or sale on the failure of the mortgagor in redeeming the property within the time allowed.

This section would appear to modify the pre-existing procedure which enjoined on the Court the necessity of making up accounts to ascertain if anything at all was due for which alone the decree was passed.(1) The taking of this account may now be postponed until after the passing of the preliminary decree. The form here prescribed is taken from the English law.(2) It may have, however, to be varied if the right to redeem is disputed, or there are several competing incumbrancers claiming redemption, in which case the decree may affirm that right, and may, moreover, declare their respective priorities and give directions whether the accounts are to be taken with or without rests, and how the payments are to be appropriated.(3)

The decree here prescribed is inapplicable to the summary remedy contemplated in section 60. The subjects here touched have been, however, in a great measure anticipated in discussions under that section (§§ 1380-1396) to which the following commentary should be read as only supplementary.

2384. The decree for redemption here prescribed does not confer on the mortgagor the same powers which he possesses in England, who may now not only sue for redemption, but may, if he chooses, sue only for sale of the property, or for sale or redemption in the alternative.(4) But these reliefs are not open to the mortgagor in India.

English Law.

2385. Principle.—As rules 3 and 5 prescribe the forms of decrees in case where the mortgagee institutes his suit upon the mortgage, so does this rule prescribe the corresponding form of decree in a case where the mortgagor sues to redeem the property. It might have been thought that the mortgagor being presumably ready to redeem ought not to be given any time of grace for redemption, but it has been considered equitable to allow him in the first instance the same time, as he would have obtained in the mortgagee's suit against him. If, however, the mortgagor fails to redeem within the initial period allowed, he has no right to obtain an enlargement, since the considerations which apply to the mortgagor-defendant who is forced to redeem or forego his equity under rule 3, do not apply to the mortgagor who comes in to pay off the mortgagee. But, of course, the Courts are empowered to enlarge time in the same way as under that rule.

2386. Meaning of Words.—"*Account be taken*," as under rule 2. "*For the mortgage-money*," this means the same thing as for "principal and

(1) *Muthra Doss* v. *Magh Singh*, 2 N.W.P. H. C. R., 207, which is cited in the Bill against the section.

(2) Seton, § 1593.

(3) *Thorneycroft* v. *Crockett*, 2 H.L.C., 239 (245, 246, *cf. ib.*, p. 254).

(4) Conveyancing Act, 1881 (44 & 45 Vict., c. 41, s. 25).

interest on the mortgage" as under rule 2. The distinction is only a variation in the phraseology, but without any difference. "*Property*," in the last paragraph, was in s. 92 held to mean the *mortgaged* property, (1) and it has been now so expressed.

2387. Nature of a Suit for Redemption.—In all cases of mortgage the mortgagor is entitled to redeem. But he may proceed either under this rule, or adopt the summary procedure prescribed in section 60. If he adopts the latter course, he is not, however, entitled to more than "an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished" (2) He cannot recover possession, and must, therefore, obtain a decree under this rule, if he is out of it. In a suit instituted under the last rule the mortgagor is entitled to redeem, and in default the Court may, according to the last paragraph of this rule, order—(*i*) If the mortgage is a mortgage by conditional sale,—foreclosure; (*ii*) If the mortgage is an English mortgage,—either foreclosure or sale; (*iii*) If the mortgage is a simple, or an usufructuary mortgage,—sale.

2388. The plaintiff should file with his plaint a copy of the mortgage-deed sought to be redeemed, failing which he must call upon the defendant to produce the original, and if necessary, to prove it by secondary evidence. He must not imperil his suit by assuming the existence of a valid mortgage which may not have been admitted or validly proved. (3) It must, moreover, be shown to be redeemable.(4) As the mortgage-deed is, ordinarily, in possession of the mortgagee, the plaintiff can always prove it by secondary evidence, and no notice for its production appears to be legally necessary to the defendant-mortgagee. (5) It is both necessary as well as in the interest of the mortgagee to produce his deed if he relies upon it for the enhancement of his claim.(6) The mortgagor was allowed to recover his land without any payment in a case in which the mortgagee had destroyed the deed to deprive the mortgagor of his equity of redemption. (7) The plaintiff suing to redeem one mortgage cannot be permitted to redeem another mortgage admitted by the defendant.(8)

Where on the death of the sole plaintiff two rival persons appeared as his legal representatives claiming the right to redeem, and the Court decided in favour of one of them, the High Court condemned the procedure with reference to the old Code, (9) which has, however, been now legalized by the new Code.(10)

2389. As has been remarked before (§ 1380), in a redemption-suit, it lies on the plaintiff to prove his title, for which purpose, however, very slight *prima facie* evidence would be required. (11) But where the plaintiff alleged that his ancestor forty-four years ago made a mortgage to the ancestor of the present possessor of the property, and by virtue thereof he seeks to dispossess the present possessor, he is bound to prove his case clearly and indefeasibly. (12) It

(1) *Kanti Ram* v. *Kutubuddin*, I.L.R., 22 Cal., 38 (40).
(2) S. 60, and §§ 941, 942.
(3) *Sheobarakh* v. *Sheobhikh*, (1882) A.W. N., 131.
(4) *Kayastha &c. Trust* v. *Shankar*, 11 O.C. 285; *Zingari* v. *Bhagwan Singh*, (1889) A. W.N., 187.
(5) Ss. 65 (*a*), 66 (2), Indian Evidence Act; *Sahai* v. *Sheo Das*, (1888) A.W.N., 147.
(6) *Sheo Sahai* v. *Sidh Gopal*, (1881) A.W. N., 92.
(7) *Shek Abdulla* v. *Shek Muhammad*, 1 B.H.C R., 177.
(8) *Krishna* v. *Rangasawmi*, I. L. R., 18 Mad., 462; *Sheo Prasad* v. *Lalit Kuar*, I L.R., 18 All. 403.
(9) S. 367; *Vithu* v. *Bhima*, I. L. R., 15 Bom., 145.
(10) O. 22, r. 5.
(11) *Bala* v. *Shiva*, I.L.R., 27 Bom., 271.
(12) *Sevaji* v. *Chinna*, 10 M.I.A., 180.

seems that a person originally with a perfect title will be permitted to redeem if a perfect title is established at the hearing. (1) But if the right to redeem is in a third person, a mere disclaimer by him of all interest, will not entitle the plaintiff to proceed with the suit. (2) So the mortgage the plaintiff has to establish is a specific mortgage, though if the defendant admits a mortgage of a different date, redemption may be allowed on the footing of that mortgage. (3) But in Bombay it has been held that the mortgagor is only bound to prove that the defendant is his mortgagee, and that the plaintiff is not bound to prove a specific mortgage, but only that his property was held by the defendant as a mortgagee. (4) Where the plaintiff sued to redeem an unregistered mortgage executed in consolidation of two prior mortgages, but the unregistered mortgage being found to be inoperative owing to its non-registration, the Court allowed redemption of the two prior mortgages, which revived at least for the purpose of showing that the defendant's possession was that of the mortgagee of the plaintiff-mortgagor. (5) A suit on the second mortgage incorporating the first mortgage does not apart from abandonment, necessarily have the effect of destroying the earlier security. (6) But if it is not referred to in the pleadings or issues, it cannot be made the basis of redemption if the suit on the specific mortgage fails. This view is, however in conflict with another case of the same Court where it has been held that if the plaintiff sues on one mortgage, and the defendant denies that mortgage, but confesses to another mortgage, the Court would be justified in decreeing redemption on the basis of the admitted mortgage. (7) So in taking accounts in a non-possessory mortgage, it is for the mortgagor to prove how much of the debt and interest has been repaid. (8) But where the mortgagee is in possession, the burden of proof is upon him, for it was his duty to keep a full, true and accurate account of the actual receipt and disbursements. (9) In taking accounts between a mortgagor and mortgagee, the Court must decide as to the accuracy or otherwise of the accounts presented to him by the parties, and it is upon these accounts and the evidence before it in the case that he must find the amount payable on redemption.

Claim for over-payments.

2390. It would appear that in a suit for redemption the mortgagor is bound to claim any surplus profits in the hands of the mortgagee, and if he omits to do so, he cannot recover them in a separate suit, (10) and a *fortiori* he cannot sue again, for recovery of over-payments, if he claimed them in the redemption suit, but as to which the Court made no order. (11) In such a case his only remedy would appear to be in an appeal from, or an application for review of the decree. In any case he cannot maintain a separate suit for recovery of such surplus profits, for it is the policy of law that in a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagee

(1) *Pearce* v. *Morris*, L.R., 5 Ch., 227; *Krishnaji* v. *Ganesh*, I.L.R., 6 Bom., 139.

(2) *Cattey* v. *Simpson*, 33 Beav., 551.

(3) *Unicha* v. *Valia*, 4 M.H.C.R., 359; *Uninan* v. *Rama*, I.L.R., 8 Mad., 415.

(4) *Bala* v. *Shiva*, I.L.R., 27 Bom., 271 (276).

(5) *Arumugum* v. *Periasami*, I.L.R., 19 Mad., 160; *Kunhi* v. *Kutty*, 4 M.H.C.R., 359; *Unnian* v. *Rama*, I.L.R., 8 Mad., 415.

(6) *Shankar* v. *Mejo Mal*, I.L.R., 23 All., 318 (323), P.C.

(7) *Kundanmal* v. *Kashibai*, I.L.R., 26 Bom., 368 (372).

(8) S. 76 (c) *Kundanmal* v. *Kashibai*, I.L.R., 26 Bom., 368 (372).

(9) *Baloji* v. *Tamangouda*, 6 B.H.C.R., 97; *Haji Hasan* v. *Mancharam*, I.L.R., 3 Bom., 137; *Shivalingaya* v. *Nagalingaya*, I.L.R., 4 Bom., 247; *Kachu* v. *Lakshamansing*, I.L.R., 25 Bom., 115 (123, 124).

(10) *Kachu* v. *Lakshmansing*, I.L.R., 25 Bom., 15; *Vinayak* v. *Daltrya*, I.L.R., 26 Bom., 661; *Kashi* v. *Bajrang Prasad*, I.L.R., 30 All., 36; *Ram Din* v. *Bhup Singh*, I.L.R., 30 All., 225.

(11) *Juggernath* v. *Shah Mahomed*, 2 I.A., 48.

and mortgagor up to the time of actual redemption or sale, as the case may be, consequently, if the mortgagor omits to claim surplus profits or they are somehow not decreed, his only remedy lies in appeal and not in a separate suit.(1)

The Court may refuse to direct an account of profits received before the institution of the suit as against purchasers for value without notice of any imperfection in their title, especially if the mortgagor is guilty of great laches and the suit is not in proper form.(2)

Redemption suit by a co-mortgagor.

2391. A mortgagor suing his co-mortgagor who has redeemed the entire mortgage for redemption, has merely to prove that a mortgage was made by him and the defendant, or those whom they represent within sixty years, that the defendant or those represented by him redeemed it and that the plaintiff is willing to pay his proportionate share of the redemption money commensurate with his interest, and reasonable interest from the date of redemption.(3)

2392. Apportionment of Debt.—On the other hand, where the mortgagee is not prepared to re-deliver the whole of the mortgaged property, the mortgagor is entitled to redeem on payment only of a proportionate share of the mortgage-debt. Such a case may arise where the mortgagee has since his mortgage acquired the equity of redemption in a portion of the mortgaged property. Where *A* purchased certain properties at two mortgage sales, and *B* purchased a portion of the same properties at a prior mortgage-sale, neither of them being a party to the decrees in which the other was a purchaser, it was held that *A* purchased the mortgagee's rights and the equity of redemption in the remainder of the property not covered by *B*'s decree, who was entitled to redeem *A* by paying off the proportionate amount of *A*'s mortgages due on the property purchased by him, failing which *A* would be entitled to pay off *B* by depositing into Court the amount for which *B* had purchased the property.(4) In a simpler case, where the mortgagee purchases a portion of the mortgaged property, the right of the mortgagor is to redeem the remainder by paying off a proportionate amount of the debt.(5) But this right is conditioned on the mortgagee's refusal to part with the property in which he has acquired an absolute interest.(6) It is only then that the mortgagor may redeem the residue by paying a proportionate amount of the debt, and which he is bound to pay.(7) If this view be correct, the purchase of a portion of the mortgaged property by the mortgagee would have the effect of whittling down to that extent the mortgagor's right of redemption. In other words, the weapon of destruction of the indivisibility of a mortgage is in the hands of the mortgagee. This is undoubtedly the effect of the Madras cases(8) which have, however, been dissented from in Allahabad,(9) where, however, the question

(1) *Ram Din* v. *Bhup Singh*, I.L.R., 39 All., 225.

(2) *Dina Nath* v. *Lachmi Narain*, I.L.R., 25 All., 446; *Shib Lal* v. *Bhawani Shankar*, I.L.R., 26 All., 72; *Anandrao* v. *Keshavrao*, (1889), B.P.J., 170.

(3) *Rani* v. *Amir Baksh*, (1898) A. W. N. 39.

(4) *Sheo Pershad* v. *Tiluk Singh*, 5 C.W. N., 232.

(5) *Rammoy* v. *Premchand*, 5 C.W.N. 423; *Wahid-un-nessa* v. *Gobardhan*, I.L.R., 22 All., 452; *Ahmed* v. *Jowahir Singh*, (1864) N.W.W P.S.D.A. 425.

(6) *Azimut Ali* v. *Jowahir Singh*, 13 M.I. A., 415.

(7) *Azimut Ali* v. *Jowahir Singh*, 13 M. I. A., 415; *Ariyaputri* v. *Alamlu*, I.L.R., 11 Mad., 304; *Kuray Mal* v. *Puran Mal*, I. L. R., 2 All., 565.

(8) *Marana* v. *Pendyala*, I.L.R., 3 Mad., 230; *Subramanyan* v. *Mandayan*, I.L.R., 9 Mad., 453, dissented from in *Lachmi* v. *Mhd. Yusuf*, I.L.R., 17 All., 63; *contra* in *Huthasanan* v. *Parameshwaran*, I.L.R., 22 Mad., 209.

(9) *Lachmi* v. *Mhd. Yusuf*, I.L.R., 17 All., 63.

to be decided was not identical. The dissenting note struck by the Bombay Court is similarly susceptible of an explanation. For there the question was complicated by the fact of the mortgagors having been Hindu co-parceners. And the Court, therefore, rightly held that since the only right which the purchaser at a court-sale of the share of a co-parcener in a Hindu family, ordinarily acquires is the right to demand that share by a suit for partition, the fact that the purchaser is also a mortgagee could not confer upon him any larger title, by releasing him from the necessity of suing for partition and imposing it on the members of the family.(1)

2393. In this view the mortgagee is bound to restore the entire security, it being then open to him in another suit to establish any rights he may have acquired by purchase.(2) This view would be intelligible did it take note of the fact that by his purchase, the mortgagee not only acquires the right of partition but also the right to redeem—a right inherent in all holders of the equity of redemption. No doubt in the case of Hindu co-parceners the subject depends upon what rights each co-parcener possesses as regards redemption of the joint property. Now it is conceded in Bombay that an individual co-parcener is competent to redeem the whole property ; (3) if so, why should the mortgagee *qua* purchaser possess less rights than the other co-parceners? This objection is met in Madras by holding that in such a case the right of redemption would be suspended until the shares of the co-owners are ascertained in a proper suit for partition. (4) Both the Courts, however, agree that any purchase by the mortgagee *post litem motam*, calculated to defeat the plaintiff's right to redeem would be so far as regards that right ineffectual.(5)

2394. Divesting the question, however, of the peculiar incidents of a Hindu co-parcenership, it may be asked whether the mortgagor can insist upon the mortgagee to restore the whole security, despite his purchase of a portion of the mortgaged property comprised therein. There is no reason and equity why the mortgagee should be compelled to do so. Indeed, any other course would lead to a circuity of action and sacrifice of reason to formulæ. Indeed, the broad principle laid down by the Privy Council is nowhere disputed, but it is sought to limit its operation to cases where the mortgagors are owners of distinct parcels comprised in the mortgage, and not sharers in the whole of such property.(6) But this is scarcely a distinguishing feature of the case,(7) and in Allahabad no such distinction is recognized.(8)

2395. It should, however, be noted that the English law is in this respect divergent, for there the recognized rule compels the mortgagor to redeem the whole, unless there is a special bargain.(9) But a person having only a partial

(1) *Bhikaji* v. *Lakshman*, I.L.R., 15 Bom. 27, *note*; *Santaji* v. *Bayaji*, (1876) B. P. J., 17 ; *Alikhan* v. *Mahamad Khan*, (1881) B.P. J., 319 ; *Narayan* v. *Ganpat*, I. L. R., 21 Bom., 619.

(2) *Santaji* v. *Bayaji*, (1876) B. P. J., 17 ; *Alikhan* v. *Mahamad Khan*, I. L. R., 10 Bom., 658 ; *Bhikaji* v. *Lakshman*, I.L.R., 15 Bom., 27 ; *Narayan* v. *Ganpat*, I. L. R. 21 Bom., 619 (625).

(3) *Bhikaji* v. *Lakshman*, I. L. R., 15 Bom., 27, *note* ; *Mora* v. *Ramchandra*, I. L. R., 15 Bom., 24.

(4) *Marakar* v. *Punjapatalli*, I. L. R., 6 Mad., 61 ; *Thillai* v. *Ramanatha*, I.L.R. 20 Mad., 295.

(5) *Thillai* v. *Ramanatha*, I.L.R., 20 Mad., 295 (299) ; explaining *Narohari* v. *Vithal Bhat*, I. L. R., 10 Bom., 648.

(6) *Shakeram* v. *Gopal*, I. L. R., 10 Bom. 656 ; *Alikhan* v. *Mahamad Khan*, I. L. R., 10 Bom., 658, *note*.

(7) *Azimut Ali* v. *Jowahir Singh*, 13 M. I. A., 404 (415).

(8) *Kuray Mal* v. *Puran Mal*, I. L. R., 2 All., 565 ; *Biseshur* v. *Ram Sarup*, I.L.R., 22 All., 284 ; *Dina Nath* v. *Lachmi Narayan*, I. L. R., 25 All., 446 ; *Shib Lal* v. *Bhawani*, I. L. R., 26 All., 72.

(9) *Hall* v. *Heward*, 32 Ch.D., 430 ; *Charter* v. *Watson*, [1899] 1 Ch., 175.

interest in the equity of redemption is entitled to redeem the whole property, leaving open the rights of the other co-owners to be adjusted afterwards.(1) This view has been accepted in a Madras case, but without reference to the trend of its earlier decisions.

2396. Mode of Accounting.—Generally speaking the account under this section is to be taken in the same way as an account under rules 2 and 4, and if upon the taking of accounts it appears that the mortgage has already been paid off, the mortgagor is entitled to immediate redemption. The account, if not complicated, may be taken during trial, otherwise it may be ordered to be taken in execution.(2) And any claim to mesne profits, accruing due after the institution of the redemption-suit, which the mortgagor may make, may either be inquired into in the same suit or the mortgagor may institute another suit within three years from the time he re-enters on the mortgaged property.(3) But where the mortgagor had made a proper tender which was improperly refused by the mortgagee, and the mortgagor sued him for redemption, and afterwards instituted another suit for compensation for wrongful detention of his property between the dates of the tender and delivery of possession, it was held that since the claim for compensation might and ought to have been set up in the redemption-suit, and the mortgagee might and ought to have been called upon to account for the profits which he had received up to the date fixed in the redemption-decree a separate suit was barred by the rule of *res judicata*.(4) Where the accounts of usufruct are impossible, the Court usually sets off interest against profits holding them equal,(5) unless they are shown to be otherwise. In one case where the usufructuary mortgagee omitted to take possession of the mortgaged premises for three years, and the mortgage-deed did not provide for the payment of interest, it was held that he was not entitled to charge interest for the period of his non-occupation.(6) But where in a mortgage-deed there was a distinct undertaking on the part of the mortgagor, to pay any amount on account of interest which was not recoverable out of the profits of the property, and the mortgagor failed to deliver possession of the property to the mortgagee, the latter was held entitled to refuse redemption until payment of the whole of the interest due during such period.(7) The price of redemption and of foreclosure is the same and the amount for which the mortgagee could foreclose, is what must be paid by the mortgagor for redemption.(8) In making accounts, the mortgagee is entitled to set up any equity he may have to urge against the mortgagor; his assignee being equally bound by covenants entered into the mortgage-deed if he is shown to have had notice of them. So where the covenant was that the mortgagor should not redeem without paying off all arrears of rent, the assignee was held bound by the covenant as he had notice of the mortgagee.(9) The mortgagor is entitled to set-off against the mortgaged money any amount to

(1) *Pearce* v. *Morris*, L. R., 5 Ch., 227, approved *per* Cotton, Lindley & Lopez, LL. J., in *Hall* v. *Heward*, 32 Ch. D., 430 (435, 436, 427); followed in *Konna* v. *Karunakara*, I. L. R., 16 Mad., 328 (332); *Muthasanan* v. *Parameswaran*, I. L. R., 22 Mad., 209.

(2) *Gour Kishen Singh* v. *Sahay Fukeer*, 7 W.R., 364; *Hurro Durga* v. *Surat Sundari*, I.L.R., 8 Cal., 332, P.C.; *Nellaya* v. *Vadakipat*, I.L.R., 3 Mad., 382; *Jamal* v. *Mahomedbhai*, (1874) B.P.J. 7; *Vithu* v. *Bala*, (1893) B.P.J., 426.

(3) Art. 105, Schedule II, Limitation Act (XV of 1877).

(4) *Cf.* ss. 76 and 84; *Satyabadi* v. *Harabati*, I.L.R., 34 Cal., 223; distinguishing *Gourkishen* v. *Sahay*, 7 W.R., 364 (as a case under the regulations) and *Kachu* v. *Lakshman*, I.L.R., 25 Bom., 115 (as not opposed to the view).

(5) *Pancham* v. *Ramudit*, 10 I. C. 7.

(6) *Bansidhar* v. *Hadi Ali*, (1889) A.W.N. 177.

(7) *Phul Chand* v. *Sandilands*, 10 O.C., 29.

(8) *Du Vigner* v. *Lee*, 2 Hare, 326.

(9) *Krishnaji* v. *Ganesh*, (1893) B.P.J., 593.

which he may be entitled.(1) *Malikana* payable to him by the mortgagee in possession may be so recovered.(2) This right of set-off may be claimed by the mortgagor's surety who may claim benefit of any sum due to the mortgagor.(3) An account once made cannot be re-opened for mere omissions or mistakes, but the mortgagor may in a proper case being made out, surcharge or falsify it. "If any of the parties can show an omission for which credit ought to be given, that is a surcharge; or, if anything is inserted that is a wrong charge, he is at liberty to show it, and that is falsification."(4) But nothing short of fraud or error clearly proved entitles a party to re-open an account once closed, and where an account has long been settled, nothing short of actual fraud will enable a party to re-open it,—the fact that the parties stood to each other in a fiduciary relation being insufficient.(5) But in the case of persons so related, accounts however old will be re-opened if it appears that they contained improper charges and that signature to them had been obtained without explanation and independent advice.(6) In a case between solicitor and client an account signed thirty-six years previously was so re-opened.(7)

The mortgagee may tack further advances if made on the security of the mortgaged property.(8) He may, moreover, add such costs, charges and expenses as he is entitled to add to the mortgage-money.(9)

2397. Accounts may be ordered to be taken with annual or biennial rests if the rents and profits from the property in possession of the mortgagee materially exceed the interest due on the mortgage, and which may be ordered to be applied in the reduction of the principal.(10) Where accounts are directed to be taken with rests, the decree should contain a clause to the following effect: "Where accounts are taken with rests, the practice is to make rest as soon as there is the first surplus, and then to make annual rests as from that time." Thus, for example, if the mortgagee has received any sum in excess of the rents and profits, say in February, the first rest should be made in February, and thereafter annually in that month, though the mortgage-deed was executed in July.(11) It should be added that payment with rests is really payment of the mortgage-money piece-meal, and that it is not to be ordered as a matter of course, unless the annual surplus is considerable(12) or there is some other compensating advantage to the mortgagee, or the conduct of the mortgagee renders that course justifiable.

Accounts against other mortgagees.

2398. In a suit for the redemption of property which has been sub-mortgaged by the mortgagee, in which suit the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of the sub-mortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee and on payment of the residue, if any, of what is due to the original mortgagee, both shall reconvey to the mortgagor.(13)

(1) *Dodd* v. *Lyda*, 1 Hare, 333.
(2) *Mhd. Husain* v. *Sheodarshan*, 4 A.L.J. R., 176.
(3) *Bechervaise* v. *Lewis*, L. R., 7 C. P., 372.
(4) *Pitt* v. *Cholmondely*, 2 Ves. Sen., 565.
(5) *Millar* v. *Craig*, 6 Beav., 433; *Gothing* v. *Keighly*, 9 Ch. D., 547; *Eyre* v. *Wynn Mackenzie*, (1894) 1 Ch. 218.
(6) *Ward* v. *Sharp*, (1884) W. N., 5.
(7) *Ib.*
(8) Ss. 79, 80, *ante*.
(9) S. 72, *ante*.
(10) *Thorneycroft* v. *Crockett*, 2 H.L.C., 239; 9 E.R., 1082. (For form of decree in such cases see *ib.*, pp. 245, 246).
(11) *Binnington* v. *Harwood*, T. & R., 477.
(12) *Horlok* v. *Smith*, 1 Coll., 287; *Gould* v. *Tancred*, 2 Atk., 533.
(13) *Narayan* v. *Ganoji*, I.L.R., 15 Bom., 692.

In an action by a second mortgagee to redeem the first mortgagee and to foreclose the mortgagor, the proper form of judgment is, that in default of the plaintiff redeeming the action is to stand dismissed with costs. (1)

When nothing is due.

2399. There is, of course, no necessity to order the taking of accounts where nothing is found to be due to the defendant or where the mortgagee has been overpaid. In such a case the decree should direct immediate delivery of possession (2) to the mortgagor and payment to him of the surplus amount, if any, due from the mortgagee.(3)

2400. Pleadings.—The title the plaintiff has to show in a suit for redemption has already been the subject of reference before (§§ 1380—1396). If a person has a right to redeem he is entitled to maintain a suit even though a suit for foreclosure may be pending against him.(4) A suit for redemption must contain all the averments necessary to establish not only the plaintiff's title but also his right to redeem. He must, for example, state if he wishes to enforce any equity he may have against the mortgagee. If the plaintiff asserts that the debt has been duly discharged, he may claim immediate possession, though in this respect the Court would not be too strict in construing his plaint. For if he has laid his claim for ejectment, the Court may treat it as a suit for redemption and order accounts to be gone into on that footing.(5) So when a mortgagor was about to pay off the mortgage amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage amount. The mortgagor thereupon filed a suit, impleading both the mortgagee and assignee as defendants. The plaint contained, in substance a claim for redemption, but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage amount and that the mortgagor should be indemnified in consequence of the loss of the original mortgage-deed. Prior to the hearing the defendants agreed that the assignee was entitled to receive the mortgage amount. The suit was dismissed on the ground that no interpleader suit could lie as the plaintiff sought an indemnity from one of the defendants which gave him a personal interest in the suit. But on appeal it was held that it was erroneous to treat the suit as only one of interpleader, and that inasmuch as the plaint also contained in substance a claim for redemption, it should have been decreed.(6) But a decree for redemption cannot be passed if the plaintiff does not wish it.(7)

2401. There is nothing against the plaintiff claiming redemption as an alternative relief. For instance he may sue to have the mortgage-deed set aside, or pray for redemption in the event of its being upheld.(8) It may be urged against this view that a plaintiff is not at liberty to claim upon an inconsistent claim. It appears to be conceded that if the suit is not for redemption, but for a totally different object, and is quite incapable of being used as a suit for redemption, an offer at the bar to redeem will not sustain it as such.(9)

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(1) *Hallett* v. *Furze*, 31 Ch. D, 312; *Pelly* v. *Wathen*, 7 Hare, 351 (364, 375).

(2) *Sheikh Golam* v. *Mt. Alla Rukhee*, (1871) N. W. P., H. C. R., 62; *Sita Ram* v. *Madho Lal*, I. L. R., 24 All., 44 (55), F. B.; *Sidu* v. *Bali*, I. L. R., 17 Bom., 32.

(3) *Sidu* v. *Bali*, I. L. R., 17 Bom., 32.

(4) See s. 60, *ante*.

(5) *National Bank* v. *United, &c., Bank of Hope Co.*, 4 App. Cas., 391.

(6) *Jagganath* v. *Kera*, I. L. R., 32 Bom., 592; following *Vyvyan* v. *Vyvyan*, 4 De G. F. & J., 183.

(7) *Gordon* v. *Horsfall*, 5 Moo. P. C., 393 (421); *Murugaster* v. *DeSouza*, (1891) A.C., 69 (72).

(8) *Hunt* v. *Worsford*, (1896) 2 Ch., 224; In re *Nobbs* [1896], 2 Ch., 830.

(9) *Semble* in *Gordon* v. *Horsfall*, 5 Moo., P.C., 393; *Crenver* v. *Williams*, 35 Beav., 353.

But in any other case, the Court will be inclined to decree redemption even though the plaintiff's suit may be for a different relief. But on this point a widely divergent practice has grown up in the different Courts. Thus while in Bombay redemption is decreed even though the plaintiff had asked for only a declaration.(1) this practice is deprecated in Madras.(2) In several Calcutta cases, it has been laid down that the plaintiff cannot be given relief he did not claim in the plaint.(3) And a similar note has been struck in the earlier cases of the other High Courts.(4) But the trend of later cases is to allow redemption even though the plaintiff may have sued to avoid the mortgage and for *khas* possession.(5) But the Allahabad Court still adheres to the earlier view maintaining as it does that the Court should not allow redemption in a suit for ejectment.(6) But this was allowed by the Privy Council in a case(7) not referred to by the Allahabad Court. However, it may be such a relief would scarcely be refused where the inconsistent pleas were due to ignorance of the real facts on the part of the plaintiff.(8) In any other case the plaintiff's inconsistency may be indefeasible. Moreover, if the plaintiff goes to trial on specific issue raised by him, as for instance, on the question of fraud, and the question is tried out, he is not entitled upon appeal to abandon that issue and to ask the Court to treat his suit as one for redemption.(9) So where the plaintiff came into Court claiming possession on the ground of invalidity of the defendant's mortgage, he was held not entitled afterwards, when it was found that his title to recover the property independent of the mortgage was barred by limitation, to say that the title prescribed for by the defendant was only as mortgagee, and that, therefore, he had sixty years to redeem.(10)

2402. The mortgagee has no doubt to see that the party claiming to redeem has at least redeemable interest in the property (§§ 1380-1396). But beyond this, he cannot raise any question as to the adequacy of consideration for the

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(1) *Sankana* v. *Virupakshapa*, I. L. R., 7 Bom., 146.

(2) *Venkatanarasammah*, v. *Ramiah*, I. L. R., 2 Mad., 108 ; *Perumal* v. *Kaveri*, I. L.R., 16 Mad., 121 (125) ; *Seshamma* v. *Chickaya*, I. L. R., 25 Mad., 507 (511); *Doraraja* v. *Ramachandra*, 16 M. L. S. R., 5.

(3) *Rughoobar* v. *Bhekaree*, 22 W.R., 472 ; *Nana Ch. Chand* v. *Telluckdye*, I.L.R., 5 Cal., 265 (268) ; *Dirgopal* v. *Bolakee*, I.L.R., 5 Cal., 269 (272). [Defendant's possession protected, though the plaintiff had lien which he must enforce in a separate suit] ; *Radha Pershad* v. *Monohar*, I. L. R., 6 Cal., 317, (319). (Plaintiff claiming *khas* possession against the *zurpeshgi* lessee, could not redeem him) ; *Kasumunnissa* v. *Nilratna*, I. L. R., 8 Cal., 79 (87). (A person suing for *khas* possession could not be allowed to redeem, but if the lower Court treat the suit as one for redemption, the High Court will be loath to interfere on that ground.) The principle was widened in *Chunder Nath* v. *Nilkant*, I. L. R., 8 Cal., 690 (699), in which the earlier case was followed, and the right to redeem in a possessory suit was conceded. (The case reversed O. A., but on other points).

(4) *Venkatanarasammah* v. *Ramiah*, I. L. R., 2 Mad., 108 ; *Venkata* v. *Kannam*, I. L. R., 5 Mad., 184 ; *Chandu* v. *Kombi*, I. L. R., 9 Mad., 208 ; *Ramasami* v. *Vellaza*, 2 M. L. J. R., 48 ; *Ramanadhan* v. *Alkonda*, I. L R., 18 Mad., 500; *Muthu* v. *Rayalu*, 6 M. L. J. R., 51.

(5) *Kasumunnissa* v. *Nilratna*, I. L. R., 8 Cal., 79 (87) ; followed in *Chunder Nath* v. *Nilkant*, I. L. R., 8 Cal., 690 (699) ; *Rupchand* v. *Dawlatrav*, I. L. R., 6 Bom., 495 ; *Shivram* v. *Genu*, I. L. R., 6 Bom., 515 , *Sunkana* v. *Virupukshapa*, I.L.R., 7 Bom., 146; *Narayan* v. *Pandurang*, I, L. R., 7 Bom., 526; *Radhabhai* v. *Shamrav*, I. L. R , 8 Bom., 168 ; *Dullabh Dass* v. *Lakshman Dass*, I. L. R., 10 Bom., 88 ; *Parsotam* v. *Rumal*, I. L. R., 20 Bom., 196 ; *Muthia* v. *Subbajan*, 2 M. L. J. R., 294.

(6) *Hargu Lal Singh* v. *Gobind Rai*, I. L. R., 19 All., 541, F.B.; *Madan Lal* v. *Bhagwan Dass*, I. L. R., 21 All., 235 (238), F. B.

(7) *Nilakant* v. *Suresh Chunder*, (1882) B. P. J., 21, P.C.; To the same effect *Gordon* v. *Horsfall*, 5 Moo., P. C., 393.

(8) *Narayanasami* v. *Ramasami*, I. L. R., 14 Mad., 172 ; *Perumal* v. *Kaveri*, I.L.R., 16 Mad., 121 (124).

(9) *Ram Dao* v. *Indromoni*, 3 C.W.N., 325; *Macdonough* v. *Shewbridge*, 2 B. & B., 555 ; *Gordon* v. *Horsfall*, 5 Moo. P. C., 393.

(10) *Doraraja* v. *Ramchandra*, 16 M. L. J. R., 5.

sale.(1) He may, however, resist the claim by setting up an agreement by the mortgagor giving him the right of pre-emption,(2) even though the right be barred by time, provided that it is not extinguished.(3) Indeed, any equity which gives the mortgagee priority over the right in which the plaintiff sues is a good defence to his action for redemption. But it may be doubted whether the mortgagee can set up an equity, the specific performance of which is barred by time. This is the outcome of the doctrine of equity, which considers a thing as done what ought to be done, but equity scarcely considers done what need not be done for the law of limitation,(4) and it may be therefore gravely doubted whether the mortgagee can set up by way of defence an equity which he could not have specifically enforced.(5) The right of pre-emption is no defence to a suit for redemption.(6)

Limitation.

2403. The ordinary period for redemption of a mortgage is sixty years; but that period may be materially curtailed by events subsequent to the mortgage. For example, if the mortgagee had already been put in possession of the property in execution of his decree for foreclosure or sale, his possession as from that date would be *prima facie* adverse, and persons claiming to redeem must then institute their suit for redemption within twelve years from the final decree for foreclosure vesting the estate in him, or from the date of the confirmation of sale in execution of his decree in any other case.(7) This is the only view deducible from the wording of rules 2 and 4, and it is consonant with that taken in America where it has been held that the mortgagee's possession in execution of his decree for foreclosure is *prima facie* adverse to the mortgagor who must then assert his right before it becomes barred by efflux of time.(8)

Beneficiary barred by benamidar.

2404. So again, since a suit instituted by a *benamidar* binds the beneficiary it follows that a decree for sale on a mortgage giving the ostensible puisne mortgagee the right of redemption would bar another suit for redemption instituted by the real puisne mortgagee.(9)

2405. Costs of Redemption.—As regards the costs of a suit for redemption the usual rule is that they are payable by the plaintiff,(10) unless the mortgagee forfeits them for his misconduct or any other reason. In a normal case, however, the mortgagee's costs are added to the mortgage-money which must be paid on the due date, failing which the former practice was to foreclose the mortgage, the Court being incompetent to extend the time for a redemption by paying the costs of the adjournment.(11) But in this respect the procedure has now been modified by the Act.(12) The costs should be assesssd on the value

(1) *Kondo* v. *Gnngadhar*, (1888) B.P.J., 91.
(2) *Cheria* v. *Vishnu*, I.L.R., 5 Mad., 198; *Kanharankutti* v. *Uthotti*, I. L. R., 13 Mad., 490; *Ukku* v. *Kutti*, I. L. R., 15 Mad., 401; *Krishna* v. *Kesavan*, I. L. R, 20 Mad., 305.
(3) *Krishna* v. *Kesavan*, I. L. R., 20 Mad., 305 (311).
(4) *Swain* v. *Ayres*, 21 Q.B.D., 289 (293).
(5) *Ramaswami* v. *Chinnan*, I.L.R., 24 Mad., 449 (466, 467).
(6) *Idarat Khan* v. *Ilahi Baksh*, I.L.R., 27 All., 78.
(7) *Pugh* v. *Heath*, 7 App. Cas., 235; *Ghinarain* v. *Ram Monaruth*, I.L.R., 6 Cal., 566*n*; *Ramjan Mahomed* v. *Chunder Mohun*, 7 C.L.J., 640; following *Brojo Nath* v. *Khelut Chunder*, 16 W.R., 33 P.C.; *Bhapi* v. *Barham Deo*, 4 C.W.N., 297; *Makhan* v. *Bhagirath Prasad*, (1905) 8 O.C., 33; *Shamsunder* v. *Mhd. Iktisam Ali*, I.L.R., 27 All., 501 (504), F.B.
(8) 2 Jones Mortgage (6th Ed.), §§ 1156, 1157.
(9) *Kaniz Fatima* v. *Waliullah*, I.L.R., 30 All., 30.
(10) *Beckett* v. *Sutton*, 19 Ch. D., 646; *Subhana* v. *Krishna*, I.L.R., 15 Bom., 644.
(11) *Ladu* v. *Babaji*, I.L.R., 7 Bom. 532; *Mahant Ishwargar* v. *Chudasama*, I.L.R., 13 Bom., 106; *Subhana* v. *Krishna*, I.L.R., 15 Bom., 644 (646).
(12) S. 93, *post*.

of the subject-matter of the suit and not on the amount of the original debt.(1) In other words, the amount is payable on the value of only the equity of redemption and not on the value of the mortgagee's interest.(2)

Jurisdiction and court-fee.

2406. In a suit for redemption the jurisdiction of the Court depends upon the nature of the plaintiff's claim. If his title to the property is undisputed, but the question is one of redemption, the value of the subject-matter for purposes of jurisdiction, is not the market-value of the land but the amount of the mortgage-money.(3) If on the other hand, he has further to establish his title to the property, then the question of jurisdiction must depend on the value of the property and not on the amount of the mortgage.(4) The Courts are divided on the question whether the Court being once rightly seized of the case is empowered to pass a decree for a sum beyond its own pecuniary jurisdiction. According to the Calcutta High Court this cannot be done(5) though the contrary has been held in some other Courts.(6)

As regards court-fee, the proper valuation of a suit to redeem a mortgage is the amount of the mortgage admitted by the plaintiff to be binding on him and not that of the mortgages set up by the defendant. On an appeal by the mortgagor for reduction of the price of redemption the appellant must pay *ad valorem* court-fee, (7) but whether the maximum fee payable is limited by the principal amount secured by the mortgage depends upon the meaning of the word "suit" in section 7 (ix) of the Court Fees Act. If it includes an appeal, then the maximum fee should not exceed that paid in the first Court;(8) otherwise it should be paid *ad valorem*.(9) But the Court Fees Act is so imperfectly worded that neither view is directly supported by it, and either view is equally possible and plausible.

But the court-fee payable in a suit for redemption is assessed on the principal of the mortgage-money and not on the intrinsic value of the right involved.(10). So even where the plaintiff claimed in addition to redemption an account from the mortgagee of the profits received by him during his possession, the Court-fee payable would be the same, namely, on the principal amount secured by the mortgage, and no *ad valorem* duty could be claimed on the surplus sought to be recovered from the mortgagee. (11)

2407. Ad interim Protection.—If the mortgaged property is shown to be in imminent danger of being lost, (12) or the mortgagee is shown to commit waste, (13) the Court may place the property in the custody of a Receiver. A Receiver may also be appointed at the instance of the mortgagee, who may prefer to be relieved of the responsibility of having to manage property in respect of which a decree for account is passed. (14)

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(1) In re *Sanderson*, 7 Ch. D., 176.
(2) In re *Sanderson*, 7 Ch. D., 176 (179).
(3) *Kubair Singh* v. *Raja Ram*, 6 N.L.R., 164.
(4) *Kallan Das* v. *Nawal Singh*, I.L.R., 1 All., 620.
(5) *Mausa Ram* v. *Umra*, (1911) P. W. R., 134; 11 I C. 198; *Onkar* v. *Lakshmichand*, 5 N.L.R., 130.
(6) *Ijjatulla* v. *Chandra*, I.L.R., 34 Cal., 954 F.B.: *Ramjit* v. *Ramudar*, 16 C.L J., 77.
(7) *Madho Das* v. *Ramji*, I.L.R., 16 All., 286; *Sundarshan* v. *Ram Pershad*, I. L. R., 33 All., 97; followed in *Sudarshan* v. *Ram Pershad*, 10 I.C., (All.) 402.
(8) *Dhiraj Singh* v. *Raja Ram*, 6 N.L.R., 164.
(9) *Madheo Prasad* (In re), I.L.R., 30 All., 547; *Baji Lal* v. *Gobardhan*, I.L.R., 31 All., 265; *Reference*, I.L.R., 29 Mad., 367; *Chappan* v. *Raru*, I.L.R., 37 Mad. 420.
(10) S. 7 (ix), Court Fees Act (VII of 1870).
(11) *Husani Begam* v. *Collector of Cawnpur*, 4 A. L. J. 375.
(12) *Tribhovan* v. *Jamuna*, (1889) B. P. J., 184.
(13) *Hanson* v. *Derby*, 2 Vern., 392.
(14) *Gregg* v. *Arrett*, S. & Sc., 674.

2408. When Payment made.—The decree in a suit for redemption generally follows the wording of rule 2 with some noticeable verbal changes, which, however, do not appear to mark any difference between decrees under the two rules. (1) The effect of the payment is to extinguish the debt, and the mortgage must (*i*) deliver to the plaintiff, or to such person as he appoints, all documents relating to the mortgaged property in his possession or power; (*ii*) re-transfer the property free from the mortgage, &c., and (*iii*) if necessary, put the plaintiff into possession of the mortgaged property. The term "re-transfer" is scarcely apt, since a simple mortgagee cannot re-transfer when according to the nature of his security there was no transfer of the property in his favour. It would appear that to a simple mortgagor clauses (*ii*) and (*iii*) do not apply, and hence in his case there can be no appreciable difference between a suit instituted under section 60 or the present rule.

2409. Contents and Construction.—A decree for redemption should state the sum due which should not be left to be determined in execution. (2)

The form of the decree prescribed in the rule does not provide for cases where the claims of several persons entitled to redeem are adjudicated in the same suit. In such cases a decree must provide for each contingency allowing successive redemptions and in default, foreclosure or sale in each case. (3) A suit for redemption should not be construed too strictly, for the Courts have discretion to pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. (4)

2410. According to the language used in the rule, the payment must be made within six months from the date of the preliminary decree. But where the decree does not embody the direction required by the rule and does not specify the consequence of non-payment, the result is the same as if the commission had not been made. But on this point the authorities are by no means unanimous. (5) There can be no doubt that under the next rule the Court has power to enlarge time, but whether it can do so retrospectively, is a question which requires discussion, and for which reference must be made to the discussion under the next section.

The interest payable under a redemption-decree would be the same as would be payable in a decree for foreclosure or sale. Such interest may continue running for sixty years till the mortgagor's right to redeem becomes barred by time. (6) But it is evident that a different rule would govern interest, when allowed by way of damages. [See the subject discussed under rule 2.]

The duty of the mortgagee to deliver all documents in his possession or power relating to the mortgaged property is one which is cast on the mortgagee even where he institutes a suit for foreclosure. With the deeds in his possession as muniments of the mortgagor's title, the mortgagee will have to return

(1) These have been noticed under "meaning of words," *supra*.

(2) *Hakim Khan* v. *Sardar*, (1896) P.R. No. 34.

(3) See for instructions under s. 86.

(4) *Nilakant* v. *Suresh Chunder* (1882), B. P.J., 21, P. C. L. R. 12 I. A. 171; *Parshotam* v. *Rumal*, I.L.R., 20 Bom., 196; *Hasanbhai* v. *Umaji*, 5 Bom. L. R. 892, (895), *Contra* in *Ramasami* v. *Vellaya*, 2 M. L. J. 48 and *Ghanya* v. *Ukund Rao* (4 N. L. R., 9) is based on no intelligible principle and ignores the fact that persons entitled to redeem may know nothing of the mortgage; why should they not then repudiate what they do not know offering to redeem if its existence and validity is proved. §§ 1967, 1968.

(5) *Jaikishen* v. *Bhola Nath*, I. L. R., 14 All., 529; following *Kodai Singh* v. *Jaisri Singh*, I. L. R., 13 All., 376; but *contra* per Mahmud, J., in *Bandhu Bhagat* v. *Shai Muhammad*, I. L. R., 14 All., 350; *Keramat Ali* v. *Inayat Hussain*, (1884) A. W. N., 329.

(6) Art. 148, Indian Limitation Act (XV of 1877); *Daudbhai* v. *Daudbhai*, I. L. R., 14 Bom., 113.

the mortgage-deed which the mortgagor's suit is intended to annul. He has no right even at his own expense to make a fair copy of the deed after he is fully paid off.(1) But if the mortgagee retains some interest in the property, as where he is a tenant-in-common, he will be permitted to retain the deeds on giving a covenant for their production.(2)

In the event of the title-deeds being lost, the mortgagee is liable to pay compensation for the damage done to the estate, and which may be set off against the mortgage-debt.(3) But in ordinary cases a bond of indemnity is all that is required.(4) But no loss, however innocent, can deprive the mortgagor of that necessary safeguard.(5)

Re-transfer on redemption.

2411. The liability of the mortgagee to re-transfer the mortgaged property is one which has been considered at some length in the earlier pages (§§ 1386-1395). It may be added here that if the mortgagor has only a partial interest in the equity of redemption, reconveyance should safeguard the interests of other persons.(6)

2412. Procedure on Non-payment.—If, however, payment is not made as required, the last paragraph declares the procedure which the Court must then follow. Generally speaking, the effect of non-payment is the same as in the mortgagee's suit for foreclosure or sale. That is, where foreclosure is allowed, the Court may order foreclosure of the mortgage, and in other cases it may order sale of the property. In an English mortgage where both foreclosure and sale are possible, the Court may order one or the other, following the line presumably as laid down in rule 4, paragraph 2. According to the concluding paragraph in the present rule, the Court is empowered to order sale in the case of a usufructuary mortgage. But under section 67, clause (*a*), the usufructuary mortgagee cannot sue either for foreclosure or sale. The effect of the two clauses then is, that while the usufructuary mortgagee may not sue for foreclosure or sale, the mortgagor may, if he chooses, bring the property to sale, by instituting a suit for redemption. It may be that the power given in the proviso is to enable the mortgagor to pay of his debt, which otherwise he might not have been able to do. Where the security is sufficient, and the sale realizes at least the amount due to the mortgagee, no injustice is possible, but where the property does not fetch, the amount sufficient to pay him, the mortgagee may lose his security and a portion of his money as well. Then again it would appear from the definition of that class of mortgage that the mortgagor authorizes the mortgagee to retain possession of the mortgaged property, *until payment of the mortgage-money*(7) and therefore to allow the mortgagor to bring the property to sale, is, it is submitted, to enable him to break in upon his own contract, without giving the mortgagee any reciprocal remedy.

Final decree in redemption-suit.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(1) In re *Wade and Thomas*, 17 Ch. D., 348 (342).
(2) *Yates* v. *Plumbe*, 2 Sm., & G., 174.
(3) *Hornby* v. *Matcham*, 16 Sim., 325.
(4) *Shelmardine* v. *Harrop*, 6 Madd., 39 (44), which prescribes the form of indemnity.
(5) *James* v. *Rumsey*, 11 Ch. D , 398 (403).
(6) *Ganpati* v. *Damodar*, (1874) B. P, J., 2; *Thorneycroft* v. *Crockett*, 2 H. L. C., 239; *Pearce* v. *Morris*, L. R., 5 Ch., 227; *Flint* v. *Howard* (1893), 2 Ch., 54.
(7) S. 58 (*d*).

(*a*) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required

(*b*) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also if necessary,

(*c*) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same:

Power to enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any), as it thinks fit, from time to time, postpone the day fixed for payment.

2413. Analogous Law.—This rule generally corresponds with rules 3 and 5, but the procedure here prescribed departs from the English rule which allows the plaintiff to claim an order for only redemption, or for only sale of the property, or for sale or redemption in the alternative. (1) And an order for sale may be made at any time before the final decree for redemption. (2)

(1) Conveyancing Act, 1881 (44 & 45 Vict., c. 41, s. 25). The old statute (The Chancery Amendment Act, 15 an 16 Vict, c. 86, s. 48) did not permit the mortgagor to pray for sale in an action for redemption.

(2) *Union Bank* v. *Ingram*, 20 Ch. D., 463; *Woolley* v. *Colman*, 21 Ch. D., 169.

The power to enlarge time is new and did not exist before the Act.(1) But its provisions relating as they do to procedure merely, would apply equally to a mortgage of a date executed before its enactment.(2)

The section has been held to be applicable, even though the decree was not drawn up in the terms of the last rule.(3)

2414. Principle.—This rule is the natural sequel to the last rule and provides in detail the procedure which the Courts should follow in the event of the mortgagor not making payment within the time limited. The last clause enables the Court, upon good cause shown, to enlarge time.

2415. Meaning of Words.—" *Defendant may apply to the Court :*" The Court here means the Court of first instance.(4) " *Shall pass a decree :* " in paragraph 2 implies that the Court is bound to pass the decree and has no discretion in the matter. "*The balance,*" *etc. :* after the words "the balance " the words " if any " did not occur in section 93, and it was pointed out in this work that those words should have been inserted and must be understood.(5) They have now been added. " *Both be extinguished :* " that is, both the right of redemption and the security. " *Such terms* :" such as payment of interest, cost or compensation, *etc.* " *Postpone the day :* " strictly construed, the word " postpone " would preclude, retrospective enlargement, but this is evidently not the meaning.(6)

2416. Mortgagor's Remedy.—The first paragraph is substantially the same as clause (*c*) of the last rule. It, however, provides for the payment of the costs allowed to the mortgagee, subsequent to the decree as mentioned in the next rule. Costs are considered a part of the mortgage-money(7) and the mortgagee may insist upon their being paid before redemption. And if they are not paid, he can refuse to deliver possession of the mortgaged property or allow the mortgagor to redeem. If the mortgagor does not pay the price of redemption, or pays in part, the mortgagee may under the subsequent paragraphs proceed to obtain a final decree for foreclosure or sale according to the nature of the mortgage, in the same manner as the mortgagee is required to do after the decree upon his mortgage is passed under rule 2 or 4. The Court cannot decree sale, where the mortgage is one by conditional sale, nor foreclosure where the mortgage does not admit of it. It is bound to pass an order in the same manner as it would have done if the mortgagor had defaulted in a suit brought by the mortgagee against him. But though this is the right of the mortgagee there is nothing to prevent the mortgagor from moving for the sale of his property, if he is unable to redeem to his advantage.(8)

The section does not provide for cases where puisne mortgagees with conflicting interests are joined in the suit, but it would appear that in such cases, the procedure indicated in cases under rules 2 and 4 should apply.

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(1) *Ishwargar* v. *Chudasama*, I. L. R., 13 Bom., 106 (109); *Subhana* v. *Krishna*, I. L.R., 15 Bom., 644; *Chudasama* v. *Ishwargar*, I. L. R., 16 Bom , 243; *Chennaya* v. *Malkapa*, I. L. R., 20 Bom., 279.

(2) *Murlidhar* v. *Parasharam*, I. L. R., 25 Bom., 101 (103); *Nandram* v. *Babaji*, I.L.R. 22 Bom., 771.

(3) *Murlidhar* v. *Parasharam*, I. L. R., 25 Bom., 101 (103).

(4) *Venkata* v. *Thiagaraya*, I. L. R., 23 Mad., 521; *Oudh Behari* v. *Nageshar Lal*, I. L. R., 13 All., 278, F. B.; *Sheonarain* v. *Chunni Lal*, I. L. R., 23 All., 88.

(5) 2 Law of Transfer (2nd Edn.), § 1522.

(6) *Rango* v. *Bhomshetti*, I. L. R., 26 Bom. 121 (126). But *contra* in *Vedapuratti* v. *Vallabha*, I. L. R., 25 Mad., 300 (314), F. B., which, however, has since been overruled by s. 148, C. P. C. (Act V of 1908.)

(7) *Subhana* v. *Krishna*, I. L.R., 15 Bom., 644.

(8) *Vedapuratti* v. *Vallabha*, I. L. R., 25 Mad., 300 (315); *Govinda* v. *Veeran*, I. L. R., 36 Mad., 32.

2417. Redemption after due date.—The question whether the mortgagor can be permitted to redeem after expiration of the period fixed by the decree in the same way as it appears he can when he is sued by the mortgagee, is one upon which the High Courts have maintained divergent opinions. Thus it was held in Bombay that an application for an enlargement of time might be made even after expiration of the time mentioned in the decree, and the Court might on sufficient cause shown extend it.(1) But in Madras it was held by the Full Bench(2) that a mortgagor who had made default in payment of the mortgage-money within the time limited by the decree, was not entitled to apply for execution of the decree after the time limited thereby. In this case, however, the facts show that, after expiration of the period of grace, the mortgagor, instead of applying for the enlargement of time, proceeded to execute the decree, and the judgment of Parker, J., clearly shows that on the question of the enlargement of time the Court was, by no means, disposed to pronounce its opinion.(3) In Allahabad the decisions were conflicting in some cases, it being held that the extension could not be made,(4) while others distinctly took the opposite view.(5) Apart from authority, the language used in the clause enabling the Court to *postpone* the day fixed for payment to the mortgagee would, if strictly construed, preclude the possibility of retrospective enlargement. In other words, an application made for enlargement of time *after* date fixed for redemption would be inadmissible. But having regard to the use of the same term in rule 3, the contextual sense and the benevolent interpretation, placed on clauses favouring redemption, the Courts have not been loath to make an extension only on the ground that it had been applied for on expiry of the the due date, if it was otherwise justifiable.(6) And there is now express authority for this procedure, (7) though the Courts should not too readily avail themselves of it, and even when they do so, it must be upon a substantial and intelligible ground and subject to such terms as are equally just to the mortgagee.

Extension after due date.

2418. This provision of the Procedure Code, does not introduce a radical novelty, since it is in consonance with the majority of earlier cases, which lend support to the view that the Court is not precluded from enlarging time, even upon an application made after expiration of the period mentioned in the decree, but a distinction must be drawn between an application under this rule and one under the corresponding proviso to rule 3. In the one case the mortgagor comes into Court professing to have his money ready, while in the other he cannot choose his own time but has to redeem by compulsion. Hence while strong reasons may not be required to accede to an application for enlargement of time under rule 3, strong and cogent reason should invariably be required to support an application under the present proviso. So in England, while, in a foreclosure-suit time may be enlarged more than once, similar indulgence

(1) *Nandram* v. *Babaji*, I. L. R., 22 Bom., 771; *Murlidhar* v. *Parashram*, I. L. R., 25 Bom., 101 (103); *Ishwar Lingo* v. *Gopal*, I.L. R., 28 Bom., 102.

(2) *Vallabha* v. *Vedapuratti*, I. L. R., 19 Mad., 40, F. B.

(3) *Ib.*, p. 47.

(4) *Jaikishen* v. *Bhola Nath*, I. L. R., 14 All., 529; *Hay* v. *Razi-ud-din*, I. L. R., 19 All. 202.

(5) *Bandhu Bhagat* v. *Shah Muhammad*, I. L. R., 14 All., 350; *Rambal* v. *Tulsa*, I. L. R., 19 All., 180; (no distinction between an application for extension under this or s. 87); *semble* in *Raja Ram* v. *Chunnilal*, *ib.*, 205; *Dhondh Bahadur* v. *Tek Narain*, I.L. R., 21 All., 251.

(6) *Ishwar Lingo* v. *Gopal*, I. L. R., 28 Bom., 102; *Rango* v. *Bhomshetti*, I.L. R., 26 Bom., 121 (126); following *Nandram* v. *Babaji*, I. L. R., 22 Bom., 771; *Nand Lal* v. *Ram Ratan*, 2 Nag. L. R., 137; *Jones* v. *Creswicke*, 9 Sim., 304.

(7) S. 148, C. P. C. (Act V of 1908).

has never been granted to the mortgagor in a suit for redemption.(1) It has been held in Bombay that the proviso enabling the mortgagor to apply for the extension of time does not apply to decrees made before the Act was put in force.(2) Although the Court cannot postpone the day of payment *suo motu* and without any application on the part of the mortgagor, still no separate and formal application would appear to be necessary.(3) In one case the mortgagor was ordered to pay a certain amount on or before the 23rd March 1899, but he failed to pay it within that period, but at a later date, but within three years from the date of the decree, he produced the requisite amount in Court and prayed for possession of the mortgage-property. The mortgagee opposed the application contending that the plaintiff had no right to redeem after the date fixed in the decree, and which had not been extended by the Court. But it was held that the mortgagor's present application may well be treated as one made for the necessary enlargement to legalize redemption, and that the Court was competent to inquire into whether the mortgagor had good cause to show for obtaining the enlargement, and whether the parties should be put on terms.(4) But in no case can the necessity for obtaining an enlargement of time be dispensed with. Ready money in the hands of the mortgagor after the due date is, therefore, no answer to the mortgagee's application for foreclosure. Nor is it a ground for the Court to extend the time as, of course,(5) though, when the money is in sight, the Court will not probably construe the clause as narrowly as when the mortgagor has to show good cause to obtain a further extension. An order refusing to enlarge time fixed in a decree for redemption, was formerly held appealable under section 244 (corresponding to the present section 47) of the Code,(6) but it is now appealable as an order and for which an express provision is made in the Code.(7)

2419. Finality of Redemption-decree.—The question whether one suit for redemption has the effect of barring a second suit for the same relief, is one the answer to which must necessarily depend upon certain considerations. If the suit is decreed, and a decree is drawn up in accordance with the provision of the last paragraph, it would necessarily preclude the possibility of another suit for redemption.(8) But a decree which only provides that if payment be not made within the time fixed, then the "judgment should be deemed to be non-existent" is not a decree which would bar a fresh suit for redemption, since it does not provide for the foreclosure or sale of the property, on failure on the mortgagor's part to redeem it. A second suit for redemption would not then be barred, as there is nothing in section 11 or 47 of the Code to prevent such a suit being maintained. But, in view of the Bombay High Court, the mere fact that the decree under the last section is defective,

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(1) *Tipping* v. *Hawes*, cited in 17 Ves., 417; Fisher, § 1956.

(2) *Chennaya* v. *Malkapa*, I. L. R., 20 Bom., 279.

(3) *Rango* v. *Bhomshetti*, I. L. R. 26 Bom. 121 (126); *Ishwar Lingo* v. *Gopal*, I. L. R., 28 Bom., 102.

(4) *Ishwar Lingo* v. *Gopal*, I. L. R., 28 Bom., 102 (105).

(5) *Collison* v. *Jeffrey*, [1896] 1 Ch., 644 in which a *bona fide* mistake was held to be a good cause; *Nandlal* v. *Ram Ratan*, 2 Nag. L.R., 17.

(6) *Rango* v. *Bhomshetti*, I. L. R. 26 Bom. 121; following *Nandram* v. *Babaji*, I. L. R., 22 Bom., 771; *Rahima* v. *Nepal*, I. L. R., 14 All., 520.

(7) O. 43, r. 1 (*o*).

(8) *Sita Ram* v. *Madholal*, I. L.R. 24 All., 44 (49) F.B.; *Vedapuratti* v. *Vallabha*, I. L. R., 25 Mad, 300, F. B.; overruling *Sami* v. *Somasundram*, I.L.R., 6 Mad., 119; *Periandi* v. *Angappa*, I. L. R., 7 Mad., 422; *Kuruthasami* v. *Jaganatha*, I. L. R., 8 Mad., 478; *Ramunni* v. *Brahma*, I. L. R., 15 Mad., 366; explaining *Vallabha* v. *Vedapuratti*, I.L.R., 19 Mad., 40, and dissenting from *Nainappa* v. *Chidambaram*, I. L. R., 21 Mad., 19.

does not preclude the mortgagee from prosecuting his remedy under this section. (1) Where the decree provides in distinct terms, that in case of default in payment, the mortgagor "will be debarred from redeeming" the mortgaged property afterwards, a second suit will be clearly barred under the rule of *res judicata*, no matter whether the decree was or was not passed in accordance with law. (2) Even in cases where the decree for redemption is passed but not executed, a subsequent suit would not, in view of the last and the present rule, be maintainable. For, under the last rule, the decree gives the right to redeem, and this right remains open till it is extinguished by a decree made under this rule. But the fact that the decree has become incapable of execution would not let in the right to sue again in a mortgage-suit any more than it would revive the cause of action in any other case. (3) But in such a case it is open to the mortgagor to apply for redemption under the decree and for extension of time, for so long as no final decree for foreclosure or sale is passed, the right to redeem remains and may be enforced at any time if good cause is shown for the delay. (4) In England it is conceded that the dismissal of a suit for redemption for any reason except for want of prosecution operates as a decree for foreclosure against him so that he cannot file another suit for the same purpose. (5) On the other hand, the mortgagee becomes the absolute owner of the mortgaged property as from that date. (6) In other words, both according to the English as well as the Indian law, the passing of a decree for redemption in accordance with the terms of the last rule has necessarily the effect of barring another suit for the same relief. (7) But here the English and Indian rules part company. For, while under English law, the practice is that on non-payment by the mortgagor of the mortgage-money within the time allowed, the mortgagee applies to the Court for the dismissal of his suit, and it is on motion, of course, dismissed, (8) such a dismissal being equivalent to a decree for foreclosure: (9) in other words, the dismissal enables the mortgagee to hold the estate free from the liability to be redeemed by the mortgagor, whose suit had been on his motion dismissed. But this is by no means in accord with the Act, inasmuch as foreclosure being by no means the only remedy open to an Indian mortgagee, the non-payment of the decretal amount cannot have that effect. Moreover, the redemption-suit need not necessarily be dismissed in such a case, since the procedure to be then followed would necessarily vary with the kind of mortgage which the defendant holds, and with the relief he is consequently entitled to obtain in respect of his mortgage. This deviation in procedure is naturally the outcome of the fact

(1) *Murlidhar* v. *Parasharam*, I. L. R., 25 Bom., 101 (102, 103).

(2) *Sita Ram* v. *Madho Lal*, I. L. R., 24 All., 44 (52), F. B. ; overruling *Hay* v. *Razi-ud-din*, I. L. R., 19 All., 202; following *Ramasami* v. *Sami*, I. L. R. 17 Mad., 96 ; *Dondh Bahadur* v. *Tek Narain*, I. L.R., 21 All., 251.

(3) *Vedapuratti* v. *Vallabha*, I. L R., 25 Mad., 300 (311), F. B. ; *Vallabha* v. *Vedapuratti*, I. L. R. 19 Mad., 40, F. B.; *Sita Ram* v. *Madho Lal*, I. L. R., 24 All., 44, F.B. ; *Dondh Bahadur* v. *Tek Narain*, I. L. R., 21 All., 251.

(4) *Vedapuratti* v. *Vallabha*, I. L. R., 25 Mad., 300 (327) F. B. ; *Ishwar Lingo* v. *Gopal*, I. L. R., 28 Bom., 102 (105).

(5) *Per* James, L. J , in *Marshall* v. *Shewsbury*, L. R., 10 Ch., 250 (253, 254).

(6) *Cholmeley* v *Countess of Oxford*, 2 Atk., 267 ; *Bishop of Winchester* v. *Paine*, 11 Ves,. 194 (199) ; *Inman* v. *Wearing*, 3 De G. & S., 734.

(7) This has been held in several cases ; *Baloji* v. *Tamanganda*, 6 B. H. C. R. (A.C.), 97 ; *Maloji* v. *Sagaji*, I. L. R., 13 Bom. 567; *Vinayak* v. *Dattatrya*, I. L. R. 26 Bom. 611; *Sita Ram* v. *Madho Lal*, I. L. R. 24 All., 44, F. B.; *Vedapuratti* v. *Vallabha*, I. L. R., 25 Mad., 300 F. B.

(8) *Stuart* v. *Worrall*, 1 Bro. C. C., 581 ; *Proctor* v. *Oates*, 2 Atk., 140 ; *Newsham* v. *Gray*, 2 Atk., 287.

(9) *Cholmeley* v. *Countess of Oxford*, 2 Atk. 267 ; *Bishop of Winchester* v. *Paine*, 11 Ves., 194 (199) ; *Inman* v. *Wearing*, 3 De G. & S., 734 ; *Marshall* v. *Shewsbury*, L. R., 10 Ch, 250.

that the remedy of foreclosure is not common to all Indian mortgages. But this fact was overlooked in several cases which professedly followed the English law. (1) Moreover, there have been cases where the decree being defective and not drawn up in the terms of the preceding rule, a similar question arose in another form. In one case for redemption of a usufructuary mortgage, the decree, instead of providing that in default of payment by the due date the property should be sold, directed that if payment was not made within the time fixed the "judgment should be deemed to be non-existent." The mortgagor having failed to pay the amount within the time fixed, brought a second suit for redemption after some years, and the question was whether such a suit would lie, and it was held that in view of the judgment, there could be no bar to such a suit. This judgment proceeded upon the view that under section 60, the mortgagor has the right to redeem his mortgage, unless the right is extinguished by act of the parties or by an order of the Court; and since such an order was not passed, the right to sue remained. (2) In another case, a decree was passed directing the mortgagee to remain in possession till the mortgage-debt was satisfied, from the usufruct of the property. About 26 years afterwards, the mortgagor's assignee applied for an account from the mortgagee, and for redemption of the property, and the mortgagee met the application with the plea of limitation, which the Court allowed holding the application to be barred by either article 178 or article 179 of the Indian Limitation Act. (3) But on this point, the Court was divided against itself, though the point was ultimately conceded in view of the fact that the applicant was conceded to have a remedy by a regular suit.

2420. The question in such cases is, of course, what the Court had decided and how the decree was worded. For, if suppose in the above case, the decree had provided rightly or wrongly that in case of default in payment "the mortgagor will be debarred from redeeming," then the second suit would have been barred by force of the decree. (4) A redemption-suit is then no exception to the general rule as to *res judicata*, and, indeed, the question would have scarcely arisen were it not for the conditional decree which has to be in the first instance passed, and which is mainly responsible for the controversy. Indeed, if this fact be kept in view, it will be easy to answer the contention sometimes made that inasmuch as the mortgage becomes merged in the decree, it cannot afford foundation for another suit, for because the decree passed is a conditional decree, there can be no extinguishment of the mortgage until the decree is made final under this section or under the terms of the decree. (5)

(1) *Gan Savant* v. *Narayan*, I. L. R., 7 Bom., 467; *Maloji* v. *Sagaji*, I. L. R., 13 Bom., 567 (in which, however, the opinion was only an *obiter dictum*). In *Mohd. Sami-ud din* v. *Mannulal*, I.L R., 13 All., 386, in which Straight, J., held that in as much as usufructuary mortgagee cannot foreclose the mortgagor's right to bring a second suit for redemption on his failure to execute the decree passed in his previous suit was not *res judicata* (*ib.*, p. 392); *Chaita* v. *Purun Sookh* (1867) N. W. P. H. C. R., 256; but *contra* in *Sheik Golam* v. *Mt. Alla Rukhee*, (1871) N.-W. P.H C.R., 62, F.B. *Amrudh Singh* v. *Sheo Prasad*, I. L. R., 4 All., 48.

(2) *Sita Ram* v. *Madho Lal*, I.L.R., 24 All. 44, F.B.; overruling *Hay* v. *Razi ud-din*, I.L. R., 9 All., 202, in which case also a similar imperfect decree was passed, but Edge, C.J., and Burkitt, J., denied that it gave the mortgagor another right to sue for redemption; *Lachman* v. *Madusudan*, 4 A. L. J. R., 447.

(3) *Chandra Sekhar* v. *Peary Mohan*, 5 C. L J., 289.

(4) *Ramasami* v. *Sami*, I.L.R., 17 Mad., 96; *Sita Ram* v. *Madho Lal*, I.L.R., 24 All., 44 (52), F.B.

(5) *Sami* v. *Somasundram*, I. L. R., 6 Mad., 119; *Periandi* v. *Angappa*, I. L. R., 7 Mad., 423; *Karuthasami* v. *Jaganatha*, I. L. R., 8 Mad., 478; *Romunni* v. *Brahma*, I. L. R., 15 Mad., 366; *Nainappa* v. *Chidambaram*, I. L. R., 21 Mad., 18, overruled in *Vedapuratti* v. *Vallabha*, I.L.R., 25 Mad., 300 (324, 325), F.B.; *Chattu* v. *Purun*, 2 Agra, 256; *Mohd. Sami ud-din* v. *Mannu Lal*, I.L. R., 11 All., 386 (in which, however, the

But the jural relation of mortgagor and mortgagee does not alone afford ground for another suit, for the question is whether the legal remedy open to him as mortgagor to enforce his rights has not become barred by an adjudication or decree in the suit. Hence, all matters adjudicated *inter partes* would be clearly *res judicata*, howsoever defective may be the decree, and whatever may be its nature. The decree may be qualified, but the adjudication was not. Even as regards the nature of the decree, it is scarcely correct to speak of it, as a preliminary decree, if that term is used to denote lack of finality, for such a decree is final in that it finally adjudicates upon the merits of the controversy.(1) But while the Allahabad and Madras High Courts agree on this point, they materially differ on the effect of the last section on the mortgagor's right of redemption. For while in view of the Madras High Court(2), the mere passing of a decree under the last section is enough to debar the mortgagor from maintaining another suit for redemption, in view of the Allahabad Court, (3) that decree alone does not debar the mortgagor from maintaining another suit until a final order is passed under this rule. But for reasons before given, this view cannot be accepted as an axiom (§ 1417). Of course, where the previous suit had been dismissed as premature or for some formal defect—in short, where there has been no adjudication at all—a fresh suit may be instituted, unless the suit was unconditionally withdrawn, in which case a fresh suit would be obviously barred.(4) And in any view the account once taken, will be conclusive in any subsequent suit.(5) Moreover, where a member of an undivided family, not being the manager, obtains a decree for redemption of the family-property, and fails to execute it, it does not prevent another member of the family, from redeeming his share, if necessary, by suit,(6) but not, if the previous suit had been instituted by the manager.(7) Where the decree is *res judicata*, not only the mortgagor but the mortgagee also cannot maintain a separate suit. If, therefore, he does not obtain an order for sale, he cannot, it would appear, maintain a separate suit.(8)

2421. As regards the right of the mortgagor to maintain a subsequent suit, the question depends upon the facts in controversy and the right or title asserted in the previous suit. This is apparent from the language of section 11 and O. 2, r. 2 of the Code. Thus a previous suit to redeem four out of six items of land mortgaged under a mortgage-deed on the ground that the mortgage was split up by a subsequent lease, if dismissed on the ground of the invalidity of the lease, will bar a second suit to redeem under the same mortgage, having regard to the provisions of section 11 and O. 2, r. 2 of the Code; section 11 being a direct bar to any claim on the lease, and section 11 and O. 2, r. 2, will bar a claim on the original mortgage as an alternative claim on it might have been made in the prior suit. But this would not prevent the mortgagor from maintaining a subsequent title on his title which is a distinct cause of action

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previous suit had been apparently dismissed as premature, in which case the second suit was right.)

(1) *Siva* v. *Nandolal Kar*, I.L.R., 18 Cal., 139; *Doobie Singh* v. *Jankee Ram*, 3 Agra, 381, F.B.; *Sheikh Goolam* v. *Mt. Alla*, 3 N. W.P.H.C.R., 62 F.B.; *Amrudh* v. *Sheo Prasad*, I.L.R., 4 All., 481. See O. 34, r. 2, Comm.

(2) *Vedapuratti* v. *Vallabha*, I. L. R., 25 Mad., 300 (329—331, F. B.

(3) *Sita Ram* v. *Madho Lal*, I.L.R., 24 All., 44 (55), F. B.

(4) S. 373, C.P.C., *Ram Prasad* v. *Dungar Singh*, 4 A. L. J. R., 201.

(5) *Navlu* v. *Raghu*, I.L.R., 8 Bom., 303; *Dasharatha* v. *Navalchand*, I.L.R., 16 Bom., 134; *Rambhat* v. *Ragho*, I. L. R., 16 Bom., 656; *Vinayak* v. *Dattatraya*, I.L.R., 26 Bom., 661; *Nainoppa* v. *Chidambaram*, I. L. R., 21 Mad., 18.

(6) *Sakharam* v. *Gopal*, (1884) B. P. J., 4.

(7) *Gan Savant* v. *Narayan*, I. L. R., 7 Bom., 467.

(8) *Maloji* v. *Sagaji*, I.L.R., 18 Bom., 567.

founded on tort against a trespasser as opposed to his former claim which arose *ex contractu* on the mortgage.(1) The finality of a redemption-decree was conceded in a case (2) ultimately decided by the Privy Council, in which, however the facts were peculiar. The owner had executed a usufructuary mortgage in favour of the mortgagee in 1851. In 1856 the mortgagor sued for redemption and obtained a decree for redemption. Both parties appealed against that decree; the mortgagor, on the ground that the mortgage-deed was invalid, and the mortgagee on the ground that the decree did not allow him interest at the stipulated rate. The Appellate Court by its decree, dated 21st April 1857, ordered that the mortgagor should be put in possession of the property on his depositing Rs. 4,000 in the Government Treasury, which he did. But as the mortgagee had meanwile filed a second appeal, possession could not be delivered to him. While the mortgagee's appeal was still pending, the mutiny broke out, and the records of the Court were destroyed, and, on restoration of order, the appeal was neither prosecuted nor revived. After the amnesty in 1858, settlement of the property was made with the mortgagee; the mortgagor's petition that settlement should be made with him being rejected on the ground that the mortgagee had never received redemption-money, and consequently he could not be made to surrender the property. The mortgagor subsequently died leaving two sons, the eldest of whom brought a suit for redemption, but it was dismissed as barred by the decree of 1857. His brother, then a minor, afterwards brought another suit for redemption, and the same question being raised in defence, their Lordships held that the decree of 1857 offered no impediment to the institution of the suit before them inasmuch as the rules made for the conduct of judicial business in ordinary course could not apply to exceptional circumstances, such as those occasioned by the mutiny and rebellion in Oudh, and that since the execution of the decree of 1857 had been rendered impossible by the *vis major* of the mutiny, the plaintiff's right to redeem remained unimpaired in spite of the settlement *sanad*, which could only confer title on the mortgagee impressed with the trust in favour of the mortgagor. As the plaintiff before their Lordships was no party to the suit instituted by his brother, their Lordships decreed redemption on payment of the mortgage-money with interest up to date.(3) Of course, the dismissal of a redemption-suit based on one mortgage would be no bar to the maintainability of another suit based on another mortgage. Nor will it be so, even though the first suit related to the mortgage of a later date, for it cannot be said that the mortgagor is bound to redeem all his mortgages at the same time or none at all.(4)

2422. Where the dismissal of a suit for redemption is final against the mortgagor, it has not necessarily the effect of debarring all persons possessing any interest in the equity of redemption from suing for the same relief. Thus since the Mitakshara son acquires an interest in the joint family property independently of his father, a dismissal against the latter does not preclude the former from suing for the same relief.(5)

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(1) *Parambath* v. *Puthengattil*, I. L. R., 28 Mad., 406; *Ramaswami* v. *Vaythinatha*, I.L. R., 26 Mad., 760; dissenting from *contra* in *Rangasami* v. *Krishna*, I.L.R., 22 Mad., 259.

(2) *Chaudhri Ahmad* v. *Seth Raghubar*, I. L.R., 28 All., 1 (P.C.).

(3) *Chaudhuri Ahmad* v. *Seth Raghubar*, I.L.R., 28 All., (18).

(4) *Thirumumpu* v. *Thirumumpu*, 16 M. L.J.R., 48, F.B. (1906); overruling *Rangasami* v. *Krishna*, I.L.R., 22 Mad., 259; following *Ramaswamyyar* v. *Vythinathayyar*, I.L.R., 26 Mad, 760; *Veera* v. *Muthukumara*, I.L. R., 27 Mad., 102.

(5) *Sundar Lal* v. *Chittar Mal*, I.L R., 29 All., 1; *Ram Narain* v. *Bisheshar*, I.L.R, 10 All., 411.

Decree where nothing is found due or where mortgagee has been overpaid.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

2423. Analogous Law.—This rule is new, but is otherwise a recognition of existing practice, and has been enacted to remedy an obvious omission in the Act.(1) As before observed (§§ 2193, 2396), the mortgagor seeking redemption can sub ect mortgagee only to one account, the adjustment of which should be final and conclusive as regards the claim and counter-claim of the parties on all matters connected with or arising out of the mortgage-security. It is not open to the mortgagee to institute a fresh suit for the payment of any surplus balance in the hands of the mortgagee, and if he omitted to claim it in his suit for redemption, his second suit would be barred either under section 11 or O 2, r. 21 of the Procedure Code.(2)

2424. Recovery of Overpayments.—While the Court is empowered to decree overpayments against the mortgagee and the sum so decreed is a part of the decree for redemption, the mortgagor is entitled to execute it as an ordinary money-decree, and for which he may attach the person or property of his mortgagee. In such a case the decree for possession should not allow the usual period of grace, for there being nothing to pay, the extension of time made in the interest of the mortgagor becomes unnecessary, and the decree should direct delivery of immediate possession, which would be made over to him, and in addition to which the mortgagee would be liable to execute a reconveyance in favour of the mortgagor, but of which all costs must be borne by the mortgagor (§ 2405).

2425. Procedure in Execution.—Proceedings under this rule are regarded in the same light as proceedings under rules 3 and 5. The decree passed under the last rule must be executed by the Court of first instance, it being immaterial that it was modified or reversed in appeal.(3) So where extension was made in appeal, an application for further extension should be made to the original Court and not to the Court of appeal.(4) It was at one time held that where the time for payment was fixed prior to the decree itself it was incapable of execution.(5) In another case it was held that where a decree vaguely mentions a time for payment, it must be taken as operating from the date it is drawn up, the indefinite period for payment therein mentioned being ignored, and no redemption will be permitted after the expiration of the period prescribed in Article 182 of the Limitation Act.(6) In

(1) Statement of Objects and Reasons on Act V of 1908.

(2) *Ram Din* v. *Bhup Singh*, I.L.R., 30 All., 252.

(3) *Venkata* v. *Thiagaraya*, I. L. R., 23 Mad., 521; *Oudh Behari* v. *Nageshar*, I.L.R., 18 All., 278, F.B.

(4) *Sheonarain* v. *Chunni Lal*, I. L. R., 23 All., 89.

(5) *Appa* v. *Bhaskar* (1893), B.P.J., 242.

(6) *Maruti* v. *Krishna*, I. L R., 23 Bom., 592; *Rungiah* v. *Nanjappa*, I.L.R. 26 Mad., 780; *Etyati* v. *Matalakat*, I.L.R., 28 Mad., 211; *contra* in *Chedi* v. *Lalu*, I.L.R. 24 All., 300.

calculating the time for redemption, the day on which the decree was pronounced must be excluded, time being calculated, from the midnight of that day.(1) The failure of the Court to draw up a proper decree does not preclude the mortgagee from resorting to the provisions of this section.(2)

A redemption-decree is satisfied as soon as the mortgagor deposits the decretal amount in Court: it is then immaterial, if after the deposit but before its payment over to the mortgagee the mortgagor himself attaches and withdraws a portion of the money in execution of his own decree for costs in the suit.(3)

Costs of mortgage subsequent to decree.

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

2426. Analogous Law.—This rule was section 94 of the Act. It may be compared with section 35 of the Code of Civil Procedure, which vests in the Court discretion to award and apportion costs, and the provisions of which must be deemed to be so far modified by this special enactment. But costs incurred in a suit before the decree would still be regulated by the provisions of section 35 of the Code.

The rule enunciates the English rule.(4)

The costs referred to in this section, as originally enacted, did not refer to the costs in a foreclosure-suit, but which, however, as remarked in the earlier edition of this work,(5) were not therefore to be adjudged upon a different principle. It was then added: "Indeed, the language used, '*by the Court under this chapter*,' seems to suggest that the omission of reference to foreclosure-suits is merely accidental and not designed." The omission has now been supplied by amendment of the present rule.

2427. Principle.—The liability of the mortgagor to pay all costs properly incurred by the mortgagee, whether in an action in which he is the plaintiff or the defendant, is one which is associated with the Chancery doctrine of the equity of redemption. As on default being made by the mortgagor, the estate was absolutely forfeited in law (§§ 1342, 1343), and was only redeemable in equity, the latter set its own price for its intervention, and in accordance with the settled principle that he who seeks equity shall do equity, it allowed the mortgagee all costs as a recompense for the loss of his estate, in all cases where the equity of redemption affected his legal right. And so in all cases whether of redemption, foreclosure or sale the mortgagee is *prima facie* entitled to add to the mortgage-money all costs which he has properly incurred in relation to his security, though the rule is here limited only to such costs as he may incur since the passing of a decree for foreclosure, redemption

(1) S. 12, Limitation Act (XV of 1877); *Hindu Singh* v. *Sardar Singh*, (1888) A.W. N., 80.

(2) *Murlidhar* v. *Parsharam*, I.L.R., 25 Bom., 101.

(3) *Parmanand* v. *Lokman Das*, I. L. R. 27 All., 392.

(4) *Dryden* v. *Frost*, 3 My. & Cr., 670(675); *Detillin* v. *Gale*, 7 Ves., 583; *National Provincial Bank* v. *Games*, 31 Ch. D., 582 (592).

(5) 2 Law of Transfer (2nd Ed.), § 1529.

or sale. But the Court is hereby armed with the power to disallow them, if the conduct of the mortgagee is such that he should forfeit them. Such costs as he is allowed, may be added to the mortgage-money, and must be paid up before redemption.

2428. Meaning of Words.—"*Costs.....incurred since the decree*:" mean costs incurred by the mortgagee in carrying out the direction of the decree.

2429. Taxation of Costs.—The costs to which the mortgagee is ordinarily entitled are those properly incurred by him in the suit. These he is entitled to receive independently of the section, and may even be recovered personally from the mortgagor when so directed or intended by the decree.(1) The section, however, provides for the payment of costs incurred by the mortgagee *subsequently* to the decree. These costs the Court *shall* add to the mortgage-money if it does not see reason to disallow them. Such costs should include the expense incurred by the mortgagee in furnishing accounts and in re-conveyance, costs of sale commissions, etc.

2430. Against whom available.—The mortgagee has the right to costs not only as against the mortgagor, but also all subsequent incumbrancers.(2)

2431. When Costs disallowed.—It has been before stated that the mortgagee is entitled to all costs in both foreclosure and redemption-suits. But there may be circumstances which may disentitle him to receive them. In England, it has been held that nothing short of misconduct will deprive him of this right.(3) Thus costs will be disallowed where a mortgagee has unsuccessfully disputed the right to redeem,(4) or had previously refused a valid tender, (5) or where he has been guilty of fraud, oppression, or has set up an adverse title.(6) So where he has been guilty of fraudulent and unfair dealing, (7) or where he joins unnecesary parties who are subsequently discharged,(8) or where he as mortgagee in possession, refuses or fails to produce,(9) or produces incorrect accounts,(10) or where he makes unsuccessfully an exaggerated claim or incurs expenses which cannot justly be thrown upon the mortgagor. In the above cases, the Court may not only disallow the mortgagee his costs, but may give the mortgagor's costs against him. So, again, no costs could be allowed where the mortgagee made unsustained charges of fraud against the mortgagor.(11) So a mortgagee suing for foreclosure when nothing was due to him, or where he was guilty of unreasonable conduct, as where he had improperly declined a valid tender made before suit, was held to forfeit his costs.(12) Where the mortgagee made a groundless claim to consolidate another mortgage, and the refusal led to litigation, the mortgagee was condemned to pay the mortgagor's costs, besides losing his own.(13)

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(1) S. 220, Civil Procedure Code, which follows the English rule (Supreme Court Ord. 65, Rule 50). *Rutnessur* v. *Jusoda*, I.L.R., 14 Cal., 185; *Damodar Dás* v. *Budh Kuar*, I L.R., 10 All., 179; *Makbul Fatima* v. *Lalta Pershad*, I.L.R., 20 All., 523, F.B. (overruling *Chiranji* v. *Moti Ram*, (1898) A.W.N., 83.

(2) *Upperton* v. *Harrison*, 7 Sim. 444; *Barnes* v. *Racester*, 1 Y. & C. C. C., 401.

(3) Fisher, § 1863.

(4) *Kirkham* v. *Smith*, 1 Ves., 257.

(5) *Greenwood* v. *Sutcliffe* (1892), 1 Ch., 1.

(6) *Taru* v. *Turner*, 39 Ch. D., 456.

(7) *Morony* v. *O'Dea*, 1 Ba. & Be., 109 (121 *note*.)

(8) *Pearce* v. *Watkins*, 5 DeG & S., 317.

(9) *Powell* v. *Trotter*, 1 DeG. & S., 388.

(10) *Skerrett* v. *Atley*, 1 Ba. & Be., 434; *Price* v. *Price*, 15 L. J. Ch., 13.

(11) *West* v. *Jones*, 1 Sim. (N. S.), 205 (218).

(12) *Roberts* v. *Williams*, 4 Hare, 129; *Wilson* v. *Cluer*, 4 Beak., 214.

(13) *Squire* v. *Pardoe*, 66 L.T., 243.

The mortgagee must pay all costs of parties whom he has improperly joined, whether as plaintiffs or defendants.(1) So are the costs of adducing unnecessary evidence ordinarily thrown on him.(2) So if distinct claims are mixed up (3) or the pleadings are improper, costs may be disallowed.(4)

Right of mesne mortgage to redeem and foreclose.

11. Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

2432. Analogous Law.—This rule enacts more explicitly in favour of the right of the mesne mortgagee as against other mortgagees of the same property which has been already the subject of sufficient discussion under section 74. The rule is acknowledged to have been added in compliance with the suggestion of the Privy Council(5) who, in a case decided in 1905, had thus remarked:

"The decree (under section 86) does not provide for the exercise by the puisne incumbrancers of their successive rights of redemption, or for working out the rights of the parties in the event of any puisne incumbrancer in front of the mortgagor redeeming the mortgaged property so as to make a complete decree. An appropriate decree for that purpose is well known in the Chancery Division of the High Court in England, and a form of it will be found in Section on Decrees.(6) Probably it is considered that the rights of the puisne incumbrancers are sufficiently protected by the provisions of sections 76 and 83 of the Transfer of Property Act. But it deserves consideration whether a form of order suitable for use in the Indian Courts might not be adopted in which the rights would be recognized and provision made for the event of their being exercised.(7)

Of course, their Lordships' remarks refer to the adoption of a suitable form applicable to puisne mortgagee. Such a form has been now prescribed by the Code of Civil Procedure.(8) And this rule has been further enacted to make it clear what rights a puisne mortgagee possesses against other mortgagees prior or subsequent.

As to this rule, the Select Committee on the Procedure Code wrote: "This clause was in the Transfer of Property Bill, but was omitted by the Select Committee on that Bill on the ground that it ought to find a place in the Civil Procedure Code." It is, however, scarcely a rule of procedure, for it declares a substantive right in favour of a puisne mortgagee, generally comprised in the legal maxim "Redeem up and foreclose down" (§ 1694).

2433. Principle.—The right of the junior mortgagee to redeem a mortgage in point of time anterior to his own is a common law right necessary for the realization of his own security. But it is not the only right available to him, for he may compel the prior mortgagee to marshal (§§ 1815—1828). But it is a right which he may enforce as soon as the prior mortgage is ripe for redemption. So far, indeed, his right is deducible both from sections 74 and 91. Now, since the right of redemption and foreclosure are correlated and

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(1) *Pearce* v. *Watkins*, 5 DeG. & S., 317; *Rochfort* v. *Battersby*, 2 H. L. C., 288.

(2) *Harvey* v. *Tebbutt*, 1 J. & W., 197; *Audsley* v. *Horn*, 26 Beav., 195 (200).

(3) *Capper* v. *Terrington*, 1 Coll., 103.

(4) *Powell* v. *Roberts*, L. R., 9 Eq., 171; *Ashworth* v. *Lord*, 36 Ch. D., 545; *Kinnard* v. *Trollope*, 42 Ch. D., 610.

(5) *Gopi Narain* v. *Bansidhar*, I.L.R., 27 All., 325 P. C.

(6) 3. Seton on Decrees (6th Ed.), p. 1979, printed under r. 2, *ante*.

(7) *Gopi Narain* v. *Bansidhar*, I. L. R., 27 All., 325 (330).

(8) App. D., Form No. 8.

reciprocal, it follows that if the puisne mortgagee has the right to redeem his predecessor, the latter has equally the right to foreclose him. And this is the second rule here enacted.

2434. Meaning of Words.—"*May institute a suit to redeem*": But is this invariably necessary? Could not he deposit under s. 83, for instance? There is, of course, nothing to debar him from doing so (§ 1863). On the other hand, section 83 expressly covers his case. He may again redeem when impanelled in a suit, and in which case, a separate suit would be wholly unnecessary.

2435. Rights of Mesne Mortgagee.—This rule is fragmentary and not very happily worded. But its sense is clear. It defines the rights of the mesne mortgagee against other mortgagees prior and subsequent to his own. But the right to redeem the one and foreclose the other is not the only right possessed by him, nor for that matter could he exercise that right at all times and whether those mortgages are ripe or not. Again, assuming that he exercises that right, the rule does not declare what advantage he may secure thereby. These questions have been all sufficiently considered under section 74, but they may be recapitulated here only so far as it is necessary to direct attention to that discussion. In the first place, the puisne mortgagee has the right, but it is not his only right, nor, indeed, is he bound to exercise it. For the puisne mortgagee may insist upon the marshaling of securities under section 81, or he may enforce a contribution under section 82. But if he is so inclined, he may redeem the prior mortgages and foreclose those subsequent to his own. If, therefore, there are several such mortgages, he is not bound to redeem or foreclose them in the order of their priorities, but such a course may not afford him any practical advantage, for since he cannot tack,[1] it follows that his redemption of a higher security would ordinarily be to his interest only if there was no intermediate incumbrance. Otherwise he may be confronted by the latter seeking to enforce the same right.

Price of redemption.

2436. The right to redeem possessed by the puisne mortgagee can, of course, be only enforced upon the maturity of the security, and the price payable by him is what would be on the date of redemption legally due on the mortgage, as it appears, on the record and he cannot be permitted to redeem on payment of more or less which may have been privately agreed to between the mortgagor and mortgagee. And a subsequent incumbrancer takes his chances as to how much, if anything, has been paid, and buys subject to the state of the account as it then exists between the mortgagor and mortgagee, and has no better or other right than the former in that respect, unless he shows some equity peculiar to himself.[2]

As to the procedure for enforcing the right, the rule declares the puisne mortgagee to "institute a suit to redeem," and which would appear to suggest too liberal an interpretation of the Privy Council precedent upon which the rule was founded. (§§ 1703, 1704). But in that case their Lordships had to construct a defective decree, and which had made no provision for declaring or safeguarding the rights of the puisne mortgage on redemption. But a proper decree should provide for it and the specimen forms appended to the Procedure Code[3] do so, and thus obviate the necessity of a second suit by the junior mortgagee redeeming his senior mortgagee.

[For further commentary, see s. 74.]

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(1) S. 80.
(2) *Per* Mitchell J., in *Carson* v. *Cochran*. 52 Minn, 67.
(3) App. D. Forms Nos. 6 to 9.

12. If any property the sale of which is directed under this order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

2437. Analogous Law.—This rule was section 96 of the Transfer of Property Act and which ran thus :

"If any property the sale of which is directed under this Chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgaage the same interest in the proceeds of the sale as he had in the property sold."

Sale of property subject to prior mortgage.

It is analogous to section 13 (*b*) of the Civil Procedure Code which runs thus :—

"When any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold."

It does not affect the powers conferred by section 57.(1)

2438. Principle.—This section is enacted to enable the mortgagee of property sold in execution to realize his security by waiving his mortgage-lien, by consenting to participate in the sale-proceeds of the property. Where property is sold subject to a mortgage or charge, the mortgagee or incumbrancer as such has no right to any share of the surplus proceeds,(2) unless he consents as provided by this rule, or section 73 (*b*) of the Code of Civil Procedure. No doubt, the object of the rule is to enable the mortgagor to realize the full value of his property which in many cases is not possible, if sales are made subject to mortgage-burthen. The rule as enacted by the section is, however, much narrower than that enacted by the Code of Civil Procedure, which applies to *all* sales, whether made in execution of mortgage or money-decrees, and hence the effect of this rule is lost in the wider scope of the corresponding section of the Code of Civil Procedure.

2439. Meaning of Words.—"*Subject to a prior mortgage* ;" see below. "*Giving to such prior mortgage. . . . . :*" *i.e.*, the sale-proceeds will, as regards his interest, be looked upon as a new shape which its security has assumed.(3)

2440. Sale free of Prior Mortgage.—In accordance with the policy of the law above enunciated, the Court may in a proper case being made out resort to the provisions of this rule. But its powers in this respect are limited by the two conditions set out in the rule, and which empowers it to act only (*i*) when sale is ordered by the Court under *this* chapter, *i.e.*, in execution of a mortgage-decree and (*ii*) the property ordered to be sold is subject to a *prior* mortgage or charge. Assuming these two conditions to co-exist, the Court may

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(1) S. 97, last paragraph.

(2) S. 295 (*a*), Code of Civil Procedure ; *Jagat Narain* v. *Dhundhey*, I.L.R., 5 All., 566.

(3) See s. 57 for analogous rule.

order sale free from the prior incumbrance, but it cannot do so without obtaining the consent of the prior incumbrancer whose interests therein is proposed to be dissolved. If he consent, he is allowed to look upon the sale-proceeds as his security having only assumed a new shape, and hence he would be entitled in respect thereof to the same interest as he had in the property sold. It would seem that the Court cannot pass a conditional decree, ordering sale of the property free from the mortgage if the mortgagee concurs in the sale and subject to it, if he does not concur.(1) In order to obtain the binding concurrence of the prior mortgagee, he would have to be formally brought on the record, and this may be one reason for impleading him in a suit by the puisne mortgagee. But from the opening words of the section, it would appear that the Court has power to order sale of any property "subject to a prior mortgage," or in other words, it may order the sale of the property at the instance of a subsequent mortgagee without requiring him to redeem the prior incumbrancer, although he may have been, as required by rule 1, made a party to the suit.(2) The mere fact that the prior mortgagee has been joined in a suit instituted by the puisne mortgagee, places him under no obligation to consent to a sale free from his incumbrance, since he may choose his own time and manner of enforcing his security.(3) And so his rights cannot be affected merely because he was impleaded by the puisne mortgage, in his suit against the mortgagor and the Court had made no express reservation of his rights in the decree. Indeed, there is no authority for the proposition that whenever the prior mortgagee is impleaded the Court is bound to pass an order expressly reserving his rights where it is not in a position to decree a sale free from his mortgagee.(4)

Sale subject to mortgage.

2441. There can be no doubt that if a puisne incumbrancer institutes a suit to enforce his mortgage, he should not in the first place be forced to join the prior incumbrancer, and then told that he could not enforce his mortgage by sale, until he redeems the prior mortgage. As observed by Mahmud, J.:—"Such a rule would operate as a great hardship in cases where the value of the prior security is enormously larger than the amount of the puisne incumbrance; whilst in cases where the amount due on the prior mortgage does not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would be obliged to wait for his money till the prior mortgage became redeemable."(5) But this view did not commend itself to the majority of the Full Bench in a later case (6) in which Edge, C. J., in delivering judgment of the Court, held that a subsequent mortgagee cannot bring to sale under his mortgage-deed the property mortgaged to him without first redeeming the prior mortgages. But besides open to the above objection this view would, if accepted, lead to the conclusion that while with the consent of the mortgagee, the property may be sold free from his incumbrance, without his consent, it may not be sold even subject to his incumbrance—a proposition which, besides being manifestly inequitable to the subsequent mortgagee, finds no support anywhere in the Act. The rule laid down by the Calcutta High Court appears therefore to be both reasonable and

(1) *Wickenden* v. *Rayson*, 6 DeG. M. & G., 210; *Langton* v. *Langton*, 7 DeG. M. & G., 30.

(2) *Kanti Ram* v. *Kutub-ud-din*, I. L. R., 22 Cal., 33 (40); followed in *Beni Madhab* v. *Sourendra Mohun*, I. L. R., 23 Cal., 795 (under the peculiar circumstances of the case, however, sale without redemption of the prior mortgages was refused).

(3) *Wickenden* v. *Rayson*, 6 DeG. M. & G 210; *Arnold* v. *Baingrigg*, 2 DeF. & J., 92.

(4) *Srinivasa* v. *Yemunabai*, 16 M. L. 50.

(5) In *Sirbadh Rai* v. *Raghunath*, I. L. R., 7 All., 568 (574, 575).

(6) *Matadin* v. *Kazim Husain*, I. L. R., 18 All., 432 (453), F.B.; *Bhagwandas* v. *Bhawani*, I.L.R., 26 All., 14 (17).

sound, and is supported by the decisions of the Madras,(1) and several other cases of the Allahabad High Court.(2)

2442. A sale-certificate purporting to be subject to a mortgage is not conclusive evidence against the purchaser of the validity of the charge in a suit to enforce it.(3) But it may be otherwise if the existence of the mortgage was admitted by the parties or established by a decree or declared under O. 21, r. 61 of the Code, and the sale has been held subject to it.(4) And a person having once sold property subject to a lien declared by the Court, cannot sue to set aside the sale on obtaining an order for a re-sale free from the alleged incumbrance. If he disputed the order of the Court, his proper remedy was to obtain a declaration that the alleged incumbrance was null and void and to have the sale stayed in the meantime.(5)

Limits of the rule.

2443. The rule contained in the rule has no application where sale is ordered subject to an undisclosed mortgage,(6) but in such a case if the decree-holder can be shown to have had notice of the prior incumbrance, which he does not disclose, he may be compelled to satisfy it, although the property may have passed into the hands of the auction-purchaser,(7) the rule contained in the section is again independent of that which authorises the sale of a revenue-paying estate, free from all incumbrances for arrears of revenue, but in which case also the charge of the mortgagee transferred from the property itself to the balance of the sale-proceeds which may remain over after satisfying the Government demand.(8)

If a mortgagee receives any money out of the surplus sale-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage-debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.(9)

It has been held in Allahabad that this rule only relates to a sale free from a prior mortgage where under the terms of that mortgage the mortgagee would be entitled to bring the mortgaged property to sale and to participate in the proceeds of the sale.(10) Hence, a usufructuary mortgagee or a mortgagee by conditional sale under a mortgage-deed which confers no right to sell is not entitled to sue for the sale of the mortgaged property, and therefore such a mortgagee can, in no event, share in the proceeds of the sale of the property to which his mortgage relates. If then the same person holds two mortgages on the same property, *e.g.*, the first a usufructuary and the second a simple mortgage in view of the Allahabad Court inasmuch as the mortgagee cannot

(1) *Vencata Chella* v. *Panjanadien*, I. L. R., 4 Mad., 213; *Gangadhara* v. *Sivarama*, I. L.R., 8 Mad., 246

(2) *Khubchand* v. *Kalian Das*, I. L. R., 1 All., 240 (247); *Sirbadh Rai* v. *Raghunath*, I. L. R., 7 All., 568 (cited *supra*); *Janki Prasad* v. *Sri Mata Matangini*, ib., 577.

(3) *Ram Chandra* v. *Haji Kassim*, I. L. R., 16 Mad., 207 (213).

(4) *Shantappa* v *Subras*, I. L. R., 18 Bom., 175.

(5) *Parshotam* v. *Ganesh*, I. L. R., 23 Bom., 759.

(6) *Fukeer Buksh* v. *Chutturdharee*, 14 W. R., 209; *Joy Chunder* v *Ram Narain*, 21 W. R, 43; *Taponidi* v. *Mathura Lall*, I.L.R., 12 Cal., 499.

(7) *Douglas* v. *The Collector of Benares*, 5 M.I.A., 271 (296).

(8) *Kamala Kant* v. *Abdul Barkat*, I.L.R., 27 Cal., 180; distinguishing *Ramdin* v. *Kalka Prasad*, I.L.R., 7 All., 502, F.B.; *Miller* v. *Runga Nath*, I.L.R. 12 Cal., 389.

(9) *Ganga Ram* v. *Jaiballav*, I. L. R., 30 Cal., 953; *Johnson* v. *Bourne*, 2 Y. & C., Ch. 268.

(10) *Bhagwandas* v. *Bhawani*, I. L. R., 26 All., 14 (17).

sells subject to the prior mortgage, he must abandon the first mortgage, if he sells under the second, failing which he cannot sell at all.(1)

S. 57 distinguished.

2444. The section does not affect the provisions of section 57, under which, however, only certain specified Courts can act, while under the present section any Court having jurisdiction over the subject-matter of the suit is empowered to act. But while under this rule the Court must obtain consent of the mortgagee, under section 57 no such consent is necessary.

Application of proceeds.

13. (1) Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold or, if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in rule 12 shall be deemed to affect the powers conferred by section fifty-seven of the Transfer of Property Act, 1882.

2445. Analogous Law.—This section is closely analogous to section 73 (*c*) of the Code of Civil Procedure, and in principle resembles section 69, *ante*.

In a case decided before the Act where there were simultaneous sales by different mortgagees, it was held that they must be deemed to have been sold free from the mortgage-liens of the different mortgagees who were entitled to be paid out of the sale-proceeds in the order of priority of their respective securities.(2)

2446. Principle.—This rule lays down the principle upon which the proceeds of sale held under the provisions of the last rule are to be appropriated. The order in which payments are directed to be made is the same as in section 69 and section 73 (*c*) of the Code of Civil Procedure, and needs no further comment than that it is based upon equity and reason.

2447. Meaning of Words.—"*Attempted sale*": means previous unsuccessful attempts at sale before the actual sale. Thus where the sale could not

(1) *Bhagwan Das* v. *Bhawani*, I.L.R., 26 All., 14 (19).

(2) *Gopee Singh* v. *Kishan Lal*, 25 W.R. 187 (188).

be held owing to want of purchaser's inadequacy of the bids, or where though the sale is made it is for some reason or other not confirmed by the Court. "*Whatever is due*:" *i.e.*, the amount found to be due on the mortgage, of which an account should be made. "*Person proving to be interested*:" such as subsequent mortgagees whose claims have been proved in the suit. Money-decree-holders are, however, not persons "interested" within the meaning of the clause although they are provided for in section 73 (*c*) of the Civil Procedure Code. "*According to their respective interests*:" *i.e.*, according to their priority.

2448. Order of Distribution.—Although this rule is generally analogous to section 73 (*c*) of the Code of Civil Procedure, the two sections do not provide for the same class of cases. Under the present rule, provision is made to secure the interests of the prior incumbrancer consenting to a sale in accordance with the provisions of the last rule, whereas the section in the Code contemplates the case of the decree-holder in execution of whose decree the property is sold. The present rule does not, like the section in the Code, save the right of the Government, nor does it provide for the distribution of the residue "rateably among the holders of decrees for money against the judgment-debtor who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees and have not obtained satisfaction thereof."(1) But it is apprehended that the residue may, nevertheless, be distributed in accordance with the provision of the Code, there being nothing in the section which is opposed to it. The prior incumbrancer must be paid "whatever is due" on account of his mortgage which may include also interest allowed after the decree.(2) A prior unregistered mortgagee, although he may lose his priority in competition with the registered mortgagee, has still the same right over the balance as if he had been the second mortgagee in point of time.(3) As was observed by the Privy Council: "The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power as trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers and ultimately for the mortgagor.(4) And the result is the same when the Court sells in order to satisfy the first mortgage. The proceeds which are paid into Court after satisfying the first incumbrance become payable first to the other incumbrancers, if any, and then to the mortgagor.(5) And where the mortgagee himself purchases the property, he is in the same position as an independent purchaser, and is not bound to give the mortgagor credit for more than the actual amount of the bid like any other purchaser.(6)

Suit for sale necessary for bringing the mortgaged property to sale.

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale, otherwise than by instituting a suit for sale in

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(1) S. 295 (*c*), Code of Civil Procedure.

(2) *Achabala* v. *Surendranath*, I. L. R., 24 Cal., 766 (772).

(3) *Padmanabh* v. *Khemu Kumar*, I. L. R. 18 Bom., 684 (687, 688); followed in *Bakhtawar Lal* v. *Baru Mal*, 4 A. L. J. R., 492.

(4) *Raja Kishen Dutt* v. *Raja Mumtaz Ali* I. L. R., 5 Cal., 198, P. C.

(5) *Per* Sargent, C. J., in *Padamanabh* v. *Khemu Kumar*, I. L. R., 18 Bom., 684 (688); followed in *Bakhtawar Lal* v. *Baru Mal*, 4 A. L. J. R., 492.

(6) See Comm. under s. 89, *ante*: *Sheonath* v. *Janki Prosad*, I. L. R., 16 Cal., 132;

enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

2449. Analogous Law.—This rule was formerly section 99 of the Act and ran as follows :—

" 99. Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section forty-three."

Attachment of mortgaged property.

This rule has suffered many vicissitudes. It was first inserted by the Transfer of Property Act, 1882, and was intended to serve much the same purpose as the rule against the clog on redemption, the object of the Legislature being to prevent the mortgagee from acquiring the mortgagor's equity of redemption, otherwise than in a proceeding in Court, and in which he would naturally be given a chance to redeem his property. The prohibition contained in the section became the subject of a keen controversy, the Courts being divided on the question whether a sale held in contravention of the section was void or merely voidable (§ 2459).

2450. In the meantime the Legislature were considering why such a sale should be avoided at all, and the Select Committee on the Code of Civil Procedure recommended its total repeal observing as follows: " We approve of the proposal to repeal the provisions of s. 99 of the Transfer of Property Act. We think that those provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgagee shall not bring the mortgaged property for sale, otherwise than by instituting a suit under section 67 of the Act in so far as it precludes the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage-debt, it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage-transaction, and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage.(1) In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage-debt, it serves no useful purpose, we understand that the provision was enacted to prevent mortgagees, from suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property; we, however, think that no such provision was needed, seeing that under the law, as it stood prior to the Act, the Courts never allowed the sale of a bare equity of redemption under a judgment on the covenant.(2)"

It was, however, considered advisable to amend the section and not to repeal it altogether, and the present rule was eventually adopted, the effect of which is to prevent the mortgagee of property with a decree for sale from

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Mahabir Pershad v. *Macnaghten*, I. L. R., 16 Cal., 682, P. C.; *Gunga Pershad* v. *Jawahir Singh*, I. L. R., 19 Cal., 4.

(1) *Khairajmal* v. *Daim*, I. L. R., 32 Cal., 296 (316), P. C.; *Lisle* v. *Reeve*, [1902] A. C., 461

(2) *Syed Emam* v. *Rajcoomar*, 23 W. R., 187; *Khairjamal* v. *Daim*, I. L. R., 32 Cal. 296 P. C.

selling it otherwise than in execution of his decree. The disability which was formerly absolute is thus now only qualified, and attaches to the mortgagee only after he has obtained a decree for sale.

2451. The provisions of this section apply equally to mortgages executed before or after the Act [1] and also to a sale held by a Revenue Court.[2] It has been held to be applicable to mortgages of all kinds and even to *zuri-peshgi* leases.[3] The fact that the mortgagee cannot maintain a suit for sale under section 67 does not control its operation.[4] According to the practice of the Calcutta High Court, " where a money-decree only is obtained for the amount secured by a mortgage, a memorandum shall be added at the end of the decree to the following effect:—NOTE.—Execution shall not be issued against the property comprised in the mortgage."[5]

As the section does not affect any rights, but only prescribes a procedure, it will apply to all incumbrances whether created before or since the passing of the Act [6] but not to decrees obtained before its enforcement,[7] nor, of course, to sales already perfected in execution of money-decrees obtained by mortgagees on claims independent of the mortgage.[8]

The rule is binding both on a Court of Revenue, as well as on a Civil Court.[9]

2452. The history of this rule divides itself into three chapters. The first relates to the state of the law as it stood prior to the enactment of section 99 as a part of the Act of 1882. The second relates to the operation of section 99 and the controversy it gave rise. The third relates to the present rule and its qualified prohibition against the mortgagee-decree-holder acquiring the property otherwise than in accordance with the procedure applicable to mortgage-suits and the mortgagor's right of redemption in the property pledged by him as a security. Adverting to the first period, section 99 as originally enacted was intended to set at rest the conflicting decisions of the several High Courts, passed before the Act; but as these cases are no longer of any practical value, reference to them at any great length need not be made here. In *Syed Emam* v. *Raj Coomar* [10], it was held that " when a creditor under a bond, by which property is mortgaged, takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property, it becomes vested absolutely in the purchaser." " The remedy of the mortgagee under a mere money-decree and under a decree for sale being identical so far as the parties to the suit are concerned, he cannot have a right to a second suit against the same parties to enforce what he has already obtained." This case was followed

Previous Law.

(1) *Sheodeni* v. *Ram Saran*, I. L. R., 26 Cal., 164, *contra* in *Tarachand* v. *Imdad Husain*, I.L. R., 18 All.; 325; *Mhd Abdul* v. *Dilsukh*, 2 A. L. J. R., 210 (215).

(2) *Tarachand* v. *Imdad Husain*, I. L. R., 18 All., 325.

(3) *Sheodeni* v. *Ram Saran*, I. L. R., 26 Cal., 164.

(4) *Sheodeni* v. *Ram Saran*, I. L. R., 26 Cal., 164 (166).

(5) Belchambers' Rules and Orders of the High Court at Calcutta, Rule 316.

(6) *Kaveri* v. *Ananthayya*, I. L. R., 10 Mad. 129; *Dinendra Nath* v. *Chandra Kishore*, I. L. R., 12 Cal., 436; see also *Bhobo Sundari* v. *Rakhal*, I. L. R., 12 Cal., 583, F. B.; *Jogemaya* v. *Thaekomoni*, I. L. R., 24 Cal., 473 (477), F. B.; *Bai Ganga* v. *Raja Ram*, I.L.R., 35 Bom., 248.

(7) *Makund Ram* v. *Ram Sarup*, (1884) A. W.N. 274.

(8) *Nanuvien* v. *Muthusamy*, I. L. R., 29 Mad., 421.

(9) *Dinendra Nath* v. *Chandra Kishore*, I. L R., 12 Cal., 436 (437); *Tarachand* v. *Imdad Husain*, I. L. R., 18 All., 325.

(10) 14 B. L. R., 408 (421), F. B.

in Bombay,[1] but not in Allahabad where it was held that an auction-purchaser under a mere money-decree takes no more than the right, title and interest of the judgment-debtor as they stood on the date of the attachment. Where, therefore, the holder of a simple mortgage-bond obtained only a money-decree on the bond in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree.[2] And this view seems to have been accepted in Madras.[3] "The principle of these Allahabad and Madras decisions would appear to be that, as the object for which the lien was created was the discharge of the debt, and as this object fails when the mortgaged property is sold in discharge of the debt, the lien must, when the object for which it was created fails, cease to exist.[4]"

The operation of section 99 and of the present rule will be presently discussed.

2453. Principle.—This rule has been enacted chiefly for the protection of the mortgagor so as to give him a right to redeem.[5] It has not been enacted for the protection of public interests. If the section had the latter object in view, the sale would be void, but having the former object in view, a sale made in contravention of the provisions of this section is not *per se* void, but is only voidable at the option of the mortgagor.[6] Another reason for which section 99 was designed was to prevent "the common practice on the part of mortgagees of suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security of the existence of which they were wholly ignorant."[7] The third reason why the section was enacted, is that the mortgagee being only entitled to pursue his remedy upon his mortgage in the manner indicated in the Act, he should not be allowed to evade the directions of those sections by obtaining a money-decree and thereby deprive the mortgagor of his right of redemption. As observed by the Calcutta High Court: "The object intended to be secured by section 99 appears to be that mortgaged property should not be allowed to be brought to sale by the mortgagee in execution of any money-decree held by him, except by a suit under section 67, to which every other incumbrancer must under section 85 be a party, and the sale that may be ordered will be free of his incumbrances and will thus fetch fair value, and will not be likely to be followed by the embarrassing litigation which not infrequently forms the sequel of the sale of an equity of redemption."[8] The same reason was put fourth in Allahabad in which it

(1) *Narsidas* v. *Joglekar*, I. L. R. 4 Bom., 57; *Khevraj* v. *Lingaya*, I. L. R., 5 Bom., 2; *Seshagiri* v. *Salvador*, *ib.*, 5; *Shaik Abdullah* v. *Haji Abdullah*, *ib.*, 113; *Hari* v. *Lakshman*, *ib.* 614 (618).

(2) *Khubchand* v. *Kalian Das*, I. L. R., 1 All., 240, F. B.: *Balwant Singh* v. *Gokaru Pershad*, *ib.*, 433.

(3) *Ponnappa* v. *Parpuvayyangar*, I. L. R., 4 Mad., 1 (65), F.B.; *Vencatachella* v *Panjanadien*, *ib.*, 213.

(4) Macpherson's Mortgage 7th (Ed.), pp. 485, 486; citing *Khubchand* v. *Kalian das*, I. L. R., 1 All., 240 (246), F. B.

(5) *Mayan* v. *Pakuran*, I. L. R., 22 Mad., 347.

(6) Hardcastle on the "Construction of Statutes." 2nd Ed., pp. 285-287; Maxwell on the "Interpretation of Statutes," 3rd Ed., pp. 544-549; cited in *Mayan* v. *Pakuran*, I. L. R., 22 Mad., 347; but *contra* in *Moti Ram* v. *Ram Lakhan*, 3 C. W. N., 290.

(7) Law Commissioners' Report, 1879 (dated 15th November 1879). § 35; see also Sir G. Evans' speech cited under S. 85.

(8) *Jadub Lall* v. *Madhub Lall*, I.L.R., 21 Cal., 34 (37); see also *Mathuraman* v. *Ettapasami*, I.L.R., 22 Mad., 372 (376); *Govind* v. *Parasharam*, I.L.R., 25 Bom., 161 (in which the scope of both s. 43 of the Code and

was said: "Prior to the passing of Act No. IV of 1882 it was the constant custom of mortgagees to obtain, on other causes of action than their mortgages, decrees for money against the mortgagor, to bring the mortgaged property to sale in execution of those money-decrees, and to have it sold, reserving their rights as mortgagees. The result of that was that in such cases, the sale being notified as one in which the property to be sold was subject to a mortgage, the purchasers would not come forward to run the risk of harassing litigation with the mortgagee in future suits, and the mortgagee or his *benamidar* was left in possession of the field, and in too many instances purchased the mortgagor's interest in the property for a mere song, and having got by such sale the mortgagor's interest for practically a trifling price, the mortgagee got the whole property into his hands. It was found from experience that the result of such a state of things was that the properties passed out of the hands of the mortgagors into the hands of the mortgagees, in many cases for far less than their value counting the mortgagee-debt and the price paid at the sale under the money-decree together. It was also found that such a state of things encouraged litigation, and it was to provide a remedy and to prevent the recurrence of such a state of things that section 99 was enacted."(1)

2454. The effect of section 99 as originally enacted was that if the mortgagee obtained a simple money-decree upon his mortgage, he could not sell the property comprised therein without instituting another suit and obtaining a decree for sale under section 67, and thus affording the mortgagor an opportunity to redeem. And the effect was the same even if his decree was not based upon the mortgage, for in that case too, were it otherwise, there would have been the recurrence of the abuse which the Legislature intended by enacting the section to cure. The rule was held to apply to a mortgage of whatever kind, as well as to a charge.(2) In this respect the rule has since been relaxed, so that there is now no objection to the mortgagee purchasing the mortgaged property in the second case last supposed. And even in the former case the mortgagee's disability commences not with his mortgage but with his decree, after which he is not permitted to bring the mortgaged property to execution-sale otherwise than in execution of his mortgage-decree. In other words, the nature of the prohibition in each case remains the same, namely, that the mortgagee is precluded from bringing the mortgaged property to sale otherwise than in execution of his mortgage-decree, but the commencing period of disability under the old and present law varies; for while under section 99 the disability was held to commence with the date of the mortgage, and it would seem irrespective of its maturity, but under the present rule the disability commences as soon as the mortgagee obtains a decree for the satisfaction of his mortgage, after which his disqualification to bring the mortgaged property to sale is as great as before.

2455. As observed before, a mortgagee decree-holder was under the old section not only debarred from bringing to sale the mortgaged property in execution of a money decree obtained on the mortgage, but also when he obtained a decree on a claim arising independently of it. In either case he was debarred from proceeding against the mortgaged property in execution except by a suit instituted under section 67. Consequently, the decree that was made even in a suit brought to satisfy a money claim, was not merely for the sale of

s. 99 will be found discussed); *Erusuppa* v. *Commercial Bank*, I.L.R., 23 Mad., 377 (382); *Martand* v. *Dhondo*, I.L.R., 22 Bom., 624.

(1) *Mahabir Singh* v. *Saira Bibi*, I.L.R., 17 All., 520 (521, 522).

(2) *Aubhoyessury Dubee* v. *Gouri Sunker*,

the equity of redemption, but for the sale of the property free from the mortgage-claim of the plaintiff, and the sale-proceeds were applied in the first instance to the discharge of the mortgages in the order of their priority, the surplus, if any, being applied to the satisfaction of the plaintiff's claim under the attachment as far as was necessary.(1)

2456. Meaning of Words.—"*Where a mortgagee*:" The term mortgagee includes also his assignee..(2) "*A decree for the payment of money*," *i.e.*, a money-decree as distinct from a mortgage-decree under rule 4. "*He shall not be entitled to bring the mortgaged property to sale.*" It is the sale and not its attachment that is prohibited. He may, then, attach it in execution of his money-decree, and it may be so kept, pending the disposal of the second suit for sale, but it cannot be sold in execution of the money-decree obtained in the first suit. The prohibition is confined to themortgage-decree-holder and has been held to be inapplicable to his assignee (3) (§ 2460). "*Notwithstanding anything in* O. 2, r. 2:" which being directed against multifariousness bars a second suit in respect of the same cause of action.

2457. What Sale is prohibited.—The object of the section has been stated above. The rule has been held to apply equally to a charge holder (4) as well as a usufructuary mortgage,(5) and since it does not affect any rights, but only prescribes a procedure, it has been held to apply to all incumbrances whether created before or after the Act, (6) but not to decrees obtained before its enforcement.(7) The section is so worded that the plaintiff may under his money-decree successfully *attach* the mortgaged property,(8) and may presumably keep it under attachment on proper grounds shown, until he obtains an order for sale in the terms of section 67.(9) This is all that the present rule enacts. But in commenting on the old section it was pointed out in the previous editions of this work (10) that its language appeared to give ground for contention that it barred all execution whether taken in pursuance of a money or a mortgage-decree; but the clause "execution of a decree for the satisfaction of any claim" must, having regard to the object and intention of the Legislature, be construed to mean money-decree, being such a decree which, if allowed to be successfully executed would bring in its train the abuses which it was the intention of the section to remove. In the words of the Calcutta High Court, the section "was never intended to apply to a decree already obtained, declaring a lien over, and authorizing a sale of the mortgaged property. It was hardly intended to apply to other decrees not being mortgage-decrees."(11) Even if so, it might be, it was said, reasonably urged that the

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I.L.R., 22 Cal., 852; *Matangini* v. *Chooneymoney*, ib., 903; distinguishing *Asutosh Banerjee* v. *Lukhimoni*, I.L.R., 19 Cal., 139; *Moti Ram* v. *Ram Lakhan*, 3 C. W. N., 290.

(1) *Govinda* v. *Narain*, I. L. R 29 Mad., 424.

(2) *Sambhuram* v. *Mt. Khulsami*, 13 C. P. L. R. 35.

(3) *Bauh Bai* v. *Manni Lal*, I. L. R. 27 All., 450; *Narhar* v. *Shivram*, 7 Bom. L. R. 816.

(4) *Aubhoyessury Dabee* v. *Gouri Sunker*, I. L. R. 22 Cal., 859; *Matangini* v. *Chooneymoney*, *ib.*, 903.

(5) *Azim-ullah* v. *Najmunnissa*, I L. R., 16 All., 415; *Moti Ram* v. *Ram Lakhan*, 3 C. W. N. 292.

(6) *Kaveri* v. *Ananthayya*, I. L. R., 10 Mad., 129; *Dinendra Nath* v. *Chandra Kishore*, I. L. R, 12 Cal., 436: see also *Bhobo Sundari* v. *Rakhal*, ib., 583, F. B.; *Chundra Nath* v. *Burroda*, *Shoondury*. I. L. R., 22 Cal, 813; *Jogemaya* v. *Thackamoni*, I. L. R. 24 Cal., 473 (477), F.B.

(7) *Makund Ram* v. *Ram Sarup* (1884), A. W. N., 274.

(8) *Gouri Sunker* v. *Abhoyeswari*, I. L. R., 25 Cal., 262: *Koji Inus* v. *Kaji Inus*, 8 Bom. L. R., 576. *Haribans Rai* v. *Sriniwas*, I. L. R., 35 All. 518; *Ram Das* v. *Munna*, 18 I. C., (Oudh) 201.

(9) *Chundra Nath* v. *Burroda Shoondury*, I. L. R., 22 Cal 813 (817).

(10) 2 Law of Transfer (2nd Edn.) § 1579.

(11) *Dinendra Nath* v. *Chandra Kishore*, I. L. R., 12 Cal., 436 (437).

mere fact that the decree-holder happened to be a mortgagee, should not disqualify him from resorting to the equity of redemption for the satisfaction of his claim, although it might not have the remotest connection with his mortgage. But strictly construed this appeared to be the logical outcome of the words " any claim whether arising under the mortgage or not." In other words, under the section as it originally enacted, it was immaterial whether the claim was for a tort committed by the mortgagor, (1) or for a libel uttered by him, the mortgaged property was nevertheless immune from a sale in execution of the decree following such a claim, unless the mortgagee-decree-holder instituted a suit under section 67. And yet the language of the section was only too clear to lead to any other interpretation.

2458. In this state of the unsatisfactory law, the Courts were obliged to struggle against the obvious inequity of the rule by devising means to circumvent it. But the mortgagee could not be permitted to circumvent the rule, by obtaining only a money-decree upon his mortgage, and then bring the mortgaged property to sale in execution. (2) It was even held that the attachment and sale of the property under the Public Demands Recovery Act, (3) of immoveable property hypothecated to Government were of the same nature and effect as attachments and sale referred to in this section. (4) So the sale of a holding in execution of a decree for rent obtained by a landlord who also held a mortgage of the holding was held to be void, and the purchaser at the sale was held to acquire no title against another mortgagee of the holding, who purchased it under a decree on his mortgage. (5) But this was not the view taken in Madras (6) and Bombay (7) where the prohibition was held to be directed against only the mortgagee-purchaser, so that the equities that arose between him and the mortgagor were not the same as when a third party was the purchaser. In any view the fact that only a portion of the mortgaged property was the subject of sale would appear to make no difference, it being likewise immaterial that out of the property sold only a portion was under mortgage. (8) The rule was held to be binding both on a Court of Revenue as well as on a Civil Court. The section was held to be one of general application and governed the proceedings of all Courts. (9) So where the mortgagee had obtained a decree for arrears of rent passed by the Revenue Court, in execution of which he sought to attach property over which he held a mortgage, it was held that the section was comprehensive enough to embrace all decrees whether passed by the Revenue Court or the Civil Court, and that therefore the decree-holder was debarred from bringing the property to sale. (10)

2459. A mortgagee who disclaimed all interest under the mortgage and obtained a simple money-decree upon the personal covenant to pay could not

(1) *Jadu Lall* v. *Madhub Lall*, I. L. R., 21 Cal., 34 (37).

(2) *Bhola Nath* v. *Muhammad*, I. L. R., 26 All., 223 (224); following *Azimullah* v. *Najmunnissa*, I. L. R., 16 All., 415; *Gobind* v. *Parasharam*, I. L. R., 25 Bom., 161.

(3) Beng. Act VII of 1880. Now see Beng. Act I of 1895.

(4) *Lachmi Narain* v. *Nand Kishore*, I.L. R., 29 Cal., 537 (541). The rule to the contrary laid down in the earlier cases (*Emam* v. *Raj Kumar*; 23 W R, 187. *Narasidas* v. *Jaglekar*, I. L. R., 4 Bom., 57), is no longer law; *Lachmi Narain* v. *Nand Kishore*, I. L. R., 29 Cal., 537 (543).

(5) *Basiruddi* v. *Kailas*, I. L. R., 33 Cal. 113; *Sonu Singh* v. *Behari Singh*, I. L. R. 33 Cal., 283; *Sheodeni* v. *Ram Saran*, I.L R., 26 Cal., 164; *Shib Dass* v. *Kali Kumar* I. L. R., 30 Cal., 463.

(6) *Mayan* v. *Pakuran*, I L. R., 22 Mad., 347; *Muthu* v. *Karuppan*, 17 M. L. J. R. 163.,

(7) *Husein* v. *Shankargiri*, I. L. R., 23 Bom., 119.

(8) *Sonu Singh* v. *Behari Singh*, I. L. R., 33 Cal., 283.

(9) *Tarachand* v. *Imdad Husain*, I. L. R., 18 All., 325.

(10) In re *Mt. Jamna Koer*, 3 A. L. J. R., 43 (S. N.).

attach and sell the mortgaged property except by a suit brought under section 67. The relinquishment of the lien did not make the property cease to be mortgaged property and the mortgagor could not be deprived of his right to redeem or his accounts taken, and with the usual safeguards usual in a suit on the mortgage.(1) Nor does the fact that the mortgagee had already instituted a suit under section 67, resulting in a compromise by the mortgagee obtaining only a simple money-decree, exclude the operation of the prohibition embodied in section 99, and in which case the only course open to the mortgagee appeared to be to institute another suit upon his decree under section 67.(2) But since a suit for sale is not open to mortgagees of all kinds, it is clear that such mortgagees laboured under special disabilities against which they had, under the original section, no redress. For instance, since a usufructuary mortgagee cannot bring the property to sale, it follows that he could not resort to the mortgaged property in order to satisfy any claim whether arising under the mortgage or otherwise. There was, of course, no reason why a usufructuary mortgagee should have suffered from greater disabilities than any other mortgagee, and the present rule consequently exempts such hard cases from its operation.

2460. Limits of the Rule.—The rule here enacted postulates the existence of a valid and subsisting mortgage upon which a suit under section 67 is possible. If therefore such a suit has become barred, or is otherwise not possible, the prohibition here enacted will cease to apply. So again, since the execution-sale of only *the* mortgaged property is prohibited, it follows that where two or more properties are mortgaged the mortgagee may obtain a money decree in a case where property *A* was mortgaged and bring to execution sale property *B* though it may have been equally mortgaged to him under a separate deed.(3) So again, since the disability is confined to the mortgagee, it does not extend to the assignee of his money-decree, who may bring to sale the mortgaged property, since, not being the assignee of the mortgage, he cannot bring any suit under section 67.(4) But inasmuch as the mortgagee could not be permitted to do circuitously what he is prohibited from doing directly, it follows that if the assignment was a mere contrivance to circumvent the disability and not a real transaction, the transferee would be as much bound by the rule as the mortgagee himself.(5) It has been held in Calcutta that this rule does not prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only obtained in accordance with the terms of the mortgage bond.(6) So where a decree is passed for sale for non-payment of an instalment due on a mortgage, the mortgagee may bring the property to sale, as the section has no application to such cases. Where a decree is passed on compromise, the judgment-debtor cannot object to execution on the ground that it is opposed to this section,(7) though it would be open to a stranger affected by the terms of the decree to impeach it. A purchase by a prior mortgagee at a sale held in execution of a decree obtained by the second mortgagee is valid, and even if

(1) *Khairaj Mal* v. *Daim*, 7 Bom. L.R., I. P. C. ; *Madho Prasad* v. *Baij Nath*, 2 A. L. J. 356. *Indarpal Singh* v. *Mewa Lal*, I. L. R. 36 All., 264.

(2) *Harmbun* v. *Behari*. 2 A. L. J. 479; *Aubkoyessury* v. *Gouri Shankar*, I. L., R. 22 Cal., 859.

(3) *Bai Ganga* v. *Raja Ram*, I.L.R. 35 Bom. 248.

(4) *Bank Bai* v. *Mannilal* I.L.R. 27 All. 450 ; *Narhar* v. *Shivram* 7. Bom. L.R. 816.

(5) *Chhagan* v. *Lakshman*, 9 Bom. L. R., 728 ; followed in *Jivaratnam* v. *Srinivasa Mudaliar*, I. L. R., 31 Mad., 33 ; in which however, the disability was held to be independent of the question of fraud.

(6) *Kashi Pershad* v. *Jamuna Pershad*, I. L. R , 31 Cal., 922.

(7) *Koshi Pershad* v. *Dulerp Narain*, 8 C., W. N., 264 (266) ; *Grant* v. *Subramanian*, I. L. R., 22 Mad., 241 (245) ; *Parmanand* v. *Daulat Ram*, I. L. R., 24 All., 549.

invalid, must be set aside by a suit brought within one year under Article 3 of the Limitation Act.(1) So even in view of the Allahabad Court which at one time held that an equity of redemption could not be sold apart,(2) it was conceded that where the Court ordered the sale of only the equity of redemption, the parties to the suit were bound by the order, and the son of the mortgagor could not on that score alone impugn the transaction.(3) So, where an order for sale of the mortgaged property in execution of a money-decree of the mortgagee was obtained after notice to the mortgagor, and the property was sold in pursuance of such order, it was held that the mortgagor could not go behind the order and seek to set aside the sale on the ground that it ought not to have been passed by reason of the prohibitory rule of the section.(4)

Effect of prohibited sale.

2461. But while the old section, as now the present rule, absolutely prohibits sale of the mortgaged property, it does not, therefore, follow that a sale, if made in violation of the rule, is absolutely void. Indeed, it is a rule enacted solely in the interest of the mortgagor to whom it is competent to waive its benefit.(5) A sale held in contravention of this section is then only voidable; it is not void and it is voidable only at the instance of the mortgagor.(6) It is not a nullity of which a stranger may take an advantage.(7) Thus in a case where a Court of Revenue in execution of a decree for rent sold the mortgagor's interest in a certain house, which had been mortgaged together with other property, and the sale was upheld on appeal to the Board of Revenue, and subsequently the auction-purchaser at the sale above referred to sued in a Civil Court for partition of the share purchased by him, it was held that the co-sharers in the property in question could not dispute the validity of the sale, notwithstanding that the decree and the sale in pursuance thereof were in direct

(1) *Kuttan* v. *Krishnan*, 12 M. L. J. R., 390; following *Sesha* v. *Krishna*, I. L. R., 24 Mad., 96 (on the question of limitation following); *Malkarjun* v. *Narhari*, I.L.R., 25 Bom., 337, P C.

(2) See O. 34, r. 1, comm.

(3) *Parmanand* v *Daulat Ram*, I.L.R., 24 All., 549 (552): *Tara Chand* v. *Imdad Husain*, I.L.R., 18 All., 325; *Madho Parsad* v. *Baijnath*, (1905) A.W.N. 152; *Umed* v. *Jas Ram*, I.L.R., 26 All., 612; *Kishen Lal* v. *Umrao Singh*, I.L.R., 30 All, 146.

(4) *Thaleri* v. *Thandora*, 10 M. L. J. R., 100; followed in *Kishan Lal* v. *Umrao Singh* I.L R., 30 All., 146.

(5) *Khairajmal* v. *Daim*, I, L.R., 32 Cal., 396, P. C., "*Quilibet potest renunciare jieri pro se introducto.*" ("Any one may renounce a law introduced for his own benefit".)

(6) The view of the text is, it is submitted, sound, notwithstanding the want of harmony that this question presents in the decided cases, in some of which such a sale has been held to be not only voidable but void, so as to convey no title to the purchaser; *Sheodeni* v. *Ram Satan*, I. L. R., 26 Cal., 164; *Shib Dass* v. *Kali Kumar*, I. L. R., 30 Cal., 463; *Basiruddi* v. *Kalis Kamini*, I. L R., 33 Cal., 113; *Asutosh* v. *Behari Lal*, I. L. R. 35 Cal. 61 F. B.; *Pancham Lal* v. *Kishun Pershad*, 14 C. W. N. 579; *Hosein* v. *Sankargiri*, I. L. R., 23 Bom., 119; *Kaji Inus* v. *Kaji Inus*, 6 Bom. L.R. 576; *Kaveri* v. *Ananthayya*, I L.R. 10 Mad. 129; *Sathuvayyan* v. *Muthusami*, I.L.R., 12 Mad., 325; *Durgayya* v. *Anantha*, I.L.R., 14 Mad., 74; *Jaganath* v. *Budhwa*. (1906) P. L. R., No. 167; other cases have adopted an intermediate course of holding the sale illegal, but not inoperative till it is formally set aside. *Sonu Sinuh* v. *Behari Singh*, I. L. R., 33 Cal., 283; *Vigneswara* v. *Bapaya*, I.L.R., 16 Mad., 436; *Mayan* v. *Pakuran*, I L.R., 22 Mad., 347; *Muthuraman* v. *Ettappasami*, I. L. R., 22 Mad. 372; *Ghaleri* v. *Thandora*. (1899) 10 M. L. J. R., 110; *Tangutoori* v. *Molakapalli*, 17 M. L. J. R., 217; *Tarachand* v. *Imdad Husain*, I. L. R., 18 All., 325; *Muhamad Abul Rashid* v. *Dilsukh*, I. L. R., 27 All., 517; *Baldeo* v. *Arjun* (1905), o. c. 327; lastly, there are cases in which it has been ruled that a sale so held is merely voidable and not void, and that even if it is not formally annulled, it does not affect the right of redemption of the mortgagor; *Martand* v. *Dhondo*, I. L. R., 22 Bom., 624; *Mayyan* v. *Pakuran*, I. L. R., 22 Mad., 347; *Erusappa* v. *Commercial, etc., Bank*, I. L. R. 23 Mad., 347; *Nannuvien* v. *Muthusami*, I. L. R., 29 Mad., 421; *Khairaj Mal* v. *Daim*, I. L. R., 32 Cal., 296 P. C.; *Ashutosh* v. *Behari Lal*, I. L. R., 35 Cal., 61, F. B.

(7) *Asutosh* v. *Behari Lal*, I. L. R., 35 Cal., 61 F. B.

violation of the section.[1] But although a sale, when once made and duly confirmed by the Court under section 314 (O. 21, r. 92) of the Code of Civil Procedure, becomes final as between the parties[2] thereto, it may be set aside on the motion of the person who has suffered from the sale made in violation of the provisions of the section ; and such a sale would not affect the interests of persons who might have been, but were not, made parties to the suit. For instance, it has been held that a son in a Mitakshara family is not bound by a sale held in contravention of this rule under a decree obtained against the father, although he might have been bound by a sale under a mortgage-decree against him. [3] So where a mortgage was executed by the managing member of a joint Hindu family who subsequently together with his brother executed a money-bond for the interest then due on the mortgage, and the mortgagee having obtained a personal decree on the latter bond brought to sale in execution a part of the mortgaged property which was purchased by a third person, it was held that the sale did not convey the interest of another undivided brother who was not a party to the decree, and who could, therefore, move to have the sale set aside,[4] or claim to redeem the mortgage which so far as regards him, was unaffected by the decree. [5] In another case where the mortgagee had himself purchased the property, it was held " that a mortgagee is not entitled by means of money-decree obtained on a collateral security such as a bond or covenant to obtain a sale of the equity of redemption separately, because by doing so, he would deprive the mortgagor of the privilege, which, upon the principle of the Court, considering the estate as a pledge, a Court of Equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it; to do that circuitously which he could not do directly." [6] It was accordingly held that notwithstanding the sale of the property to the mortgagee the mortgagor was entitled to redeem, even though he may not have taken proceedings under section 294 (now O. 21, r. 72) of the Code to set aside the sale. [7] And it has been held that the mere fact that the decree makes the debt a charge on the property cannot be held sufficient to exclude the case from the rule contained in the section. [8] In other words the mere creation of a charge by a decree does not take away the bar of prohibition [9] unless the decree also directs sale of the property so charged. [10]

2462. But it is not within the competence of a Court to give the mortgagee the same right in the sale-proceeds of the mortgaged property as he had

(1) *Tarachand* v. *Imdad Husain*, I. L. R., 18 All , 327 ; *Mhd. Abdul* v. *Dilsukh*, I. L. R., 27 All., 517 ; In short, a sale contravening this section is according to these cases only voidable, but *contra Mayan* v. *Pakuran*, I. L. R., 22 Mad., 347.

(2) *Mayan* v. *Pakuran*, I. L. R., 22 Mad., 347.

(3) *Muthuraman* v. *Ettappasami*, I. L. R., 22 Mad., 372 ; *Sardar Singh* v. *Ratan Lal*, I.L.R. 36 All. 516.

(4) *Sathuvayyan* v. *Muthusami*, I. L. R , 12 Mad., 523 ; *Durgayya* v. *Anantha*, I.L.R., 14 Mad., 74 ; *Vigneshwara* v. *Bapayya*, I.L. R., 16 Mad., 436 ; *Ramasami* v. *Virasami*, I. L. R., 21 Mad., 222 ; *Muthuraman* v. *Ettappasami*, I.L.R., 22 Mad., 372; *Martand* v. *Dhondo*, I. L. R., 22 Bom., 624 (628).

(5) *Sardar Singh* v. *Ratan Lal*, I.L.R. 36 All. 516.

(6) *Bhuggobutti* v. *Shamachurn*, I. L. R., 1 Cal , 337 ; cited with approval in *Martand* v. *Dhondo*, I.L.R., 22 Bom., 624 (628); *Datto* v. *Ganesh*, 4 Bom. L. R., 952.

(7) *Martand* v. *Dhondo*, I. L. R., 22 Bom., 624.

(8) *Durgayya* v. *Anantha*, I. L. R , 14 Mad., 74.

(9) *Chundra Nath* v. *Burroda Shoondury*, I. L. R., 22 Cal., 813 ; *Aubhoyessury* v. *Gouri Sunker*, I. L. R., 22 Cal., 859 ; *Matangini* v. *Chooneymoney*, I. L. R., 22 Cal., 903 ; *Hem Ban* v. *Behari Gir*, I. L. R., 28 All., 58.

(10) *Hemangince* v. *Kumode Chander*, I. L. R., 26 Cal., 441.

in the property itself, and a sale held at the instance of the mortgagee in execution of such an order would none the less be illegal and inoperative against a judgment-creditor who was no party to it, though the agreement would be binding between the parties to the suit. (1) And "the fact that the sale took place before the suit (*i.e.*, the suit to get back possession of the property sold) was filed cannot give validity to the sale, if it was contrary to the provision of section 99. (2) So in Bombay, in a case decided independently of the section, the mortgagee in execution of a simple money-decree obtained for some of the instalments due on his mortgage-bond, brought to sale the property which he held in mortgage, and in his application for execution did not mention his lien on the property for the instalments that were still to fall due, it was held that the auction-purchaser if he supposed that he was purchasing the full proprietary title, purchased the property free of the mortgagee's lien. (3) And similarly in another case decided under the unamended section it has been held that where a co-mortgagee put up the mortgaged property to sale in execution of a money-decree, he was estopped from afterwards enforcing his mortgage against the auction-purchaser. (4) But the other co mortgagee, however, did not thereby lose his right, and he would, notwithstanding the sale, be entitled to enforce his interests in the mortgage against the purchaser. (5) And on a similar principle a mortgagee cannot even sell the mortgaged property first for a portion of the mortgage-debt and then for a second time for the remainder. Hence, where he sells the property for a portion of his debt, the sale extinguishes his mortgage. (6)

2463. It would appear that it is no answer to the plaintiff's claim for redemption that he was born *after* the decree, and accordingly, in a case where the mortgagee having obtained a decree upon his mortgage, but construed not to be for sale, and in execution of which he attached for sale the property mortgaged to him, and upon which the plaintiff, a son of the judgment-debtor born after the decree but before sale, instituted a suit for setting aside the sale, or for the exoneration of his share, it was held that the decree being not one for sale, and, therefore, made in contravention of the rule enacted by the section, the mortgaged property could not be brought to sale in execution thereof, and that the plaintiff being interested in the equity of redemption, could not be deprived of his right to redeem the property. He was accordingly allowed time to redeem, the Court being further of opinion that the plaintiff's suit was not barred under section 244 of the Code of Civil Procedure. (7)

2464. But a mortgagor objecting to a sale made in contravention of this section would have to apply under section 244 (now s. 47) of the Code. (8) And

(1) *Grant* v. *Subromanian*, I. L. R., 22 Mad., 241 (245).

(2) *Sathuvayyan* v. *Muthusami*, I. L. R., 12 Mad., 325.

(3) *Ramchandra* v. *Jairam*, I L.R., 22 Bom., 686; *Onkar Seth* v. *Baijnath*, 7 C.P. L.R., 15.

(4) *Dullab* v. *Krishna*, 3 B.L.R., 407; *Tukaram* v. *Ramchandra*, I.L R., 1 Bom., 314; *Tinnapa* v. *Murugappa*, I L.R., 7 Mad., 107; *Agarchand* v. *Rakhma*, I.L.R., 12 Bom., 678; *Jagnnnatha* v. *Gangi*, I.L R., 15 Mad., 303; *Kasturi* v. *Venkatchalapathi*, 412, *ib.*; *Muhammad Hamid-ud-din* v. *Shib Sahai*, I.L R, 21 All., 309.

(5) *Sada Sheo* v. *Kareeman*, 3 C. P. L. R., 15

(6) *Bannu Bi* v. *Uttamchand*, 1 C.P.L.R., 79.

(7) *Muthuram* v. *Ettappasami*, I.L R., 22 Mad, 372; *contra* in *Muthu* v. *Karuppan* 17 M L.J.R., 163; see also *Ramasamy* v. *Virasami*, I.L.R., 21 Mad., 222; *Mantand* v. *Dhondo* I L.R., 22 Bom., 624 (628).

(8) *Sonu Singh* v. *Behari Singh*, I L.R., 33 Cal., 283 (286); *Ashutosh* v. *Behari Lal* 11 C.W.N., 1011, F B., (S.C.) I.L.R., 34 Cal, F B.; *Mayan* v. *Pakuran*, I.L.R., 22 Mad., 347; *Muthu* v. *Karuppan*, I.L.R., 30 Mad., 313; *Gaya Prasad* v. *Randhir Singh*, 3 A L J.R., 456.

if the application is made before its confirmation, it will not be confirmed if it appears to have been made in contravention of this rule. But if he applies for setting it aside after its confirmation, it can then be set aside only if he shows that owing to fraud or other reasons not attributable to his negligence he was kept in ignorance of the sale-proceedings and the proceedings preliminary to sale. (1) It has already been observed before that a mortgagee could not formerly bring the mortgaged property to sale in execution of a decree obtained even on another debt. His purchase of such property being in contravention of the provisions of this section, was then held to be illegal and conferred on him no legal title. Being in actual possession, however, the mortgagee was on the one hand entitled to receive credit for the purchase-money paid, and on the other to account to the mortgagors for the amount realized by them during the period of their possession. (2) But in taking this view the Madras Court does not appear to be consistent with itself. For there are cases of that Court in which it has been held that a sale made in contravention of this section is not void, but is only voidable; so that its effect upon the rights of the mortgagor depends not upon the sale, but upon who purchases the property. If it is purchased by the mortgagee himself, then the Courts are agreed that by so doing he could not be freed from his liability to be redeemed at the option of the mortgagor. (3) But if the property be purchased by a stranger to the suit, the sale then cannot be avoided. (4) And even where the mortgagee is the purchaser, if the mortgagor was a party to the proceedings, he cannot be permitted to redeem after confirmation of the sale. (5)

Remedy by suit under s. 67.

2465. It must be noted that the mere taking of a money-decree on a mortgage-bond does not in law destroy the mortgage-lien, so as to bar a subsequent suit under section 67. (6) But should the subsequent suit be necessarily regarded as founded upon the mortgage? It has been suggested in Calcutta (7) and in one case held in Allahabad in cases decided under section 99 which contained the words "attaches the mortgaged property" that a suit under section 67 may be regarded as a suit on the charge created by the attachment of the property effected in execution of the money-decree, or on the original mortgage. This view was controverted in this work, (8) on the ground that, if that were the case, the mortgagee would be debarred from instituting his suit under s. 67 as soon as the attachment was raised. nor, indeed, could he bring his suit before the attachment. It was then observed that this could not have been the intention of the Legislature, and the present amendment seems now to confirm that view. It was added that the section was inaccurately worded and naturally presented difficulties of construction: one such difficulty referred to, was in its reference to section 67, which contemplates a suit only on mortgage "after the mortgage-money has become payable," and it was observed that if it was to be literally construed a money-decree howsoever obtained by a mortgagee would be ineffectual, because he could not execute it as against the mortgaged property

(1) *Ashutosh* v. *Behari Lal*, 11 C.W.N., 101 F.B.

(2) *Shib Das* v. *Kali Kumar*, I. L. R., 30 Cal., 463; *Durgayya* v. *Anantha*, I. L. R., 19 Mad., 74; *cf. Papamma* v. *Protapa*, I. L. R., 19 Mad., 249, P. C.

(3) But *contra* in *Shibu* v. *Chandra Mohan*, I. L. R., 23 Cal., 849.

(4) *Mayan* v. *Pakuran*, I.L.R., 22 Mad., 347; *Erusappa* v. *Commercial and Land Mortaage Bank*, I. L. R., 23 Mad., 377; *Muthu* v. *Karuppan*, 17 M. L. J. R., 163; *Martan* v. *Dhondo*, I. L. R., 22 Bom., 624.

(5) *Muthu* v. *Karuppan*, 17 M. L. J. R., 163.

(6) *Venkaya* v. *Suraya*, 17 M. L. J. R., 325.

(7) *Jadup Lall* v. *Madhub Lall*, I. L. R., 21 Cal., 34.

(8) Law of Transfer (2nd Ed.) § 1583.

under section 99, and he could not institute a suit thereon for the sale of the property under section 67. And to say that he could institute a suit *on his mortgage* [1] was certainly not to enable him to execute his money-decree—for if the mortgage-money has become payable he could have instituted a suit under section 67 anyhow. The present rule, however, obviates this difficulty, for since it presupposes a decree on a claim arising out of a mortgage, a suit under s. 67 would be *prima facie* maintainable. And the second suit under section 67 would be based not upon the charge created by the attachment nor upon the money-decree,[2] but upon the mortgage upon which the first suit was presumably based, and for the satisfaction of which out of the mortgaged property law prescribes only one procedure—that is, by a suit under section 67. The section, of course, does not debar the mortgagee from executing his decree as against any other property of his judgment-debtor which he is entitled to bring to sale without having to institute another suit.

2466. It would appear that where in the original suit a plaintiff asked for a decree against the mortgaged property and for an order that in execution of it the property be attached and sold, but where from inadvertence of the judge or from other cause, the judgment of the Court took no notice of the prayer and simply decreed the amount due, reserving a lien on the mortgaged property, a second suit would not on that account be barred. But if the Court has distinctly refused the prayer for sale, the section cannot enable the mortgagee to maintain a fresh suit, as in that case the matter would be *res judicata*.[3] On the other hand, where a mortgagee sued for sale of the property under this section; but the suit was compromised by the mortgagee taking a money-decree, in which, however, the mortgaged property was declared to be charged for payment of the decree, it was held that notwithstanding the decree the mortgagee would have to institute another suit under section 67 before he could bring the mortgaged property to sale.[4] This case may be defended on the ground that the previous decree being only declaratory of a charge on the mortgaged property could not be executed, but that a fresh suit to enforce the charge was necessary. In short, the previous decree being merely a money-decree, another suit was necessary to bring the property to sale; but whether this second suit would be to enforce the mortgage, or the charge declared by the previous decree, the Court did not consider, but it is evident that the second suit would *prima facie* be to enforce the charge, though a suit on the original security is not inconceivable.[5] The plaintiff cannot be allowed to bring a suit for a mere declaration, where in accordance with the provisions of the section he is liable to institute a suit under section 67,[6] nor can he be allowed in a suit under the last-named section to reserve his rights and interests under the mortgage, which, if allowed, would, indeed, have the effect of frustrating the very object for which such a suit is enjoined.[7] From the wording of the section it is, of course, abundantly clear that before the plaintiff could succeed in his subsequent suit under section 67,

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(1) *Azim-ullah* v. *Najm-un-nissa*, I. L. R., 16 All., 415. (The head-note of this case is misleading.

(2) *Saligram* v. *Murlidhar*, 10 C. P. L. R., 21.

(3) *Ganpat Rao* v. *Sakho Bai*, 3 C. P. L. R., 170; *Narain* v. *Ragho*, (1877) C. P. Sel. Cas., 29.

(4) *Jagdam Sahai* v. *Mahabir*, I. L. R., 28 All., 60; *Madho Prasad Singh* v. *Brijnath*, (1905) A. W. N., 152; *Narasinga Das* v. *Mt. Munna*, 6 A. L. J. 731.

(5) S. 101.

(6) *Lekhraj* v. *Ghafur Khan*, (1894) A. W. N., 205.

(7) *Mahabir Singh* v. *Saira Bibi*, (1895) A. W. N., 116.

he must shew that he is a mortgagee, otherwise section 43 (now O. 2, r. 2) of the Code would clearly bar his suit.(1)

2467. In this connection it may be noted that though this rule overrules O. 2, r. 2 of the Code, it has not the effect of annulling the whole of that rule, but only so much of it as might stand in the way of the mortgagee instituting another suit on the same cause of action. Now as O. 2, r. 2 of the Code is directed against two evils, namely, the splitting of claims, and the splitting of remedies, the only effect of this rule is to relieve the mortgage from the consequences of the splitting of his remedies. Thus, where a debtor is liable for Rs. 15,505 promised to pay Rs. 4,000 before 18th September, and to give a mortgage on a specified property for the balance, and in the event of his failing to pay Rs. 4,000 within the stipulated period, the mortgage was to be for the full amount, and both of which covenants being broken, the question was whether the creditor was entitled to sue for Rs. 4,000 and the balance of Rs. 11,505, separately, or whether Rs. 4,000 being only a part of Rs. 15,505 he could sue only once for the whole amount. It was held that having regard to the objects of the two sections, the creditor was not entitled to maintain the two suits.(2)

Purchaser without notice.

2468. In view of what has been already stated (3) it is perhaps unnecessary to add that whatever may be the effect of the sale on the parties to the suit, it cannot prejudice a *bona fide* purchaser without notice of the defect in his title. In such cases the mortgagee is held to be estopped from enforcing his mortgage(4) and so is the mortgagor who was a party to the suit.(5)

2469. Enforcement of Security-bond.—The question, whether a security-bond given for the appellant to an appellate Court for the due performance of its decree is a mortgage within the sense of section 58, is one upon which there is some difference of opinion between the High Courts. According to the view taken in a Calcutta case, where the security-bond was addressed to no one in particular, but was in reality given to the Court, the transaction evidenced thereby was held to be a mortgage, and in this view this rule would offer no bar to the security being realized in execution.(6) But if the security be in favour of a specified individual, *e.g.*, the Registrar of the Court, this section would then, it was maintained, clearly offer an impediment to realization of the security otherwise than in execution of a decree obtained thereon under section 67.(7) But this view has not been acceded to by the other Courts,(8) and it may be submitted that the Calcutta view is too narrow and obliterates the difference between a private contract and an engagement made for the due

(1) *Jailal* v. *Dhankal Singh*, (1887) A. W. N., 249.

(2) *Govind* v. *Parshram*, I. L. R., 25 Bom., 161 (167).

(3) O 34 r-5, Comm.

(4) *Muhammad* v. *Shib Sahai*, I.L.R. 21 All. 309; *Ashutosh* v. *Beharilal*, I.L.R. 35 Cal. 6; F. B.; *Ram* v. *Jairam*, I L.R. 22 Bom. 686; *Rani Ratan Kuar* v. *Ratan Lal*, 2 N.L R. 106.

(5) *Madan* v. *Jamna*, (1908) A.W.N, 48; *Venkayya* v. *Subrayya* I,L.R. 30 Mad, 362.

(6) *Shyam Sundar* v. *Bajpai*, I. L. R , 30 Cal., 1060.

(7) *Girindra* v. *Gopal*, I.L.R., 26 Cal,, 246; *Tokham Singh* v. *Gurwar Singh*, I. L. R., 32 Cal., 494; *Chandrabati* v. *Madho*, 19 C.W.N., 178. The same Court has in other cases held that a security-bond given under s. 545 of the Code cannot be enforced in execution of a decree under s. 253 of the Code, but that a separate suit would have to be brought against the surety. *Kali Charan* v. *Balgobind* I. L. R., 15 Cal., 497; *Tokhan* v. *Roop Narain*, I. L. R., 22 Cal., 25; this view though it depends upon the construction of the two sections, and though it has been also dissented from by the other Courts, does not affect the question discussed in the text.

(8) *Bans Bahadur* v. *Mughla*, I. L. R , 2 All., 604, F. B.; *Janki* v *Sarup*, I. L. R., 17 All , 99; *Thirumalai* v. *Ramayyar*, I. L. R., 13 Mad., 1; *Vankapa* v. *Bashingapa*, I.L.R., 12 Bom., 411.

performances of a Court's decree. Any other view would involve the necessity of the Court's entering the lists with the recalcitrant debtor, either by suing him itself, or by assigning the bond in favour of the decree-holder. Moreover, such a course would involve expense and delay which it was the very purpose of the bond to avert.

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Charges.

2470. Analogous Law.—This rule was formerly a part of section 100 of the Transfer of Property Act, from which Act it has been transposed to here along with the other sections relating to procedure. It compendiously extends to suits for the enforcement of a charge the procedure laid down for the redemption of mortgages, and for the enforcement of a mortgage in which the appropriate relief is by way of sale of the mortgaged property. As charge creates only a collateral security in its incidence resembling a simple mortgage, a relief by way of foreclosure is obviously inapplicable to it. And even as regards the procedure for the enforcement of a simple mortgage, it is only applicable "so far as may be"—that is to say, so far as it is consistent with the nature and extent of the security created by the charge. [For a further commentary, see s. 100.]

TOPICAL INDEX.

PAGE

A

Abatement.
- Application of, Doctrine of ...
- Rateable, when made ... 958

Accession.
- Acquired, Law as to 979, 980
- Enures for the benefit of subsequent mortgagees ... 1081
- Kinds of ... 977
- Law as to, S. 63 975—983
  - profits arising from ... 982
  - where mortgagee acquires not as mortgagee ... 980
- Mortgagee's right to, prevails as opposed to the right of the Crown ... 1081
- Mortgagor's election, in case of separable ... 981
- Mortgagor's right to ... 977
- Mortgagor's right to, Limitation upon 978
- Natural, Devolution of ... 978
- Omission to claim, Effect of ... 982
- Possession of, by mortgagee not adverse 979
- Principle of the law of ... 977
- Regarded as part of *corpus* in computing value of properties for determining quantum of contribution ... 1190
- Rights and liabilities of mortgagor, as to inseparable acquisitions ... 981
- Rights of a mortgagee to ... 1077
- Rule of, limited by contract ... 1081
- S. 63, Tr. P. Act, and S. 90, Trusts Act, Distinction between ... 976
- Two kinds of, natural or acquired ... 1078
- What, pass with mortgage 1078—1081
- When ceases to be an ... 1078
- When mortgagee is entitled to compensation as to ... 982
- See *Mortgaged Property.*

Accounts.
- In suit for possession, How taken ... 972
- Liability of mortgagee in possession.
  - to keep and give ... 1144
  - to render—See *Mortgagee in Possession.*
- Liability of mortgagee to, when arises 1412
- Mode of taking, in a redemption suit 1545, 1546

PAGE

Accounts—(concld.)
- Mode of taking 1312-1315, 1414, 1415
  - Difference between English and Indian Law ... 1149
  - with rests, explained ... 1149
- Method of taking 1312—1315
- Necessity of taking, in suit for sale ... 1490
- Non-liability to account of mortgagor, when arises ... 1154
- No, when profits vary 1154, 1155
- Of mortgagee—Principal heads of receipts and disbursements in ... 1412
- Refusal to, presumption arising from, against mortgagee in possession ... 1148
- Right of mortgagor to call for, only when mortgagee is in possession ... 1124
- Scrutiny of ... 1147, 1148
- Subsequent mortgagee not bound by, between prior mortgagee and mortgagor ... 1296
- Suit for, and surplus profits, Limitation for ... 859
- Taking of
  - not necessary when nothing is found due or where mortgagee has been over-paid ... 1547
  - postponed until after passing of preliminary decree ... 1540
- What a full, must contain 1148, 1149
- Production of, by mortgagee—See *Possession.*

Accretion.
- Law as to ... 979
- See *Accession.*

Acknowledgment.
- Of liability, Limitation, Effect on ... 949
- Registration of, when necessary ... 930

Acquiescence.
- When, amounts to consent ... 954
- Whether sufficient to extinguish mortgagor's title ... 946
- See *Mortgagee.*

Acquisitions.
- See *Accession.*

Act—
- ***Imperial Act.***
- **XXXII of 1839.**
  - See *Interest Act.*

PAGE

Act—

I of 1843.
Reference to ... 863

XXVIII of 1855.
See *Interest Act.*

XL of 1858.
S. 3, Reference to ... 1231

XI of 1859.
Ss. 37, 40, Reference to ... 1105

X of 1865.
See *Succession Act, 1865.*

XXVIII of 1866.
See *Trustees' and Mortgagees' Powers Act, 1866.*

X of 1870.
See *Land Acquisition Act.*

XXIII of 1870.
See *Coinage Act.*

I of 1872.
See *Evidence Act, 1872.*

IX of 1872.
See *Contract Act.*

IX of 1875.
See *Majority Act.*

XI of 1876.
See *Presidency Banks Act.*

III of 1877.
See *Registration Act.*

XVII of 1879.
See *Dekkhan Agriculturists' Relief Act.*

II of 1882.
See *Trusts Act.*

VII of 1889.
See *Succession Certificate Act, 1889.*

VIII of 1890.
See *Guardians and Wards Act.*

I of 1894.
See *Land Acquisition Act.*

XXII of 1899.
See *Coinage and Currency Act.*

V of 1908.
See *Civil Procedure Code.*

IX of 1908.
See *Limitation Act.*

XVI of 1908.
See *Registration Act.*

Bengal Acts.

XVIII of 1885.
Reference to ... 858

PAGE

Act—

VII of 1880.
See *Public Demands Recovery Act.*

VIII of 1885.
S. 167, Applicability of ... 1277
S. 167, distinguished with S. 101, of Tr. P. Act ... 1277

I of 1895.
See *Public Demands Recovery Act.*

Central Provinces Acts.

XVIII of 1881.
See *Central Provinces Land Revenue Act.*

IX of 1883.
See *Central Provinces Tenancy Act.*

XI of 1898.
See *Central Provinces Tenancy Act.*

Madras Acts.

II of 1864.
Reference to ... 1231

VIII of 1865.
Reference to ... 1105

II of 1869.
Reference to 858, 1425

Of the Parties.
See *Words and Phrases.*

Administration Suit.
When creditor in, entitled to redeem ... 1234

Admissibility.
Of a document unstamped and unregistered ... 883
Of unregistered mortgage 879—881

Admission.
Attestation of, condemned ... 874
By mortgagor.—See *Equity of Redemption.*

***Ad interim* Protection.**
When could be granted in a redemption suit ... 1550

Advance of Money.
Costs, charges, expenses, if regarded as further advances ... 821
Further advances in current debit account may form consideration for mortgage 820, 821
Past and future, as consideration ... 819

Adverse Possession.
Commencement of, before execution of mortgage, Effect of ... 1032
Co-mortgagor's possession of whole mortgaged property becomes, against other co-mortgagors ... 857

PAGE

Adverse Possession—(concld.).

Mortgagee's disability to set up ... 928
No title by, could be claimed by a mortgagee in possession ... 1148
Possession by mortgagee not adverse to mortgagor ... 975
Possession of mortgaged property by third party, whether adverse to mortgagor and mortgagee ... 975
Usufructuary mortgagee in actual possession puts in, against mortgagor having legal possession ... 861
By mortgagee—See *Accession*.
See *Equity of Redemption*.

Agreement.

Not compulsorily registrable ... 887

Agent.

Service of notice to, or tender made to, S. 102 1300—1302
When could exercise mortgagee's power of sale 1062, 1063
See *Principal and Agent*.

Alienation.

Against covenant, void as against covenantee 1007, 1008
Covenants against, under law in force before Tr. P. Act, Law as to 1006, 1007
Covenant not to alienate, where no intention expressed to pledge specific immoveable property, is no mortgage 787
Of mortgaged property — See *Lis Pendens*.
See *Covenant*.

Alluvion and Diluvion.

See *Accretion*.

Alterations.

Effect of, in deeds 884—886
What are material ... 884
When vitiates deeds 884—886

Altered Deeds.

Effects of 884—886
Value of ... 886

Ambiguity.

Equivocal declarations of intention, Presumption in cases of ... 1286
Test to determine whether document is usufructuary mortgage or perpetual lease ... 856

Ambiguous Document.

See *Ambiguity*.

Ameliorative Waste.

What is ... 1143

PAGE

American Courts.

Practice and procedure of, regarding joinder of parties in mortgage-suits. 1346

Analogous Law.

See under each section.

Annuity.

Charge of ... 1265
Grant of, Presumption raised from ... 780

Anomalous Mortgage.

Claim to enforce terms of an, Valuation of ... 1252
Definition of, S. 98 ... 1244
Exceptions to ... 1247
General incidents of 1251, 1252
How arises ... 851
Instance of ... 861
Mortgage for fixed term but otherwise usufructuary creates only ... 852
Not found in English Law ... 1244
Provisions of, not applicable to transactions not answering the definition of a mortgage in S. 58 ... 1251
Rights and liabilities of the parties in 1244
Specially provided for in S. 98 ... 785
Usufructuary mortgages and, instances of ... 852
Well-known instances of 1247—1251
What are ... 1244
Oral evidence, Admissibility of, to prove an ... 1251
See *Words and Phrases*.

Appeal.

Against final decree in suit for sale 1523, 1524
Against orders passed under O. 34, r. 2, Law as to ... 1454
Alteration of suit for possession based on fraud, into redemption suit in ... 970
In respect of orders passed in proceedings under O. 34, r. 5, whether allowed, discussed 1523, 1524
Lies against a supplementary decree... 1539
Order refusing extension of time for the payment of mortgage money is subject to ... 1478
Preliminary decree for sale is subject to ... 1495
Preliminary decree under O. 34, r. 4, subject to ... 1488
Right of, against, Order granting or refusing extension of time under S. 87 or 89, Tr. P. Act, Law as to... 1478
See *Costs*.

PAGE

Application.
For a supplementary decree, struck off in default cannot be revived ... 1532
Form of, under O. 34, r. 3 ... 1460
For supplementary decree when lies 1533,1534
Of sale-proceeds, O. 34, r. 13 ... 1569
Time, for, by mortgagee to pass final decree for foreclosure ... 1457
Under S. 47, Civ. Pro. Code (1908), By a mortgagor objecting to a sale... 1580
Under O. 34, r. 3, need not be in writing ... 1462
See *Payment into Court.*

Appointment.
Of guardian—See *Guardian.*

Apportionment.
Doctrine of, S. 82 ... 958
Of debt in redemption suit 1543—1545
Rule of, enunciated in para. 1 of S. 82 1186, 1187
Of income—See *Mortgagee in Possession.*
Of payments, Law as to ... 1414
Of payments in a suit for foreclosure 1414, 1415
Of proceeds of sale—See *Sale, Sale-proceeds.*
Where repayment is less than interest, Law as to ... 1451
See *Payment.*

Arh.
A simple mortgage ... 827

Assignee.
Of a mortgagor, Power of, to question validity of sale 1515, 1516
Rights of an, of a mortgage ... 889

Assignment.
Future book debts, of sufficiency of description in ... 806
Future coffee crop assigned to secure repayment of loan held to be mortgage ... 794
Mortgaged lease by—See *Mortgaged Lease.*
Mortgage, by way of ...888, 889
Notice of, person in possession, if entitled to ... 925
Stock-in trade, of, sufficiency of description in ... 806
Stock-in-trade, of, whether a mortgage 898
See *Bankruptcy, Equitable Assignment, Equity of Redemption, Mortgage-decree, Sub-mortgage.*

PAGE

Attaching Creditor.
No marshalling between a mortgagee and, of the mortgagee .. 1183
When may redeem 1233, 1234

Attachment.
See *Mortgaged Property.*

Attestation.
Admission, of, condemned ... 874
History of ... 864
Documents requiring—See *Documents.*
Meaning and sufficiency of 872—874
Necessity of, for a mortgage deed, and charge ... 1254
Of the execution and of the instrument, Difference between ... 872
Presumptions arising from ... 875
What is deficient ... 874
What is a valid 872—874
Whether implies consent 874, 875
Who may be an attesting witness 871, 872
See *Documents, Mortgage.*

Attiper.
See *Words and Phrases.*

Auction-purchaser.
Acquisition of, Property by, free from all incumbrances ... 1396
Title of, of mortgaged property 1512, 1513
Title of, starting point of ... 1523
See *Puisne Mortgagee.*

Averment.
Of fraud—See *Fraud.*

Award.
Decree on, O. 34, r. 4, to a, Application of ... 1495

B

Bankruptcy.
Assignment of equity of redemption where consolidation and tacking combined, Effect of, on ... 966
See *Insolvency.*

Bankruptcy Act, 1883 (English).
S. 49, Reference to ... 1172

Bargain Paper.
When may amount to mortgage ... 788

Benamidar.
Beneficiary barred by ... 1549

Benamidar Plaintiff.
See *Plaintiff.*

Benami Mortgage.
See *Mortgage.*

PAGE

Benami Transactions.
See *Mortgage*.

Beneficiary.
Barred by benamidar ... 1549

Bengal Tenancy Act (VIII of 1885).
S. 12, Reference to 888, 921
S. 65, Reference to, for instance of charge created by operation of law. 1254
S. 65, whether referred to in, is a charge ... 1275
S. 67, as to effect of deposit as regards interest ... 1213

Bequest.
See *Will*.

Bhogabandhukum.
Usufructuary mortgage, Analogue of, in Hindu law ... 853

Bill of Sale Acts (English).
Provide for mortgage of moveable property ... 1172
Reference to ... 898

Birth.
After decree does not deprive equity of redemption ... 1580

Book Debts.
Assignment of future, if proper description ... 806

Breach of Contract.
See *Damages*.

Broker.
Right of, negotiating for loan on mortgage to brokerage ... 798

Brokerage.
Broker's right to, for negotiating loan, in spite of failure of contract ... 798
See *Broker*.

Burden of Proof.
In a redemption suit. 1541, 1542
In case of alterations in deeds. 886, 887
Questions arising under S. 66, Law as to, on ... 1004
Registration shifts ... 884
Where document is not, what it purports to be ... 811

Bye-bil-wafa.
English mortgage and, Comparison between ... 859
Form of mortgage used by Mahomedans 784
With possession—Arises among Mahomedans out of the combination of usufructuary with a mortgage by conditional sale ... 1247

PAGE

C

Capacity.
Persons competent to mortgage. 814, 815

Cause of Action.
When mortgagee could institute another suit on the same ... 1583

Central Provinces Land Revenue Act.
S. 65, Meaning of "charge" in .. 1275
S. 65, Reference to, for instance of charge created by operation of law... 1254

Central Provinces Tenancy Act.
S. 40, Meaning of "charge" in ... 1275

Certificate.
By registering officer, Evidentiary value of ... 1406

Charge.
Against whom enforceable ... 1273
Applicability of doctrine of marshalling to ... 1184
Contingent, Exclusion of. 1255, 1256
Contingent, not recognised in Indian Law ... 1256
Covenant not to alienate does not constitute mortgage or. 793, 794
Created
as a result of legal obligation ... 1266
by operation of Law, Instances of 1253, 1254
by operation of Law, Various kinds of 1266—1271
Creates only a collateral security, no relief by way of foreclosure ... 1584
Deed failing to operate as a mortgage cannot be used as creating a ... 874
Definition of 1252, 1253
Definition of, as originally proposed 1253
Doctrine of merger in the case of a, how obviated in English practice ... 1280
Document creating a, Instance of ... 811
Enforcement of
Law as to 1489, 1490
against a transferee without notice, Difference of opinion *re* 1254, 1255
Explained and discussed ... 830
Extinction or keeping alive of, question of intention ... 1284
Extinguishment of
applicability of the principle ... 1276
English Law, Applicability of, to India, discussed 1277—1279
law before passing of S. 101, 1277, 1278
Principle of ... 1280

PAGE

Charge—(contd.).
Extinguishment of
provisions do not conflict with S. 167 of the Bengal Tenancy Act ... 1277
S. 101 ... 1276
wording of section discussed ... 1276
Form in which, paid off no test of keeping it alive ... 1291
Goods assigned, when not in existence, on 1254 *f.n.*
Holder of,
cannot foreclose ... 1272
does not possess all the rights of a mortgagee ... 1272
if entitled to variation in period of limitation ... 1300
remedy of 1271, 1272
whether possesses the right of marshalling and contribution ... 1272
How affects limitation ... 1265
How to be effected, No provision ... 1256
Instances how a, may be created ... 1259
Instances of 1261, 1262, 1263
Intention to keep alive ... 1282
how to ascertain ... 1288
test to ascertain 1289—1291
Intention to preserve, Oral evidence of ... 1287
Instruments providing for power of sale of mortgages or ... 832
Landlord purchasing tenant's property entitled to keep alive rent-charge and to priority ... 1291
Lien and, distinguished ... 1253
Limitation for enforcement of, 832—836, 1274
Madras High Court Rules for enforcement of law respecting suits relating to mortgage and, sale and redemption 1311—1316
May be created also in respect of moveables ... 1275
Meaning of, in S. 40, of the Central Provinces Tenancy Act and in S. 65 of the Central Provinces Land Revenue Act ... 1275
Mere agreement to sell or mortgage whether creates a charge ... 1259
Merger of
against admitted intention of owner ... 1287
when paid off by owner of estate of inheritance ... 1282
Money paid under compulsion when a. 1269
Money spent by mortgagee in possession

PAGE

Charge—(contd.).
when a charge—See *Mortgagee in possession.*
Mortgage and
covenant for sale, not the sole test ... 1259
difference between, Importance of 1254, 1255
distinction between 779, 1254, 1255
distinction between depended on limitation 832
distinguished 1257—1259
stand on same footing for priority ... 1284
Mortgage how differs from 786, 1257
Mortgage of non-existent property when operative as ... 803
Must take effect immediately ... 1256
Need not be in writing, Attestation and registration not necessary, even if in writing ... 1254
Not always implied by a trust 1104 *f.n.*
Not implied from a mere right to contribution ... 1270
No, in respect of illegal or void contracts ... 1269
Of annuities ... 1265
On after-acquired property might be created by contract to mortgage "all my real and personal estate"... 799
On debt ... 1272
On immoveable property, whether hypothecation bond a 1254 *f.n.*
Paid by owner of an estate in fee or in tail, Presumption in case of ... 1279
Partner's lien when a ... 1271
Persons in fiduciary position of, ... 1270
Pre-requisites of 1255, 1256
Property must be secured to create a ... 1261
Property must be specified to create a... 1260
Provisions relating to
mortgage, Applicability of, to a sale or redemption of mortgaged property, Applicability of, to property subject to a ... 1584
supplementary decree, whether extend also to ... 1538
Redemption of prior, not a merger of subsequent interest ... 1107
Revenue sale, Proceeds of, on, S. 73 ... 1101
Rights and liabilities of parties to a. 1272, 1273
Rights of a tenant for life paying a ... 1279
Rules regarding mortgage and, Bombay High Court's powers to make 1310, 1311

PAGE

Charge—(concld.).

Satisfaction of, Created by mortgage how effected ... 1293
Settlements, wills, etc., may create a ... 1264
Simple mortgage and, difference between 1257, 1258
distinguished 829, 830, 831
Simple mortgage, Assumed to include a 1254 *f.n.*
Simple mortgage without power of sale is ... 828
Subrogation, Created by the equitable principle of ... 1271
Suit on, as shield against rival incumbrancer ... 1291
Suit to enforce a, Court-fee payable in a ... 1276
To be reimbursed by a trustee under S. 32 of the Trust Act ... 1274
Trustee, of a, Rights of 1274, 1275
Trustee, of a, whether a first charge... 1274
Trustee's lien when a ... 1270
Trust property, on, exception to general rule ... 1253
Use of the term, in Limitation Act ... 1255
Valuation of subject-matter in a suit to enforce a ... 1276
When perpetual ... 1263
Whether enforceable against a transferee without notice ... 1265
Whether kept alive, Test to find out ... 1284
Whether necessary to be in writing, Difference between English and Indian Law 1256, 1257
Whether referred to in S. 65 of the Bengal Tenancy Act is a, under Tr. P. Act ... 1275
Words in deeds connoting a, will not transfer interest ... 787
See *Covenant*, *Decree*, *English Mortgage*, *Insolvency*, *Sub-mortgage*, *Words and Phrases*.

Charter Act.

Reference to ... 1304

Cheque.

Not a good tender ... 1209

Chose in Action.

Assignment of a, and transfer of a mortgage, Difference between ... 889

PAGE

Civil Law.

Mortgage, in 825, 826

Civil Procedure Code (1882).

S. 43, Reference to ... 1583
S. 47, Reference to ... 1512
Ss. 237 and 287 (*c*), Reference to ... 1011
S. 244, Reference to ... 1580
Ss. 244, 310-A, 642, Reference to 1523, 1524
S. 247, Reference to ... 1451
S. 257-A, Reference to ... 820
Ss. 304 to 309, 312, 588, Reference to. 1305
S. 310-A, Reference to ... 1454
S. 316, *Re* starting point of auction-purchaser's title ... 1523
S. 335, Reference to ... 1415
S. 368, Reference to ... 924
S. 440, Reference to ... 1231

Civil Procedure Code (1908).

Private sale authorized by ... 1518
S. 2 (2), Definition of preliminary decree referred to ... 1460
S. 11, Reference to 1472, 1561
S. 11, Expl. 4, Reference made to ... 946
S. 13 (*b*), Provisions of ... 1566
S. 47, Reference to 1471, 1524, 1580
S. 48, Reference to 1475
S. 48, Whether applicable to a supplementary decree 1536, 1537
S. 65, *Re* starting point of auction-purchaser's title ... 1523
Ss. 67, 86, 87, 88, 89, 99, Reference to 846
S. 73, Reference to ... 1101
S. 73 (*b*), Reference to ... 1566
S. 73 (*c*), Reference to ... 1175
Ss. 81 and 82 and O. 34, r. 15, applicable to a person having a charge 1254, 1255
Ss. 121—131, Reference to ... 1304
O. 1, r. 9, Reference to ... 1370
O. 2, r. 2, Reference to 1115, 1525, 1583
O. 2, r. 2—See *Usufructuary Mortgage*.
O. 2, r. 3, Reference to ... 1195
O 2. r. 21, Reference to ... 1561
O. 6, r. 15, *Re* verification of petitions, Referred to 1205, 1206
O. 8, r. 6, Reference to ... 1152
O. 9, r. 13, Reference to ... 1471
O. 21, r. 1, Reference to ... 925
O. 21, rr. 1, 2, Reference to ... 1468
O. 21, r. 2, Reference to 991, 1504
O. 21, r. 11 (2), Reference to ... 1460
O. 21, r. 66, Reference to ... 1163
O, 21, r. 69, Reference to ... 1500

PAGE

Civil Procedure Code (1908)—(concld.).
O. 21, r. 72, Reference to ... 1529
O. 21, rr. 82—96, Reference to ... 1507
O. 21, r. 89, Reference to 1285, 1305, 1489, 1507
O. 21, r. 92, Reference to ... 1529
O. 23, r. 3, Reference to ... 881
O. 24, r. 7, Reference to ... 947
O. 32, rr. 1—16, Reference to ... 1303
O. 32, r. 3, Reference to ... 1303
O. 34, Provisions of in respect of suits relating to mortgages and charges 1343—1584
O. 34, r. 1, for procedure in redemption suits ... 1222
O. 34, rr. 1, 2 and 3, Reference to ... 1130
O. 34, r. 3, Reference to ... 1211
O. 34, r. 11, Reference to ... 1122
O. 34, r. 15, Provisions relating to sale or redemption of mortgaged property, Applicability of, to property subject to a charge ... 1584
O. 41, r. 5, Security bond given under, not exempt from registration ... 881
Fifth schedule, amends S. 100 ... 1253
Repeal of S. 99, Tr. P. Act, by, Effect of 1027

Clog on Redemption.
See *Redemption.*

Coinage Act.
Ss. 12, 13, 14, Reference to 1207 *f.n.*

Coinage and Currency Act.
S. 2, proclaiming gold coins shall be legal tender at Rs. 15 a sovereign 1207 *f.n.*

Collections.
Duty of mortgagee in possession to account for illegal ... 1140

Commission.
Mortgagee's right to, when allowed ... 941
Payment of, Law as to ... 1415
Recoverability of, by a mortgagee ... 1415

Common Law.
Mortgagor's disability to lease mortgaged property under English ... 1005

Co-mortgagee.
Payment to, Effect of ... 909
See *Mortgagee.*

Co-mortgagors.
Claim of, to contribution—See *Contribution.*
Purchase by, Effect of ... 1520
Redemption suit by ... 1543

PAGE

Co-mortgagors—(concld.).
Whether representatives of a deceased mortgagor regarded as, for purposes of contribution ... 1239
See *Usufructuary Mortgage.*

Companies Clauses Act, 1863.
S. 24, Reference to ... 1167

Companies Clauses Consolidation Act, 1845.
S. 42, Reference to ... 1167

Compensation.
Mortgagee not entitled to, in case of natural accession ... 978
Person entitled to reasonable, where stipulation becomes penal ... 1428
Right of mortgagee to, extends to actual expense incurred by him ... 981
See *Improvements, Mortgagee.*

Competency.
Persons competent to mortgage 814, 815

Compound Interest.
When allowed 1422, 1423

Compromise.
Distinction between, of mortgage suit and an ordinary suit ... 1444
How may decree be varied by 1444—1446

Compromise Decree.
Compromise deed and, Difference between ... 881

Compromise Deed.
Compromise decree and, Difference between ... 881
Whether and when provisions *re* registration of mortgages apply to ... 881

Concensual Securities.
Mortgage, a form of ... 779

Condition.
Payment at time and place certain, Covenant for, Demand at specified place essential to fulfilment of ... 1013
What is a depreciatory condition 1070, 1071
When is depreciatory ... 1067
See *Foreclosure.*

Conditional Mortgage.
When deposit of deeds is made subject to condition ... 893

Conditional Sale.
Mortgage by conditional sale distinguished from ... 850
Mortgagee by, Remedy of ... 1022
See *Mortgage by Conditional Sale.*

PAGE

Condition Precedent.

Demand if, to bringing action ... 1013
Existence of, Mortgagee if barred from realizing security by ... 1013

Consent.

Mortgagees' severance of interests by, Law as to ... 954
Whether attestation implies 874, 875
See *Acquiescence*.

Consequential Relief.

See *Redemption*.

Consideration.

Admissibility of oral evidence to prove. 1408
Agreement of lawful nature may form, for mortgage 817, 818
Evidentiary value of, recital of receipt of, in bond ... 1405
Mortgage, for 817—821
Mortgage without, Validity of ... 818
Non-receipt of, See *Oral evidence*.
Partial failure of, Effect on mortgagee's right to sue ... 1014
Various forms of 818—821
What it may consist of 818, 819
See *Advance of money, Decree, Possession*.

Consolidation.

Contract, By 962—965
Debts secured on two separate properties, or on two mortgages of same property, if liable to ... 966
Doctrine of 959-966
Effect of S. 61 on ... 959
History of tacking and 959, 960, 961
Mortgagee's right to sell property twice 966
Mortgagor and mortgagee, Relative position of, in ... 962
Mortgagor's right to redeem particular property singly ... 966
Present state of law of ... 961
Principle of ... 960
Tacking and
Distinction between 960, 1173
How combined 965, 966
See *Bankruptcy, Equity of redemption*.

Construction.

Of final decree in redemption suit 1557—1559
Of preliminary decree in redemption suit 1551, 1552

Construction of Acts.

English cases no authorities in, of Indian legislature ... 789
See *Comm.* under S. 1.

PAGE

Contract.

of mortgage. See *Mortgage*.
Benefit of, conferred by S. 65, Law as to ... 1000
Express, Statutory rights by, Bar of 1010, 1011
Illegal or void, no claim for contribution in respect of ... 1194
Implied, Exclusion of, by notice ... 992
Marshalling may be excluded by ... 1182
Nature of, determined not by name but by its contents ... 810
To the contrary, Provisions of S. 60, not subject to ... 900
When may be implied by law 1266 *f.n.*
Breach of, Implied. See *Mortgagee*.

Contract Act, 1872.

No provision in, for mortgage of moveable property ... 1172
Provision as to tender under, Applicability of ... 909
Reference to ... 898
S. 11, Reference to ... 1303
S. 16, Reference to ... 1432
Ss. 16, 19, Reference to ... 1416
S. 17, for definition of fraud 1155, 1156
S. 18, for definition of misrepresentation 1155, 1158
S. 29, Reference to ... 799
S. 38, Reference to 918, 1213
S. 39, Reference to ... 818
S. 63, Not applicable to agreement to postpone sale, when unsupported by any consideration ... 1065
S. 69, A mortgagee to be reimbursed for the payments made on behalf of the mortgagor ... 1084
S. 69, Contribution, rule as to, analogous with ... 1237
S. 69, Provisions of ... 1238
Ss. 69, 70, Reference to ... 1157
S. 73, Reference to ... 1430
S. 74, Reference to ... 1426
S. 74, Reference to ... 1436
S. 95, *et seq*, Use of the word "lien" referred to ... 1253
Ss. 140, 141, As to general rights of a surety ... 1230
Ss. 151, 213, 60, 84, Provisions in S. 76, cls. (*a*), (*g*), (*h*), (*i*), of T. P. Act borrowed from ... 1183
S. 172, Reference to 779 *f.n.*

PAGE

Contract Act, 1872—(concld.).

Ss. 172—181, Reference to ... 778
S. 176, regarding power of sale of moveable property by pawnor ... 1054
Ss. 217, 221, as to rights of an agent 1270

Contract to Mortgage.

See *Mortgage*.

Contribution.

Accessions regarded as part of corpus for determining quantum of ... 1190
Against whom available 1202, 1240
A mere right to, does not imply a charge ... 1270
Cases in which claim for, does not arise 1203, 1204
Claim for
- Duration of 1242, 1243
- For what payments 1240, 1241
- Not to be joined with one on mortgage ... 1294
- Payment need not be by the claimant himself to create a 1197
- When could be made 1195, 1196, 1197
- Whether permissible in respect of a forced sale ... 1193

Co-mortgagor's claim to, Questions arising in ... 1237
Doctrine of 1184, 1185
- English and Indian Law ... 1185
- General view of the doctrine ... 1186
- Immaterial elements in 1187, 1188
- Object of the section 1185, 1186
- Principles on which based 1185, 1186

Deduction of incumbrance for determining of quantum 1189, 1190
Duration of the right to 1200, 1201
Equitable relief when allowed ... 1201
Essentials to a claim for 1195—1197
Extension of the rule of ... 1202
Interest could be charged at a reasonable rate from date of redemption... 1241
Liability to 1186, 1187
Limitation to claim for 1242, 1243
Marshalling and, Difference between... 1202
Mode of recovery of 1194, 1195
Mortgage-debt, to S. 82 1184, 1185
Nature of right acquired by co-mortgagor ... 1238
No claim for, in respect of illegal or void contracts ... 1194
Obligation to contribute attaches to property and cannot be enforced personally ... 1202

PAGE

Contribution—(concld)..

Only a species of marshalling ... 1202
Principle of, and Doctrine of marshalling, Relation between ... 1186
Procedure to enforce claim for ... 1242
Quantum of 1187-1189, 1201, 1202
- When to be determined 1188-89
- To determine, property when to be valued 1188, 1189

Recovery of 1193-1194
Redemption of whole mortgage, Co-mortgagor's right to, after ... 952
Right of marshalling prevails over the right of, where the two clash ... 1195
Right to
- An equitable right ... 1204
- Exists irrespective of privity between plaintiff and defendant ... 1237
- When commences 1195, 1241, 1242

Rule as to
- Analogous with S. 69, Contract Act ... 1237
- On redemption by one of several co-mortgagors, S. 95 ... 1236
- Principle of ... 1237

Suit for 953
- Parties to ... 1193
- Proper parties to a, all persons liable to contribute are ... 1347

Valuation of property
- to determine rate of 1188, 1189
- to determine quantum of, should be as at the time of mortgage and not when it is sold ... 1188

When Doctrine of Equity applies to ... 1194
Whether charge-holder possesses the right of ... 1272
Whether dependent on redemption ... 1239
Whether implies payment of whole debt 1192, 1193
Whether possession necessary 1239, 1241, 1242
Whether representatives of a deceased mortgagor are co-mortgagors for purposes of ... 1239
Whether right of, created a charge on the property 1198—1200
Who can claim 1238, 1239
Who is entitled to the right 1238, 1239

Contributory Negligence.

How affects forfeiture of priority 1163, 1164

PAGE

Conveyancing Act (English 1881).

Mortgagor's power to lease mortgaged property under English ... 1005
Reference to 782, 989, 999, 1000, 1009
S. 1 (*vi*), Definition of mortgage ... 1254
S. 2 (vi), Reference to ... 729
S. 15 (1), Reference made to ... 929
S. 18, power to create tenancies ... 1139
Ss. 19—22, provisions applicable to Presidency Towns ... 1054
S. 19, cl. (*ii*), s. 23, cl. (2) (*iii*),—Provisions as to insurance copied from ... 1100
S. 20, Provisions of .. 1064
S. 21 (1), (3). Provisions as to title of purchaser borrowed from ... 1069
S. 21 (2). Provisions borrowed from... 1074
S. 21 (3). Provision as to appropriation of sale proceeds copied from ... 1075
S. 23; s. 76, cl. (b) borrowed from ... 1133
S. 23 (3), (4), *re* application of insurance money ... 1144
S. 67, *re* notice to be in writing ... 1063

Co-parcenary Property.

In a Hindu family who are to be joined as parties to a suit relating to mortgage 1377-1379
Rights of, not joined as party to a mortgage suit 1388-1390
See *Joint Family Property, Hindu Law.*

Costs.

Appeal, against ... 1441
Awarding of
Court's discretion in exercise of ... 1438
Rules as to ... 1439
Considered as part of mortgage money ... 1554
Estimate and certification of, Rule as to 1306, 1310, 1315
Forfeiture of, in respect of omission to join necessary party ... 1396
Mortgagee's right to
Against whom available ... 1563
Law as to ... 1438
Mortgagee, of
Subsequent to decree, S. 94 (repealed) ... 1236
When disallowed 1307, 1310, 1316
Of mortgage subsequent to decree
O. 34, r. 11 ... 1562
Principle of the rule 1562, 1563
Of redemption 1549, 1550

PAGE

Costs—(concld.).

Order allowing or disallowing, if appealable ... 1441
Mortgagor for, personal non-liability of, Law as to ... 1487
Power of Court to award interest on... 1440
Power of Court to give and apportion 1438, 1439
Taxation of ... 1563
When disallowed ... 1563
When must be paid by mortgagee ... 1564
When to be added to mortgage-debt 1562, 1563
When personally recoverable ... 1440
Whether could be recovered under a supplementary decree 1537, 1538
Of sale—Mortgagee's right to—See *Sale.*
Payment into Court.

Court.

Competent, Adjudication by, Necessity of ... 948
Deposit in, of money due on mortgage ... 1204
Deposit to be in what Court ... 1209
Interference of, in case of waste, How exercised ... 1003
Money in deposit in, Right of mortgagor to ... 1204
Order of, second suit for redemption, after, Bar of 946, 947
Payment for which, may order sale ... 1501
Power of, to grant extension of time under O. 34, r. 5 ... 1500
Power of, to relieve debtor in respect of hard bargains ... 1432
Power of, to re-open foreclosure ... 1471
Power of, to revise or disallow interest 1415, 1416
Sale by, without jurisdiction a nullity 1517
See *Receiver.*

Court-fee.

Ad valorem, Necessity of, in respect of suit for sale of mortgaged property ... 1495
Ad valorem, payable in suit to enforce mortgage by conditional sale ... 1453
Charge, suit to enforce a, payable in a 1276
In a redemption suit ... 1550
Payable on a claim to enforce terms of an anomalous mortgage ... 1252
Payable on appeal against final decree in a suit for sale ... 1524

PAGE

Court-fee—(concld.).
Payable in an appeal against supplementary decree ... 1539
Redemption, suit for, payable in a ... 1223

Court Fees Act.
Sch. II, Art. 1, Reference to ... 1471
See *Court-fee.*

Covenant.
Covenant not to alienate construed as charge ... 803
Mere covenant not to alienate no mortgage or charge 793, 794
Not to alienate, no mortgage or charge 793, 794
Personal
Instances of 1036—1038
Nature of ... 1037
Whether binding on assignee ... 1040
To pay, when implied ... 1038
See *Alienation, Condition, Mortgagor, Title.*

Covenant for Sale.
Whether the sole test to distinguish between a charge and mortgage ... 1259

Covenant not to alienate.
See *Covenant.*

Creditor.
Administration suit, in, when entitled to redeem ... 1234
See *Attaching creditor, Judgment-creditor, Usufructuary mortgage.*

Crops.
See *Future crops.*

Crown.
Disability of, to foreclose ... 1027
When entitled to the right of redemption ... 1235

Curator.
Of a lunatic may redeem ... 1232
Legal, Appointment of ... 1303

Custom.
Requisites of 1251, 1252
What is a ... 1251
See *Usage.*

D

Damages.
Breach of contract
to assign future property, for 807
to execute deed, for 797, 798
to tend, for ... 797
Loan, measure of, in cases of ... 797
Measure of, for breach of contract to lend 797, 798

PAGE

Damages—(concld.).
Procedure when a party is entitled to, but not interest ... 1421
Recovery of, when mortgagee entitled to ... 1003
Remedy where instrument fails in operation for want of operative words ... 803
See *Interest, Mortgagee, Usufructuary mortgage.*

Damdupat.
Applicability of the rule of, in a mortgage suit : its origin 1423, 1424
A rule of Hindu Law ... 1423
Rule of 1423, 1424
If Tr. P. Act affected in Bombay by ... 1425
Operation of ... 1423
Operation of, on a mortgage discussed 1423, 1424
Saving of, by Contract Act. 1425
Three fundamental rules to which, is subject ... 1425
Scope of 1425, 1426

Debentures.
Priority how determined in ... 1167

Debt.
Apportionment of, in redemption suit 1543—1545
Discharge of, by final decree for
Foreclosure 1469—1471
English Law ... 1469
Meaning of ... 820
Of a father, duty of son to discharge. 1378
Whether contribution implies payment of whole 1192, 1193
See *Mortgage-debt.*

Declaration of Intention.
See *Intention.*

Decree.
Ambiguous, how construed ... 1492
Application for amendment of, No limitation for ... 1447
Compromise, in mortgage-suit, Nature of ... 1444
Construction of
Allowing future interest simply 1450, 1451
Favouring interest ... 1449
Illustrative cases, in respect of 1448
Passed under Tr. P. Act, Law as to 1490—1492
Passed under O. 34, r. 4 1490—1492

PAGE

Decree—(contd.).
Plaint, pleadings and judgment for, user of ... 1490
Contents and form of, in suits relating to mortgages and charges ... 1312
Costs of mortgage subsequent to ... 1562
Creating charge on property, application of S. 67, to ... 1015
Defective, mortgagee, under rights of, Law as to 1399, 1400
Executing Court bound to execute, according to its terms ... 1447
Final
if, indispensable to a valid sale under O. 34, r. 5 ... 1505
in foreclosure suit, O. 34, r. 3 1455
in redemption suit 1552, 1553
in redemption suit, Construction of 1557, 1559
What portion of mortgaged property may be made subject to 1501
When mortgagee entitled to apply for ... 1497
Finality of, Law as to ... 1505
For recovery of balance due on mortgage ... 1524
Can only be against mortgagor 1525
For redemption
Finality of 1556–1560
When satisfied ... 1562
Foreclosure suits, in, S. 86 (repealed) 1216
Foreclosure suits, in, procedure when payment of amount is made, S. 87 (repealed) ... 1216
Form and effect of final, for foreclosure ... 1469
Form of
on the mortgage of moveables.. 1452
Where successive periods for redemption allowed 1442—1444
Where a derivative or sub-mortgagee is joined ... 1444
For possession in case of redemption and for foreclosure or sale in default, S. 93 (repealed) ... 1236
For sale
In a foreclosure suit, when could be passed S. 88 (repealed) ... 1217
Limitation for execution of 1521-1523
Procedure when money due is paid, S. 89 (repealed) ... 1217
Ignoring of vague and indefinite clauses in construing a ... 1492

PAGE

Decree—(concld.).
In redemption suit— Nothing found due on mortgage or where mortgagee has been over-paid ... 1561
Money, Obtaining of, by mortgagee, Effect of ... 1015
Mortgagee, Obtained by, may form consideration ... 820
On a mortgage when may be rendered incapable of execution ... 1459
Mortgagor cannot question the validity of ... 1516
Passed on mortgage for sale of property, not money decree ... 1495
Passed under O. 34, r. 2, cannot be set-off against decree for money against mortgagee ... 1451
Proper Court to amend ... 1447
Purchaser not bound to look behind the ... 1517
Redemption suit, in
S. 92 (repealed) ... 1235
Contents in, and construction of a 1551, 1552
Son born after, whether deprived of the equity of redemption ... 1580
Suit for sale, in, S. 88 (repealed) ... 1217
When no bar to subrogation 1115, 1116
When preliminary and final ... 1460
Whether a person not joined as party is bound by 1383, 1384
For redemption—See *Redemption*.
See *Sale, Supplementary Decree*.

Decree-holder.
Position of, as against third parties ... 1489

Deed.
After registration, operates as a completed conveyance ... 884
Alterations in
Whether affects rights and title vested under it ... 886
Whether vitiated by 884—86
Delivery of
O. 34, r. 2 ... 1451
Whether creates any right ... 1212
Effect of alterations in 884—886
Onerous covenants of a, Law as to ... 935
Recital in, conclusive as between parties to ... 1406
Registration of, Effect of ... 1406
Value of altered ... 886
See *Documents*.

PAGE

Defendant.

Necessary—See *Foreclosure.*
Persons interested in mortgage, when impleaded as ... 1348
Plea by, in respect of necessary party, Non-joinder of ... 1364

Dekkhan Agriculturists' Relief Act (XVII of 1879).

S. 15, Power of Court to pass decree payable by instalments in cases under ... 1446
S. 44, Reference to ... 1495
S. 68, *re* provision as to attestation ... 873
Express provision to redeem under ... 906

Delay.

Mere, not a sufficient ground for refusal of a legal remedy ... 1164

Delivery.

Deed of, whether creates any right ... 1212

Delivery of Possession.

Generally accompanies some form of Indian mortgages ... 784
Enjoyment of usufruct and, incidents of usufructuary mortgage ... 851
Simple mortgage and ... 832
Usufructuary mortgage, Necessity of, in ... 851

Demise.

Assent of both parties necessary ... 860

Deposit.

By mortgagor, How made ... 1014
Court's power in case of dispute 1209—1211
Delivery of title-deed, whether creates any right ... 1212
Effect of
English and Indian Law same... 1213
on interest ... 1214
on interest, if amount deposited falls short of what is actually due ... 1214
premature ... 1212
withdrawal of, by mortgagee 1210-1211
Form of notice of ... 1209
In Court, of money due on mortgage ... 1204
Interest ceases from date of, of mortgage-debt ... 1213
Meaning of ... 890
Memorandum of 894—896
does not create any interest in immoveable property and does not require registration 894

PAGE

Deposit—(concld.).

Must satisfy all requirements of a valid tender ... 1206
Payment by ... 917
Right of mortgagor to money in, in Court ... 1204
Tender by ... 1206
To be in what Court ... 1209
Who may ... 1209
See *Equitable mortgage, Payment into Court, Words and phrases.*

Deposit in Court.

Money in, Provision as to, Principle of the rule ... 1205
Of money due on mortgage—Provision as to, S. 83 ... 1204
Provision as to,
limits of the rule ... 1212
is confined only to money due under mortgage ... 1205

Deposit of Title-deeds.

Mortgage by ... 825
Property charged by ... 892
Under oral agreement to cover present and future advances whether creates an equitable mortgage ... 895
What amounts to a, to effect an equitable mortgage 889, 890
See *Equitable mortgage.*

Dereliction.

See *Accretion.*

Desachar.

See *Words and phrases.*

Description.

Of thing which could be ascertained as soon as it came into existence, vagueness in, Effect of ... 797

Description of Property.

Mortgaged property certain if ascertainable 800, 801
Principle as to 800, 802
Rule as to ... 805
To be sufficient for identification of property ... 806
When vague ... 806
Wrong description, Effect of ... 803

Dharthe.

Instance of anomalous mortgage ... 1247
What is a ... 1251

Diligence.

Degree of, to be used by a mortgagee in possession 1137—1139

PAGE

Diluvion.

Usufructuary mortgagee's right to recover money, if property is destroyed by fire or ... 1051

Discharge.

Of mortgage, when and how made ...
See *Payment, Tender.*

Distribution.

Order of,
a step-in-execution proceeding 1517
of sale proceeds ... 1570
See *Sale proceeds.*

Documents.

Attestation of, History of ... 864
Conduct under deed, Intention of deed discernible from 830, 831
Construction of
Rules for ... 792
Rule as to ... 802
Rule of 814, 815
Express declarations of intention in, override all rules of construction of .. 1285
Intention, Evidence outside, for construing ... 789
Interpretation of, Rules as to 792, 794
Mortgage-deed.
Rules for construction of, and discovery of its intention 830, 831
to be construed as whole ... 802
Nature of, not settled by name given to, by parties ... 788
Proof of,
by handwriting when attesting witnesses are dead ... 877
required by law to be attested 864, 876, 877
Rectification of deed not to be sought for where property wrongly described through unilateral mistake ... 803
Rule of construction is to look to substance not form of, ... 792
Sealing not essential part of registration ... 868
Test as to nature of ... 792
Unregistered and unstamped, Admissibility of ... 883
When deemed registered 867, 868
Whether a registered, could be rescinded ... 883
See *Burden of proof, Description, Oral evidence.*

PAGE

E

Easements Act, 1882.

S. 10—Reference made to ... 1001

Ejectment.

Suit for
Possession under S. 62, Nature of ... 968
Power of Court to pass decree for redemption in ... 922
See *Redemption.*

Election.

Of securities by mortgagee 1288, 1289
Time for 1288, 1289
See *Accession.*

Elegit.

See *Tenancy by elegit.*

Enactment.

See *Rule.*

Encumbrance.

See *Incumbrance.*

English Cases.

How far guide, Construction of Indian Statutes ... 789

English Judicature Act.

See *Statutes.*

English Law.

Comparison of law of tender as between Indian law, and ... 918
Difference between Indian law and,
as to mortgagee's right to present realization of security 1030, 1031
as to distinction between land and house securities 1000, 1001
Documents, Construction of, As to, how differs from Indian law ... 789
Equity of redemption under ... 899
General rule as to, Persons who are necessary parties to mortgage suits, under ... 1346
Liabilities of parties in assignment of lease under ... 999
Merger, Presumption in, as to ... 1287
Mortgage of, History of 783, 784
Notice before redemption, under, when necessary ... 948
Oral evidence, Relevancy of, to prove liability ... 815
Rules as to charges and expenses for renewal of lease, Difference between Indian law and, regarding ... 948
Test to determine nature of in, and Indian law, Comparison of ... 810

PAGE

English Law—(concld.).
Usufructuary mortgage under, Nature of ... 967
See *Accession, Foreclosure, Improvements, Mortgage, Mortgagor, Practice and Procedure, Redemption, Usufructuary mortgage.*

English Mortgage.
Charges and, Limitation applicable to 833
Defined
S. 58 ... 778
And explained ... 859
Essentials of ... 860
Feature, characteristic of ... 860
Fixtures, Rule as to, in ... 817
History of ... 859
Indian Analogue of ... 859
Local incidents of ... 861
Mortuum Vadium, Surviving specimen of ... 859
Only surviving form of mortgage in English law ... 780
Other kinds of mortgage and, Difference between ... 860
Ownership actually transferred ... 785
Personal covenant present in ... 859
Provisions of S. 67, Applicability of, to simple as well as to 1009, 1010
Sale absolute with condition of re-purchase, resembles a ... 861
Trustee, by, Analysis of ... 859

English Wills Act.
Signing of a will under 870 *f.n.*

Enlargement of Time.
See *Extension of time.*
See *Foreclosure.*

Equitable Assignment.
In a case of, Service of, Notice is starting point for determining priority.

Equitable Mortgage.
A form of mortgage popular in mercantile community ... 780
Deposit of title-deeds
Essential 889, 890
When amounts to a 889, 890
Essentials of, discussed 889—893
Exemption of, from Registration laws 861, 865
Forms and conditions of 893—896
Holder of an, and of a registered mortgage—Priority ... 896
How effected ... 889
Intention to mortgage material to an 891, 892
Kinds of ... 897

PAGE

Equitable Mortgage—(concld.).
May be subject to conditions ... 893
Memorandum of deposit 894, 896
does not create any interest in immoveable property and does not require registration ... 894
Mere possession of title-deeds not proof of intention to deposit as security... 891
No writing and registration required in an 893, 896
Power of directors of Presidency Banks to advance money on ... 893
Power of Presidency Banks to advance money on ... 893
Pre-requisites of an ... 889
Property charged by deposit of deeds. 892
Remedies of mortgagee in 896, 897
Rights of mortgagor in an ... 897
Sub-mortgage of an ... 893
Title deeds deposited under an oral agreement to cover present and future advances whether creates an 895
Title deeds may relate to any property, not necessarily situated within the limits of one of the towns 892, 893
What title-deeds include 891, 892
Whether must be by registered instrument in an unexempted area, when affects immoveable property ... 826
See *Mortgage.*

Equity.
And public policy, Interference of Court on ground of ... 1004
Doctrine of, when, applies to contribution ... 1194
Judge made, in Madras regarding admissibility of parol evidence of documents 844, 845

Equity of Redemption.
Assignment of, if capable of creating personal liability on assignee 1040, 1041
Assignee of, Liability of, to doctrine of consolidation 964, 965
Covenant to pay profits, if clog on ... 938
Loss of, by adverse possession, Law as to 94
Merger of mortgagee's interest on acquisition of, by mortgagee, Effect on liability to pay Government revenue 1296
Mortgagor's admission of mortgagee's ownership, Effect on ... 946
Mortgagor's, not affected by rights of mesne mortgagee's interest 1123, 1122
Of mortgagor, Principle of 900-904

PAGE

Equity of Redemption—(concld.).

Owner of share of, Right to redeem whole mortgage by ... 923
Parties entitled to, Mortgagee's duty to discover ... 1368
Personal right or right of action, Not a, but estate in land ... 861
Persons interested in the 1227, 1248
Possessory mortgage, Nature of—in ... 950
Purchaser of, Liability to pay off mortgage money by ... 1041
Purchaser of, Right of, to set up subsequent incumbrance paid by him... 1300
Rights of a mortgagee purchasing ... 1277
Right of redemption and, explained ... 861
Rival claimants for, Law as to ... 925
Transferable as estate in land ... 861
Under English law, Distinction between right to redeem under Tr. P. A. and ... 944
Whether an assignee of, could redeem ... 1220
See *Bankruptcy, Interest, Limitation, Merger, Mortgagor.*

Estate.

Legal, Distinction between equitable estate and, under English law, not observed in Indian law ... 1006

Estoppel.

Doctrine of, How applicable as against mortgagee ... 1011
Doctrine of
Reference to ... 817
When truth is known to both parties 1409, 1410
Marshalling forfeited by ... 1184
Mortgagee's title by ... 991
Mortgagor and Mortgagee, As between 970
Plea of, When, cannot be raised ... 991
See *Mortgagee, Mortgage suit.*

Evidence.

Admissibility of extraneous, to discover mortgagor's intention *dehors* deed of mortgage 789-792
Admissibility of unstamped mortgage in evidence ... 883
Extrinsic evidence to gather intention from documents, Admissibility of 789-792
Oral contemporaneous agreement of, if admissible to prove document other than it purports ... 790
Recitals in instrument if conclusive, and against whom ... 849

PAGE

Evidence—(concld.).

To prove mortgage against stranger, Nature of ... 849
To prove recital of fact erroneous in contract and to vary its terms, Difference between ... 790
Sale certificate in a sale subject to mortgage whether conclusive evidence of the validity of the charge 1568
See *Evidence Act, 1872, Oral evidence, Waiver.*

Evidence Act, 1872.

Conduct and acts of parties, how far guide in construction of section of ... 789
Reference to ... 844
Ss. 58—70, Reference to ... 875
Ss. 68, 69, *re* proof of a document required to be attested. 876-877
Ss. 68 to 71, provision for proving documents requiring attestation ... 864
S. 92, Reference to 788, 789, 791
S. 92, Proviso 1, Principles decided under ... 791
S. 92 Proviso (1), Reference to ... 1406
S. 92, Proviso (4), Reference to ... 1445
S. 92, Proviso (5), as to admissibility of oral evidence in an anomalous mortgage ... 1251
S. 115, Doctrine of Estoppel ... 1155

Excluded Interest.

Position of 1382, 1383
— English Law ... 1382

Exclusion.

When, immaterial 1385, 1386

Execution.

Attestation of, Necessary 872, 874
See *Attestation.*

Execution of Decree.

Limitation for, for sale 1521-1523
Procedure for, in redemption suit where nothing found due 1561, 1562.

Execution Proceeding.

Addition of new parties in, Illegality of ... 1366
Necessary party in ... 1365
Order for distribution, a step in ... 1517

Executory Agreement.

Mortgage of non-existent property when operative as ... 803

PAGE

Expense.

Incurred by mortgagee in possession in management of the property.
See *Mortgagee in possession, Words and phrases.*

Extension of Time.

Mortgage money, for payment of, under old Regulations 840,841
Redemption, for, after due date 1555, 1556

Extrinsic Evidence.

See *Evidence, Oral evidence* ...

F

Father.

Sale by, of ancestral property, when son may sue to set aside 1389, 1390

Felon Mortgagor.

Power of, to redeem ... 1232

Fiducia.

Earliest form of security known to Roman law ... 826
Explanation of ... 826

Final Decree.

Effect of ... 1471

Final Decree for Foreclosure.

Consequences, Discharge of the debt 1469—1471
Effect of, on right of privies 1471, 1472
Form and effect of ... 1469
Payment or non-payment of decretal amount whether question for consideration in passing a ... 1468
Redemption after time allowed but before. See *Redemption.*
Redemption before, Enlargement of time—Ground for 1461—1464

Fixtures.

Follow *corpus* on transfer ... 817
Incidents of property to which annexed ... 817
Intention to transfer, with property how inferrible ... 817
What constitute ... 817

Foreclosure.

Court's power to re-open ... 1471
English law ... 1471
Decree for
In default of redemption, S. 93 (repealed) ... 1236
Amendment of a, Application for, Order on, If Appealable. 1478—1476

PAGE

Foreclosure—(contd.).

Limitation affecting transactions in which a, may be passed ... 1414
Not decree for money within meaning of S. 48 C.P.C. 1908 1475
No relief by way of, in the case of a charge ... 1584
English law, Mortgagee under, entitled to, on non-fulfilment of a single condition ... 1014
Final decree of, Sale or, Liable to be set aside on account of fraud and mistake ... 1478
Final order for, under S. 87 or 93, Rule as to ... 1308
Form and effect of final decree for ... 1469
Mortgagee's right of,
for default of one or more instalments, Law as to ... 1411
on failure to pay one or more instalments ... 1411
Mortgagee's right to contract himself out of his right to sue for ... 1009
Order absolute for, when to be passed, S. 87 (repealed) ... 1216
Or sale Decree of, Mortgagee's right to 1015
Principle of the law as to ... 1009
Preliminary decree for, Joinder of parties after, Law as to, ... 1364
Preliminary decree in, suit for,
Form and Contents of ... 1441
O. 34, r. 2 ... 1402
Prior state of law as to suits for ... 833
Procedure for, prescribed for mortgagees under old Regulations 839, 840
Sale or, Creditor's right corresponding to mortgagor's right of redemption... 861
Suit for,
All heirs of a deceased mortgagee as plaintiffs in, necessity of impleading ... 1360
before and after Transfer of Property Act ... 850
by sub-mortgagee, Necessary parties in ... 1370
Courts must decide on pleadings of parties in ... 1408
Decree in, Form of ... 1402
Facts which mortgagee must prove in ... 1405
Impleading of all co-mortgagees either as plaintiffs or defendants in, Necessity of ... 1356

PAGE

Foreclosure—(concld.).
In respect of puisne incumbrancers in, Successive periods for redemption, Allowance of... 1357
Mortgagor and all other persons interested in redemption in, Necessity of impleading ... 1357
Necessary defendants in ... 1357
Necessary plaintiffs in ... 1356
Power to decree sale in, O. 34, r. 4. cl. (2) ... 1479
or sale, Joinder of Parties in, O. XXXIV, r. 1, Exp. ... 1343
What rights must be adjudicated in ... 1409
Usufructuary mortgagee cannot sue for sale, or ... 852
What rights must be adjudicated in a suit for 1409—1411
Whether redemption permissible after decree for 1457, 1458
See *Instalment, Mortgages, Notice, Practice and Procedure, Redemption, Res judicata.*

Foreclosure Suit.
Decree in, S. 86 (repealed) ... 1216
See *Foreclosure, Suits.*

Forfeiture.
Doctrine of, of priority S. 78 ... 1155
None where mortgage is usufructuary ... 852

Fraud.
Averment of, must be specific ... 1157
Definition in Contract Act ... 1156
Effect of ... 1286
on relations between mortgagor and mortgagee 840, 841
Must be proved by evidence 1156, 1157
Power of Court to interfere with freedom of contract for undue influence and ... 1432
What is ... 1156
See *Appeal, Merger.*

Future Advance.
See *Advance of money, Subsequent advances.*

Future Crops.
Hypothecation of, when a valid contract and when enforceable. ... 1172
Mortgage of, when valid ... 898

Future Property.
Contract to mortgage, Specific performance ... 796

PAGE

Future Property—(concld.).
Mortgage of future produce unlimited as to time ... 797
Mortgage of
only bare contract ... 796
Validity of 803—805
when operative as charge ... 803
See *Damages, Specific performance.*

G

Gahan lahan.
Form of Mortgage ... 784

General Clauses Act, 1897.
S. 3 (25), Reference to ... 836
S. 6, Reference to ... 846

Government Revenue.
Claim to, paramount charge ... 1106
Mortgagee's liability to pay, on merger of his interest by acquisition of equity of redemption ... 1296

Grandson.
Personal liability of, of debtor irrespective of assets ... 1426

Gross Negligence.
Charge of, Defences to 1161—1167
Priority forfeited by 1159—1167
Whether forfeiture of priority by, could be superadded to a pecuniary penalty enacted for non-performance of a statutory duty ... 1162
See *Words and phrases.*

Guardian.
Appointment of ... 1232
May be appointed under the Guardian and Wards Act, S 9 (*1*) ... 1232
Right of, to redeem ... 1231

Guardian and Ward.
Guardian *ad litem*, Appointment of, Where mortgagee is minor ... 1303

Guardian and Wards Act.
Reference to 1231, 1303
S. 9 (2), Empowering the appointment of guardians ... 1232

H

Handwriting.
Proof of document by handwriting when attesting witnesses are dead... 877

Hard Bargain.
Court, Power of, to relieve debtor in respect of ... 1432

PAGE

High Court.
See *Interest.*

High Court Rules.
For carrying out law as to mortgages and charges 1306—1316

Hindu Law.
Co-parcenary property, Mortgage of, Suit relating to—Who are to be joined as parties to 1377—1379
Damdupat, a rule of ... 1423
Form of Hindu and Mahomedan mortgages distinguished ... 784
Interest of widows under ... 923
Rights and liabilities of a son under 1377—1381
Son's duty to discharge father's debts 1378
Sons under Mitakshara law when bound, though not joined as parties to a suit on a mortgage 1388—1390
Son in Mitakshara family whether bound by a prohibited sale under a decree against his father ... 1579
Texts of, See *Grandson.*
See *Joint Family Property.*

Hindu Widow.
Reversioner of, if entitled to redeem mortgage ... 1349

Hypotheca.
Origin of ... 826

Hypothecation.
Creation of, Manner of ... 826
Creditor's remedies in ... 826
Forms in which it has now survived... 826
History of 825, 826
Known as hypotheque in France and hypothec in Scotland ... 826
Moveable property, Of ... 826
Of future crops—See *Future crops.*

I

Idiot.
See *Lunatic.*

Ignorance.
See *Merger.*

Illudwara.
An instance of anomalous mortgage... 1247

Immoveable Property.
Interest in specific, necessary in mortgage ... 786
Whether registration of mortgage of, necessary in an unexempted area ... 896

PAGE

Improvements.
Compensation for, by mortgagee under English law ... 983
Mortgagee making, to property if entitled to compensation 982, 983
See *Mortgagee in possession, Accession.*

Income.
Appropriation of, by mortgagee in possession 1149—1151
Surplus of—Limitation for recovery of 1151

Incompetency.
Of same to be both plaintiff and defendant in same suit ... 1363
See *Mortgagee, Mortgagor.*

Incumbrance.
Deduction of, for determining quantum of contribution 1189, 1190
Joint incumbrance, Extinction of, in cases of co-mortgagees ... 1288
Prior
mortgagor's liability to pay off, S. 65, cl. (*e*) ... 999
used as shield confers no right to resist intermediate mortgage suit for sale ... 1293
Test of its continuing to subsist for benefit of acquirer of property .. 1282
See *Words and phrases.*

Indemnity.
Loss of mortgage deed, mortgagor's right to, on ... 925

Indian Law.
English law and, Difference between, as to nature of mortgages ... 780

Injunction.
Ex parte order of, Obtaining of ... 1003
Mortgagee's right to, when mortgagor commits active waste ... 1003

Inquiry.
Under O. 34, r. 3 ... 1461

Insolvency.
After-acquired property of insolvent, mortgages and charges on, how affected by ... 807
Claim in, Proof of, Non-application of rule, to ... 1425
See *Sub-mortgage.*

Instalment.
Failure to pay one or more—Mortgagee's right to foreclose ... 1411
Foreclosure for, Effect of ... 1012

PAGE

Instalment—(concld.).

Mortgage-debt, If, decreed as payable by ... 1446
Mortgagee, whether bound to receive payments in ... 1011
Overdue, payment and acceptance of, if proof of waiver ... 1012
Stipulation of mortgage money to be payable in, Law as to ... 1011

Institutes of Manu.

Ch. VIII, Text *re* Damdupat ... 1423

Instrument.

See *Attestation, Document.*

Insurance.

Duty of mortgagee in possession to apply money obtained by, to reinstate property ... 1144
Money obtained by a policy of, when lien may be created on ... 1144

Intention.

Clue to find out 1295, 1286
Declarations of intention expressly made override all canons of construction of documents ... 1285
Equivocal declarations of, Rule in cases of ... 1486
Implied intention, Clue to, to be found in acts and conduct ... 1286
Oral evidence of, Admissibility of ... 1287
Rules for discovering, of documents 792, 793
Self-interest, Test of ... 1289
To mortgage, essential to an equitable mortgage 891, 892

Interest.

Agreement to take receipts in lieu of, how affects mortgagee in possession. 1152
Allowable,
Limits of ... 1418
Rates of 1415—1418
A party is entitled to damages, when not entitled to, Procedure when ... 1421
Appropriation of a payment towards, Sufficient to extend period of limitation ... 1495
At stipulated rate, Court's power to decree ... 1416
Awarding of, as compensation, Law as to ... 1430
Calculated at rate stipulated in the bond ... 1418

PAGE

Interest—(contd.).

Cases in which Court has power to reduce ... 1416
Cessation of, Principle of the rule ... 1213
Cessation of, S. 84 ... 1212
Compound, Payment of.
If penal ... 941
Stipulation as to, Law as to ... 1422
When penal ... 1422
Contract rate of, claimable up to date fixed in decree for redemption ... 1417
Could be charged in a claim for contribution, at a reasonable rate ... 1241
Effect of, Deposit on ... 1214
Enhanced, if it exceeds reasonable compensation, is penal ... 1431
Enhancement of, Retrospective, Relief against ... 1426
For what period recoverable in a mortgage suit 1420—1422
Hindu Law, Texts of, in respect of doctrine of Damdupat ... 1423
Holders, Persons, who are ... 1348
Increased rate of, from date of default, when becomes penalty ... 1425
In lieu of, When damages recoverable. 1421
Liability of mortgagee in possession to pay, on profits ... 1151
Mortgagee acquiring equity of redemption from mortgagor cannot claim from subsequent mortgagee because of merger ... 1296
No cessation of, if money tendered employed otherwise, or is not ready for payment to mortgagee ... 1215
Non-allowance of, in case of enlarged time under S. 807 1307-1310
Payment of, at enhanced rate, stipulation for, either from date of bond, or from date of breach, Rule as to ... 1430
Penal enhancement of, Limits of Rule as to ... 1427
Penal, Relief against ... 1426
Period of limitation for, on a mortgage 1420—1422
Persons having uncertain and contingent, if necessary parties to suits for mortgage ... 1349
Post diem.
Claimable for what period ... 824
If included in mortgage money, 824
Law as to 1419—1422
Recoverable for what period ... 1420

PAGE

Interest—(concld.).

Power of Court.
To award ... 1486
To decree, from date of decree to realization ... 1418
To revise or disallow 1415, 1416
Rate of,
Allowable on a mortgage 1415—1419
Considered reasonable by different High Courts ... 1429
Rule of Damdupat, when inapplicable. 1424
Stipulated, reasonableness of, Law as to ... 1418
Stipulation of, on default of payment by instalments, not penal ... 1428
Stoppage of, on a mortgage ... 1419
Suit for, alone. When maintainable... 1041
When awarded by way of damages, under S. 68 ... 1052
When excluded for the calculation of stamp-duty ... 883
When mortgagee not entitled to ... 1418
When recoverable up-to-date of realization, in a mortgage suit 1419, 1420
See *Compound interest, Costs, Damdupat, Mortgage, Set-off.*

Interest Act. XXXII of 1839.

Reference to 1419, 1430
Enactments repealed by 1153 *f.n.*
Ss. 4, 5, 6, Repealing usury laws, Reference to ... 1153

"Interested."

Meaning of 1225, 1226

J

Jenmi Panayam.

What is ... 1250

Joinder of Parties.

Ex abundanti cautela ... 1350
In appeal and execution, Law as to ... 1365
Members of a Joint Hindu family, In suits relating to, Law as to ... 1366
Law as to, in respect of mortgage by tenants in common ... 1362
Objection by persons improperly impleaded ... 1357
To mortgage suits, Policy of Court, in respect of ... 1347
See *Redemption.*

Joint Family Property.

Mortgage of Suit relating to, who are to be joined as parties 1377, 1378

PAGE

Joint Family Property—(concld.).

Sale of, by father, When may be set aside at suit of a son 1389, 1390
Undivided share in, mortgaged by a co-parcener falling to another on partition, Effect of 993, 994
Undivided share in, Mortgage of, Law as to ... 993

Joint Hindu Family.

Manager of, when represents all other members ... 1380
Right of manager of, to maintain and defend suits on behalf of the family, under Mitakshara, Law as to ... 1376
See *Joint Family Property.*

Joint Mortgagors.

See *Usufructuary Mortgage.*

Judgment-creditor.

May redeem, when he has attached the mortgagor's interest 1233, 1234

Judicial Proceedings.

See *Ministerial Proceedings.*

Jura in re aliena.

Mortgage a species of .. 785

Jurisdiction.

Objection to, when, should be taken 1453
Of Court in a Redemption suit ... 1550
Sale without, a nullity ... 1517
Suit for foreclosure, if a "suit for land" within meaning of S. 12 of the Letters Patent ... 1453
Suit for possession by the mortgagee of an occupancy holding in the United Provinces, of Court, for ... 968

K

Kanom.

An instance of anomalous mortgage... 1247
Suit for recovery of amount of, if lies 853

Kanomdar.

Rights of 1249, 1250
Whether entitled to claim compensation for improvements ... 1250

Kanom Mortgage.

Otti and, Difference between 1249-1250
What is a ... 1249

Katkabala.

Form of mortgage ... 78

PAGE

Katkabala Muddatakriyam.

Transaction arising among Hindus out of the combination of a usufructuary with a mortgage by conditional sale ... 1247

Kavidu.

What is a ... 1250

Kulachar.

See *Words and phrases.*

L

Laches.

In enforcing right, how affects rule of priority 1164, 1165

When bars a legal remedy ... 1164

See *Words and phrases.*

Lakhamukhi.

An instance of anomalous mortgage ... 1247-1251

Land Acquisition Act (1870).

S. 9, Reference to 1103, 1489

Land Acquisition Act (1894).

Reference to ... 1051

Landlord.

See *Parties to suit.*

Landlord and Tenant.

Landlord, decree for arrears of rent entitles him to priority and to keep alive rent charge ... 1291

Law of, Effect of, on renewal of mortgaged leases .. 988

Land Transfer Act, 1875 (English).

S. 129, Repealing Vendor and Purchaser Act, restored tacking ... 1173

See *Statute* 38 & 59, *Vic. c.* 87.

Lease.

Contract to make or accept, a, under Statute, Enforcement of ... 1005

Doctrine of postponement of priority governs also ... 1155

Mortgage and, distinguished ... 819

Mortgaged, Renewal of, S. 64 ... 983

Mortgage distinguished from 812-814

Renewal of,

When it is the mortgaged property, Rights of mortgagee ... 1091

by testator after bequest to one, Effect of ... 986

Mortgaged, by mortgagor, Effect of, on original mortgage ... 985

Principle of the law underlying ... 984

PAGE

Lease—(concld.).

Rights of parties under 984, 985

Rules as to charges and expenses for ... 984

See *Ambiguity, Zurpeshgi leases.*

Lease in Perpetuity.

See *Ambiguity.*

Legal Mortgage.

See *Mortgage.*

Legal Representative.

Of mortgagor, See *Mortgagor.*

Lessee.

Right of, to redeem 1228-1230

See *Parties to suit, Possession.*

Letter.

Mere offer by, not a valid tender ... 1209

Lien.

Applicability of, doctrine of marshalling to ... 1184

Charge and, distinguished ... 1253

Doctrine of ... 1270

Use of the term. Difference between, in English and Indian Law ... 1253

In Contract Act ... 1253

When may be created on moneys secured by a policy ... 1144

When partner's lien a charge ... 1271

Definition of, in England ... 1253

See *Salvage lien.*

Solicitor's for costs—See *Solicitor.*

See *Title-deeds, Vendor and Purchaser, and Words and phrases.*

Limitation.

Affecting transactions in which a decree for foreclosure may be passed 1414

Change in law of, due to Privy Council decision, noticed 832, 849, 850

Charge-holder or incumbrancer, if entitled to variation in statutory period of ... 1300

Equity of redemption, for claiming ... 861

For application under, O. 34, r. 3 ... 1473

For execution of a decree for sale. 1521-1523

For mortgage 882-886

For redemption ... 1549

For suit by mesne mortgagee 1128, 1129

For suit for accounts by mortgagor ... 859

For suits under S. 68 ... 1052

History of law of, for mortgages and charges 882-886

In respect of suit which admits of a decree for sale 1493, 1494

PAGE

Limitation—(concld.).

In respect of transactions in which a decree for foreclosure may be passed, Law as to ... 1414
Mortgage by conditional sale.
Governed by twelve years under art 132, Lim. Act ... 849
Limitation for, under law before Transfer of Property Act 1882, 850
Period of,
for supplementary decree ... 1536
For interest on a mortgage 1420-1422
Personal remedy by supplemental decree must be within 1534, 1535
Recovery of surplus of income, for ... 1151
Law of, right of redemption to, Subjection of ... 949
Sale, Power of, not provided for in simple mortgage-deeds, how affected 832
Starting point of,
in case of default in payment of instalment ... 912
for a supplementary decree 1535, 1536
Suits to enforce a charge, for .. 1274
To claim contribution 1242, 1243
To enforce a claim to surplus sale proceeds of revenuesale ... 1106
Usufructuary mortgage, Limitation for ... 857
See *English Mortgage.*

Limitation Act (XV of 1877).

Reference to ... 832
S. 20, Reference to 857, 1414
Art. 2, Reference to ... 1578
Sch. II, Arts. 10, 120 and 144, Reference to ... 941
Sch. II, Art. 11, Reference to ... 1415
Sch. II, Arts. 57, 65, 120, 132, 134, 147, 178, Reference to ... 1494
Sch. II, Art. 97, Reference to ... 1042
Sch. II, Arts. 99, 120 and 132, Reference to ... 1195
Sch. II, Arts, 115, 116, and 132, Reference to 911, 1421
Sch. II, Art. 116, Reference to ... 1430
Sch. II, Art. 120, Reference to 953, 996
Sch. II, Art. 132, for suits to enforce a charge ... 1274
Sch. II, Art. 132, for the use of the word "charge" ... 1255
Sch. II, Art. 132, Reference to 1041, 1108, 1490
Sch. II, Arts, 132, 147, Reference to. 1254

PAGE

Limitation Act (XV of 1877)—(concld.).

Arts. 134, 144, 148, Reference to 1242, 1243
Sch. II, Art. 179, Reference to 922-946
Sch. II, Arts, 181, 182, Reference to 1521—1523
Sch. II, Arts 181, 183, Reference to ... 1473

Limitation Act (1908).

S. 3, Reference to ... 1151
S. 10, When charge a trust under ... 1266
S. 20, Reference to ... 1495
Ss. 30 & 31, Reference to ... 849
Sch. II, Art. 75, Reference to ... 911
Art. 105, Sch II, Reference to ... 1151
Art. 109, Reference to ... 853
Art. 132, Governs limitation for suits relating to mortgage by conditional sale ... 849
Art. 132, Reference to 832, 836, 1198
Arts. 132, 135, Reference to ... 1300
Art. 147, Reference to 832, 836
Art. 148, Reference to ... 834

Lis Pendens.

Mortgaged property, Alienation of, after preliminary decree, is subject to ... 1488
See *Parties to suit.*

Loan.

Contract to make, Nature and breach of 797, 798
See *Specific Performance.*

Local Usage.

What is a ... 1252
See *Usage.*

Lord Cranworth's Act.

See *Statute 23 and 24, Vic.*; *c. 145.*

Lord St. Leonard's Act.

See *Statute 22 and 23, Vic, c. 35.*

Loss.

Occasioned by default of mortgagee in possession 1133, 1152

Lunacy Act, 1858.

Reference to ... 1374

Lunatic.

Power of, to redeem through curator... 1232

M

Madras Customary Mortgages.

Instances of anomalous mortgages 1248, 1249

Maintenance.

Charge created for, Enforcement of ... 1051

PAGE

Mahomedan Law.

Form of Hindu and Mahomedan Mortgages distinguished ... 784
Origin and nature of bye-bil-wafa explained 784, 785

Majority Act.

S. 3, The minority of a person is subject to ... 1232

Management.

Of Property—Rights of Mortgagee in possession for expenses incurred in the —See *Mortgagee in possession.*

Manager.

Of a co-parcenary property—See *Joint Hindu family.*

Marshalling.

Applicability of
To other cases, surety of a debtor, etc. ... 1184
To charges and liens ... 1184
Contribution and, Difference between. 1202
Contribution only a species of ... 1202
Doctrine of
and principle of contribution, Relation between ... 1186
extension of, to purchasers 1183, 1184
founded on ... 1179
principle of ... 1178
Enforceable in favour of an incumbrancer whose charge is merely voluntary ... 1181
English Law of ... 1177
Equity considered, in applying the doctrine of ... 1181
Forfeited by estoppel ... 1184
Limits of 1179—1183
Logical corollary of the doctrine of subrogation ... 1178
May be excluded by contract ... 1182
Must not impair first mortgage 1179, 1180
Not applicable between a mortgagee and attaching creditors of the mortgagor ... 1183
Not intended to defeat the rights of subsequent mortgagees 1180, 1181
Not permitted when rights are different ... 1181
Not unless there are two creditors of same common debtor 1182, 1183
No, when security sufficient ... 1184
Of Properties 1513—1515
Origin of the rule of ... 1178

PAGE

Marshalling—(concld.).

Permitted where no injustice is done to debtor or creditor ... 1181
Principle of, Same as in English Law 1177
Right of
one of, under application ... 1184
prevails over contribution where the two, clash ... 1195
Securities, of, S. 81 ... 1177
To what claim the rule applicable. ... 1179
Unsecured creditor may marshal ... 1183
Volunteer disqualified from exercising the right of ... 1181
Whether a charge holder possesses the right of ... 1272
Whether notice necessary ... 1182

Material Irregularity.

When sale not invalid notwithstanding 1516, 1517

Maxims.

Accessio cedit principali ... 977
Audio alteram partem ... 1499
Certum est quod certum reddi potest... 800
Certum est qui certum reddi potest ... 1260
Certum est quoa certum reddi potest... 1263
Cessante ratione cessat ipse lex 875, 876
Cessante ratione legis cessat ipse lex... 1386
Contra non valentem agere nulla currit præscriptio ... 1135
De minimis non curat lex ... 1044
Ex turpi non oritor actio ... 1050
Falsa demonstratio non nocet cum de corpore (or persona) constat 800, 801, 802
Omne majus continent in seminus ... 1206
Omne majus continct in se minus ... 1277
Omne principale trahit ad se accessorium ... 1226
Omnia præsumuntur rite esse acta ... 838
"Once a mortgage, always a mortgage, and nothing but a mortgage" ... 936
Nemo potest esse dominus et tenens 1277 *f.n*
Prior tempore potior jure ... 782
Qui facit per alium facit per se ... 869
Qui facit per alium facit per se ... 1451
Qui prior est tempore potior est jure 925, 1155, 1156, 1176
Redeem up, freclose down 1123, 1124
Superficies solo cedit ... 979

Mayukha.

Ch. V. S. 1, Cl. 17 Reference to 1428 *f.n.*

Memorandum.

Deposit of 894—896
See *Deposit*

PAGE

Merger.

Acquisition of equity of redemption by prior mortgagee unknown to later mortgagee creates none ... 1281
Against revenue sale 1296, 1297
Doctrine of
in the case of a charge, how obviated in English practice. 1280
necessary condition for ... 1281
of securities ... 1280
rule as to ... 956
rule of law ... 1280
stated 1280, 1281
The benefits and evils of ... 1280
Earlier security merging in later depends on benefit and intention ... 1283
Equity of redemption acquired by mortgagee merges mortgage and denies interest from subsequent mortgagee ... 1296
Equivocal declarations, Effect of, on 1280
Fraud prevents 1298, 1299
Intention to, how far a guiding principle for the applicability of the doctrine of ... 1280
if imputable to man who is ignorant of his rights ... 1284
prevent, Inference of ... 1287
Judgment on subsequent security is no, of earlier charge on security ... 1295
Mere omission to connect two securities in deed freshly drawn up, Effect of, on ... 1286
Mortgage of proprietary rights and lease of Khudkhast of same if creates ... 1287
Mortgagor paying off incumbrance if affects subsequent incumbrancer ... 1300
No, if higher security be ineffectual ... 1281
No, of subsequent interest on redemption of prior charge ... 1107
None
on novation 1292—1295
where person acts in ignorance of his rights 1297, 1298
where remedies in two securities not co-extensive ... 1299
Non-existence of claim against which mortgage could be kept alive at time of sale if affects priority by creating. 1282
Novation distinguished from ... 1292
No, where continuance of charge beneficial to owner ... 1289

PAGE

Merger—(concld.).

Of charge secured by term contrary to admitted intention of owner ... 1287
Of charge when paid off by owner of estate of inheritance ... 1282
Once taken place, Effect of, on right once extinguished ... 1289
Presumption against, in case of ambiguity in declarations of ... 1286
Presumptions as to 1287, 1288
Prevention of, afforded by slight evidence ... 1287
Question of, governed by actual intention of parties, when the two securities are vested in the same person ... 1281
Revival of higher securities and doctrine of ... 1286
Severance by, On mortgagee's acquisition of portion of mortgaged property 955
Vendor's lien not merged in mortgage, Priority of ... 1290
When a necessary consequence ... 1280
When to be presumed ... 1280
When will arise and when not 1283, 1284
Where charge used as shield against rival incumbrancer ... 1291
Where equitable mortgage by deposit of title deeds is followed by assignment. 1286
Where mortgagee is mortgagor's administrator .. 1284
Where not hindered 1295, 1300
Where owner of estate having charge on it dies ... 1287

Mesne Mortgagee.

Limitation for suit by 1128, 1129
Prior mortgagee and
competition between—Question of priority ... 1129
rights of 1124—1126
Rights of, *inter se.*
mortgagee's Equity of redemption not affected by 1123, 1124
principle of the rule ... 1122
S. 75 ... 1122
Right of, to redeem and foreclose. 1564, 1565

Ministerial Proceedings.

Effect of, judicial, and taken before passing of Tr. P. Act, after its enactment ... 848

Minor.

Right of, to redeem through his guardian ... 1231

PAGE

Minor and Guardian.
See *Guardian and Ward.*

Minority.
Question of, immaterial in respect of mortgage of co-parcenary property... 1379

Misdescription.
Effect of, on sale ... 1520

Misrepresentation.
Definition of, in Contract Act ... 1158
Forfeiture of priority on account of 1158, 1159

Mistake.
Effect of, on priority ... 1298
When deprives a mortgagee of his priority ... 1166
See *Merger, Unilateral mistake.*

Mitakshara Law.
See *Hindu Law.*

Money.
Deposit of, in Court, due on a bond ... 1204
In deposit in Court, Right of mortgagor to ... 1204
Obtained by in Insurance—See *Mortgagee in possession, lien*

Money-decree.
See *Decree.*

Money-lenders Act, 1900 (English)
Reference to ... 1432

Mortgage.
Accession to mortgaged property, principle of ... 1077
Admissibility and proof of unregistered 879—881
After-acquired property, mortgage of, Validity of ... 803
All persons having interest in, or right of redemption, Impleading of, Necessity of ... 1344
Anomalous, cl. (*c*), S. 63, if applicable to 1047
Anomalous mortgages (S. 98) ... 785
Applicability of S. 67 to, executed after commencement of Tr. P. Act ... 1009
Application of S. 68 to, and not to charge ... 1029
A species of jura *in re* aliena ... 785
Assignment of 888, 889
Assignment of future coffee crop as security for loan if a ... 794
Attestation of execution necessary 872—874
Bargain paper when may amount to... 788
Benami, Suit to enforce, Beneficiary as co-plaintiff in, Impleading of, Law as to 1358, 1359

PAGE

Mortgage—(contd.).
Benamidar mortgagee, to sue alone on, competency of ... 1358
Benefit of, Loss by mortgagee of ... 1011
Bengal Reg. XVII of 1806, Before and under ... 785
Bond containing stipulation entitling obligee to recover money from immoveable and moveable property... 793
By managing member, Suit for, All co-parceners in, Necessity of impleading ... 1357
Bye-bil-wafa form, Reason for adoption of, by Mahomedans ... 784
Charge and
Difference between, Importance of 1254, 1255
distinction between 1254, 1255
distinction between depended, on limitation ... 892
distinction between, S. 100 ... 780
stand on same footing for priority 1284
Charge how differs from ... 786
Characteristics of ... 785
Civil law, In, and ancient history of... 781
Claim for contribution not to be joined with one on ... 1194
Claimants by paramount title not interested in ... 1351
Classification and forms of ... 825
Common law mortgages, classification of ... 784
Consideration for 817—821
Contract of
O. 34, r. 3, Order under, extinguishes relationship of creditor and debtor created by ... 1477
place of performance under, Law as to ... 916
Contracts preceding or relating to, whether registration necessary ... 865
Contract to,
creates no right *in rem* ... 795
if capable of specific performance 795—797
mortgage "all my real and personal estate" not void for uncertainty nor opposed to public policy and might amount to a, on after-acquired property ... 799
mortgage and, Distinction between 795, 796
Costs of, subsequent to decree ... 1562

PAGE

Mortgage—(contd.).

Covenant not to alienate,
does not constitute charge or 793, 794
where no intention expressed to pledge specific immoveable property, does not constitute 787
Creditor taking, on debtor's lands retains priority by subsequent mortgage of same property with other property ... 1294
Decree in redemption suit, nothing found due or where mortgagee has been overpaid ... 1561
Decree on, when may be rendered incapable of execution ... 1459
Deed failing to operate as, cannot be used as creating a charge ... 874
Defined
S. 58 ... 777
and definition discussed ... 782
and classification of, in Code Napoleon ... 779
in English and American law 779, *f.n.*
of, in the English Conveyancing Act ... 1254
Discrimination between no contract of mortgage and void ... 1040
Doctrine of reciprocity, Application of to ... 901
Document described as, will not become one ... 793
Enforcement of, by mortgagee ... 1014
English and Indian law definitons of, Distinction between ... 780
Essential requirement of, is transfer of interest ... 786
Evidence dehors deed to discover its intention, Admissibility of ... 789
Expressions used in, if conclusive indications of intention ... 787
Extinguishment of, By acknowledgment in writing ... 930
Fastens on mortgagor's property obtained by exchange or partition ... 817
For future advances, Principle of the rule ... 1170
Form of ... 866
For subsequent advances, When binding, S. 79 ... 1168
Four kinds of, recognised by Act ... 780
Future crops, of, when valid ... 898
Future property, Contract to, and specific performance 796, 797

PAGE

Mortgage—(contd.).

Hindu and Mahomedan forms of, distinguished ... 784
Historical retrospect of 783, 784
History of English law of 783, 784
Holder of a registered, and of an equitable mortgage, Priority between. 896
Immoveable property, Of, only dealt with in Act ... 778
Incidents of 815, 816
Indivisibility of
illustration of rule as to, S. 67, cl. (*d*) 1024, 1025
law as to ... 951
exceptions to ... 951
rule as to, Exception to 1025, 1026
Instruments directly or indirectly providing for power of sale held previously to be ... 832
Instrument not taking effect for want of operative words, remedy in cases of 803
Instruments providing for power of sale if charges or ... 832
Intention in, Test to find out 786, 787
Intention to keep alive, clue to ... 1285
Interested in,
kinds of persons not ... 1349
reversioner, Not person ... 1349
Interest transferred in a ... 785
Language of creation need not be in any special form ... 825
Legal and Mortgage, Distinction between ... 798
Lease and
distinguished ... 819
distinction between 812—814
Lease, Of the nature of, Contract to execute ... 796
Limitation for 832—836
Madras High Court Rules in respect of suits relating to charges and 1311—1316
Mode proof of of 875, 877
Mortgage-deed given as, if creates a ... 787
Mortgagor to pay proper Stamp duty 883
Mortgages void for uncertainty ... 799
Moveables, of, Question of, discussed. 898
Moveable property, of ... 778
Nature and attributes of, discussed in detail 785, 786
Necessity for proof when arises ... 875
Not relinquished by taking promissory note for interest ... 1295
Novation of, requires extinction of old mortgage 798, 799

PAGE

Mortgage—(contd.).

Object of legislature in codifying law of, and prior Indian law of 781, 782
Of moveable property, No provision with regard to ... 1172
Old and present law, Divergence between 783, 784
On failure of a mortgage, personal covenant when unenforceable 878, 879
Particular words if necessary to constitute ... 792
Parties to,
arrangement qualifying right to redeem by ... 943
extinguishment of right of redemption, by act of ... 932
suit for persons having contingent interest, to be added as, disqualification of ... 1354
suit for persons qualified, and not qualified to be joined as 1350
Paying off, indicates no intention to keep it alive ... 1290
Payment, discharge or release of, destroys charge created by ... 1293
Persons competent to 814, 815
Suit for persons pleading *jus tertii*, Disqualification of, to be impleaded in ... 1350
Pledge and, Relation between ... 784
Possession, mortgagee's right to, must arise under ... 1046
Possible remedies under ... 1022
Power of High Court to make rules, as to charges and, S. 104 1304—1339
regarding charges and, Principle of the law, as to ... 1305
Power of sale in a,
before the Act, discussed 1054, 1055
in other systems of law ... 1055
principle of 1058, 1059
provisions relating to, Discussions in Council 1057, 1058
validity of, when sale out of Court ... 1059
when to be exercised 1059, 1060
when valid ...1053, 1054
Power to deposit in Court money due on, S. 83 ... 1204
Previous state of law as to ... 825
Principle of, Discussion of underlying 782
Priority of vendor's lien not merged in 1290
Proceedings subsequent to sale under a, Procedure applicable to ... 1305

PAGE

Mortgage—(contd.).

Proof of 875—877
law as to ... 1408
Property comprised in a, who are to be joined as parties in a suit for foreclosure, sale or redemption of, S. 85 (repealed). ... 1215
Property less than Rs. 100 in value, Necessity for registration of, discussed 887, 888
Property mortgaged is certain if ascertainable ... 800
Recital of nature if conclusive regarding it ... 793
Recovery of balance due on,
S. 90 (repealed) ... 1217
O. 34, r. 6 ... 1524
Registration and Attestation of 861, 862
history of the section *re* 862—864
Registration—Valid & invalid 867—869
Registration & writing of, Previous law ... 864
Remedy on failure of, consideration of 1040, 1041
Renewal of ... 1293
a mortgaged lease, S. 71, 983—988, 1081
Repurchase, mere stipulation for, is not indicative of ... 794
Rights of the assignee of a ... 889
Right of redemption of a son, See *Son*.
Rules for carrying out Provisions of Tr. P. Act regarding charges and, Bombay High Court's power to make 1310, 1311
Running account, for security of ... 819
Sale subject to 1567, 1568
Sale with right of repurchase and, Distinction between ... 808
Security for debt is distinguishing feature of, apart from other transfers 807, 808
Signature of mortgagee to a, essential 869-871
Simple, No transfer of ownership in ... 1020
Stipulation as to compound interest in deed of, if hard and unconscionable 1434
Stamp duty leviable on 881, 882
Subsequent, Suit to enforce, Prior mortgagee, If necessary party in, Law as to 1351—1353
Substituted security, In cases of ... 817
Successive, Re-conveyance, in cases, Law as to ... 929

PAGE

Mortgage—(contd.).

Suit for
- adverse claimants, and claimants by paramount title, If proper parties to ... 1350
- erroneous Decree in, Effect of ... 1479
- lessee or tenant, If necessary party to ... 1348
- mortgagor parting with his equity of redemption, not a necessary party in ... 1355
- parties to ... 1347
- persons who are necessary parties to a, Rule as to ... 1345
- proper parties in, Distinction between necessary parties and...1348
- purchaser not joined in, Rights of, Law as to ... 1396
- rights of defendants in, Findings with reference to, If available as estoppel ... 1345
- to be pleaded in, persons pleading *jus tertii*, Disqualification of ... 1350
- unnecessary Parties to ... 1348

Suit on
- when lies for personal recovery ... 1409
- not suit for recovery of debt requiring succession certificate ... 861
- son governed by Mitakshara Law, not joined as party to, when bound 1388—1390
- unregistered ... 1409
- unregistered, Law as to ... 1409

Suits relating to—See *Practice and Procedure.*

Test whether transaction is 807, 808

Third parties to, Rights of, not affected by S. 68 ... 1032

Time, when essential in contract of... 915

Transactions appearing to be, but really sales 807, 808

Transactions held to be 801, 802
- and not to be 792—795
- or otherwise 808-811

Transactions not held to be ... 802

Transfer, if should be express ... 787

Transfer of a, and assignment of a chose-in-action, Difference between. 889

Transfer or charge, whether ... 782

Trust and, Distinction between ... 811

Two witnesses must attest a ... 872

PAGE

Mortgage—(concld.).

Unattested, Operation of 878, 879

Unregistered, Rejection of, Effect of 924

Unstamped, Whether and when admissible in evidence ... 883

Usufructuary, Covenant to pay under, Effect of 1018, 1019

Usufructuary, Covenant by mortgagor not to alienate property under ... 1017

Usufructuary, mortgagor's failure to deliver possession, after execution of 1018

Usufructuary, Personal covenant in, Effect of ... 1039

Usufructuary, Personal covenant to pay, Addition of, if alters nature of 1039

Usufructuary, Personal liability Matter of express contract in mortgage by conditional sale and ... 1039

What accessions pass with 1078—1081

What is a usufructuary ... 1153

What passes on ... 815

What property may be mortgaged ... 814

When to be by assurance, S. 59 861—898

When writing and registration compulsory 861, 862

Writing and registration of, made compulsory for first time by the Act ... 864

See *Contribution, English mortgage, Equitable mortgage, Incumbrance, Insolvency, Interest, Merger, Mortgagee in possession, Subsequent advances, Welsh Mortgage, Zuripeshgi leases*

Mortgage by Annuity Deed.

Description of ... 780

Invented to evade usury laws ... 780

Mortgage by Conditional Sale.

Anomalous mortgages and their relation to .. 851

Beng. Reg. XVII of 1806, Before and after ... 785

Collateral stipulations in, validity of 850

Conditional sale distinguished from ... 850

Defined ... 780

Defined, S. 58 ... 777

Definition and meaning of ... 836

Equity of redemption, English law of, if applicable in Madras to 843—845

Form of words, Necessity of particulars 848, 849

History of, in Madras and Bombay 842—846

Limitation governing 849, 850

PAGE

Mortgage by Conditional Sale—(concld.).

Not treated as mortgage in English Law ... 780
Oral evidence, Admissibility of, to show intention to redeem 843—846
Ownership actually transferred ... 785
Personal covenant absent from ... 859
Personal liability for repayment of loan, absent in, and in usufructuary mortgage ... 851
Previous law and history of, traced 836—848
Previous State of law of, in Bengal, United Provinces and Central Provinces 836—842
Sale and, distinguished ... 848
Sale with condition for repurchase and, Distinguished ... 836
Test to ascertain whether deed is conditional sale or 848, 849
Transfer of Property Act, Effect of, on old law regarding it ... 846
Vernacular names for ... 836
See *Mortgagee*.

Mortgage-debt.

Actionable claim, Whether an ... 822
Costs considered as part of ... 1554
Interest on, cessation of, S. 84 ... 1212
Moveable property, If ... 786
Whether sale extinguishes 1520, 1521
See *Contribution*.

Mortgage-decree.

Assignment of, not compulsorily registrable ... 1495
Leave of Court, under, mortgagee purchasing with, Position of ... 1512
For Sale, Limitation for execution of ...1521—1523
Property sold under
re-purchase of, law as to ... 1507
who may re-purchase ... 1508
Property sufficient to pay off, Sale of ... 1493
Property under, Conduct of sale of ... 1509
See *Mortgagor*.

Mortgage-deed.

A covenant in, Scope of ... 993
Construction of, for determination of time of re-payment ... 971
Defined
S. 58 ... 777
and explained ... 824
Definition of, in Stamp Act 778, 779
See *Documents*.

PAGE

Mortgaged Lease.

By assignment or sublease of term ... 998
Kinds of ... 998
Mortgagor notifying unwillingness to redeem case, effect of ... 988
Renewal of ... 1082
principle of the rule ... 1082
rights of the mortgagee ... 1081
Rights and liabilities of mortgagor and mortgagee as to, S. 65, Cl. (*d*)... 998

Mortgaged Property.

Accession to, S. 70 ... 1077
Attachment of
repealed law (S. 99) ... 1252
in execution of decree when no specific order for sale made ... 1015
Destruction of, by extraneous causes, Liability of mortgagor on ... 1050
Disability of mortgagor to redeem portion of ... 901
Implied warranty of title of ... 992
Mortgagee's liability to deliver, with all accessions ... 926
Mortgagee's interest in, if defeated by mortgagor's fraudulent conduct ... 992
Mortgagor's liability to furnish another security on destruction of ... 1050
Natural or accidental destruction of, Prov. to S. 63, to, Restriction of ... 1051
Omission to implead person interested in, Consequence of ... 1368
Portion of
mortgagee's acquisition of, effect on indivisibility of mortgage ... 951
redemption of, Law as to 950, 951
Possession of
mortgagor in, Waste by, Law as to, S. 66 1000—1008
mortgagor's liability to secure complete and peaceable ... 1045
Property that may be mortgaged ... 814
Redemption of, whole or part ... 1224
See *Mortgage*, *Mortgagee*, *Mortgagee in possession*.

Mortgagee.

Acceptance of negotiable instrument by, Non-extinction of original security by ... 913
Acquiescence by, In diminished security for long time, Effect of ... 1049
Acquiescence of, in his dispossession, bars his remedy under S. 68 1047, 1048
Acquisition by, modes of ... 956

PAGE

Mortgagee—(contd.).

Acquisition of mortgaged property compulsorily made entitles, to compensation ... 817
Application under S. 83 by, Essentials of 1307, 1311
Assignee if included in term ... 822
By conditional sale
remedy of ... 1022
right of, to sue only for foreclosure ... 1016
Can, redeem 1226, 1227
Conflicting remedies of 1022, 1023
Contract to, future property ... 796
Costs of, subsequent to decree, S. 94 (repealed) ... 1236
Defined 821, 822
Defined, S. 58 ... 777
Defined in Stamp Act ... 779
Disability of, to foreclose or sell, in case of works of public utility, S 67, Cl. (*c*) 1024
Duties of, in a Redemption suit 1551, 1552
Effect of third, redeeming first ... 1121
Election of securities by 1288, 1289
Grant of long lease to, Law as to ... 927
Heirs of deceased. See *Foreclosure.*
Impairment of security of, By wrongful act or default of mortgagor, S. 68 cl. (*b*) 1042, 1044
Incompetency of, and mortgagors and How relieved against ... 1303
Injunction and recovery of damages, by ... 1003
In possession
difference between rights of non-possessory mortgagee and, ... 1032
when liable to account ... 1412
Leave to bid, when granted to ... 1511
Liabilities of
in case of assignment of mortgaged lease ... 998
to account, in sale, under power, of property in possession ... 1076
to account when arises ... 1412
to make restoration of property in same condition ... 927
to realize security in the only way prescribed in Tr. P. Act. 1403
to specifically raise pleas in suit to recover mortgage-money... 1044
to sue in respect of whole mortgaged property ... 1025
Limitation of rights of, S. 67, cl. (*a*), 1016, 1018

PAGE

Mortgagee—(contd.).

Mortgaged property, Specification of, Essential for a 799, 803
Mortgagor becoming trustee for, if entitled to foreclose, S. 67, Cl. (*b*)... 1023
Mortgagor from denying title of, Estoppel of ... 991
No marshalling between a, and attaching creditors of the Mortgagor ... 1183
Obtaining of collateral advantage, for fresh consideration by, Legality of... 942
Other rights of, Law as to ... 1411
Persons entitled to demand reconveyance from ... 922
Power of sale
in English law ... 1055
when to be exercised 1059, 1060
Power of, to create tenancies ... 1139
Possession by
application for, Time for, Law as to ... 1475
mortgagors obligation to protect 1046
disturbance of, Law as to, S. 68, Cl. (*c*) 1045, 1046
Possession, Right of, to be placed in, accrues from date of final decree of foreclosure ... 1477
Principal by, Acceptance of, If debars him from claiming interest ... 1414
Prior, Suit to enforce subsequent mortgage, If necessary party in ... 1351
Puisne,
accounts taken in earlier suit If bound by ... 1404
disability of, to eject, if prior mortgagee becomes auction-purchaser ... 1395
obtaining of an order for sale by 1020
omission to join, Effect of ... 1393
rights of, as against auction-purchaser ... 1394
Purchase by, of part of mortgaged property, subject to his charge, Effect of 1514, 1515
Purchase by, of property to be sold under his power of sale, prohibited 1072, 1073
Purchase without leave by, Legality of 1511
Question whether a, is a second or subsequent, how to be decided ... 1109
Recoverable by, Items of account ... 1415
Remedy of,
after sale 1520, 1521

PAGE

Mortgagee—(contd.).

against person not joined as party to a suit 1386, 1387
under S. 67, if concurrent ... 1031
under S 67, Nature of 1030—1032
when deprived of his security for want of title in mortgagor ... 993
when mortgagor commits active waste 1003, 1004
when prohibited from bringing mortgaged property to sale without instituting a suit for sale 1581, 1583

Rights of,

to accession to mortgaged property ... 1077
as against third parties 1032, 1034
as purchaser, as against subsequent and prior mortgagees 1513
for personal recovery, when enforceable ... 1045
for reimbursement of expenses for defending his title ... 997
purchasing equity of redemption ... 1277
to a renewed lease when the mortgaged property is a lease ... 1081
to bring one suit in case of two mortgages on same property 1016
to costs, against whom available ... 1563
to mortgage money with interest, on redemption ... 973
to relief, depends on nature of possession assured ... 1047
to repurchase mortgaged property ... 1454
to sue for foreclosure or sale, S. 67. 1008—1028
to sue mortgagor alone, In respect of mortgage of *stridhan* ... 1366
under a supplementary decree 1532, 1533
subsequent, to pay off prior, S. 74 1106

Revenue Sale, owing to default of ... 1106
Severance of interests of several, when allowed ... 1025
Simple,

remedy of, Sale through Court. 1019
Right of—to sue only for sale... 1016
to sue personally ... 1036

PAGE

Mortgagee—(concld.).

Simple, Stipulation of additional remedy by, if entails forfeiture of statutory remedy ... 1020
Statutory rights of 1014, 1015
Subsequent and prior, Right of former to pay off latter—Procedure prescribed discussed ... 1107
Subsequent mortgagee not bound by accounts between prior mortgagee and mortgagor ... 1296
Suit by, Defence to ... 1014
Suit for damages on breach of implied contract by ... 992
Suit for mortgage-money on failure to secure quiet possession by ... 997
Usufructuary,

creditor of, Disability of, to attach mortgagee's interest as "debt" ... 1018
disability of, to sue for foreclosure or sale ... 1016
heirs of, When entitled to sue without succession certificate 1051
remedies of, other than the one defined under S. 58 ... 1016
remedy of, to realize his security by possession 1016—1018
right of, to sue for sale, if there is agreement to repay the principal ... 1016
personal non-liability of, Principle of ... 1016
suit by, for sale, where possession is only in lieu of interest 1017
suit for possession by, Right of, when accrues ... 1018
when entitled to sue for damages for dispossession by act of mortgagor ... 1018

What items of account recoverable by ... 1415
When entitled to add costs to mortgage-debt 1562, 1563
When, entitled to bid at sale ... 1510
When is a, in possession ... 1085
When must pay costs ... 1564
When not entitled to interest ... 1419

See *Consolidation*, *Equitable mortgage*, *Estoppel*, *Interest*, *Mortgaged lease*, *Mortgaged property*, *Mortgage-money*, *Mortgagor*, *Possession*, *Practice and Procedure*, *Priority*.

PAGE

Mortgagee in Possession.

Cannot acquire any adverse title by the operation of the law of limitation, and cannot be absolved from liability to account ... 1148
Duties of, (S. 76) 1131—1133
exceptions to certain, in cases when receipts have been agreed to be taken in lieu of interest, S. 77 ... 1152
extent of ... 1133
not to commit waste 1142, 1143
not to commit waste, Not applicable to *ameliorative waste* ... 1143
not to commit waste, which is destructive or permanently injurious to property ... 1143
principle of the rule ... 1134
to apply insurance money to reinstate property 1143, 1144
to apply insurance money to reinstate property, English and Indian Law, Difference between ... 1144
to appropriate income after necessary deduction to interest and towards mortgage debt. 1149-1151
to collect rents and profits 1137—1139
to keep and give accounts ... 1144
to make repairs necessary for the preservation of the property ... 1142
to manage property with ordinary prudence 1136, 1137
to pay all public charges 1140, 1141
no less the interest of, to preserve property from forfeiture or sale ... 1095
whether bound to perform, even when possession not as mortgagee ... 1134
Effect of tender by mortgagor on rights and duties of 1151, 1152
Liability of, for rents and profits collected by the Mortgagor 1139, 1140
history of 1152, 1153
to account for illegal collections ... 1140
to pay interest on profits ... 1151
to render accounts, Extent of 1145—1147
to render accounts, when exempted from 1153, 1154

PAGE

Mortgagee in Possession—(contd.).

Limitation for recovery of surplus income from ... 1151
Lose occasioned by default of 1133, 1152
Need not be in actual physical possession ... 1088
Non-liability to account, when arises 1154
Not bound,
to carry out repairs out of his own pocket ... 1142
to pay public charges out of his pocket ... 1140
to secure highest rent ... 1137
Not entitled to recover costs incurred as on an unnecessary and harassing litigation ... 1092
Not liable for actual profits of land ... 1137
Not liable to account, if possession obtained through court ... 1146
Occupation need not be personal ... 1139
Payment with rests, effect of ... 1150
Payments made by, rate of interest allowed on ... 1098
Position of, is that of a trustee ... 1145
Possession may be actual or constructive to impose liability to keep and give accounts ... 1144
Possession of, not adverse ... 1135
Power of, to create tenancies ... 1139
Presumption against,
from refusal to account ... 1148
from non-production of accounts 1146, 1147
Rights of, (S. 72) 1083, 1084
principle of the rule 1084, 1085
applies to all mortgages irrespective of their date of execution ... 1084
how affected when he is also lessee 1086—1088
to charge for expense incurred in management of the property 1090—1092
to charge for money spent by him ... 1100
to charge for premiums in insuring the property ... 1100
to charge for renewal of the lease 1100
to payments made in respect of Government revenue ... 1098
to recover expenses in supporting his own title against the the mortgagor 1099, 1100

PAGE

Mortgagee in Possession—(concld.).
to recover payments made to protect property from forfeiture is independent of possession 1095, 1096
to recover payments made for supporting mortgagor's title 1098, 1099
to spend money as is necessary and add such money to the principal money 1083, 1084
to spend money, Limits of admissible expenditure 1089—1100
when commences ... 1085
Sale by, in exercise of his power, Rights of mortgagor to an account ... 1076
To exercise due diligence, Degree of diligence 1137—1139
To recover money spent to protect property from forfeiture or sale; the forfeiture or sale must be such as would have imperilled his security 1096, 1097
What amounts to 1088, 1089
When entitled to charge for money spent for the preservation of the property from destruction, forfeiture or sale 1092, 1093
When entitled to value of improvements 1093, 1095
When is a ... 1085
When liable for gross negligence in managing property ... 1136

Mortgagee Purchaser.
Not trustee ... 1512
Rights of ... 945

Mortgagee's Legal Costs Act (1895)
See *Statute 58 and 59 Vic., C. 25.*

Mortgagee's Shield.
What is ... 1121

Mortgage Money.
Defined ... 824
S. 58 ... 777
Discharge of, How made ... 909
Mortgagee's right to sue for
S. 68 1028, 1052
principle of the law as to 1029, 1030
Not fully paid by usufructuary mortgagor, Procedure where ... 969
Payment of, to one co-mortgagee, No discharge of entire mortgage ... 910
Payment of, when debt is payable by instalments, Law as to 911, 912

PAGE

Mortgage Money—(concld.)
Personal obligation to repay, by mortgagor, if a necessary incident of every mortgage ... 1034
Procedure for, mortgagor seeking to deposit in Court 1315, 1316
Suit for recovery of unpaid balance where mortgage executed and mortgagee has only made part payment, Maintainability of ... 798
Time when, becomes payable ... 903
When mortgagee entitled to ... 1014
When payable 1011, 1012
When payable, Interpretation as to 907, 908
See *Instalments, Payment into Court, Redemption.*

Mortgages and Charges.
How distinguished 1257, 1258
See *Charge.*
Provisions regarding practice and procedure relating to suits for enforcement of 1343—1584

Mortgage Security.
Incidents of 815, 816

Mortgage Suit.
As between co-defendants in, Bar of *res judicata*, Law as to ... 1368
Nature of ... 861
Necessary parties to, Who are ... 1369
Persons who should be impleaded in ... 1369, 1376
See *American Courts, Mortgage, Suit.*

Mortgage Usufructuary by Conditional Sale.
How created ... 1247
What is a ... 1247

Mortgagor.
Assignee if included in term ... 822
Comparison of, in possession under S. 66, with one under English law. 1004
Cannot question validity of decree ... 1516
Contracts, implied, by, S. 65, Law as to 988—1000
Covenant for defence of title and quiet enjoyment by, S. 65, cl. (*b*) ... 996
Covenant for endorsing payments, Validity of 990, 991
Covenant for title of, S. 65, cl. (*a*) ... 994
Covenant to pay, by, When implied ... 1032
Defined 821, 821
S. 58 ... 777

PAGE

Mortgagor—(contd.).

Duty of,
to preserve mortgaged property. 1001
to prevent setting up of hostile claim ... 992
towards mortgagee ... 992
Effect of tender, on right and duties of mortgagee in possession 1151, 1152
Estoppel of ... 991
Express contract by, Effect of, on S. 66. 1006
Implied contract by, Statutory covenants subject to ... 990
Incumbrance paid off by, cannot be set up against subsequent incumbrances created by him ... 1300
In possession
liability of, to preserve property ... 1001
non-liability of, for deterioration rights of ... 1001
Lease of mortgaged property by, in India, Law as to 1005, 1006
Legal representative of, Necessary party ... 1357
Liability of
as trustee, when mortgage is void ... 1040
distinction of, under Cls. (*b*) and (*c*) of S. 68 ... 1044
for payment of Government charge, continues even after sale of equity of redemption, 997
to pay rent, When does cease ... 997
Limitation of liability of, under S. 68 Cl. (*b*) 1044, 1045
Meaning of, in S. 95 1238, 1239
Mortgagees and, Incompetency of,
How relieved against ... 1303
Mortgagee's remedy against, after sale 1520, 1521
Mortgagor's purchase of reversion of lease merges term in mortgage ... 986
Not affected by tacking ... 1176
Objecting to a sale, should apply under S. 47, C.P.C. (1908) ... 1580
Omission by—See *Redemption*.
Personal liability of
limitation for 1041, 1042
non-implication of, under Tr. P. Act. ... 1028
Presumption as to, in simple and English mortgage ... 1038
under S. 68, Cl. (*a*). Binding nature ... 1033

PAGE

Mortgagor—(contd.).

Possession
by one co-mortgagor of whole mortgaged property becomes adverse to other co-mortgagors ... 857
right of, to recover under S. 62, cl. (*b*) 973, 974
Power of
to designate property to be sold but not to specify the order in which the properties are to be sold ... 1515
to object to a sale 1515—1517
and also of assignee of mortgagor's interest to question validity of sale 1515, 1516
to redeem, Whether should be whole or part of property 1544, 1545
Power of Court to grant relief to, In respect of fraud, coercion, undue influence, and misrepresentation ... 1437
Reconveyance of property to, How effected ... 928
Promise to pay by, If one of 'binding' nature ... 1034
Rights of
in a equitable mortgage ... 897
to call for accounts only arises when mortgagee is in possession ... 1124
to lease mortgaged property after passing of mortgage-decree ... 1003
to money deposited in Court, S. 83 ... 1204
to redeem, Revival of 1116—1118
to return of mortgage-deed ... 925
to set off over payments towards interest ... 1414
Rule as to valid payment of debt to any co-creditor by, Exception to .. 910
Sending money by post or money order, Law as to ... 914
Signature of, essential to a mortgage 869—871
Subsequent acquisition of title to property mortgaged without title by, Effect of ... 994
Suppression of prior incumbrance by, confers on mortgagee right to sue for recovery of money ... 1042
Usufructuary suit for redemption by, Power of Court to order sale in ... 1017

PAGE

Mortgagor—(concld.).
Ways by which, can help mortgagee to secure quiet possession 996, 997
What amount to be paid by ... 912
What must be claimed by, in a suit for redemption 1542, 1543
When could redeem by paying only a portion of the debt 1543—1545
Whether representatives of a deceased, are co-mortgagors for purposes of contribution ... 1239
Wrongful acts of, kinds of 1042, 1043
Wrongful act or default of—See *Mortgagee, Consolidation, Contribution, Deposit, Equitable mortgage, Equity of redemption, Mortgaged lease, Mortgaged property, Redemption, Tender, Waste.*

Mortuum Vadium.
Form of mortgage once recognised by English Law ... 780

Movable Property.
Bill of Sale Acts provide for mortgage of movable property in English Law. 1172
Mortgage debt if ... 786
Mortgage of, English and Indian Law 1172
No provision with regard to mortgage of ... 1172
Registration not necessary even in unexempted area in the case of mortgage of ... 896
Sale of, by the pawnor, governed by Contract Act ... 1055
Subsequent advances on the mortgage of ... 1172
Mortgage of, Question of, discussed ... 898

Muddatakriyam.
Form of Mortgage ... 784

Multiplicity of Suits.
See *Suits.*

N

Nazrana.
See *Commission.*

Negligence.
Against negligence, how affects priority 1163, 1164
In law, what is ... 1159
Mere, not enough to entail forfeiture of priority ... 1162

PAGE

Negligence—(concld.).
Must be
a breach of duty to public or to person affected 1162, 1163
in the transaction itself and the proximate cause ... 1163
What is ... 1159

Negotiable Security.
See *Payment.*

Negotiable Instrument.
See *Mortgagee.*

Newspaper.
Notice in, not a good tender ... 1209

Niawa.
Instance of anomalous mortgage ... 1247

Nirmutal.
What is a ... 1250

N.W.P. Land Revenue Act.
Ss. 113 and 114—Reference to ... 948

Notice.
Doctrine of, importance of, in law of property on account of its effect on priority ... 1166
Effect of,
on priority ... 1166
on subsequent advances ... 1171
Essentials, to be effective ... 1064
Foreclosure, of, previous law as to necessity of giving 837—839
Form of,
of deposit ... 1209
of Payment into Court ... 1309
In relation to sub-mortgage 822, 823
Invalid under old law if cured by considering it as issued under Transfer of Property Act. ... 848
Mortgagee, when entitled to ... 948
Newspaper, in a, not a good tender ... 1209
No fresh, necessary when there is a long delay between the maturing of the notice and the actual sale ... 1065
Of deposit or tender when required ... 1215
Of intermediate incumbrance if affects priority ... 1286
Of Sale, should be in writing ... 1063
Persons,
who may be served with ... 1302
incompetent to contract, Rule, where, S. 103 ...1302, 1303
rule as to tender and, Principle of ... 1301
Service of, Affidavit of, Rule as to 1307, 1310

PAGE

Notice—(concld.).
Service of 1064, 1065
rule as to 1306, 1310, 1315
starting point for determining priority in a case of equitable assignment ... 1166
to mortgagor, when necessary... 1014
To Mortgagor, Necessity of, Law as to ... 1500
Under old regulations treating of mortgages 837, 838, 841, 842
Want of, does not invalidate sale ... 1065
When application to be on ... 1307
When necessary ... 1166
When there is a waiver of ... 1065
Whether necessary for marshalling ... 1182
Whether registration equivalent to, for marshalling ... 1182
See *Agent*, *Sale*.

Novation.
A valid contract sufficient to constitute 1010
Civil law, classifications of ... 1292
Effect of, on prior contract 1292, 1293
Further charge, or ... 882
Lease, renewal of a terminable without renewal amounts to a ... 985
Merger and, Distinguished ... 1292
No, if creditor abandons remedy, but not claim, against debtor ... 1294
Original contract modified where creditor and debtor agreed that bond's interest was recoverable from rents of debtor's tenants ... 1295
Possession when actually necessary for ... 853
Renewal of Usufructuary mortgage ... 852
Usufructuary mortgage, Contract of, Renewal of 798, 799
See *Merger*.

O

Offer.
Mere, by letter not a valid tender ... 1209

Onus.
Shifted by registration .. 884

Operation of law.
Charges created by, various kinds of 1266—1271
See *Words and phrases*.

Oral agreements.
Whether registrable ... 887

PAGE

Oral Evidence.
Admissibility of ... 820
for showing real nature of instrument 788, 789
in respect of an anomalous mortgage ... 1251
showing ostensible co-obligor to be really surety ... 857
to show intention as to redemption of mortgages by conditional sale 844—846
to show security included past and future advances ... 819
to show transaction is mortgage or not 808—811
Cases where admissible and principle as to admissibility of 789—792
Intention may be proved by, of conduct and dealings ... 1287
Mortgagor's right to give, in respect of non-receipt of consideration ... 1406
of intention inferrible from contemporaneous correspondence and parol evidence of conduct ... 1287
Principles decided under S. 92, proviso 1, Evidence Act, 1872, Summary of 791, 792
Scope of rule as to 790, 791
To show, one kind of deed to be really another, Admissibility of ... 790
See *Consideration*.

Order.
Under S. 83, How enforced ... 1308

Order Absolute.
For Foreclosure, when to be passed, S. 87 (repealed) ... 1216

Otti.
An instance of anomalous mortgage ... 1247

Ottidar.
Rights of ... 1249

Otti Kamparam.
What is ... 1250

Otti Mortgage.
What is a 1249, 1250
Kanom Mortgage and, Difference between 1249, 1250

Overpayment.
Recovery of, in Redemption suits, See *Practice and Procedure*.

Ownership.
Jura in re aliena and ... 851

PAGE

P

Parol Evidence.
Admissibility of, to show ostensibly absolute conveyance to be sale really 807—811
See *Oral evidence.*

Parties to Suit.
Administrator, when necessary party 1373
Assignee *pendente lite* proper party in suit for redemption ... 1372
Attaching creditor, Necessary party so long as attachment continues ... 1371
Debenture-holder, when necessary party 1374
Fraudulent and voluntary transferee, if necesary party ... 1371
Kanomdar, Necessary party in mortgage suit ... 1374
Landlord, when necessary party ... 1375
Lessee's right to be represented in mortgage suit ... 1375
Mortgage, Assignee of, necessary party in mortgage suit ... 1370
Omission to join puisne mortgagee, Effect of ... 1393
Person attaching property *pendente lite*, if necessary party ... 1372
Suit relating to mortgage of co-parcener's property, If necessary in, Impleading of other co-parceners ... 1366
Surety, When necessary party in mortgage suit ... 1376
Trustee, When necessary party ... 1373
See *Mortgage, Practice and Procedure, Son.*

Partition.
Mortgagees *inter se* to right of, Disability of ... 1367
See *Joint family property.*

Partners.
Of a mortgagor, Whether necessary parties to a suit on mortgage 1384, 1385

Partnership.
When partner's lien a charge ... 1271

Payment.
Appropriation of ... 913
Legal presumption as to ... 914
Manner of ... 914
Mode of ... 913
With rests, Effect of ... 1150
Need not be by the claimant himself in respect of a claim for contribution 1197
Negotiable security, Tender of, if valid 918

PAGE

Payment—(concld.).
Place of, General rule as to ... 915
Presumption as to, Rebuttal of ... 914
Proper time of 914, 915
Pro tanto, Law as to ... 913
See *Contribution, Court, Deposit.*

Payment into Court.
Application under Ss. 86, 92, regarding, Rule as to ... 1307
Deposit of mortgage-money, Application for, How made ... 1306
Notice of, under S. 80 or any subsequent section, Rule as to 1307—1310
S. 83, Costs and expenses under, Rule as to 1306, 1310-1315
Specification and purpose of money, to be paid under S. 83, Rule as to 1306, 1310

Payment out of Court.
Of Money.
by mortgagee, Rule as to ... 1307
by mortgagor, Invalidity of ... 1504
on application by mortgagee under S. 57 (c), Rule as to ... 1307

Penalty.
Stipulation in bond if in the nature of, is a question of fact ... 1430

Perpetual Lease.
See *Ambiguity.*

Person.
Competent to mortgage 814, 815

Personal Covenant.
Superadded to mortgage makes usufructuary into simple usufructuary mortgage 853, 854
When unenforceable on the failure of a mortgage 878, 879
See *English Mortgage.*

Personal Decree.
Usufructuary Mortgagee if can obtain. 852
See *Decree.*

Personal liability.
Of debtor's grandson, Texts of Hindu law as to ... 1426
Usufructuary mortgagor not personally liable to repay loan ... 852

Personal recovery.
When suit for, on a mortgage lies ... 1409

Peruarthum.
An instance of anomalous mortgage... 1247

Peruarthum Mortgage.
What is a ... 1248

PAGE

Pignus.

Form of Mortgage ... 826

Plaint.

Amendment of, for ensuring joinder of all persons, Power of Court in respect of ... 1364

Plaintiff.

Benamidar, Right of, to sue on Benami Mortgage, Law as to 1358, 1359
Person sued for, becoming incompetent to represent the interest affected by claim of, Effect of ... 1366
See *Foreclosure, Redemption.*

Pleadings.

By parties joined, Law as to 1367—1369
Form of, In suits relating to mortgages and charges 1311, 1312
Decrees, orders and in suits relating to mortgages and charges 1316—1339
Mortgage securites, In suits for enforcement of, Rule as to ... 1309
Redemption, on 1547—1549
See *Appeal, Mortgagee.*

Pledge.

Definition of, in Contract Act, 1872, Reference to 779 *f. n.*
Mortgage and, Relation between ... 784
Mortgage of future indigo crops if, of specific moveable property ... 805
Object of ... 786
Simple mortgagee confers no power of sale ... 827

Possession.

Co-mortgagor, of, to enforce contribution, whether adverse ... 1242
Disturbance of
By any other person, Law as to 1048—1050
by third parties, Construction of the rule as to ... 1048
For imposing liability to keep and give accounts, may be actual or constructive ... 1144
In case of redemption, S. 93 (repealed) 1236
Incidents of, on re-transfer .. 1476
Lawful covenant for quiet enjoyment to, Restriction of 1046, 1047
Liability of mortgagee in,—to restore entire property ... 926
Liability of party in—of mortgaged property, to pay public charges, S. 65, cl. (c) 997, 998

PAGE

Possession—(concld.).

Mere, of title deeds not proof of intention to deposit as security ... 891
Mortgagee entering into, Right of, to standing crops ... 1476
Mortgagee who has paid part consideration, if entitled to ... 1026
Mortgagor's right to sue for, not dependent upon mortgagee's production of accounts ... 972
Nature of, in English mortgage and other mortgages ... 860
Novation, if actual possession necessary for, of usufructuary mortgage ... 853
Priority when determined according to date of ... 1167
Recovery of, in cases other than those prescribed by cls. (*a*), (*b*) of S. 62 ... 975
Recovery of, mortgagor's right to ... 926
Re-transfer of
mortgagee's obligation to return title deeds, on 1475—1476
on redemption and foreclosure 1475
Right to, Determination of, in respect of different sales ... 1394
Right to sue for, when accrues ... 973
Suit for
by mortgagor when and how instituted ... 972
Whether convertible into one for redemption ... 972
Transfer of, how made in usufructuary mortgage ... 851
Usufructuary mortgage under how and when obtained 969, 970
Usufructuary mortgagee's and lessee's, distinguished ... 851
nature of ... 851
Whether necessary to claim contribution 1239, 1241, 1242
See *Adverse Possession, Delivery of Possession, Mortgagor, Usufructuary mortgage, Waste.*
Title acquired by continuous—See *Title.*

Post diem interest.

See *Interest.*

Postponement.

See *Redemption.*

Power of Sale.

See *Mortgage, Mortgagee, Mortgagor, Sale.*

PAGE

Practice and Procedure.

Alteration of a suit for possession into one for redemption ... 972
Application of sale proceeds ... 1569
Change in, by S. 68 ... 1029
Consequences of failure to join necessary persons as parties to a suit on a mortgage 1382—1385
Costs how to be assessed 1549—1550
Costs of mortgage subsequent to decree ... 1562
Decree in redemption suit when nothing due on mortgage or where mortgagee has been overpaid, O. 34, r. 10 ... 1561
Decree in redemption suit where nothing found due, Procedure in Execution 1561, 1562
Discretionary power to decree sale, O. 34, r. 4, Cl. (2) 1483, 1484
English practice how far guides admissibility of oral evidence to construe documents ... 789
Enlargement of time
for redemption before passing final decree for foreclosure. 1461, 1462
grounds for enlargement 1462—1464
Final decree in Redemption Suit O. 34, r. 8 1552, 1553
Foreclosure or sale of mortgages by conditional sale, and English mortgage, In suit for 1314, 1315
Form of application, under O. 34, r. 3 1460
In a suit for redemption 1541, 1542
Inquiry under O. 34, r. 3 ... 1461
In respect of,
mortgagee holding two mortgages on same property by same mortgagor ... 1397
obtaining of a final decree for sale ... 1503
sale held in execution of decree passed under O. 34, r. 5 ... 1506
Interest for what period recoverable on a mortgage 1420, 1422
Items of account recoverable by a mortgagee ... 1415
Manager of a joint Hindu family when represents all other members ... 1380
Mode of taking accounts 1411—1415
Modification in, by S. 67 1026, 1027
Mortgagee's omission to plead, Effect of ... 1044

PAGE

Practice and Procedure—(contd.).

Mortgagee's right in an English mortgage to sue for mortgage-money on failure to secure quiet possession, When accrues ... 997
Mortgagee's right to foreclosure on failure to pay one or more instalments ... 1411
Mortgagee when not entitled to interest ... 1419
Mortgages and charges, Procedure relating to, as provided in O. 34, C. P.C., 1908 1343—1584
Mortgage security, Procedure for enforcement of ... 805
Of American Courts as to, Joinder of parties in, Mortgage suits ... 1346
On *non-payment* of the decretal amount in the foreclosure suit 1458, 1459
On *payment* of the decretal amount in a foreclosure suit ... 1458
Operation of decree on a person not joined as party to a suit 1383, 1384
Parties to a mortgage suit, Object of the rule *re* ... 1386
Parties to a suit, Failure to join necessary persons as, Consequences of, English Law ... 1382
Pleadings on redemption 1547—1549
Possession, Re-transfer of, Court's power to order, Difference between, in redemption and in foreclosure ... 1475
Power of Court to.
compel mortgagee to render accounts ... 974
decide what property and how much of it should be sold ... 1502
reduce interest when it is exorbitant or unconscionable ... 973
Power to decree sale in foreclosure-action in England ... 1483
Preliminary decree in redemption suit —Procedure prescribed for—O. 34, r. 7 1539, 1540
Prior mortgagee in America, Impanelling of ... 1354
Procedure applicable to a charge O. 34, r. 15 ... 1584
Procedure for a puisne mortgagee to enforce his right to redeem and foreclose 1564, 1565
Procedure on non-payment of redemption money ... 1552

PAGE

Practice and Procedure—(contd.).

Procedure to bring a mortgaged property to sale 1570, 1571
Rule *re*—Three stages of the rule, 1571, 1572
Procedure when a party is entitled to damages but not interest ... 1421
Questions for consideration on an application for final foreclosure decree ... 1468
Rates of allowable interest on a mortgage 1415—1419
Recovery of balance due on mortgage. 1524
Recovery of over-payments in redemption suit ... 1561
Redemption by puisne mortgagee 1126—1128
Right of mesne mortgagee to redeem and foreclose, O. 34, r. 11 ... 1564
Rights of puisne mortgagee, not joined as party to suit 1390—1392
Sale of property subject to prior mortgage 1566
Suit for ejectment, Power of Court to pass redemption decree in ... 922
Suit for recovery of money only by enforcement of lien, Power of Court to award compensation in ... 1018
Suit on a mortgage, when lies for personal recovery ... 1409
Suit under S. 67, is matter of procedure to enforce a right ... 1027
Supplementary decree, Essentials for a, 1527—1552
Time for application by mortgagee, to pass final decree for foreclosure ... 1457
Under Transfer of Property Act and before it, regarding mortgages by conditional sale, compared ... 846
Usufructuary mortgage, as to ... 967
What rights must be adjudicated in a suit for foreclosure 1409—1411
When a party is not entitled to interest but is entitled to damages.. 1421
When compound interest recoverable 1422, 1423
When joinder unnecessary 1385, 1386
When mortgagee has not been paid from the usufruct ... 972
When mortgagor is minor and the guardian sues to redeem ... 1232
When payment made in a redemption suit ... 1551
Whether mortgagee can sue persons not already joined as parties to a suit 1386, 1387

PAGE

Practice and Procedure—(concld.).

Whether mortgagor's partners are necessary parties to a suit on mortgage 1384, 1385
Who are to be joined as parties to a suit relating to mortgage of joint Hindu Family property 1377, 1378
See *American Courts, Appeal, Foreclosure, Mortgage, Redemption, Usufructuary mortgage.*

Pre-emption.

Contract of, Specific performance of, Suit for ... 941
Covenant for
how enforced ... 941
nature of ... 940
Covenants for preference and, If clogs on 939, 940

Preliminary Decree.

Redemption suit, in, O. 34, r. 7 1539, 1540

Prescription.

Title acquired by, See *Title.*

Preservation.

Of property—Rights of mortgagee in possession to charge for expenses incurred in, from destruction, forfeiture or sale—See *Mortgagee in possession.*

Presidency Banks Act.

Re power of, to advance money on equitable mortgage ... 893
S. 37, restricting power of directors to advance money on equitable mortgage ... 893

Presumptions.

Arising from non-production of accounts ... 1147
As to advantage gained by mortgagee by availing his position as such 987, 988
Attestation, Arising from ... 875
In respect of, Claim made but not decreed ... 1490
Merger and connected presumptions... 1287
Merger, Presumptions regarding 1287, 1288
Of death, in respect of, mortgagor not heard of for thirty years ... 1362
of merger when, and when will not arise ... 1282
See *Mortgagee in possession, Payment, Redemption.*

PAGE

Price.

Redemption, of, to be paid by puisne mortgagee ... 156

Principal.

See *Principal and Agent.*

Principal and Agent.

Whether principal bound by Agent's fraud, misrepresentation, etc., so as to affect his priority ... 1167

Priority.

Affected by tacking ... 1176
Charge and mortgage, Between, Test of 1284
Determined according to date of possession between two purchasers of a mortgaged property ... 1167
Doctrine of forfeiture of, S. 78 ... 1155
Effect of notice on ... 1166
Effect of waiver on ... 1167
Exceptions to 1155—1168
Forfeited by fraud 1156—1158
Forfeited by gross negligence 1159—1161
Forfeited on account of misrepresentation 1158, 1159
Forfeiture of,
  negligence against negligence how affects 1163, 1164
  on account of fraud, See *Fraud.*
  on account of gross negligence, See *Gross negligence*
  when arises ... 1281
  mere negligence not enough to entail ... 1162
  negligence must be the proximate cause and in the transaction itself ... 1163
How determined in debentures ... 1167
Mistake, fraud and novation militate against ... 1298
Not affected by mere delay ... 1169
Notice of intermediate incumbrance, effect of, on ... 1286
Of mortgagees ... 896
Of mortgages and merger ... 1282
On renewal of mortgage ... 1293
Postponement of, Rule as to,
  principle of ... 1155
  one of general application and governs also leases ... 1155
Rules for forfeiture or postponement of, cannot be used to defeat right obtained by continuous possession or prescription ... 1168

PAGE

Priority—(concld.).

Rule of,
  how affected by contributory negligence 1163, 1164
When postponed, S. 78 ... 1155
Service of notice, starting point for determining, in a case of equitable assignment ... 1166
To entail forfeiture of, negligence must be a breach of duty 1162, 1163
Vendor's lien, Of, not merged in mortgage ... 1290
When a case for, arises ... 1156
When mistake deprives a mortgage of ... 1166
Whether Agent's fraud etc., affects Principal's priority ... 1167
Whether forfeited, owing to laches in enforcing right 1164, 1165
Whether forfeiture of, could be superadded to a pecuniary penalty enacted for non-performance of a statutory duty ... 1162
See *Misrepresentation, Notice.*

Prior Mortgage.

Sale free of 1566, 1567
Sale, Subject to O 34, r. 12 ... 1566
  conditions necessary for ... 1566
  limits of the rule 1568, 1569
Sale subject to,—See *Sale.*

Prior Mortgagee.

Mesne mortgagee and,
  competition between, question of priority ... 1129
  rights of 1124, 1126
Position of, Purchaser 1129—1131
Postponement of, S. 78 ... 1155
Receipt given by, need not be registered 1119
Right of puisne mortgagee to redeem, discussed 1126, 1128
Right of puisne mortgagee to redeem, is only a right, not an obligation ... 1126
See *Priority.*

Private Sale.

When authorised by Civil Procedure Code ... 1518

Priority of Contract.

Mortgagor and sub-mortgagee, Between 822, 823
Usufructuary mortgage transferred without mortgagor's privity, Effect of 857

Proceeds.

See *Sale Proceeds.*

PAGE

Profits.

Interest on, Liability of mortgagee in possession to pay ... 1151
No accounts, when, vary 1154, 1155
See *Accession, Rents and profits, Set-off.*

Proof.

Burden of, consideration, Payment of, in presence of Registrar, Effect on... 1405
By calling attesting witnesses ... 877
By hand-writing when attesting witnesses are dead ... 877
Of unregistered mortgage 879, 881
See *Burden of proof, Documents, Mortgage.*

Property.

Deposit of title deeds, charged by .. 892
Marshalling 1513—1515
Must be secured to create a charge ... 1261
Must be specified to create a charge ... 1260
Purchase of, subject of mortgage by mortgagee subject to his mortgage, Effect of 1514, 1515
Re-transfer of, on redemption ... 1552
Sale of
Court's discretion in respect of 1493
subject to prior mortgage ... 1566
Subject of mortgage
less than Rs. 100 in value—necessity for registration discussed 887, 888
redemption of, Whole or part... 1224
Subject to a charge—Provisions relating to sale or redemption of mortgaged property, Applicability of, to ... 1584
To bring, subject of mortgage, to sale, suit for sale necessary O. 34, r. 14, 1570, 1571
Valuation of, to determine rate of contribution 1188—1189

Public Demands Recovery Act.

Reference to ... 1576

Puisne Mortgagee.

Cannot redeem himself ... 1219
Impleading of, In suit by a prior mortgagee ... 1369
Meaning of ... 822
No claim for delivery of title deeds ... 1119
Price of redemption to be paid by ... 1565
Rights of
not joined as party to suit 1390—1392
to redeem prior mortgagee 1126—1128
to redeem prior mortgage, Principle of the rule 1107, 1108

PAGE

Puisne Mortgagee—(concld.).

Rights of—(*Concld.*)
on subrogation ... 1115
to redeem prior mortgagee S. 74 ... 1106
When right to redeem could be exercised by ... 1565
See *Mortgage, Parties to suit.*

Punjab Customary Mortgage.

Instances of anomalous mortgages, are 1251
See *Anomalous mortgages.*

Public.

Inconvenience to—Prevention of, Object of S. 67, Cl. (c) ... 1024

Public Charges.

Payment of, by party in possession —See *Possession.*

Public Policy.

Contract to mortgage "all my real and personal estate" if void for uncertainty or as against ... 799
See *Equity.*

Purchase.

By co-mortgagor, Effect of ... 1520
By prior mortgagee 1129, 1131
Of part of mortgaged property by mortgagee, subject to his mortgage, effect of 1514, 1515

Purchaser.

Bona fide without notice, Title of, Difference between English and Indian Law ... 1074
Not bound to look behind the decree... 1517
Position and title of, when a stranger is 1518—1520
Right of, in a mortgage sale—as against subsequent and prior mortgagees ... 1513
Starting point of title of ... 1523
Title of, on sale of mortgage by the mortgagee 1069—1072
When could claim title deeds ... 1520
See *Sale, Vendor and Purchaser.*

Q

Question of Law.

Whether a covenant is reasonable or otherwise for the protection of the covenantee is a ... 936
See *Practice and Procedure.*

R

Railway Companies Act, 1867 (English).

S. 23, Reference to ... 1167

PAGE

Rateable Abatement.
See *Abatement.*

Rateable Distribution.
Who can claim, of sale-proceeds 1517, 1518

Receipt.
By prior mortgagee need not be registered 1119
See *Consideration.*

Receipts.
In lieu of interest, agreement to take, how affects mortgagee in possession, S. 77 ... 1152

Receiver.
Appointment of, by Court ... 1004
Court's power to appoint, in mortgage suits ... 1015
When may be appointed in a redemption suit ... 1550

Recital.
Inadmissibility of, as against third parties ... 1407
See *Consideration, Evidence.*

Recovery.
Contribution, mode of, of 1194, 1195
Mortgage, of balance due on, S. 90 (repealed) ... 1217
Of contribution 1193, 1194
Of over payments—See *Practice and Procedure.*
Of surplus of income, Limitation for 1151

Rectification of Deed.
See *Documents.*

"Redeem up, Foreclose down."
See *Maxims.*

Redemption.
Acts other than by acts of parties, Extinguishment of right of, by ... 944
After time allowed but before final decree for foreclosure — Whether mortgagor can claim, as of right 1464—1467
Agreement to pay remuneration to mortgagee, If clog on ... 935
Before final decree for foreclosure though after due date—English Law ... 1467
time for—Enlargement of, 1461—1464
Cases in which, is impossible 906, 907
Clogs on ... 920
English law, against ... 933
origin of the rule against 932, 933
rule against, Application of ... 942
collateral covenants forming, Indian Law as to ... 934

PAGE

Redemption—(contd.).
Condition against, if enforceable ... 859
Condition of permanent possession of property as tenant, is clog on ... 937
Contracts delaying or defeating, Absolute nullity of ... 933
Co-parcener's right to make, of whole estate ... 924
Costs of 1549, 1550
Covenants clogging, Various forms of. 936—939
Covenants postponing period of, How supported ... 905
Co-widow's right to make, Law as to 923
Decree for, Finality of 1556—1560
Decree for foreclosure or sale in default of, S. 93 (repealed) ... 1236
Decree for
Nature of ... 947
powers conferred on mortgagor by—English and Indian Law 1540
when satisfied ... 1562
Decree in suit for, S. 92 (repealed) ... 1235
Effect of third mortgagee redeeming first ... 1121
Equity, Pure creation of ... 861
Express stipulation against, before certain period, Effect of ... 904
Extension of time for, after due date 1555, 1556
Extinguishment of right of ... 932
Felon mortgagor may redeem through administrators or *interim* curators. 1232
Guardian's right to redeem ... 1230
History of, S. 60 861, 899, 900
Lessee's right to redeem 1228, 1229, 1230
Limitation for ... 1541
Minor could redeem through his guardian ... 1231
Mode of 1219, 1220
Money for, Amount of, Party excluded, Payable by ... 1397
Mortgaged property, of, whole or part. 1224
Mortgagee could purchase the equity of ... 1227
Mortgagor's liability
to claim accession in a suit for 982
to sue for, as consequential relief ... 921
Mortgagor's offer of, by payment of cash, Effect of ... 973
Mortgagor's option to redeem either, when there is a usufructuary mortgage and a subsequent simple one on same property ... 97

PAGE

Redemption—(contd.).

Mortgagor's right of 1223, 1224
sale of land owing to default of mortgagee, Effect on ... 924
subject to rule of limitation ... 903
when accrues 904, 905
adjudication by Court, on, *res judicata* ... 946
Mortgagor's right of
to benefit of new lease on ... 983
to make, when only date is fixed. 905
Sale of land for arrears of revenue, Effect on ... 946
Necessary defendants in suit for, Law as to ... 1362
Of mortgages, Procedure prescribed for, Applicability of, to suits for enforcement of a charge ... 1584
Of prior charge, not a merger of subsequent interest ... 1107
Of prior mortgage—Price and conditions of 1118, 1119
Order of ... 1221
as between several successive mortgagees ... 1221
Parties to, Necessary, Law as to ... 1360
Persons interested in the equity of. 1227, 1228
Persons other than mortgagor entitled to make ... 924
Persons other than those mentioned in S. 91, entitled to redeem ... 1235
Piece-meal, Rule against, Principle of 951
Pleadings on 1547—1549
Possession should be decreed in case of, S. 93 (repealed) ... 1236
Possession, suit for, under S. 62, whether suit for ejectment or ... 968
Possession, when mortgagee precluded from enforcing his mortgage rights to 971
Postponement of date of, whether order must be before fixed date or may be after ... 1467
Power of lunatic or idiot to redeem ... 1232
Power of remainderman or reversioner, etc., to redeem ... 1233
Price of
proportional reduction of, S. 68 last proviso ... 912
to be paid by puisne mortgagee 1565
Procedure for
by puisne mortgagee 1126—1128
Prescribed under old Regulations 839, 840
Puisne mortgagee, Right of, to make 1394

PAGE

Redemption—(contd.).

Quantum of interest necessary for 923, 924
Re-transfer of mortgaged property on 1552
Right of
as between prior and subsequent mortgagees and priority ... 1281
bar of ... 924
Right of
by excluded son, as against *bona fide* transferee without notice 1401
extinction of mortgagor's omission to sue within limitation, entails ... 945
how enforceable ... 920
foreclosure and right of,
Accrual of, Presumption as to... 906
judgment creditor to redeem 1233, 1234
mortgagor on ... 925
mortgagor to make, S. 60 ... 898
mortgagor to redeem a portion by paying a portion of the mortgage-debt 1543—1545
of a son to redeem a mortgage executed by his father ... 1378
persons interested in property, who are 1224 — 1226
puisne mortgagee to redeem prior mortgage ... 1106
surety to redeem 1230, 1231
surety who redeems ... 1231
when vests in the Crown ... 1235
Rights acquired on ... 1222
Right to redeem one of two properties separately mortgaged, S. 61 ... 959
Second suit for, if maintainable ... 947
Stipulation against alienation by mortgagor, operation of, as clog on ... 937
Stipulation for postponement of payment of money for, Effect of ... 971
Sub-mortgagee's right of ... 1227
Subrogation is by ... 1110
Subject to payment of bonus, if legal 941
Subsequent mortgagee's right of prior mortgage ... 999
Successive periods for, when fixed ... 1441
Suit for 920—923
against sub-mortgagee, Bar of 924
Court-fee payable in a ... 1223
difference between ejectment suits and ... 923
foreclosure or accounts, in settlement of, necessity of ... 1403
hearing of, Plaintiff's right to prove perfect title at ... 923

PAGE

Redemption—(concld.).

Suit for—(*Concld.*).

joinder of parties in, Rule as to 932
non-payment of mortgage money, if bar to ... 922
plaintiffs in, who may be joined as, Law as to ... 1361
Procedure in ... 1222
relating to simple mortgages and charges, Procedure in 1313, 1314
When maintainable ... 908
When creditor in an administration suit entitled to right of ... 1234
Whether an assignee of the Equity of, could redeem ... 1220
Whether could be permitted after due date ... 1555
Whether mortgagee permitted to redeem 1226, 1227
Whether necessary to claim contribution ... 1239
Whether permissible after decree for foreclosure 1457, 1458
Whether tender amounts to ... 1109
Whether trustees could redeem ... 1233
Who may sue for
Principle of the rule ... 1219
S. 91 ... 1218

See *Contribution*, *Equity of redemption*, *Mortgage*, *Mortgage by conditional sale*, *Mortgaged Property*, *Mortgagor*, *Parties to suit*, *Practice and Procedure*, *Res judicata*, *Usufructuary mortgage*.

Redemption Decree.

Finality of 1556—1560

Redemption Suit.

Apportionment of debt in 1543—1545
Burden of proof in 1541, 1542
Claim for over-payment must also be included 1542, 1543
Co-mortgagor, by ... 1543
Decree in, Contents and construction of 1551, 1552
Dismissal of, based on one mortgage no bar to maintainability of another suit based on another mortgage ... 1560
Duties of a mortgagee in 1551, 1552
Final decree in
construction of 1557—1559
mortgagor's remedy ... 1554
O. 34, r. 8 1552, 1553
principle of the rule ... 1554

PAGE

Redemption Suit—(concld.).

Jurisdiction and Court fee in ... 1550
Mode of taking accounts in 1545, 1546
Nature of 1541, 1542
No exception to rule of *res judicata* ... 1558
Preliminary decree in 1539, 1540
Preliminary decree in, Principle of the rule ... 1540
Procedure when payment is made ... 1551
Rights of mortgagor and mortgagee in taking accounts in a redemption suit 1545, 1546
What mortgagor must claim in 1542, 1543
When accounts of Sub-mortgagees could be taken in 1546, 1547
When Court may appoint a receiver ... 1550
Whether bars a second suit for the same relief 1556—1559
Whether dismissal of, has the effect of debarring other persons possessing interest in the Equity of Redemption from suing for same relief ... 1560

See *Redemption Suit*.

Reduction.

See *Abatement*.

Registrar.

Execution by, Age of, Record of, Law as to ... 1407
Question of title, no power to decide... 868
See *Burden of Proof*.

Registration.

A deed after, operates as a completed conveyance ... 884
Necessity of 864, 865
Not essential in an Equitable mortgage ... 893
Of a charge not necessary ... 1254
Of Mortgages. See *Mortgage*.
Sealing not essential part of ... 868
Shifts *onus* ... 884
When valid and invalid 867—869
Whether compulsory in an unexempted area in the case of an equitable mortgage affecting immoveable property ... 896
Whether equivalent to notice for marshalling ... 1182

See *Compromise deeds*, *Documents*, *Deposit*, *Equitable mortgage*, *Security bonds*.

PAGE

Registration Act.

Relates only to *instruments*, not to transaction ... 895

Registration Act (1877).

S. 17, Reference to ... 862
Ss. 23, 24, Reference to ... 876

Registration Act (1908).

S. 17 (*c*) Reference made to ... 930
S. 17 (*h*), Whether a preliminary contract is or is not registrable ... 887
S. 17 (*n*), III of 1877, S. 17 (xi), of XVI of 1908—*Re* exemption of receipt by prior mortgagee ... 1119
Ss. 21, 22, Rule in, as to specification and description of mortgaged property ... 799
S. 48, *Re* priority of mortgagees ... 896

Regulation.

Proceedings under, governed by what law 1026—1027

Regulations.

Beng. Reg. XV of 1793.

Reference to ... 1425
S. 10, Reference to ... 1152
S. 11, Reference to ... 858

Beng. Reg. I of 1798.

Reference to ... 837
S. 2, Rules *re* tender or deposit of money due on mortgage, borrowed from ... 1205

Beng. Reg. XXXIV of 1803.

Ss. 12—15, Reference to ... 837
Reference to ... 858

Beng. Reg. XVII of 1806.

Mortgages by conditional sale before, Nature of ... 785
Reference to ... 836
Reference to ... 847
Reference to ... 1205
S. 8, Reference to ... 837

Beng. Reg. VIII of 1819.

S. 11, Sale free from encumbrance may be made under ... 1105

Beng. Reg. V of 1827.

Reference made to ... 1019

Mad. Reg. XXXIV of 1802.

References to 858—1425

Remainderman

Power of, to redeem ... 1233

PAGE

Renewal.

Mortgaged lease, of, Rule as to, S. 64, 983—988
Of mortgaged lease, Rule as to, if covers all renewals 986, 987
Profits and, Duty of mortgagee in possession to collect 1137—1139

Rent Charge.

See *Landlord and Tenant.*

Repairs.

Duty of mortgagee in possession to make necessary ... 1142

Representatives.

Of a deceased mortgagor are co-mortgagors for purposes of contribution ... 1239

Repurchase.

Stipulation for, does not make transaction mortgage ... 794

Res Judicata.

Dismissal of redemption suit for non-satisfaction of mortgage-debt whether ... 970
Instance of ... 1282
No bar by, to a supplemental decree 1530, 1531
Redemption suit, no exception to ... 1558
See *Redemption, Revenue Court.*

Rests.

Annual, not allowed by English law... 1150
Mode of payment with, Effect of ... 1150
What are 1149, 1150

Revenue.

Arrears of, claim of Government to, Paramount charge 1105, 1106
Payment of, when duty of a mortgagee in possession 1140, 1141

Revenue Court.

Adverse decision by, when *res judicata* 948

Revenue Sale.

Charge on proceeds of, Rule as to, Applicability of, discussed 1103, 1104
Charge on proceeds of, Rule as to, applicable to sales free from all incumbrances ... 1101
Charge on proceeds of, Rule as to, principle of ... 1102
Charge on proceeds of, S. 73 ... 1101
Effect of ... 1105
Limitation to enforce claim to surplus, sale proceeds of ... 1106

PAGE

Revenue Sale—(concld.).
Mortgagee's default, owing to, effect of 1106
Merger against 1296, 1297
Surplus of, mortgagee's charge on 1103, 1104
Revenue Sale Law.
Reference to ... 1105
Reversion.
Mortgagor's purchase of, prohibits renewal of lease ... 986
Reversioner.
Of Hindu widow, If entitled to redeem 1349
Power of, to redeem ... 1233
Reverter.
Doctrine of ... 1116
limits of 1116, 1117
Right in rem.
Contract to mortgage does not create... 796
Right of Privies.
Effect of final decree for foreclosure on 1471, 1472
Right of Sale.
See *Sale.*
Right of Suit.
See *Usufructuary mortgage.*
Right to redeem.
See *Equity of redemption, Mortgage, Mortgagor, Redemption.*
Rules.
Enactment and, distinguished ... 1305
Framed by Calcutta High Court, in respect of mortgages and charges 1306—1310
High Court's power to make, regarding mortgages ... 1304
Implied, under S. 66 ... 1002
Running Account.
As consideration for mortgage ... 819

S

Salami.
See *Commission.*
Sale.
Absolute, Order for, S. 89 ... 1305
A nullity, without jurisdiction of Court ... 1517
Avoidance of, of property sold under the mortgagee's power of sale 1073, 1074
By mortgagor, Right to an account how affected 1076, 1077
By mortgagee in possession, Right of mortgagor to an account ... 1076
By mortgagee, for recovery of interest. 1069

PAGE.

Sale—(contd.).
By mortgagee, not a private alienation 1070
By second or subsequent mortgagee subject to prior mortgage, valid ... 1062
By Registrar, Repeal of, Rules as to... 1308
Conduct of 1066—1068, 1515—1517
Contribution, claim to, whether permissible in respect of a forced ... 1193
Costs of, Mortgagee's right to, out of sale-proceeds ... 1068
Decree for
persons who can obtain a ... 1480-1482
limitation for execution of 1521—1523
sub-mortgagee, when entitled to a ... 1481
under mortgage, O. 21, r. 89 of Civ. Pro. Code, 1908, Non-applicability of ... 1489
under Tr. P. A., Provision for payment of amount of deficiency in, Rule as to 1307, 1311
what it must contain ... 1015
in default of redemption, S 93 (repealed) ... 1236
procedure when money due is paid, S. 89 (repealed) ... 1217
when could be passed in a foreclosure suit, S. 88 (repealed). 1217
Effect of misdescription on ... 1520
Final decree for foreclosure or, when re-opened 1477, 1478
Final decree in suit for
proceedings in, Orders passed in, whether appealable 1523, 1524
O. 34, r. 5 1495—1512
Final decree for passing of, entails no destruction of security ... 1501
For recovery of interest
difference between English and Indian Law ... 1069
Provisions borrowed from English Statute ... 1069
Free of prior mortgage 1566, 1567
Grounds on which a, may be set aside. 1516
In execution of a money or mortgage-decree, Difference between 1518, 1519
Instruments directly or indirectly providing for power of, held previously to be mortgages ... 892
May be either by private treaty or public auction 1066, 1068
Mortgage and, with right of repurchase. Distinction between ... 808

PAGE

Sale—(contd.).

Mortgage by conditional sale and sale with condition of repurchase, Distinction between ... 836
Mortgagee's remedy after 1520, 1521
Mortgagee selling under his power of, whether a trustee for the mortgagor. 1066
Suits for, Form of decree in ... 1484
Mortgagor objecting to a, must apply under S. 47, C.P.C. (1908) ... 1580
Necessity of a suit for sale to bring the mortgaged property to sale, History of the rule 1572, 1573
No separate suit to set aside order confirming ... 1523
Notice of 1063, 1064
Not made through Court, Validity of, 1059, 1060
Objections to 1515—1517
Of ancestral property by father of joint Hindu family, when may be set aside at the suit of sons 1389, 1390
Of immoveable property, Purchaser's right to certificate of sale, &c., on, Rule as to ... 1308
Of mortgaged property.
  effect of prohibited sale 1578—1581
  in spite of prohibition, whether void ... 1578
Of property subject to prior mortgage, Principle of the rule ... 1566
Of property subject to prior mortgage. 1566
Once made and duly confirmed by Court, when may be set aside ... 1579
Orders absolute for, successive, Power of Court to make ... 1502
Persons who have no right to sue for. 1480
Position and title of stranger purchaser 1518—1520
Power of
  in a mortgage, who may exercise 1061, 1062
  English statutory powers 1060, 1061
  exceptions to ... 1077
  passes on assignment ... 1063
  of a mortgagee, suspension of—English and Indian Law, Difference between ... 1063
  of a mortgagee when suspended 1063
  in a mortgage, when Agent or Attorney could exercise 1062, 1063
  of mortgagee, before the Act, discussed 1054, 1055

PAGE

Sale—(contd.).

  of moveable property by pawnor governed by Contract Act ... 1055
  in a mortgage, validity of 1053, 1054
  title of purchaser on, Provisions as to, borrowed from English law ... 1069
  title of purchaser on 1069—1072
  by mortgagee—Limits of mortgagee's discretion 1068, 1069
  mortgagee's rights and duties. English Law 1067, 1068
  rights and duties of the mortgagee exercising the power 1066, 1067
  express and statutory powers ... 1060
  express and statutory powers, Difference between English and Indian Law 1060, 1061
  of mortgagee, when to be exercised .. 1059
  English express powers ... 1060
  mortgagee cannot himself purchase property, sold under the 1072, 1073
  improperly exercised 1071, 1072
  title of purchaser on, Object of the rule ... 1069
Preliminary decree in suit for, O. 34 r. 4 cl. (1) 1479—1483
Procedure to bring a mortgaged property to sale 1570, 1571
Prohibition against, under S. 99 ... 1015
Proceeds of, when subject to prior mortgage, Application of, S. 97 (repealed) ... 1243
Proceeds of, Appropriation of, Direction as to 1075, 1076
Provisions relating to, of mortgaged property, Applicability of, to property subject to a charge ... 1584
Purchase by co mortgagor, Effect of ... 1520
Purchaser not bound to look behind the decree ... 1517
Rights of,
  a mortgagee purchaser as against subsequent and prior mortgagees 1513
  is component right of ownership 786
Right incident to the right of, is that of repurchase ... 1124
Subject to mortgage 1567, 1568
Subject to prior mortgage
  limits of the rule 1568, 1569
  requisite conditions ... 1566
  S. 96 (repealed) ... 1243

PAGE

Sale—(concld.).
Suit for
representatives of deceased mortgagee in a, Act VII of 1889, if applicable to ... 1487
charge holders right to maintain under S. 67 ... 1021
decree in a, S. 88 (repealed) ... 1217
relating to simple mortgages and charges, Procedure in 1312, 1313
Transactions really but appearing to be mortgages 807, 808
Under power, Onus on impeaching ... 1075
Usufructuary mortgage and, distinguished ... 851
Usufructuary mortgagee cannot sue for foreclosure or ... 852
Validity of, Mortgagor's right to question, Power of assignee of mortgagor's interest 1515, 1516
When valid, notwithstanding material irregularity 1516, 1517
Whether extinguishes mortgage-debt 1520, 1521
Without notice, remedy in case of ... 1065
Without notice, no cancellation ... 1065
See *Decree*, *Foreclosure*, *Mortgage*, *Mortgagee*, *Practice and Procedure*, *Private sale*, *Revenue Sale*, *Suit for sale*.

Sale Certificate.
In a sale subject to mortgage, whether conclusive evidence of the validity of the charge ... 1568

Sale-proceeds.
Application of
O. 34, r. 13 ... 1569
rule *re*-Principle of the rule ... 1569
when sale subject to prior mortgage, S. 97 (repealed) ... 1243
Appropriation of, Directions as to 1075, 1076
Distribution of ... 1517
Order of distribution of ... 1570
Surplus, represents immoveable property ... 1106
See *Revenue sale*.

Sale with condition for repurchase.
See *Sale*, *Conditional sale*.

Salvage lien.
If can be set up in defeasance of mortgage ... 797
Reference to ... 797
Whether a charge 1266—1269

PAGE

Salvage lien—(concld).
Whether applicable outside Maritime law ... 1268

San Mortgages.
Instance of anomalous mortgage ... 1247
Possession unnecessary for ... 832
What are ... 1251

Satisfaction.
Joint-decree-holder, Disability of, to certify, in respect of whole decree ... 1501

Sealing.
Not an essential part of registration... 868

Secretary of State for India in Council.
See *Words and phrases*.

Security.
Alternative, Law as to, S. 68 1050, 1051
Marshalling of, S. 81 ... 1177
Meaning of ... 782
Merger of ... 1280
No marshalling when, sufficient ... 1184
Substituted, Principle of, Application of 995
When deemed insufficient, S. 66 Exp. 1000
See *Equitable mortgage*, *Mortgaged Property*.

Security bond.
Enforcement of a. 1583, 1584
Given for an appellant to an appellate Court for due performance of a decree, whether a mortgage 1583, 1584
Under S. 545 (O. 41, r. 5) not exempt from registration ... 881
Whether and when registration necessary ... 881

Security-deed.
Holder of, Right of, to sue under S. 67. 1021
See *Security bond*.

Security for performance of decree.
Mortgage deed given as, if creates mortgage ... 787

Self-acquired Property.
See *Co-parcener*.

Service.
See *Notice*.

Set off.
Usufructuary mortgagee's right to, Profits for interest ... 982

Shield.
Doctrine of ... 1121

Signature.
Of mortgagor essential 869—871
Thumb mark by a literate person, not a 869 *f. n.*
To a will under English Wills Act 870 *f. n.*

PAGE

Signature—(concld.).
What it includes ... 869
Whether affixing a mark by an illiterate person amounts to 869, 870

Simple mortgage.
Arh, a ... 827
Causes of action open to mortgagee in 827
Characteristics of ... 826
Charge and difference between 1257—1259
distinguished ... 830
Component contracts in ... 827
Covenant not to alienate with declaration of invalidity of alienation constitute ... 794
Defined, S. 58 ... 777
Effect of, on subsequent purchasers without notice and on power of sale 831, 832
History of, before passing of Transfer of Property Act 831, 832
Incidents of ... 826
Interest conveyed in ... 785
Limitation for enforcement of 832—836
Mortgage by conditional sale or, Test to find out whether transaction is 830, 831
Mortgagee's failure to enforce one or other remedy in same suit no bar to enforce other remedy by separate suit ... 827
Nature of, not altered even if mortgagee be in possession 829, 830
Possession in mortgagee, Necessity of. 832
Proceeding against mortgagor personally or against property are forms of realising ... 827
Remedies under 826, 827
order of enforcement of ... 827
Rights under 826, 827
Sale, Power of available under, exerciseable only through order of Court... 827
essential for 828, 829
Sale, Transfer of right of ... 828
Test to determine whether transaction is 828, 829
Vernacular names for ... 827
Words constituting 827, 828
See *Redemption.*

Simple usufructuary mortgage.
How created ... 1245
Instances of 1245, 1246
What is a 1244, 1245
Incidents of 854, 855

PAGE

Simple usufructuary mortgage—(concld.).
Personal covenant added to usufructuary mortgage converts it into 853, 854

Solicitor.
Retention of title-deeds by mortgagee's, as lien for costs, if valid ... 926
See *Title-deeds.*

Son.
Born after decree, whether deprived of the equity of redemption ... 1580
Duty of a, under Hindu Law to discharge father's debts ... 1378
In Mitakshara family whether bound by a prohibited sale under a decree against his father ... 1579
Minority of, immaterial when mortgaged property is coparcenary property ... 1379
Right of a, to redeem mortgage executed by his father ... 1378
Rights and liabilities of, according to Hindu Law 1377—1381
Under Hindu Mitakshara Law, when bound, though not joined as party to a suit on mortgage 1388—1390
When may sue to set aside sale by father 1389, 1390

Specific performance.
Contracts of which Court of Equity enforces 796, 797
Contract to mortgage, of ... 796
Contract to assign future property if specifically enforceable ... 807
Contract to mortgage future crops, of 796
Future property, Contract to mortgage, if capable of 796, 797
Loan, Contract to give, Remedy ... 796
Loan, Of contract of, Suit for, if lies... 798
Suit for, Of contract to execute mortgage deed ... 796
Unilateral mistake causing wrong description of mortgaged property gives right to ... 803
Zuripeshgi lease, of contract to execute ... 796
See *Pre-emption.*

Specific Relief Act, 1877.
S. 21 (*a*), Reference to ... 795

Stamp Act (English), 1891.
S. 86, Reference to ... 779

Stamp Act (1879).
S. 46, Reference to 794, 795

PAGE

Stamp Act (II of 1899).
Reference to ... 783
S. 2 (17), Reference to 778, 779
S. 24 proviso, Reference to ... 779
S. 24, *re* deductions where mortgaged property is subsequently sold to the mortgagee ... 883

Stamp Duty.
Leviable on a mortgage 881, 882
Mortgagor to pay stamp duty ... 883
Table showing, leviable on various mortgages ... 882
When interest excluded for the calculation of ... 883
See *Documents.*

Standing Crops.
See *Possession.*

Statute
12 Edw. II. St. 1, c. 2.
See *Statute of York.*
8 & 9 Vic., c. 16.
See *Companies Clauses Consolidation Act.* ... 1167
22 & 23 Vic., c. 35.
Reference to 1074 *f.n.*
23 & 24 Vic., c. 145.
Mortgagees, confers power of sale on 1060
Reference to ... 1061
Reference to 1074 *f.n.*
S. 11, Reference to ... 1084
26 & 27 Vic., c. 118.
See *Companies Clauses Act.*
30 & 31 Vic., c 127.
See *Railway Companies Act, 1867.*
36 & 37 Vic., c. 36.
S. 25, sub-S. 4, compared with provisions of S. 101 of Tr. P. Act ... 1279
38 & 39 Vic., c. 87.
Ss. 26, 63, Reference to ... 1061
44 & 45 Vic., c. 41.
Ss. 19 (ii), 23 (i), (2) (iii), Reference to 1084
S. 71, Reference to ... 1061
See *English Conveyancing Act.*
45 & 46, Vic., c. 38.
S. 64, Reference to ... 1061
46 & 47 Vic., c. 52.
See *Bankruptcy Act, 1883.*
47 & 48 Vic., c. 54.
See *Yorkshire Registries Act, 1884.*
58 & 59 Vic., c. 25.
Reference to ... 1090
58 & 59 Vic., c. 29.
Ss. 2, 3, Reference to ... 1100

PAGE

Statute
58 & 59 Vic., c. 87.
See *Land Transfer Act, 1875.*

Statute of York.
Reference to ... 864

Stock-in-trade.
Assignments of, whether amounts to mortgage ... 898

Stranger.
See *Tender.*

Stranger Purchaser.
Position and title of 1518—1520

Sub-lease.
See *Mortgaged Lease.*

Sub-mortgage.
Assignment by way of, if absolute or only assignment as charge ... 823
How created and formalities for creation of ... 822
Incidents of 822, 823, 824
Insolvency of mortgagor, Effect of, on 823
Meaning of ... 822
On an equitable mortgage ... 893
Rights and liabilities of sub-mortgagee 822, 823, 824
What it comprises ... 823

Sub-mortgagee.
Rights of 1482, 1483
to redeem ... 1227
to sue under S. 67 ... 1021
When accounts of, could be taken in redemption suit 1546, 1547
See *Mortgagee, Sale.*

Subrogatee.
See *Subrogation.*

Subrogation.
Conditions imposed for the acquisition of the right of ... 1271
Decree when no bar to 1115, 1116
Doctrine of 1106, 1271
how applied 995, 996
Doctrine underlying section ... 1282
Implies existence of two or more mortgages at one and the same time ... 1109
Implies redemption ... 1110
Knowledge or consent of mortgagor or any previous intimation unnecessary ... 1112
Legal or conventional, Rights of subrogatee under ... 1282
Limits of 1113—1115
No claim to, when a person merely performs his own obligation ... 1121

PAGE

Subrogation—(concld.).
Of rights—Puisne mortgagee 1113—1115
Payments by other persons how affects 1110, 1111
Person lending money to have sale in execution of mortgage decree cancelled subrogated to prior mortgagee's rights ... 1285
Pre-requisites for the right to .. 1112
Right to
defective title no bar 1111, 1112
continues even after decree for foreclosure or sale and even after sale, until it is confirmed ... 1110
Voluntary payment does not confer right ... 1112
Who is entitled to 1108, 1109

Subsequent Advances.
Effect of notice on ... 1171
English and Indian Law, Difference between ... 1171
Mortgage for
English Law .. 1169
English and Indian Law distinguished ... 1169
principle of the rule ... 1170
when binding, S. 79 ... 1168
On the mortgage of movable property 1172

Subsequent Mortgagees.
Rights of, not intended to be defeated by marshalling 1180, 1181

Substituted Security.
See *Mortgage.*

Succession Act, 1865.
S. 76, Reference to ... 799

Succession Certificate.
Necessary for recovery of amount due under a supplementary decree ... 1539

Succession Certificate Act (VII of 1889).
Mortgage suit, certificate, if necessary for conduct of ... 861
S. 4, Reference to ... 1487
S. 4, Reference to ... 1516
S. 4, Amount recoverable under a supplementary decree is a "debt" under 1538, 1539

Suit.
Abatement of, when ... 924
Before institution of, Necessary party, to be joined ... 1363

PAGE

Suit—(concld.).
Decree in
for redemption, S. 92 (repealed) 1235
for sale, S. 88 (repealed) ... 1217
Every, Framing of, Cardinal rule, in respect to, stated ... 1347
Final decree in a, for sale, whether orders on proceedings in, are appealable 1523, 1524
For foreclosure, Decree in, Procedure when money due is paid, S. 87 (repealed) ... 1216
For foreclosure, order absolute when to be passed, S. 87 (repealed) ... 1216
For foreclosure, sale or redemption, who are to be joined as parties to S. 85 (repealed) ... 1215
For redemption—Final decree in 1552, 1553
For sale necessary to bring a mortgaged property to sale 1570, 1571
Multiplicity of, Avoidance of ... 1345
No separate
for recovery of balance due on mortgage ... 1525
to set aside order confirming sale or refusing judgment-debtor's application ... 1523
On a mortgage, for personal recovery, when lies ... 1409
On unregistered mortgage ... 1409
Party once joined in, when dischargeable ... 1349
Parties to a
proper array of, Power of Court in respect of ... 1363
time for joining, Law as to 1363—1366
Person joined in necessary party to the execution proceedings ... 1365
Redemption, for,
court fee payable in ... 1223
procedure in ... 1222
Under S. 99, Tr.P. Act, Law as to 1027, 1028
Valuation of, to enforce a charge, ... 1276
When decree for sale could be passed in a, for foreclosure, S. 88 (repealed) 1217
See *Contribution, Practice and Procedure, Redemption.*

Suit for Contribution.
See *Contribution, Suit.*

Suit for Foreclosure.
See *Foreclosure, Suit.*

Suit for Redemption.
See *Redemption.*

PAGE

Suit for Sale.

Necessity of, to bring the mortgaged property to sale 1570, 1571
history of the rule 1572, 1573
limits of the rule 1577, 1578
object of the rule 1573, 1574
principle of the rule 1573, 1574
scope of the rule 1573, 1574
what sales are prohibited 1575—1577
Of mortgaged property—Valid & subsisting mortgage essential ... 1577
Sale of mortgaged property prohibited without bringing a, mortgagee's remedy. 1581—1583
See *Sale*.

Suits Valuation.

In a claim to enforce the terms of an anomalous mortgage ... 1252
See *Valuation of suits*.

Supplementary Decree.

Appeal against a, court fee payable in 1539
Application for, struck off in default cannot be revived ... 1532
Case for a 1526, 1527
For a, previous sale necessary 1527, 1528
Given to pay what amount 1529, 1530
is a "decree" and therefore appealable 1539
Limitation for, Starting point for limitation 1535, 1536
May be made payable by instalments 1530
Must be in the same suit, in which decree for sale was passed 1531, 1532
No bar by *Res judicata* 1530, 1531
Period of limitation for ... 1536
Personal remedy by, must be within limitation 1534, 1535
Previous sale whether necessary should have been in execution of the decree 1527
Relinquishment by mortgagee of his claim to part of property immaterial 1528, 1529
Remedy by, cannot be availed of when there is no sale ... 1529
Rights under 1532, 1533
What should be shown, for the remedy of, to be availed of ... 1527
When application for, lies 1533, 1534
When could be passed ... 1525
Whether could include also costs 1537, 1538
Whether provisions of S. 48, C. P. C., 1908, apply to 1536, 1537
Whether provisions *re* extends to charges ... 1538

PAGE

Supplementary Decree—(concld.).

Whether valid, if granted after sale without decree ... 1532

Surety.

Right of
to make redemption ... 1375
to redeem. 1230, 1231
who redeems a mortgage ... 1231
See *Parties to suit*.

T

Tacking.

Abolished, S. 80 ... 1172
Actual possession not necessary for, when right is clear ... 1176
Consolidation and,
difference between ... 1173
how combined 965, 966
Doctrine of, Principle of the rule abolishing 1173, 1174
Effect of S. 80 on ... 959
English doctrine of 1175, 1176
For, it is essential that the legal estate and the equitable incumbrance be held by the same person and in the same right ... 1176
In English Law, traced 1172, 1173
Instances of, pemitted between mortgagor and mortgagee ... 1175
Meaning of ... 960
Mortgagor not affected by ... 1176
Not possible after decree settling priorities ... 1176
Of future advances, when allowed 1170—1172
Only affects priority ... 1176
Origin of 1175, 1176
Right to, only lasts whilst the legal estate is retained ... 1176
When still allowed 1174, 1175
See *Consolidation*.

Tenancy by Elegit.

Usufructuary mortgage and, Comparison between ... 853

Tenants in common.

See *Joinder of parties*.

Tender.

By deposit ... 1206
By mortgagor, When valid ... 1014
Co-mortgagor's offer of, if valid ... 920
Conditional.
offer of money when ... 918
whether good 1207, 1208
Effect of, by mortgagor 1151, 1215

PAGE

Tender—(concld.).

For English rule. See r. 48, O 39-B, County Court Rules, 1882, r. 4, O. 29, County Court Rules, 1903 ... 1205
Insufficient, Effect of 918, 919
Mere readiness to pay, if valid ... 917
Minor son of mortgagor, If entitled to make ... 919
Money deposited in Court is treated as 1205
No interest after ... 1212
Persons who should make, Law as to 919
Requirements of a valid 1207, 1208
Stranger to mortgage, If entitled to make ... 919
To be effective, must be ever ready ... 1215
To whom to be made to ... 1302
Under protest, if conditional ... 918
Valid
essentials of ... 917
general rule as to ... 917
What are not sufficient tenders 1208, 1209
What may be considered as sufficient, absence of provision in Tr. P. Act as to ... 909
Whether an act of redemption ... 1109
Whether must be of the whole amount 1206, 1207
See *Agent, Payment.*

Time.

Allowed under O. 34, r. 3, maximum 6 months ... 1464
Extension of
application for, under O. 34, r. 3 need not be in writing... 1462
for redemption after due date 1555, 1556
under O. 34, r. 3 1461—1464
Under O. 34, r. 3, terms of ... 1464
For application by mortgagee to pass final decree for foreclosure ... 1457
See *Redemption.*

Title.

Acquired by continuous possession or prescription, not to be defeated by application of rule for forfeiture of priority. ... 1168
Covenant for
nature and use of ... 993
scope of ... 992
Merger prevented where title acquired by 1298, 1299
Of stranger purchaser at a sale 1518—1520
Starting point of, of auction purchaser 1523

PAGE

Title—(concld.).

Warranty of—See *Mortgaged property, Mortgagor.*

Title-deeds.

Delivery of, by mortgagee ... 931
May relate to any property to create an equitable mortgage 892, 893
Mere possession of, not proof of intention to deposit as security ... 891
Solicitor's lien on, Law as to ... 931
What, include 891, 892
When purchaser could claim ... 1520
Deposit of—See *Equitable Mortgage.*
See *Possession.*

Trade Fixtures.

See *Fixtures.*

Transfer.

If should be express or implied in mortgage ... 787
Meaning of ... 786
Mortgage is a ... 786

Transferee.

Without notice, whether charge enforceable against a ... 1265

Transfer of Property.

How made in usufructuary mortgage 851
Not complete in usufructuary mortgage ... 851
Incidents of property on ... 815

Transfer of Property Act, 1882.

Mortgages by conditional sale how affected by passing of ... 846
Proceedings taken before, for redemption of mortgages by conditional sale, Effect of, after passing of Act 847, 848
Scope of, as to sub-mortgagees and puisne incumbrances ... 822
S. 62, cl. (*b*), Scope of ... 974
S. 67, Object and scope of 1009, 1010

Trust.

Charge not always implied by a 1104 *f.n.*
Mortgage distinguished from ... 811

Trustee.

Lien of, when a charge ... 1270
Position of a mortgagee in possession is that of a ... 1145
Whether could redeem ... 1233
See *Mortgagee, Mortgagee-purchaser, Parties to suit.*

PAGE

Trustee's and Mortgagee's Powers Act (1866).

S. 6, Reference to ... 1061
Ss. 6 to 19 applicable only in cases where the deed confers such a power 1057
Ss. 6 to 19, Provisions of 1051--1057

Trustees and Mortgagees Powers Act (XXVIII of 1886).

S. 1, Reference to ... 779

Trusts Act (1882).

Ss, 15, 19, 23, Provision in S. 76, Cls. (*a*), (*g*), borrowed from ... 1133
S. 18, Reference to ... 1000
S. 32, for meaning of charge of a trustee ... 1255
S. 32, Reference to ... 1253
S. 32, Referred to, for instance of charge created by operation of law ... 1254
S. 32, Trustee could reimburse his charge under ... 1274
S. 90, and Tr.P. Act S. 63, Distinction between ... 976
S. 90, Reference to ... 988
S. 90, Reference to renewed lease ... 1081
S. 90, Relation between S. 64, Tr. P. Act, and 987, 988

U

Unattested Mortgage.

Operation of 878, 879

Undivided Share.

See *Joint Family Property.*

Undue Influence.

What constitutes 1433, 1434
See *Fraud.*

Unilateral Mistake.

Description of mortgaged property wrongly made through, gives rise to specific performance ... 803

Unregistered Mortgage.

Admissibility and proof of 879—881
May be evidence of a simple debt or personal obligation ... 879
Suit on ... 1409
When wholly inoperative ... 879

Usage.

Custom and, How to be interpreted ... 1251

Usufructuary Mortgage.

Ambiguous document, Test to find out whether, is lease in perpetuity or ... 856
Analogues of ... 853
Anomalous mortgages and, instances of 852

PAGE

Usufructuary Mortgage—(contd.).

Assignment of 856, 857
C.P.C. 1908, O. 2, r. 2, When mortgagor omits to include surplus profits, a second suit for same barred under ... 971
Co-mortgagors each entitled to recover possession only of their particular share ... 857
Decree in redemption suit, What mortgagor may obtain under ... 970
Defined, S. 58 ... 778
Delivery of possession for validity of, Necessity of ... 851
Description to which it should conform 853
Duration of, Necessity of any particular period for ... 852
English law, Effect of dismissing redemption suit under ... 970
Essentials of ... 851
Fixed term, mortgage for, if creates an 852
Forms of ... 851
History of ... 853
Incidents of ... 851
Interest transferred in ... 786
Liability of mortgagee in, to render accounts, when exempted from 1153, 1154
Limitation for ... 857
Limited as to time, Incidents of ... 855
Mortgagee in possession under, Duties of ... 974
Mortgagor not tendering money in full, Procedure where ... 969
Mortgagor's relief under S. 62, nature of ... 971
Not personally liable ... 852
Novation of ... 853
Novation of, essentials for 798, 799
Object of provision in S. 62, as to 968, 969
Old and new law, Difference between as to .. 967
Payment of future rent under S. 65 Cls. (*c*) and (*d*), by mortgagor under, non-liability of, S. 65, Proviso 999, 1000
Personal decree, Right of mortgagee in, to ... 852
Personal liability for repayment of loan absent in, and in mortgage by conditional sale ... 851
Personal liability of mortgagor absent in ... 852
Possession, Right of mortgagor under, to recover, S. 62 967—975
Possession, suit for, under, Nature of 968

PAGE

Usufructuary Mortgage—(concld.).

Possession, suit for, when no time fixed, S. 62, Cl. (*a*) ... 972
Possession under, How obtained 969, 970
Redemption out of Court, What mortgagor may obtain under ... 970
Remedies of mortgagor in 852, 853
Repayment of loan begins immediately after loan advanced ... 851
Right to plant trees and acquire property in them, by mortgagee in, Law as to ... 980
Simple usufructuary mortgage a form of ... 854
Suit for possession
liability of mortgagor to include all he is entitled to claim in respect of mortgage in ... 971
mortgagor's omission to include surplus profits in ... 971
Time when, may be redeemed ... 902
Transfer of, without mortgagor's privity, effect of ... 857
Vernacular names for ... 857
What is a ... 1153
Zur-i-peshgi lease and, Distinction between ... 855
Zur-i-peshgi lease containing proviso for redemption is ... 793
See *Appeal*, *Mortgage*, *Mortgagee*, *Possession*, *Redemption*, *Set-off*.

V

Valuation.

Of suit to enforce a charge ... 1276
Property, of,
for purposes of contribution should be as at the time of mortgage, not when it is sold 1188
to determine rate of contribution 1188, 1189

Vendor and Purchaser.

Form in which charge paid off, no test of keeping it alive ... 1291
Priority for vendor's lien ... 1290
Purchaser by auction, Starting point of, Title of ... 1523
Purchaser, Rights of, of property sold in execution of mortgage-decree 1513—1515
Purchaser when may claim title-deeds 1520
Purchaser without notice, Rights of, under a prohibited sale of mortgaged property ... 1583
Right of mortgagee purchaser 1513—1515

PAGE

Vendor and Purchaser Act.

S. 7 abolished Tacking in England ... 1172

Vivum Vadium.

Form of mortgage once recognized in English Law ... 780

W

Waiver.

Acceptance of over due instalment if... 911
Effect of, on priority ... 1167
Interest of co-mortgagors by severance of, Law as to ... 953
Irregular payments, Acceptance of, *Prima facie* evidence of ... 1013
Law as to, by mortgagee ... 911
Mortgagee taking promissory note for interest due does not waive security. 1295
Overdue instalment, Acceptance of, by mortgagee, if 1012, 1013
Overdue interest, Payment and receipt of, if ... 1012
See *Instalment*.

Waldi.

Instance of anomalous mortgage ... 1247
What is ... 1251

Ward.

See *Guardian and Ward*.

Waste.

Active, kinds of, which mortgagor cannot commit 1002, 1003
Active, mortgagor's liability for ... 1002
Duty of mortgagee in possession not to commit 1142, 1143
Permissive, mortgagor's non-liability for ... 1001
Possession, Principle of the law as to, by mortgagor in ... 1001
What is an ameliorative ... 1143
See *Mortgagee in possession*.

Welsh Mortgage.

Resembling usufructuary mortgage, also exists in English law ... 780
S. 62, Cl. (*b*) 973—974
Usufructuary mortgage and, Comparison between ... 853
Vivum Vadium, a name of ... 853

Will.

Bequest or, Void for uncertainty if intention not definite ... 799
Signing of, under English Wills Act 870 *f.n.*

Withdrawal.

Effect of, of deposit by Mortgagee 1210, 1211

PAGE

Witness.

Principle of calling attesting ... 877
Two, are necessary for a mortgage-deed 872
Who are competent ... 871
Who may be an attesting 871, 872

Words and Phrases.

See *Maxims.*
Aangudhar ... 1037
According to their respective interests. 1570
Account be taken ... 1540
Acquire all the rights of the mortgagee as such ... 1108
Act of the parties. ... 1255
A decree for the payment of money ... 1575
After payment of the said arrears. ... 1103
After the principal money has become payable ... 1205
Amount due for the time being ... 1526
Amount became payable ... 1108
A mortgage can be effected ... 866
And the transaction does not amount to a mortgage ... 1255
And to give a receipt for such amount... 1168
Anubhavam ... 1250
Any accession ... 1078
Any persons entitled, etc. ... 1205
Arh ... 827
At any time ... 1108
Attempted sale 1569, 1570
Attest 872, 873
Attestation 872, 873
Attesting witness ... 873
Attiper ... 1250
Bargain paper ... 788
Becomes absolutely entitled ... 1280
Before a suit is...barred ... 1205
Besides the mortgagor ... 1219
Bhoga bandhukum ... 853
Bhogya bandhaka ... 857
Bhogyam ... 857
Birt ... 987
Both be extinguished ... 1554
But not so as to prejudice, etc. ... 1179
Bye-bil-wafa 836, 859
Charge 1237, 1253
Charge of a trustee ... 1255
Charge or incumbrance ... 1284
Combination of the first and third ... 1244
Common fund ... 1196
Contract does not extend ... 1244
Dakhalahi ... 1049
Debt 820, 1129, 1186
Default on his part ... 1103
Defendant may apply to the Court ... 1554

PAGE

Words and Phrases—(contd.).

Delivery of the property ... 866
Delivery.....with intent to create a security thereon ... 866
Deposit 890, 1214
Desachar ... 1252
Dewutter ... 814
Drishtabandhaka 827, 836
During the continuance of the mortgage 1085, 1134
Engagement ... 783
Every second or subsequent mortgagee 1123
Evidenced in the mortgage-deed ... 1244
Except in the case provided for in S. 79 ... 1174
Expense ... 1240
Expenses properly incurred ... 1237
Fair occupation rent ... 1149
Fiducia 781, 826
Forfeiture or Sale ... 1085
For supporting the mortgagor's title ... 1085
For the mortgage money ... 1540
For the purposes of the security ... 1078
Fraud ... 1155
From the defendants ... 1526
Gahan lahan 784, 836
Giving to such prior mortgage ... 1566
Gross neglect ... 1159
Gross negligence 1155, 1159
Has been induced 1153—1156
He has a charge ... 1237
He shall not be entitled to bring the mortgaged property to sale ... 1575
Hibabilawaz ... 802
Huq aziri ... 1021
Hypotheca 781, 826
Idu adamanam ... 827
If a mortgagee.....expresses the maximum to be secured thereby ... 1170
If any ... 1123
In any Court, etc. ... 1205
If made with notice of a prior mortgage 1170
If the balance is legally recoverable otherwise ... 1526
If then in his possession or power ... 1206
Ildarwara ... 857
Iladarawara ... 936
Incumbrance 821, 822, 1190, 1280
Incumbrancer 821, 822
In full discharge of such amount ... 1206
Interest 1225, 1226, 1228, 1229

PAGE

Words and Phrases—(contd.).

In the absence of a contract to the contrary ... 1186
Is absolutely entitled ... 1280
Jote ... 988
Jumma-wasil-bakee papers ... 1413
Kalanadi, Reference made to ... 1019
Kanom 811, 853, 857, 1010
Karzrokka ... 800
Katkabala ... 784
Kutkubala ... 836
Kifalut ... 787
Kulachar ... 1252
Kutbhandaka ... 836
Laches ... 1164
Lease for a term of years ... 1082
Lien 1237, 1253
Malikana ... 987
Mal-i-waqf ... 814
Mancipatio ... 781
May institute a suit to redeem ... 1565
May redeem or institute a suit for redemption ... 1219
May spend such money as is necessary 1085
Misrepresentation ... 1155
Mortgaged property is sold ... 1103
Mortgagee takes possession ... 1085
Mortgagor ... 1237
Mortuum Vadium ... 859
Muakhiza ... 787
Muddatakriyam 784, 809, 836
Mustaghraq ... 787
Mustraghraq ... 827
Nazarana ... 1415
Nazar gahan ... 827
Negligence ... 1159
Net proceeds ... 1526
Nothing in this section (S. 84) to ... 1214
Nothing in this section (S. 82) etc. ... 1186
Notwithstanding anything in O. 2, r. 2 ... 1575
Nuda Consentio ... 826
One of several mortgagors ... 1237
Operation of law ... 1255
Or (combination of) the second and third ... 1244
Or institute a suit for redemption ... 1224
Or other incumbrance ... 1280
Or such continuance ... 1280
Other than the mortgagee ... 1219
Otti 857,908
Patni ... 698
Patnis ... 1375
Paying off a prior mortgage ... 1174

PAGE

Words and Phrases—(contd.).

Pendente lite ... 1372
Person proving to be interested ... 1570
Petition verified ... 1205
Pignies 781, 826
Pornathan ... 836
Postpone the day ... 1554
Principal money secured ... 866
Property ... 1541
Property by its nature insurable ... 1085
Pusine mortgage ... 825
Rehan 787, 828, 832
Salami ... 1416
Samudayam ... 811
Secretary of State for India in Council. 1059
Shall be extinguished ... 1280
Shall be postponed ... 1156
Shall pass a decree ... 1554
Signature ... 869
Signed by the mortgagor ... 866
So far as such property will extend ... 1129
Spes successionis ... 1355
Stipulated period ... 840
Stridhan ... 1366
Subharna bond ... 1019
Subject to a prior mortgage ... 1866
Sub-mortgage ... 822
Such amount to the prior mortgagee... 1108
Such a power ... 1059
Such other person as aforesaid ... 1214
Such sale ... 1526
Such terms ... 1554
Swadhina adamanum ... 857
Tabula in naufragio ... 1174
Tacita hypotheca ... 826
Tarar Jahan ... 801
Tarangahan ... 827
Tender ... 1214
The balance (in O. 34, r. 8) ... 1554
The judgment-creditor of the mortgagor ... 1219
Transfer ... 786
Vivum Vadium ... 859
Wajib-ul-arz ... 849
Watan ... 814
Watandar ... 874
Whatever is due ... 1570
When the principal money secured is one hundred rupees ... 866
Where a mortgagee ... 1575
Whether of one or several owners, etc. 1186
Who has no notice, etc. ... 1179
Written notice ... 1205
Zuripeshgidar ... 1008

PAGE

Words and Phrases—(concld.).
Zur-i-peshgi leases ... 1375
Zur-i-peshgi mortgage ... 1357
See "*Meaning of Words*" *under each section.*

Writing.
Not essential to an equitable mortgage ... 893
Whether charge should be in, Difference between English and Indian Law 1256, 1257
Whether necessary to effect a mortgage—See *Mortgage*

Y

Yorkshire Registries Act, 1884.
Ss, 14, 16, Abolishing Tacking in Yorkshire ... 1173

PAGE

Z

Zur-i-peshgi lease.
History of 812, 813
Lessees are mortgagees and liable to render accounts ... 1145
Meaning and incidents of 855, 856
Mortgage, when treated as ... 793
Possession, Recovery of, after expiration of term under ... 908
Provisions of O. 34, r. 14, apply to ... 1572
Redemption provided for in, to be regarded as usufructuary mortgages... 793
Right of lessee to bring property to sale, under ... 1017
Specific performance of mortgage of the nature of ... 796
Usufructuary mortgage and, Difference between ... 855
See *Ambiguity.*